

## EU State Aid Control



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## Chapter 3

# State Measure

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*Rein Wesseling and Marieke Bredenoord-Spoek\**

### 1. INTRODUCTION

Article 107(1) TFEU states that:

*“[...] any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”.*

This chapter deals with the element in Article 107(1) TFEU that only interventions *by the State or through State resources* can qualify as State aid in the sense of the EU State aid rules.

As is the case with respect to the other elements of Art. 107(1) TFEU, no specific legislation exists on the issue of State measures. However, the Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU (the “Notice on the notion of State aid”),<sup>1</sup> published on 19 May 2016, covers this topic extensively.

Before the Notice on the notion of State aid, private practitioners and EU Member States had to rely on case law as their only source of information on the assessment of whether a measure was indeed a “State measure” in the sense of Art. 107(1) TFEU. For that reason, this chapter will discuss a large number of case law.

### 2. ONE OR TWO ELEMENTS?

The second feature of the notion of State aid is embodied in the words in Art. 107 TFEU “*granted by a Member State or through State resources*”. The word “or” (alternative) implies that

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\* Rein Wesseling is a professor in competition law at the University of Amsterdam and a partner at Stibbe. Marieke Bredenoord-Spoek is a senior associate at Stibbe. The views expressed in this chapter are those of the authors and do not necessarily represent those of Stibbe. For transparency reasons, the authors note that Stibbe is involved in some of the cases mentioned in this chapter.

1. Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, published on 19 May 2016, *available at*: <http://files.m17.mailplus.nl/user317000154/50807/state%20aid.pdf>. The Notice is the last part of the Commission’s State aid Modernisation initiative. The Notice gives guidance on the different constituent elements of the notion of State aid, including the financing of the aid through State resource. This guidance can be used to determine whether public spending falls within or outside the scope of EU State aid control.

this is one single requirement, not a cumulative one. In other words, it would appear that it is enough that State resources are involved for a measure to qualify as State aid.

However, case law has made it clear that not all transfers of State resources amount to State aid, but that in addition to consisting of State resources, the transfer must be attributable, or “imputable”, to the State. This follows from the *Stardust Marine* case in which the Court of Justice ruled that for advantages to be capable of being categorised as State aid, they must, first, be granted directly or indirectly through State resources, *and*, second, be imputable to the State.<sup>2</sup> We refer to subsection 1.3.2 below for a detailed discussion of the *Stardust Marine* case and related cases.

By the very same token, it is not enough that there is a measure taken by the State providing for some advantage to firms for the measure to count as State aid. The measure must *also* involve the use of at least some State resources (e.g. involve expenses from the public budget, or create a financial exposure for the State).<sup>3</sup> This follows clearly from Court rulings such as in the well-known *PreussenElektra* case,<sup>4</sup> which is discussed in more detail in subsection 1.4.4, alongside other cases.

This viewpoint of two cumulative conditions is confirmed in the Notice on the notion of State aid. Already in the introduction it refers to six different elements which jointly determine the presence of State aid, two of which are “*the imputability of the measure to the State and its financing through State resources*”.<sup>5</sup> In its third chapter, the Notice explicitly states that these concern two separate and cumulative conditions.<sup>6</sup>

Therefore there are a series of requirements for a measure to qualify as State aid, and the two elements imputability and State resources are to be viewed as cumulative. However, the two elements are closely connected and are often considered together as they both relate to the public origin of the measure in question.

In the next sections, the two elements are discussed in more detail. First, we will discuss the imputability, i.e. the fact that the aid must be imputable to the State (section 1.3), and second, State resources, i.e. the fact that the aid must be granted directly or indirectly by the State (section 1.4). Apart from presenting and analysing the case law in a comprehensive manner, the aim of the chapter is also to cast more light on the question *why* the European Courts have interpreted Art. 107(1) TFEU in the way they have. Concluding remarks are presented in section 1.5.

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2. See e.g. Case C-482/99 *France / Commission (“Stardust Marine”)* [2002] ECR I-4397, para. 24; Case T-351/02 *Deutsche Bahn* [2006] ECR II-01047, para. 103.
  3. Biondi, A. (2006), Some Reflections on the Notion of “State Resources” in European Community State Aid Law, *Fordham International Law Journal*, Vol. 30 Issue 5, p. 1432-1434.
  4. E.g. Case C-379/98 *PreussenElektra* [2001] ECR I-02099.
  5. Notice on the notion of State aid, point 5. The six elements mentioned in the Notice are: (i) the existence of an undertaking (i.e. whether the activity concerned is an economic activity), (ii) the imputability of the measure to the State, (iii) its financing through State resources, (iv) the grant of an advantage, (v) the selectivity of the measure and (vi) its potential effect on competition and trade within the Union.
  6. Notice on the notion of State aid, point 38.

### 3. IMPUTABILITY TO THE STATE

#### 3.1 Directly granted by public authority or designated private or public body belonging to the public sector

In order to qualify as State aid, the measure must be somehow attributable to the State. If a measure is granted directly by the State or a public authority, the imputability to the State is a given. Even if the public authority granting the aid enjoys some autonomy, the use of resources is imputable to the State.

This was confirmed in the 1996 judgment *Air France* of the General Court.<sup>7</sup> This case concerned the issue of bonds and notes issued by Air France, which were almost entirely taken up by the CDC-P, a wholly owned subsidiary of the ‘Caisse’, a special public body established by statute. The French authorities submitted that this did not constitute State aid for a number of reasons, mainly because the Caisse and the CDC-P were institutions independent of the French government. The General Court focussed on the relation between the Caisse and the government and disagreed with the governments’ arguments, ruling that the Caisse was a public authority, and as such part of the public sector.

*“62 That conclusion is not undermined by the arguments to the effect that the Caisse enjoys legal autonomy from the political authorities of the State, that the appointment of its Director-General, who is subject solely to supervision by an independent supervisory commission, is irrevocable, that the Caisse has a special statute in relation to the Cour des Comptes, and that it has a particular accounting and fiscal regime. Those arrangements are part of the internal organization of the public sector, and the existence of rules for ensuring that a public body remains independent of other authorities does not call into question the principle itself of the public nature of that body. Community law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid.”<sup>8</sup>*

The General Court then clarified that this was not contrary to the Court of Justice’s judgment in *Commission/France* of 1985. In that judgment the Court had ruled that “*it follows that [Article 107 TFEU] covers aid which, like the solidarity grant in question, was decided and financed by a public body and the implementation of which is subject to the approval of the public authorities*”<sup>9</sup> However, according to the General Court in *Air France*, this ruling of the Court of Justice in the *Commission/France* case should not be interpreted as meaning that a finding of State aid always presupposes the existence of approval of the public authorities, where the financial transaction in question was decided upon and financed by a body which is itself part of the public sector. The Court of Justice was merely listing all the factors actually existing in the case before it, and not a series of necessary conditions. Consequently, even if the investment

7. E.g. Case T-358/94 *Air France / Commission* [1996] ECR II-02109; e.g. also Ølykke G.S. (2013), Public Undertaking and Imputability, the Case of DSBFirst, *European State Aid Law Quarterly*, 2013(2), p. 349 and seq.

8. E.g. Case T-358/94 *Air France / Commission* [1996] ECR II-2109, para. 62.

9. E.g. Case 290/83 *France / Commission* [1985] ECR 439, para. 15.

made by the Caisse in the *Air France* case was not subject to specific approval by the French Government, the fact that the Caisse, belonging to the public sector, used for that investment funds which were at its disposal was sufficient.<sup>10</sup>

Measures granted directly by the public authority or a designated private or public body that belongs to the public sector, are therefore attributable to the State, even if these bodies enjoy (some) autonomy and the measure is not explicitly approved by the State. The rationale is explained by the Court of Justice in *Stardust Marine*; “community law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid.”<sup>11</sup>

### 3.2 Granted through intermediary public or private bodies, or through State-owned enterprises – the *Stardust Marine* indicia

However, if the advantage is granted through one or more intermediate bodies, public or private, or through State-owned enterprises (typically referred to as public undertakings by the European Courts), imputability is less evident.<sup>12</sup> In those cases where the measure is granted more indirectly, it must be carefully assessed whether the measure can be imputed to the State. In that case it is necessary to examine “whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures”<sup>13</sup>

This criterion (“having been involved”) and the specific indicia to be taken into account in making this assessment have been developed in the *Stardust Marine* case of 2002.<sup>14</sup>

That case concerned the French company Stardust Marine, active in the pleasure-boat market. Stardust Marine was financed through loans and guarantees by SBT-Batif, a subsidiary of Altus Finance, which was itself part of the Crédit Lyonnais group. In 1994 Stardust Marine got in financial trouble due to a combination of fraud, poor commercial strategy, inappropriate management and several unexpected losses. The Crédit Lyonnais group granted new loans to Stardust Marine and eventually acquired control over it through conversion of debt into capital. Crédit Lyonnais itself was largely owned and supported by the French State at the time, following the bank’s financial troubles in 1993. In the period 1994 to 1995 Stardust’s capital was increased several times by CDR, a 100% subsidiary of Crédit Lyonnais and by Altus Finance.<sup>15</sup> The Commission ruled that the capital increases injected into Stardust Marine by Altus Finance and CDR constituted State aid. France appealed this decision.

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10. E.g. Case T-358/94 *Air France / Commission* [1996] ECR II-2109, para. 68.

11. E.g. Case C-482/99 *France / Commission (“Stardust Marine”)* [2002] ECR I-4397, para. 23; e.g. in this context Carullo, G. (2013), State Resources in the Case Law: Imputability Under and Organizational Perspective, *European State Aid Law Quarterly*, Vol 3, p. 456.

12. Notice on the notion of State aid, point 39. For the purpose of this chapter, we will use the term “State-owned enterprise” to denote what is commonly referred to in EU competition law as a public undertaking. It must be recalled that, in the context of competition law, the concept of “undertaking” covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. E.g. e.g. Case C-41/90 *Klaus Höfner and Fritz Elser / Macrotron GmbH*, [1991] ECR I-2979, para. 21 and Joint Cases T-443/08 and T-455/08 *Freistaat Sachsen and Land Sachsen-Anhalt / Commission* [2011] ECR II-01311.

13. E.g. Case C-482/99 *France / Commission (“Stardust Marine”)* [2002] ECR I-4397, para. 52.

14. E.g. Case C-482/99 *France / Commission (“Stardust Marine”)* [2002] ECR I-4397.

15. Opinion of Advocate General Jacobs in Case C-482/99 *France / Commission (“Stardust Marine”)* [2002] ECR I-04397, para. 5-13.

The central (first) plea the French government put forward was, first, that the funds used by Altus and SBT, subsidiaries of Crédit Lyonnais, to finance Stardust could not be classified as State resources and second, that the support measures taken in favour of Stardust could not be regarded as imputable to the French State. The Court of Justice confirmed that these are indeed the two elements of the “granted by a Member State or through State resources” of Art. 107(1) TFEU (see above section 1.2) and that for advantages to be capable of being categorised as aid they must be granted directly or indirectly through State resources *and* be imputable to the State.<sup>16</sup>

As to the imputability, the Court of Justice considered that in the contested decision, the Commission inferred the imputability of the financial assistance granted to Stardust Marine by Altus Finance and SBT to the State simply from the fact that those two companies, as subsidiaries of Crédit Lyonnais, were indirectly controlled by the State. Inferring such imputability from the mere fact that that measure was taken by a State-owned enterprise could not be accepted.<sup>17</sup> As Advocate General Jacobs put it: “*it would in my view go too far to classify autonomous decisions of public undertakings and other entities distinct from public authorities automatically as State measures*”.<sup>18</sup> Instead, it is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures. The Court of Justice considered that this might be difficult to demonstrate exactly:

*“53 On that point, it cannot be demanded that it be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measures in question. In the first place, having regard to the fact that relations between the State and public undertakings are close, there is a real risk that State aid may be granted through the intermediary of those undertakings in a non-transparent way and in breach of the rules on State aid laid down by the Treaty.*

*54 Moreover, it will, as a general rule, be very difficult for a third party, precisely because of the privileged relations existing between the State and a public undertaking, to demonstrate in a particular case that aid measures taken by such an undertaking were in fact adopted on the instructions of the public authorities.”<sup>19</sup>*

For these reasons, the Court of Justice suggested a pragmatic approach to establish whether measures taken by State-owned enterprises (public undertakings) are imputable to the State. The Court ruled that imputability may be inferred from a set of circumstances of the case and the context in which the measure was taken. Elaborating on the possible, the Court first recalled which indicators it had already taken into consideration in other cases.<sup>20</sup> It referred to *Van der Kooy* and *Italy / Commission*.

