

STATE AIDS AND TAX MEASURES:

THE JUSTIFICATION OF A DEROGATION BY "THE NATURE OR GENERAL SCHEME OF THE SYSTEM"

The measure must affect competition and trade between Member States:

A) The distortion of the competition:

The concept of "competition" covers three complementary aspects of the competition: the dynamic, the structural and the institutional one. The analysis of the three aspects must be in relation with the aim of the European Treaties (a sufficient and an efficient degree of competition).

The European Treaties demand two levels for the analysis of competition distortion: the one for the action of the companies (art. 101 TFEU) and the other for the action of the States (art. 107.1 TFEU). But the parameters of the analysis have to be similar.

The analysis to conclude that a tax measure distorts the competition is not being done by the European Commission.

B) The trade's distortion between State members:

The concept of "trade" is easier than the one of "competition". That's why the analysis has to be more accurate.

The measure must affect competition and trade between Member States:

A) The distortion of the competition:

The State can prove, with an analysis of the three aspects that covers the concept of "competition", that the distortion of the competition is not against the aim of the European Treaties: a sufficient and an efficient degree of competition.

B) The trade's distortion between State members:

Because of the more accurate analysis of this element of the first condition, the State only can prove that the Commission is wrong on its analysis.

The advantage must be granted by the State or through State resources:

A) The imputability of the measure to de State

The State is considered by the European Union as a whole. That's why the State is the only responsible of all the tax measures.

However, the tax measure can be the result of the distribution of the tax power in a State member.

B) The use of State resources

There is no doubt about the idea that tax measures are State resources. However, it's important to consider the limits of the concept of "tax measure".

In the other hand, the term "use" means that it is necessary a "supplementary charge" for the State. It's important to consider how to calculate this charge when we are in front of a direct advantage and the possibility that this supplementary charge represents an indirect advantage.

The advantage must be granted by the State or through State resources:

A) The imputability of the measure to de State

The possibility for the State to prove that the tax measure is the result of the distribution of the tax power in a State member. In that case, the consequences could be different.

B) The use of State resources

The limits of the concept of "tax measure" as the limits of State resources.

The existence of a "supplementary charge" for the State is based on different criterion depending on the case.

The limits of the possibility that this "supplementary charge" gives an indirect advantage are not clear.

The measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets:

A) An economic, fix and free benefit ...

An economic benefit doesn't mean that the analysis has to be economic. A fix benefit doesn't mean that it is selective. A free benefit doesn't mean that has to be no compensation.

B) ... that gives to the beneficiary a better position in relation to its equals

When we study if a measure gives an advantage to the recipients of an economic, fix and free benefit, we must consider if the advantage is given by the rule or by its application. In the first case, the important point is to analyse if the rule is a general or an special one or an exceptional one according to the principle of equality.

In tax measures, the principle of equality is related to the economic capacity principle.

The measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets:

A) An economic, fix and free benefit ...

The compensation that the recipient of the benefit gives to the State can prove that the benefit is not free.

B) ... that gives to the beneficiary a better position in relation to its equals

If we are in front of an special rule, because its difference with the general measure is based on the economic capacity principle, it cannot give an advantage to the recipient of the benefit.

The measure must be specific or selective in that it favours "certain undertakings or the production of certain goods":

A) Selectivity "de iure"

B) Selectivity "de facto"

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