

Cross-border mobility of companies in light of the ECJ case law on freedom of establishment

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Abstract

The cross-border mobility of companies by means of a merger or transfer is very controversially and passionately discussed in the literature. Freedom of establishment of companies means, *inter alia*, that the cross-border transfer of a company must be possible in the European Union. In its judgments on the cross-border change of registered office, the Court of Justice (ECJ) has significantly substantiated the provisions of Art. 49, 54 TFEU about the recognition, conversion and transfer of companies. The article analyzes the principles for the cross-border conversion and relocation of companies, which have been elaborated in the ECJ case law. In conclusion, concrete future proposals for a directive on the transfer of company seat will be presented

Keywords

Freedom of establishment, cross-border conversion, cross-border transfer, ECJ

1. Introduction

The ECJ in VALE¹ *Építési Kft.* judgment marks a milestone in the way to the realization of the cross-border mobility of companies in the EU. In the judgment, the ECJ ruled that a company established in an EU Member State wishing to transfer its registered office into another Member State and thus to change the applicable jurisdiction enjoys the protection of freedom of establishment under certain conditions. The Member States are obliged to allow foreign companies to switch to a national legal form under the same conditions as a domestic company. This means a situation where a company moves either its registered office or its management from one legal order (*Wegzugstaat*) to another (*Zuzugstaat*). The statement of the ECJ in the *Cartesio*² judgment from 2008 has been confirmed and specified in the VALE *Építési Kft.* judgment. Since by the transnational conversion and transfer we speak about restructuring whose legal framework is not yet harmonized in secondary law, it has to be carried out according to national law which entails a number of collision problems. These problems can and should be resolved

by applying the principle of equivalence and effectiveness established by the ECJ.

2. Cross-border conversion and transfer of companies in the light of the ECJ case-law on freedom of establishment

2.1. Cross-border restructuring as an expression of freedom of establishment

The cross-border mobility of companies³ and, therefore, the possibility of its cross-border restructuring is of fundamental importance for the realization of the internal market and for the economic integration in the EU. The economic sense of corporate mobility should enable the European companies to increase efficiency to optimize the allocation of resources through reorganization of their activities. As the ECJ stated in the *SEVIC*⁴ judgment, "cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC (now Article 49 TFEU)."⁵ According to the ECJ the freedom of establishment⁶ covers all measures "which enable companies to gain access to another Member State and to pursue activities in any State by allowing the participation in the economic life of the other Member State under the same conditions, which apply to domestic companies."⁷ Since then, the literature has widely held the view that the freedom of establishment encompasses all cross-border restructuring of companies, including their transformations and divisions.

In the VALE judgment the ECJ has stated that cross-border transformations of companies' *sensu stricto* (identity-preserving form change) are also covered by freedom of establishment. It is true that companies (in comparison to natural persons) are creatures of the national legal order which can regulate their establishment, existence, and functioning

¹ FUNTA, R. (2012): Freedom of establishment of companies in the EU and the effects of the VALE ruling, C-378/10. A never ending story or a farewell?.

² C-210/06, *Cartesio Oktató Szolgáltató bt*, ECLI:EU:C:2008:9641.

³ ŠKRINÁR, A. - NEVOLNÁ, Z., a kol. (2009): *Obchodné právo*.

⁴ C-411/03, *SEVIC Systems AG*, ECLI:EU:C:2005:10805.

⁵ C-411/03, *SEVIC Systems AG*, ECLI:EU:C:2005:10805.

⁶ SVOBODA, P. (2013): *Úvod do evropského práva*.

⁷ C-411/03, *SEVIC Systems AG*, ECLI:EU:C:2005:10805.

autonomously (so-called "creation theory"). However, the Member States are not allowed to exclude foreign companies from a general basis from such conversion measures which are allowed to domestic companies. Such a general "influx-block" for foreign companies represent different treatment compared to the domestic companies. The general exclusion of companies established in other EU Member States from the transformations in accordance with national legal provisions is likely to hinder such companies from exercising their freedom of establishment and thus represent a restriction within the meaning of Art. 49 and 54 TFEU.⁸

In this context it should be emphasized that the notion of establishment is understood in the settled case-law of the ECJ that the "concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period".⁹ For the cross-border mobility it means that a company which is conducting a conversion can only rely on freedom of establishment vis-à-vis the host country if it is actually settled in that State and carries out an economic activity on its territory. The registering authority of the host country may require a proof or at least a statement about the corresponding economic activities in that State. Since the term of establishment ("fixed establishment for an indefinite period") does not coincide with the administrative seat, the host country is not allowed to make the entry of the company dependent on the settlement of the latter on its territory. Art. 54 (1) of the TFEU does not require that a significant economic activity takes place in the Member State of establishment or even the administrative seat must be at the same place as the statutory seat.¹⁰

There is a question whether the company state of origin may prohibit its isolated form change (without actual settlement in the host country) if the host country this permits. I agree that the state of origin can not refuse to participate in such a change of legal form and that its rights are limited to the protection of specific interests which may be jeopardized by the form change.

2.2 Prohibition of unequal treatment of national and cross-border transformations

As in the SEVIC judgment, the ECJ has also accepted in the VALE judgment that the unequal treatment of national and cross-border transformations can not be justified by the absence of provisions of secondary¹¹ Union law. The corresponding harmonization of national rights (as a result of the adoption and

implementation of the draft directive on the transfer of company seat, still in the draft phase) would facilitate cross-border transformations and would be certainly helpful. It does not, however, constitute a prerequisite for the exercise of freedom of establishment, which is enshrined in the primary Union law.¹² Therefore, the host country may apply by cross-border transformations only such restrictions that are appropriate, necessary and proportionate by imperative requirements in the public interest. These include, for example, the protection of the interests of creditors, minority shareholders and employees, as well as the effectiveness of fiscal controls and the fairness of trade.

According to the ECJ, the change of a legal form of an influxed company established in the EU abroad can, from the perspective of the host country, be equated with the establishment of a new company in that state. As a 'creature of national law' such a company must comply with all the requirements which are imposed in the host country.¹³ Because European rules on the harmonization of cross-border conversion and transfer are still not in place, such procedures are subject to the successive application of two national, non-harmonized legal orders, that is, the law of the home Member State and the law of the host Member State in which the company will be registered after the conversion. Undoubtedly, such cross-border legal proceedings involve specific collision problems. It is, however, the task of the respective Member States to solve these problems so that the perception of the fundamental freedoms guaranteed by the primary Union law will not be thwarted.¹⁴

The ECJ therefore understands the national rules on transformations as "implementing norms" for cross-border transformations. With regard to the implementation of the law of the Member States he points to the equivalence and effectiveness principle. According to the principle of equivalence, the cross-border transfer can not be treated more unfavorably than the national one.¹⁵ Therefore, the incoming state should not refuse to register the foreign predecessor as a "legal predecessor" if such registration is foreseen for national transformations. It is clear from the principle of effectiveness that Member States can not, by the application of their national law, make the exercise of the rights guaranteed by Union law impossible or excessively difficult. From this point of view, the host country is obliged to take into account the documents issued under the law of the other

⁸ KARAS, V. - KRÁLIK, A. (2012): Právo Európskej únie.

