

National Judges and Training in EU State aid Law

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The latest Call from the European Commission identifies the training of national judges in EU State aid law as one of its priority areas. The number of State aid cases at the national level is increasing and present complex issue of law and economics for national judges to solve. A recent training session at the Spanish Judicial School in Barcelona reveals how a successful programme of training can be organised, highlighting the many recent State aid issues that have been identified in European Commission policy documents and Decisions and case law of the European Courts.

Keywords: National Judges; Training Programmes; Law and Economics.

I. Introduction

The Articles in this Special Issue are the successful outcome of a stimulating judicial training seminar held in March 2017. The seminar was significant in that it represented a shift in the focus of the European Commission's national judicial training programme by concentrating solely upon State aid issues in a bilingual (English and Spanish) forum. The seminar was organised in the context of the Spanish Judicial School in Barcelona. This is different from many of the other seminars funded by the *Training of National Judges and Judicial Cooperation in the field of EU Competition Law* funded by the European Commission, where academic institutions tend to be the dominant recipients of the funding for training.¹ The seminar was successful in the quality of the papers presented and the high level of discussion from a multi-national audience composed of judges, lawyers, officials from national courts' administration, academics and a representative from the Legal Service of the European Commission who is highly regarded for his depth of practical knowledge on the workings of State aid law, as well as the workings of the minds of European Commission officials administering the day to day enforcement of the rules.

In contrast to the training needs of national judges in the application of Articles 101 and 102 TFEU the training needs of national judges in the application of EU State aid law has received less attention. The programme for *Training of National judges and Judi-*

cial Cooperation in the field of EU Competition Law was established in 2002 in the context of the adoption of Regulation 1/2003² which ushered in the decentralisation of EU competition law. The early Calls for the training of national judges were general and not specific about national judicial training needs. The underlying purpose of the training of national judges in the annual Calls revealed that it is 'intended to generate knowledge and a homogeneous application of EU competition law throughout Europe.'³ The European Commission argued that 'assistance should be provided to national judges, as regards the exercise of their new powers.'⁴ The generality of the early training programme Calls was seen as a positive aspect of the training brief by some training providers who reported that the 'openness' and 'flexibility' of the early Calls allowed for different content and approaches to match national legal situations. But from 2009 onwards the European Commission began

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1 For details of past Calls and successful grants see the Europa site at <<http://ec.europa.eu/competition/court/training.html>> Last accessed on 30 April 2017.

2 Regulation 1/2003, O J L 1, 4.1.2003, p. 1–25.

3 J Coughlan, W Heusel, E Szyszczak, V Patrini, A Pauer, *Study on judges' training needs in the field of European competition law Final Report*, January 2016, 83, available at <<http://ec.europa.eu/competition/publications/reports/kd0416407enn.pdf>> Last accessed on 30 April 2017.

4 *Ibid.*, 75.

to identify priority areas in the Calls, alongside tailor-made training programmes.⁵ It was at this time that training in EU State aid gained greater recognition as a training need at the national level. It is interesting that this decision was taken given that in many Member States no or very few State aid cases have been brought to the courts. While judges have developed little expertise and specialisation in EU State aid law it is also questionable as to whether judges actually need this expertise. State aid litigation at the national level is certainly not a day-to-day occurrence or the bread and butter of litigation practitioners across the EU. Indeed many of the early cases at the national level often had a constitutional or public law nature to them, with challenges being made as to the capacity of the State to grant State aid. Furthermore, it is difficult to predict in which court an action concerning State aid may appear. There are few special provisions for such actions in Member States' national laws. In jurisdictions where the distinction between administrative and civil justice is clearly defined, administrative courts will in principle be competent for actions against State bodies but cases between competitors may be brought before the civil courts. However, we are beginning to see examples of opportunist litigation where a claim is brought in an unusual forum to challenge a government policy. A good example is the *Eventech* case.⁶ Here a firm operating mini-

cabs deliberately broke the law by driving in traffic lanes reserved for buses and 'Black Cabs' that were licensed to use the advantage of the less congested bus lanes. By breaking the law the minicabs attracted fines and the case was brought before the Parking Adjudicator to raise the issue of whether there was State aid involved. This would have been a novel argument for the Parking Adjudicator to determine and the arguments in the case were put forward by some of the leading State aid lawyers in the EU.

