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# THE NOTION OF ADVANTAGE IN EU STATE AID LAW AND ITS RECENT DEVELOPMENT

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## 1. Introduction

What is common to Starbucks, Fiat and Apple? Any person showing even the slightest interest for European law would probably know the answer to this question: the European Commission's (hereinafter: the Commission) decisions in which it was claimed that these companies obtained State aid. The Netherlands, Luxembourg and Ireland adopted tax rules that were artificially reducing the tax burden on the previously mentioned companies. The Commission in its decisions ordered these Member States to recover millions of euro from the respective companies in order to re-establish the previously existing situation.

Although these cases and their echo in the media has once again brought this area of law in the public spotlight, an even better indicator of its significance is the fact that cases concerning State aid rules are numerous. According to the Commission, in 2014 Member States spent EUR 101.2 billion on State aid, which makes approximately 0.72% of the European Union (hereinafter: EU) GDP[1].

In the absence of State aid rules Member States would be allowed to support their national companies on the internal market[2]. That kind of behaviour would inevitably cause a 'subsidy race' between Member States which would prevent the functioning of the internal market, one of the most important foundations of EU[3].

The EU State aid rules are a complex system and the description of them in their entirety would escape the aim of this thesis. The focus of this paper is to shed light on only a small fragment of this system: the notion of advantage. The primary reason for the

[1] http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html as accessed on December 5, 2016.
[2] Kelyn Bacon, European Union Law of State Aid, Second Edition, Oxford University Press, (2013), p. 9.
[3] Ibid 9.

selection of the topic is that the rules on advantage, unlike some other State aid rules, are characteristic only for this area of EU law. Another is that there are numerous recent decisions brought by the Commission and the Court of Justice of the European Union (hereinafter: the Court) that are further developing of this legal concept.

The thesis will start by providing a short overview of the purpose of EU State aid rules and an analysis of the general definition of State aid. This chapter serves as a sort of 'second introduction' that will help readers without a deep knowledge of State aid rules and enable them to follow the remainder of the analysis.

The second chapter will explain the general notion of advantage, which is one of the requirements that have to be fulfilled under Article 107 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) in order for a measure to be defined as State aid. This chapter will elaborate the factors that have to be taken into account when determining whether a certain measure of the State provides an advantage for its recipient. Special attention will be given to the private investor and the private creditor tests, the instruments used by the Commission in a dominant number of cases when examining whether an advantage has been granted to the undertaking in question.

The third chapter will deal with the newest decisions brought by the Commission and the Court in this area. The cases that will be elaborated are the ones which, in the author's opinion, are the most significant since they either develop the notion of advantage or detect potential directions in which this notion may develop and on which we need to keep an eye in the future.

## 2. State aid in EU law

### 2.1. The objectives of State aid policy

Some of the basic aims of the EU, as stated in Article 3 of the Treaty on the European Union, are economic growth, prosperity, competitiveness, social protection, full employment, social progress and cohesion between Member States[4]. For the achievement of these tasks the same Article predicts the establishment of the common market, the monetary union and the pursuance of common policies, one of which is competition policy[5].

The common market 'can only be effectively maintained by preventing collusive agreements between firms, abuses of dominant position, ensuring competitive market structures through merger control and by abolishing unjustified State aid that distorts competition by artificially keeping non-viable firms in business'.[6]

The reason why the rules on State aid were included in the TFEU was to prevent Member States to support so called 'national champions'. It was feared that such behaviour could easily result in a 'subsidy race' between Member States that may distort the creation and functioning of the internal market.[7]

### 2.2. The notion of State aid

The notion of State aid is included in the TFEU itself whose Article 107(1) prescribes 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

[4] Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13–390, Article 3; Nicolaides, Kekelekis, Kleis, State Aid Policy in the European Community, Principles and Practice, Second Edition, Kluwer Law International, (2008), p. 2.
[5] Ibid.
[6] Nicolaides, Kekelekis, Kleis, State Aid Policy in the European Community, Principles and Practice, Second Edition, Kluwer Law International, (2008), p. 2.
[7] Kelyn Bacon, European Union Law of State Aid, Second Edition, Oxford University Press, (2013), p. 9.

undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.[8]

In order to define measure as State aid these four conditions must be cumulatively fulfilled:

(i) Intervention by the State or through State resources;

(ii) The recipient receives an advantage on a selective basis;

(iii) The measure distorts or threatens to distort competition;

(iv) The measure is likely to affect the trade between Member States[9].

Although the first condition indicates that a certain measure has to be either imputable to the State *or* have an impact on State resources, the Court in its case-law established that this condition has to be interpreted cumulatively rather than alternatively[10]. In other words, in order to define a measure as State aid both an intervention by the State and an effect on State resources have to occur. Having that in mind, the term 'State' in the sense of this first condition includes central government, regional or local authorities or other public agencies[11]. On the other hand the term 'State resources' refers to not only resources that are granted directly by the State, but also by public or private bodies established or appointed by the State[12].

As regards the second condition, 'the recipient receives an advantage on a selective basis', except for the fact that there has to be an advantage, which is a notion that will be

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[8] Consolidated version of the Treaty on the functioning of the European Union, OJ C 326, 26.10.2012, p. 47-390, Article 107(1).
[9] Ibid.
[10] Case C-126/01 GEMO, (2003) ECR I-13769, ECLI:EU:C:2003:622, para 24.
[11] Case C-323/82 Intermills SA v Commission, (1984) ECR 3809 ECLI:EU:C:1984:345, p. 3823.
[12] Case C-290/83 France v Commission, (1985) ECR 439, ECLI:EU:C:1985:37, para 14.

elaborated at large in the subsequent chapter, it is important that the recipient of an advantage is an undertaking. An undertaking, in this respect, 'is an entity engaged in an economic activity, regardless of its legal status or the way in which it is financed'[13], wherein an economic activity is an activity 'consisting in offering goods and/or services in a given market'[14]. Furthermore, in order to fulfil the second condition an advantage also has to be selective, which means that it has to 'favour certain undertakings or the production of certain goods'[15]. The easiest way to see if an advantage is selective is by examining whether another undertaking in a comparable legal and factual situation as the one in the concrete case has also benefited from the same measure. If the answer is positive, then a measure is not selective and there is no State aid[16].

