Economic or Non-Economic, that is the Question

Annotation on the Judgment of the General Court (Sixth Chamber) of 30 April 2019 in Case T-747/17 *Union des Ports de France v European Commission*

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The Case T-747/17 Union des ports de France (UPF), an annulment action brought against the European Commission (EC, the Commission) Decision declaring the tax exemption in favour of French ports constitutes a State aid within the meaning of Article 107(1) TFEU, deserves attention primarily for the Court's view of the differentiation between beneficiaries' economic and non-economic activities according to which there is no threshold of non-economic activities carried out by one entity required to categorize it as entirely non-economic. The Case also involves distinguishing between individual aid and aid scheme; an assessment of the effect on competition and trade between Member States and the application of principles of proportionality and sound administration. The admissibility hinges on whether the EC Decision addressed to France could be of 'direct and individual' concern to a professional association – UPF.

Keywords: Taxation, Economic Activity, Non-Economic Activity, State Prerogatives

I. Background

In 2013 the European Commission (EC, the Commission) launched in-depth investigations into ports' taxation by sending a questionnaire to Member States to determine whether domestic tax systems constitute State aid or not, and whether or not these measures should be allowed.[1] With respect of the French income tax exemption in favour of legal persons – port operators – the Commission had come to the preliminary conclusion that it involves illegal and incompatible State aid and requested France to remove these illegal measures. Following a negative response by the Member State, in 2017 the Commission adopted a negative decision (without recovery) declaring an aid scheme in question incompatible with the internal market.[2] The annotated judgment originates from an unsuccessful annulment action against that Commission decision, brought by Union des ports de France (UPF) - an association of mainly trade and fishing port operators and chambers of commerce.[3]

II. Locus Standi

The applicant sought the annulment of the decision formally addressed to France, therefore before substantive issues could be tackled the Court had to assess whether the association – UPF - has standing to bring this action. The rationale for granting *locus standi* to the associations seem primarily procedural and practical: The argument runs that it prevents the unnecessary multiplication of cases where claims involving the same or substantially the same questions of law, which could have been separately brought by the association's members, can be combined into one

DOI: -

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1 See Commission Press release, IP/16/2451, 8 July 2016.

2 Commission Decision SA.38398 OJ L332/2017 (*Taxation of ports in France*).

3 Case T-747/17 *UPF v Commission* [2019] ECLI-271.

single action under the association's umbrella.[4] It only applies to the situation where its members have abstained from litigating the matter in separate judicial proceedings despite having separate legal standing.[5] Otherwise, the association can claim no individual interest in such case. Port of Brest have indeed gone ahead to challenge the decision separately, other UPF members have not done so.[6]

As of required 'direct and individual' effect the Court, asserted that, while the decision has been formally addressed to France, it leaves no room for the exercise of discretion by the government. The Member State was required to simply eliminate the offending tax exemption system in its entirety. For this reason, contrary to what the Commission claims, the Court concluded that the decision have a direct impact on taxpayers – UPF members.[7]

Regarding the individual effect, again contrary to the Commission's claims, the Court concluded that the number of entities affected by the tax measure is exhaustive since on the one hand the total number of ports and chambers of commerce was known at the time the contested decision was made, and on the other this group could never be enlarged. Because even though, at some later stage, a new port or a chamber of commerce could possibly be created, these would not be eligible for tax exemption since the EC decision result in the inapplicability of the tax measure in question. By applying the closed category test and, on finding this satisfied, the Court held the UPF's application admissible.[8]

III. The Distinction Between Economic and Non-Economic Activities

The first substantive argument raised by the UPF concerned an alleged error in classifying the tax measure as an aid scheme instead of a series of individual measures going to each particular beneficiary. In this regard, it is also worth to mention here that the distinction between individual aid and aid scheme are often controversial due to its practical ramifications, stemming largely from the standard used in assessing the impact an aid measure had on competition and inter State trade. In examining an aid scheme, it is not necessary to show that any undertakings have actually benefited from it. It is sufficient to conclude that the scheme is liable to influence competition and trade on the basis of a logically valid, although entirely theoretical, mechanism.[9] Thus, the abolition of the aid scheme will have an immediate *erga omnes* effect. Conversely, for a series of individual aid measures the Commission will need to examine the individual situation of each aid beneficiary and ascertain whether they received an advantage unobtainable under normal market conditions.[10]

