The 'Effect on Trade between the Member States' Criterion: Is It the Right Criterion by Which the Commission's Workload Can Be Managed?

*Cees Dekker**

On 29 April 2015, the European Commission decided on several notified measures, ruling that in none of those cases State aid was involved because, as the accompanying press release stated, they were unlikely to have a significant effect on trade between Member States. According to the press release, the decisions give additional guidance on how to determine which cases should be assessed by the Commission and which should not, to allow the Commission to focus on cases with a larger impact on the internal market. A couple of decisions in 2016 followed the same line of reasoning. This article discusses the question of how these decisions relate to the Court's case law and the Commission's own practice regarding the criterion 'effect on trade between Member States' laid down in Article 107(1) TFEU. It will also explore to what extent these decisions give actual clarity on the application of this criterion and if there is a better alternative to reduce the workload of the national authorities and the Commission.

Keywords: Interstate Trade; De Minimis; Appreciable Effect; Notice on the Notion of State Aid.

I. Introduction

To determine whether a government measure involves State aid within the meaning of Article 107(1) 1 TFEU, it must be determined whether the measure meets all the criteria of said Article. If the measure meets all criteria, it should be notified to the European Commission according to Article 108(3) TFEU, unless Regulation no. 651/2014 (GBER)[1] applies. If not all criteria of Article 107(1) 1 TFEU are met, the measure does not constitute State aid.

This article addresses the criterion *as far as this aid adversely affects the trade between Member States*, mentioned in Article 107(1) TFEU. The reason for that is that the Commission in 2015 and 2016 issued several decisions, in which the notified measures according to the Commission did not constitute State aid since they allegedly did not affect trade between Member States because it could not be foreseen that the measures would have more than a marginal effect on the conditions of cross-border investments or establishment. To be able to determine how these decisions relate to previous case law of the Court of Justice and the Commission's practice concerning the criterion's 'influence on the trade between Member States' laid down in Article 107(1) TFEU, I shall first discuss the framework of this criterion, as explained and applied in that case law and decision practice. I shall also determine to what extent these decisions of 2015 and those from 2016 respectively, give actual clarity on the application of this criterion, as the Commission stated in its accompanying press releases.[2]

---

* Cees Dekker, Attorney-at-law, Partner at Nysingh advocaten-notarissen N.V., Zwolle (The Netherlands).
DOI: 10.21552/estal/2017/2/4

1 European Commission, Regulation No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1.

2 Press Release IP/15/4889 (regarding the following seven Commission decisions of that date: *Public hospitals in the Hradec Králové Region*, SA.37432; *Städtische Projektgesellschaft "Wirtschaftsbüro Gaarden - Kiel"* SA.33149; *Alleged aid to a specialised rehabilitation clinic for orthopaedic medicine and trauma surgery,* SA.38035 (2015/NN); *Alleged State aid to Glenmore Lodge* SA.37963; *Alleged State aid to UK member-owned golf clubs,*

II. Framework

1. Actual or Potential Effect on Trade

The wording of Article 107(1) 1 TFEU regarding the criterion of the effect on trade between Member States differs somewhat from the formulation of the same criterion in the Articles 101(1) and 102 TFEU. Where the Articles 101 and 102 TFEU apply to practices 'which *may* affect trade between Member States', Article 107(1) TFEU defines a measure as State aid if it 'affects trade between Member States'. It seems that this last criterion is met less easily than the criterion formulated in Articles 101 and 102 TFEU. As shown by the case law of the Court of Justice, however, the criterion 'trade between Member States' should not be interpreted in such a limited meaning. According to the Court's case law, it is not necessary for the qualification of a national measure as State aid that the measure in question has actually affected trade between Member States and to have actually distorted competition. The only thing that must be verified is that the aid in question *may* affect trade between Member States and distort competition.[3]

In this regard, the criterion 'trade between Member States' in the State aid law is interpreted the same way as in Articles 101 and 102 TFEU.

2. Market Position of the Beneficiary Company

According to case law, trade between Member States is not only affected when aid is provided to a company engaged in the import and export of products or services. Aid provided to a company that does not export, but has to compete with products from other Member States within the internal market, may also affect trade between Member States, according to the Court of Justice.[4] According to the Court of Justice, aid to companies that locally or regionally provide services, and do not provide services outside the State where they are based, may also affect trade between Member States, because,

> [w]here a Member State grants a public subsidy to an undertaking, the supply of transport services by that undertaking may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of providing their transport services in the market in that Member State, [...].[5]

Formulated this way, aid may affect trade between Member States by benefitting a company that acts in a market in which companies based in other Member States may *become active*. The Court of Justice refers to a situation in which those companies from other Member States are not necessarily active in the market in question yet. It refers to their chances to offer their services in that market (in the Member State concerned). This is in fact the case when aid is provided to a company operating in a liberalised market.