16. Case C-482/99 *France / Commission (“Stardust Marine”)* [2002] ECR I-4397, para. 21-24.

17. E.g. in this context, Winter, J. (2004) Re(de)fining the notion of State aid in Article 87(1) of the EC Treaty, *Common Market Law Review* 41, p. 486: “*The Court was not prepared to accept the Commission’s contention that the possibility of control implies per se imputability of a measure to the State.*”

18. Opinion Advocate General Jacobs in Case C-482/99 *France / Commission (“Stardust Marine”)* [2002] ECR I-4397, para. 55.

19. E.g. Case C-482/99 *France / Commission (“Stardust Marine”)* [2002] ECR I-4397, para. 53-54.

20. E.g. Case C-482/99 *France / Commission (“Stardust Marine”)* [2002] ECR I-4397, para. 55.

*Van der Kooy* concerned the Dutch private gas exploration and supply company Gasunie, in which the Netherlands held 50% of the shares. The question was whether the tariffs set by Gasunie could be imputed to the Netherlands. The applicants argued this was not the case, as the Netherlands only held 50% of the shares, Gasunie was incorporated under private law, and the tariffs were the result of an agreement under private law between Gasunie and other parties, to which the State was not a party.<sup>21</sup> However, the Court of Justice considered that (i) the shares in Gasunie were so distributed that the Netherlands' State directly or indirectly held 50% of the shares and appointed half the members of the supervisory board – a body whose powers included that of determining the tariffs to be applied, (ii) the Minister for Economic Affairs was empowered to approve the tariffs applied by Gasunie, so that the Netherlands' government could block any tariff which did not suit it, and (iii) Gasunie had on two occasions given effect to the Commission's recommendations to the Netherlands' government. These factors demonstrated that Gasunie “*in no way enjoys full autonomy in the fixing of gas tariffs but acts under the control and on the instruction of the public authorities*”. Therefore, it was clear that Gasunie could not fix the tariff without taking account of the requirements of the public authorities. The Court of Justice concluded that the fixing of the contested tariff was the result of action by the Dutch State.<sup>22</sup>

In *Italy / Commission* the Court of Justice had considered that, apart from factors of an organic nature which linked the public companies IRI and Finmeccanica to the State (the Italian State gave IRI a capital fund, and IRI controlled the capital of Finmeccanica; the Italian Government appointed the members of IRI's management board, which in turn appointed the members of Finmeccanica's management board), those companies, through the intermediary of which aid had been granted, although being required to operate in accordance with economic criteria, did not have full freedom of action, since they had to take account of directives issued by the Interministerial Committee for Economic Planning.<sup>23</sup> The Court concluded that “*taken as a whole, those factors show that IRI and Finmeccanica act, in essence, under the control of the Italian State*”.

In addition to these already used indicia, the Court of Justice in *Stardust Marine*, suggested a number of other indicia which might be relevant in concluding that an aid measure taken by a State-owned enterprise is imputable to the State. The Court mentioned:

*“in particular, its integration into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of it being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains.”*<sup>24</sup>

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21. E.g. Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy* [1988] ECR 00219, para. 33.

22. Joint Cases 67/85, 68/85 and 70/85 *Van der Kooy* [1988] ECR 00219, para. 32-38.

23. E.g. Case C-305/89 *Italy / Commission* [1991] ECR I-01603, para. 14.

24. E.g. Case C-482/99 *France / Commission* (“*Stardust Marine*”) [2002] ECR I-4397, para. 56; Notice on the notion of State aid, point 43.

Advocate General Jacobs mentioned in addition the following facts and circumstances which could be taken into account to assess whether or not a certain measure was imputable to the State:

*“evidence that the measure was taken at the instigation of the State; the scale and nature of the measure; the degree of control which the State enjoys over the public undertaking in question; and a general practice of using the undertaking in question for ends other than commercial ones or of influencing its decisions”*<sup>25</sup>

The above list of indicia is non-exhaustive.<sup>26</sup>

The Court of Justice stressed that the legal status of the company was one of the relevant factors, but should not be regarded as sufficient to determine whether or not the State is involved. This works both ways: the mere fact that a public undertaking has been constituted in the form of a capital company under private law cannot be considered as sufficient to exclude the possibility of imputability to the State, and *vice versa* the fact that a company is under control of the State (the organic criterion) cannot be used as the sole criterion to impute the measures to the State.<sup>27</sup> The Commission had imputed the measure to the State on the sole basis of the company being wholly owned by the French State. The Court of Justice thus annulled that decision.

### 3.3 Post-*Stardust Marine* case law on imputability

After the seminal *Stardust Marine* judgment, the Commission and the European courts further developed and applied the *Stardust Marine* criteria. In the Dutch *Pearle* case of 2004,<sup>28</sup> the central question was whether or not the funding of the advertising campaign through resources levied from the association’s members constituted aid. We refer to subsection 1.4.4 below for a more detailed discussion of the case and the element of State resources. As to imputability, Advocate General Colomer considered that the measure was not imputable to the State as the State had no influence whatsoever on how the levies collected from the association’s members would be spent:

*“the HBA (a trade association governed by public law) does not appear to have exercised over the resources from which the campaign was financed a degree of control sufficient for them to be attributable to it. [...] those resources had been obtained by means of a compulsory contribution linked exclusively to the organisation of the advertising venture at issue. [...] The fact is that the bye-law imposing the contributions required to meet the costs involved was adopted by the HBA on a proposal from a private professional opticians’ association*

25. Opinion of Advocate General Jacobs in Case C-482/99 *France / Commission* (“*Stardust Marine*”) [2002] ECR I-4397, para. 67.

26. Notice on the notion of State aid, point 43.

27. E.g. Case C-482/99 *France / Commission* (“*Stardust Marine*”) [2002] ECR I-4397, para. 57. E.g. also Case T-442/03 *SIC / Commission* [2008] ECR II-1161, para. 107: “Although the applicant’s argument that Portugal Telecom was controlled by the Portuguese Republic, as majority shareholder, constitutes an uncontested fact in the dispute, in view of the case law outlined above, it is not sufficient for a finding that the measure at issue was imputable to the State”.

28. E.g. Case C-345/02 *Pearle and others* [2004] ECR I-7139.

(NUVO). That association also proposed the amount of the contribution which would have to be levied. The HBA therefore serves only as a vehicle for levying and allocating resources collected for a purpose determined previously by operators in the professional sector in question”<sup>29</sup>

The Court of Justice followed the Advocate General:

“the file clearly shows that the initiative for the organisation and operation of that advertising campaign was that of the NUVO, a private association of opticians, and not that of the [HBA]. As the Advocate General pointed out [...] the Board served merely as a vehicle for the levying and allocating of resources collected for a purely commercial purpose previously determined by the trade and which had nothing to do with a policy determined by the Netherlands authorities”<sup>30</sup>

In *Doux Élevages* (2013) the question was whether the compulsory contributions to an inter-trade organization could be classified as aid. We refer to subsection 1.4.4 below for a more detailed discussion of the case and the element of State resources. A French inter-trade organisation for the agricultural sector had introduced the levy of a ‘*cotisation volontaire obligatoire*’ (a contribution which is initially voluntary and later endorsed and made compulsory by an Inter-ministerial Order), for the purposes of financing common activities decided on by that organisation.<sup>31</sup>

The Court of Justice stressed that there was nothing in the case file that showed that the initiative for imposing the contribution originated with the public authorities rather than the inter-trade organisation. The State was acting simply as a ‘vehicle’, according to the Advocate General, and confirmed by the Court. The activities carried out by the inter-trade organisation were therefore not imputable to the State.<sup>32</sup>

In recent years, there have been interventions by central banks of the Member States and by various special funds created by the Member States, in response to the financial crisis. The Commission has provided guidance on the criteria for the compatibility of State aid with the internal market pursuant to Art. 107(3)(b) TFEU during the financial crisis.<sup>33</sup> These measures, despite central banks typically enjoying a large degree of institutional and political autonomy (especially in the Eurozone countries), are generally considered by the Commission as measures imputable to the State.<sup>34</sup> However, the Commission clarified that where a central bank reacts to a banking crisis not with selective measures in favour of individual banks, but with general

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29. Opinion of Advocate General Colomer in Case C-345/02 *Pearle and others* [2004] ECR I-07139, para. 73-76.

30. Case C-345/02 *Pearle and others* [2004] ECR I-7139, para. 37.

31. Case C-677/11 *Doux Élevages and Coopérative agricole* [2013] EU:C:2013:348, para. 16-18.

32. Case C-677/11 *Doux Élevages and Coopérative agricole* [2013] EU:C:2013:348, para. 40 and 41.

33. E.g., Commission Communication of 26 Nov. 2008, on the Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis, O.J. 2009 C83/1 and Commission Communication of 1 Aug. 2013, on the application of State aid rules to support measures in favour of banks in the context of the financial crisis (‘Banking Communication’), O.J. 2013, C 216/1.

34. Notice on the notion of State aid, point 48.

measures open to all comparable market players in the market (e.g. lending to the whole market on equal terms), such general measures often fall outside the scope of State aid control.<sup>35</sup>

In the particular case of aid to certain financial institutions in France through a guarantee scheme, the Commission concluded that, while the fund created for the operation was owned only in part (34%) by the State, but for the major part (66%) by certain banks, the intervention was imputable to the State. The reason was that the fund, while being constituted by private law, was the result of a legislative act, its activity subject to strict governmental control, but mainly because the financial risk attached to the operation was borne *in fine* by the French State.<sup>36</sup>

### 3.4 Burden of proof & standard of proof: *Commerz v Port Authority of Rotterdam*

The Court of Justice found in *Stardust Marine* the mere fact that a company is under State control to be insufficient to establish imputability. The involvement – “*in one way or another*” – of public authorities in adopting these measures must also be examined. The burden of proof is on the Commission.<sup>37</sup> In *Olympiaki Aeroporia*, the General Court also held that it is in principle for the Commission to provide proof.<sup>38</sup> A similar burden of proof is on the Commission when it alleges misappropriation of previously approved aid by a beneficiary.<sup>39</sup>

Although the Court of Justice also places the burden of proof clearly on the Commission, the required standard of proof is a little more difficult to establish. Hence, the extent and manner in which a State must be involved in order to establish State aid is unclear.