In this Case the plaintiff claims that such a broad approach - declaring the whole tax measure incompatible with the internal market – will also affect ports' non-economic, 'public remit' activities which should fall outside the State aid rules. This should not have happened, UPF claimed, if each beneficiary is assessed separately with regards to the distinction between economic and non-economic activities. Although admittedly the Commission has clearly stated that there may be cases where the activities performed by ports' operators are non-economic in nature and amounted to the exercise of a State prerogative with respect to, inter alia, navigation safety, security or environmental protection, but UPF regarded these statements as too general, too broad, and too vague.[11] Especially given that the existence such a non-economic component had no overall impact on the contested decision.

Concerning the argument that the Commission failed to address some of the activities carried out by the French ports, the plaintiff contends that the distinction between economic and non-economic activity based on whether the infrastructure is located within or outside the port facility is flawed. It claims that 'automatically' considering an outlying infrastructure operation as non-economic departs from the Commission's previous practice of classifying infrastructure investments (both construction and modernization) as non-economic provided access is granted to the general public in a non-discriminato-

4 See Cases T-122/96 *Federolio v Commission* [1997] ECLI-142 [61]; C-319/07 P *3F v Commission* [2009] ECLI-435.

5 See inter alia Case T-189/08 *Forum 187 v Commission* [2010] ECLI-99 [58].

6 Case T-754/17 *Port de Brest*.

7 *UPF* (n 3) [33].

8 ibid [37, 41].

9 See inter alia Cases C-148/04 *Unicredito* [2005] ECLI-774 [55]; T-34/02 *LeLevant v Commission* [2006] ECLI-59 [110].

10 Case T-127/99 *Territorio Histórico de Álava v Commission* [2002] ECLI-59 [178-97].

11 cf *Taxation of ports in France* (n 2) Section 5.1.1.

ry manner.[12] The UPF's argument runs that rather than geographic proximity, instead a more detailed case-by-case analysis should have been done to determine whether an activity is solely dedicated to ports' operation or whether it also serve the general public. Therefore, according to UPF, the latter ones should fall outside the scope of Article 107 TFEU.

Additionally, the plaintiff claimed that the Commission failed to adequately examine various types of activities carried out in seaports to correctly distinguish ~~and~~ economic and non-economic and to determine which of these is predominant. If the economic activity is purely ancillary to the non-economic operations those mixed activities should fall outside the State aid rules.[13]

The Court emphasized that there is no precise threshold, expressed in percentage terms or absolute terms, of non-economic activities carried out by one entity required to categorize it as entirely non-economic.[14] In the same vein, if the entity exercises an economic activity which can be separated from the non-economic exercise of public powers, it will be considered an undertaking in relation to part of its activities.[15]

While this brings up a broader question of how to categorize an entity engaged in both economic and non-economic activities if these are not operationally independent, in any case, EPF failed to present any evidence indicating that certain port operations (like marine traffic management, pollution control) are inseparable from the exercise of its State prerogatives. The Court agreed with the Commission, relying on existing Case law, that while there may be a link between different kind of activities especially if income from economic operations is used as a source of financing for non-economic activities it nevertheless is insufficient to support a conclusion these types are inextricably linked.[16]

IV. Effect on Competition and Trade

Before moving to the analysis of the plea in law, alleging an error of law and inadequate reasoning as regards the conditions relating to the distortion of competition and the effect on trade between Member States, it's worthwhile to mention that such an alleged error has been frequently, almost 'routinely' invoked by appellants before the Court. While the Commission's reasoning can indeed be deficient and perfunctory counterpoints are usually also lacking. Consequently, on the one hand this plea is overused but on the other, it is often done in an ineffective way, merely stating it generally, without pointing out alleged methodological deficiencies.

