

State resources in the case law: imputability under an organizational perspective

*Gherardo Carullo**

paper published in *European State Aid Law Quarterly*, no. 3 (2013): 453.

Abstract

Under an organisational perspective, the article analyses the most relevant case law on the criteria of imputability of the resources used to finance aid schemes. The Author's aim is to assess whether a link may be found between the first requirement set by Article 107(1) TFUE and the way in which Member States organise the use of their public powers. Having classified and analysed the decisions of the European Courts accordingly, the Author concludes highlighting the role, under State aid rules, played by the way in which public bodies are structured.

I. Introduction

In recent years European Courts have shown to pay greater attention to the notion of State resources. In particular, the Court of Justice has elaborated some useful criteria that come in hand when assessing if a measure adopted by a Member State fulfils or not the first requirement set by Article 107(1) TFUE.¹

Through the analysis of the relevant case law, the aim of this article is to highlight the links that have emerged between the notion of State resources, their imputability to the State, and the organizational models adopted by Member States.

Given the “narrow interpretation” repeatedly confirmed by European Courts of ex-Article 87(1) EC (now 107(1) TFUE)², the problem of the imputability of the resources has been

* Ph.D. candidate at *Università degli Studi di Milano*, Italy (University of Milan).

¹ In particular with the “*troika of cases of PreussenElectra, Stardust Marine and Pearle*”, as pointed out by *Kroes*, *Reforming Europe's State Aid Regime: an Action Plan for Change*, *EStAL* 3/2005, p. 399.

² Quoted expression by *Schohe/Arhold*, *The Case-Law of the European Court of Justice and the Court of First Instance on State Aids in 2002/2003*, *EStAL* 2/2003, p. 145. See Case C-189/91, *Kirsammer-Hack* [1993] *ECR* I-6185, paras 17 et seq.; joined Cases C-52/97, C-53/97 and C-54/97, *Viscido* [1998] *ECR* I-2629, para.

well analysed. The aim of the present study, therefore, is to provide a different perspective to the debate. In particular, the analysis will try to determine if the case law on the subject may indicate that one of the underlying common thread in the case law on the interpretation of the first requirement set by Article 107(1) TFUE, i.e. on the “rules of imputability”³, may be linked with the way in which Member States organise their public bodies when they decide to intervene, in any way whatsoever, in the market.

Rather than in a chronological order, the relevant case-law will be analysed according to the different organizational models adopted by Member States.⁴ In this way it will be possible to investigate at which conditions European Courts have retained that the first requirement set by Article 107(1) TFUE was fulfilled, being the measures: (i) financed by public undertakings; (ii) provided within intra-group transactions; (iii) financed by *ad hoc* instituted/appointed funds; (iv) provided through merely controlled resources.

Finally, it will be necessary to analyse those border-line cases in which the first requirement set by Article 107(1) TFUE has not been deemed fulfilled.

The analysis will not focus, on the contrary, on aid schemes that, in the strictest sense, are financed by Member States with their own resources.

Given that the resources come from a Member State⁵ and that the narrower lecture of the expression “granted by a Member State or through State resources” has been preferred by

14; Case C-200/97, *Ecotrade* [1998] ECR I-7907, para. 36; Case C-295/97, *Piaggio* [1999] ECR I-3735, para. 43; Case C-379/98, *PreussenElektra* [2001] ECR I-2099, para. 58..

³ As defined by *Rubini*, *The Elusive Frontier: Regulation under EC State Aid Law*, EStAL 3/2009, p. 281, to identify all “*those cases of indirect action when, in one way or another, the State acts through a third party*”.

⁴ The proposed structure constitutes a mere attempt to categorize the vast different ways in which aid schemes have been put in place. By no means it pretends however to be a comprehensive list of all the various types of interventions put in place by Member States, especially considering that, as noted by *Sinnaeve*, *What to Expect from National Courts in the Fight against Unlawful State Aid*, EStAL 1/2005, p. 1, “*Member States [...] often without any intention to circumvent the State aid rules, come up with innovative forms of economic intervention [...]. These new instruments do not clearly fall within the traditional aid categories such as grants or loans, and are therefore difficult to qualify for the Commission and even more so for a national judge*”.

