Studia Iuridica 101
ISSN 0137-4346; e-ISSN 2544-3135

https://doi.org/10.31338/2544-3135.si.2024-101.11

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ON THE NEED FOR *PER SE* IMPUTABILITY OF MEASURES TO THE STATE IN EUROPEAN UNION STATE AID LAW*

Abstract

For a measure to be considered State aid, it must satisfy several cumulative criteria, one of which is that it must be imputable to the State. According to existing case law, it is necessary to establish the actual involvement of authorities in a specific transaction. However, given the changing role of the State in the economy, characterized by a growing reliance on professional market players to fulfil public tasks, proving such active involvement can become challenging. Therefore, in this paper, the author proposes the introduction of *per se* imputability to the European State aid acquis. That is a rebuttable presumption that a measure originates from the State when actions are taken by State-owned entities or when a particular course of action is mandated by law.

* This publication has been supported by National Science Centre, Poland (*Narodowe Centrum Nauki*) under the project no. 2021/43/B/HS5/00548. For the purpose of Open Access, the author has applied a CC-BY public copyright licence to any Author Accepted Manuscript (AAM) version arising from this submission.

KEYWORDS

State aid, State resources, imputability, advantage criterion, Market Economy Operator Test

SŁOWA KLUCZOWE

pomoc państwa, zasoby państwowe, przypisywalność, kryterium korzyści, test operatora rynkowego

INTRODUCTION

In order for a measure to be considered as State aid under Article 107(1) TFEU, it must be imputable to the State.[1] According to a well-established case law dating back to the landmark *Stardust Marine* ruling, imputability requires demonstrating that authorities were involved "in one way or another" in the adoption of the measure.[2] However, the author believes that this approach is increasingly problematic given the changing role of the State in the modern economy, particularly the growing reliance on professional market players (both public and private) to carry out public tasks. The reasons for this inadequacy are twofold. Firstly, government influence can be exerted through numerous subtle and informal channels, making it difficult to detect.[3] Secondly, there are various frameworks in which the State compels entry into business relationships through legislation, without actively participating in subsequent transactions.[4] Such transactions would not have taken place if businesses were free to consider only commercial factors. As a result (at least potentially), they may confer advantage to their partners that are unattainable under normal market conditions.

In light of the points mentioned above, this paper aims to present and justify a proposal for introducing the concept of *per se* imputability. This refers to a rebuttable presumption that a measure is attributable to the State when actions

[1] P. Werner, V. Verouden (eds.), *EU State aid Control. Law and Economics*, Aalphen aan den Rijn 2017, pp. 87-89; K. Bacon (ed.), *European Union Law of State Aid*, Oxford 2017, p. 60.

[2] Case C-482/99 *France v Commission (Stardust Marine)*, EU:C:2002:294, para. 52.

[3] See e.g. M. Bałtowski, P. Kozarzewski*, Formal and real ownership structure of the Polish economy: state-owned versus state-controlled enterprises*, "Post-Communist Economies" 2016, Vol. 28, No. 3, pp. 405-419; P. Wegenschimmel, A. Hodges, *The embeddedness of 'public' enterprises: the case of the Gdynia (Poland) and Uljanik (Croatia) shipyards*, "Business History" 2013, Vol. 65, No. 1, pp. 113-130.

[4] Until now, the majority of cases have focused on systems that mandate the purchase of energy from renewable sources. However, in principle, the issue is not limited to any specific sector.

are taken by State-owned entities or when a course of action is mandated by law.[5] The paper's discussion will be built upon these specific issues, forming the foundation of the analysis. The rationale behind the proposed presumption is also closely tied to the *PreussenElektra* judgment, which considers imputability and State resources criteria as cumulative rather than alternative, contrary to the explicit wording of Article 107(1) TFEU.[6] Regardless of one's personal stance on this interpretative approach, it is important to note that, even if State resources are involved, without imputability, a measure would not qualify as State aid, even if it resulted in the creation of potentially distortive advantages unobtainable normal market conditions.[7] By adopting *per se* imputability approach in such cases, the emphasis in assessment would shift towards evaluating the economic suitability of the measure. In the author's opinion, this approach aligns more effectively with the so-called objective concept of State aid, which requires assessing a measure based on its observable effects and interventionist nature, rather than relying solely on formal criteria.[8] Consequently, it can be argued that if State resources are involved in a transaction that would not have occurred under normal market conditions, it should suffice to presume (albeit rebuttably) that the measure is imputable to the State.

