

Nature Conservation

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Refreshing your memory (1)

- State aid measure:
 1. State resources
 2. Undertaking
 3. Advantage
 4. Selectivity
 5. Distortion of competition
 6. Effect on trade between MS

Refreshing your memory (2)

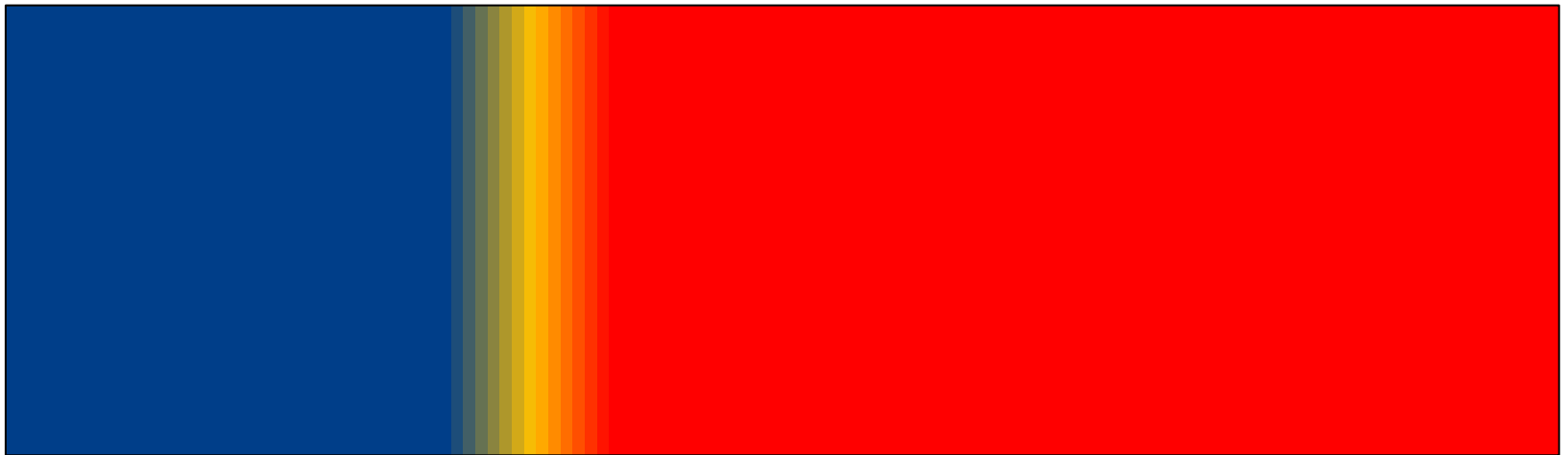
- State aid measures are incompatible with the internal market
- Unless declared compatible by the Commission

- State aid measures have to be notified to the Commission before the aid is granted
- Some measures are exempted from the notification obligation (then state aid can be granted without notification and approval; it is still a state aid measure!!)