The Court of Justice confirmed this line of reasoning in the *Heiser* case, about a tax benefit for an Austrian dentist, considering that the fact that a company only provides local or regional services, does not answer the question whether trade between Member States is affected. The Court of Justice considered in this case that, "*since it is not inconceivable* [...] that medical practitioners specialising in dentistry, such as Mr Heiser, might be in competition with their colleagues established in another Member State, the second condition for the application of Article 107(1) of the Treaty must be considered to be fulfilled."[6] Thus, the Court of Justice apparently uses the standard that the possibility that concerning companies compete with companies in another Member State, *cannot be excluded*. The fact that this possibility *cannot be ex-*

SA.38208; *Netherlands Investment aid for Lauwersoog port*, SA.39403; *Alleged State aid to medical centre in Durmersheim*, SA.37904) and IP/16/3141 of 21 September 2016 (regarding the following decisions: Decision of 20 July 2016, *Port of Wyk*, SA.44692; Decision of 1 August 2016, *Aid to support the Valencian language in the press*, SA.45512; Decision of 4 August 2016, *Aid to local media published in the Basque language*, SA. 44942; Decision of 9 August 2016, *Alleged State aid to Santa Casa de Misericordia de Tomar*, SA.38920 and Decision of 9 August 2016, *BLSV Sportcamp Nordbayern*, SA. 43983). All State aid decisions to which this article refers can be found on the Commission's DG Competition website at <http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=1,2,3> by filling in the case number. Last accessed on 22 April 2017.

3 Case C-518/13 *Eventech* [2015] ECLI-[65]. In the same sense, also see: case C-102/87 *France v Commission* [1988] ECR I-4067 [19].

4 *France v Commission* (n 3), [19]. An example of the application of the thus implemented criterion in the decision practice can be seen in the Commission's decision on the Centre Plan Mill and Sint Hubert, in which the Commission decides about the aid to a development combination of a housing corporation and project developer, both limited to the Dutch market: "Given that companies from other Member States are also active in the Dutch building sector, we cannot rule out that this measure will disrupt the intra-community trade", European Commission, Decision of 14 October 2009, N555/2008, *Centrumplan Gemeente Mill and St. Hubert.*

5 Case C-280/00 *Altmark Trans* [2003] ECR I-7747, [78].

6 Case C-172/03 *Heiser* [2005] ECR I-1627, [35]; Emphasis added.

cluded is enough then to decide that trade between Member States is affected within the meaning of Article 107(1) TFEU.

The Court of Justice applied the same standard in the more recent *Eventech* case. In that case, the Court addressed the question whether the practice of permitting London black cabs to use bus lanes on public roads during the hours when traffic restrictions with respect to those lanes are operational, while prohibiting minicabs from using those lanes, except for picking up and setting down their pre-booked passengers, involves State aid and, therefore, whether this practice affects interstate trade. With respect to this, the Court of Justice considered, after referring to the standards from the case law referred to above:

> In the main proceedings, the view must be taken, in particular, that it is conceivable that the effect of the bus lanes policy is to render less attractive the provision of minicab services in London, with the result that the opportunities for undertakings established in other Member States to penetrate that market are thereby reduced, which it is for the referring court to determine.[7]

This case too shows that the question whether the possibility that the chances of companies from other Member States are reduced, *can or cannot be excluded*, is decisive. Nothing shows that there were any undertakings from other Member States that had specific plans to offer their services in London, but this does not seem to be of any importance to the Court of Justice.

This case law does not affect the *criterion* of Article 107(1) TFEU: *as far as this aid affects the trade between Member States*. The inability to rule out the possibility that trade between Member States is affected, is, in my opinion, a standard of proof.

This standard of proof of the inability to rule out the possibility that trade between Member States is affected, does not mean that the Commission only has to state that this effect cannot be excluded. The Court of Justice requires (at least with respect to violation procedures in accordance with Article 108(2) TFEU) the Commission to found the allegation that trade between Member States may be affected. In the *Wam* case, among others, the Court of Justice ruled that the Commission should investigate whether the measures may adversely affect trade between Member States and may distort competition, by giving relevant indications in the decision as to the predictable consequences.[8] The Commission, however, is "not obliged to carry out an economic analysis of the actual situation of the relevant market or the patterns of the trade in question between Member States or to show the real effect of the aid at issue, in particular on the prices applied by Wam, or to examine Wam's sales on the United Kingdom market."[9]

In my opinion, we can therefore determine that the Court of Justice applies the term 'affecting trade between Member States' in a very broad sense which includes potential effect, and that this effect is sufficiently proven if the possibility thereof cannot be excluded, although the Commission might have to explain *why* the possibility that interstate trade is affected, cannot be excluded.