The Court rejected UPF claim that the EC failed to assess the measure's impact on undertakings using port infrastructure which may have benefited indirectly from it.[17] While it can be argued that such an indirect advantage may have occurred — the same holds true of every transport infrastructure — it does not change the existence of an operators' advantage. It is therefore unclear what might have been achieved with this plea.

Using the established interpretive canon of the effect in trade and competition UPF argued that even if the tax measure in question may have some impact on ports' charges it would not have any distortive effect since pricing cover only a part of many drivers of port competitiveness. These factors range from port throughput, port facilities, access to intermodal transportation network to policy and regulatory factors.[18] Given said multitude of factors, UPF argument runs that the Commission failed to isolate effects to a single cause, thus failed to prove a distortive effect. In other words, EC allegedly has not shown the possibility of distortion to competition and trade.

The Court rejected this argument: The Court held that the Commission is not required to demonstrate the actual effect of aid granted, rather it must show that a measure may potentially affect markets.[19] Since no one contest that the tax measure in question results in an unmarketlike advantage to port operators and that these undertakings and are in a high-

12 The Court cited *Financial support for infrastructure works in Flemish ports* (N 520/2003) Commission Decision of 20 October 2004 [2005] OJ C176/11.

13 Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU [2016] OJ C262/1 [207].

14 *UPF* (n 3) [83]. Here the Court cited Case C-74/16 *Congregación de Escuelas Pías Provincia Betania* [2017] ECLI-496 [44-63].

15 See inter alia Case C-138/11 *Compass-Datenbank* [2012] ECLI-449 [38].

16 *UPF* (n 3) [84].

17 ibid [104-5].

18 See Marc Huybrechts et al., *Port competitiveness: an economic and legal analysis of the factors determining the competetiveness of seaports* (De Boeck 2002).

19 *UPF* (n 3) [102] and cited cases C-71/09 P, C-73/09 P and C-76/09 P *Venezia vuole vivere* [2011] ECLI-368 [63]; T-487/13 *Navarra de Servicios y Tecnologías* [2015] ECLI-899 [66].

ly competitive market (both large and small ports), these two factors sufficed to presume a potential effect on competition and trade.[20]

Even if, due to a variety of case-specific circumstances, some seaports (island and overseas ports) are in different competitive situation warranting different approach, this should have been brought during recovery phase or at some later stage.[21] Because in case of aid schemes an analysis doesn't have to include the particular situation of each individual beneficiary.[22] The Court has not questioned the accuracy of UPF's claims but has merely restated the existing Case law.[23] In this sense, the Commission did exactly what the standards required (even if this approach may be and often is criticized as being rudimentary, lacking rigorous economic analysis).[24]

V. Procedural Issues, the Principle of Proportionality

The plaintiff also put forward a claim for an error of law in the conduct of the existing aid review procedure and infringement of Article 108(1) and (2) TFEU, combined with the principle of proportionality. The argument ran that by requiring France to provide the evidence of the compatibility with the internal market of the tax measure in question, the Commission reversed the burden of proof and acted as if it had received an application for approval of a new aid scheme. The logic behind this plea is as follows: In case of existing aid, the decision concerning aid compatibility has already been taken and can be re-examined by the Commission on a case-by-case basis without necessarily changing the existing aid status of such an aid scheme. It is the Commission that bears the burden of proof to show that the aid incompatible with the internal market. Here however the measure can be regarded as existing aid only in the literal sense of the word – it was *de facto* in force. There had never been any EC decision concerning this measure especially given that it had been adopted in 1942-43, a long time before the European Community, and since then the disputed tax exemption was never considered as State aid by France so it was not notified.[25]

With respect to plea alleging an infringement of the principle of proportionality and Article 2 of Regulation 1589/2015, UPF claimed that the Commission failed to demonstrate that no modification to that measure could make it compatible with the EU rules on State aid.[26] Therefore the decision to simply abolish the exemption scheme was unnecessarily excessive. The argument runs that the principle of proportionality requires that the scheme can only be abolished if modifications to that measure to make it compatible with the EU rules on State aid are absolutely impossible. The Commission should therefore determine whether the tax measure could have been modified in such a manner as to be in-line with rules governing the financing of Services of General Economic Interest (SGEI) and consequently declared compatible with the internal market under Article 106(2) TFEU.

