

A. Introduction

Through its public undertakings the State participates in the economy. This seems at least questionable, from various points of view. According to Article 3(1)(g) EC there should in the European Community be a true single market and system of undistorted intra-Community trade and competition. According to some scholars, public undertakings are no obstacle to achieving these aims, because, they argue, public undertakings are treated like private companies in nearly all respects, as they are members of the same compulsory regulatory bodies, with the same fiscal obligations, and they have to comply with the same anti-trust laws.¹ But this approach seems wrong. The special threat of competition arising from public undertakings cannot be denied, as it is explicitly mentioned twice in the EC Treaty, namely in Article 31 and Article 86. There are certain dangers arising from the participation of States in the market. Especially questionable is the complexity of the relations between the State and its public undertakings, in particular because with its participation in the economy, the state competes directly with its own citizens. And in this, the State has a number of advantages: the State has – theoretically – unlimited financial resources² and can,

¹ H Schwintowski, 'The common good, public subsistence and the functions of public undertakings in the European internal market' (2003) 4 EBOR Law Review 373-74.

² K Hellingman, 'State Participation as State Aid under Article 92 of the EEC Treaty: The Commission's Guidelines' (1986) 23 CML Rev 111.

moreover, support its undertakings with its functions as a public authority.

Looking at the economies of the Member States we can see that every Member State, to a varying degree, participates in the market through public undertakings.³ Also, States tend to support their public undertakings. But this is not all plain sailing, because Article 87(1) EC prohibits ‘any aid granted by a Member State or through State resources’. Therefore, we have to ask to what extent the participation and the financial and other relations between the State and its undertakings count as aid and are therefore prohibited according to Article 87(1) EC, and therefore restrict the State to this extent.

The main objective of State aid control is to ensure a ‘level playing field’ in the internal market for undertakings through the prior control of advantages that are granted by Member States to selected beneficiaries, to enhance both the efficiency of the economy as a whole and consumer welfare.⁴ But con-

³ L Hancher, T Ottervanger, PJ Slot (eds), *EC State Aids* (3rd edn Sweet & Maxwell, London 2006) para 8-001; G Abbamonte, ‘Market Economy Investor Principle: a Legal Analysis of an Economic Problem’ (1996) 17 ECL Review 259.

⁴ State Aid Action Plan – Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM(2005) 107 – SEC(2005) 795, 7 June 2005, para 7; M Schütte, ‘The Notion of State Aid’ in MS Rydelski (ed), *The EC State Aid Regime – Distortive Effects of State Aid on Competition and Trade* (Cameron May, London 2006) 52; F Groeteke, K Heine, ‘“Institutional Rigidities” and European State Aid Control’ (2004) 25 ECL Rev 322; A Biondi, ‘Some Reflections on the Notion of “State Resources” in European Community State Aid Law’ (2006-07) 19 Fordham International Law Journal 1428; F de Cecco, ‘The Many Meanings of “Competition” in EC State Aid Law’ (2006-07) Cambridge Yearbook of European Legal Studies 122; P Craig, ‘The Evolution of the Single Market’ in C Barnard, T Scott (eds), *The Law of the Single European Market – Unpacking the Promises* (Hart, Oxford 2002) 2; HW Friederiszick, LH

sidering the concerns described above about the States' market participation with public undertakings, and recognising that inefficient and anticompetitive results are primarily caused by state intervention, it is, nevertheless, of general importance to realise that, according to established case law, the active participation of the State in the market economy is in itself not automatically contrary to the rules on State aid.⁵ One of the main responsibilities in searching for the limits arising from State aid law which apply to the relation between States and public undertakings is to assess when State measures would not be considered to amount to aid if checked against economic rationality: that is, they would have also have been undertaken by an investor operating under normal market conditions; or in other words, to assess when public undertakings operate on the 'level playing field' of competition.⁶ This control was not rigorously applied to public undertak-

Röller, V Verouden, 'EC State Aid Control: An Economic Perspective' in MS Rydelski (ed), *The EC State Aid Regime – Distortive Effects of State Aid on Competition and Trade* (Cameron May, London 2006) 145; M. Merola and others, 'The Most Appropriate Economic Tool for a Better Targeted State Aid Policy' in J Derenne, M Merola (eds), *Economic Analysis of State Aid Rules – Contributions and Limits* (Lexxion, Berlin 2007) 31; P Rey, 'On the Form of State Aid' in C Ehlermann, M Everson (eds), *European Competition Law Annual 1999: Selected Issues in the Field of State Aids* (Hart, Oxford 2001) 141.

⁵ L Hancher, T Ottervanger, and PJ Slot (eds), (n 3) para 3-066; H Lesguillons, 'The State as Shareholder and the Private Investor Principle' (2003) *International Business Law Journal* 363.

⁶ G Roberti, 'Public Guarantees and Community Control of State Aids' in C Ehlermann, M Everson (eds), *European Competition Law Annual 1999: Selected Issues in the Field of State Aids* (Hart, Oxford 2001) 278; P Anestis, S Mavroghenis, 'The Market Investor Test' in MS Rydelski (ed), *The EC State Aid Regime – Distortive Effects of State Aid on Competition and Trade* (Cameron May, London 2006) 122.

ings before the ‘public U-turn’ in EU competition policy in the 1980s, as the Commission started enforcing competition rules against public undertakings too.⁷

To analyse the relationship between State and public undertakings, and its limits arising from EC State aid law, we first have to ask what public undertakings are. Further we have to look where their position in the Treaty is, and then, following the requirements of Article 87(1), consider in detail where the limits of State participation lie. We do this referring to certain typical situations in the ‘life’ of a public undertaking, and placing the main focus on the market economy investor principle, its requirements and its problems. Because it is not possible nowadays to write about competition law without looking at least briefly at the impact of the current financial crisis – which was initially triggered in mid 2007 by problems with subprime mortgage lending in the US that impacted heavily on other markets, leading to a loss of confidence between financial institutions and a systemic crisis for the entire banking sector⁸ - we will mention this impact at several points.

⁷ W Sauter, ‘Competition Policy’ in A El-Agraa (ed), *The European Union – Economics & Policies* (6th edn, Financial Times, Harlow 2001) 197; E Morgan, ‘Competition Policy in the European Union’ in N Healey, *The Economics of the New Europe* (Routledge, London 1995) 251-53; D Spector, ‘The Economic Analysis of State Aid Control’ in J Derenne, M Merola (eds), *Economic Analysis of State Aid Rules-Contributions and Limits* (Lexxion, Berlin 2007) 8.

⁸ C Quigley, *European State Aid Law and Policy* (2nd edn Hart, Oxford 2009) 336.