⁹ C-221/89, Factortame II, ECLI:EU:C:1991:3905.

¹⁰ PALA, R. - PALOVÁ, I. - LEONTIEV, A. (2010): Cezhraničné fúzie.

¹¹ RATKA, T. (2003): Grenzüberschreitende Sitzverlegung von Gesellschaften.

¹² FUNTA, R. - GOLOVKO, L. - JURIŠ, F. (2016): Európa a európske právo.

¹³ FUNTA, R. - BOVOLI, V. (2011): Freedom of Establishment of Companies in the EU/La libertà di stabilimento delle società dell'UE.

¹⁴ JÚDOVÁ, E. (2008): Vplyv primárneho práva na právnu úpravu cezhraničných vzťahov.

¹⁵ DVORÁK, T. (2013): Přeměny a přezhnanění přeměny obchodních společností a družstev.

Member State or issued by its authorities, if these conditions are compatible with the law of the Union. Otherwise, the company that is changing its legal form would be practically unable to prove compliance with the procedural rules of the State of origin.

This wording can also be interpreted in such a way that the registering body in the host country is not bound by the findings in the state of origin. It is, however, to be assumed that this body can not call into question the meaningfulness of the documents without a valid reason. Such a behavior would not be in line with the meaning and purpose of the principle of effectiveness. The register body may exercise its right of scrutiny if, firstly, there are legitimate doubts as to the consistency of these documents (for example, where there is a suspicion that some documents have been falsified). Secondly, the competent body may examine whether or to what extent such documents are equivalent to the formalities required by the national law of the host country. However, a formalistic approach of this body (that the balance sheets should be drawn up and scrutinized in accordance with domestic law) would make the implementation of the process more difficult.

2.3 Cross-border transformation from the perspective of the country of origin

In the VALE judgment the ECJ has, in principle, been concerned with the freedom of establishment restrictions that were present in the law of the host Member State (that is, Hungarian law). His statements also remain relevant in regards to the state of origin (departure state) of the company and supplement the *Cartesio*¹⁶ judgment. As is known, the ECJ stated in this judgment from 2008 that a Member State may exclude the mere transfer of the administrative seat (the central administration) abroad, while retaining the previously applicable law. In the absence of a uniform EU law definition of the companies, each Member State is empowered to determine the link (for example, the operational registered office in the country) that a company must always prove in order to be seen as a company of that State. A Member State (Hungary at the time) can therefore autonomously require that its companies have to maintain their central administration on its territory. However, if a company wishes to move to another Member State transforming its legal form it into a company legal form governed by the national law of the host country, this process is recognized by the freedom of establishment. This means that the state of origin can not generally sanction the change of the legal status and the departure into another Member State by means of the resolution of winding-up and liquidation if the host state is ready to accept such a company. The state of origin can only subject this cross-border change of company legal form to restrictions justified by mandatory reasons of public interest (a four-stage test).

¹⁶ KARPAT, A. (2017): Voľný pohyb spoločností v judikatúre Súdneho dvora EÚ.

This important statement of the ECJ in the *Cartesio* judgment¹⁷ is to be read in the light of the VALE judgment. Firstly, the ECJ has made clear that the conversion requirements of the host country are also subject to the conformity with the freedom of establishment. If a Member State admits the change of the legal form between different legal forms of national law (e.g. Slovak s.r.o. into a.s.)¹⁸ then it can not hinder the transnational change of legal form between parallel types of companies (e.g. Polish spółka z o.o. into German GmbH). On the other hand, it is not necessary that the national law of the host country contains specific provisions on collision relating to the cross-border transformations or seat transfer. Secondly, from the VALE judgment it is clear that the state of origin is also subject to the principle of equivalence and effectiveness.

It can, and should, apply the own rules applicable to domestic transformations to the cross-border change of legal form and seat transfer. However, the State of origin may not treat the cross-border restructuring of its companies unfavorably vis a vis domestic form changes and impose disproportionate restrictions.¹⁹ Moreover, the principle of effectiveness gives rise to a positive duty to the two participating Member States to make cross-border transformations possible under their national law. In other words, European law requires from the Member States' authorities and bodies not only not to prevent such structural measures. On the contrary, the Member States are obliged to support its companies²⁰ in carrying out these complicated procedures so that they can leverage from the freedom of establishment. The fulfillment of this duty therefore requires the willingness of the national authorities to interpret the national provisions on transformations Europe friendly in order to solve the specific problems encountered in carrying out cross-border transactions. The national authorities should also be willing to cooperate with each other in order to overcome any possible obstacles.

3. Conclusions

The majority of the problems resulting from cross-border mobility of companies are due to the lack of harmonization of the corresponding national rules.²¹ However, the European and harmonized national rules about the international merger of joint-stock companies, but also about the cross-border transfer of the European company (SE), can be applied analogously.

¹⁷ NOVOTNÁ, P. (2008): Freedom of establishment after *Cartesio*.

¹⁸ SUCHOŽA, J. a kol. (2016): Obchodný zákonník a súvisiace predpisy-Komentár.

¹⁹ EBKE, W. (2005): The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond.

²⁰ KLIMENTOVÁ, A. - MURA, L. (2013): Komparatívna analýza organizačno-právnych foriem malého a stredného podnikania.

²¹ MAMOJKA, M. (2011): Sloboda podnikania v EÚ V/S majetková dôveryhodnosť právnických osôb-vybrané otázky.

In summary, it can be stated that the ECJ has largely succeeded in removing the obstacles enshrined in national law in regards to cross-border mobility of companies. The *Cartesio* and *VALE* judgments complement each other and, together with the earlier *SEVIC* judgment, form a coherent concept of international corporate restructuring in the EU. This concept is based on the fundamental assumption that neither the exit state nor the influx state can exclude the cross-border change of legal form if their national law permits and regulates domestic (national) transformations.

In the absence of a secondary legal harmonization of the conversion procedure, national rules must be applied which are intended as implementing norms. The successive application of the relevant national legal order can create a number of legal problems which can, however, be solved by observing of the principle of equivalence and effectiveness, as well as by the EU friendly interpretation of the national rules. The cross-border mobility of companies is a necessary prerequisite for the realization of the internal market of the EU. About a free internal market we can only if the companies can choose their location in the EU according to the most favorable economic conditions. It is important to give the companies the possibility to effectively exercise the opportunity guaranteed by the primary law through the adoption of the directive on the transfer of company seat.