IMPUTABILITY OF ACTIONS OF STATE-CONTROLLED UNDERTAKINGS

In relation to the first situation mentioned, where *per se* imputability can be considered, the resources of public undertakings are generally deemed as State resources for the purpose of State aid assessment under Article 107(1) TFEU.[9] However, these undertakings are expected to be guided primarily by business

[5] The question of *per se* imputability has been mentioned as something potentially worth considering earlier, albeit mostly as *obiter dicta.* See J.A. Winter, Re(de)fining the Notion of State Aid in Article 87(1) of the EC Treaty, "Common Market Law Review" 2004, Vol. 41, pp. 487–501.

[6] Case C-379/98 *PreussenElektra*, EU:C:2001:160, paras 58-62. See also Case C-329/15 *ENEA*, EU:C:2017:671, paras 25-26.

[7] Criteria set out in Article 107(1) TFEU are cumulative. Unlike the rule of reason concept, there is no provision in EU State aid law that allows for flexibility. Consequently, even if a measure is considered distortive, it would not be classified as State aid if it fails to satisfy all of the criteria. See T-67/94 *Ladbroke Racing v Commission*, EU:T:1998:7, para. 52.

[8] E.g., Cases 173-73 *Italy v Commission*, EU:C:1974:71, para. 13; C-75/97 *Belgium v Commission (Maribel bis/ter)*, EU:C:1999:311, para. 25; C-83/98 P *France v Ladbroke Racing and Commission*, EU:C:2000:248, para. 25; C-452/10 P *BNP Paribas and BNL v Commission*, EU:C:2012:366, para. 100.

[9] P. Werner, V. Verouden, *EU State Aid…*, p. 89.

considerations rather than interventionist motives.[10] As a result, the Court, as previously mentioned, also requires proof that authorities were involved "in one way or another" in the decision-making process within these undertakings.[11]

In order to ascertain whether such involvement did indeed occur, the Court, initially in the *Stardust Marine* case, established a set of non-exhaustive indicators that were subsequently elaborated in case law and quasi-codified by the European Commission in the *Notice on the notion of State aid*.[12] Therefore, the assessment of imputability should specifically consider the integration of a public undertaking into the structures of the public administration, the nature of its activities and their normal competitive market conditions in comparison to private operators, the legal status of the undertaking (whether subject to public law or ordinary company law), the level of supervision exerted by public authorities over the undertaking's management, and any other indicators that demonstrate the involvement of public authorities in the adoption of a measure or the unlikelihood of their non-involvement. These indicators should also take into account the scope of the measure, its content, and the conditions it contains.[13] Whereas, in *Van der Kooy* case, the Court specified that one indicator of a public undertaking acting on State "order" is the authorities' ability to veto management decisions, without necessarily being able to impose a specific course of action.[14] Additionally, in *Italy v Commission* and *Commerz Nederland* cases, the Court expanded on imputability criterion by stating that the undertaking must consider "directives or guidelines" issued by a public body.[15] This aspect has been further developed in subsequent case law, notably in *Pearle* and *Doux Elevages* cases, where the Court emphasized the importance of distinguishing between policy-driven State involvement and situations where authorities merely act as facilitators or vehicles for commercial operations.[16] If the State's involvement is purely technical in nature and unrelated to public policy, the measure will not be considered imputable.

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[10] C. Koenig, J. Kühling, *EC control of aid granted through State resources: Public undertakings, Funds, imputability and the importance of how resources are transferred*, "European State Aid Law Quarterly" 2002, Vol 1, No. 1, p. 15.

[11] Case C-482/99 *Stardust Marine*, para. 52.

[12] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, [2016] OJ C262/1, para. 43.

[13] Cases C-160/19 P *Comune di Milano v Commission*, EU:C:2020:1012, paras 46-48; C-425/19 P *Commission v Italy and Others*, EU:C:2021:154, paras 59-62; T-561/18 *ITD and Danske Fragtmænd v Commission*, EU:T:2021:240, paras 333-334.

[14] Case C-67/85 *Van der Kooy v Commission*, EU:C:1988:38, para. 33.

[15] Cases C-305/89 *Italy v Commission*, EU:C:1991:142, para. 14; C-242/13 *Commerz Nederland*, EU:C:2014:2326, para. 35.

[16] Cases C-345/02 *Pearle and Others*, EU:C:2004:448, para. 37; C-677/11 *Doux Élevage and Coopérative agricole UKL-ARREE*, EU:C:2013:348, paras 40-41.

