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The State as a "Mere Vehicle" for Aid? Or How the CJEU Has Opened the Door to Uncontrolled (Pseudo) Fiscal State Aid Measures

Albert Sanchez Graells[1]

In its Judgment of May 30, 2013 in *Doux Élevages and Coopérative agricole*[2] the Court of Justice of the European Union ("CJEU") carried on with its line of case law in *Pearle and Others*[3] by stressing that, according to Article 107(1) TFEU, State aid cannot exist if the economic advantage under analysis is not funded by "State resources" and there is no "imputability to the State." As a general point of law, the finding may not seem surprising (for this is in line with the general approach to the notion of aid, also in the 2014 Draft Commission Notice on the notion of State aid[4]). However, in the specific circumstances of the case, I find it very hard to swallow that there was no "imputability" to the French State of the measure contended.

In the case at hand CIDEF, a French agricultural inter-trade organization (for poultry), introduced the levying of a "cotisation volontaire obligatoire" (sic) ("CVO") for the purposes of financing common activities decided on by that organization. The contribution was initially introduced in 2007 as a voluntary measure for the members of CIDEF, but it was extended in 2008 to all traders in the sector on a compulsory basis and renewed in 2009 by a tacit Ministerial decision to accept that extension, later made express by virtue of a public notice.

The CVO imposed a payment of 14 Euro per 1,000 turkey poults. In a rough estimate, considering that the French production of turkeys in 2009 was around 400,000 metric tonnes in carcass weight equivalent ("tcwe"), and that a reasonable average weight for a turkey is about 11 kg, the overall value of the measure could be estimated at 500,000 Euro/year. This is a non-negligible sum if it is to be used by the agricultural organization at its own discretion and, consequently, it was a measure bound to be litigated.

Indeed, two complainants challenged the 2008/9 extension of the CVO on the basis that making it a mandatory payment for all traders in the sector (*i.e.* going beyond the group of members of CIDEF and, even within them, making it compulsory) involved State aid and, accordingly, it ought to have been notified to the European Commission under Article 108(3) TFEU. The French Conseil d'État referred the matter to the CJEU for a preliminary ruling, which has now decided that there was no element of State aid in the mandatory extension of the CVO to all traders in the industry concerned.

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[2] C-677/11 *Doux Élevages and Coopérative agricole UKL-AREE* (EU:C:2013:348)

[3] C-345/02 *Pearle and Others* (EU:C:2004:448)

[4] Pursuant to Article 107(1) TFEU, ¶¶42-45

The reasoning of the CJEU indeed follows its previous line of case law in the area of State aid and adopts a very narrow approach to the concept of economic advantages "granted by a Member State or through State resources." On the point of the involvement of State resources, the CJEU finds that:

> **the contributions [...] are made by private-sector economic operators—whether members or non-members of the inter-trade organisation involved**—which are engaged in economic activity on the markets concerned. That mechanism does not involve any direct or indirect transfer of State resources, **the sums provided by the payment of those contributions do not go through the State budget or through another public body and the State does not relinquish any resources, in whatever form** (such as taxes, duties, charges and so on), which, under national legislation, should have been paid into the State budget. **The contributions remain private in nature throughout their lifecycle** and, in order to collect those contributions in the event of non-payment, the inter-trade organisation must follow the normal civil or commercial judicial process, not having any State prerogatives.[5]

This should come as no big surprise, since this has become the standard position in the case law of the CJEU (*i.e.* that if the State "does not touch" and "should not have touched" the money, it cannot constitute a "State resource"). However, one may wonder why the Court has not addressed the point of the (pseudo) fiscal nature of the imposition of a contribution (*i.e.* a levy) on undertakings that do not belong to the private organization charging it.

In the absence of a voluntarily established association (via membership) within which confines decisions on charges and contributions remain, the prerogative of an inter-trade association to require payments from undertakings (even from those not associated) surely goes beyond the sphere of powers created by private law since taxation is one of the very exclusive powers of the State. In that regard, the reasoning followed by the CJEU on the point of "imputability to the State" requires some close scrutiny.