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Prospects of implementation of European policy in the sphere of protection of children's rights in Ukraine

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Abstract

In Ukraine, despite a number of measures taken in recent years for the protection of children's rights, there are still many problems in this area, and, above all, in monitoring the observance of current legislation. This promotes comparative legal studies aimed at learning trends, patterns and features of legislation which protect children rights in the world, especially in the EU member states. The article reveals the shortcomings of legal regulation of children rights in Ukraine. Suggestions are made for the implementation of the best practices of EU member states in this area.

Keywords

Children's rights, protection of children's rights, EU legislation

1. Introduction

The European community pays great attention to protection of rights and freedoms of children. In the European Union a number of regulations that set the strategic direction of activity of public authorities in the sphere of protection of children's rights are in force, e.g. the Declaration of the Rights of the Child, The United Nations Convention on the Rights of the Child, Declaration of Principles on Tolerance, The European Convention on the Exercise of Children's Rights. At the same time, current conditions require new forms of work with children. This, in turn, leads to the development of modern mechanisms of organizational and legal protection of rights and freedoms of the child.

2. National action plans concerning protection of children's rights in Ukraine and the EU

If we compare national action plans on children's rights protection, which were adopted in Ukraine in recent years, with national action plans that were adopted in EU member states, we can conclude that national action plans adopted in the member states of the European Union are more complex and include much broader range of issues that need to be solved.¹ Ukrainian National Action Plan on Implementation of the UN Convention on the Rights of the Child until 2016 did not contain a list of measures necessary for the implementation of the National Action Plan and did not provide the improvement of Ukrainian

legislation on the protection of children's rights.² But the work is continuing on the National Action Plan on Implementation of the UN Convention on the Rights of the Child for 2017 – 2021.³

The main disadvantage of Ukrainian state plans and programs on realization of rights of children is that their financing is not determined by those plans or programs. Financing is performed from the funds ensuring the functioning of corresponding ministries and agencies or from funds remaining after the satisfaction of more important, according to the Government, needs, i.e. by the residual principle. The new National Plan of Ukraine for the period 2017 – 2021 provides that measures for its implementation will be financed by the Government. Recommendations of the UN Committee on the Rights of the Child concerning the determination of the volume and proportion of national budget that are spent on children through public and private institutions or organizations for the evaluation of the impact and availability, quality and effectiveness of services for children in different spheres have also not been fulfilled.⁴ In Ukraine, information on the Convention is distributed among the children and among professional groups of adults who work with children. However, the total number of such materials is absolutely insufficient for Ukraine. There is no state system in place which would inform all children about the content of the UN Convention on the Rights of the Child in a form which is clear to them. Similarly, in Ukraine there is no effective system of training of specialists working with children, especially teachers, doctors, law enforcement officials, lawyers, judges to provide a deep understanding of the content of the Convention and general principles of its implementation. Information about the state of implementation of children's rights in Ukraine is not systematically collected and is not published.

Another advantage of national action plans on children rights protection that have been adopted in the EU member states is that they contain not just common goals, but also detailed measures for their implementation; indicate authorities responsible for implementation of each measure; foresee monitoring of implementation of these measures; contain indicators for the assessment of performance of each

¹ GOLOVKO, L. (2015): Protection of children's rights: foreign experience.

² Law of Ukraine 'On the National Program 'National Action Plan on Implementation of Convention on the Rights of the Child' for the period until 2016.

³ Resolution of the Cabinet of Ministers of Ukraine on approval of National Action Plan on Implementation of the UN Convention on the Rights of the Child for 2017 – 2021.

⁴ Alternative report on the implementation of the provisions of the UN Convention on the Rights of the Child in Ukraine.

individual measure. A good example in this respect, in my opinion, is the National Action Plan of Slovakia, which in addition to the bodies responsible for the implementation of certain measures contains the terms of their implementation.^{5 6} Further drawback of the National Action Plan of Ukraine is the lack of requirement to provide annual report about its implementation. But this is not surprising, because if in national action plan concrete measures which might be taken are not listed, there is no need to report about the state of their implementation.

Nowadays in Ukraine the system of subjects, which are obliged or entitled to protect the rights and freedoms of a child include Parliament of Ukraine, the President, the Cabinet of Ministers of Ukraine, local state administrations, courts, the Constitutional Court of Ukraine, Parliament Commissioner for Human Rights, Commissioner of the President of Ukraine for Children's Rights, enforcement agencies, etc. At the same time it is necessary to strengthen the potential of bodies of local self-government,^{7 8 9} especially in the conditions of the reform of the system of local self-government.^{10 11}

3. Combating violence against children

In Ukraine there is no National action plan to combat violence against children. In our view Ukraine should implement the practice of EU member states concerning adoption of National strategies to combat violence against children. In Norway the National strategy to combat violence and sexual abuse against children and youth (2014–2017) was adopted, which is aimed to systematically resolve the problems of child abuse (the National Strategy).¹² In this document, the Government of Norway has foreseen 42 measures intended to prevent violence against children and youth. The strategy was developed jointly by the Ministry of Youth, Gender Equality and Social Assistance, Ministry of Health, Ministry of Education, Ministry of Justice and Public Security. When developing the Strategy consultations with many state

and public organizations that work with children were held, as well as a whole series of studies were produced. The main focus of the National Strategy is made on the prevention, early intervention and collaboration between different institutions. Childrens who are in difficult situation and need help, according to the National Strategy are detected at an early stage and they should be provided fast, relevant and comprehensive care. Since pre-school and school education play a key role in identifying children who are in difficult situations, teaching staff should be aware of the types of assistance that can be provided to childs who have suffered violence and in which authorities it is possible to seek help. In order to implement this requirement of the National Strategy in practice systematic measures were taken to train teachers, social workers, police officers, doctors and other professionals who have contact with childrens which had a significant positive effect.

Systematic measures were taken to inform pupils about the issues of violence. In schools, other educational institutions and institutions where childrens spend their free time leaflets with necessary information were distributed. Starting from 2013 - 2014 school year in educational programs, according to the National Strategy hours for teaching of issues concerning domestic violence and child abuse were stipulated in the second, fourth, seventh and tenth grades of secondary schools. That is, from the first years of education in school, the child gets to know the rules of behavior in situations when they are confronted with the topics of violence. The body responsible for the implementation of this requirement of the National Strategy is the Ministry of Education and science of Norway. In our view, teaching problems of child abuse in school is a rewarding experience. Timely informing the childs about the rules of conduct helps to reduce cases of child abuse. Interesting experience is creation of bullying prevention and intervention plans by Norwegian schools. Such plans foresee academic and non-academic activities aimed at ballying prevention, policies and procedures for reporting and responding to ballying, collaboration with families.¹³

The positive experience of Norway, worthy implementation in Ukraine, is the practice of continuous monitoring of the children who have mental health problems and children, whose parents use drugs. For this purpose in Norway a pilot program 'Early pregnancy - mental health, intoxication and domestic violence' was launched. Responsible for the implementation of this program is the Ministry of Chindren, Equality and Social Inclusion in collaboration with the Ministry of Education and the Ministry of health and care services. Regional centers for violence prevention develop interdisciplinary curricula for different specialists. In Norway there are

⁵ The National Action Plan for Children 2013-2017.