⁵ It should be recalled that the Court of Justice has underlined that “although the term «aid granted through State resources» is wider than the term «State aid», the first term still presupposes that the resources from which the aid is granted come from the Member State”, joined Cases 213/81 to 215/81, *Norddeutsches Vieh-und Fleischkontor Will and Others* [1982] ECR 3583, para. 22.

In certain cases, in fact, Member States are merely responsible for redistributing European funds according to prescribed criteria. In such cases if a Member State violates those criteria, favouring certain undertakings, the infringement does not constitute State aid within the meaning of Article 107(1) TFUE, since the aid

European Courts⁶, the situations in which the State, in the strictest sense, finances directly, with its own resources, aid schemes, do not raise any particular issue under an organisational perspective.

Having regard to the scope of the present study, what becomes of greater interest, since the cumulative interpretation has to be preferred, it is to clarify until what point resources held by entities other than the State can be regarded as being State resources, and what kind of control, if any, the State shall be able to exercise over such resources in order to fulfil the first requirement set by Article 107(1) TFUE.⁷

II. Transfers by public undertakings

As suggested by the abundance of case-law on the subject, a frequent way in which aid schemes are implemented is through the provision of the resources by undertakings on which the State can exercise a certain degree of control.⁸

On this, the *Stardust Marine* Case⁹ can easily be considered the cornerstone of the matter, being still the reference point for the most recent case law¹⁰ and Commission's Decisions.¹¹

cannot be regarded as being granted through State resources, as it is granted, on the contrary, through Community resources. According to the Court of Justice, there is no aid since “any incorrect application of Community law, even if taking the form of an incorrect allocation of a tariff quota, may only be dealt with as a breach of the relevant provisions of Community law” (*Ibid.*, para. 23).

⁶ See case law cited *supra*, fn. 2.

⁷ On the need to clarify such elements under the cumulative approach, see *Winter*, Re(de)fining the notion of State aid in Article 87(1) of the EC Treaty, CMLR 41/2004, p. 480.

⁸ It has been underlined that State ownership is particularly problematic because it raises two problems: a general danger of confusion between public functions and functions as undertaking's owner; and a danger of abuse of the strong financial power of the State. See *Hellingman*, State Participation as State Aid Under Article 92 of the EEC Treaty: The Commission's Guidelines, CMLR 1/1986, p. 111. Under a different perspective, it has been underlined the necessity to impose specific limits to the privileges of which public undertakings may benefit, given that “le statut d'établissement public industriel et commercial confère aux entreprises publiques des privilèges susceptibles de fausser la concurrence sur le marché” *Eckert/Kovar*, Répertoire de droit communautaire Entreprises publiques, Dalloz 2011, .

⁹ Case C-482/99, *France v Commission (Stardust Marine)* [2002] ECR I-4397, para. 24.

¹⁰ See Case T-442/03, *SIC* [2008] ECR 11-1161, para. 94; Case T-384/08, *Elliniki Nafpigokataskevastiki v. Commission* [not published in the ECR], para. 51; Joined Cases T-268/08 and T-281/08, *Land Burgenland and Austria v Commission* [not yet published, under appeal]; Cases T-29/10 and T-33/10, *Netherlands and ING Groep v Commission*, [not yet published, under appeal].