II. The Role of the National Courts and the European Commission

A survey of the literature⁷ on the role of national judges in applying EU State aid law shows that the focus of discussion is upon how national courts *should* apply and enforce State aid rules rather than how national courts *are* applying the rules.⁸ There are arguments to be made that part of the modernisation process of EU State aid law should address the need to revitalise the enforcement of State aid rules, especially using private enforcement and judicial enforcement.⁹

The role of national courts and the role of the European Commission are seen to be complementary and separate roles in the application and enforcement of the State aid rules.¹⁰ The complex economic analysis required to determine the compatibility of State aid under Article 107(2) and (3) TFEU is a matter for the European Commission.¹¹ The European Commission is also responsible for determining whether a State aid can be declared compatible on the basis of Article 106(2) TFEU. A national court may apply the *Altmark* conditions¹² but competence reverts to the European Commission where the conditions are not met and there is an issue of whether Article 106(2) TFEU might apply.¹³

The national courts have jurisdiction to apply the State aid rules in three situations. The first is the enforcement of the 'standstill clause' in the last sentence of Article 108(3) TFEU. The CJEU has held that the prohibition in Article 108(3) TFEU directly gives rise to effective rights which national courts must safeguard.¹⁴ This prohibits the Member States from implementing aid until it has been approved by the European Commission. It is the task of the national courts to provide effective remedies for the implementation of aid contrary to Article 108(3) TFEU.¹⁵

5 Ibid., 78.

6 C-518/13 *Eventech* [2015] ECLI-9.

7 On the literature on State aid in the national courts is rarely written by academics but is commented on by practitioners, judges, European Commission officials etc.

8 European Commission, *Study on judges' training needs in the field of European competition law Final Report*, 271-276.

9 See the arguments put forward by A Sanchez Graells, 'Digging Itself Out of the Hole? A Critical Assessment of the European Commission's Attempt to Revitalise State Aid Enforcement after the Crisis' (2015) *Journal of Antitrust Enforcement*, available at SSRN <<https://ssrn.com/abstract=2602798>> Last accessed on 30 April 2017.

10 See the European Commission Notice on the Enforcement of State aid law by National Courts, OJ C 85/1 9.4.2009, paras 19-22 and the discussion by B Brandtner, T Beranger and C Lessenicch 'Private State Aid Enforcement' (2010) 9(1) *EStAL*, 23.

11 *Brandtner et al* (n 10), 23; K Lenaerts, 'National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness' (2011) 46 *Irish Jurist*, 13.

12 C-280/00 *Altmark Trans* [2003] ECLI-415.

13 W Sauter, 'The Altmark Package Mark II: New Rules for State Aid and the Compensation of Services of General Economic Interest' (2012) 33 (7) *ECLR*, 307.

14 Case 120/73 *Lorenz v Germany* [1973] ECLI-152, [8].

15 Case C-354/90 *FNCEPA v Commission* [1991] ECLI-440, [11-12].

Second, national courts have the power to apply and enforce decisions of the European Commission taken under Article 108(2) TFEU,¹⁶ including, in particular, enforcing recovery decisions.

Third, national courts may apply the provisions of any Block Exemption adopted under Article 109 TFEU.¹⁷ The State Aid Block Exemptions, like all EU Regulations, have direct effect.

Thus, national courts have a role to play in the public and private enforcement of EU State aid law. The public dimension focuses upon the recovery of unlawful State aid and incompatible State aid while the role of private enforcement ties in also with the application of the Block Exemption Regulations.¹⁸

Brandtner *et al.* point out that the roles of the national court and the European Commission are distinct.¹⁹ National courts have no competence to conduct a compatibility analysis under Article 107(2) and (3) TFEU but are obliged to ensure the enforcement of individual rights violated by an infringement of the standstill obligation in Article 108(3) TFEU. Thus Brandtner *et al.*, alongside Knade-Plaskacz,²⁰ argue that the competence of the national courts is derived from the procedural unlawfulness of State aid law. But, as Nebbia argues, national courts should not decide ‘substantive matters concerning the compatibility of the State aid with the common market.’²¹