The central question is whether indirect indicators taken as a whole suffice to establish imputability or that indirect evidence may solely be used to support the *in concreto* finding that a particular measure is attributable to the State.<sup>40</sup>

Advocate General Jacobs highlighted this question in his conclusion in *Stardust Marine*. He identified it as a tension between earlier case law from the Court of Justice and the General Court. The former held in *Van der Kooy* and *Italy v Commission* that it considered a body of indirect indicators as a whole in order to come to imputability, whereas it found in *Commission v France* that in the specific circumstances of the case a particular measure was attributable to the State. By contrast, in *Air France* the General Court focused on the public or private nature of the Caisse and did not even examine whether it took its decisions – in the actual case or

35. Notice on the notion of State aid, point 48, and footnote 71.

36. E.g. Commission Decision 2008/548 of 30 October 2008 – *Scheme for refinancing financial institutions*, para. 5, 55 and 56 (OJ C(2008)6617); e.g. also Gebski, S. (December 2009), Competition First? Application of State Aid Rules in the Banking Sector, *The Competition Law Review*.

37. Case C-482/99 *France / Commission* (“*Stardust Marine*”) [2002] ECR I-4397, para. 52, e.g. in particular the last sentence.

38. Case T-68/03 *Olympiaki Aeroporia Ypiresies* [2007] ECR II-02911, para. 34.

39. Joint Cases T-111/01 and T-133/01 *Saxonia Edelmetalle and Zemag / Commission* [2005] ECR II-01579, para. 86: “*it is in principle for the Commission to establish that all or part of the aid previously authorised by it by an earlier decision has been misused by the beneficiary. If it fails to do so, that aid is to be considered as being covered by its previous approval decision*”.

40. Van de Castele, K. and Grespan, D. (2008), Granted by a Member State or Through State Resources in Any Form Whatsoever: State Resources and Imputability, in Mederer, Pesaresi and Van Hoof (eds.), *EU Competition Law: State Aid*, Vol IV, Leuven: Claeys and Casteels, para. 2.130.

even in general<sup>41</sup> – under the decisive influence of the public authorities.<sup>42</sup> In his view, a general test for imputability is not easily set. Instead, Advocate General Jacob argued, “*it will in my view be sufficient to establish on the basis of an analysis of the facts and circumstances of the case that the undertaking in question could not take the decision in question ‘without taking account of the requirements of the public authorities’.*” Furthermore, “*because of the difficulties of proof and the obvious danger of circumvention a restrictive view should not be taken of the type of evidence to be adduced. Circumstantial evidence (perhaps even press reports) might be relied upon.*”<sup>43</sup>

As indicated above, in *Stardust Marine*, the Court of Justice followed Advocate General Jacobs, finding that rather than demonstrating that the aid measure in question was specifically incited by the State in the particular case, the attribution to the State may be inferred from indirect circumstances.<sup>44</sup> The Court of Justice clarified the standard of proof with regards to the particular involvement of public authorities in a specific case to “*an involvement in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains.*”<sup>45</sup> One may thus infer the particular involvement of the public authorities from rather indirect indicators as well as the sense and content of the aid measure itself. However, the sole establishment of potential control is insufficient for a measure to fall within the scope of Art.107(1) TFEU.

The stance taken in *Stardust Marine* was recently reiterated and further elaborated in *Commerz Nederland v Havenbedrijf Rotterdam*, a case involving certain financial guarantees granted by the Rotterdam port operator. The Court of Justice held that *any* indication of either public involvement (or the unlikelihood of no public involvement) or the absence of State involvement in the operator’s decision was relevant.<sup>46</sup> Furthermore, “*it is for the referring court to determine whether, in the present case, imputability to the State of guarantees by Havenbedrijf Rotterdam may be inferred from the body of evidence arising from the circumstances of the case in the main proceedings and the context in which they were provided. To that end, it is necessary to determine whether that evidence demonstrates, in the circumstances, that the public authorities were involved or that it was unlikely that they were not involved in the provision of those guarantees.*”<sup>47</sup>

In the case at hand, there were clear organisational links between the *Havenbedrijf* (the port operator) and the municipality of Rotterdam, which tend to demonstrate, in principle, that the public authorities were involved or that it was unlikely that they were not involved. In addition, it was considered that the fact that the sole director of the company acted improperly and disregarded the company’s statutes did not, of itself, exclude such involvement. At the same time, the referring court had established that the sole director deliberately kept the provision of the guarantees secret, because, in particular, of the fact that there were grounds for presuming that the public authority would have opposed the provision of those guarantees, had it been

41. On whether the criterion of involvement means involvement in the actual measure of involvement in general, e.g. below Case C-242/13 *Commerz Nederland / Havenbedrijf Rotterdam* [2014], EU:C:2014:2224.

42. Opinion of Advocate General Jacobs in Case C-482/99 *France / Commission (“Stardust Marine”)* [2002] ECR I-04397, para. 62.

43. Opinion of Advocate General Jacobs in Case C-482/99 *France / Commission (“Stardust Marine”)* [2002] ECR I-04397, para. 64, 65 and 68.

44. Case C-482/99 *France / Commission (“Stardust Marine”)* [2002] ECR I-4397, para. 53 and 55.

45. Case C-482/99 *France / Commission (“Stardust Marine”)* [2002] ECR I-4397, para. 56.

46. Case C-242/13 *Commerz Nederland / Havenbedrijf Rotterdam* [2014], EU:C:2014:2224, para. 33.

47. Case C-242/13 *Commerz Nederland / Havenbedrijf Rotterdam* [2014], EU:C:2014:2224, para. 34.

informed of it. The Court of Justice ruled that it was for the referring court to examine whether, in the light of *all the relevant evidence*, those factors were such as either to establish or exclude the involvement of the municipality of Rotterdam in the provision of those guarantees.<sup>48</sup>

Generally, it can be observed that the Commission has set for itself a higher standard of proof – probably in order to make the decision as court proof as possible.<sup>49</sup>

In its 2005 decision *DVB-T Berlin-Brandenburg*,<sup>50</sup> the Commission found that the media authority of Berlin-Brandenburg ('Mabb'), had given subsidies to commercial broadcasters, for example RTL and ProSiebenSat.1, to meet part of their transmission costs via the DVB-T network launched in November 2002. In return, the broadcasters undertook to use the DVB-T network licensed to the company T-Systems for at least five years. The Commission considered that Mabb, although independent from the government, was a public authority. First of all, it was established by the State Media Treaty of the Länder of Berlin and Brandenburg, which also defined Mabb's organisational structure and assigned to Mabb a broad range of public tasks in the field of broadcasting and frequency management. Moreover, Mabb was subject to legal supervision by the Land governments of Berlin and Brandenburg and its annual budget was subject to control by the Court of Auditors of the Land of Berlin. Mabb acted on provisions of the State Media Treaty when it adopted the statutes granting the advantages to certain broadcasters. The Commission therefore considered that the measure was imputable to the State.

In its decision in *ABX Logistics* of 2005,<sup>51</sup> the Commission noted that (i) the directors of the Belgian national railway company SNCB/NMBS were appointed by the King, according to interested parties on political grounds; (ii) a government commissioner was appointed by the board of directors as well as the management board as a mechanism to ensure that the law and statutes of SNCB/NMBS were observed and (iii) the statutory public task of SNCB/NMBS. Moreover, the Commission relied upon the record of the Council of Ministers as well as a related press release "*which clearly show the involvement of the Government, at that date, in the decision on the restructuring of ABX*".

Also in more recent decisions the Commission relied on indirect indicators. In *Ducroire/Delcredere*<sup>52</sup> for instance, a case involving the Belgian export credit agency ONDD, the Commission established imputability based on the following factors: (i) the ONDD was an autonomous public institution under Belgian public law, (ii) the members of the Board of Directors were appointed and dismissed by the government, that also set the remunerations, (iii) those members of the Board known as 'ministerial delegates' appointed on a proposal from the supervising ministers may suspend decisions during Board deliberations and (iv) the ONDD benefits from a Belgian State guarantee. Moreover, the Commission also found a

48. Case C-242/13 *Commerz Nederland / Havenbedrijf Rotterdam* [2014], EU:C:2014:2224, para. 33-38. The case is still at the Dutch Supreme Court (September 2015).

49. Van de Castele, K. and Grespan, D. (2008), 'Granted by a Member State or Through State Resources in Any Form Whatsoever': State Resources and Imputability, in Mederer, Pesaresi and Van Hoof (eds.), *EU Competition Law: State Aid*, Vol IV, Leuven: Claeys and Casteels, para. 2.136.

50. Commission Decision 2006/513 of 9 November 2005 – *Digital terrestrial television (DVB-T)* para. 53 (OJ L 200, 22.7.2006, p. 14).

51. Commission Decision C 53/2003 of 7 December 2005 – *ABX Logistics*, para. 66-73 (OJ L 383, 28.12.2006, p. 21).

52. Commission Decision SA.23420 of 20 March 2013 – *SA Ducroire/Delcredere NV*, para. 174 (OJ L 144, 15.5.2014, p. 29).

direct indicator, as the ministerial delegate who suspended the decision in this particular case must report to the minister who nominated him as a Board member.

It follows from *Olympiaki Aeroporia* (2007) that the Commission is to include an adequate and understandable statement of reasons in its decision.<sup>53</sup> The Commission had found in that case that the tolerance of the Hellenic Republic with regard to the persistent failure of Olympic Aviation – Olympiaki Aeroporia’s subsidiary – to pay VAT on fuel and spare parts constituted new State aid. Thus, the Commission assumed imputability to the State. The General Court, however, pointed out an inherent inconsistency in the Commission Decision. The Commission had established that the parent company, Olympiaki Aeroporia, purchased the fuel before selling it on to Olympic Aviation. Therefore, Olympiaki Aeroporia rather than Olympic Aviation was liable for the VAT claims. The General Court held that “*having regard to the fact that compliance with the obligation to state reasons is a substantive procedural requirement infringement of which the Community Courts may raise of their own motion, it is sufficient to hold that the contested decision is inadequately reasoned in so far as it concludes that there was tolerance of Olympic Aviation’s failure to pay VAT*”.<sup>54</sup>

### 3.5 Imputability for implementation of EU directives

EU Member States are required to implement the rules of Community law, for instance an EU directive. In doing so, and if the State is merely implementing a directive in national legislation, these measures are not imputable to the State. Otherwise, a lawful legislative act adopted by the Community legislature would be subject to review under Art. 107(1) TFEU.<sup>55</sup>

This was confirmed by the General Court in *Deutsche Bahn* concerning a tax exemption for airlines required by Union law.<sup>56</sup> Deutsche Bahn, the national railway company, submitted that the tax exemptions led to a financial advantage for the airlines, and that it therefore constituted State aid. According to Deutsche Bahn, the measures in question were imputable to the German State.

The Court of Justice held, in separate proceedings, that the directive central to the case imposed on EU Member States a clear and precise obligation not to levy the harmonised excise duty on fuel used for the purpose of commercial air navigation. Contrary to Deutsche Bahn’s submission, the degree of latitude afforded to EU Member States by the directive, which stated that the exemptions are granted by the EU Member States ‘under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse’, applied only to the wording of the conditions for implementing the exemption referred to and did not affect the unconditional nature of the obligation imposed by that provision to grant exemption. The

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53. Case T-68/03 *Olympiaki Aeroporia Ypiresies* [2007] ECR II-2911, para. 348-349 and 363-365.

54. Case T-68/03 *Olympiaki Aeroporia Ypiresies* [2007] ECR II-2911, para. 349.

55. Opinion of Advocate General Trstenjak in Case C-431/07 *Bouygues SA and Bouygues Télécom SA / Commission* [2009] ECR I-02665, para. 114-115: “*It is therefore necessary to examine whether [...] the French authorities merely fulfilled their obligations under the Community framework, that is to say, under Article 10 EC and the third and fourth paragraphs of Article 249 EC. If so, it would mean that the measure is not imputable to the French State but arises, in actual fact, from an act on the part of the Community legislature and is therefore not subject to Article [107] (1) EC*”.