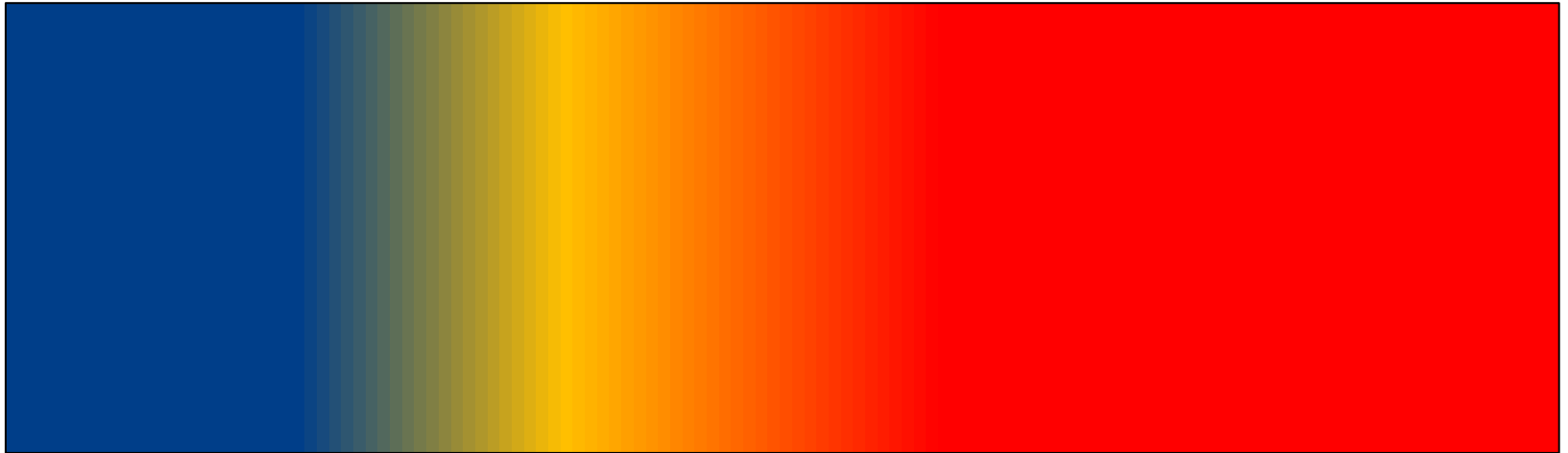
Refreshing your memory (3)

- Categories of state aid measures:
 1. **Measure but no state aid**
 2. **State aid measure, but exempted from the notification obligation**
 3. **State aid measure, but compatible**
 4. **State aid measure, but may be compatible**
 5. **Incompatible state aid measure**
 - ✓ **Green** = national courts / authorities / Commission / ECJ
 - ✓ **Red** = **only** the Commission

Society has changed: From.....



To ...



50s

- State aid rules were drafted in the late 40s.
- Many public interests were safeguarded by the government itself or through state companies
- Markets were characterized by one thing: profits
- Between governments and markets, non-profit organizations, charity organizations and alike were situated; they were left untouched by the state aid rules (no one bothered)
- Application of state aid rules in a pretty straight forward relationship between governments and companies (markets)

Developments in the 90s and 00s

- Liberalization: many government tasks / activities were liberalized and privatized
- Companies discovered corporate social responsibility, at first out of belief (Ben&Jerry's), but then also because it has market value
- Non-profit organizations and alike began applying business principles in order to cut costs and save more money for the good cause
- Distinction between government and market became a bit blurred

10s

- After 60 years the state aid rules in the Treaty are still the same
- State aid rules are most of the times applied in the same straight forward relationship between government and company
- When the parties were more difficult to define, *ad hoc* solutions were found (by the Commission or the ECJ)
- But sometimes the application of the state aid rules in this new societal order leads to unexpected consequences

Nature Conservation



Wikimedia.org

How are things done in the Netherlands?

- Until 2008 nature conservation was designed, organized and financed by the central government
- The provinces were the executors
- From 2008, provinces could determine the nature conservation policies in their territory; still mostly financed by the central government
- (Now, central government wants to cut the financial resources and transfer all responsibility to the provinces)

Subdivision of nature conservation

- Nature conservation can be divided into:
 1. Acquisition of land for nature conservation
 2. 'Design' of nature on acquired land
 3. Actual conservation or management of nature
- Subsidy regulations reflect this subdivision

SNL

- Conservation or management of nature → Subsidiestelsel natuur- en landschapsbeheer:
 1. Subsidieverordening natuur- en landschapsbeheer (SNL)
 2. Subsidieregeling kwaliteitsimpuls natuur en landschap
- Provinces adopt a nature management plan which defines the types of the nature on the territory
- These types determine the type of subsidy to acquire
- Subsidy amount is max 84% of the net cost price (model)
- Beneficiaries are Vereniging Natuurmonumenten, 12 provincial Landschappen and other nature managers
- Only the SNL was notified to the Commission as a potential state aid measure