Regarding the third condition, a measure distorts competition if it strengthens the position of an undertaking in relation to its competitors[17]. In most of the cases this criterion will be unproblematic to prove since it is highly unlikely that a measure that puts an undertaking in a more advantageous position does not distort competition[18].

Trade between Member States is affected by a measure if the financial position of a recipient is strengthened as compared to other undertakings in the EU[19]. In order to satisfy this criterion it is sufficient for the Commission to prove that trade between Member States might be affected[20].

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[13] Case C-41/90 Höfner and Elser v Macrotron, (1991) ECR I-01979, ECLI:EU:C:1991:161, para 21.
[14] Case C-118/85 Commission v Italy, (1987) ECR 02599, ECLI:EU:C:1987:283, para 7.
[15] Case C-143/99 Adria-Wien Pipeline, (2001) ECR I-08365, ECLI:EU:C:2001:598, para 34.
[16] Ibid 41.
[17] Case C-730/79 Philip Morris v Commission, (1980) ECR 02671, ECLI:EU:C:1980:209, para 11.
[18] Paul Craig and Gráine De Búrca, Eu Law Text, Cases, and Materials, Sixth Edition, Oxford University Press, (2015), p. 1138.
[19] Case C-730/79 Philip Morris v Commission, (1980) ECR 02671, ECLI:EU:C:1980:209, para 11.
[20] Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 Alzetta Mauro and Others v Commission, (2000) ECR II-02319, ECLI:EU:T:2000:151, para 76-90.

## 3. The notion of Advantage in EU State aid law

This chapter offers an analysis of the concept of advantage within the meaning of Article 107(1) TFEU. After a general overview, it will include an explanation of the tests applied to establish the existence of an advantage.

As already stated, the advantage forms only a part of the second criterion 'the recipient receives an advantage on a selective basis'. Once it is established that an advantage has been granted, in order to satisfy the same criterion, it is also necessary to prove that its recipient is an undertaking and that a measure that provides an advantage is selective.

### 3.1. General rules

It is considered that a measure provides an advantage if it leads to an improvement of the economic and/or financial position of the beneficiary and if the beneficiary could not obtain that kind of an improvement under 'normal market conditions'[21]. However, this rule by itself cannot answer all questions occurring in practice. As State aid can appear in countless different forms and the facts of each case are different, the determination whether there is an advantage in a particular case will very often depend on a case by case analysis. However, the subsequent paragraphs will try to offer some additional standards that can help in assessing the existence of an advantage.

Firstly, it should be recalled that the concept of State aid is broader than that of a subsidy. This means that State aid includes not only direct grants to the recipients but also measures that have the same effect as such. 'Aid in form of a direct grant self-evidently improves the position of a recipient and in that provides it with an

[21] Joined Cases C-399/10 and C-401/10 P Bouygues and Bouyges Télécom v Commission, (2013) ECR 00000, ECLI:EU:C:2013:175, para 39; Case C-39/94 SFEI, (1996) ECR I-03547, ECLI:EU:C:1996:285, para 60.

advantage'[22]. However, the notion of State aid 'embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and measures which, without being subsidies in the strict meaning of the word, are similar in character'[23]. In fact, in 2015 State aid given in form of a subsidy made only approximately half of the given State aid[24]. A typical example of a measure that is not a subsidy in the strict sense but provides an advantage to an undertaking would be measures related to taxation which reduce tax charges for certain undertaking[25]. In this sense it is important to have in mind that there is no hierarchy between subsidies in the strict sense and other forms of an advantage[26]. In *Salzgitter v Commission* applicant claimed that the Commission should prove that a mitigation of charges has the same effect as a subsidy[27]. However, the General Court has concluded that 'once it is proven that a measure mitigated the charges of an undertaking, that measure must be classified as State aid and has the same effect as a subsidy, so no additional evidence is necessary'[28].

The list of forms in which State aid can be given is not exhaustive. Still, some of the forms in which State aid tends to occur more often are: direct grants, State guarantees[29], loans on more favourable terms (so called *soft loans*)[30], late payment facilities[31], tax

[22] Conor Quigley, European State Aid Law and Policy, Third Edition, Hart Publishing, (2015), p. 13.
[23] Case C-143/99 Adria-Wien Pipeline, (2001)ECR I-08365, ECLI:EU:C:2001:598, para 38.
[24] For more information see: State Aid Scoreboard 2015, http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html as accessed on December 5, 2016.
[25] Case C-173/73 Italy v Commission, (1974) ECR 00709, ECLI:EU:C:1974:71.
[26] Conor Quigley, European State Aid Law and Policy, Third Edition, Hart Publishing, (2015), p. 15.
[27] Case T-308/00 Salzgitter AG v Commission, (2004) ECR II-1933, ECLI:EU:T:2013:30.
[28] Case T-308/00 Salzgitter AG v Commission, (2004) ECR II-1933, ECLI:EU:T:2013:30, para 84; Conor Quigley, European State Aid Law and Policy, Third Edition, Hart Publishing, (2015), p. 15.
[29] Case T-154/10 France v Commission, (2012) ECR 00000, ECLI:EU:T:2012:452; Case C-275/10 Residex Capital, (2011) ECR I-13043, ECLI:EU:C:2011:814.
[30] Case T-214/95 Vlaamse Gewest v Commission, (1998) ECR II-00717, ECLI:EU:T:1998:77; Case C-102/87 France v Commission, (1988) ECR 04067, ECLI:EU:C:1988:391.
[31] Case C-256/97 DM Transport, (1999) ECR I-03913, ECLI:EU:C:1999:332.

advantages[32], payment for public services in certain situations[33], selling assets at an undervalue or on better terms[34], writing off debt[35], reimbursement of part of the costs of goods or services[36] etc[37].