While Article 107 TFEU is not directly effective, national courts may (and often must) apply and interpret Article 107(1) TFEU, particularly in order to determine whether a measure is a State aid which ought to have been notified pursuant to Article 108(3).²² Increasingly litigants are using the national courts to challenge Member State policies in a range of sectors bringing in to play the need for national judges to understand the European Courts’ case law and European Commission policy and soft law communications. Private enforcement of State Aid law brings into play questions of the definition, or notion, of a State aid, definitions of economic and non-economic activity as well as the basic concepts of State aid law relating to selectivity and the effect on trade between Member States. These are all concepts that are subject to European Commission Decisions, the case law of the European Courts and often consolidated into soft law by the European Commission.

There are avenues for the national court to obtain guidance in State aid cases. First, national courts may refer a State aid question to the CJEU for a prelimi-

nary ruling using Article 267 TFEU. A survey of references from national courts from 2000 – 2017 reveals that the number of such references is low but it is increasing. As with the use of the preliminary reference procedure generally the incidence of its use across of the Member States is uneven. Germany, Italy, France and Spain tend to use the procedure more frequently than other Member States. The Netherlands, the United Kingdom, Belgium, Austria have made occasional use of the procedure. In the early part of the period under scrutiny the cases appear *ad hoc*, but more recently issues relating to taxation have been preponderant.

Using the preliminary reference procedure as a basis to determine the extent of problem cases before national courts is not an exclusive indicator of the perceived problems national judges face when applying EU State aid law in national courts. For example, many cases may be settled on the basis of applying national law and where references are made there may be pressure from the parties to send the case to the CJEU, especially where the issues are high profile, or involve a lot of interested parties. Köhler argues that the case law of the European courts provides sufficient guidance as to when and how State aid law should be applied and enforced,²³ but it is questionable how much time a national judge may have to research a case, or keep up to date with developments in case law. Unless State aid issues are a recurrent area of litigation before a national judge there are few incentives to invest the time in keeping up to date with case law. Even with the new No-

16 Case 77/72 *Capolongo v Maya* [1975] ECLI-81.

17 *Ibid.*

18 P Van Cleynenbreugel, ‘Efficient Justice in the Service of Justiciable Efficiency? Varieties of Comprehensive Judicial Review in a Modernised EU Competition Law Enforcement Context’ (2014) 10 (1) *The Competition Law Review*, 35.

19 B Brandtner, T Beranger and C Lessenich, ‘Private State Aid Enforcement’ (2010) 9 (1) *EStAL*, 23.

20 A Knade-Plaskacz, ‘Enforcement of State aid law at national level. The relationship between national courts and the European Commission’ (2013) 3(2) *Juridical Tribune*, 116.

21 P Nebbia, ‘State Aid and the Role of National Courts’ in E Szyszczak (ed.) *Research Handbook on European State Aid Law* (Edward Elgar 2011).

22 Article 106(2) TFEU is directly effective in non-State aid situations but in the State aid context the requirement to notify aid measures even where Article 106(2) is engaged means that in practice this cannot be applied by the national courts.

23 M Köhler, ‘Private Enforcement of State Aid Law – Problems of Guaranteeing EU Rights by Means of National (Procedural) Law’ (2012) 11 (2) *EStAL*, 369.

tice on the Notion of State Aid, which provides a useful and succinct explanation of the case law, one participant at the seminar pointed out that a national judge may not have the time to read such a document given the short time often allocated to cases at first instance.

Preliminary references in the State aid field raise the interpretation of Article 107(1) TFEU. A national court may also legitimately query the effect of a European Commission Decision. The validity of a Commission Decision may also be questioned in a preliminary reference, except in cases where the party concerned could have brought an application for annulment of the decision under Article 263 TFEU but failed to do so, or was unsuccessful.²⁴ But national courts cannot refer questions of compatibility of State aid with the common market, since a Decision on that matter is exclusively within the jurisdiction of the European Commission (subject to review by the European Union Courts).²⁵ Nor can the national court ask the CJEU to rule specifically on the validity of a national measure under Articles 107 and 108 TFEU: that is a matter for the national court to determine itself following the guidance given by the CJEU.²⁶

24 This bar does not apply where the party concerned would not have had standing to bring an action for annulment: Case T-141/03 *Sniace v Commission* [2014] ECLI-752, [40]. For an extreme case of challenging a Commission decision, see Case C-333/07 *Régie Networks* [2008] ECLI-764 where a decision adopted in 1997 was declared invalid following a preliminary reference made almost 10 years later.