Main argument of the Dutch authorities

- Nature conservation or management and the activities to promote nature 'experience' are not economic activities in the meaning of EU law
- It is not a service that is provided on a market
- Even though the beneficiaries sell products of nature, offer guided tours and have tourist centers, these – economic – activities are (very) secondary to their core non-economic activity: the management of nature
- So the beneficiaries are not undertakings and therefore the subsidies do not constitute state aid measures

Decision of the Commission (1)

- “While it cannot be excluded that some of the conservation tasks will be purely non-economic in nature, in other cases the conservation objective will be, at least partially, achieved through tasks involving economic activities, such as e.g. the sale of crops, leases of land and activities attracting tourism”
 - ✓ Because the conservation objective is partially achieved with revenues coming from economic activities, the Commission considers the beneficiaries undertakings
 - ✓ Commission interprets ‘nature management’ very broadly
 - ✓ Economic and non-economic activities are not on separate accounts
 - ✓ Environmental objective will always coexist with economic objective

Decision of the Commission (2)

- All elements are present, so state aid measure:
 - Par. 3.1: undertakings
 - No. 33: state resources and selectivity
 - No. 34: advantage
 - No. 35: distortion of competition and effect on trade between MS

- ➔ Assessment of compatibility under art. 107 (3) (c) TFEU:
development of certain economic activities

Decision of the Commission (3)

- No. 43: balancing test
- No. 44 – 58: application
- No. 59 – 60: conclusion
 - State aid measure is compatible

Land acquisition

- In 1990, the Ecologische Hoofdstructuur (EHS) was defined
- The EHS is a coherent network of existing and future nature areas
- Not all areas are 'nature' yet
- The purchase of land within the EHS and sometimes outside the EHS can be subsidized for 100% of the minimum market value
- Beneficiaries are 'nature managers', such as Vereniging Natuurmonumenten etc.
- Acquired land must be designated as 'nature' and may not be sold again, unless approved of by the provincial authorities
- Received subsidies then have to be paid back within 6 months

Main argument of the Dutch authorities

- Nature conservation or management as such is not an economic activity
- Though some activities by nature managers can be qualified as economic, those activities are secondary to the core activity of nature management
- Therefore the beneficiaries are not undertakings and the subsidies are not state aid measures

Decision of the Commission (1)

- The Commission refers to the decision on the subsidies for nature management and states that the beneficiaries are undertakings
- Also the other elements are present (*Altmark* criteria are not fulfilled)
- Therefore the subsidies for the acquisition of land for the purpose of nature management are state aid measure

→ Assessment of compatibility

Decision of the Commission (2)

1. SGEI Decision: Dutch authorities could not guarantee that all beneficiaries had a yearly turnover of less than € 100 mio and received a yearly compensation of less than € 30 mio
 2. So the Commission turned to the SGEI Framework (stressing that the assessment was basically the same)
 3. Fulfilled the criteria of the SGEI Framework
- ➔ Subsidies for the acquisition of land for the purpose of nature management is compatible

1. Is nature conservation an economic activity?

- Since the objective of nature management was also financed through economic activities, the beneficiaries were considered undertakings
- When nature management in the broad sense is stripped of the economic activities, is it then still an economic activity?
- If no, then the application of the state aid rules might lead to unwanted results, i.e. cost inefficiency, higher public expenditures, the destruction of products of nature etc.

The goal of the subsidies

- What is actually subsidized?
 1. Nature conservation (in the narrow sense)
 2. Acquisition of land for that purpose
- Not: the sale of products of nature etc. (the economic activities)

Two theories

1. Theory of separation: when an entity performs both economic and non-economic activities, it can only be qualified as an undertaking where it concerns the economic activities
→ Subsidies for non-economic activities cannot be considered state aid
2. Theory of conversion:
 - ✓ When an entity starts to perform economic activities next to economic activities, it converses into an undertaking, also for the formerly non-economic activities
 - ✓ Formerly non-economic activities converse into SGEI when they involve a public service

Which one?