The author's opinion is that the problem with such indicators is their inherent focus on formal aspects, particularly the institutional setup of State oversight. This relatively narrow focus often disregards the presence of informal means of State influence, which can be difficult to identify at first glance. While the jurisprudence concerning merger control has long dealt with the identification of these subtle forms of influence (albeit in a different context), it has been underutilized in the field of State aid.[17] However, this acquis could serve as a valuable point of reference for understanding potential scenarios in which "decisive influence" and "effective control" – essentially equating imputability – may arise, along with the associated challenges of identifying them.

Notably, the ability to veto decisions of an undertaking, as mentioned in *Van der Kooy*, aligns well with the concept of negative control that is established in merger control acquis.[18] Negative control refers to a situation where a shareholder has the power to create a deadlock in managerial decision-making, ensuring that the undertaking's actions align with their strategic objectives.[19] In *Van der Kooy* and *Salvat* cases, determining the existence of negative control was a straightforward process because it was legally established and the State was the sole entity capable of exercising such control (so, the Court did not have the opportunity to elaborate on the issue).[20] However, there are more complex situations where the aforementioned indicators may be less straightforward to apply. Negative control can be jointly held by a group of shareholders, where their collective influence allows them to block certain decisions or impose their preferred course of action (positive control), while no individual shareholder possesses such authority alone.[21] In the context of State aid, it is conceivable that authorities retain residual shares in predominantly privatized undertakings, without holding any associated voting rights. This is particularly common in post-communist countries.[22]

Although one might argue that when other shareholders are private, there can be no representation of the State without a formal, legally binding "order" from the authorities, the reality may differ. In practice, this group of private shareholders may maintain close proximity to the State and have various connections with the public sector, such as through government contracts. As a minority share-

[17] See e.g. M. Rosenthal, S. Thomas (eds), *European Merger Control*, Munich 2010, pp. 25-38; I. Kokkoris, H. Shelanski, *EU Merger Control A Legal and Economic Analysis*, Oxford 2014, pp. 119-134 and sources quoted therein.

[18] E.g. merger decisions M.3198 - *VW-AUDI/VW-AUDI Vertriebszentren* [2003] OJ C206/14; M.3537 - *BBVA/BNL* [2004] OJ L233/2; M.3876 - *Diester Industrie/Bunge/JV* [2005] OJ C264/5.

[19] M. Rosenthal, S. Thomas (eds), *European Merger...*, p. 32.

[20] Cases C-67/85 *Van der Kooy*, paras 27-38; T-136/05 *Salvat père & fils and Others v Commission*, EU:T:2007:295, paras 154-156.

[21] E.g. Case T-282/02 *Cementbouw Handel & Industrie v Commission*, EU:T:2006:64, para. 42 and decision M.295 - *SITA-RPC / SCORI* [1993] OJ C88/9, para. 73.

[22] M. Bałtowski, P. Kozarzewski, *Formal and real...*, pp. 405-419; P. Wegenschimmel, A. Hodges *The embeddedness of…*, pp. 113-130.

holder, the State can *de facto* impose its will because other shareholders may seek to maintain friendly relations with the government or expect *quid pro quo*.[23] In such cases, State influence, referred to as "directives" in *Italy v Commission* case, would be exercised through informal and discreet channels that are difficult to detect.[24]

If an informal controlling group exists, with at least one entity being State-controlled, the cohesion of this group relies on the shared interests of its members. However, these common interests may be transient, driven by short-term tactical considerations, leading to fluctuating composition within the controlling group over time.[25] Thus, it can be argued that although the State, as a minority shareholder, may have the capacity to enforce its will in some cases, it cannot do so over all other shareholders consistently.[26] While cooperation involving the State as a party may exhibit more stability compared to collaboration among unrelated private enterprises (as parties may seek to maintain amicable relations with the State), the stability of such cooperation none the less cannot be guaranteed. Moreover, it is important to note that in many cases, particularly with recently privatized undertakings, a significant percentage of shares may be owned by employees or individual traders. In instances of fragmented ownership, the shareholder group typically lacks a unified voice and tends to remain passive. This circumstance creates an opportunity for well-organized professional minority shareholders or their group to effectively guide the undertaking.[27]

After considering the points discussed above, it can be argued that neither a single indicator nor a specific set of indicators can guarantee absolute certainty in detecting State influence exercised through informal channels. While it may be unrealistic to expect a completely foolproof set of *ex ante* criteria, none the

[23] See *per analogiam* merger decisions where joint control was identified: M.967 – *KLM/AIR UK* [1997] OJ C372/20; M.1412 - *Hutchison Whampoa/RMPM/ECT* [1999] OJ C127/3. See also M.4249 - *Abertis/Autostrade* [2006] OJ C268/7, paras 6-12 where the Commission stated that commonality of interest may indicate joint control.