25 Case C-237/04 *Enirisorse* [2006] ECLI-197, [23]; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECLI-758, [71].

26 Case C-140/09 *Fallimento Traghetti del Mediterraneo* [2010] ECLI-335, [22–24].

27 Notice on the enforcement of State aid law by national courts, OJ C 85, 9. 4. 2009. See the discussion in *Brandtner et al* (n 10), *Nebbia* (n 21) and *Knade-Plaskacz* (n 20).

28 Notice on the enforcement of State aid law by national courts, [82–88].

29 *Ibid.*, [89–92].

30 *Ibid.*, [94].

31 *Ibid.*, [93].

32 A Pisapia, 'The Role of the national Judge in European State Aids Sector' (2014) 11(5) *US-China Law Review*, 600.

33 European Commission, Enforcement of EU State aid law by national courts: The Enforcement Notice and other relevant materials, Handbook, 2010, Brussels, available at <http://ec.europa.eu/competition/publications/state_aid/national_courts_booklet_en.pdf> Last accessed on 30 April 2017.

34 European Commission, Notice Towards an Effective Implementation of Commission Decisions Ordering Member States to Recover Unlawful and Incompatible Aid (2007/C 272/05) (European Commission), 2007/C 272/0, [2007] OJ C 272/4.

A second avenue of help for the national judge is the Notice on the enforcement of State aid law by national courts.²⁷ This Notice sets out two mechanisms under which the European Commission can assist national courts in their application of the State aid rules. First, national courts may ask the European Commission to transmit relevant information in the possession of the European Commission, including information of the progress of a State aid investigation, copies of unpublished European Commission Decisions and other documents in the European Commission's possession.²⁸ Second, a national court may request the European Commission's opinion on relevant issues concerning the application of the State aid rules. This would include opinions on whether a measure qualifies as State aid, whether an aid falls within a Block Exemption, whether an individual aid falls under an approved aid scheme, whether exceptional circumstances exist that would prevent full recovery of unlawful aid, the calculation of interest, and issues concerning damages claims under EU law. National courts may not ask for an opinion on the compatibility of an aid measure, since this falls outside their competence.²⁹ The European Commission will endeavour to provide opinions within four months from the date of the request.³⁰ The opinion will provide the factual, economic or legal clarification sought without considering the merits of the national proceedings. It will not legally bind the national court,³¹ but will have significant persuasive force.

Pisapia stresses that the Notice is a tool for the national judges to enforce State aid law but national judges cannot check the compatibility of any State aid against EU law as this is the function of the European Commission.³² Analysing the EU Courts' case law Pisapia argues that the European Commission's 'control of legitimacy' and the national courts' 'formal control' are complementary exercises. She argues that national judges have an important role to play as they intervene 'to reduce the anti-competitive effect of illegal supports' to sectors or individual undertakings. They can interrupt the flow of illegal aid through recovery orders or by ordering compensation for the harm caused.

Additionally, in 2010 the European Commission prepared a Handbook on Enforcement of EU State Aid Law by National Courts.³³ A further relevant document is the Recovery Notice³⁴ providing guidelines in cases where the European Commission adopts a Decision to recover unlawful aid.

As some of the Articles in this Special Issue reveal the increased interest in State aid litigation suggests a need for the European Commission to update or revise these Notices.

III. Future Training Needs

One interpretation of the increase in preliminary references to the CJEU could be that more issues of EU State aid require guidance from the CJEU, especially in areas where new challenges are emerging, seen for example, in the number of tax issues sent to the CJEU. Another indicator of the incidence of the number and kind of cases that are emerging would be a systematic analysis of the national cases reported in the leading Competition and specialist State aid journals. Again this may not paint the whole picture since some respondents for the journals may be selective in the cases they review.

