

Port of Izola: An Appreciable Twist in State Aid Law?

Annotation on the Judgment of the General Court (Second Chamber) of 14 May 2019 in Case T-728/17 *Marinvest d.o.o. and Porting d.o.o. v European Commission*

Edwin Schotanus*

Under the Case law of the Court of Justice (CJ), aid measures are very quickly considered to affect competition and trade between Member States (inter-State trade). Nonetheless, in certain clear, specific situations, this will not seem to be the case. The European Commission is constantly seeking ways to dispose of such issues fast, in order to focus on more harmful types of State aid. This pragmatic approach by the Commission is at odds with the CJ's principled application of the criteria 'effect on competition' and 'effect on inter-State trade', and may sometimes result in inconsistent Decisions. Legal certainty would be furthered by a CJ ruling about the Commission's pragmatic approach.

Keywords: effect on inter-State trade; effect on competition; appreciability; State aid.

I. Introduction

This article discusses the judgment of the General Court (GC) of 14 May 2019 between an operator of a marina in Slovenia and the Commission.¹ In part II, I will examine the Commission's Decision which the operator appealed to the GC. I will then analyse the GC's ruling in part III. Finally, in part IV, I will set forth my views on the GC's findings, partly in light of later rulings by Court of Justice of the European Union (CJEU).

II. The Commission's Decision

Komunale Izola d.o.o. is fully owned by the Municipality of Izola, Slovenia, and operates the municipal marina. There is another marina in the municipali-

ty, too. *Marinvest d.o.o.* and *Porting d.o.o.* operate this marina. *Altan Prefabbricati S.p.A.* (an Italian legal entity) indirectly holds all the shares in both *Marinvest* and *Porting*. *Marinvest* and *Porting* contended that *Komunale Izola* received advantages from the municipality which they did not. To put an end to this alleged type of distortion of competition, *Marinvest* and *Porting* filed a complaint with the Commission.

Based on information from Slovenia as well as *Marinvest* and *Porting*, the Commission adopted a provisional position. The Commission announced the provisional position to *Marinvest* and *Porting* on 14 February 2017, giving them the opportunity to respond to this. They did so. On 20 July 2017, the Commission ruled that the putative advantages did not constitute aid measures, because

even if some marginal distortion of local competition cannot be excluded, the Commission can conclude that the alleged aid measures are not liable to affect trade between Member States.²

In reaching this conclusion, the Commission explained the formal framework first. Referring to the *Wam* decisions by the CJEU, the Commission noted that it had to show that the aid measure affected or

DOI: 10.21552/estal/2019/3/14

* Edwin Schotanus is a lawyer at KienhuisHoving.

¹ Case T-728/17 *Marinvest-Porting v Commission* [2019] ECLI:EU:T:2019:325.

² European Commission, Decision of 20 July 2017, SA.45220, regarding alleged aid in favour of *Komunale Izola d.o.o.*, Slovenia.

threatened to affect competition and inter-State trade. Although a precise economic impact assessment was unnecessary, the Commission did have to explain that competition and inter-State trade might be affected.³

The Commission then referred to its individual decisional practice concerning local activities generally⁴ and marina activities specifically.⁵ In this practice, the Commission has elucidated the circumstances under which a measure benefiting a marina should not be deemed to be able to appreciably affect competition and inter-State trade. This is the case if the activities in question primarily meet a local demand and do not attract customers from other Member States. Moreover, the measure must not have any foreseeable effects on cross-border investments in the sector concerned or cross-border establishment of undertakings.

The Commission applied these principles to the circumstances of the case. The Municipality of Izola is located on the Slovenian coast. Izola is described as a thriving tourist centre with the largest marina in Slovenia. The marina operated by Marinvest and Porting has a capacity of 700 berths for yachts up to 30 metres. The municipal marina has 505 berths, with 37 berths available for rental. The remaining 468 berths are reserved for Izola's permanent residents. In terms of image and facilities, the marinas are likewise different, with the municipal marina's having a much more Spartan design than Marinvest and Porting's marina. International tourist media do not mention the municipal marina at all. Finally, the turnover realised from the municipal marina's operation of the 37 berths was EUR 91,000 in 2015.