- The Commission seems to apply the theory of conversion, but it does not explicitly state so
 - Most case law supports the theory of separation
 - Also the Commission in its latest communication on SGEI adheres to the theory of separation
- Flaw in the statement of reasons?
- Note: no separation of accounts, but the Commission did not use that as a decisive factor

2. On what provision are the decisions based?

- SNL: art. 107 (3) TFEU → development of certain economic activities
- Land acquisition: SGEI Framework, i.e art. 106 (2) TFEU → undertakings entrusted with a service of general economic interest
 - ✓ But with the statement that the Framework was applied **only** because the Dutch authorities could not guarantee that the beneficiaries would comply with the turnover and compensation ceilings of the SGEI Decision
 - ✓ Which implies that when those criteria are met, the Decision is applicable → no notification

Why?

- No idea! 😊 Different authors within the Commission staff?
- But it is sloppy, even more so because
 - ✓ both notifications were dealt with at the same time
 - ✓ the Commission refers in its Land acquisition Decision to the SNL Decision
 - ✓ the Commission also refers to an earlier German Decision on subsidies for nature management, which were also declared compatible on the basis of art. 106 (2) TFEU

Consequences

- Huge!
- Difference between
 - a) notification and possible influence of the Commission on the subsidy scheme and
 - b) non-notification which leaves all powers to the grant provider

3. What are the consequences of this line of reasoning?

- Whenever a non-profit organization or another non-commercial entity sells products for the good cause and receives a subsidy from a government, the government grants state aid
- Which is, as a basic rule, prohibited
- So the government has to check whether the SGEI Decision is applicable (or GBER or De minimis Regulation) in order to grant the state aid without notification
- E.g. Vereniging Natuurmonumenten and Unicef fall outside the ambit of the SGEI Decision

However...

- Although the Decisions can be criticized and can lead to absurd consequences, in practice the effect will not be very large
- Most non-profit and such organizations do not receive subsidies (financed through donations and contributions)
- If they do, the subsidies mostly stay below € 15 mio a year → SGEI Decision is applicable (if the 'good cause' is acknowledged as a SGEI), so no notification if the criteria are fulfilled
- If the subsidy has to be notified, the Commission will probably declare it compatible with the internal market

Follow up

- The Land acquisition Decision is appealed
- However, the SNL Decision not
- Also, the Decision on German subsidies for nature management is appealed and the Netherlands intervened (case T-347/09)
- Main arguments:
 - ✓ Those subsidies for nature management do not constitute state aid
 - ✓ Nature management as such is not an economic activity
 - ✓ The fact that nature management is for a small part financed with the revenues of economic activities does not turn nature management into an economic activity
 - ✓ Therefore, the beneficiaries are not undertakings when it concerns nature management

Chances?

- Case *Compass-Datenbank*:
 - Austria manages the Austrian Trade Register and the data base that contains all the information
 - Austria tendered the task of making this information accessible to third parties out to certain companies
 - These third parties were not allowed to use the information for commercial purposes
 - However, Compass-Datenbank made the information from the Trade Register available to third parties and asks a fee for that
 - Austria orders Compass-Datenbank to stop that activity

Argument *Compass-Datenbank*

- Main argument: Austria (and the companies) are abusing their dominant position by prohibiting others to use these data commercially
- From a legal perspective: only undertakings can abuse a dominant position in the meaning of the TFEU, so Austria had to be qualified as an undertaking
- Legal question: are these activities economic activities for which Austria can be considered 'an undertaking'?

Judgment Compass-Datenbank (2012)

- In so far as a public entity exercises an economic activity which can be **separated** from the exercise of its public powers, that entity, in relation to that activity, acts as an undertaking, while, if that economic activity **cannot be separated** from the exercise of its public powers, the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers (par. 38)

Chances?

- Can the (minor) economic activities be separated from the non-economic activities of nature conservation?
- Probably not, so in that case those activities should be qualified as non-economic and the nature conservation organizations cannot be qualified as undertakings
- Hence: no state aid measures