56. Case T-351/02 *Deutsche Bahn* [2006] ECR II-1047.

General Court ruled: “in transposing the exemption into national law, Member States are only implementing Community provisions in accordance with their obligations stemming from the Treaty. Therefore, the provision at issue is not imputable to the German State, but in actual fact stems from an act of the Community legislature”.<sup>57</sup>

The same was ruled by the Court of Justice in *Sandra Puffer*, concerning tax deductions under a tax directive. The implementation of the directive led to a difference in treatment between economic operators making taxable supplies and those making exempt supplies. As the Advocate General pointed out, this different treatment cannot be ascribed to an individual State. It is an integral part of the VAT system set up by Community harmonising legislation which must be implemented in the same way by all EU Member States. Consequently, the condition of intervention by the State is not met, meaning that the State aid rules cannot apply.<sup>58</sup>

This is different in situations where EU law allows for certain national measures and the EU Member State enjoys discretion (i) on whether to adopt the measures in question or (ii) in establishing the characteristics of the concrete measure which are relevant from a State aid perspective.<sup>59</sup>

It emerges from *Deutsche Bahn* that only the implementation of provisions in EU directives that allow no discretion to the EU Member State precludes imputability. Examples of cases in which EU legislation was implemented but the measure was still imputed to the EU Member State are rare.

The judgements in *NOx* provide some insight. Both the General Court and the Court of Justice were requested to rule on the implementation of Directive 2001/81 (“NEC” Directive) by the Netherlands. The Commission cleared the proposed ‘dynamic cap system’, through which the top 250 largest polluters in 2004 were assigned tradable emission rights, as a State aid compatible with the Single Market.<sup>60</sup> The Commission reached the same conclusion as to State resources and imputability to the State in other Decisions concerning the implementation of the NEC Directive.<sup>61</sup> In appeal, the General Court held that the measure was not selective and thus did not constitute a State aid.<sup>62</sup> The Court of Justice, however, sided with the Commission in finding that the measure did qualify as State aid.<sup>63</sup> The debate in *NOx* focused primarily on the notion of selectivity whilst the issue of imputability with regard to the implementation of the NEC Directive was not clearly addressed.

On the contrary, in a related context, that of the EU Emissions Trading System (“ETS”), the Commission has taken a clearer stance. The EU ETS launched in 2005, is the cornerstone of the European Union’s drive to reduce its emissions of greenhouse gases. The system works by putting a limit (a ‘cap’) on overall emissions from large emitters in the industrial sector, including

57. Case T-351/02 *Deutsche Bahn* [2006] ECR II-1047, para. 103.

58. Case C-460/07 *Sandra Puffer* [2009] ECR I-3251, para. 70; Opinion of Advocate General Sharpston in Case C-460/07 *Sandra Puffer* [2009] ECR I-3251, para. 70.

59. Notice on the notion of State aid, point 45.

60. Commission Decision N 35/2003 of 24 June 2000 – *NOx Trading Scheme*, (OJ C(2003) 1761).

61. Commission Decision N 653/1999 of 12 June 2000 – *CO<sub>2</sub> Quotas*, (OJ C 322/9); Commission Decision 416/2001 of 28 November 2001 – *Emissions Trading Scheme*, (OJ C88/16); Commission Decision N 692/2006 of 21 February 2007 – *UK Large Combustion Plants National Emission Reduction Plan*, (OJ C 77/1).

62. Case T-233/04 *NOx* [2008] II-00591, para. 84-00.

63. Case C-279/08P *NOx* [2011] I-07671, para. 61–63.

power generation. Within this limit, companies can buy and sell emission allowances as needed. The purpose of this ‘cap-and-trade’ approach is to fix a target (the cap) and give companies incentives to cut their emissions in the most cost-effective way.<sup>64</sup> The ETS directives have imposed on Member States the obligation to grant (during a long transition period) emission rights for free to certain industrial sectors identified to be at risk of losing substantial market share in a context of international competition. The free granting of these rights is not deemed to be imputable to the State. By contrast, where the Member State does have discretion, as is the case in the compensation Member States can give to certain electro-intensive industries for the increased cost of electricity linked to ETS, there is imputability to the State.<sup>65</sup>

A similar basic principle applies to the distribution of EU resources, for instance the EU Structural Funds and the Cohesion Fund. It may be inferred that when an EU Member State enjoys a wider margin of discretion in the allocation of what are essentially EU resources, these measures must be in concordance with the State aid rules. Thus, even though formal Commission approval is required under the various EU co-financing mechanisms, the measure is imputed to the Member State. The Commission held, e.g., that a project “*partly financed with European structural funds, which qualify as state resources once they come under the control of a Member State [ ... ]*”, may constitute State aid.<sup>66</sup> The question may be raised whether the process is fully efficient, however. After all, there is no *a priori* reason why the Commission approval could not already take into account the State aid control dimension of the measure. Having said this, it is true that the State aid control procedure is quite specific (e.g. in the procedural rights it gives to complainants), so that a distinct ‘State aid control path’ would probably need to be preserved in any case.

By contrast, if the resources are awarded directly by the EU, without the intervention of a Member State, they do not qualify as State resources. Nevertheless, in such cases, principles similar to the substantive provisions of State aid law may apply, by virtue of secondary Union legislation.<sup>67</sup>

#### 4. STATE RESOURCES

As indicated in the introduction, only advantages granted directly or indirectly through State resources are capable of being classified as State aid.<sup>68</sup>

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64. Verouden, V.(2012), *State aid and EU climate policy*, Concurrences seminar (12.12.2012).

65. Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post 2012 (OJ C 154, 05.06.2012, p. 4).

66. Commission Decision N 157/2006 of 22 November 2006 – *South Yorkshire Digital Region Broadband Project*, (OJ C 80), para. 29; Notice on the notion of State aid, point 60.

67. E.g. Notice on the notion of State aid, point 60; e.g. also the 2014 Joint statement by Joaquín Almunia, former European Union Commissioner for Competition, and Werner Hoyer, President of the European Investment Bank (EIB), on State aid matters in relation to the activities of the EIB Group, available at: [http://europa.eu/rapid/press-release\\_IP-14-53\\_en.htm](http://europa.eu/rapid/press-release_IP-14-53_en.htm).

68. Notice on the notion of State aid, point 47.

#### 4.1 Public sector resources

Most obviously, all resources from the public sector are regarded as State resources. As the General Court held in *Air France* (discussed previously):

*“It follows that all subsidies from the public sector threatening the play of competition are caught by the abovementioned provisions, it being unnecessary for those subsidies to be granted by the government or by a central administrative authority of a Member State.”*<sup>69</sup>

This specifically includes all resources of intra-State entities such as decentralised, federated, regional or other public authorities.<sup>70</sup> As the Court of Justice put it in its 1984 judgment *Germany/Commission*, “the fact that the aid programme was adopted by a State in a federation or by a regional authority and not by the federal or central power does not prevent the application of Article [107(1)] if the relevant conditions are satisfied.”<sup>71</sup> Art. 107(1) TFEU is directed at all aid financed from public resources, including aid granted by regional and local bodies of the EU Member States, whatever their status and description. Even if an institution within the public sector enjoys some autonomy, its resources can still qualify as State resources and consequently, its measures as State aid.<sup>72</sup>

#### 4.2 Resources from State-owned enterprises (public undertakings)

Resources from State-owned enterprises (public undertakings) may as well fall under the definition of State resources. This is because the State is capable, by exercising its dominant influence over such companies, of directing the use of their resources in order, as occasion arises, to finance specific advantages in favour of other companies. Contrary to what the French government argued in *Stardust Marine*, such an interpretation cannot be regarded as a possible source of discrimination against State-owned enterprises as compared with private companies, because the position of a State-owned enterprise cannot be compared with that of private companies, according to the Court of Justice. Through its control over State-owned enterprises, the State may pursue objectives other than commercial ones.<sup>73</sup>

In *Greece/Commission* of 2004, the Hellenic Republic claimed that the settlement of debts of several types of cooperatives by ABG, the Agricultural Bank of Greece, could not be regarded as State aid, since they did not involve State resources. It argued that ABG did not receive compensation from the Greek State for writing off these debts. The Commission considered that ABG was a public-sector bank whose sole shareholder was the Greek State and which was controlled by the Greek State. Moreover, the Commission considered that by Greek law, ABG could help agricultural cooperatives to pay outstanding debts. Therefore, the Commission qualified ABG’s resources as State resources. The Court of Justice agreed that ABG was under the control of the Greek State to a significant degree: “It is not disputed that the

69. Case T-358/94 *Air France / Commission*, EU:T:1996:194, para. 56.

70. Notice on the notion of State aid, point 48.

71. Case 248/84 *Germany / Commission*, ECR 4013, para. 17.

72. Case T-92/00 *Territorio Histórico de Álava – Diputación Foral de Álava* [2002] ECR II-1385, para. 57.

73. Case C-482/99 *France / Commission (“Stardust Marine”)* [2002] ECR I-4397, para. 38 and 39.

Greek State is the ABG's sole shareholder and that it appoints the members of its board of directors. The Greek State can thus have a dominant influence, directly or indirectly, on the use of the ABG's financial resources. Therefore, the Commission was right to conclude, in point 105 of the statement of reasons for the contested decision, that the rescheduling of debts under Article 5 of Law No. 2237/94 involved the use of State resources."<sup>74</sup> The Court of Justice did not consider it relevant whether ABG got compensated by the Greek State, because its resources were already State resources within the meaning of Art. 107(1) TFEU.

Not only companies whose *entire* capital is held by a State, are viewed as State-owned enterprises whose resources are considered State resources. In *Italy and SIM 2 Multimedia / Commission*, the financial resources of Friulia were also considered State resources. However, as the Italian State pointed out, "only" 87% of Friulia's authorised capital belonged to the Region of Friulia-Venezia Giulia, with the remainder being held by private partners who also enjoyed "wide powers of decision-making and disinvestment".<sup>75</sup> The Commission nevertheless considered that Friulia came under the control of the region and that consequently, its financial resources were State resources. The Court of Justice ruled that the Commission was right in holding in the contested decision that Friulia's operations were carried out by means of State resources, since those resources "constantly remained under public control and were therefore available to the competent national authorities."<sup>76</sup>

Perhaps counter-intuitively, it is also possible for a State-owned enterprise to be both a donor and a recipient of State aid. This was the case in joined cases *Freistaat Sachsen and Land Sachsen-Anhalt / Commission* of 2008.<sup>77</sup> It concerned the relocation of DHL's European air freight hub from Brussels to Leipzig-Halle in Germany. Flughafen Leipzig-Halle GmbH ("FLH") and its parent company Mitteldeutsche Flughafen AG ("MF") received a capital contribution from their public shareholders of € 350 million to build a new runway at Leipzig-Halle. FLH and MF also entered into a framework agreement with DHL under which FLH was obliged to construct the runway, and to guarantee continuous air access to DHL. In addition, under the framework agreement DHL received certain advantages and guarantees.<sup>78</sup> The Commission decided (i) that the capital contribution which Germany planned to grant to FLH for the construction of a new runway and related airport infrastructure was State aid (albeit compatible with the common market), but (ii) that the framework agreement between MF and FLH on the one hand and DHL on the other hand constituted State aid as well because MF and FLH hedged business risks for DHL at terms which a private investor operating in normal conditions of a market economy would not have accepted.<sup>79</sup>

74. Case C-278/00 *Greece / Commission* [2004] I-3997, para. 53-54; Opinion of Advocate General Geelhoed in Case C-278/00 *Greece / Commission* [2004] ECR I-3997, para. 111-116.

