

Chapter 6

The Influence of the European State Aid Rules on National Tax Policy

Franz Philipp Sutter¹

6.1 Introduction

Art 87 of the Treaty of Rome reads: “Save as otherwise provided in this Treaty, any aid in any form whatsoever granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.”

The underlying purpose of a principal ban on State aid in Art 87 EC lies in guaranteeing fair competition, functioning markets and economic efficiency within the European Union. In the words of the Commission’s recent State Aid Action Plan 2005 its competition policy “rests upon the idea that a market-based economy provides the best guarantee for raising living conditions in the EU to the benefit of citizens. ... Competition is furthermore essential to enhance the competitiveness of the European economy, as it creates an environment in which efficient and innovative companies are rewarded properly”.² Against this background the Commission emphasizes that “State aid control comes from the need to maintain a level playing field for all undertakings active in the Single European Market, no matter in which Member State they are established. There is a particular need to be concerned with those state aid measures, which provide unwarranted selective advantages to some firms, preventing or delaying the market forces from rewarding the most competitive firms, thereby decreasing overall European competitiveness. It may also lead to a build-up of market power in the hands of some firms, for instance when companies that do not receive state aid (e.g. non-domestic firms) have to cut down on their market presence, or where state aid is used to erect entry barriers. As a result of such distortions of competition, customers may be faced with higher prices, lower quality goods and less innovation”.³ Moreover state aid would “not come for free”, as taxpayers in the end have to finance state aid and there are opportunity costs to it. Giving aid to undertakings would “mean taking funding away from other policy areas”.⁴

Without questioning the reasonableness of these economic considerations of the Commission in principle, it must however be noted that it would be an illusion to

think that the EC State Aid rules alone can ensure a “level playing field” on the European Market, as the EC State aid control has to start from an unequal general legal setting in the European Union. An illustrative example is the procedure against the Austrian Energy Tax Rebate system that was installed in Austria in package with the first introduction of a new energy tax.⁵ The rebate system was then attacked because it provided for a selective advantage for huge energy consumers that were granted a rebate of a certain percentage of their energy tax debt establishing a sort of ceiling of the maximum energy tax costs. To the Austrian industry the reproaches of being “subsidized” by the energy tax package came as an “economic surprise” since the introduction of the energy tax package meant a huge additional financial burden for them, while many other European Member States still did not have any energy taxation at all at this time. Therefore one should not forget: As the choice of tax events lies within the sovereignty of the Member States, the European State aid rules cannot do anything against such general differences between the Member States – a structural deficiency that has to be kept in mind when talking about the economic function of State aid control.⁶

As the wording of Art 87 EC already shows (arg “any aid in any form whatsoever”), Art 87 EC is characterized by a very broad notion of State Aid⁷, also referred to as “form neutrality” of the EC State aid surveillance. This form neutrality has already been stressed by the Spaak Report preparing the draft of the EC Treaty in 1956⁸ and shall prevent Member States from easily circumventing the prohibition by simply changing the form of their individual business support. As the Treaty of Rome does not contain any legal definition of the term “aid”, its borderlines had to be determined by the ruling practice of the ECJ. According to the Court the term embraces every “measure which, in various forms, reduces the charges normally borne by an undertaking and which is not therefore a subsidy in the strict sense of the word but is equivalent to one by reason of its nature and effect”.⁹ This early ruling in the Case *De Gezamenlijke Steenkolenijnen* has remained the landmark decision in the definition of the scope of Art 87 EC and is thus still the starting point of any examination of indirect State aid including cases of preferential tax measures. Later rulings of the ECJ have further stressed the broad concept of Art 87 EC and its effect-orientated definition approach. On the occasion of the Case *Italy v Commission* of 1974, in which the ECJ had to examine a temporary and partial reduction of social charges for the benefit of the textile and garment-making industry and small craft, the Court held: “The aim of Article 92¹⁰ is to prevent trade between Member States from being affected by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. Accordingly, Article 92 does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects. Consequently, the alleged fiscal nature or social aim of the measure in issue cannot suffice to shield it from the application of Article 92”.¹¹

Tax privileges do not go hand in hand with direct funding, but they put the beneficiaries in a clearly better position than their competitors who pay the full amount of taxes and hereby fulfil the *De Gezamenlijke*-formula. Fiscal privileges could consist of “a reduction in the tax base (such as special deductions, special or accelerated depreciation arrangements or the entering of reserves on the balance