The Court rejected all these arguments: First, it asserted that the wording of Article 108(2) TFEU

> (...) after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused (...)

together with Chapter VI of the Regulation 2015/1589 established a clear and precise procedure with regard to non-notified measures. France has been given ample opportunity to comment upon EC's finding and to provide evidence to support their reasons and claims during the subsequent proceedings. Also, France had been made aware of the Commission's initial State aid concerns when 'appropriate measures' were proposed as set out in Article 22 of Regulation 2015/1589 and only later the Commission initiated proceedings as per Article 23 of said regulation. These rules are equally applicable to both new and existing aid. As a result, the Court concluded that there has been no infringement of any of procedural rules.[27]

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20 cf *UPF* (n 3) [102] and *Taxation of ports in France* (n 2) [88, 91].

21 *UPF* (n 3) [111]

22 ibid [110-2].

23 Similarly *Venezia vuole vivere* (n 19) [63, 125].

24 See inter alia John Temple Lang, 'EU State aid rules – The need for substantive reform' (2014) EStAL 440.

25 *Taxation of ports in France* (n 2) [70-1].

26 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU [2015] OJ L248/9.

27 *UPF* (n 3) [123-4].

Similarly, the Court agreed with the Commission's conclusions that the exemption set out in Article 106(2) TFEU is not applicable. The Court *implicite* referred to its existing Case law, according to which Member States are best positioned to define the general interest.[28] In this respect the contested decision explicitly refer to the statement made by the French government that installations at Le Havre (only there) are critical,

> the unavailability of which would be liable to bring about a significant reduction in the potential to wage war, economic potential, security or the ability of the nation to survive.[29]

France mentioned no other ports with regard to general interest tasks. While this reference is in section of the contested decision entitled 'Activities of general interest or forming part of the essential functions of the State' it is glaringly obvious had nothing to do with Services of General Economic Interest as understood in the EU *acquis*.[30] In the light of France's reticence, it cannot be reasonably (proportionally) expected from the Commission to proactively examine all of roughly 500 French ports to determine whether there are any activities in the general interest.[31] Finding no arguments to support France's position the Court concluded that the Commission adequately investigated this subject.

Finally, the Court confirmed that the nature of the income tax exemption makes any amendments, aimed at its compatibility with the internal market, exceedingly difficult if not impossible.[32] As a result the Commission declared the entire system incompatible with the internal market, thus found nothing 'salvageable'.

VI. Applicability of Article 93 TFEU

Additionally, UPF contends that the Commission failure to fully analyse different aspects of port operations has resulted in the infringement of Article 93 TFEU since certain ports' intermodal operations meet the needs of coordination of transport. The Court rejected the claim that the more permissive *lex specialis* enshrined in Article 93 TFEU should have been applied. Although the exception in Article 93 TFEU regarding more permissive State aid rules does not apply to maritime transport, but it does to inland waterways as well as to various forms of land transport, and given that ports are increasingly becoming complex intermodal hubs characterized by the integration of arterial roads, rail stations and so on in a way that could easily have been interpreted as transport coordination.[33]

Yet, according to the Court, the Commission properly concluded that a general, unconditional tax exemption is by definition is not tied to a particular investment project but rather at reducing costs in day-to-day operation. Although the terminology of Article 93 TFUE is very vague, superfluous and the Commission approach appears very lenient, none the less the aid must enable the realization of the project or activity in the interest of the Union.[34] Without it, a measure for all intents and purpose represent a form of operating aid in principle considered to be incompatible with the internal market.[35] Even if the need of transport coordination is real (for example when intermodal operations are functionally separable and separately invoiced), the Court observed the tax exemption by its very nature cannot be limited to what is necessary to cover the costs required for the needs of transport coordination or incurred in the discharge of public service obligations and therefore it cannot be deemed proportional. In the same vein using the measure in question would have no incentive effects because this scheme benefits large ports with the lowest need for incentives — high taxpayers — proportionately more than smaller facilities.[36] As a result, Article 93 TFEU was found inapplicable.