Given these circumstances, the Commission concluded that the municipal marina did not attract customers from other Member States and that the government measures did not preclude or impede foreign investment or establishment.

Marinvest and Porting disagreed, and appealed the Decision to the GC. The GC affirmed the Commission's Decision.

III. The GC's Decision

Marinvest and Porting's grounds for appeal before the GC not only had to do with the Commission's substantive judgment, but also the asserted violation of their rights of defence. For instance, the Commission,

they maintained, used other figures in its ultimate decision than the figures which had been used in the letter of 14 February 2017 sent to them (which included the Commission's provisional position). The GC rejected this ground for appeal. The GC explained that the examination referred to in Article 12 of Regulation 2015/1589⁶ provides for a procedure solely with the Member State complained of as the relevant party. Like the alleged beneficiary, the complainant is merely one potential source of information for the Commission. Thus, they do not have the same rights as the relevant Member State. When the Commission received more complete information from the Member State Slovenia, it did not for that reason have to enable Marinvest and Porting to view and perhaps respond to this. The additional information simply confirmed the Commission's provisional position (which had been communicated to Marinvest and Porting). The GC felt that Marinvest and Porting's rights had therefore not been impaired.

Later in the ruling, the GC addressed the grounds for appeal which Marinvest and Porting had raised against the Commission's judgment that the asserted aid measures could not have had more than a marginal effect on competition or inter-State trade.

In the introductory findings, the GC reiterated the points of departure regarding court review of aid measures. As regards the criteria 'effect on competition' and 'effect on inter-State trade', the effect need not be appreciable or significant. A potential effect is enough, unless this effect is merely hypothetical

3 Joint Cases T-304/04 and T-316/04 *Italy and Wam SpA v Commission* [2006] ECLI:EU:T:2016:239; and Case C-494/06 P *Commission v Italy and Wam SpA* [2009] ECLI:EU:C:2009:272.

4 Press release IP/15/4889, *Commission gives guidance on local public support measures that can be granted without prior Commission approval* and Commission Notice on the notion of State aid, § 6, OJ 2016, C 262/1. For more information see C Dekker, 'The 'Effect on Trade between the Member States' Criterion: Is It the Right Criterion by Which the Commission's Workload Can Be Managed?' (2017) 2 EStAL 154-163; and B Zelger, 'The 'Effect on Trade' Criterion in European Union State aid Law: A Critical Approach' (2018) 1 EStAL 28-42.

5 European Commission, Decision of 29 October 2003, C10/2003, regarding measures in favour of non-profit harbours for recreational crafts, the Netherlands, OJ 2004, L 34/63; European Commission, Decision of 29 April 2015, SA.39403, regarding investment aid for Lauwersoog port, the Netherlands; see also European Commission, Decision of 24 November 2015, SA.42219, regarding refurbishment of the Schuhmacher-quay in the port of Maasholm, Germany; European Commission, Decision of 20 July 2017, SA.44692, regarding investment for the Port of Wyk auf Föhr, Germany.

6 Council Regulation 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ 2015, L 248/9.

or presumed. Because the latter possibility cannot be excluded, the Commission must demonstrate the potential effect.⁷ A potential effect may already exist if the beneficiary itself does not offer any cross-border activities. The small size of the aid or of the beneficiary need not preclude a potential effect, either. An aid measure to an undertaking which is merely active locally may still affect competition and inter-State trade if foreign undertakings can offer services similar to the beneficiary's and such possibility is not purely theoretical.⁸

The GC then determined that the Commission assumed the right circumstances in its assessment. The GC did not attach any value to the additional information which the alleged beneficiary had put forward in its statement in intervention. In its statement, the alleged beneficiary noted that the international Duino-Isola Regatta had called in at the municipal marina in 2017 and 2018. *Marinvest* and *Porting* referenced this as an illustration of the existence of a potential effect. The GC, however, disregarded this information, because the Commission had supposedly been unaware of the information when it took the decision. If the Commission had in fact been aware of this and the accuracy of the information had been established, this would not have – in the GC's eyes – significantly affected the Commission's conclusion.⁹