3. Appreciable Effect on Interstate Trade?

The next question is whether the effect on trade between the Member States must also be 'appreciable'.

According to the case law of the Court of Justice, there is no threshold or percentage below which it can be assumed that trade between Member States is not affected. The small proportions of the aid or the small size of the benefitted undertaking does not exclude the possibility that interstate trade is affected, according to the Court of Justice in its judgment in *Altmark*[10] and many other cases. At the same time, in a situation in which the Commission had refused to assess an interest subsidy granted by Spain against the (at that time) Notice on the *de minimis* rule for State aid (now the *de minimis* regulation[11]), the Court of Justice ruled that "whilst the Court has held that the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected [...] a small amount of aid to an undertaking over a given period does not

7 *Eventech* (n 3), [70].

8 Case C-494/06P *Commission v Italy and Wam SpA* [2009] ECR I-3639, [57].

9 *Ibid*, [58].

10 *Altmark* (n 5), [81].

11 European Commission, Regulation (EU) No 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ 2013 L 352/1.

affect trade between Member States in particular economic sectors."[12] The Court does not specify under what circumstances this is the case. With this judgment, the Court of Justice on the one hand provides room to acknowledge that the Commission could apply a *de minimis* rule, of which the legal validity (or at least the unconditional applicability) on the other hand is questionable, given the Court's rule that there is no threshold or percentage below which it may be assumed that interstate trade is not affected. In the meantime, the Court of Justice leaves open the possibility that even below the *de minimis* thresholds, trade between Member States may be affected, where it considered in this case: "The amounts determined by the Commission [the *de minimis* thresholds – CTD] have not been contested to this day."[13] This case shows that the Commission is also under the obligation to assess aid against the framework that it determined for itself in the *de minimis* regulation, but that it is possible (in practice: for a complainant) to demonstrate that measures indicated by the Commission as *de minimis* aid, can still affect trade between Member States. As far as I know, however, this has never happened in practice yet.

Thus, as to the 'appreciability' of the effect on interstate trade, it can be determined that such a criterion is not applied if State aid is concerned. The criterion seems to be applied digitally by the Court of Justice: either the trade between Member States is affected, or it is not. Once it is (or may be) affected, the criterion is met, no matter how small the effect.

It follows from the Court's case law:
- that the criterion of 'affected trade between Member States' is met if the possibility of an effect cannot be excluded;
- that this is the case when the aid benefits a company that operates in a market where companies from other Member States may also *become active*;
- that no minimum is determined for this, except for the minimum of the *de minimis* threshold, as long as the thresholds determined in the *de minimis* regulation are not contested in a specific case as set too high; and
- that the Commission must explain why the trade between States is affected, but does not need to make an economic analysis.

Because of all this, according to the case law of the Court of Justice, a measure is very easily considered to constitute State aid, at least for the criterion of 'effect on trade between Member States'. As a result, many measures have to be reported to the Commission, unless the measure can be implemented in accordance with the GBER.

III. The Commission's Decision Practice

The Commission's decision practice has been summarised adequately in the Commission's Notice on the Notion of State aid (the 'Notice').[14] This Notice shows that the Commission generally holds on to the opinion that the criterion is met when the possibility that trade between Member States is affected, cannot be excluded.[15] It usually does not perform a comprehensive market study.[16]

The Commission, however, points out in its Notice that it has found in several cases that, given the purely local nature of certain activities, trade between Member States is not affected by aid for these activities. According to the Notice in those cases the Commission ascertained, in particular, that
- the beneficiary supplied goods or services to a limited area within a Member State, and
- the beneficiary was unlikely to attract customers from other Member States, and
- that it could not be foreseen that the measure would have more than a marginal effect on the conditions of cross-border investments or establishment.[17]

12 Case C-351/98 *Spain v Commission* [2002] ECR I-8031, [51].

13 *Ibid*, [52].

14 European Commission, Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ 2016 C262/1. The Notice can be accessed at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719(05)&from=EN> Last accessed on 22 April 2017.

15 See *Notice* (n 14), [190-194].

16 A case in which the Commission did do this was the one regarding the Dutch Marinas (European Commission, Decision of 29 October 2003 on measures in favour of non-profit harbours for recreational crafts, the Netherlands, C10/2003, OJ 2003 L 34/63). In this case, the Commission studied the market share of the marinas involved in the European market, and it concluded that only a small number of mooring places was used by foreign tourists. Given the very small market share of the marinas involved, the Commission determined that the trade between Member States was not affected by the sale of stretches of land and water to the marina below market price. In that sense, the Commission sticked to the case law since it does not speak of a lack of 'appreciable' effect or a not more than marginal effect, but of 'no effect'.