¹¹ E.g. the recent Decision of 19/12/2012 on Aids granted by SEA S.p.A., a fully public owned company, to SEA Handling S.p.A. (not yet published). In the Decision to initiate the formal investigation procedure of

Given the notoriety of the case, it should be sufficient to recall that on that occasion the Court had concluded that for the resources of an undertaking to be considered as State resources, it is not sufficient the mere control of the State over the undertaking, but that “it is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures”.¹²

A key point of the judgment, in the light of the aim of the present article, is the acknowledgement by the Court that one of the most problematic aspects of State participations is that “through its public undertakings, the State may pursue objectives other than commercial ones”.¹³

The latter point of the judgment is of particular interest if read in conjunction with the provision according to which “the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership”.¹⁴

23/06/2012 (OJ C/29/2011), the Commission has based entirely on *Stardust Marine* its conclusion that the resources fell within the scope of Article 107(1) (paras. 55 et seq. of the Decision). The Commission has in particular stressed the fact that the resources had been transferred from SEA S.p.A. to SEA Handling S.p.A. on request of its public shareholders.

¹² *Ibid.*, para. 52. At this regard it has been clarified that “[a]utonomous decisions of public undertakings are not automatically to be classified as State aid measures, even if their resources as such are subject to some form of public control. Something more is needed to determine whether the action of such bodies can be attributed to the State too”, *Hancher*, Case C-482/99, French Republic v. Commission (“*Stardust Marine*”), judgment of the full court of 16 May 2002, CMLR 3/2003, p. 749. Several years before *Stardust Marine*, it had been warned, however, that “there could be no intervention against the State if a public undertaking should act on its own initiative, that is in the absence of any State measure. It is difficult to see the rationale of such a total immunity from the Treaty rules for public undertakings acting on their own initiative and the correctness of this interpretation must therefore be doubted”, *Marenco*, Public Sector and Community Law, CMLR 3/1983, p. 498.

¹³ *Stardust Marine*, cited *supra*, fn. 9, para. 39. On the subject it has been noted that “Article 222 of the EEC Treaty should not be interpreted in such a way that public ownership is unlimited and hence withdrawn from the competition regime. Article 90(1) implies the contrary”, *Hellingman*, State Participation, cited *supra*, p. 115. In fact, according to *Marenco*, Public Sector, cited *supra*, p. 496 “the freedom left to each Member State cannot be exercised to the disadvantage of the Member States or their undertakings: the Treaties ensure that the game should be played fairly”. Moreover, commenting *Stardust Marine*, it has been affirmed that the notion of *imputability* “prend en particulier toute son importance dans le cadre de la libéralisation qui touche désormais pratiquement tous les secteurs, et impose de plus en plus aux entreprises publiques de se comporter sur les marchés comme les entreprises privées. Ce mouvement est parfois explicitement encouragé par le droit communautaire. Cette évolution implique une plus grande responsabilité des entreprises publiques, et corrélativement, une certaine limitation des responsabilités de l’actionnaire public aux décisions les plus importantes pour les entreprises”, *Alexis*, Notion d’aide d’Etat. Remarques sur l’arrêt *Stardust Marine* du 16 mai 2002, EStAL 1/2002, p. 154.

¹⁴ Ex-Article 295 EC (now Article 345 TFUE).

In general terms, such provision is regarded as guaranteeing a great degree of freedom to Member States on the way in which they can participate, as economic operators, in the market.¹⁵ However, European Courts have shown, through their case law, that the fact that public ownership cannot be limited by the Treaties does not exclude that European Institutions have the power to verify how such ownership in actual facts is exercised.¹⁶

Or, in other words, as affirmed by Advocate General *Jacobs*, “*the intensity of the Court's review may depend on how far the public authorities are likely to be involved*”.¹⁷

At this regard the Court of First Instance has maintained, in the *Charleroi* Case, that if the State, acting as a Public Authority, fixes the rate of a parafiscal charge and, at the same time, controls the undertaking to which those charges have to be paid by its users, the decision fixing the rates is of an economic nature, and it does not constitute exercise of public powers.¹⁸

In light of the above, therefore, it results that the participation of the State in an undertaking may be relevant for determining the nature of its acts. In other words, as a consequence of public participation in an undertaking, it is necessary to assess if the acts adopted by the State constitute exercise of public authority, or if the commercial nature of the activities carried out by the participated undertaking requires that the decisions of the State are to be considered as non authoritative acts.¹⁹

¹⁵ And, for this reason, it has been criticised by part of the Doctrine, see *Kovar*, Les prises de participation publiques et le régime communautaire des aides d'Etat, RTD Com. 1992, p. 190 et seq., “*La liberté ainsi reconnue aux Etats membres signifie qu'ils sont en droit d'aménager un régime de propriété publique, même si on peut avoir le sentiment que la généralisation de celle-ci s'accorderait mal avec les conceptions économiques dont procède la Communauté*”.