⁶ FUNTA, R. – NEBESKÝ, Š. - JURIŠ, F. (2014): Právo európskej únie.

⁷ KUDRIAVCEVA, O. (2014): Historical and legal Journal. - 2014. - № 1. The constitutional principles of human rights and freedoms of the child in Ukraine: experience, problems and prospects.

⁸ KONDRATIUK, N. A. - TYULCHENKO, I. K. (2010): Children's Rights in Ukraine: problems and ways of their solution.

⁹ KOLODIY, A. M. - OLIYNYK, A. Y. (2008): The rights, freedoms and duties of man and citizen in Ukraine.

¹⁰ KUDRYAVTSEVA, A. Ensuring the constitutional rights of the child in Ukraine / O. KUDRYAVTSEVA // Bulletin of the Ministry of Justice of Ukraine. - 2013. - № 8. - 19 - 25.

¹¹ KRAVCHUK, M. V. (2010): Theory of law (reference notes).

¹² National strategy to combat violence and sexual abuse against children and youth (2014–2017).

¹³ Bullying Prevention & Intervention Plan.

10 assistance centers for children. Some municipalities have municipal psychologists which help children who have undergone violence.

Taking into account experience of Scandinavian countries we consider that Cabinet of Ministers of Ukraine has to define national strategies and ensure the implementation of policies relating to the protection of children's rights in accordance with international and national law. Ministry of Family, Youth and Sports of Ukraine should create a single national program concerning the protection of rights of families, children and youth. Regional institutions should ensure implementation of this program at the local level. Positive experience of Sweden is establishment of small centers that advise adolescents - addicts and their parents, which are widespread in this country. Social workers in most municipalities regularly provide information and advice on issues relating to drugs in schools. In the Scandinavian countries social services organized on a territorial basis play the leading role among the state institutions dealing with the protection of minors that allows to effectively solve problems of specific child by professionals working in the territory of child's residence.

4. Protection of rights of children with mental and physical disabilities

For Ukraine, the issue of social protection of disabled children is especially important due to the steady upward trend in the proportion of disabled children in the total population.¹⁴ Practice shows that many of the provisions of socioeconomic policy concerning disabled children are outdated, do not meet today's needs, and are not consistent with generally recognized international norms and standards. The legal framework contains many positive steps towards solving many problems of disabled children, but is mainly declarative, not providing material resources and management mechanisms of implementation. Thus, the existing system of social protection of disabled children requires changes, additions and modernization. The experience of highly developed countries showed the ineffectiveness of passive state policy on social protection of citizens with special needs, which is based on compensation costs. Today, Ukraine is trying to move from medical to social model of disability. The latter is the relationship between people with disabilities and society, rather than fixing the variations in its health and development, as is typical for medical model and was characteristic for the soviet system of management.¹⁵

¹⁴ LIBANOVA, E. M. - CHERENKO, L. M. - POLYAKOVA, S. V., REUT, A. H. (2009): Poverty and unequal opportunities for children in Ukraine. - Kyiv: Institute of Demography and Social Studies of NAS of Ukraine.

¹⁵ KRAVCHENKO, M. V. (2017): Actual problems of social protection of invalids in Ukraine.

Providing education for disabled children in Ukraine is at a low level, existing institutions do not allow to realize themselves and have many weaknesses. Ukraine must develop educational institutions in accordance with international standards, i.e. make free entry barriers to rooms, arrange bathrooms, provide access to the upper floors of the schools or access to public transport. Noteworthy is the experience of many countries that have introduced integrated education in secondary schools, which involves gaining knowledge of disabled children together with healthy children. This possibility enables disabled children to largely integrate into environment of peers. It seems appropriate to use the experience of Sweden, where activities in the field of child protection a number of NGOs are involved. Thus, NGO 'Save the Children' promotes equal access to education for persons with disabilities and communicates with many organizations dealing with children with special needs around the world. The basis of their activity is rehabilitation program involving this category of children in public life. Also it seems appropriate to use the experience of Sweden concerning the organization for orphaned children with mental and physical disabilities a number of houses that are home for about 30 children. Doctors and specialists-pathologists conduct necessary medical monitoring and appropriate pedagogical work. Thus, doctors determine methods of rehabilitation (massage, exercise therapy, physiotherapy, medical treatment) and teachers develop individual training programs.

In Germany, in case of child abuse social services and educational support are often offered. The procedure of social services actions in the case of signs of child abuse are regulated in Article 8a of Social Code, Book VIII.¹⁶ The main means of primary prevention activities in Germany are as follows: educational and informational support,¹⁷ namely information campaigns aimed at public awareness of the problem of violence against children; educational programs to promote parenting and child development; functioning of 'hot' telephone line; consulting in community centers, etc. To the secondary prevention of child abuse in Germany belong: appropriate (reaction) monitoring and detection of violence; only service information and advice to children, youth and families; work with families, teenagers under the individual plan; family group conferences, etc. To the means of tertiary prevention of violence belongs a package of social, educational, and medical and psychological activities and services aimed at rehabilitation of personal and social status of people, including a child who has suffered violence.¹⁸

¹⁶ German Social Code 26th of June, 1990, Book VIII, Section 8a (Protective Assignment in Case of Threat of the Child's Welfare).

¹⁷ GORISHNA, N. M. (2013): Social and educational support of youth initiatives in Western Europe.

¹⁸ ZYMIVETS, N. V. - MALIYENKO, Y. M. - TSYUMAN, T. P. (2009): Implementation of a pilot model of structural

In recent years the Federal Government has developed a number of national action plans and programs relating to early prevention; government intervention in the case of violence against a child or if the child does not receive the necessary care; protection of children and adolescents from sexual violence; aimed to help adolescents to obtain education.¹⁹

The positive experience of Germany is seen in the existence of educational programs on early childhood. The goal of educational programs for children and young people is to create a positive atmosphere in families, support parents in the upbringing of children, support children and adolescents in their individual and social development, develop parenting skills, and enhance interaction between parents and children. There is a practice of sending letters to parents, development of family manuals, family consultations, and workshops on parental issues.

5. Conclusions

Ukraine needs fundamental changes in the sphere of protection of children's rights. Normative legal acts should contain concrete obligations of concrete subjects and not just declarations to which we aspire. This concerns also the draft National Action Plan on Implementation of the UN Convention on the Rights of the Child for 2017 – 2021. It requires changes concerning detailed phased measures aimed at protection of children's rights, timetable of their implementation, responsibilities of concrete subjects, monitoring of implementation of aforementioned measures, indicators for the assessment of performance of each individual measure. Following the example of European countries Ukraine should practice continuous monitoring of the children, who have mental health problems and children, whose parents use drugs. Small centers that advise adolescents - addicts and their parents should be established.