The aim of Article 107 TFEU is to prevent distortions of trade between Member States by actions of public authorities 'which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods'[38]. In accordance with this, what matters when evaluating whether a specific measure conducted by a public authority provides an advantage for an undertaking is its actual effect and not its cause or aim[39]. This means that regardless of 'good intentions' that public authorities have at the time when they are putting a certain measure into effect (for example preventing job losses), the measure provides an advantage for an undertaking if its effect is the improvement of the undertaking's economic position in a way that could not be obtained under normal market conditions. As a matter of fact, as pointed out by Advocate General Lenz, if a certain measure has an economic policy aim, such as social or structural policy, it is even more likely to contain an advantage[40].

When deciding whether an undertaking could have obtained an advantage under 'normal market condition' it is important to establish whether the State in the certain case is acting as a market participant (*iure gestionis*) or in the exercise of its sovereign or

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[32] Case C-173/73 Italy v Commission, (1974) ECR 00709, ECLI:EU:C:1974:71; Case C-200/97 Ecotrade, (1998) ECR I-07907, ECLI:EU:C:1998:579.
[33] Case T-14/96 BAI, (1999) ECR II-00139, ECLI:EU:T:1999:12.
[34] Case C-40/75 Produits Bertrand, (1976) ECR 00001, ECLI:EU:C:1976:4; Case T-366/00 Scott v Commission, (2007) ECR II-00797 ECLI:EU:T:2007:99.
[35] Case C-246/12P Ellinika Nafpigeia v Commission, ECLI:EU:C:2013:133.
[36] Case C-100/92 Fonderia A v Cassa Conguaglio per il Settore Elettrico, (1994) ECR I-561, ECLI:EU:C:1994:70, para 13.
[37] Conor Quigley, European State Aid Law and Policy, Third Edition, Hart Publishing, (2015), p. 15 and 16.
[38] Case C-173/73 Italy v Commission, (1974) ECR 00709, ECLI:EU:C:1974:71, para 12.
[39] Ibid 13.
[40] Opinion of Advocate General Lenz Case 234/84 Belgium v Commission, (1986) ECR 02263, ECLI:EU:C:1986:151, p. 2271.

public functions (*iure imperii*)[41]. If the State is acting as a participant in the market by engaging in economic activities (*iure gestionis*) there are, commonly, other market participants to whose behaviour the State's actions can be compared[42]. In that case determining whether the undertaking has obtained an improvement in its economic and/or financial situation under normal market conditions can be examined by the application of the private investor test (see infra 2.2)[43]. On the other hand, if the State is exercising its sovereign functions (acting *iure imperii*), for example by enacting legislation, there are no entities on the market with whose behaviour State actions can compare to[44]. In that situation 'whether the legislation produces a benefit to some undertakings will therefore simply turn on effects of the legislation itself, seen objectively'[45].

In order to determine whether a certain measure improved the economic and/or financial position of the beneficiary it is necessary to compare its situation to that of other undertakings on the market[46]. This has to be done because 'the existence of an advantage can only be established by way of a comparison with the normal situation in the relevant area'[47]. In other words, the effect that a measure had on a certain undertaking that is a potential recipient of State aid has to be compared with the effect that it had on other undertakings.

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[41] Kelyn Bacon, European Union Law of State Aid, Second Edition, Oxford University Press, (2013) p. 31. Case T-196/04 Ryanair v Commission, (2008) ECR II-3643, ECLI:EU:T:2008:585, para 79.
[42] Kelyn Bacon, European Union Law of State Aid, Second Edition, Oxford University Press, (2013) p. 31.
[43] Ibid.
[44] Kelyn Bacon, European Union Law of State Aid, Second Edition, Oxford University Press, (2013) p. 31. Case T-196/04 Ryanair v Commission, (2008) ECR II-3643, ECLI:EU:T:2008:585, para 79.
[45] Kelyn Bacon, European Union Law of State Aid, Second Edition, Oxford University Press, (2013) p. 31. Case T-335/08 BNP Paribas v Commission, (2010) ECR II-3323, ECLI:EU:T:2010:271, para 169.
[46] Kelyn Bacon, European Union Law of State Aid, Second Edition, Oxford University Press, (2013) p. 33.
[47] Ibid.

A question that is naturally raised in this respect is what is the relevant moment in relation to which it is necessary to make a comparison between the beneficiary and the other undertakings. It is the time when a certain measure is adopted[48]. In this context the Court has stated in *Adria-Wien Pipeline* that a subsequent change in the situation of the presumed beneficiary in comparison with the situation at the time when the measure was adopted will not be relevant in the process of determining if there is an advantage[49].

When determining whether a certain measure constitutes an advantage it may be unclear what is considered a measure in the first place since some actions perceived separately do not constitute an advantage. In this respect the Court has found that in some situations 'several consecutive measures of State intervention must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention'[50]. This is especially the case when several measures are so closely linked to each other that they are inseparable from one another, especially 'having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions'[51].

In the last few years State aid is very often given in the form of guarantees. In relation to this, a measure may constitute an advantage for an undertaking even if the action from the public authority is only contingent. The excellent example for this statement is the Court's decision in *La Poste*[52]. In that case the Court stated that even if the State's guarantees for undertaking's loans are never called upon and the State does not

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[48] Case T-308/00 Salzgitter AG v Commission, (2004) ECRII-1933, ECLI:EU:T:2013:30, para 153 and further.
[49] Case C-143/99 Adria-Wien Pipeline, (2001) ECRI-08365, ECLI:EU:C:2001:598, para 41.
[50] Joined Cases C-399/10 and C-401/10 P Bouygues and Bouyges Télécom v Commission, (2013) ECR 00000, ECLI:EU:C:2013:175, para 103-4.
[51] Ibid.
[52] Case T-154/10 France v Commission, (2012) ECR 00000, ECLI:EU:T:2012:452.

intervene in order to return the loan instead of it, there is still an advantage because 'a potential additional burden for the State is liable to constitute State aid'[53].