¹⁶ On this matter it has been affirmed that even if “the EU is striving to create an economic system that is neutral as regards ownership structures and does not impose constraints on public ownership of entities fulfilling public services obligations[, ... o]n the other hand, there is also a tendency in EU law to leave economic processes to market determination rather than to administrative decision making. Calls for competitive tendering that have been voiced in all the sectors are supposed to increase transparency of the market, thereby creating better competition conditions and leaving less discretion to public authority”, *Gromnicka*, Services of General Economic Interest in the State Aids Regime: Proceduralisation of Political Choices?, EPL 3/2005, p. 459.

¹⁷ Opinion of AG *Jacobs* delivered on 13 December 2001 in Case 482/99, French Republic v. Commission (*Stardust Marine*) [2002] ECR I-04397.

¹⁸ T-196/04, *Ryanair c. Commission (Charleroi)* [2008] ECR II-03643, paras. 63, 102 and 103.

¹⁹ The need of distinguishing the role of the State as a proprietor and as a public authority has been underlined by the Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain

Thereby it appears from the cited case law that the participation of the State in the activities of an undertaking entails two specular consequences. On one side the decisions of the undertakings are subject to revision under Article 107(1) TFUE in order to verify if the intervention of the State has led to pursuing objectives other than commercial ones. On the other side, in accordance with the single entity doctrine, the decisions of the State, even if adopted through acts normally expression of public power, may be qualified as non-authoritative if these are adopted essentially in light of the activities of a controlled undertaking.²⁰

It is therefore necessary to assess if the decisions taken by public undertakings are actually influenced by the State.²¹ From this perspective it is perfectly reasonable the argument of the Court of Justice provided in *Stardust Marine* according to which the mere control of a public undertaking and the exercise of a dominant influence over its operations cannot constitute an automatic presumption that that control has been actually exercised. In order to determine if the measures adopted by an undertaking are imputable to the State, it has to be assessed if the undertaking, in the specific case under investigation, has operated with sufficient independence “according to the degree of autonomy left to it by the State”.²²

undertakings, OJ 2006 L 318/17. As explained in whereas n. 8, “[s]uch transparency applied to public undertakings should enable a clear distinction to be made between the role of the State as public authority and its role as proprietor”.

²⁰ Commenting the *Charleroi* Case, it has been held that “[t]he argument that airport management companies and the State – within the wide meaning of the term – act as single entity might be ascribed to the assumption that the State indirectly carries out economic activities ‘through’ the company and might try to circumvent the application of the private investor test by arguing the exercise of sovereign powers”, *Stadlmeier/Rumersdorfer*, The Ryanair/Charleroi Case Before the European Court, ASL 4/2009, p. 318.

²¹ Not surprisingly, given the position of European Courts on the subject, the doctrine has concluded that to avoid the applicability of State aid rules, when conferring selective advantageous measures, public undertakings should merely leave all decisions exclusively to their managing body, see *Bartosch*, Distortions of Competition on the Markets for the Operation of Airport Infrastructures: the Commission’s New Guidelines, EStAL 4/2005, p. 627.