Next, the GC analysed the Commission's substantive findings about the beneficiary's activities. After having given an overview of these findings,¹⁰ the GC approved the Commission's analysis.¹¹ From the GC's perspective, the Commission had, in its assess-

ment, rightly taken as the point of departure the number of berths available for non-residents of Izo-la. Given this number of berths (37 of the 505), the Commission was entitled to conclude that the measures would not reasonably have had significant appeal to foreign water sports enthusiasts.¹² The beneficiary's marginal market share in both the Slovenian and Adriatic markets for berths (specifically, 1.07% and 0.05% respectively) was also evidence of a non-appreciable effect on inter-State trade.¹³ Additionally, the GC held that the Commission had properly ruled that the beneficiary's activities would not, on the one hand, deter any foreign investment in Slovenian water sports and did not, on the other hand, provide evidence of expansion into foreign countries. The GC illustrated the first point by referring to the unconditional extension in 2014 of the concession granted to *Marinvest* and *Porting*, despite the measures awarded to the alleged beneficiary.¹⁴ The Commission, the GC said, had rightly concluded that, while the measures would have (or would have had) some effect on competition and inter-State trade, it was not an appreciably adverse effect.¹⁵

Finally, the GC rejected *Marinvest* and *Porting*'s arguments about violation of the principle of legitimate expectations and the duty to give reasons. A violation of the principle of legitimate expectations (entailing that the Commission had deviated from its Notice on the notion of State aid¹⁶) had not occurred, the GC held, because the Commission had applied the points of departure in its Notice, and its analysis of the circumstances of the case was consistent with these points of departure.¹⁷ Likewise, for the same reasons, a violation of the duty to state reasons (entailing that the Commission had not explained why it had deviated from its own Notice) had not occurred.¹⁸

Therefore, the GC dismissed the appeal of *Marinvest* and *Porting* and affirmed the Decision of the Commission.

IV. Commentary

1. Case Specific Comments

This judgment provides food for thought about the practical application by the Commission of the criteria 'effect on competition' and 'effect on inter-State

7 *Marinvest-Porting v Commission* (n 1) [81], with reference to joint Cases T-304/04 and T-316/04 *Italy and Wam SpA v Commission* [2006] ECLI:EU:T:2016:239.

8 *Marinvest-Porting v Commission* (n 1) [82], with reference to 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, C 262/1.

9 *Marinvest-Porting v Commission* (n 1) [92].

10 *ibid* [96-99].

11 *ibid* [100].

12 *ibid* [100-101].

13 *ibid* [102-103].

14 *ibid* [104-105].

15 *ibid* [106].

16 Commission Notice on the notion of State aid, OJ 2016, C 262/1.

17 *Marinvest-Porting v Commission* (n 1) [108-110].

18 *ibid* [111].

trade'. This was the first time that an EU court had substantively rendered a decision about the Commission's conclusion that a measure did not satisfy the two aforementioned criteria.¹⁹ Although I can justify the outcome of the case in light of the circumstances, there is a tension between this ruling and the case law developed by the CJ regarding these criteria. In different judgments, the CJ has interpreted these criteria so narrowly that AG Hogan recently spoke about a 'low threshold'.²⁰

In the CJ's view, a measure can affect competition if it frees an undertaking from costs which it normally should have borne itself as part of its regular business operations. After all, the beneficiary's competitors do not receive this advantage and may thereby be harmed.²¹ The measure also affects inter-State trade, since the aid granted enables the beneficiary to operate (or keep operating) its undertaking, potentially causing opportunities for foreign undertakings and investments to diminish. The local or regional nature of the activities, and the scope of the activities, the aid or the beneficiary's territory are irrelevant.²² Various rulings by the CJEU show further that the effect should not be hypothetical or probable. Based on the foreseeable consequences of the measures, there must be an assessment of whether competition and inter-State trade may be affected. One example of this can be seen in *Italy and Wam v Commission*. In its Decision, the Commission had automatically applied the line developed by the CJ, even though the measure pertained to subsidisation of activities outside the EU. Under these circumstances, the Commission should have examined and explained what the foreseeable consequences of the subsidisation were for inter-State trade.²³

In my opinion, the CJ's findings in *Heiser* and *Black Cabs* illustrate the low threshold which AG Hogan talked about. The CJ felt that it was

not inconceivable [...] that medical practitioners specialising in dentistry, such as Mr Heiser, might be in competition with their colleagues established in another Member State.²⁴

In *Black Cabs*, the CJ found 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.²⁵

Hence, the fact that cross-border competition was not inconceivable was in itself enough for the CJ to assume that both competition and inter-State trade could be affected as a result of the measures at issue.