When elaborating the notion of advantage, in order to have a clearer and more practical picture of the previous statements, one has to keep in mind that the burden of proving that there is an advantage in a particular case lies on the Commission[54]. In relation to this the Court has stated that the Commission cannot presume that there is an advantage basing its opinion on a lack of information[55] – it has to offer information that constitute 'a sufficient basis' on which it can be concluded that an undertaking has benefited from an advantage[56].

As previously stated the Commission developed two tests – the private investor and the private creditor test – in order to facilitate the examination of the existence of an advantage. These tests are not applicable in each case but when they are applicable the Commission is under a duty to apply them[57]. The subsequent two paragraphs will explain under which circumstances each of these tests are being applied and will illustrate the rules of their application as well as show the differences between them.

### 3.2. Private investor test[58]

The State is allowed to engage in all kinds of commercial transactions but 'since State resources are used in order to engage in these transactions, it must be considered whether this may result in State aid being granted to the counterparty'[59]. On the other

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[53] Ibid para 124.
[54] Case T-154/10 France v Commission, (2012) ECR 00000, ECLI:EU:T:2012:452, para 119.
[55] Ibid.
[56] Case C-520/07 P MTU v Commission, (2009) I-08555, ECLI:EU:C:2009:557, para 56.
[57] Conor Quigley, European State Aid Law and Policy, Third Edition, Hart Publishing, (2015), p. 155.
[58] Some authors use the term 'market economy investment principle' or 'market economy operator principle'.
[59] Conor Quigley, European State Aid Law and Policy, Third Edition, Hart Publishing, (2015), p. 153.

hand, Article 345 TFEU states that the system of property ownership is not affected by EU law[60]. Consequently, 'the principle of equal treatment means that Member States are free to undertake, directly or indirectly, economic activities in the same way as private companies'[61]. In other words, the State is allowed to participate on the market and make investments only in the same way as private companies.

Based on the previously mentioned Article, the Commission developed the private investor test. Generally, in this test the Commission compares the behaviour of State as potential provider of an aid in certain case with the behaviour of a private investor under similar circumstances: if a private investor under similar circumstances would have made the same decision as the one that is suspected to be State aid, there is no advantage and consequently there is no State aid[62]. The Court not only accepted this test but, as we will see in the subsequent paragraphs, also gave a more detailed elaboration through its case-law.

The comparison between the conduct of a public and a private investor must be made by reference to the action which a private investor would have had at the time when a certain aid was given, having in mind the information available and the foreseeable development at the time[63].

The standing of the Court is that a private investor is motivated only by profit or return on investment, meaning that such an investor would not provide any kind of advantage

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[60] Consolidated version of the Treaty on the functioning of the European Union, OJ C 326, 26.10.2012, p. 47-390, Article 345.
[61] Conor Quigley, European State Aid Law and Policy, Third Edition, Hart Publishing, (2015), p. 153.
[62] Case C-303/88 Italy v Commission ('ENI-Lanerossi'), (1991) ECR I-1433, ECLI:EU:C:1991:136, para 20-24; As previously stated, this method cannot be used in a situation in which the State is exercising its sovereign or public functions (see 2.1).
[63] Case C-482/99 France v Commission ('Stardust Marine), (2002) ECRI-04397, ECLI:EU:C:2002:294, para 70.

to someone else without asking for something in return[64]. In that context the Court in its decisions explicitly states that 'social, regional policy and sectoral considerations' are not motives for a private investor[65]. So if a private investor that is led by profitability would not have made the same investment as a public authority did the private investor test would not be satisfied and there would be an advantage.

The investor's motive, however, does not have to be to earn the biggest possible profit[66]. It is acceptable that an investor wants to maximise his profit, without running excessive risks in comparison with other participants in the market[67]. Still, it is necessary that the investor expects at least a minimum return equivalent to the average return for the sector concerned[68].

What also must be taken into account when applying the private investor test are already existing ownership/investment structures. If an investor is already a shareholder in an undertaking, he will look more favourably for a follow-up investment[69]. This means that in case the State is already a shareholder in an undertaking it is sufficient to prove that it is acting as a 'private holding company or a private group of undertakings pursuing a structural policy – whether general or sectoral – and guided by prospects of profitability in the longer term'[70]. So the State does not have to be motivated by realizing a profit in the relatively short term, in such

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[64] Case C-234/84 Belgium v Commission, (1986) ECR 02263, ECLI:EU:C:1986:302, para 14.
[65] Ibid.
[66] Joined Cases T-228/99 and T-233/99 Westdeutsche Landesbank Girozentrale, (2003) ECRII-00435, ECLI:EU:T:2003:57, para 255.
[67] Ibid.
[68] Ibid.
[69] Ben Slocock, The Market Economy Investor Principle, Directorate-General Competition, unit A-3, Competition Policy Newsletter, Number 2, June 2002.
[70] Case C-305/89 Italy v Commission, (1991) ECRI-01603, ECLI:EU:C:1991:142, para 20.

constellations[71]. However, if a public investor disregards any prospect of profitability, even in the long term, the measure would fulfil the advantage criteria[72].

In most of the cases the private investor test is conducted by proving that a certain investment *would be* also acceptable for a private investor. However, by far the best way to satisfy the private investor test is by showing that *there actually is* such an investor making the same investment on the same terms[73]. This method, also called 'concomitance test' by some authors[74], is only valid if the public authority and the private investor are in comparable situations[75]. This would not be the case if the private investors are employees investing in their own company since they are motivated by their desire to keep their jobs rather than the profitability of the company[76].