Noteworthy is the experience of many European countries that have introduced integrated education in secondary schools, which involves gaining knowledge of disabled children together with healthy children. This possibility enables disabled children to largely integrate into environment of peers. Ukraine must equip educational institutions in accordance with international standards, i.e. make free from barriers entry to the room, arrange bathrooms, provide access to the upper floors of the school or access to public transport. National action plans and programs relating to early prevention of violence against children should be thus developed.

prevention of violence against children, summarizing the experience of the project.

¹⁹ SMETANSKOHO, M. I. (2008): Organization of profile education in Western Europe.

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Conflict between tax sovereignty and state aid control

Maciej Laszczak

Abstract

In recent years, tax regulations have been under greater focus of EU aid supervision. The uncertainty surrounding the classification of aid rules and the widening of the concept of aid has a significant impact on the tax autonomy of EU Member States. If every tax-relieving standard can be treated as a prohibited aid, there is a fundamental conflict of competence between the continuing autonomy of the Member States in the field of direct taxation and the aid prohibition. The resolution of this conflict, as well as the creation of legal certainty, requires a clearer focus on the supervision of State aid.

Keywords

EU, State aid, Tax sovereignty

1. Introduction

In recent years, tax regulations have been under more control by the EU state aid regulator.¹ The tightened control is focused at both statutory provisions and, more recently, individual administrative measures, in particular so-called Rulings und Advanced Pricing Agreements. This extension of State aid control creates considerable legal uncertainty for both national tax legislators and the companies concerned. The central problem of the State aid supervision is the lack of predictability of the classification of tax measures. The uncertainty surrounding the classification of aid rules and the widening of the concept of aid has a significant impact on the tax autonomy of EU Member States. If every tax-relieving standard can be treated as a prohibited aid, there is a fundamental conflict of competence between the continuing autonomy of the Member States in the field of direct taxation and the prohibition of aid. The resolution of this conflict, as well as the creation of legal certainty, requires a clearer focus on the supervision of State aid and the purposes of the prohibition.

2. EU aid supervision for tax benefits

Since the practice of State aid supervision leads to the recovery of a benefit recognized as aid, there is considerable legal uncertainty for companies, as they have no instruments of reducing this legal uncertainty. The risk of national regulations being banned by the

European Commission as a prohibited aid also limits the tax autonomy of EU Member States. In conjunction with the notification of proposed legislation under EU state aid law, this uncertainty is also transferred to legislation, thereby significantly affecting the tax autonomy of EU Member States.² We can consider in the problems of the practice of State aid supervision the expression of a fundamental conflict of competence between fiscal autonomy and the common understanding of the Member States. Art. 107 (1) TFEU lays down a prohibition on State aid: „Unless otherwise provided in the Treaties, state aid or State aid of any kind is a form of competition by favoring certain undertakings or branches of production distorting or threatening to distort, is incompatible with the internal market insofar as it affects trade between Member States.“ The aid prohibition is not absolute, but Member States aid is subject to approval by the European Commission. Art. 107 (2) and (3) TFEU contain authorization procedures. Paragraph 2 lists the situations that must be approved. Paragraph 3 provides that the European Commission has discretion as to the extent to which it approves aid for regional or structural/sectoral support or for the promotion of projects of common European interest or cultural promotion. It is always a condition that Member States indicate new aid before it is reported to the European Commission for the first time. Failure to report the aid leads to illegality and repayment obligations even if the aid is capable of being authorized. The concept of aid according to the ECJ goes beyond the concept of subsidy. Such measures also include „reducing the burdens which a company has to bear on a regular basis, and thus, although they are not subsidies in the strict sense of the term, are equal in nature and effect.“³ Consequently, the prohibition of aid covers not only direct subsidies but also tax measures („aid of any kind“).

3. Tax benefits as state aid

The identification of State aid in the form of tax advantages presents considerable difficulties, because it is not a question of granting an advantage in the sense of State aid, but of abandoning the disadvantage of taxation. The “market economy operator test“ or

¹ HANCHER, L. - OTTERVANGER, R. - SLOT, P. J. (2016): EU State Aids.

² HOFMANN, M. (2016): State Aid Law of the European Union.

³ C-78/08 to C-80/08, Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl (C-78/08), Adige Carni Soc. coop. arl, in liquidation v Agenzia delle Entrate and Ministero dell'Economia e delle Finanze (C-79/08) and Ministero delle Finanze v Michele Franchetto (C-80/08), ECLI:EU:C:2011:550, Point. 45.

“private investor test“ applied in the field of direct subsidies, according to which a subsidy does not exist if the state would act in the same way as a private investor, does not work here. The delineation difficulties become apparent on the basis of recent decision-making practice in the field of tax subsidies. Particularly problematic are the cases of so-called de facto selectivity. Although the Gibraltar's corporate tax system was based on the Gibraltar decision⁴ of the ECJ, the basis for assessment was chosen on the basis that foreign holding companies would not have had to pay any taxes. In addition, there has recently been a tendency of the European Commission and the ECJ to extend aid supervision. Art. 107 TFEU is no longer used only against distortions of competition, but also as an instrument against the presumed waste of taxpayers' money. In addition, inequalities of a general nature are increasingly being taken up.⁵ The lack of rigor in the case-law and the tendency for permanent extension are reasons why a sample template according to which the European Commission initiates state aid proceedings can not be identified. In the course of the so-called LuxLeaks affair, there has been (for the first time) a systematic inquiry into state aid-relevant agreements between companies and tax authorities. The aid test is regularly carried out in three steps:

1. Identification of the reference system (standard taxation)
2. Deviation from the reference system
3. No justification as a general part of the reference system.

The central problem with regard to the determination of the advantage is to find out the regular or normal load (“normal zero level“ of taxation).⁶ This can not be determined objectively, but with regard to the continuing national sovereignty, it depends on the legislative provisions of the respective Member State and the tax system used by it. The ECJ does not pay enough attention to the argument that relief serves the efficiency of the tax system. In principle, tax benefits are covered by Art. 107 TFEU even if they are intended to offset charges elsewhere. Thus, for example, a VAT exemption from self-employed doctors could not be justified. It only compensates for the disadvantage to salaried doctors, who are not subject to VAT due to lack of entrepreneurship.⁷

⁴ C-106/09 P, European Commission (C-106/09 P) and Kingdom of Spain (C-107/09 P) v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland, ECLI:EU:C:2011:732.

⁵ C-20/15 P and C-21/15 P, European Commission v World Duty Free Group, EU:C:2016:981.

⁶ LOPEZ-PIERNAS, J. (2015): The Concept of State Aid under EU Law: From Internal Market to Competition and Beyond.

⁷ C-372/97, Italian Republic v Commission of the European Communities, ECLI:EU:C:2004:234, Point. 6.