17 See *Notice* (n 14), [196].

This line of reasoning, although incidentally occurring in prior years, was more consistently applied by the Commission in its decisions of 29 April 2015 and those referred to in the press release of 21 September 2016.[18] In the press release accompanying the decisions of 2015, it stated that the notified measures did not involve State aid because they were unlikely *to have a significant effect* on trade between Member States. That suggests that the Commission holds that there was an effect indeed, but that that effect was not enough to meet the criterion of Article 107(1) TFEU.

The wording of some of the decisions differs, however, slightly but *significantly* from the wording of the press release. In most of the cases the Commission considered in light of the available information, that the measures could not reasonably be foreseen to have more than a marginal effect, if any, on the conditions of cross-border investment and establishment between Member States.[19] The Commission then concludes that, therefore, the measures *are not liable to affect trade* between Member States.[20] In other decisions from the same date, however, the Commission considered that "neither the situation of the relevant market, the position of the undertaking in that market or the pattern of trade in the services in question show that the public support could reasonably be foreseen to have more than a marginal effect, if any, on the conditions that determine trade between Member States."[21]

Even if we assume that the latter line of reasoning (and the wording of the April 2015 press release) was a slip of the pen, the question is whether the former line of reasoning is in conformity with the Court's case law.

In my view, it is not. While the Court of Justice holds that the criterion is met if the possibility of an effect on trade cannot be excluded and that this is the case when the aid benefits a company that operates in a market where companies from other Member States may also *become active, not more than a marginal effect on the conditions of cross-border investment and establishment*, does not fulfil the test the Court applies. After all, when there is *not more than a marginal effect*, an effect cannot be excluded. This argument is not mere semantics. Applying a 'not more than a marginal effect' assessment, means that measures that have a marginal effect on the conditions of cross-border investment and establishment, will be considered not to constitute aid, while the Court does not apply such a threshold below which State aid is not involved. This *not more than a marginal effect* meant, for instance, that the subsidy of € 3,329,040 from the Dutch authorities to Lauwersoog Port,[22] exceeding by far the *de minimis* threshold, did not affect interstate trade, according to the Commission.

The next question is how the Commission assesses whether a public funding has *not more than a marginal effect on the conditions of cross-border investment and establishment*.

It would be getting too far to discuss all the decisions to which the two press releases refer. Therefore, I will give some examples. In the case regarding the funding of five regional hospitals by the Czech government,[23] the Commission considered that trade between Member States was not affected, because the main activity of the hospitals is to provide medical care to the inhabitants of the service area (limited to their own region). The Commission held that people will usually choose the nearest hospital for emergency care, and that cross-border traffic for elective care is only expected if it concerns a specialised hospital with an international reputation. Furthermore, the capacity (based on contracts with health care insurers) is adjusted to the regional need, and the number of foreign patients in the hospitals involved, in a six-year period, was never higher than three per year, for all five hospitals collectively. Finally, the Commission concluded that there was not any sign of cross-border investments in the region. The Commission held in

18 See the references made in footnote 4.

19 European Commission, Decision of 29 April 2015, *Czech Republic Funding to public hospitals in the Hradec Králové Region*, SA.37432 (2015/NN), para 23. The Commission used the same line of reasoning in the following decisions of the same date: *Städtische Projektgesellschaft "Wirtschaftsbüro Gaarden - Kiel"* SA.33149 (2014/NN ex 2011/CP), para 23; *Alleged aid to a specialised rehabilitation clinic for orthopaedic medicine and trauma surgery,* SA.38035 (2015/NN), para 17; *Alleged State aid to Glenmore Lodge* SA.37963 (2014/NN) (ex 2013/CP), para 23; *Alleged State aid to UK member-owned golf clubs,* SA.38208 (2014/NN) (ex 2014/CP), para 29. All decisions to which press release IP/16/3141 of 21 September 2016 refers follow the same line of reasoning.

20 See *e.g. Public hospitals in the Hradec Králové Region*, SA.37432 (2015/NN), para 24.

21 European Commission, Decision of 29 April 2015, *Netherlands Investment aid for Lauwersoog port*, SA.39403 (2014/N), para 40. The Commission took the same line of reasoning in its decision of the same date in *Alleged State aid to medical centre in Durmersheim*, SA.37904 (2014/NN), para 20.