The private investor test does not apply only if a Member State requests so[77], it is a factor which the Commission is required to take into account for the purposes of establishing the existence of State aid[78]. Consequently, in cases in which the private investor test is applicable 'the Commission is under a duty to ask the Member State concerned to provide it with all relevant information enabling it to determine whether the conditions governing the applicability and the application of that test are met '[79].

Other factors that must be taken into account when applying the private investor test will vary depending on the situation in particular the content of the act in question[80]. In

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[71] Ibid.
[72] Case C-303/88 Italy v Commission ('ENI-Lanerossi'), (1991) ECR I-1433, ECLI:EU:C:1991:136, para 22.
[73] See for example Commission Decision 1999/705/EC on the state aid implemented by the Netherlands OJ L 280 , 30.10.1999, p. 87–121.
[74] Kelyn Bacon, European Union Law of State Aid, Second Edition, Oxford University Press, (2013), p. 41.
[75] Case T-296/97 Alitalia v Commission, (2000) ECR II-03871, ECLI:EU:T:2000:289, para 22.
[76] Ibid 84.
[77] Case C-124/10P EDF v Commission, ECLI:EU:C:2012:318 para 10.
[78] Ibid.
[79] Case C-124/10P EDF v Commission, ECLI:EU:C:2012:318, para 104.
[80] Case C-329/93 Germany v Commission, (1996) ECR I-05151, ECLI:EU:C:1996:394, para 31.

that regard the Commission has to be led by its obligation to make a complete analysis of all factors that are relevant for the transaction in the particular case and the context in which it has been made[81].

It can also be the case that a public authority makes several investments into a subsidiary at different points in time. In such a case the fact that one of these measures satisfies the private investor test does not automatically mean that all of them do so[82]. Whether investments are independent, must be concluded from their chronology, their purpose, and the subsidiary's situation at the time when each investment decision was made[83]. If the conclusion, after taking into consideration the previously mentioned facts, is that the investments are independent, the private investor test can be applied separately on each of them[84].

The comparison between the conduct of a public and a private investor must be made by reference to the attitude which a private investor would have had at the time in which certain aid was given, having in mind the information available and the foreseeable development at the time[85].

### 3.3. Private creditor test[86]

Although at first glance the private creditor test may seem to be the same as the private investor test, certain differences require a separate elaboration of this test. These

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[81] Ibid.
[82] Case T-11/95 BP Chemicals v Commission, (1998) ECR II-03235, ECLI:EU:T:1998:199, para 170.
[83] Ibid 171.
[84] Ibid.
[85] Case C-482/99 France v Commission ('StardustMarine), (2002) ECRI-04397, ECLI:EU:C:2002:294, para 70.
[86] Conor Quigley, European State Aid Law and Policy, Third Edition, Hart Publishing, (2015); Kelyn Bacon, European Union Law of State Aid, Second Edition, Oxford University Press, (2013); Phedon Nicolaides, Mihalis Kekelekis, Maria Kleis, State Aid Policy in the European Community, Principles and Practice, Second Edition, Kluwer Law International, (2008).

differences arise from the fact that in some cases the State does not act as an investor but as a creditor.

The private creditor test applies in case of repayment agreements concluded between public authorities and undertakings[87]. In these situations a comparison to a private investor would not be suitable because the private creditor, unlike the private investor, does not always seek to maximise profits – his motivation is to prevent financial loss[88].

If it is likely that a repayment agreement concluded between public authority and undertakings constitutes an advantage, the behaviour of a public authority must be compared with the behaviour of a private creditor[89]. If the undertaking would not have obtained comparable financing facilities from a private creditor in the same situation, there is an advantage within Article 107(1) TFEU[90]. As in the case of the private investor test, the private creditor has to be 'equivalent in all relevant respects to the State body concerned'[91].

In the application of private creditor test a private creditor, with whom we compare the public authority's behaviour, must be regarded as an efficient economic operator[92]. The main aim of an efficient economic operator is to recover the debt and in that process he has to choose the most appropriate means for the concrete situation[93]. In other words, if in a particular situation a public authority's actions were the best possible option in

[87] Case C-73/11P Frucona Košice v Commission, ECLI:EU:C:2013:32, para 72.
[88] Case T-36/99 Lenzig v Commission, (2004) ECR II-03597, ECLI:EU:T:2004:312, para 32.
[89] Case C-73/11P Frucona Košice v Commission, ECLI:EU:C:2013:32, para 72.
[90] Ibid.
[91] Opinion of Advocate General Jacobs in Case C-256/97 DM Transport, (1999) ECR I-03913, ECLI:EU:C:1998:436, para 36.
[92] Opinion of Advocate General Poiares Maduro in Case C-276/02 Spain v Commission, (2004) ECR I-08091, ECLI:EU:C:2004:211, para 36.
[93] Ibid.

order to recover the debt from an undertaking and the same actions would be also taken by a private creditor, these actions do not confer an advantage.

A question that often arises is whether a public authority acted in accordance with the standard of an efficient economic operator if it did not pursue all legally possible options to recover its debt. This question is usually asked in cases where a public authority foregoes to take all the necessary actions to recover its debt from the undertaking since that would lead to its liquidation. The Court stated that if the most effective way to recover the debt is to allow the undertaking to go into liquidation, then it must be assumed that a private creditor would not seek to prevent that outcome[94]. In that case if the public authority has failed to do so there is an advantage for a debtor. On the other hand, if the private creditor would assess that its losses would be lower if the company is allowed to continue to operate, there is no advantage if the public authority has failed to start the undertaking's liquidation[95].

Other factors that need to be taken into account in the application of private creditor test will vary from case to case and will not be closer examined in this work. However, some of these factors can be the creditor's status, the nature and extent of any security the creditor may hold as well as the amount it would receive in the event of liquidation[96].