[24] Compare M. Bałtowski, P. Kozarzewski, *Formal and real...*, pp. 405-419 with circumstances of case C-305/89 *Italy v Commission*. This problem has been recognized in the State aid context: P. Werner, M. Caramazza, *'State' Aid or Not – This Is the Question*, "European State Aid Law Quarterly" 2019, Vol. 18, No. 4, pp. 525-526.

[25] See T.A. Caplow, *A theory of coalitions in a triad*, "American Sociological Review" 1956, No. 21, pp. 489-493; D.A. Lax, J.K. Sebenius in H.P. Young (ed.), *Negotiation Analysis*, Ann Arbor MI 1991.

[26] See *per analogiam* merger joint venture decisions M.1368 - *Ford/ZF* [1999] OJ C32/5 where the Commission stated that stability of joint venture can be evaluated over 7 years and over 4 years in M.744 - *Thomson / Daimler-Benz* [1996] OJ C 179/3.

[27] Historical trends in attendance at annual shareholder meetings are being analysed: See e.g. M.4730 - *Yara/Kemira GrowHow* [2007] C245/7; M.2574 - *Pirelli/Edizione/Olivetti/Telecom Italia* [2001] C325/12. Additionally, the amount of financial investors and speculative capital is being considered, as these investors typically do not have an active interest in running the undertaking. See M.6718 - *Toyota Tsusho Corporation/CFAO* [2012] OJ C377/3.

less when viewed in the context of the overarching objective of the EU State aid control system, as exemplified by *Air France* case, which emphasises the need to prevent the State from evading Article 107 TFEU by establishing seemingly independent grantors, they fall short.[28] In the author's opinion, there is room for improvement within the realm of possibility to enhance the effectiveness of these indicators.

In this context, the author believes that the primary concern is the assessment of transactions' economic adequacy. In State aid cases, the Market Economy Operator Test (MEOT) is typically employed for this purpose. The MEOT involves evaluating whether the transaction in question would be deemed acceptable to a hypothetical, fully rational private investor.[29] If the answer is negative, it is presumed that the measure being examined serves an interventionist purpose and could potentially qualify as State aid.[30] However, it is important to note that currently, the MEOT is only conducted once all the criteria set out in Article 107(1) TFEU, including imputability, have been established. This means that if the aforementioned soft forms of State influence do not contribute to finding imputability, there will be no opportunity to assess whether the subsequent transaction adheres to normal market conditions.

Upon analysis of the initial postulate in light of the preceding discussion, an important question arises: Can transactions occur that deviate from typical market behaviour, providing an undue advantage to a partner, without being imputable to State actions? The answer is, in principle, yes. In any market economy, there are inherent elements of business risk and information asymmetry that can lead to occasional instances of poor decisions favouring a business partner under specific circumstances.[31] However, it is crucial to note that the MEOT takes into account only the information available at the time the decision to allocate resources was made.[32] The ultimate outcome, assessed retrospectively, is not the primary focus. Rather, the MEOT aims to determine whether the activity in question was economically justifiable based on the circumstances prevailing at the time the decision was made.[33] With this in mind, one can answer the earlier question by stating

[28] T-358/94 *Air France v Commission*, EU:T:1996:194, para. 62.

[29] Cases C-533/12 P and C-536/12 P *SNCM and France v Corsica Ferries France*, EU:C:2014:2142, para. 30; T-11/95 *BP Chemicals v Commission*, EU:T:1998:199, para. 161.

[30] Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale v Commission*, EU:T:2003:57, para. 325; T-163/05 *Bundesverband deutscher Banker v Commission*, EU:T:210:59, para. 277; T-561/18 *ITD and Danske Fragtmænd*, para. 353.

[31] C.R. Leslie, *Rationality Analysis in Antitrust*, "University of Pennsylvania Law Review" 2010, Vol. 158, No. 2, p. 279; J.F. Tomer, *What is behavioral economics?,* "The Journal of Socio-Economics" 2007, Vol. 36, No. 3, p. 468.