22 See references made in footnote 21.

23 European Commission, Decision of 29 April 2015, *Czech Republic Funding to public hospitals in the Hradec Králové Region*, SA.37432 (2015/NN).

this case, therefore, 'that the measures cannot reasonably be foreseen to have more than a marginal effect, if any, on the conditions of cross-border investment and establishment between Member States.' What the Commission did not assess is whether there was no sign of cross-border investments *because* the incumbent hospitals got public funding. The Commission did not confirm in this case, that the beneficiaries themselves did not invest elsewhere either. Apart from that the Commission should assess not only whether patients from outside the region come to the hospitals involved, but also whether patients from inside the region go to hospitals outside the region. That might have been relevant specifically in the case of the same date concerning aid to the medical centre in Durmersheim. The beneficiary in that case operates four hospitals, three medical centres and several care facilities not far from the French border. According to the Commission, cross-border competition in the field of basic care is unlikely due to the linguistic problems and differences in healthcare insurance systems. Unlikely, but not excluded, I would say. At least that should be something to investigate in order to exclude an effect on trade between Member States. Where the Commission concluded in this case that the aid did not benefit a beneficiary that is active in a transnational market, this cannot be based on the fact that the beneficiary itself is not transnationally active, for the beneficiary may compete in its local market with companies in which foreign companies have shares. The Commission did not assess whether cross-border investments were made (or whether foreign investors would have considered investing) in the concerning regions or not.

Where the Commission states that trade between Member States is not affected by local activities if the aid does not cause any demand or investment to be diverted to the region concerned, and does not hinder the establishment of companies from other Member States, the Commission, in my opinion, applies a higher burden of proof of the lack of an effect on interstate trade[24] than the Court of Justice. The Court does not talk about 'diversion' of demand or investments, nor of a hindering of the establishment of companies from other Member States.[25] Foreign companies (or local subsidiaries of them) already active in the market may also experience hindrance. It is also striking that the Commission, regarding foreign investments, looks at current investments, but disregards the possible diminished chances of foreign companies to start investing, which is what the Court of Justice starts from.

It appears from the examples discussed above that the Commission considers the possibilities of cross-border trade, but the way in which it does so, is incomplete. The Commission seems to contemplate only where the demand side of the market for the beneficiary itself comes from, not whether suppliers outside the region (from another Member State) provide goods and services to customers living in the region of the beneficiary. It neither assesses whether foreign investors are involved as competitors that are established in the same Member State as the beneficiary, or whether the effect of the aid is that foreign investors refrain from investing in that region. Furthermore, it does not (always) assess whether the beneficiary due to the aid gains a better position to invest in activities on a market on which foreign undertakings are active. Under these circumstances one cannot say that it is *unconceivable* that the effect of the measure is to render less attractive the provision of the activities involved, with the result that the opportunities for undertakings established in other Member States to penetrate that market are thereby reduced.[26] In other words, the way in which the Commission assesses whether public funding has *not more than a marginal effect on the conditions of cross-border investment and establishment*, is not precise enough to conclude that an effect on interstate trade can be ruled out.

Another example of such an incomplete analysis is an earlier Decision of the Commission (from 2002) regarding the subsidy of the British government to Brighton West Pier in which the Commission held that this subsidy was no aid measure, on the following grounds: 'There is no similar construction in the other Member States and the pier is likely above all to attract British tourists. The pier's international reputation is insufficient to attract tourists from other Member States.'[27] Although this reasoning in itself

24 In the sense that the criterion of Article 107(1) TFEU is met less easily.

25 See Case C-280/00 *Altmark Trans* [2003] ECLI-415, [78].

26 Cf. *Eventech* (n 3), [70].

27 European Commision, Decision of 6 June 2002, N560/01 and NN17/02, to be found in the *non-paper* about Services of general economic interest and state aid of 12 November 2002, published on the Commission's website, para 51, available at <http://ec.europa.eu/competition/state_aid/reform/archive_docs/1759_sieg_en.pdf> Last accessed on 22 April 2017.

can be seen as a foundation of the argument that the effect on trade between Member States can be ruled out, it is remarkable that the Commission did not discuss the possibility that foreign companies (want to) operate *touristic attractions* to compete with the Brighton pier. That would be the market on which the aid could have an effect and is, therefore, relevant for the assessment whether interstate trade is affected.

These incomplete analyses become even more problematic when the assessment does not take place at the right level of the relevant market. If we look for instance at one of the examples the Commission gives in its Notice on the Notion of State Aid where interstate aid would not be affected – swimming pools that mainly aim at a local catchment area[28] – this could easily lead to misunderstandings. For one, swimming pools that are mainly intended for a local catchment area may not attract users from another Member State, but when the public authorities fund 'a swimming pool', it is likely that it consequently strengthens the position of a swimming pool *operator*.[29] There are undertakings that own or operate dozens of swimming pools and/or other (sports) facilities, probably. If they also have or operate facilities in border areas or in other Member States, the aid of a swimming pool that only attracts a local public may still affect interstate trade. The assessment whether trade between Member States is affected can therefore not only be based on the origin of the users of a service, but should be done after it is properly assessed what (upstream) markets could be affected.