### 4. Recent developments regarding the notion of advantage

The aim of the upcoming chapter is to draw attention to recent decisions by the Commission and case-law of the Court. The practice of these institutions is, however,

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[94] Ibid.
[95] Ibid 35.
[96] Case T-152/99 HAMSA v Commission, (2002) ECR II-03049, ECLI:EU:T:2002:188, para 168.

very broad. The following cases are selected firstly because they either represent a development of case-law or they pinpoint the latest issues regarding the interpretation of the notion of advantage. Another reason for the selection of these cases is that they indicate general standings of the Commission and the Court in questions related to the advantage criterion. In some of these cases the Court's support for unambiguous rules in the field of the advantage criterion comes to the surface. On the other hand there can be seen the Commission's more economic approach that is in favour of flexible rules when it comes to determining whether a certain measure constitutes an advantage.

### 4.1. Case T-473/12 Aer Lingus v Commission

The first case is a decision by the General Court. In 2015 it annulled the Commission's decision whereby an aviation company was ordered to return the received State aid to the Republic of Ireland[97]. In the judgement the General Court imposed a new obligation on the Commission under which it must declare the exact amount of advantage that was received by an undertaking[98].

In 2009 Ireland brought a new excise duty called Air travel tax (hereinafter: ATT)[99]. The ATT was imposed on flights with a departure from Irish airports and needed to be paid for each passenger[100]. The exact amount of the rate, however, depended on the distance of a flight's destination in relation to Dublin[101]. For destinations that were less than 300 km away from Dublin the rate was EUR 2 per passenger and for destinations that were

[97] Commission Decision 2013/199/EU on State aid, OJ L 119, 30.4.2013, p. 30–39.
[98] Case T-473/12 Aer Lingus v Commission, OJ C 96, 23.3.2015, p. 12–13, ECLI:EU:T:2015:78.
[99] Ibid 2.
[100] Ibid 3.
[101] Ibid 4.

further than 300 km from Dublin the rate amounted to EUR 10 per passenger[102]. The ATT was directly paid by the airlines[103].

In 2011 the Commission initiated proceedings in respect of the differentiated tax rates applied under the ATT[104]. The Commission's concerns were raised by the circumstance that the tax system provided one general tax rate that was applicable to the majority of flights and only one other lower rate that covered solely the flights in the area 300 km around Dublin (10-15 % of all flights).[105] The Commission assumed that the taxation favoured aviation companies operating domestic flights in comparison to companies operating intra-Union flights.[106] Later, in July 2012, the Commission brought its decision in which it concluded that the ATT constituted State aid that is incompatible with the internal market and it ordered Ireland to recover the incompatible aid from the beneficiaries[107]. It declared the amount of State aid correlated with the difference between the EUR 10 tax rate and the EUR 2 tax rate per passenger.[108]

However, aviation companies Aer Lingus and Ryan Air initiated proceedings before the General Court claiming that the Commission made a mistake in calculating the advantage of EUR 8 per passenger that needed to be recovered to the State[109]. They claimed thata large part of that amount was passed on to the passengers by the reduction of ticket prices[110].

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[102] Ibid.
[103] Ibid 3.
[104] Ibid 6.
[105] Commission Decision 2013/199/EU on State aid, OJ L 119, 30.4.2013, p. 30–39, para 45.
[106] Case T-473/12 Aer Lingus v Commission, OJ C 96, 23.3.2015, p. 12–13, ECLI:EU:T:2015:78, para 15-17.
[107] Commission Decision 2013/199/EU on State aid, OJ L 119, 30.4.2013, p. 30–39, para 68 and 71.
[108] Case T-473/12 Aer Lingus v Commission, OJ C 96, 23.3.2015, p. 12–13, ECLI:EU:T:2015:78, para 70.
[109] Ibid 22.
[110] Ibid.

The General Court stated in its decision that where the ATT was intended to be passed on to the passengers the Commission could not presume that the advantage that the airlines obtained and retained in fact amounted, in all cases, to EUR 8 per passenger[111]. Accordingly, the Commission should have determined the extent to which Aer Lingus and Ryan Air had actually passed on to their passengers the economic benefit resulting from the application of the ATT at the lower rate, in order to be able to quantify precisely the advantage which the airlines actually enjoyed and that needs to be recovered[112].

This decision is very important because the General Court 'equates the formal concept of advantage and the actual economic benefit derived by aid recipients, which in turn depends on the particular circumstances of each recipient and the actual market situation'[113]. This imposes the obligation on the Commission to calculate the amount of each advantage in order to recover it.[114] Regarding the fact that the case of each undertaking is different and that there are some elements (such as for example how many more passengers were travelling with these airlines because of the lower tax) that are difficult or impossible to determine precisely, this obligation puts a very burdensome task on the Commission[115].

### 4.2. Case T-58/13 Loutraki and Others v Commission

There are two important aspects of the notion of advantage that the General Court further developed in this decision. Firstly, it instituted the obligation of the Commission

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[111] Ibid 97.
[112] Ibid 99.
[113] Phedon Nicolaides, State Aid Uncovered: Critical Analysis of Developments in State Aid 2015, Lexxion Publisher, (2008), p. 31.
[114] Ibid 32.
[115] Ibid.

to identify the relevant market when assessing the existence of an advantage and it explained the influence of the economic crisis in Greece on the concept of advantage.

In 2012 Organismos Prognostikon Agonon Podosfairou AE (hereinafter: OPAP), a betting undertaking, obtained two licences by the Greek authorities[116]. One licence was providing it with an exclusive licence to operate 35 000 Video Lottery Terminals for a period of 10 years and the other with the 10-year prolongation of the exclusive rights for the operation of 13 games of chance[117]. OPAP paid fees for both of these licences[118].

In April 2012 several casinos filled a complaint with the Commission in which they stated that Greece would have been able to receive more money if it had granted more licences or organized a public tender for its award[119]. Applicants also stated that OPAP's profits were considerably higher than they would have been if there were other operators on the market[120].