[32] T-16/96 *Cityflyer Express v Commission*, EU:T:1998:78, para. 76; T-228/99 and T-233/99 *WestLB*, para. 246; T-425/04 RENV *France and Orange v Commission*, EU:T:2015:450, para. 227.

[33] The ultimate success of an investment can only be assessed *ex post facto*. At that stage, no action can be taken regarding previously approved measures.

that while there may indeed be instances of poor business decisions that lead to undue advantage, the proper implementation of the MEOT should be able to identify transactions that have interventionist motivations.[34]

The indicators discussed earlier, even though by themselves cannot guarantee detecting all State involvement, can serve a purpose in the following interpretive approach: If these indicators, in conjunction with the overall circumstances surrounding the adoption of a measure, indicate a likelihood of the transaction being unmarketlike, the MEOT should be conducted. If the results of the test demonstrate that no rational private investor would invest their capital under such conditions, then the imputability to the State should be presumed.

Whenever a seemingly differentiated approach to public undertakings in comparison to those private is considered, it is also necessary to determine whether it would be in line with the principle of neutrality set out in Article 345 TFEU.[35] This principle (applied in this context) requires equal treatment of all undertakings, regardless of their ownership structure.[36] The author argues that there is no risk of violating this principle. Conducting the MEOT does not imply unequal treatment; rather, it enables the assessment of whether a transaction is unmarketlike and should be evaluated for its compatibility with the Internal Market, as any other State aid. The reason the MEOT does not need to be conducted for private undertakings in the discussed scenarios is simply because their actions do not have the potential to constitute State aid. Therefore, the situation where a private entity acts independently without any State involvement is not comparable to a State-owned undertaking potentially acting in an interventionist capacity. Any differences in approach to these situations arise from objective disparities in their circumstances.[37]

Nevertheless, a cautionary note – of more practical rather than legal nature – regarding the proposed solution must be sounded. In reality, State-owned undertakings engage in numerous routine transactions with other market players, which

[34] See Cases T-156/04 *EDF v Commission*, EU:T:2009:505, para. 228; T-242/12 *SNCF v Commission*, EU:T:2015:1003, para. 292 where the Court held that State acting in its capacity as authority cannot be compared to actions of a private investor in a market economy.

[35] The aforementioned principle is somewhat automatically brought up in this context, although its precise meaning may be subject to discussion, particularly considering the limited availability of case law on the matter. See commentary in B. Akkermans, E. Ramaekers, *Article 345 TFEU (ex Article 295 EC), its meanings and interpretations*, "European Law Journal" 2010, Vol. 16, No. 3, pp. 292–314.

[36] F.-J. Säcker, F. Montag (eds), *European State Aid Law: A Commentary*, Munich 2016, p. 109; M. Klamert in M. Kellerbauer, M. Klamert, J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights*, Oxford 2019, p. 2048.

[37] Article 345 TFEU is interpreted as manifestation of the principle of non-discrimination (M. Klamert in M. Kellerbauer, M. Klamert, J. Tomkin (eds), *The EU Treaties*..., p. 2048). However, discrimination only occurs if there is no objective justification for unequal treatment: See e.g. C-106/83 *Sermide*, EU:C:1984:394, para. 28; C-17/90 *Pinaud Wieger v Bundesanstalt für den Güterfernverkehr*, EU:C:1991:416, para. 11.

is a normal occurrence in all market economies. As a result, it is not feasible to thoroughly examine every transaction of State-run undertakings for a potential interventionist nature. It is impractical both in terms of the sheer number of transactions involved and the legal requirement to uphold the principle of neutrality.[38] Making all such transactions notifiable as potential State aid would be unmanageable. It is worth noting, however, that the current interpretive approach faces similar challenges. Therefore, the proposed approach will not introduce any additional difficulties in this regard. It is important to recognize that, while this limitation does not question the overall feasibility of the proposed solution, it does highlight the inherent challenge of fully addressing all transactions involving State-owned undertakings.