With regard to selectivity, it should depend on the economic effects. As a result, generally formulated rules, which in fact can not be used by all companies, are also covered. Secondly, it should not be decisive whether a group of beneficiary companies can be distinguished and whether non-beneficiary companies are in direct competition with the beneficiary companies. Thirdly, it should also not matter whether a benefit can theoretically be used by all companies in a comparable situation, which basically applies to almost all abstractly formulated tax benefits, but only whether the rule can be used by all companies given a particular economic activity. In the case of the World Duty Free Group, the Grand Chamber of the ECJ does not consider it decisive whether a rule is open to all companies. The criterion „favoring certain undertakings or branches of production“ is not considered to be significant where there is a difference in treatment between companies in a comparable factual and legal situation. Thus, for the criterion of selectivity, it is sufficient that a regulation differentiates between companies that carry out “similar transactions“. On the other hand, not every benefit should be seen as selective. In this way, excessive restriction of national legislators should be avoided.

The criterion of selectivity is also of central importance because the other conditions of Art. 107 TFEU practically never lead to the rejection of aid. According to settled case-law, there is no need to prove that the aid in question constitutes a real distortion of competition and that it has no real effect on trade between Member States.⁸ This is remarkable, since Art. 107 TFEU does not address aid as such but only those which affect cross-border trade. In contrast, the case-law merely examines whether the aid is potentially capable of distorting competition and affecting trade between Member States. General exceptions to the notification requirement apply

- according to the so-called EU de minimis regulation for aid up to 200.000 euros. However, this exception is irrelevant to tax legislation because it depends on the overall impact, which will always be above the de minimis threshold, because tax credits are formulated abstractly in general and are therefore granted in a non-predefined multiplicity of individual cases.⁹
- For aid under the so-called block exemption regulation under certain conditions in favor of small and medium-sized enterprises (so-called SME subsidies) and research and development; Environmental protection

⁸ NEMITZ, P. F. (2007): The Effective Application of EU State Aid Procedures.

⁹ Commission Regulation (EU) No 1407/2013 18.12.2013 on the application of Articles 107 and 108 TFEU to de minimis aid, OJ EU L 352/1.

measures; Promotion of employment and training and regional aid.¹⁰

4. Consequences by the categorisation of unauthorized aid for states and taxpayers

The European Commission and the ECJ tend to assume a very broad concept of aid.¹¹ The resulting considerable legal uncertainty regarding the classification of national measures creates problems not only for companies, but also for Member States. For tax authorities, the question arises as to whether and when actual agreements and advanced pricing agreements (APAs) fall within the scope of the aid prohibition. Even on a case-by-case basis, where the authority has discretionary powers in favor of taxpayers, it is possible to fulfill the conditions of Art. 107 TFEU. The ECJ alone is responsible, in the interest of the uniform development of European law to classify a measure as aid within the meaning of Art.107 TFEU. The financial risk, however, is borne not by the state, but by the taxpayer, as EU unlawful state aid with a ten-year retroactive effect has to pay back. The appeal to the protection of legitimate expectations has so far been unsuccessful. Although the European Commission could waive the recovery of the aid if it would infringe a general principle of EU law. This includes the protection of legitimate expectations. In the ECJ's view, difficulties with the classification also do not affect the obligation of the beneficiary to ascertain that the state aid procedure (Art. 108 (3) TFEU) has been in line with the law.¹²

5. The lack of a legally binding definition

The state aid control raises procedural and substantive issues, without any precise definition of the objectives of European aid supervision. However, clarity about the function of the aid prohibition is a prerequisite for the development of an adequate regulatory framework. The discussion in the literature strives about the balance between prohibition of state aid and national sovereignty. The preliminary question about the objectives of the aid prohibition is usually only marginal. The purpose of the European aid prohibition is captured in the element of selectivity. On the other hand, the elements of the distortion of competition or the threat of distortion of competition and the detrimental effect of inter-State trade in the application of the law are interpreted so broadly that, in practice, they have no independent effect.

6. Conflict between tax sovereignty and State aid control

In principle, it is possible to reproduce a desired system of state subsidies by reorganizing the tax laws.

¹⁰ Commission Regulation (EU) No 651/2014 17.6.2014 determining the compatibility of certain categories of aid with the internal market pursuant to Articles 107 and 108 TFEU, OJ EU L 187/1.

¹¹ QUIGLEY, C. (2009): European State Aid Law and Policy.

¹² WERNER, P. - VEROUDEN, V. (2016): EU State Aid Control: Law and Economics.

For example, the creation of tax exemptions for the aid recipient may create a situation in which the recipient, both in terms of the net burden and in terms of incentives will be brought into the same position he would reach through direct aid. The form in which the subsidy is granted is therefore of no importance. However, difficulties arise in delimiting tax subsidies from measures designed to minimize the efficiency costs of taxation. Depending on the tax type and the tax object, it may therefore make economic sense to differentiate the tax burden by specific regulations. The practice of State aid supervision¹³ in the field of tax law reveals a fundamental conflict of competence between the EU level and the Member States. It is true that the ECJ can review aid decisions. However, this does not include a trade-off between the political objectives of a fiscal rule.

Direct subsidies can be unilaterally prevented by the European Commission. However, as Member States have exclusive competence in almost all areas of taxation. It is therefore understandable that aid supervision also covers tax measures ("any type of aid"). Growing importance of competition in the 1990s has led to an increase in the understanding of fiscal aid. This development has been deepened further in the recent debate on tax competition through the G20, OECD and the EU.

7. Conclusions

The equal treatment of direct aid and tax subsidies is basically understandable. However, the application of State aid law in the field of tax law creates a fundamental conflict of competence with the tax autonomy of the Member States. This conflict is particularly important as aid supervision is not based on a clear distinction between prohibited tax subsidies. It is true that not every favorable tax law standard constitutes a subsidy which affects cross-border trade. The considerable legal uncertainty destroys the credibility of Member States' tax policies and undermines their tax autonomy.

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¹³ WHISH, R. (2008): Competition Law.

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Better corporate governance in Europe through law on employee participation?

Paolo Bergamini

Abstract

Europe has always been the world region with the strongest workers' rights. In many European countries, collective bargaining, employee participation and union membership are firmly rooted in the corporate world. The combination of strong workers' rights and built-in welfare state defines the core of the European social model. Although employee participation is widespread in Europe companies are trying to escape their duties. Thus, the aim of the article is to present new ideas for EU corporate governance as well as the ECJ position.

Keywords

Corporate governance, Corporate Law, EU

1. Introduction

In the majority of European countries, there are rules which guarantee employees participation in corporate boards.¹ In a nearly 20 countries of the European Economic Area (EEA), employee representatives may participate in the supervisory or administrative board. Workers' organizations are widespread and can be considered as a central component of the European social model. Employees could also have their say in countries where companies traditionally have a single governing body, such as France, Norway or Sweden. In most countries, the rules are legally binding. This means that a company that fulfills the requirements is obliged to include employees in its management body. An exception can be seen in the Nordic countries, where workers or unions could decide whether and how they would like to exercise their rights.