75. Joint Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia / Commission* [2003] ECR I-4035, para. 24.

76. Joint Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia / Commission* [2003] ECR I-4035, para. 33-34.

77. Joint Cases T-443/08 and T-455/08 *Freistaat Sachsen and Land Sachsen-Anhalt / Commission* [2011] ECR II-1311. For a more elaborate description, e.g. also Chapter III.1 of this volume.

78. Joint Cases T-443/08 and T-455/08 *Freistaat Sachsen and Land Sachsen-Anhalt / Commission* [2011] ECR II-1311, para. 1-6.

79. Joint Cases T-443/08 and T-455/08 *Freistaat Sachsen and Land Sachsen-Anhalt / Commission* [2011] ECR II-1311, para. 13-15.

MF, FLH and Germany appealed this decision, arguing first, that FLH, as a State-owned enterprise, could not be the recipient of State aid, and secondly, that the decision was contradictory since FLH was regarded both as a recipient and a donor of aid, but that those two functions were irreconcilable. The General Court disagreed on both points. It first explained that a State-owned enterprise may well be the recipient of State aid. It repeated that:

*“It must once again be recalled that, in the context of competition law, the concept of ‘undertaking’ covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. In this regard, it must be stated that, save for the reservation in Article [106(2) TFEU], Article [107 TFEU] covers all private and public undertakings and all their production.*

It must also be pointed out that the existence or otherwise of legal personality distinct from that of the State, conferred by national law, does not prevent the existence of financial relations between the State and its organs carrying on economic activities and consequently, the possibility that those organs might receive State aid within the meaning of Article [107(1) TFEU].

*Thus, just as it cannot be accepted that the rules on State aid can be circumvented merely through the creation of autonomous institutions charged with allocating aid, it cannot be tolerated that the mere fact of creating an SPV could exempt the latter from those rules. It must be considered whether that body carries on an economic activity and may therefore be classified as an undertaking and whether it obtained a transfer of State resources.”<sup>80</sup>*

The General Court then ruled that FLH engaged in an economic activity and therefore had to be regarded as an undertaking within the meaning of Art. 107(1) TFEU. It was also common ground that it received public financing in the form of the capital contribution granted directly to FLH by public bodies. Under those circumstances, FLH could be the recipient of State aid.<sup>81</sup> In regards to the second argument raised by the applicants, that FLH could not at the same time be the grantor and recipient of State aid, the General Court ruled that these classifications are not incompatible, since the State aid at issue was distinct and was examined separately. The Court ruled that:

*“a public undertaking can be the recipient of aid once the undertaking is active in the marketplace. However, nothing prevents the said undertaking from also granting aid by way of a separate measure. Thus, aid can be granted, not only directly by the State, but also by public or private bodies which the State establishes or designates with a view to administering the aid. The State is perfectly capable, by exercising its dominant influence over public undertakings, of directing the use of their resources in order, as occasion arises, to finance specific advantages in favour of other undertakings. The applicants are therefore*

80. Joint Cases T-443/08 and T-455/08 *Freistaat Sachsen and Land Sachsen-Anhalt / Commission* [2011] ECR II-1311, para. 128-130.

81. Joint Cases T-443/08 and T-455/08 *Freistaat Sachsen and Land Sachsen-Anhalt / Commission* [2011] ECR II-1311, para. 128-135.

*wrong to claim that undertakings within the meaning of Article [107 TFEU] cannot grant aid and that FLH must either be attached to the State or regarded as an undertaking.”<sup>82</sup>*

In the light of the foregoing and of the fact that the aid measures at issue were distinct from each other, the General Court considered that there was nothing to prevent FLH being, on the one hand, as a public body, the donor of the aid received by DHL by way of the Framework Agreement but also, as a company active in the airports market, being the recipient of State aid, in that case the capital contribution.<sup>83</sup>

### 4.3 Resources must enter under control of the State

The origin of the resources as such is not relevant provided that these resources are available to, and enter under the public control of the national authorities, even if the resources do not become the property of those public authorities.<sup>84</sup>

This was already determined by the Court of Justice in 1974. In its landmark case *Italy / Commission* the Court of Justice had to rule over a measure imposed by the Italian government which granted a reduction in the social charges pertaining to family allowances for the benefit of the textile and garment-making industry and small crafts. The Italian government pointed out that the Italian textile industry was handicapped by the imposition of social charges which did not take into account the peculiarities of the industry. As a result of the industry having a particularly high proportion of female employees, a much higher amount was paid by companies in the textile sector as social security contributions than the amount of social security benefits that was received in the sector. The objective of the measure was to partially exempt those companies from the financial burdens arising from the normal application of the general system of compulsory contributions imposed by law. According to the Italian government, the measure did not constitute aid. This was because it was not granted “through State resources”, since the loss of revenue resulting from the reduction in contributions relating to family allowances was offset by revenue accruing from (extra) contributions made by employers to the unemployment insurance fund. In other words, through charges which did not fall on the community as a whole. The Court of Justice did not accept this argument and ruled that “*as the funds in question are financed through compulsory contributions imposed by State legislation and as they are managed and apportioned in accordance with the provisions of that legislation, they must be regarded as State resources, even if they are administered by institutions distinct from the public authorities.*”<sup>85</sup>

Similarly, the Court of Justice has stated in *Steinike*, a case that concerned a fund set up for the promotion of products of the German agricultural, forestry and food industry and financed *inter alia* by contributions from companies in the agricultural, forestry and food sector that: “*The prohibition contained in Article 92 (1) covers all aid granted by a Member State or through*

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82. Joint Cases T-443/08 and T-455/08 *Freistaat Sachsen and Land Sachsen-Anhalt / Commission* [2011] ECR II-01311, para. 143.

83. Joint Cases T-443/08 and T-455/08 *Freistaat Sachsen and Land Sachsen-Anhalt / Commission* [2011] ECR II-01311, para. 145.

84. Notice on the notion of State aid, point 57.

85. Case 173/73 *Italy / Commission* [1974] EU:C:1974:71, para. 16.

*State resources without its being necessary to make a distinction whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid*.<sup>86</sup>

The Court of Justice ruled in 1992 in *Compagnie Commerciale de l'Ouest* that the same applies to parafiscal charges, i.e. indirect taxes to certain products. The case concerned proceedings between a number of companies trading in petroleum products and the French customs administration concerning the legality of a parafiscal charge levied in France on certain petroleum products. The charge was applied under the same conditions to both domestic and imported products, however, the proceeds of the charge were used for the benefit of domestic products only, so that the advantages accruing from it offset the burden borne by domestic companies. The Court of Justice ruled that, depending on how the revenues from the parafiscal charge were used exactly, in this case to benefit the domestic products over the imported products, these charges might constitute State aid.<sup>87</sup>

#### 4.4 Private resources do not constitute aid ...

The above case law shows that the origin of the resources is not relevant, as long as the resources enter under public control and are available to public authorities, before being transferred to the beneficiaries. It is not always easy to distinguish this from purely private resources. Regulation that leads to financial redistribution from one private entity to another, without any further involvement of the State, does not entail a transfer of State resources. If the money flows directly from one private entity to another, without passing through a public or private body designated by the State to administer the transfer, it does not constitute aid.<sup>88</sup>

Already in 1978, the Court of Justice made clear that the advantages granted to certain economic operators as a result of price-control rules imposed by the State, cannot qualify as State aid since “*the advantages which such an intervention in the formation of prices entails for the distributors of the products are not granted, directly or indirectly, through State resources*”<sup>89</sup>

A much debated case in which this principle was also applied, is *PreussenElektra*.<sup>90</sup> In this case from 2001 the Court of Justice ruled that only advantages granted directly or indirectly through State resources are to be regarded as aid. Private resources, even if channelled as a result of State intervention, do not constitute State aid. The case concerned measures which were decided upon by the State but financed by private companies. More specifically, private electricity supply companies were required by law to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value, and the financial burden arising from that obligation was allocated by that law amongst those electricity supply companies and upstream private electricity network operators. The State had a fundamental role in determining the level of compensation granted to specific producers, but its intervention was limited to setting up the legislative framework. The measure did “*not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity*”. This led to the conclusion that the measure could not “*be regarded as constituting a*

86. Case 76/78 *Steinike & Weinlig v Germany* [1977] ECR 595, para. 21.

87. Joint Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest* [1974] ECR 709, para. 31 and seq.

88. Notice on the notion of State aid, point 61.

89. Case 82/77 *Van Tiggele* [1978] ECR 25, para. 25.

90. Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

*means of granting to producers of electricity from renewable energy sources a particular advantage at the expense of the State*”<sup>91</sup>

As such, in *PreussenElektra* the Court of Justice embraced the narrow view of what constitutes State aid, namely that the resources granted have to belong to a State budget or to any other budget of a public entity or private body designated by the State.<sup>92</sup> The Court of Justice followed AG Jacobs in this respect, whose opinion had discussed the two possible interpretations of the requirement “State resources”:<sup>93</sup>

“115 On the one hand, it might be argued that the second alternative aid granted ‘through State resources’ covers measures financed through public funds, whilst the first alternative ‘aid granted by a Member State’ covers all remaining measures which are not financed through State resources. Under that extensive interpretation of Article 92(1) any measure which confers economic advantages on specific undertakings, and which is the result of conduct attributable to the State, constitutes State aid independently of whether it involves any financial burden for the State.

116 On the other hand, Article 92(1) may be read as stating that aid must necessarily be financed through State resources and that the distinction between aid granted by a State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State. Under that second narrower interpretation the measure at issue must necessarily cost the State money and financing through public resources is a constitutive element of the definition of State aid.

117 It is now well-established case-law [Van Tiggele] that the second reading prevails and that only advantages which are granted directly or indirectly through State resources are to be regarded as State aid within the meaning of Article 92(1).”

The authors note that, as has been put forward elsewhere,<sup>94</sup> the judgment in *PreussenElektra* seems to focus very much on the formal requirements of State resources, thereby allowing for support measures with a similar economic effect to State aid measures. While this narrow view might improve legal certainty, at the same time the judgment is often criticized as being overly formalistic.<sup>95</sup> Moreover, the *PreussenElektra* case is often difficult to distinguish from the case law

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91. Case C-379/98 *PreussenElektra* [2001] ECR I-2099, para. 59–62.

92. Koenig, C. and Kühling, J. (2002), EC control of aid granted through State Resources, *European State Aid Law Quarterly* 2002(1), p. 7-18.

93. Opinion of Advocate-General Jacobs in Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

94. Van de Castele, K. and Grespan, D. (2008), ‘Granted by a Member State or Through State Resources in Any Form Whatsoever’: State Resources and Imputability, in Mederer, Pesaresi and Van Hoof (eds.), *EU Competition Law: State Aid*, Vol IV, Leuven: Claeys and Casteels, para. 2.29; Sinnaeve, A., Het arrest Pearle: bekijkt het Hof het begrip Staatssteun met een nieuwe bril?, *NTER* (2004-10,01); G. Schohe und C. Arhold, *European State Aid Law Quarterly*, (2002-01,33), Die Rechtsprechung von EuGH und EuG zu staatslichen Beihilfen in den Jahren 1998-2002, p. 36.

95. Talus, K. (2013) *EU Energy Law and Policy: A Critical Account*, Oxford University Press, e.g. in particular p. 142.

discussed under subsection 1.4.3 which appeared to suggest that the origin of the resources is as such not relevant. The difference is that in the *PreussenElektra* case, the resources were never under the public control of the national authorities. They were transferred directly from one private company to another, without a transit through a public or private entity designated to channel them to the beneficiaries. The resources central to the cases *Italy / Commission* and *Compagnie Commerciale de l'Ouest* had entered under public control and had therefore been available to the national authorities.