The Commission in its decision claimed that the amount paid by OPAP for one licence was higher than its net present value[121]. However, the net present value for the other licence was much higher than the one paid by OPAP which provided it with an economic advantage[122]. Still, the Commission concluded that these two measures must be assessed jointly since they have been notified together and they concern the granting of exclusive rights to the same company at the same time for very comparable activities[123]. The Commission found that there had been no advantage for OPAP and consequently no

[116] Case T-58/13 Club Hotel Loutraki and Others v Commission, ECLI:EU:T:2015:1, para 2.
[117] Ibid 3-4.
[118] Ibid.
[119] Ibid 5.
[120] Ibid.
[121] Ibid 11.
[122] Ibid 12.
[123] Ibid 9.

State aid if these two measures are assessed together[124]. Seven other Greek casinos appealed against this decision[125].

Firstly, the Applicants stated that these two measures must be regarded separately since they concern different markets and that the existence of an advantage for the purpose of Article 107(1) TFEU must be assessed for each market separately[126]. In relation to that they claimed that 'the market definition is a necessary step in assessing State aid and that the Commission could not, therefore, assess the notified measures jointly without having first conducted a comprehensive market analysis'[127]. The General Court disagreed stating that a thorough and prior analysis of the market concerned is not necessary to determine the existence of an advantage for the purpose of Article 107(1) TFEU[128]. What is also important is that the General Court accepted the Commission's argument that two measures in this case must be considered together regardless of the Applicants' claim that the licences were given for the different periods of time[129].

Secondly, the Commission in its decision claimed that the expected rate of return of OPAP was high in order to compensate for the higher risk of investment linked to the exceptionally disturbed situation of the Greek economy[130]. Unfortunately, the General Court in its decision did not explicitly refer to this statement[131]. However, it stated that the purpose of the measures in question was to increase OPAP's market value 'to make it more attractive to potential buyers' since it was supposed to be privatised in the near

[124] Ibid 14 and further.
[125] Case T-58/13 Club Hotel Loutraki and Others v Commission, ECLI:EU:T:2015:1.
[126] Ibid 79.
[127] Ibid 80.
[128] Ibid 88.
[129] Ibid 93.
[130] Letter to the Member State, State aid SA.33988 (2011/N), OJ C1, 4 January 2013, para 31.
[131] Case T-58/13 Club Hotel Loutraki and Others v Commission, ECLI:EU:T:2015:1.

future[132]. 'The question that arises from this statement is how OPAP could be made more attractive without the State conferring an advantage to it, which was not available under normal market conditions'[133]? The possible answer to this question is that the General Court considered that OPAP had to be made more attractive in order to compensate for the extra risk[134]. Since this case is currently undergoing the appeal procedure there is still hope that the Court will answer this question[135].

### 4.3. Commission Decision 2015/314 on the State aid implemented by Spain

In 2001 Spain made changes to its Corporate Tax Law[136]. According to this law an undertaking taxable in Spain may deduct goodwill resulting from shareholding by gradually amortising it and thus lowering the corporate tax basis when acquiring at least a 5% shareholding in a foreign company and holding that stake for at least one year[137]. The financial goodwill is determined by deducting the book value of the acquired company from the acquisition price paid for the shareholding[138].

Since 2009 the Commission brought several decisions in which it stated that tax amortisation of financial goodwill arising from the acquisition of foreign companies constitutes State aid that is incompatible with the internal market[139]. These decisions are significant because they implicated amortisations measures may under certain circumstances be considered as an advantage.

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[132] Ibid para 92.
[133] Phedon Nicolaides, State Aid Uncovered: Critical Analysis of Developments in State Aid 2015, Lexxion Publisher, (2008), p. 69.
[134] Ibid.
[135] Ibid.
[136] Commission Decision 2015/314 on the State aid implemented by Spain, OJ L 56, 27.2.2015, p. 38–67, para 16.
[137] Ibid.
[138] Ibid 17.
[139] Commission Decision 2011/282/EU on the tax amortisation of financial goodwill implemented by Spain OJ L 135, 21.5.2011, p. 1-46; Commission Decision 2011/5/EC on the tax amortisation of financial goodwill implemented by Spain, OJ L 7, 11.1.2011, p. 48–75.

However, two decisions were brought in front of the General Court which merely concluded that the Commission had not established that the measures at issue were selective[140]. Unfortunately, the General Court in its decisions did not at all elaborate on the possibility of the existence of an advantage in the form of an amortisation since the mere fact that a measure was not selective was enough to prove that there is no State aid[141].

Since these two cases are currently under an appeal in front of the Court, it is still left to see whether the Court will agree with the Commission and confirm that an advantage can be given in form of amortisation.

### 4.4. Commission Decision 2015/1470 on State aid implemented by Romania

In 1998 Romania enacted a law which was stimulating foreign undertakings to invest in Romania by an exemption of payment of import duties[142]. However, Romanian national competition authorities brought the decision in which they concluded that a particular law was against the Europe Agreement signed a few years earlier between the European Community and its Member States, on the one hand, and Romania, on the other hand, which was a candidate country at the time[143]. More precisely, the law was considered to have provided the companies which have benefited by it with State aid[144].

At the same time Romania had in place an agreement with Sweden: the Agreement between the Government of the Kingdom of Sweden and the Government of Romania on

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[140] Case T-399/11 Banco Santander and Santusa v Commission, OJ C 462, 22.12.2014, p. 20–20, ECLI:EU:T:2014:938 ; Case T-219/10 Autogrill España v Commission, OJ C 462, 22.12.2014, p. 19–19, ECLI:EU:T:2014:939.
[141] Ibid.
[142] Commission Decision 2015/1470 on State aid implemented by Romania OJ L 232, 4.9.2015, p. 43–70, para 14.
[143] Ibid 16.
[144] Ibid.

the Promotion and Reciprocal Protection of Investments[145]. That agreement granted each country's investors certain protections when investing in the other country, inter alia investments' fair and equitable treatment in the host state, which also included protection of the investors' legitimate expectations[146].