IMPUTABILITY OF ACTIONS OF PRIVATELY OWNED INTERMEDIARIES

Regarding the second part of the paper's postulate, it is currently established in jurisprudence that if a private undertaking is obligated by the State to engage in a particular transaction, it does not qualify as State aid unless the undertaking specifically receives funds for that purpose.[39] It is important to note that these dedicated funds do not necessarily have to originate directly from the public administration but can come from various parafiscal levies, which are legally required but payable directly to the undertaking responsible for their subsequent redistribution.[40]

Irrespective of one's assessment of this approach, which is beyond the scope of this paper, in such cases, the question of imputability shifts to how the private entity distributes the funds received from the State, potentially resulting in what is referred to as indirect State aid.[41] The ruling in *Air France* case provides general interpretive guidance in relation to the presented postulate. The Court stated

[38] In this scenario, treating public and private undertakings differently would have violated the neutrality principle. This is because there would have been no objective difference in the factual circumstances between them, and the sole basis for the differentiated treatment would have been the ownership structure.

[39] Cases C-329/15 *ENEA*, paras 26 & 30; C-706/17 *Achema and Others*, EU:C:2019:407, para. 68; C-434/19 *Poste Italiane*, EU:C:2021:162, para. 43.

[40] Cases T-47/15 *Germany v Commission (EEG 2012)*, EU:T:2016:281, para. 118 & 122-128; C-850/19 P *FVE Holýšov I and Others v Commission*, EU:C:2021:740, para. 46.

[41] For a commentary see: T. Iliopoulos, *Is ENEA The New PreussenElektra?,* "European State Aid Law Quarterly" 2018, No. 1, pp. 19-27; G. Carullo, *State Resources in the Case Law: Imputability Under an Organizational Perspective*, "European State Aid Law Quarterly" 2013, Vol. 12, No. 3, pp. 453-463.

that the State cannot exempt measures from the State aid control regime by dissociating the granting body from the State apparatus, thereby granting it a certain degree of independence that potentially precludes imputability.[42]

The State aid acquis distinguishes between the recipient of State resources and the beneficiary who ultimately receives an advantage unobtainable under normal market conditions.[43] The recipient is considered "invisible" within the State aid control system if it merely acts as a vehicle for State intervention and does not retain any funds for itself, or if it receives only market-based remuneration for its services.[44] State aid can be granted to either the ultimate beneficiary, the recipient, or both the recipient and indirect beneficiary.[45] In light of this case law, the issue of imputability can be framed as follows: If State resources and imputability are considered separate criteria, what level of decision-making discretion can the recipient of State resources have before its actions are no longer imputable to the State?

It is reasonable to conclude that the level of discretion of a private intermediary cannot be simplified into a dichotomous distinction of either full decision-making authority or none at all. In order to determine the imputability of actions by such intermediaries and assess whether they are sufficiently under State control, the case law has elaborated (again disregarding merger control acquis) a set of very general and highly casuistic indicators. These indicators aim to determine whether the intermediary's conduct has been dictated by instructions from public authorities or if the State has exercised dominant influence in the company's decision-making process. For example, in *Volotea*, *Germanwings*, and *easyJet* cases, the Court held that when an intermediary's discretion in selecting partners (the alleged beneficiaries) is "significantly reduced by the criteria and guidelines established by the [State]", then the imputability criterion is met.[46] Whereas in *Commerz Nederland*, the Court stated that the intermediary "had to take into account directives issued by governmental bodies".[47] A complete lack of discretion is thus not required, although the specific level of discretion needed to avoid giving rise to imputability remains unclear.

When considering this case law in conjunction with the general *Stardust Marine*-derived reasoning, it becomes evident that the assessment of imputability

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[42] Case T-358/94 *Air France*, paras 62 & 68.

[43] Cases C-156/98 *Germany v Commission*, EU:C:2000:467, para. 26; C-403/10 P *Mediaset v Commission*, EU:C:2011:533, para. 81.

[44] Case T-116/01 and T-118/01 *P & O European Ferries (Vizcaya) v Commission*, EU:T:2003:217.

[45] E.g., Cases T-424/05 *Italy v Commission*, EU:T:2009:49, para. 108; T-901/16 *Elche Club de Fútbol v Commission*, EU:T:2020:97, para. 36.

[46] Cases T-607/17 *Volotea v Commission*, EU:T:2020:180, para. 92; T-716/17 *Germanwings v Commission*, EU:T:2020:181, para. 97; T-8/18 *easyJet Airline v Commission*, EU:T:2020:182, paras 126-127.

[47] Case C-242/13 *Commerz Nederland*, para. 35.

focuses on two elements: the presence of institutional, formal control and active involvement in the specific decision-making process.[48] However, alongside the previously discussed challenges of identifying informal influence, which remain pertinent here, the author believes that the apparent focus on State involvement in the particular transaction, poses a potential complication.