The *Marinvest and Porting* ruling does not fit within this line, I believe. What's more, the Commission and the GC could have reached a very defensible, yet different judgment in this case.

For instance, the ruling gave short shrift to the circumstance that *Marinvest* and *Porting* were part of a group headed by an Italian company. This circumstance was in and of itself relevant, as well as relevant to the assessment of the willingness to invest (or further invest) in Slovenian marinas. Although the GC noted that *Marinvest* and *Porting* - despite the alleged aid measures - extended their concession in 2014, the ruling did not indicate why they had done so. The reason for the extension could have been relevant to the assessment (for example, that the alleged aid measures resulted in a longer payback period for investments). The bilingualism of the region (laid down by statute) and the proximity of Italy played a role, too - all the more so, because *Marinvest* and *Porting* were part of an Italian corporate group. This made it easier for the municipal marina to attract water sports enthusiasts from Italy. The municipal marina did not have to incur additional costs for its communications, for instance. Also, the argument of *Marinvest* and *Porting* that non-permanent residents of Izoła made use of berths reserved for permanent resi-

19 I will not discuss the judgment of 27 September 2006 in *Werkgroep Commerciële Jachthavens Zuidelijke Randmeren et al v Commission* (T-117/04, ECLI:EU:T:2006:276), since the GC concluded there that the parties' appeal against the Commission's Decision of 29 October 2003 (cited above in n 5) was inadmissible, and the GC therefore did not substantively assess the appeal. Of course, there are decisions by the CJEU about the mirror-image situation (namely, the situation in which the Commission believes that competition and trade are in fact affected).

20 Opinion of AG Hogan of 6 June 2019 in Case C-659/17 *Azienda Napoletana Mobilità* [2019] ECLI:EU:C:2019:475 [30].

21 For example Case C-301/87 *Boussac Saint Frères* [1990] ECLI:EU:C:1990:67 [44].

22 For example Case C-280/00 *Altmark* [2003] ECLI:EU:C:2003:415 [77, 78, 81 and 82].

23 *Italy and Wam v Commission* (n 3).

24 Case C-172/03 *Heiser* [2005] ECLI:EU:C:2005:130 [35].

25 Case C-518/13 *Eventech v The Parking Adjudicator* [2015] ECLI:EU:C:2015:9 [70].

dents²⁶ is relevant in this regard and should have had more detailed attention.²⁷ That only water sports enthusiasts with boats measuring less than ten metres were involved was not, as I see it, a relevant criterion, because boats of this size could have come from other Member States as well. Neither the Commission's Decision nor the GC's ruling shows that boat length was a distinguishing criterion. Both documents, however, give the impression that only boats longer than eight to ten metres were relevant to assessing whether competition or inter-State trade was affected. In addition, the beneficiary's remark that it had hosted the international Duino-Isola Regatta in 2017 and 2018 (and in which boats longer than ten metres also participated), while *Marinvest* and *Porting's* marina had hosted this regatta in previous years, was relevant.

All in all, there was sufficient evidence for concluding that the measures could indeed affect competition and inter-State trade.

2. Recent Developments

In light of the CJ's strict interpretation of the criteria 'effect on competition' and 'effect on inter-State trade', the GC's ruling does not foster legal certainty. After all, divergent interpretations of these criteria do not promote legal certainty. This risk is nonetheless present, as shown by later rulings and an opinion by AG Tanchev, which I will discuss hereafter.

a. Energy in Lithuania

The day after the GC's *Marinvest and Porting* judgment, the CJ, in a preliminary ruling on questions of

law, once again affirmed its strict interpretation.²⁸ The CJ's decision related to financing services of general economic interest in the electricity sector in Lithuania. Given the context of the electricity sector, the CJ's maintenance of the strict interpretation in this matter comes as no surprise.