The way in which the Commission dealt with one of the cases from 29 April 2015, regarding the municipality of Kiel, that allegedly provided aid to Wirtschaftsbüro Gaarden,[30] may, precisely from this perspective, be questioned. This case concerned a complaint from a consultant against an agency founded by the municipality to provide advice and consultancy to individuals, starting businesses and small and middle-sized companies to promote the attractiveness and economic activity of the disadvantaged neighbourhood of Kiel-Gaarden. The Commission concluded that the services were only aimed at this target group located in a limited geographical area, and that there was no sign of cross-border investments in basic services to very small companies, and, that therefore, the funding by the municipality (just below € 700,000 in three years) could not reasonably be regarded as having an effect on interstate trade. That argument seems not convincing. Would a consultancy firm – for instance one of the international consultancy firms that are also active in Germany – not be interested if the costs for their services (partly) would be paid by the public authorities?

The question as to which market should be assessed can also be raised regarding the Commission's decision in *BLSV Sportcamp Nordbayern*[31] to which the September 2016 press release refers. This decision involves a grant of over € 20 million for the construction of a campus (accommodation of 110 rooms with 299 beds, including full board and lodging fulfilling the standards of a youth hostel) with sports facilities (a three-pitch sport halls, an artificial grass pitch, a fitness room, an indoor and outdoor climbing wall, a beach-volleyball field, a multifunctional gymnastic room and regeneration facilities like a sauna, a treatment- and massage room as well as meeting/seminar room). It appears from the decision the expected user base of the Sportcamp is, as follows: 30 % schools; 28 % non-profit sports associations; 14 % sessions for sport trainer courses and 28 % for miscellaneous purposes (*e.g.* users from churches as well as social groups using the camp for seminars and teaching courses). An estimated maximum of 4 % of the users would come from abroad, but only in the context of the activities of sport associations and schools. The beneficiary and operator of the Sportcamp is the Bavarian State Sports Association (BLSV), a non-profit organisation. BLSV operates three other Sportcamps. I think the assessment in this case started from a wrong point of view, where the Commission considered that only the provision of training camp to individual travellers would appear to constitute an economic activity, as all other

28 See *Notice* (n 14), [197]. It is striking that, for each example given in paragraph 197, a case can be found that relates to the same sector in which the Commission judged that the trade between Member States was affected. It would be going too far to discuss all these cases. Reference is made, for example to the following decisions: SA.33045, *Kristall Bäder AG* (swimming pool); SA.404486, *Hallenbad Wachtberg* (swimming pool - abbreviated announcement of aid provided under the General Block Exemption Regulation (EC) no. 800/2008); SA.19864 (2014/C) - Government funding of the IRIS public hospitals in Brussels; SA.39426 *PICFIC* (hospitals); SA.38122 *'Guido' and 'Królowa Luiza' coal mines* (museums).

29 See *e.g. Hallenbad Wachtberg* (n 28).

30 European Commission, Decision of 29 April 2015, *Städtische Projektgesellschaft "Wirtschaftsbüro Gaarden – Kiel*, SA.33149.

31 European Commission, Decision of 9 August 2016, *BLSV Sportcamp Nordbayern*, SA.43983.

activities are limited to school education and exercise of amateur sport in a not-for-profit association. It does not become clear from the decision why the provision of sports facilities and accommodation to not-for-profit customers is not an economic activity. However, taking this assessment as a starting point, the Commission considered that because of the very low volume of economic activities, the fact that it is credible that the Sportcamp will cater for a local market and the restrictions for the use of the accommodation by individual travellers, the activity is not of such a nature as to dissuade operators in other Member States to enter the market by maintaining or increasing the local supply, or to exercise their right of establishment, nor of such a nature as to possibly attract more private users from abroad. This seems a rather weak reasoning. Would not it be attractive for private operators to operate such a facility (or even four of such facilities)? The reason that there are no private operators providing these facilities might be explained by the mere fact that BLSV can operate these facilities with the aid of the public authorities. Judged by the line of reasoning of the Court, one could very well say that BLSV offers accommodation and sports facilities to customers against payment[32] and therefore operates on a market that is open for competition. Under those circumstances "undertakings established in other Member States have less chance of providing their [...] services in the market in that Member State."[33]

All these examples do not mean that the Commission always analyses the circumstances of the case in this way. There are many decisions taken after 29 April 2015 that follow the 'classic' line of reasoning that it cannot be ruled out that trade between Member States can be affected and, therefore, is in conformity with the Court's case law. This, however, makes the Commission's practice even more unpredictable on this point.