The reason being that the author believes that imputability of a measure will still occur even if State involvement is limited to the creation of a specific legal framework for subsequent transactions. Initiating a legislative process, whether at the national or regional level, should be considered a clear indication of the authorities' intentions.[49] The question of their subsequent participation in implementation, and how private entities fulfil their legal obligations is a mere technicality. In certain cases, the design of the legal framework can significantly restrict the de facto discretion of private entities, despite their apparent decision-making freedom, potentially leading to imputability. In this context, several problematic areas can be identified.

The specific circumstances related to the scope of a measure can effectively determine who the actual beneficiaries are. It is evident that the *ratio legis* of the measure largely influences the practical aspects of its application. As a result, there may be specific situations where there is only one beneficiary or a limited group of beneficiaries that realistically benefit from the measure.[50] While the measure's scope is determined by objective general criteria in theory, meaning that any eligible undertaking could also benefit, it becomes evident in reality that no other undertaking would meet those criteria.[51]

Furthermore, although the conclusion is not as straightforward in this scenario, if an undertaking receives State resources but operates within a framework that mandates the complete expenditure of allocated funds, it may be compelled to use them in an economically suboptimal manner. This means that it might

[48] This is especially visible in Case C-329/15 *ENEA*. A. Giraud, S. Petit, *The ENEA Judgment: A Formalistic Interpretation of Transfer of State Resources Annotation on the Judgment of the Court (Fifth Chamber) of 13 September 2017 in Case C-329/15 ENEA S.A. v Prezes Urzędu Regulacji Energetyki*, "European State Aid Law Quarterly" 2018, Vol. 2, pp. 308-310.

[49] See C. Koenig, B. von Wendland, *The Art of Regulation: Competition in Europe – Wealth and Wariness*, Cheltenham 2017, pp. 31-44.

[50] This is the case, for example, when regional airports/ local governments aim to promote their region through onboard advertisements. In most instances, they would have no choice but to enter into a contract with the largest carrier operating from that airport. However, the CJEU case law does not explicitly recognize this issue: See J. Kociubiński, *"Cut off one Hydra head, two more would grow back in its place": Challenges in combating concealed state aid to airlines and regional airports*, "European Competition Law Review" 2022, Vol. 43, No. 7, pp. 321-330.

[51] Compare in this context the test of abstract terminology (used to determine whether an act affects entity individually) for example in 789 and 790/79 *Calpak v Commission*, EU:C:1980:159 with circumstances of case C-15/14 P *Commission v MOL*, EU:C:2015:362 where the Court stated that a measure will be selective if despite seemingly abstract criteria only one specific undertaking will be capable of fulfilling them (paras 64-66).

engage in transactions that, although seemingly economically justifiable at the time, are unnecessary for the alleged grantor. If such actions were deemed imputable, the MEOT should be able to detect these unmarketlike operations. Engaging in such unmarketlike transactions solely for the sake of transaction, without any genuine business goal, may result – this part is confirmed in acquis - in conferring an advantage that cannot be obtained under normal market conditions.

Another situation that can be seen as potentially controversial is when the State establishes the parameters of transactions, while a private intermediary, backed by State resources, ultimately decides with whom to conduct these transactions. This situation raises the aforementioned concerns regarding whether such forced transactions can meet business conditions, whether they were necessary, whether the State exerted informal influence in partner selection, and whether the discretion of the intermediary is essentially meaningless under specific circumstances.

However, this also exposes an inconsistency in the case law. On the one hand, based on the existing acquis, the level of discretion where the intermediary selects the counterpart would not meet the criteria for imputability.[52] On the other hand, also according to the existing acquis, sectoral measures and those with limited territorial scope are considered selective.[53] Therefore, it can be contended, relying on the case law regarding selective advantage, that in the scenario described above, the mere fact that State funds were injected into a particular sector constitutes an advantage that is not aligned with normal market conditions, and the selection of exact beneficiaries becomes of secondary importance. This perspective corresponds with the definition of aid programs, as acknowledged by the Court, where there is no requirement to determine the exact beneficiaries of the assistance.[54] It is merely sufficient to analyse the scheme's overall characteristics without going into the detailed situation of each undertaking to determine whether they have benefited or not.[55] Thus, it can be argued that providing funds to a specific sector or area would not have occurred under normal market conditions which, again according to the existing acquis, should be regarded as an advantage within the meaning of Article 107(1) TFEU.[56]

In the opening of the conclusion to this section, it is important to express the view that the requirement of prior transfer of State resources introduces unnecessary complications that hinder the effectiveness of the proposed postulate of *per*

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[52] For example *per analogiam* T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others v Commission*, EU:T:2002:59, para. 254; C-6/12 *P Oy*, EU:C:2013:525, para. 27.