b. Public transport in Naples

On 6 June 2019, AG Hogan concluded (again in proceedings for a preliminary ruling) that the CJ's strict interpretation leads to a low threshold for satisfying the criteria 'effect on competition' and 'effect on inter-State trade'.²⁹ In his opinion, AG Hogan did not mention the *Marinvest and Porting* ruling, even though, I think, the facts did offer links for doing so. Referring to *Altmark* and *Black Cabs*, AG Hogan opined that the State aid rules also apply to an undertaking which had privately been granted an exclusive right to offer public transport in solely the region of Naples. AG Hogan reasoned that this would only have been different if the applicable national law had mandated and territorially limited this private award. In view of the *Marinvest and Porting* decision here, AG Hogan could have also concluded that, in the given circumstances, competition and/or inter-State trade had not been limited appreciably. I infer from the lack of any reference to this decision that AG Hogan wanted to continue following the CJ's strict interpretation.

The CJ rendered its judgment in this case on 29 July 2019.³⁰ With reference to its strict interpretation of the criteria 'effect on competition' and 'effect on inter-State trade',³¹ the CJ did confirm the conclusion of AG Hogan, that the State aid rules do apply to a purely local active undertaking. Only in the exceptional circumstances mentioned by AG Hogan, these criteria would not be fulfilled. In its ruling the CJ did refer neither to the *Marinvest and Porting* ruling of the GC nor to its reasoning in said ruling. Therefore, it looks like the CJ is not (yet) willing to change its strict approach towards the aforementioned criteria.

c. Youth Hostels in Berlin

In the GC's ruling of 20 June 2019,³² the focus was the Commission's Decision on aid measures to a youth hostel in the region of Berlin.³³ The division between the Commission and the GC on this issue il-

26 *Komunale Izola d.o.o., Slovenia* (n 2) [23].

27 See European Commission, Decision of 4 May 2018, SA.34815, regarding alleged aid in favour of Dutch marina 'Jachthaven Scharendijke' [49 – 51].

28 Case C-706/17 *AB Achema et al v VKEKK* [2019] ECLI:EU:C:2019:407 [90 – 96].

29 *Azienda Napoletana Mobilità* (n 20).

30 Case C-659/17 *Azienda Napoletana Mobilità* [2019] ECLI:EU:C:2019:633.

31 *ibid* [28 – 32].

32 Case T-578/17 *a&o hostel and hotel Berlin GmbH* [2019] ECLI:EU:T:2019:437.

33 European Commission, Decision of 29 May 2017, SA.43145, regarding alleged non-tax aid measures to youth hostel Berlin Ostkreuz GmbH.

illustrates there being two rival ideas when it comes to satisfying the criteria 'effect on competition' and 'effect on inter-State trade' or not.

In its Decision *Berlin Ostkreuz*, the Commission concluded in relatively straightforward fashion that the challenged aid measures could affect competition, because publicly financed youth hostels compete with privately financed youth hostels. The Commission also felt that the measures at issue could affect inter-State trade. Youth hostels are active in the international market for low-budget accommodation, with the beneficiary having targeted foreign tourists and being located in Berlin, a tourist hotspot.^{34 35} In assessing whether the measure was justifiable under Article 107(3) TFEU, the Commission then concluded that the effect on competition and inter-State trade was of such scope as not to be incompatible with the internal market. The Commission took into account the beneficiary's market share and the fact that this was a growing market and that the amount of the financial support was small.³⁶

Although the GC agreed with the conclusions drawn by the Commission from the facts established, the GC did not share the Commission's ultimate conclusion. Specifically, the Commission had determined earlier in its Decision that *de minimis* aid was not involved here. Further, the Commission had determined that the measures in question could affect competition and inter-State trade. Given that the Commission could not then exclude '*the existence of serious difficulties with regard to the proportionality of the contested measures*', the Commission could not base its ultimate conclusion solely on the reasoning that the effects on the market for low-budget accommodation would not be appreciable.³⁷ Accordingly, the GC reversed the Commission's Decision.