VII. The Principle of Good Administration

The alleged breach of the principle of sound administration lies in the fact that the Commission requires the abolition of the exemption scheme while leaving

28 The Commission probe is limited to ascertaining whether there is a manifest error of assessment

29 *Taxation of ports in France* (n 2) [20].

30 ibid Section 4.1.1.

31 *UPF* (n 3) [149].

32 The system envisaged an unconditional exemption for all entities in a specific category.

33 See inter alia Commission Decision SA.32224 [2011] OJ C215/19 (*Alblasserdam Container Transferium*).

34 Case T-314/15 *Greece v Commission* [2017] ECLI-903 [180].

35 This distinction in not formally recognized in *verba legis* of neither Article 93 nor 107(3)c TFUE.

36 *UPF* (n 3) [131].

in place port aid schemes in other Member States. Consequently, UPF argued, this does not ensure a level playing field between the various European ports but, on the contrary, leads to further distortions of competition. The Commission therefore allegedly infringed the principle of impartiality which is the necessary corollary of the principle of good administration. It is somewhat puzzling what this plea is supposed to have achieved. It goes without saying that no one could plead for himself an illegality committed in favour of another.[37] This plea would have no impact even under the assumption that the claim is factually correct.

VIII. Commentary

The arguably most important issue emerging from Case T-747/17 *Union des ports de France* pertains to distinguishing between the economic and the non-economic activities of ports. While it can be observed with some satisfaction that the Court clearly stated that there exists no threshold below which all the activities of an entity can be considered to be non-economic on the grounds that economic activities are in the minority, it still remains unclear how to appropriately determine which part of an entity's activities should be dismissed as irrelevant. In light of the above, the line of reasoning appears to be a step in the right direction but doesn't seem to go far enough: It can be argued that it could have provided more guidance in the matter of assessing this point. Especially, if no exact quantitative threshold can be set in advance, does it mean that the threshold is still considered a reference point, just on a case-by-case basis?

Given the ports' operational characteristics the author is of the opinion that there exists no feasible methodology to determine a percentage ratio between its economic and non-economic activity. Because, it must be clearly emphasized that 'minor' doesn't necessarily mean irrelevant or less significant. Also, it is unclear what analytical value have the fact that some fixed percent of operating costs is dedicated to particular activities, or that this activity generates a certain percentage of income, engage a certain percentage of manpower and so on. Such a metric will always by arbitrary.

In the earlier *Selex* Case the Court asserted that if an economic activity is inseparable from the exercise of its State prerogatives, all of the activities carried out by that entity remain activities related to the exercise of those prerogatives.[38] Can one therefore say that if an exercise of State prerogatives is inseparable from the core economic activity and subordinate to it, all of activities of that entity shall remain economic? Even if for example, a port operator provides navigation services to all coastal or estuarine marine traffic it does not change the fact that these services with respect to port-related traffic constitute an inseparable part of port's operations. In other words, port's core business would have been impossible without it. From a port operator perspective, therefore, serving the passing marine traffic is strategically irrelevant, merely a sideshow, and what count is its indispensability for port's operations. It can therefore be said that the possibility of technical separation is not synonymous with being operationally nonessential. Also, even if these ancillary services could have functioned independently from the port, the same cannot be said in the opposite. In connection with these considerations, it is perhaps worthwhile to elaborate a more functional approach based on operational indispensability for the entity's core business.

37 ibid [165-6].

38 Case C-113/07 P *Selex v Commission* [2009] ECLI-191 [81-2].