The Fall of the House of Usher and the NoA

The arrival of the NoA, the Commission's Notice on the concept of an aid, which was the only piece of the second wholesome reform of secondary EU State aid legislation that had been left unfinished when the former Commission quit office in late 2014 had been hailed as the Ark NoA by this journal. This Quarterly wished it to carry State aid law through the floods, culminating into the "ring that rules them all" (see the Editorial to Issue 2/2016).

With the completion of the second year following its publication drawing nearer and nearer this enthusiastic image once portrayed has however become a lot dimmer and blurred. More and more of what is written in the NoA has already been either overruled by the EU Courts or is subject to serious challenge, albeit not yet realised. Whilst the NoA says that "material selectivity of a measure implies that the measure applies only to certain (groups of) undertakings or certain sectors of the economy in a given Member State" (see *ibid*, para. 120), the Grand Chamber of the Court of Justice, in its ruling in the *Spanish Goodwill* case, has ridden the finding of such selectivity from the necessity to define any specific group which can be delineated by whatever criterion. The cross-overs from the private investor test to the private creditor test have been re-adjusted in the most recent judgment of again the Grand Chamber in deciding on the Commission's appeal in the *FIH* case. The 20% threshold, up to which the economic use of any given infrastructure is deemed to leave the non-economic character of the latter unaltered, has been under fire by one Advocate General; it, coincidentally so, survived this time, as the Court itself did not have to pronounce itself on this matter, but could decide the case without it. Furthermore, there is the Commission's "no effect on trade" policy, vigorously promoted since the adoption of seven decisions in April 2016, commonly referred to as the so-called seven dwarfs. This new vogue of practice, created to brush off large chunks of undesired complaints and also enshrined in multifold citations in the NoA (see *ibid*. footnotes 285 to 293), is under serious challenge by legal actions lodged by these undesired trouble-makers. This list could be continued for a good while. However, the space for this Editorial is more limited.

The NoA, devised with political ambitions and with no apparent plan to be regularly checked on its reliability today resembles very much the famous House of Usher. In his legendary short-story Edgar Allan Poe portrayed two ailing siblings, Roderick and Madeleine Usher. The latter was finally buried alive, but rose back out of her coffin only to return to the state of a corpse, taking Roderick with her. The house in which these two and an unnamed visitor had lived together finally split alongside a large crack extending from the roof, down the front of the building and into an adjacent lake. In the case of the NoA the crack has always been there, such being inevitable in a building the solidity of which firmly rests on its ability to adapt to the developments of the jurisprudence. With each new ruling contesting its sayings this crack has widened and will continue to do so. Finality will be reached when said jurisprudence, buried alive in the non-progressing constraints of the NoA, will return back to life enabling the crack to fulfill its eventual mission.

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