Given the similarities between the sets of facts in *Marinvest and Porting* on the one hand and *Berlin Ostkreuz* on the other hand, the difference in result cannot really be explained. Aid to marinas in Slovenia could not appreciably affect competition or inter-State trade, while aid to a youth hostel in the Berlin region could.

d. Public transport in Apulia

On the same day as the *Azienda Napoletana Mobilitàà* ruling was rendered, AG Tachev submitted his conclusion regarding possible State aid to an opera-

tor in financial difficulties of rail infrastructure and public transport in the Italian region Apulia.³⁸ Once again in proceedings for a preliminary ruling.

Referring to the jurisprudence of the CJ regarding the criterion 'effect on inter-State trade', AG Tachev concluded that the measures in question are capable to distort trade between Member States. Although the operator in question is itself not involved in inter-State trade, the contested measures reduce the opportunities of, for example, Arriva Italia (a subsidiary of Deutsche Bahn) to take over or to continue the activities of that operator.³⁹

AG Tachev extensively pays attention whether or not the contested measure is capable to distort competition.⁴⁰ As was the case in the *Azienda Napoletana Mobilitàà* ruling, this relates to the fact that the operator has a legal monopoly to exploit the rail infrastructure and the provision of public transport on that infrastructure. As a result, neither competition on the relevant market nor competition for that market was possible. According to AG Tachev, this however is insufficient to conclude that the contested measure does not distort competition. To reach such a conclusion, potential competition should also be excluded. In the case at hand, potential competition is - according to AG Tachev - however possible. After the current concession expires, the contracting authority has the choice to award a new concession either directly or pursuant to a competitive tender. Consequently, competition for the market is possible and the contested measure is therefore capable to distort competition.

In view of the jurisprudence of the CJ, the conclusion of AG Tachev is not surprising. What is surprising, is that, contrary to the presence of subsidiaries of Altan Prefabbricata in the port of Izola, the alleged interest from a subsidiary of Deutsche Bahn is for AG Tachev decisive to conclude that the

34 *ibid* [53 and 54 – 56].

35 Recently, a Dutch court held that, based on these principles, a measure benefiting a provider of lodging in the Province of Groningen had to be deemed incapable of affecting competition or inter-State trade (ECLI:NL:RBNNE:2019:1681).

36 *Berlin Ostkreuz* (n 33) [92 – 95].

37 *a&o hostel and hotel Berlin GmbH* (n 32) [121 - 125].

38 Opinion of AG Tachev of 29 July 2019 in Case C-385/18 *Arriva Italia Srl cs* [2019] ECLI:EU:C:2019:647.

39 *ibid* [45 – 48 and 90].

40 *ibid* [57 – 78 and 116 - 122].

criterion 'effect on inter-State trade' is fulfilled. This makes it all the more remarkable that the GC did not pay separate attention to this fact in its *Marinvest and Porting* ruling. Further stands out that AG Tachev refers to the rulings mentioned above, but not to the *Marinvest and Porting* ruling at all.

The comment of AG Tachev regarding the interpretation of the criterion 'effect on competition' in the different fields of competition law deserves special mention. The Italian competition authority had approved the acquisition of the operator by the Italian ministry of Economic Affairs, as the concentration did not distort competition on the relevant market. This did however not prejudice the conclusion that one of the contested aid measures could distort competition. AG Tachev opined that

the notion of distortion of competition is given a broader definition in the context of Article 107(1) TFEU than in the context of Article 101 TFEU or merger control.⁴¹

41 *ibid* [120].

3. Conclusion

In a timeframe of three months the CJEU has rendered various judgments regarding the application of the criteria 'effect on competition' and 'effect on inter-State trade'. The white knight between these judgments is the *Marinvest and Porting* ruling discussed in this annotation. In this ruling, the GC affirms the pragmatic approach of the Commission regarding these criteria. In the *Marinvest and Porting* ruling, the effect on competition and inter-State trade was not appreciable. This is at odds with the CJ's principled application of these criteria, which could result in inconsistent decisions. Legal practice would therefore be furthered if the CJ expressed its views on the GC's rulings in *Marinvest and Porting* (and *a&o hostel and hotel Berlin*). Only the CJ can provide clarity on whether State aid law likewise includes an appreciability requirement or not. As long as the CJ has not rendered a judgment on the Commission's pragmatic application of the criteria 'effect on competition' and 'effect on inter-State trade', the risk of inconsistent decisions will remain, which will not promote legal certainty.