[53] E.g., cases C-248/84 *Germany v Commission*, EU:C:1987:437, para. 18; C-148/04 *Unicredito Italiano*, EU:C:2005:774, paras 44-48.

[54] E.g., cases C-438/16 P *Commission v France and IFP Énergies Nouvelles*, EU:C:2018:737, para. 63; C-337/19 P *Commission v Belgium and Magnetrol International*, EU:C:2021:741, para. 77.

[55] E.g., cases C-15/98 and C-105/99 *Sardegna Lines v Commission*, EU:C:2000:570, para. 51; C-510/16 *Carrefour Hypermarchés and Others*, EU:C:2018:751, paras 32-33.

[56] E.g., cases C-39/94 *SFEI and Others*, EU:C:1996:285, para. 60; C-71/09 P, C-73/09 P and C-76/09 P Comitato "Venezia vuole vivere" and Others v Commission, EU:C:2011:368, para. 98.

se imputability. Assuming that State resources have been transferred, the current interpretative approach to intermediaries' conduct cannot guarantee the detection of all unmarketlike transactions that could potentially distort competition. Thus, adopting the postulate of imputability whenever a transaction is mandated by law provides a room for the MEOT to be employed. However, there are still salient issues regarding transactions that may be economically justifiable in principle but are unnecessary for the grantor or where the selection of partners appears arbitrary (potentially influenced by the State). These cases involve uncertainties and conjectures. It is conceptually questionable, despite being supported by existing case law, to search for economic rationality in situations where an entity is legally constrained to spend all allocated funds or allocate them for specific purposes.[57] Nevertheless, the current approach, using a hypothetical private investor in the MEOT, focuses on assessing whether a transaction is economically justifiable under highly constrained and specific conditions, rather than its overall economic soundness.[58] This highlights a limitation of the MEOT. The constrained circumstances under consideration would have never existed if the State had not created the given framework. Therefore, *per se* imputability in this context should not be seen as a definitive, "silver bullet" type of solution, but rather as a modest improvement.

CONCLUSIONS

From a purely legal standpoint, the preceding discussion has established the general feasibility of the proposed postulate. However, it has also revealed interdependent factors and interpretative approaches that could hinder the efficiency of the proposed solutions. When considering practical implications, the analysis has brought forth a dilemma: Whether the proposed solution might impose an undue burden on control mechanisms and result in a significant number of false alarms.

In terms of the first aspect, the issues of imputability and State resources as cumulative criteria come to the forefront. The problem arising from this interpretive approach is that in practice, there may be transactions that are clearly attributable to the State, at the same time, they exhibit interventionist characteristics, would not be possible under normal market conditions, and could potentially distort competition. Yet when these transactions are carried out by professional market participants without any impact on the State budget, they fall outside the

[57] E.g. cases T-1/12 *France v Commission*, EU:T:2015:17, para. 32; T-165/15 *Ryanair and Airport Marketing Services v Commission*, EU:T:2018:953, para. 166.

[58] Case T-228/99 and T-233/99 *WestLB*, para. 271.

scope of the notion of State aid. A return to a literal interpretation of Article 107(1) TFEU can thus considered a logical proposition, a corollary postulate, enabling effective implementation of *per se* imputability. Although the current interpretive approach undermines the effectiveness of the papers' postulate, it does not fundamentally challenge its core concept.

The practical aspect of the proposed postulate presents a different issue. While the MEOT, if conducted correctly, should be capable of detecting non-market transactions, the practical challenge arises from the existence of numerous transactions mandated by law, and especially routine transactions carried out by State-owned undertakings, which are not notifiable. This raises the issue that the European Commission would heavily rely on spot checks and *ex post* controls, particularly in the latter case. Therefore, the feasibility of the postulate ultimately depends on finding the right balance between the acceptable level of "permeability" in control systems and the additional workload that heightened scrutiny would entail. Regarding the detection of violations, it is not reasonable to expect any interpretive approach to achieve a 100% success rate. However, further research is required to assess the realistically achievable level of effectiveness. In terms of resources, the Commission already conducts random *ex post* controls. Hence, again further analysis is needed to determine whether the existing resources are adequate or if additional resources would be necessary to ensure a sufficient level of detectability.

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