The Court of Justice confirmed this approach in the *Pearle* case in 2004. *Pearle* was a company established in the Netherlands active in the optical sector, and affiliated with a trade association governed by public law, HBA. The HBA imposed on its members, for the first time in 1988, a “compulsory earmarked levy” to finance a collective advertising campaign for the companies in the sector. *Pearle* and the other appellants took the view that the collective advertising campaigns organised by the HBA were of benefit primarily to their competitors, and sought ways to challenge the levy. They argued that the services provided by means of the advertising campaigns constituted State aid. The Dutch *Hoge Raad* referred preliminary questions to the Court of Justice on the notion of imputability (see above under subsection 1.3.3) and State resources. AG Colomer’s “*instinctive response [was] that the Community legislature did not have in mind initiatives launched by an incorporated trade body and financed from the contributions of its members when it laid down the prohibition contained in Article [107(1)]*”<sup>96</sup> He then analysed that the central question was whether the advertising campaign could be regarded as being financed from public resources. The requirements for resources to be regarded as State resources comprise “*firstly, that such resources should be linked to the State, or to a body which forms part of the structure of the State [...], [and] secondly, [that] those resources must be attributable to the State or to the relevant public body in such a way that it is able to exercise a sufficient degree of control over them*”<sup>97</sup> AG Colomer then observed that “*it would be appropriate to take the view that the HBA has not acted as an emanation of the State, and that the capital which it used could not have been public in nature either.*”<sup>98</sup>

The Court of Justice followed the AG’s reasoning and ruled that:

*“it does not in the circumstances of the case appear that the advertising campaign was funded by resources made available to the national authorities. On the contrary, the judgment making the reference makes it clear that the monies used by the Board for the purpose of funding the advertising campaign were collected from its members who benefited from the campaign by means of compulsory levies earmarked for the organisation of that advertising campaign. Since the costs incurred by the public body for the purposes of that campaign were offset in full by the levies imposed on the undertakings benefiting therefrom, the Board’s action did not tend to create an advantage which would constitute an additional burden for the State or that body.”*<sup>99</sup>

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96. Opinion of Advocate General Colomer in Case C-345/02 *Pearle and others* [2004] ECR I-7139, para. 55.  
 97. Opinion of Advocate General Colomer in Case C-345/02 *Pearle and others* [2004] ECR I-7139, para. 67-68.  
 98. Opinion of Advocate General Colomer in Case C-345/02 *Pearle and others* [2004] ECR I-7139, para. 73-74.  
 99. Case C-345/02 *Pearle and others* [2004] ECR I-7139, para. 36.

Thus, since the costs associated with the advantage were not “public” in nature and were offset by the contributions from the beneficiaries of the advantage, no State resources were used.

In *Doux Élevages*, discussed under subsection 1.3.3 above as regards the imputability element, the question was raised whether the compulsory contributions to an inter-trade organization could be classified as State resources.<sup>100</sup> The Court of Justice considered that the contributions were made by private-sector economic operators, that they did not involve any direct or indirect transfer of State resources, that the sums provided by the payment of those contributions did not go through the State budget or through another public body and that the State did not relinquish any resources which should have been paid into the State budget. Consequently, the contributions remained private in nature throughout their lifecycle and, in order to collect those contributions in the event of non-payment, the inter-trade organisation had to follow the normal civil or commercial judicial process, not having any State prerogatives.

The Court of Justice further set out that the funds did not need to be available to the State permanently to classify as State resources; “*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*”. The Court therefore assessed whether the resources were available to the State. The Court ruled that this was not the case:

*“it is clear that the national authorities cannot actually use the resources resulting from the contributions at issue in the main proceedings 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.”*<sup>101</sup>

#### 4.5 ... or do they?

In the years following its judgment in *PreussenElektra*, the Court of Justice rendered several judgment in more cases concerning the energy market in various EU Member States (most notably *Essent Netwerk Noord* in 2008,<sup>102</sup> and *Vent de Colère!* in 2013<sup>103</sup>). These cases resembled the factual situation in *PreussenElektra* to a large extent. Nevertheless, while the Court of Justice ruled in *PreussenElektra* that no State resources were involved, the Court of Justice in

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100. Case C-677/11 *Doux Élevages and Coopérative agricole* [2013] EU:C:2013:348.

101. Case C-677/11 *Doux Élevages and Coopérative agricole* [2013] EU:C:2013:348, para. 32-36. The Court further noted that the question referred to it only concerned contributions levied within an inter-trade organisation, not other possible resources which may originate from the State budget (para. 42-44). The Court established that the fact that private funds are used alongside sums which may originate from the State budget, does not mean that these funds become State resources. It side-stepped the question of what would happen if the private contributions would not be sufficient to cover the costs of the inter-trade organization (which was also co-financed directly by the State). The facts presented in the ruling (a preliminary ruling) do not allow for further conclusions in this regard. The potential financial exposure to the State does appear to play an important role in other contexts, as set out in subsection 1.4.5. *E.g. also* Derenne, J., Citron, P., Domecq, M., and Mylrea-Lowndes, T., (2014), Recent Developments in State Aid Law, *Journal of European Competition Law & Practice*, Vol 5, No. 1, p. 60.

102. Case C-206/06 *Essent Netwerk Noord* [2008] ECR I-5497.

103. Case C-262/12 *Vent de Colère!* [2013] EU:C:2013:851.

*Essent Network Noord* and *Vent De Colère!* came to a different conclusion. While this may be interpreted as a break in the case law of the Court of Justice, the authors consider that the latter two cases are indeed compatible with and a further development of the principles established in *PreussenElektra*.

Taking a closer look at the facts giving rise to the *Vent de Colère!* case, this case concerned the promotion of certain forms of “green energy”, namely wind energy. France introduced an obligation on certain companies to purchase electricity from wind energy for a price that was above the then market price for electricity. At the same time, France developed a compensation mechanism for the additional costs incurred by those companies. Until 2003, the additional costs arising from the obligation to purchase were offset in full through a public service fund for the generation of electricity financed by charges payable by the producers, suppliers and distributors referred to in the law. After an amendment of the law in 2003 however, those additional costs were secured through charges payable by final consumers of electricity, the amount of which was calculated in proportion to the quantity of electricity consumed and determined by the Minister for Energy by order on a proposal from the *Commission de régulation de l'énergie*. The final consumers paid this amount as a surcharge on their electricity bill to the electricity providers. The latter had to transfer the difference between the costs arising from the obligation to purchase and the surcharges received from its customers to the *Caisse des Dépôts et Consignations* (a public long term investment group, the “CDC”). Four times a year, these charges were repaid by CDC to the electricity providers with a negative balance. CDC maintained a specific account for that purpose. In the event that the charges collected from final consumers would be insufficient to cover the additional costs, the French State would cover the deficit.<sup>104</sup>

The association *Vent de Colère!* filed a claim before France’s highest administrative court (the *Conseil d’Etat*) claiming that this compensation system constituted State aid. According to the referring court, the purchase of electricity generated by wind power installations at a price higher than the market price is an advantage that may affect trade between EU Member States and may also affect competition.<sup>105</sup> With regard to the criterion of aid granted by an EU Member State or through State resources, the *Conseil d’État* was uncertain as to how to apply the case law developed in *PreussenElektra* and *Essent Network Noord*. Specifically, the *Conseil d’État* wondered whether the amendment of the law in 2003 changed the assessment of whether State resources were at stake.

The *Conseil d’État* stated that, for the system in place before 2003, it applied the judgment in *PreussenElektra*, holding that the financial burden of the obligation to purchase enjoyed by wind power installations was shared amongst a certain number of companies, without public resources contributing, directly or indirectly, to the financing of the aid. The *Conseil d’État* had therefore taken the view that the mechanism *then* in force for the purchase of the electricity generated by wind power installations did not constitute State aid. However, the *Conseil d’État* then observed that in *Essent Network Noord*, the Court held that financing by means of a price surcharge imposed by the State on purchasers of electricity, constituting a charge, with the monies remaining, furthermore, under the control of the EU Member State, had to be regarded

104. Case C-262/12 *Vent de Colère!* [2013] EU:C:2013:851, para. 1-13; Opinion of Advocate General Jääskinen in Case C-262/12 *Vent de Colère!* [2013] not yet published in ECR, para. 1-14.

105. Case C-262/12 *Vent de Colère!* [2013] EU:C:2013:851, para. 9.

as an intervention by the State through State resources.<sup>106</sup> The *Conseil d'État* therefore referred a preliminary question to the Court of Justice asking, in essence, whether a mechanism for offsetting in full the additional costs imposed on companies because of an obligation to purchase wind generated electricity at a price higher than the market price that is financed by final consumers, must be regarded as an intervention by the State or through State resources.<sup>107</sup>

The Court first took a closer look at the CDC, finding *inter alia* that it centralised the sums collected in a special account before paying them out, thereby acting as an intermediary in the management of those funds. Moreover, the CDC was a public law corporation, whose general manager was appointed by the President of the Republic within the Council of Ministers. The CDC – under a mandate from the French State – furthermore provided administrative, financial and accounting management services for the *Commission de régulation de l'énergie*, the independent administrative authority responsible for ensuring the proper functioning of the market for electricity and gas in France. The CDC also determined late payments or defaults in payment by final consumers and reported them to that regulatory authority.

The Court of Justice therefore referring to the 1973 judgment in *Italy / Commission*,<sup>108</sup> where it held that funds financed through compulsory charges imposed by legislation, managed and apportioned in accordance with that legislation, may be regarded as State resources even if they are managed by entities separate from the public authorities, concluded that the funds managed by CDC remained under State control.<sup>109</sup>

The French government had also pointed to the fact that at least part of the funds were not channelled through the account of the CDC: the companies subject to the obligation to purchase retained the charges received from final consumers in so far as they did not cover the companies' own total additional costs, and only transferred the surplus to the CDC. However, the Court of Justice considered that this was not sufficient to exclude there being an intervention through State resources.<sup>110</sup>

In this regard, the Court stressed that the obligation to purchase would be covered in full by the French State, requiring the French State to discharge past debts and to cover in full the additional costs imposed on companies should the sum of the charges collected from final consumers of electricity be insufficient to cover those additional costs.<sup>111</sup>

It has been argued that the judgment in *Vent de Colère!* is difficult to reconcile with the Court's judgment in *PreussenElektra*.<sup>112</sup> We, on the other hand, agree with the Court that the difference in outcome between *Vent de Colère!* on the one side and *PreussenElektra* on the other side, can be explained by looking at the CDC and its function in managing the cash flow, as well as the role of the State as an ultimate guarantor (i.e. the fact that the State would step in, in case the charges collected would be insufficient to cover the additional costs). These two elements form the difference between *PreussenElektra* and *Vent de Colère!*. The question remains whether one of those elements without the other would lead to the same conclusion,

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106. Case C-262/12 *Vent de Colère!* [2013] EU:C:2013:851, para. 10-12.

107. Case C-262/12 *Vent de Colère!* [2013] EU:C:2013:851, para. 13 and 14.

108. Case 173/73 *Italy / Commission* [1974] ECR 00709, para. 35.

109. Case C-262/12 *Vent de Colère!* [2013] EU:C:2013:851, para. 33.

110. Case C-262/12 *Vent de Colère!* [2013] EU:C:2013:851, para. 27.

111. Case C-262/12 *Vent de Colère!* [2013] EU:C:2013:851, para. 22-26.

112. Giraud, A. (2014), *Vents De Colère! – Testing the Limits of PreussenElektra*, *European State Aid Law Quarterly* 2014(2), 344–348.

i.e. that the resources at stake here, are State resources. We expect that in this case, also without the involvement of the CDC, the conclusion would be that State resources are involved. After all, the element of the unlimited guarantee would in itself be sufficient to consider that State resources are at stake.