There appears to be a greater number of cases investigated by the European Commission, sometimes being reviewed by the European Courts, concerning the definition of economic and non-economic activity in the context of State aid. The investigations are usually at the behest of complaints by competitors. There is also evidence of a greater number of national cases concerning compensation for public service obligations (Services of General Economic Interest) involving the application of the *Altmark* criteria and the Almunia Package of measures.³⁵ This may be as a result of the greater divestment of State resources and the allocation of State responsibilities to charities, NGOs or new hybrid bodies. But also, as the experience of Spain and France reveals in the recognition that new services such as high speed broadband access or access to digital broadcasting, are now cast as SGEL.

In the Recommendations for future training the Report argued that judges handling State aid cases are not a homogeneous group and cannot be considered as a single target group for training. From the research at least three distinct groups can be identified: judges in administrative courts and judges dealing with actions against State bodies (public law actions); judges in civil courts who may be asked to handle damages claims; specialist judges, for example in tax courts.

Specialisation is identified as the key to future training needs. One of the weaknesses of the Train-

ing programme to date has been that it is inefficient. Academic institutions have been successful in obtaining the funding to train national judges but often the programmes replicate academic university Modules in competition law, concentrating upon substantive law. This is not necessarily a bad starting place, given the complexity of the case law and need to understand definitions in State aid law. However, there appears to be much duplication within and across training courses on offer, with less emphasis upon progression and different levels of understanding of State aid law. Thus it is recommended that future programmes should be more selective, target particular groups of judges with problem-solving and case management at the heart of the training.³⁶ Training should also widen its ambit to focus on procedural aspects of State aid law.

There is a need for basic training in EU State aid which would encompass familiarity with case law of the European Commission and the European Courts, alongside familiarity with the sources of EU State aid law. The latter is available on the Europa webpages. Familiarity with a route map of hard and soft law would be a useful starting point. One issue here is the need for linguistic training in understanding the concepts of EU State aid law and language training in English, French and German since not all soft law is accessible in the official languages. This language training could be a sensitive issue in the future after the UK has left the EU. The recommendation of the *Study on judges' training needs in the field of European competition law* was that 'English can and should be used as the only language of a [training] programme when a lingua franca is required, e.g. for networking, exchanges or cross-border training programmes.'³⁷ But interviewing national judges for the research project has revealed a desire also to have training conducted in the national language since judges argue that at the national level they are being asked to apply and enforce national law, based upon underlying EU law.

35 See the article 'The *Altmark* Case Revisited: Local and Regional Subsidies to Public Services' by E Szyszczak in this Special Issue.

36 J Coughlan, W Heusel, E Szyszczak, V Patrini, A Pauer, *Study on judges' training needs in the field of European competition law Final Report*, January 2016, 113.

37 J Coughlan, W Heusel, E Szyszczak, V Patrini, A Pauer, *Study on judges' training needs in the field of European competition law Final Report*, January 2016, 112.

More advanced training might encompass familiarity with economic concepts as well as the quantification of damages. The example of *Arfea*³⁸ reveals that a national judge may not be on safe ground even when an expert is used to quantify the *Altmark* criteria. Furthermore, as the *Arfea* case shows, it may be necessary for national judges to have a greater understanding of how to evaluate expert economic evidence.

The seminar held in Barcelona is a significant example of how an effective training programme can be provided, in terms of the high quality of papers presented, the high quality of discussion and the rich

exchange of experiences and ideas between judges from different Member States. The latest Call³⁹ for proposals reveals that the European Commission has taken notice of the evaluation of the training programme and the changes taking place in State aid litigation and enforcement. The Call asks for proposals based upon improvement of knowledge, application and interpretation of EU competition law and the development of legal linguistic skills of national judges. State aid is at the top of the priority areas of training in competition law, alongside the development of linguistic skills. Furthermore preference is given to projects which build upon consecutive levels of training and which complement or innovate with projects of other training providers at national level. The iterative nature of training is stressed in that proposals will be preferred where they address the training of judges from several Member States (in one training session) thus encouraging cross-border networking.

38 Case T-720/16, pending. Discussed in the article by E Szyszczak (n 35) in this Special Issue.

39 European Commission, Open Call for Training, available at <http://ec.europa.eu/competition/calls/proposals_open.html> Last accessed on 30 April 2017.