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Competition and State Aid

An Analysis of the EC Practice

Alberto Santa Maria

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Competition and State Aid

An Analysis of the EC Practice

Edited by

Alberto Santa Maria

Prepared by

Studio Santa Maria

Claudio Biscaretti di Ruffìa
Martino Ebner
Edoardo Gambaro
Niccolò Landi
Antonio Papi Rossi
Paola Piroddi
Maia M. E. Reni
Alberto Santa Maria
Alberto Tedoldi

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Competition and State Aid

An Analysis of the EC Practice

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Editor-in-Chief
ALASTAIR SUTTON,
Visiting Fellow at the Centre of European Law at King's College,
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Lector et auditor nostros probat, Aule, libellos,
sed quidam exactos esse poeta negat.
non nimium curo: nam cenae fercula nostrae
malim convivis quam placuisse cocis.
(M. Valeri Martialis, *Epigrammaton*
Liber de spectaculis, IX, LXXXI)

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Introduction

Alberto Santa Maria

1. FOREWORD

In presenting this volume we propose to devote to one of the principal objects of our shared daily work as lawyers and jurists. Let me, as the team leader, submit a few preliminary observations somehow beyond the scope of the specific subject matter of this book.

The idea to write down and publish our experiences in so stimulating and topical a field as 'State aid' originated from the fact that Santa Maria law firm ('Studio Santa Maria'[1]) has been called upon to defend many of the major cases purported by the Commission to be State aid that have been filed against Italy in the last few years. We have been assigned some cases by the Italian government itself but, more often, our professional services have been sought by private parties, whether through other law firms or individual lawyers on behalf of recipients of alleged State aid, both undertakings and trade associations, or in the service of individual undertakings or trade associations claiming to have been harmed by national measures assumed to fall within the notion of State aid.

In the European internal market, which has long been a 'space without boundaries' where the four fundamental freedoms are (or ought to be) implemented in full, the State's intervention in the economy – though being legitimate in itself pursuant to Article 295 EC in relation to property ownership – turns especially

1. *See*: <www.santalex.com>.

Alberto Santa Maria, *Competition and State Aid: An Analysis of the EC Practice*, pp. 1–14.

dangerous for the harmonious functioning of the internal market when it is intended essentially to favour certain, usually domestic, undertakings or the production of certain goods. As the subject stands astride macro- and micro-economics, it involves some of the issues that are crucial to the full accomplishment of the Community's objectives. As I will discuss further in paragraph 2 below, and as will emerge clearly from other arguments submitted in this volume, the persisting all-embracing assessment of the unbecoming unbalance by the Community's institutions (the Commission and the Courts alike) – deriving from a choice originally made in the Treaty of Rome (and remained unchanged despite several amendments made thereto over the years), whereby 'aid' granted by public bodies (State aid, in fact) is expressly linked to competition law – no longer appears suited to encompass the entire phenomenon.

In particular, the gradual injection of such fundamental principles as legal certainty, proportionality and legitimate expectations into Community legislation is calling into question the widely discretionary approach the Commission has taken to the field of State aid, over which it has exclusive jurisdiction save for a quite specific instance.[2] Such specific instance is 'unlawful' aid, which, in the Community language, broadly means any 'public' aid measure – i.e. one granted by the State or by any other authority or body, whether central or local, or through *State resources* – which has not been notified and not yet made the object of a Commission decision, and over which national courts have concurrent competence with the Commission's pursuant to the last sentence of Article 88(1) EC, in the sense explained in Chapter VIII below.

In fact, the need to ensure compliance with the right of establishment and the principle of free movement of services – along with the necessary, now firmly established, requirement of the free movement of capital – throughout the internal market has resulted in the European Court of Justice being vested, upon appropriate reference by the Commission, with direct jurisdiction over cases heretofore summarily categorized as State aid.

Against such a complex background, our law firm's vast expertise in the field has not occurred by chance. Rather, it is the result of an accurate preparatory work on general issues of Community law, enriched by our day-to-day analytical work and ongoing professional commitment to advisory activities, even before litigation services, in the area of competition at large – which has made our firm a point of reference when State aid cases are to be dealt with. Hence, the considered choice to use our specialist know-how to popularize the results of our efforts in handling a number of different situations from many different points of view, on a case-by-case basis and depending on each client's specific position. Despite our being so deeply involved, we will not hesitate to criticize the workings of one or another of the devices applied within the complex system of State aid law, in an attempt to help correcting and improving it in the Community's best interests.

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2. EC courts have endorsed the wide discretionary power applied by the Commission in State aid law. *See* Chapter VII.

This book provides an economic and juridical analysis of individual elements of the 'State-aid phenomenon' and of the impact it has on free competition. It is mainly addressed to those jurists and economists who concern themselves with State-aid issues for whatever reasons. Thus, we have taken an entirely 'practical' approach to the discussion offered here, combining the necessary knowledge of the basics of Community law, which are closely related to the subject matter of this book, with the expertise we have built in our every-day practice, in an attempt to provide the reader with an intentionally simplified view – yet one as close to reality as possible – of the many specific profiles considered in our analysis.