In *PreussenElektra*, the funds flew directly from one company to another without coming under State control, without creating any form of financial exposure for the State. Admittedly, the cash flow itself was the result of State legislation, but the companies making the payments were only themselves, individually bound by the obligation to purchase the electricity at an increased price from another company. There was no private or public body appointed with supervising or managing the payments and there was no exposure for the State. In the *Vent de Colère!* case on the other hand, the Court of Justice ruled:

*“34 All those factors taken together serve to distinguish the present case from that which gave rise to the judgment in PreussenElektra, in which the Court held that an obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable sources at fixed minimum prices could not be regarded as an intervention through State resources where it does not lead to any direct or indirect transfer of State resources to the undertakings producing that type of electricity (see, to that effect, PreussenElektra, paragraph 59).*

*35 As the Court has already had occasion to point out – in paragraph 74 of the judgment in Essent Netwerk Noord and Others – in the case which gave rise to the judgment in PreussenElektra, the private undertakings had not been appointed by the Member State concerned to manage a State resource, but were bound by an obligation to purchase by means of their own financial resources.*

*36 Consequently, the funds at issue [in PreussenElektra] could not be considered a State resource since they were not at any time under public control and there was no mechanism, such as the one at issue in the main proceedings in the present case, established and regulated by the Member State, for offsetting the additional costs arising from that obligation to purchase and through which the State offered those private operators the certain prospect that the additional costs would be covered in full.*

*37 Accordingly, Article 107(1) TFEU must be interpreted as meaning that a mechanism for offsetting in full the additional costs imposed on undertakings because of an obligation to purchase wind generated electricity at a price higher than the market price that is financed by all final consumers of electricity in the national territory, [...], constitutes an intervention through State resources.”*

The Commission, in its Notion of State aid Notice, stresses that the distinguishing factor is whether or not the State is in control of the resources, not whether the entity channelling the resources is public or private.<sup>113</sup> If the collecting entity is bound by law to use the proceeds from

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113. Notice on the notion of State aid, point 64.

the charges for designated purposes only (as was the case in *Essent Netwerk Noord* and *Vent de Colère!*), the sums in question are considered to remain under State control and therefore, to form State resources.<sup>114</sup>

The Commission does not appear to emphasize the role of the State as a guarantor in its Notice on the notion of State aid. Yet, in the German renewable energy (“EEG”) decision, it did. In the EEG decision, the Commission held that German law on renewable energy involved State aid, however it considered most of the aid compatible with EU law. The Commission referred to the *Vent de Colère!* case and explicitly mentioned the fact that the State was to guarantee the companies involved that their additional costs would be offset in full.<sup>115</sup>

Germany disputed the Commission’s finding and argued that the measure did not involve State resources and did not confer an advantage. The General Court sided with the Commission and held that EEG was State aid which involved State resources.<sup>116</sup> The Court considered that the law was implemented as a public policy by the State to support producers of renewable electricity. Furthermore, the State controlled the way in which the network operators could collect and administer the funds generated by the EEG surcharges. In the otherwise comparable *PreussenElektra* judgment, the funds were transferred directly from private parties to the products of renewable energy, thus there was no involvement of the State or State-controlled intermediary.

#### 4.6 No need for resources to be permanently at the State’s disposal

As said above, it is relevant whether the resources are available to the national authorities. This does not imply that those resources need to be at the authorities’ *permanent* disposal. In the 1996 *Air France* case<sup>117</sup> there was a debate whether the funds managed by the Caisse (the public authority who had invested in Air France and which was deemed to belong to the French government, see subsection 1.3.1 above) were privately sourced. The French government had pointed to the fact that the depositors of those funds could require repayment at any time and that those funds were therefore reimbursable. The General Court considered that regard should be had to the economic reality. Indeed, on the one hand the sums deposited with the Caisse were repayable and could be withdrawn by depositors. Therefore, unlike revenue from taxation or compulsory contributions, these sums were not permanently at the disposal of the public sector. On the other hand, however, economic reality was that the deposits with, and withdrawals from, the Caisse produced a constant balance. The Caisse was able to use this as if the funds represented by that balance were permanently at its disposal, even if they were not:

*“67 The Court considers that the investment in question, financed by the balance available to the Caisse, is liable to distort competition within the meaning of Article [107(1) TFEU] in the same way as if that investment had been financed by means of revenue from taxation or compulsory contributions. That provision therefore covers all the financial means by*

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114. Notice on the notion of State aid, points 63-65.

115. Commission Decision SA.33995 of 23 July 2014 – *EEG 2014 – Reform of the Renewable Energy Law*, para. 190 (OJ C37/73).

116. Case T-47/15 *Germany / Commission* [2016] EU:T:2016:281.

117. Case T-358/94 *Air France / Commission* [1996] ECR II-2109.

*which the public sector may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Consequently, it is irrelevant that the funds used by the Caisse were repayable. Moreover, there is nothing in the documents before the Court to suggest that the realization of the investment in question was hampered by the refundability of the funds used.”<sup>118</sup>*

The same approach was taken by the Court of Justice in *Ladbroke Racing*. This concerned the Pari Mutuel Urban (“PMU”), an economic interest group, consisting of the principal racecourse companies in France, which was set up to manage the organisation of an off-course betting platform on behalf of its members.<sup>119</sup> After having received a complaint from the Ladbroke Group, a competitor on the market for organising and providing betting services in connection with horse-races,<sup>120</sup> the Commission investigated aid given by the French government to PMU.

Originally those funds were meant to be used only for certain social security payments, and the winnings not used for that purpose had to be paid to the State.<sup>121</sup> Nevertheless, legislation was changed in order to allow PMU to use unclaimed winnings to make redundancy payments to former employees.<sup>122</sup> The Commission concluded that these unclaimed winnings did not constitute State aid, because the State resources criterion was not met. The Commission had distinguished between two types of sums collected on horse-race betting, namely “public levies”, which went to the Treasury (30FF/100FF), and “non-public levies”, which were distributed between bettors (70FF/100FF). As regards the amounts resulting from unclaimed winnings, the Commission considered that they formed part of the “normal”, and therefore non-public, levies. The General Court overturned this conclusion.<sup>123</sup> The General Court considered that France waived revenue that should have been paid over to the Treasury and that although the funds were not directly held by the State, it was sufficient that they were permanently at the disposal of the State.<sup>124</sup>

On appeal, the French Government submitted that, having regard to the particular nature and the general scheme of the horse-race betting system, the revenue which remained available to the racecourse companies after the payment of winnings to bettors and deduction of the public levies necessarily constituted normal resources. The fact that the public authorities restricted the use of part of those resources to particular objectives, according to the French government, did not convert them from normal resources into State resources.<sup>125</sup>

The Court of Justice disagreed and considered that the measure enabled the racecourse companies to cover certain social expenditure of the PMU (expenditure they would normally

118. Case T-358/94 *Air France / Commission* [1996] ECR II-2109, para. 65-67.

119. Case C-83/98 *Ladbroke Racing* [2000] ECR I-03271, para. 3.

120. Ladbroke Racing Ltd (hereinafter ‘Ladbroke’), is a company incorporated under English law and controlled by Ladbroke Group plc whose activities include organising and providing betting services in connection with horse-races in the United Kingdom and other countries in the European Community; Case T-67/94 *Ladbroke Racing* [1998] II-1, para. 1.

121. Case T-67/94 *Ladbroke Racing* [1998] ECR II-1, para. 106.

122. Sánchez, M., (2006), *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade*, Cameron May, p. 43.

123. Case T-67/94 *Ladbroke Racing* [1998] ECR II-1.

124. Case T-67/94 *Ladbroke Racing* [1998] ECR II-1, pp. 78-82.

125. Case C-83/98 *Ladbroke Racing* [2000] ECR I-3308, para. 40-50.

have to bear themselves) and that the amount of the sums corresponding to the unclaimed winnings was monitored by the competent French authorities. Therefore, in so far as those resources had been used to finance social expenditure, they constituted a reduction in the social security commitments which a company normally had to discharge. The Court of Justice held that these resources were State resources:

*“50 The judgment in Case T-358/94 Air France v Commission, relied on by the appellant, provides very clear confirmation, at paragraph 67, that Article [107(1)] of the Treaty covers all the financial means by which the public sector may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Consequently, even though the sums involved in the measure allowing the PMU access to unclaimed winnings 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 aid and for the measure to fall within Article 92(1) of the Treaty.”<sup>126</sup>*

## 5. FORM OF STATE RESOURCES

The transfer of State resources can take various forms. Examples are direct grants, subsidies, loans, guarantees,<sup>127</sup> direct investment in the capital of enterprises and benefits in kind. A firm and concrete commitment to make State resources available at a later point in time is also considered a transfer of State resources.<sup>128</sup>

A positive transfer of funds is not necessary, as a foregoing of State revenues is sufficient. Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources.<sup>129</sup> In that respect one can refer to *Sloman Neptun*.<sup>130</sup> This case concerned German legislation that allowed certain shipping companies flying under the German flag to subject foreign seafarers not resided in Germany to working conditions and rates less favourable than those applicable to German workers. The Court relied on its previous *Italy / Commission* decision (referred in subsection 1.4.3) and reiterated that the partial reduction of social charges that normally burdened the budget of companies in a particular sector constitutes aid if aim of the measure is to exempt some companies from the normal financial burdens imposed by law.<sup>131</sup>

Moreover, financial instruments (such as guarantees, loans or capital investment) granted to companies represent a burden to the State budget, insofar as the rate charged by the State is below the market rate that other companies in the same situation would have to pay.<sup>132</sup> The Commission issued a Notice on State aid in the form of guarantees where it establishes that

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126. Case C-83/98 *Ladbroke Racing* [2000] ECR I-3308, para. 50.

127. Case C-275/10, *Residex Capital IV*, [2011] I13043, para. 39-42.

128. Notice on the notion of State aid, point 51.

129. Notice on the notion of State aid, point 51.

130. Joint Cases C-72 & 73/91, *Sloman Neptun Schiffahrts v E. gbetriebsrat Bodo Ziesemer*, [1993] ECR I-887.

131. Joint Cases C-72 & 73/91, *Sloman Neptun Schiffahrts v E. gbetriebsrat Bodo Ziesemer*, [1993] ECR I-887, para. 15; e.g. also Rubini, L., (2009), The 'Elusive Frontier': Regulation under EC State Aid Law, *European State Aid Law Quarterly*, Vol 3, p. 287-288.

132. Hancher, L. Ottervanger, T. and Jan Slot P., (2012), *EU State Aids*, Sweet & Maxwell, 4th Ed., p. 65.

the risk of a State guarantee is carried by the State and such risk-carrying should normally be remunerated by an appropriate premium.<sup>133</sup> In that respect one can refer to *La Poste*, where the Court of Justice decided that there had been granted aid in the form of an unlimited and implied State guarantee to La Poste because its status as an establishment of an industrial and commercial character (*établissement public à caractère industriel et commercial*, or ‘EPIC’).<sup>134</sup> Even though this case focuses mainly on the advantage criterion, AG Jääskinen analysed the guarantee as a drain of State resources, “*State intervention that is likely both to place the undertakings to which it applies in a more favourable situation than others, and to create a sufficiently specific risk of a supplementary charge being incurred in the future for the State may be a burden on State resources.*”<sup>135</sup>

The Notice on the notion of State aid furthermore specifies that derogations from the normal insolvency rules, which allow companies to continue trading in circumstances under which they would not be allowed if the ordinary insolvency rules were applied, may involve an additional burden for the State if public bodies are among the principal creditors of those companies or where such action amounts to a *de facto* waiver of public debts.<sup>136</sup> In those circumstances, those derogations from the normal insolvency rules, may constitute the transfer of State resources.