At the pan-European level, there is also a fear that a regulatory competition is emerging. Companies would be able to look at different national regulatory and legal frameworks, eventually selecting the one with the softest specifications. The obligation to follow employee representation can be avoided in this way. For example, companies could have their headquarters registered in a "non-employee" country, such as a UK joint stock company. Several German companies already use a foreign legal form, e.g. Ltd. & Co. KG. Due to a gap in the German Co-Determination Act, there is no need for codetermination for these companies in the Supervisory Board.

Through the so-called single-person company (*Societas Unius Personae*, SUP) one may see the departure from the co-determination in the future. The European Commission wants to introduce the single-person company in order to create a European legal form that can also be used by small and medium-sized enterprises.² The establishment of subsidiaries abroad should also be simplified. In fact, the EU would facilitate the founding of letterbox companies. Companies would be able to separate their legal headquarters and the place of the operative business and choose under which national company law they would be subordinated. On the other hand, there are demands from politics and trade unions for a stronger participation of employees in corporate matters. The European Trade Union Confederation had suggested that participation rights should apply throughout Europe and to all European forms of companies.

2. New ideas for corporate law on employee participation

Europe has always been the world region with the strongest workers' rights. In many European countries, collective bargaining, employee participation and union membership are firmly rooted in society. The combination of strong workers' rights and a developed welfare state defines the core of the European social model. In international comparison, the European social model is very successful in terms of growth and prosperity as well as relatively low social inequality. The member countries of the European Union (EU) not only have a high quality of life, but also high life expectancy, a relatively healthy population and high levels of individual satisfaction.

In its global competition report, the World Economic Forum (WEF) emphasizes the role of innovation as a key factor in economic growth. It describes competitiveness as the totality of institutions and measures that determine a country's level of productivity. Productivity, in turn, determines prosperity in the long run. But despite these achievements, the tone of political discussions about the European social model and the wider outlook for the European economies is often pessimistic. Even before the euro crisis, political debates about the Lisbon agenda and the subsequent Europe 2020 agenda were often very critical. Europe was seen as an aging and flagging region with little capacity for innovation and growth (in comparison to the USA).

¹ BALLING, M. - HENNESSY, E. - O'BRIEN, R. (1998): Corporate Governance, Financial Markets and Global Convergence.

² BARCA, F. - BECHT, M. (2002): The control of corporate Europe.

Three perspectives determine the discussions of the expert groups:

- an understanding of local practices and company-specific and country-specific experiences,
- a debate on the principles of corporate governance in a broader social context,³
- a basic understanding of the sustainability of the current form of Europeanization between liberalization and the European social model.

3. Arguments against corporate law on employee participation

In larger companies, employees choose their representatives in the supervisory board. For example, if we look on Germany, only the employees employed in Germany are entitled to vote, the workforces from the foreign branches may not vote. There is a simple reason for this state. Germany can not issue regulations for the election of a supervisory board to other countries. Co-determination opponents nevertheless derive from this state and argue that it must be abolished.

The free movement of workers is limited by the fact that employees could not switch to a foreign branch of the company, without losing their right to vote or to be elected. In fact, however, the right to vote does not expire as a result of crossing the border, but rather because of the change of business. In addition, it is normal for certain rights to change when employees move abroad, for example in case of protection against dismissal.

Another argument is that foreign employees would be discriminated by participation in the supervisory board. But that is a misinterpretation of the prohibition of discrimination. This says that no foreigner may be disadvantaged compared to a resident. It would work, for example, if Germans were allowed to vote in the German branch of a company, but not colleagues with Czech citizenship.

4. ECJ confirms the European law conformity of German company law on employee participation

The German corporate co-determination law was under evaluation by the ECJ: The ECJ has followed the Advocate General's Opinion and has confirmed the German corporate co-determination law. The judgment of the ECJ was based on a request for a preliminary ruling. The parties were in dispute over the composition of the respective Supervisory Board. The defendant, a parent company of a tourism group (TUI AG) which employs approximately 77.000

³ HOPT, K. (2006): Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the U.S.

employees worldwide. About 10.000 of them are employed in Germany, compared with almost 40.000 in other EU countries. According to the Articles of Association, the defendant Supervisory Board is made up of 20 persons. According to § 7 (1) of the German co-determination Act (MitbestG), 10 members represent the shareholder side and 10 members the employee side. The claimant, Mr Erzberger, has been a shareholder since mid-2014. He argued that the defendant Supervisory Board is incorrectly composed, since the German corporate co-determination law states, that the right to vote and stand for election of employee representatives to the Supervisory Board are only available to employees employed in Germany, violate the principle of non-discrimination as laid out in Art. 18 TFEU and the freedom of movement guaranteed by Art. 45 TFEU. As a result, the claimant considers the German corporate co-determination law to be inapplicable, so that the defendant Supervisory Board is to be filled exclusively with representatives of the shareholders (§ 96 (1) of the Stock Corporation Act (AktG)).⁴ The ECJ noted that violation of the principle of non-discrimination as laid out in Art. 18 TFEU only applies if the TFEU does not provide for a special prohibition of discrimination. However, that is the case in Art. 45 (2) TFEU, which governs the special prohibition of discrimination on grounds of nationality in favor of workers in the area of working conditions. Therefore, the ECJ limited itself to the examination of Art. 45 TFEU. The Court then differentiates between two constellations:

- Employees who do not exercise their freedom of movement within the Union

In regards to employees of the TUI Group employed by a subsidiary established in a Member State other than Germany, the Court notes that their situation does not fall within the provision of free movement of workers. The provisions on the free movement of workers are not applicable to workers who have never sought or intended to exercise their freedom of movement within the Union. The fact that the subsidiary in which the workers concerned fulfil their duties is controlled by a parent company established in another Member State (in this case Germany) is irrelevant in that regard.

- Employees who give up their jobs in Germany in order to take up employment with a subsidiary of the Group in other EU countries

Among the employees of the TUI Group employed in Germany who take up employment with a subsidiary of that group established in another Member State, the Court notes that their situation is in principle subject to

⁴ LOWER, M. (2010): Employee Participation in Governance.

the free movement of workers. However, the loss of the right to vote and to stand as a candidate for the employee representatives on the Supervisory Board of the German parent company and, if applicable, the loss of the right to exercise or continue to exercise a Supervisory Board mandate did not constitute an obstacle to the free movement. The free movement of workers does not guarantee an employee that: a move to a Member State other than its home Member State will be socially neutral. Such relocation may, because of the differences between the systems and the laws of the Member States, have advantages or disadvantages for the worker in question, depending on the individual case. In the present case, the German corporate co-determination law which aims to involve workers in the decision-making and strategic bodies of the company through elected representatives, covers both German company law and German collective labor law. It is limited to those employed in domestic companies, provided that such a restriction is based on an objective and non-discriminatory criterion.