While, for instance, the Commission found that the subsidy of € 3,329,040 from the Dutch authorities to Lauwersoog Port, already mentioned, did not affect interstate trade, it considered that the investment of € 571,232 (total of costs of € 970,507) from the German authorities in the creation of a technical energy infrastructure at the port of Kiel to allow ships docked there to meet their on-board energy requirements through an efficient supply of shore-side electricity, did affect interstate trade.[34] In the latter case the Commission followed the 'classic' line of reasoning, considering that "an advantage granted to a port operator in an EU Member State is likely to enhance its ability to compete with other port operators in the EU to attract traffic and reinforce its market position."[35] It does not appear from the decision whether the Commission considered the extent of the possible advantage for ships using the port's facilities and whether that advantage was of such a nature that it would attract more traffic.

Another example of the use of these two lines of reasoning is the German cases regarding the investment for the extension of the cruise ship terminal Putbus-Lauterbach on the one hand and the investment for the Port of Wyk auf Föhr on the other hand.[36] In the former case Germany notified a direct grant of € 4,527,408, meant to expand and adapt the infrastructure at the port to meet the growing demand in the market for river cruise ship services. According to the Commission it could not be excluded that the project would, at least potentially, distort competition between river cruise ship ports *in Germany*.[37] The Commission argued that the financial support granted by Germany would be used for extending the existing cruise ship terminal in Putbus-Lauterbach to adapt the port to the expected growing demand in the market for river cruises. According the Commission it was expected that after completion of the project the cruise ship terminal of Putbus-Lauterbach would be able to increase the number of cruise ship passengers. As concerns the interstate trade, "[f]urthermore, the Commission is of the view the measure is at least potentially capable of affecting trade between Member States by potentially diverting traffic away from other Member States, especially from ports operating around the Baltic Sea."[38] In this case the Commission apparently applies a (very) low burden of proof, given the fact that

32 At least it does not appear from the decision that the Commission examined whether the customers of BLSV pay for the services offered by BLSV.

33 *Altmark* (n 5).

34 European Commission, Decision of 13 June 2016, *"Green Port" Kiel: Landstromanlage Norwegenkai*, SA.41193.

35 *Ibid.*, [36].

36 European Commission, Decision of 19 August 2016, *Extension of the cruise ship terminal Putbus-Lauterbach*, State Aid SA.45848 and Decision of 20 July 2016, *Investment for the Port of Wyk auf Föhr*, SA.44692.

37 *Cruise ship terminal Putbus-Lauterbach* (n 36), [35].

38 *Ibid.*, [36].

it only referred to competition with other *German* ports.

The second case, regarding Port of Wyk auf Föhr, involved a € 6,564,000 grant meant for the renovation and modernisation of the infrastructure of the port, not enabling the port to cater for larger ships than before. The port is used by a ferry service from the German mainland and from a neighbouring German island, used for supplying the island as well as for bringing tourists to the island. The Commission considered, *inter alia*, that competition for the services offered in connection with the notified project occurs at a purely local level and given the specific circumstances of the island, that the planned investment would clearly not have any significant effect on the patterns of trade between Member States in the sense that it would have a decisive and significant impact on the decision of shipping companies from other Member States to use the port in Wyk auf Föhr rather than ports in other Member States. Therefore, the Commission held that trade between Member States was not affected. So, in this case competition with other German ports apparently was not relevant.

In another case concerning a port, the fact that competition came from another port in the same country – Croatia – apparently was enough reason to consider that there was at least a potential effect on trade between Member States and competition.[39] After all, the Commission argued in this case that the aided port of Osijek (in Croatia) is "in competition with other modes of transport like road and rail and could be at least potentially in competition with similar ports in Croatia (*e.g.* the port of Vukovar) and Hungary (*e.g.* the port of Mohacs in the future)" The latter, however, has a different product specialisation (no bulk cargo) and geographic location (a different river) and the lack of direct competition at present between the two ports was confirmed by the Commission's decision in 2015 in the case Development of Mohacs Port.[40] However, the Commission considered that the aided project in this latter Mohacs port case also aims at developing bulk cargo.

We see here cases in which competition occurs between undertakings within the same country and (in the *Osijek* case) potential competition in the future with a foreign undertaking, being enough to assume an at least potential effect on trade. In taking this latter circumstance in consideration, the Commission follows the line of the *Altmark* judgment cited above.[41]

These examples show us that since April 2015 the Commission uses two types of assessments: a 'classic' one, in which the Commission based on a scanty analysis comes to the conclusion that an effect on interstate trade cannot be ruled out; and the one that applies the criteria mentioned in the Notice of the Notion of State aid at paragraph 196 (in short: local activities, no attraction to customers from other Member States, not more than a marginal effect on the conditions of cross-border investments or establishment). It appears, however, that at least in some cases the latter analysis of the Commission is not accurate enough to rule out an effect on interstate trade.