In 2013, after the previously mentioned tax law was declared to be State aid, Viorel and Ioan Micula, Swedish investors in Romania, sought damages in front of an arbitration tribunal predicted in the Agreement[147]. That agreement granted each country's investors certain protections when investing in the other country, inter alia fair and equitable treatment of investment in the host state, which also included the protection of investors' legitimate expectations[148]. An arbitration tribunal established that Romania has to pay approximately EUR 82 million on behalf of Viorel and Ioan Micula and three companies owned by them because of the breach of investment protection guaranteed by the Agreement[149].

The question that was imposed after the decision of arbitration tribunal was whether the compensation of EUR 82 million represents an advantage. In 2015 the Commission brought a decision regarding this question in which it firstly stated that 'in cases of liability based on the wrongful conduct of national authorities, no advantage is granted to an undertaking where such liability merely ensures that the damaged party is given what it is entitled to'[150]. However, in this case the compensation has been awarded on the basis of an agreement that was contrary to EU law since it is incompatible with

[145] Commission Decision 2015/1470 on State aid implemented by Romania OJ L 232, 4.9.2015, p. 43–70, para 1.
[146] Ibid 22.
[147] Ibid 1.
[148] Ibid 22.
[149] Ibid 1.
[150] Ibid 101.

provisions of the EU Treaties. For that reason the Commission in its decision concluded that there is an advantage and that this compensation represents State aid[151].

Although the Micula brothers and their companies appealed against the decision in front of the General Court, they eventually decided to discontinue proceedings in December 2015. As a result, the case was removed from the register[152].

### 4.5. Commission Decision 2015/506 Flughafen Berlin-Schönefeld GmbH

This Commission Decision is of great importance as it illustrates circumstances under which a public authority may discriminate undertakings by offering services at different prices without giving an advantage to any of them.

Since 1990 Berlin had three airports: Berlin Tegel, Berlin Tempelhof and the East Berlin airport of Schonefeld[153]. Although before the reunification of Germany all three of them were operated by different companies, since 1990 they are operated by a single holding company, Berlin Brandenburg Flughafen Holding GmbH (hereinafter: BBF)[154]. BFF is jointly owned by the regions of Berlin and Brandenburg and the German Federal Government[155].

In June 1993 it was announced that Schönefeld will become main Berlin airport because it was predicted that 'an increase in air traffic could only be handled efficiently by a single airport that would be of a suitable size and properly equipped with modern technology'[156]. Tegel and Tempelfhof were not considered as suitable candidates since

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[151] Ibid 102.
[152] Case T-646/14 Micula and Others v Commission, OJ C 136, 18.4.2016, p. 44–44, ECLI:EU:T:2016:135.
[153] Commission Decision 2015/506 on the measures taken by Germany with regard to Flughafen Berlin-Schönefeld GmbH OJ L 89, 1.4.2015, p. 1–36, para 7.
[154] Ibid 11.
[155] Ibid.
[156] Ibid 13.

they could not have been extended to a sufficiently and their positions were not suitable because of the impact on local residents (in particular in terms of noise)[157].

Soon afterwards Schönefeld started pursuing a strategy which involved attracting low cost carriers (hereinafter: LCC) consequently adopting a new schedule of charges[158]. Although there was the applicable schedule of charge, BBF concluded the agreement with EasyJet which involved a specific charge system under which EasyJet was able to pay lower price than what was prescribed by the schedule[159]. The issue at hand was whether discounts to charges or financial incentives having the same effect as such discounts that are deviating from the general rules, represent an advantage in sense of Article 107(1)[160].

The Commission decided that these discounts do not automatically confer an economic advantage. The decision states that 'in order to determine whether they do so, it is necessary to assess whether a prudent market economy operator guided by profitability prospects would have accepted to grant similar discounts and incentives to the particular carrier concerned'[161].

In other words, the Commission's conclusion is that investors can discriminate by charging different prices to their client but that it has to be shown that lower prices or fees increase net revenue, otherwise there is an advantage.[162]

## 5. Conclusion

[157] Ibid 14.
[158] Ibid 33.
[159] Ibid 42.
[160] Ibid 183.
[161] Ibid 184.
[162] Phedon Nicolaides, State Aid Uncovered: Critical Analysis of Developments in State Aid 2015, Lexxion Publisher, (2008), p. 103.

This detailed analysis of the concept of an advantage has shown that determining whether an undertaking received an advantage from a public authority is one of the major difficulties in deciding whether a certain measure contains State aid. The rules in this area are mostly imprecise which leaves open many questions when these rules are being applied. As a consequence one needs to have their eyes constantly opened when they aim to be in pace with the continuous progress in this area of law.

From the overview of cases in the last chapter of this paper two main directions of the development of the concept of an advantage can be observed. On one hand, we can note that additional complexities have been installed into the process of assessing potential State aid measures. In *Aer Lingus* the General Court equalized the notion of advantage in the formal sense and the actual economic benefit that an undertaking received stating that the Commission has the obligation to calculate the exact amount of an advantage. This makes the Commissions' task more cumbersome. Furthermore, this well indicates that the Court is in favour of more unambiguous and stricter rules when determining whether a certain measure represents State aid.

On the other hand, as opposed to the Court, the Commission takes a more economic standing. Its standing can be seen best on the example of the Commission's decision in case of Club Hotel Loutraki. In that decision the Commission stated that the higher risk of an investment in case of exceptionally disturbed situation in the Greek economy needs to be taken into account when deciding whether there is an advantage. It should be also recalled that the Commission's devotion for an economic analysis of each case in determining whether an undertaking received an advantage is nothing new if we have in mind that the Commission was the one who invented private investor test in which the actions of the State are compared with the ones of the real participant in the market.

Although the Court's decisions are the only thing that matter in the end, in the author's opinion more economic and flexible analysis of each case is necessary since the law by itself cannot cover and predict all the questions occurring in the practice. However, the other side of this medal is that it also allows for legal uncertainty which, although harmful, is a necessary side effect for the greater cause in this case which is the functioning of the common market.

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