5. Conclusions

For employees working in foreign subsidiaries, the ECJ, like the Advocate General, denies the applicability of the special prohibition of discrimination on grounds of nationality to the area of working conditions under Art. 45 (2) TFEU. It lacks the necessary element of the actual exercise of free movement by these workers. For employees moving into a foreign subsidiary of a German corporation, the ECJ also denies a violation of EU law. Although, this constellation falls under the free movement of workers, it does not give the worker the right to rely in the host Member State on the conditions of employment which existed in his home Member State in accordance with national law. Therefore, a Member State is not prevented from applying the rights under its co-determination rules to restrict only to employees in domestic companies. Not treated by the ECJ - as previously by the Advocate General - were employees who do not have the right to vote or to stand for election under the MitbestG. The ECJ has declared that the German co-determination law represent a strong and clearly regulated provision of the employee's interests.

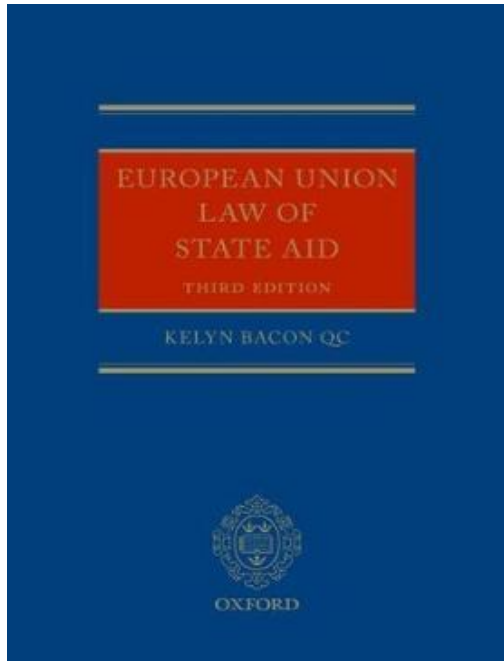
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European Union Law of State Aid

(by *Kelyn Bacon*)

book review



Oxford University Press (2017)
ISBN 978-01-9878-736-5

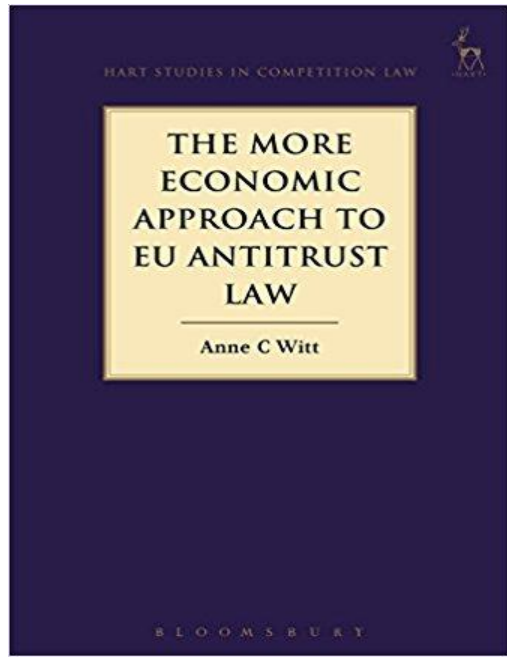
The book *European Union Law of State Aid* provides a comprehensive overview about the EU law of State aid, covering all relevant legislation, case law, and the themes shaping EU State aid policy. It discusses the concept of EU State aid and its development in the EU, as well as practical aspects of this part of EU Law. It offers extensive overview of specific sectors, like transport, media and communications, energy and environmental protection, culture or agriculture. This new edition is updated in order to cover the legislative changes in this area, including the new General Block Exemption Regulation and De Minimis Regulation, horizontal aid guidelines as well as State aid cases. The book is accessible to give lawyers, regulators, public officials and students clarity and concision make it an invaluable reference to this area of law.

The core State aid rules have been in place since the 1957 Treaty of Rome. But the content of the policy has changed over time. The current EU State aid regime is designed to result in less, but much better targeted aid in order to speed up the European economy. The legal framework of EU State aid is governed by Articles 107 to 109 of the Treaty on the Functioning of the European Union (TFEU) and a large number of secondary measures and guidelines. Under EU State aid we understand any aid granted by a Member State or through State resources in any form is in principle prohibited as incompatible with the Internal Market where it: (a) distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods; and (b) affects trade between Member States. The European Union Law of State Aid has become a complex area. Thus, it is challenging for practitioners and academics. State aid was a neglected area of competition law until attempts to modernise it became central to the Lisbon process (2000). The aim here was to encourage State aid by reducing aid to specific sectors and by making better use of aid for horizontal projects central to EU integration needs.

The More Economic Approach to EU Antitrust Law

(by Anne C. Witt)

book review



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In the late 1990s, the European Commission embarked on a long process of introducing a “more economic approach” to EU antitrust (competition) law. The present book establishes the changes that the more economic approach has made to the European Commission enforcement practice over the past fifteen years. It clearly demonstrates that the more economic approach not only introduced modern economic assessment tools to the European Commission analyses, but fundamentally changed the European Commission interpretation of the law. This book argues that the European Commission new understanding of the law has many benefits. However, these rules also have a number of serious drawbacks. The European Commission review of Article 102 TFEU is not satisfactory. Moreover, its revised interpretation of the law is mostly incompatible with the case law of the European Court of Justice. This situation is undesirable from the point of view of legal certainty and the rule of law. The book “The More Economic Approach to Antitrust Law” deals with the “more economic approach” in antitrust (competition) law, which the European Commission proclaimed a decade ago. The book’s main argument is that the

“more economic approach has transformed the Commission’s competitive assessments to the point of unrecognisability. [...] The Commission operates on the basis of a different concept of harm, a different concept of countervailing effects and uses different tools to prove the former.” (p. 250). The book’s main part (Part II) describes the situation before and after the introduction of the more economic approach in regard to Article 101, 102 TFEU and merger control. According to the author, the “key to the Commission’s more economic interpretation of the law lies in its new understanding of the antitrust rule’s purpose” (p. 246). The understanding of the more economic approach is, that it “is based on the principle that EU antitrust law should be guided by the objective of economic theory, namely the creation of economic wealth, to the exclusion of any other aim. However, the Commission chose to adopt a more restrictive concept of economic wealth than that favoured by economic theory, and decided that EU antitrust law should be guided by the aim of enhancing consumer welfare rather than total welfare.” (p. 246). Part I shortly describes “triggers and catalysts” leading to the adoption of the more economic approach, and Part III describes what the author sees as the more economic approach “advantages”, as well as “concerns”. Author “analysis focuses on the substantive changes that the Commission has made in the interpretation and application of the EU antitrust rules under the catchphrase of the more economic approach.” (p. 3)