Perhaps stretching the concept of a “transfer” of State resources, the Notice on the notion of State aid confirms that the creation of a “sufficiently concrete risk of imposing an additional burden” on the State may also be seen as the involvement of State resources. The *France Télécom* case provides a good example. This concerned the French company France Télécom, that experienced financial trouble from 2001 onwards. In 2002 it had to report huge debts, a loss of the last financial year, and moreover its ratings from rating agencies such as Moody’s and Standard & Poor’s were downgraded and its share prices fell.

The French Minister for Economic Affairs gave an interview with a newspaper in which he stated that if France Télécom were to face any financing problems, the French State would take whatever decisions necessary to overcome them. This was followed up by a press release of 13 September 2002, in which the French authorities stated that the French State would contribute to the strengthening of France Télécom’s capital base and would, if necessary, take steps to prevent it from being faced with any financing difficulties.

These comments seemed to have effect, and France Télécom’s ratings improved. The French State, through the Minister of Economic Affairs, repeated the message in the press. In December 2002 the Minister issued another press release which stated: “*In the light of the action plan drawn up by management and the investment return prospects, the French State will participate in the EUR 15 billion strengthening of France Télécom’s capital base in proportion to its share in the capital, giving an investment of EUR 9 billion.*”

133. Notice from the Commission on the application of arts 87 and 88 of the EC Treaty [now Art. 107 and 108 TFEU] to state aid in the form of guarantees [2008] (O.J. C155/02), p. 4.

134. Case C-559/12 P *France / Commission* [2014] EU:C:2014:179; *ee also* Laprêvotte, F., Emin, C. and Coupé, F. (2014), The (French) Postman Rings Twice in Vain: The Court of Justice upholds of the General Court’s judgment in *La Poste*, *European State Aid Law Quarterly*, 2014(4).

135. Opinion of Advocate General Jääskinen in Case C-559/12 P *France / Commission* [2014] EU:C:2014:179, para. 18; *e.g. also* Case C-83/98 *Ladbroke Racing* [2000] ECR I-3308, where the Court confirmed settled case law “*reduction in the social security commitments which an undertaking normally had to discharge*”.

136. Case C-295/97 *Piaggio* [1999] ECR I-3761, para. 40-43 and Case C-200/97 *Ecotrade* [1998] ECR I-7907, para. 45.

As a result of these press releases and messages, France Télécom's financial situation improved; its ratings improved, its share price went up and it was again able to get financing elsewhere in the market, against competitive conditions. Therefore, France Télécom never made use of the offer of the French State. In other words, there was no *actual* transfer of resources from the French State to the company.

A competitor of France Télécom considered that nevertheless State aid had been granted. The General Court disagreed.<sup>137</sup> However, the Court of Justice set aside the General Court's judgment. First it recalled that one should look at the effects of a measure,<sup>138</sup> that State interventions take various forms and that several consecutive measures might be regarded as a single intervention.<sup>139</sup> In this case, the Court of Justice considered the announcements and the loan proposal to be inseparable measures that should be assessed together.

Next, the Court of Justice ruled that "*State intervention capable of both placing the undertakings which it applies to in a more favourable position than others and creating a sufficiently concrete risk of imposing an additional burden on the State in the future, may place a burden on the resources of the State.*"<sup>140</sup> This applies even if there is "only" a risk of an additional burden on the resources of the State, not an actual transfer of State resources.<sup>141</sup>

In addition, and contrary to what the General Court had found, the Court of Justice confirmed that it is not necessary that such a reduction, or even such a risk, should be equivalent to that advantage granted to the company.<sup>142</sup> The Court of Justice in *France Télécom* broadened the notion of State resources to any aid granted by a public authority, not only when using formalistic measures (i.e. national legislation) but also to aid conferred by an informal measure lacking binding force, such as the public announcements in combination with the offer of the loan, as in this case the State budget was *potentially* burdened.<sup>143</sup>

In July 2015, the General Court issued its second judgment on those arguments with which it did not deal in its first *France Télécom* decision.<sup>144</sup> This judgement focusses on the question whether the measures at stake qualify as an advantage. The General Court considered that the Commission did not correctly apply the Market Economy Investor Principle test. Therefore, it considered that the Commission was wrong to classify the offer of a loan made by the French authorities to the company as State aid and annulled the Commission's decision.

The authors refer to the Chapter on Advantages for a more in-depth exploration of the different forms State aid may take.

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137. Case T-425/04, *France / Commission*, [2010] ECR II-2099.

138. Joint Cases C-399/10 and C-401/10 P, *Bouygues SA / Commission*, EU:C:2013:175, para. 102.

139. Joint Cases C-399/10 and C-401/10 P, *Bouygues SA / Commission*, [2013] EU:C:2013:175, para. 103. For an analysis on the argument of "single intervention" e.g. Muñoz, M. (2014), A New Turn in the France Télécom Case: new twist to the Concept of State aid?, *European State aid Law Quarterly*, Vol 3.

140. Joint Cases C-399/10 and C-401/10 P, *Bouygues SA / Commission*, [2013] EU:C:2013:175, para. 106.

141. E.g., Case C-387/92, *Banco Exterior de España v Ayuntamiento de Valencia*, [1994] ECR I-877, where the Court held in para. 14: "*It follows that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 92(1) of the Treaty.*"

142. Joint Cases C-399/10 and C-401/10 P, *Bouygues SA / Commission*, [2013] EU:C:2013:175, para. 110.

143. Kaczmarek C. (2012), Judgment of 13 September 2010 in *France, France Télécom a.o. v Commission*, *European State Aid Law Quarterly*, Vol 3.

144. Joint Cases T-425/04 RENV, T-444/04 RENV *France and Orange v Commission* [2015], EU:T:2015:450.

## 6. CONCLUDING REMARKS

Until the creation of the Notice on the notion of State aid, practitioners had to rely mainly on jurisprudence in order to interpret the second condition under Art. 107(1) TFEU. Nevertheless, case law still remains a useful source in order to assess whether aid has been granted “by the State or through State resources” and particularly in recent years the EU Courts have given much greater attention to this notion. Even though this phrase might seem to provide alternative conditions, the EU Courts have consistently interpreted them cumulatively.<sup>145</sup> Consequently, in order to fulfil this criterion the aid must not solely be granted through State resources, but also be imputable to the State.

With regards to imputability, it is clear that measures granted directly by the State or a public authority, are considered to be imputable to the State. Even if the public authority granting the aid enjoys some autonomy, the use of resources is imputable to the State.<sup>146</sup> Moreover, a measure can also be imputable to the State when the aid is granted through intermediary public or private bodies or through State-owned enterprises. In this scenario, imputability is less evident, and it must be carefully assessed whether “the public authorities were involved, in one way or another, in the adoption of those measures”.<sup>147</sup> In order to make this assessment, all relevant circumstances have to be taken into account. The Commission compiled a non-exhaustive list of indicators in the Notice on the notion of State aid that could play a role. These include both direct and indirect indicators, as well as the sense and content of the aid measure itself.

The second sub-condition entails that the aid must be granted directly or indirectly through State resources. It must be noted that all resources from the public sector will be regarded as State resources, including regional and local bodies, even if an institution within the public sector enjoys some autonomy.<sup>148</sup> In addition, resources from State-owned enterprises are considered State resources as well (but please note that measures granted by State-owned enterprises and financed through their resources are not necessarily State measures. Indeed, it must be analysed whether the measure is imputable to the State (see above)). In the case of State-owned enterprises, the Court has confirmed that it is possible that the enterprise is both the donor and the recipient of aid.<sup>149</sup>

In addition, the fact that a measure granting an advantage is not financed directly by the State, but by a public or private body established or appointed by the State to administer the aid does not exclude that that measure is financed through State resources. For instance, contributions or duties made compulsory by State legislation and parafiscal charges can also constitute State aid under Art. 107(1) TFEU, even if they are administered by institutions separate from the State.<sup>150</sup> On the other hand, as established in *PreussenElektra*, if the advantage flows directly from one private company to another without the monies being available in any

145. Case C-482/99 *France / Commission (“Stardust Marine”)* [2002] ECR I-4397, para. 24.

146. Case T-358/94 *Air France / Commission* [1996] ECR II-2109.

147. Case C-482/99 *France / Commission (“Stardust Marine”)* [2002] ECR I-4397, para. 56.

148. Case 248/84 *Germany / Commission* [1985] ECR 4013.

149. Joint Cases T-443/08 and T-455/08 *Freistaat Sachsen and Land Sachsen-Anhalt / Commission* [2011] ECR II-1311.

150. Case C-262/12 *Vent de Colère!* [2013] EU:C:2013:851, para. 33.

way to an entity designated by the State to administer the money, they will not be considered State resources. The criterion is whether the State, at any time, and even if only temporarily, has “control over” the resources.<sup>151</sup>

State resources can take various forms. EU jurisprudence has clarified that the notion of State aid not only includes direct transfers (e.g. grants and loans), but also measures that mitigate the charges normally borne by a company.<sup>152</sup> Moreover, a firm and concrete commitment to make State resources available at a later point in time is also considered a transfer of State resources. In *France Télécom*, the Court of Justice considered that announcements made by national authorities to support a company, in combination with the unconditional offer of a loan, qualified as the use of State resources, even though not a single euro was transferred.<sup>153</sup>

Concluding, it seems that the final word on whether a measure is considered to be a “State measure” depends on many factors and circumstances, such as the specific characteristics of the case, its timing, the measure itself and the role of the body who is granting or managing the aid. It might seem – as some authors have observed – that the case law in relation to State resources and imputability has been somehow inconsistent.<sup>154</sup> The authors of this Chapter however believe that this perceived inconsistency in the EU Courts’ jurisprudence on the “State measure” element is due to the development of this notion from the rather vague phrase ‘by a Member State or through State resources’ to a much more comprehensive understanding of what measures are attributable to the State. This development, as can be concluded from case law analysed, suggests that State measures can have an incredibly broad meaning, consisting of measures which are obvious to detect, such as explicit State grants, to other measures much more removed and obscure, to the extent that even public announcements without an actual transfer of resources might be considered as a State measure under Article 107(1) TFEU. Finally, the authors believe that while the notion has developed significantly over the last decades, the future will provide even more guidance on how this notion is applied.

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151. Case C-206/06 *Essent Netwerk Noord* [2008] ECR I-5497, para. 70.

152. Case C-200/97 *Ecotrade* [1998] EU:C:1998:579, para. 34

153. Joint Cases C-399/10 and C-401/10 P, *Bouygues SA / Commission*, EU:C:2013:175. As discussed above, the General Court recently ruled that the announcements and the unconditional offer of a loan did not meet the “advantages” criterion; e.g. Joint Cases T-425/04 RENV, T-444/04 RENV *France and Orange v Commission* [2015], EU:T:2015:450. We refer to the Chapter on Advantages for a further elaboration of this criterion.

154. Rubini, L., (2009), The ‘Elusive Frontier’: Regulation under EC State Aid Law, *European State Aid Law Quarterly*, Vol 3., page 285; Vesterdorf, B. (2005), A Further Comment on the New State Aid Concept as this Concept Continues to be Reshaped – Pearle – a further piece of the State aid puzzle?, *European State Aid Law Quarterly*, Vol 3.