IV. Guidance and Workload Reduction?

As noted before, the Commission states in the accompanying press releases, that 'additional *guidance*' is given with the decisions the press releases refer to, to allow Member States to assess which cases have to be reported to the Commission. In that regard, the decisions would be an addition to the GBER. In itself, the fact that the Commission makes (more) clear when measures do have to be reported and when they do not, should be welcomed. However, the Commission still creates little clarity with its practice since April 2015, and points the national authorities in the wrong direction with its *guidance*. This does not do any good for the clarity in State aid law; authorities which are under the impression they do not have to report their aid in accordance with the *guidance*, may find out later that they have provided unlawful aid, for instance when a third party files a complaint. The risk of this is borne by the beneficiary companies.

The most striking argument in the press release is that the main objective (apparently: of these decisions) is to reduce the administrative workload of the national authorities and the companies. The Commission does not mention its own workload, but it is hard to avoid the impression that this was one of the considerations in the judgments, now that the Commission does mention that, thanks to the decisions,

39 European Commission, Decision of 26 September 2016, *Croatia Investment aid to the port of Osijek*, SA.43109.

40 European Commission, Decision of 18 August 2015, *Development of the Mohacs Port*, SA.41275.

41 *Altmark*, (n 7).

it can focus on the State aid cases with the largest impact on the internal market.

If the Commission intends to reduce its workload, the decisions discussed in this article will not help much, because too many questions remain around the application of the criterion 'effect on trade between Member States', as to the legality of the Commission's approach as well as its practical use. A raise of the *de minimis* threshold would work out much better in practice. However, such a raise would (conceptually) be at odds with the broad explanation of the criterion that the Court of Justice applies. That is why, within the system of State aid law, it would be better not to work with a raised *de minimis* threshold, but to include aid below certain thresholds as a general category in the GBER. About aid with such a small ('marginal') impact, it could be said that, when it pursues one of the objectives mentioned in Article 107(3) TFEU (particularly those mentioned under Article 107(3c) TFEU: aid to facilitate the development of certain economic activities), the advantages of the aid make up for the small - marginal - impact on the competition and interstate trade. So far, the GBER does not contain a general (not bound to types of beneficiaries or sectors) category of exempted measures, but I do not see any reason why such a category could not be introduced. We might think about aid up to a certain maximum amount, *e.g.* limited to small and middle-sized companies that do not export. This would of course require further elaboration. In any case, I will point out now, for instance, that the GBER's general requirement that aid must have a stimulation effect can be easily met by determining that aid that meets the conditions as further detailed in the GBER, has a stimulating effect, the way it determined already for certain categories.[42] Another advantage of ranging this aid with a marginal effect under the GBER is that the Member State has to notify the Commission afterwards.[43]

An alternative to reduce the workload is that the Commission applies a simplified procedure to cases with little impact. The Commission already had a similar plan in 2003 with the LET (*limited effect on trade*) project, according to which aid meeting the described conditions could be presented through a summary procedure. The document in which this LET approach was described,[44] was briefly available on the Commission's website, but was withdrawn because of the legal uncertainty about its tenability.[45] Unlike the decisions discussed here, the LET approach (aid, however with a simplified notification) was more in line with the case law of the Court of Justice.

V. Conclusions

The way in which the Commission in the twelve decisions to which the said press releases refer, concluded that the Member States' measures do not affect trade between Member States, is not in conformity with the case law of the Court of Justice. First, where the Commission in its assessment of the national measure does not come further than the conclusion that there is not more than a marginal effect on the conditions of cross-border investment and establishment, it cannot rule out that trade between Member States is affected. Second, the basis on which the Commission comes to its conclusion that there is not more than a marginal effect on the conditions of cross-border investment and establishment, can be questioned in several cases.

If the Commission tries to reduce its workload there are alternative ways, like defining the aid involved as aid falling under the GBER, or introducing a simplified procedure for certain categories of aid, that would fit better in the case law of the Court and brings more certainty for national authorities and beneficiaries.

42 See Article 6(5) GBER. In relation with the aid's transparency, the same technique is applied to Article 5(2 subs e-i) GBER.

43 Article 11(sub a) GBER.

44 Just like the LASA (lesser amounts of State aid) document, issued at the same time. Both documents can still be found at <http://ec.europa.eu/competition/state_aid/reform/sit_let_en.pdf> and <http://ec.europa.eu/competition/state_aid/reform/sit_lasa_en.pdf > Both online sources were last accessed on 22 April 2017.

45 See also, W Mederer, N Pesaresi and M Van Hoof, *EU Competition Law, Volume IV, State Aid, book one* (Leuven: Claeys & Casteels 2008), 404.