As an obvious consequence of our direct involvement in several Community law proceedings, we have been able, in dealing with the issues presented in the different chapters of this book, to rely not only on records still unpublished, but even on documents that are by no means freely accessible, such as pleadings and replies lodged by each of the parties to, and the persons intervening in, any one case, the scripts of at least our own oral speeches at public hearings, and orders and notices from the Registries of the European Court of Justice or the Court of First Instance.

The contents of this book are the outcome of substantial teamwork gradually refined in the course of each professional assignment, in completing which at least the lawyers who have authored the individual chapters of this book participated as the members of an increasingly integrated functional whole. Whether our purpose has successfully been accomplished, I leave my colleagues and friends – 'my table companions', in the poet Martialis' words[3] – to judge after they will have, as I hope, had at least a cursory glance at the result of our efforts.

2. THE COMMISSION'S EXTENSIVE APPLICATION OF ARTICLE 87 EC, PARTICULARLY IN RELATION TO STATE AID SCHEMES: A CRITICISM

The European Commission's Directorate General for Competition has chosen to apply the rules on State aid quite widely for the last few years. This basic approach is far removed from a somewhat subdued beginning, which dates back, if I am not mistaken, to the decision to suspend aid granted in the *Ford Tractor Belgium* case.[4] Only 13 'negative' decisions then followed until 1980, whilst as many such decisions were taken in 1981 alone. But even more noteworthy has been the Commission's approach to the most recent cases, in which it has sought to apply State aid legislation quite beyond the boundaries set by Article 87(1) of the Treaty. This trend, which clearly goes against consensus opinion, has prompted me to call into question the very rationale underlying the current use by the Commission of the rules applicable to State aid, at least in respect of 'aid schemes'. These are usually

3. M. Valeri Martialis, *Epigrammaton (Liber de spectaculis)*, IX, 81, cited in the page following the title page of this volume.
4. *See Commission* Decision 64/651/EEC of 28 October 1964.

legislative, especially tax-related, measures designed by a Member State to support not individual positions – which would entail 'individual' aid – but to grant benefits to *specific* categories of undertakings or to favour certain operations by *only* certain categories of undertakings. For 'general' acts, i.e. measures addressed to all the recipients involved in the same situation, do not fall, contrary to a widespread misunderstanding, within the category of State aid. They are, indeed, quite lawful in themselves or, in the words of the Treaty of Rome, 'compatible' with the common market, precisely because of their general quality and in their being hardly apt to distort competition.

In principle, the Community rules applicable to whether *individual aid* or *aid schemes* (by an act of law) provide a quite complex framework in many respects. First, because they apply to national measures that must necessarily fulfil a number of criteria, all of them essential: (i) the measure must have been issued by a public authority; (ii) it must have an impact on that public authority's budget; (iii) it must be 'selective'; (iv) it must be capable to distort competition; and (vi) it must affect trade between Member States.

Moreover, because State aid essentially falls within the scope of the Community legislation on competition, its determination entails a three-sided, inseparable relationship between: (i) the State granting the aid; (ii) the Commission, which must ensure compliance with the applicable rules; and (iii) the *undertakings*, whether or not they are in receipt of State aid. Significantly, where the aid recipient is not an 'undertaking', the provisions of Article 87 *et seq.* of the Treaty shall not apply,[5] as the Commission stated in its decision on the Italian banking foundations in relation to the Ciampi Act.[6]

For the Commission's scrutiny to make sense in any one specific case, it must relate to the 'relevant market', as this phrase is used in competition law in respect of both geographic and product markets.

Lastly, the Community rules applicable to State aid have brought about a complex system also because, in case a negative decision is taken on an aid being found to be incompatible with the common market, the Commission will, pursuant to Article 14(1) of Regulation No. 659/1999, order that the Member State concerned must forthwith recover any sum already awarded to the beneficiary.

In theory, the *recovery* obligation is not a punitive provision. Its sole function is to restore *ex tunc* the competitive situation that existed before the aid was granted and that the alleged State aid distorted. In practice, however, recovery is a heavy burden, and one that usually falls upon the aid recipient quite unexpectedly – notwithstanding presumption of the contrary under Community case-law. Further, recovery is not just a theoretical or merely potential occurrence, because the

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5. *See* Commission Decision 2003/146/EC of 22 August 2002 on the tax measures for banking foundations implemented by Italy, OJ 2003 L55/56.
6. The decision was confirmed in part by the judgment of the Court (reference for a preliminary ruling from the Italian Corte di cassazione) *Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato, Cassa di Risparmio di San Miniato SpA* [2006] ECR I-289. On this issue, *see* Chapter I.