The Court first goes back to the general criterion for finding "imputability to the State" and reminds us that:

> Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, **the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources** (see [France v Commission, C-482/99, EU:C:2002:294], paragraph 37 and the case-law cited).[6]

This approach will prove itself problematic because the CJEU will engage in an *a contrario* analysis of the CVO.

In fact, the CJEU tries to apply the criteria laid down in *Commission v. France* to the CVO and considers that:

[5] C-677/11, *supra* note 2, at ¶32, emphasis added.
[6] C-677/11, *supra* note 2 at ¶35, emphasis added.

> the conditions laid down [therein] are not met. It is clear that the national authorities cannot actually use the resources resulting from the [CVOs] to support certain undertakings. **It is the inter-trade organisation that decides how to use those resources**, which are entirely dedicated to pursuing objectives determined by that organisation. Likewise, **those resources are not constantly under public control and are not available to State authorities**.[7]

This would in itself be problematic, given that the use of those resources in an activity subject to intense regulation as part of the Common Market Organisation ("CMO") for poultry meat would require some State control—although this falls outside the scope of State aid control. However, even exclusively from the State aid perspective, the CJEU finding does not hold water.

It must be stressed that, in my view, the CJEU's assessment went astray from the point when it determined that:

> there is nothing in the case-file submitted to the Court permitting it to consider that the initiative for imposing the CVOs originated with the public authorities rather than the inter-trade organisation. It is important to emphasise […] that **the State was simply acting as a 'vehicle'** in order to make the contributions introduced by the inter-trade organisations compulsory, for the purposes of pursuing the objectives established by those organisations. Thus, **neither the State's power to recognise an inter-trade organisation […] nor the power of that State to extend an inter-trade agreement to all the traders in an industry […] permit the conclusion that the activities carried out by the inter-trade organisation are imputable to the State** (sic).[8]

The reasoning followed by the CJEU could not be more puzzling, particularly at paragraph 41 of C-677/11, which to me seems plainly wrong. Given the literal tenor of Art 107(1) TFEU, which sets that the prohibition of State aid covers "any aid granted by a Member State or through State resources in any form whatsoever" it is clear that the analysis of the "imputability to the State" must cover the aid measure and not the activities of the beneficiary of such measure. Therefore, the conclusion reached in paragraph 41 simply a *non sequitur*.

After having recognized that "the State was simply (sic) acting as a 'vehicle' in order to make the contributions introduced by the inter-trade organisations compulsory, for the purposes of pursuing the objectives established by those organisations"[9] it is an illogical step to conclude that such (vehicular) intervention is not imputable to the State. In my opinion, this plainly makes no sense. The implications of the Judgment in C-677/11 are likely to be far-fetched, since they open the door to a floodgate of (pseudo) fiscal measures designed by Member States (by indirect influence to the relevant inter-trade or similar organizations, which should not be readily proven).[10]

The only remaining hope at this point is that, under the relevant constitutional law of the Member States, such (pseudo) fiscal levies are considered unconstitutional limitations to the right to property, since the State is the only entity vested with powers to extract money payments

[7] C-677/11, *supra* note 2 at ¶36, emphasis added.

[8] C-677/11, *supra* note 2 at ¶¶40 and 41, emphasis added.

[9] C-677/11, *supra* note 2 ¶40.

[10] *See* C-677/11, *supra* note 2 ¶40 *ab initio* to compensate for the stricter (?) controls on aid directly granted by public authorities.

not voluntarily accepted by undertakings—accepted at least as a general implication of their membership of an association (as was the case in C-345/02 *Pearle*, although any element of mandatory membership obviously would grant the same conclusion). Consequently, this (pseudo) fiscal structure that allows non-State entities to extract mandatory payments can be seen as an excessive restriction of the right to property under some Member States constitutional law—such as in Spain, for instance.

Maybe with the accession of the EU to the European Convention on Human Rights and a stronger duty to protect the right to property under Art 1 Protocol No. 1 ECHR (which includes rules on taxation, not mentioned in the right to property recognised in Article 17 of the Charter of Fundamental Rights of the EU), the CJEU will need to revisit this line of case law. Otherwise, the doors are open to uncontrolled State aid granted by means of (pseudo) fiscal measures, which is an undesirable outlook.