

Selectivity on Trial: a Critical Discussion of Recent State Aid Developments

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All views expressed are personal

"Favouring certain"

- Opinion of AG Wahl, Case C-15/14 P
Commission v MOL EU:C:2015:32, paragraphs
47 and 48:

That requirement as to selectivity or — to use another term frequently employed — ‘specificity’ of the measure must be clearly distinguished from the detection of an economic advantage. In other words, once an advantage, understood in a broad sense, has been identified as arising directly or indirectly from a particular measure, it is then for the Commission to establish that that advantage is specifically directed at one or more undertakings. It falls to the Commission to show that the measure, in particular, creates differences between undertakings which, with regard to the objective of the measure, are in a comparable situation. [...]

That said, the selectivity requirement cannot, none the less, in my view, be completely disconnected from the concomitant, albeit separate, identification of an economic advantage.

Evolution of selectivity within State aid law

- Case 30/59 De Gezamenlijke Steenkolenmijnen in Limburg v ECSC High Authority EU:C:1961:2, pages 21 to 25

Comparison between Articles 4(c) and 67 ECSC (analogous to Articles 107 TFEU and 116 TFEU).

Integration was only partly established by the Treaty and, owing to the power retained by the Member States, the coal [...] undertakings established in their respective territories remain subject to different legislation and regulations the provisions of which are liable to operate to the advantage or disadvantage of the coal [...] industry of a Member State in comparison with the same industry coming under the jurisdiction of the other Member States or with other industries in the same State. Although these situations conflict with the general purpose of the Treaty, they are the inevitable and legitimate outcome of the partial integration which the Treaty seeks to attain.

Evolution of selectivity within State aid law

- Joined Cases 6 and 11/69 Commission v France
EU:C:1969:68, paragraphs 20 and 21

A preferential rediscount rate for exports, granted by a State in favour only of national products exported and for the purpose of helping them compete in other Member States with products originating in the latter, constitutes an aid within the meaning of Article [107 TFEU] [...].

[T]he fact that the preferential rate in question is applicable to all national products exported and only to them [...] can remove from the measure in question the character of an aid which is prohibited except in the cases and procedures provided for by the Treaty.

Evolution of selectivity within State aid law

- Case 173/73 Italy v Commission (Italian textiles) EU:C:1974:71, paragraphs 14 and 15

Since in a system of this kind employers' contributions are assessed in accordance with the wage costs of each undertaking [...], the burden of payment of these allowances is rendered exactly the same for all undertakings.

The above observation [...] applies, on the same basis, to the relationship between the different branches of industry. [...]

It must be concluded that partial reduction of social charges pertaining to family allowances devolving upon employers in the textile sector is a measure intended to partially exempt undertakings of a particular industrial sector from the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system.

2016 Notice on Notion of Aid (NoA)

Selectivity is one of the seven sections in the NoA, and section 5 (pp. 36 to 55) is the longest of the seven.

It deals with: General principles

Material Selectivity

Regional Selectivity

Specific issues concerning tax measures.

Selectivity – Individual aids

Case C-270/15 P Belgium v Commission
EU:C:2016:489, paragraph 49

In the [case of individual aid], the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective.

Selectivity – Individual aids

- Case T-135/12 France v Commission
EU:C:2015:116, paragraph 43

[L]’appréciation d’un avantage sélectif dans les circonstances de l’espèce ne requiert pas la définition d’un cadre de référence tel que celui proposé par la République française. Au sens de l’article 107, paragraphe 1, TFUE, constituent des aides d’État les aides qui, notamment, favorisent «certaines entreprises ou certaines productions». [I]l ressort de l’intitulé même de la loi instaurant la mesure litigieuse, qui se lit «loi [de 1996] relative à l’entreprise nationale France Télécom», qu’elle ne concerne que cette dernière et qu’elle est, de ce fait, sélective, sans qu’il soit nécessaire, dans les circonstances de l’espèce, de vérifier ultérieurement si elle introduit des différenciations entre opérateurs se trouvant dans une situation factuelle et juridique comparable au regard de l’objectif poursuivi par la mesure litigieuse, comme le prétend la République française.

Material selectivity – general schemes

Case C-15/14 P Commission v MOL EU:C:2015:362,
paragraphs 59 and 60

It falls to the Commission to show that the measure, in particular, creates differences between undertakings which, with regard to the objective of the measure, are in a comparable situation. It is necessary therefore that the advantage be granted selectively and that it be liable to place certain undertakings in a more favourable situation than that of others.

[...] [W]hen examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity.

Material selectivity – general schemes

What is the role of competitive dynamics in establishing selectivity?

Case C-270/15 P Belgium v Commission EU:C:2016:489, paragraphs 53 and 54

[T]he situation of operators in the bovine sector was implicitly but necessarily compared to that of all the undertakings which, like them, are subject to inspections which they are required to perform before placing their products on the market.

Although [...] Belgium maintains that those different sectors are not in a comparable situation since the tests intended to control the quality of products, even food products, vary from one sector to another [...], such an argument is ineffective in the context of the categorisation of State aid, which relates not to the tests themselves but to their financing by State resources having the effect of alleviating the burden of costs on its beneficiaries. It is undisputed that [...], [...] Belgium did not dispute [...] that the operators in the bovine sector benefited, by the financing of the screening tests, from an advantage which¹⁹ was not available to undertakings in other sectors.

Material selectivity – general schemes - justification

Initially the issue of justification of a difference of treatment of some operators from others in a comparable situation in light of the nature of the system was confined to fiscal and social security measures.

That element is present in the test set down by the Court in Italian textiles.

By contrast, it is not present in Case C-126/01 Gemo SA EU:C:2003:622, paragraph 35, for a measure under which the State bears the cost of a service provided essentially though not₁ exclusively to farmers.

Material selectivity – general schemes - justification

Case C-518/13 Eventech EU:C:2015:9, paragraphs 56 to 61

[T]he referring court asks the Court [...] to assess, in order to determine whether there is any selectivity in the advantage granted, whether the measure at issue introduces distinctions between operators who are, in the light of the objective pursued, in a comparable factual and legal situation.

[...]

In that regard, it must be stated, first, that the identification of the factual and legal situation of Black Cabs and minicabs cannot be confined to that prevailing in the market sector in which those two categories of conveyors of passengers are in direct competition, namely the pre-booking sector. It cannot seriously be doubted that all the journeys made by Black Cabs and minicabs are liable to affect the safety and efficiency of the transport system on all the road traffic routes in London.

Secondly, it must be taken into consideration that, by virtue of their legal status, only Black Cabs can ply for hire; they are subject to the rule of ‘compellability’; they must be recognisable and capable of conveying persons in wheelchairs, and their drivers must set the fares for their services by means of a taxi meter and have a particularly thorough knowledge of the city of London.

It follows that Black Cabs and minicabs are in factual and legal situations which are sufficiently distinct to permit the view that they are not comparable and that the bus lane¹² policy therefore does not confer a selective economic advantage on Black Cabs.

Material selectivity – general schemes – justification - coherence

Case T-287/11 Heitkamp BauHolding v Commission (Sanierungsclausel) EU:T:2016:60, paragraphs 160, 170 and 172

A national measure may be justified by the nature or general scheme of the tax system at issue only if, first, it is consistent not only with the characteristics forming an essential part of the tax system at issue but also with the implementation of that system and, secondly, it is consistent with the principle of proportionality and does not go beyond what is necessary, in that the legitimate objective being pursued could not be attained by less far-reaching measures. [...]

[T]he measure at issue is not consistent with the objective pursued. [It] applies only to undertakings in difficulty. In those circumstances, it is not clear why the principle of taxation according to the ability to pay requires that a company in difficulty should be able to benefit from loss carry-forward, where that carry-forward is denied to a healthy company that has incurred losses and meets the other requirements of the restructuring provision. [...]

[T]he argument relating to the lack of control over the use of losses is not consistent. Other companies which do not fulfil the requirements of the restructuring clause may also encounter economic difficulties and be unable to exert control over how losses are used, while being excluded from the application of the restructuring clause.