²² *Ibid.*, para. 52. Assessment that, however, does not seem of easy solution, not even in light of the criteria set by *Stardust Marine*, being these “rather vague and partly inappropriate” *Schohe and Arhold*, The Case-Law of the European Court of Justice and the Court of First Instance on State Aids in 2002/2003, cited *supra*, p. 146. A true qualification of the degree of freedom left by the State to its undertakings, in fact, entails necessarily a case by case analysis of the factual grounds of each situation brought before European Institutions. For an interesting case showing such difficulties, see Case T-442/03, SIC v. Commission [2008] ECR II-01161, with a detailed analysis of the problem of imputability by *Honoré*, Case T-442/03, SIC v. Commission, EStAL 4/2008, p. 761 et seq..

And it should be underlined the what matters, according to this case law, it is only that the State has influenced the decisions of its undertakings. Therefore it is only fundamental to show that Public Authorities have interfered with the decision that led to the adoption of an aid, being irrelevant that the reasons why the aid measure has been actually put in place was “likewise due to State influence”, or not.²³

Interestingly, the conclusion that the State has exercised an actual control over an undertaking may be upheld in Courts simply because the State, by only claiming that its private partners had wide powers of decision-making and of disinvestment, has not denied the Commission’s claim that the company was under the control of Public Authorities.²⁴

Applying such criteria, the General Court has recently upheld the Commission’s finding that an aid financed by a bank in which a Member State retained a majority shareholding could be regarded as being subsidized by State resources since the decisions to grant the aid were not taken independently by the management, but, on the contrary, were taken by the Government and were only implemented by the bank.²⁵ The General Court has in particular affirmed that “the State was perfectly capable, by exercising its dominant influence over that undertaking, of directing the use of its resources in order to finance, as occasion arose, specific advantages in favour of other undertakings”.²⁶

The same reasoning has been applied also to those situations in which the funds used by a public company were financed exclusively by its commercial activities. Those resources, if utilised for subsidizing aid measures, must be considered as State resources, if the State has influenced the decisions of the undertakings.²⁷ On the other hand, however, it must be highlighted that if the State grants to fully owned public undertakings a part of the charges imposed on certain undertakings, State aid rules may still apply.²⁸

²³ See *Bartosch*, The Net Additional Costs of Discharging Public Service Obligations-The Commission’s Deutsche Post Decision of 19 June 2002, EStAL 2/2002, p. 193.

²⁴ See Joined Cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia v Commission (Seleco)* [2003] ECR I-4035, para. 32.

²⁵ *Elliniki Naffigokataskevastiki v. Commission*, cited *supra*, fn. 10, para. 57.

²⁶ *Ibid.*, para. 90.

²⁷ See *Seleco*, cited *supra*, fn. 24, para. 33.

²⁸ See Joined Cases C-34/01 to C-38/01, *Enirisorse* [2003] ECR I-14243. Italy had allocated to the public undertakings responsible for technical equipment and warehouses in some Italian ports, a significant proportion of the port charges. According to national law, such undertakings were qualified as public economic entities under the supervision of the *Ministero della Marina Mercantile* (Merchant Navy Ministry).

Therefore, on one hand, funds of a public undertaking, anyhow collected, when utilised for financing aid schemes must be considered, under certain circumstances, as State resources within the scope of Article 107(1) TFUE. On the other hand, though, the fact that the funds of a public undertaking are under public control does not mean that, if the State allocates a part of its income to such undertakings, it is not renouncing to a part of its tax revenues.²⁹

III. Intra-group transactions

The same principles examined in the preceding paragraph may also apply to intra-group transactions, in particular to those cases in which logistical and/or commercial assistance are provided by public owned undertakings to their subsidiaries.³⁰

In the subsequent *Chronopost* judgment the Court of Justice confirmed that such transactions may constitute State aid³¹, even if it upheld the Commission's finding that the logistical and commercial assistance provided by *La Poste* to *SFMI-Chronopost* did not constitute State aid in the case at issue.³²

It should be recalled that in its Decision³³ the Commission had focused its analysis on the economic terms of the agreements between *La Poste* and *SFMI-Chronopost* to assess if they could be considered “comparable to those of an equivalent transaction between a private parent company, which may very well be a monopoly (for instance, because of the ownership of exclusive rights), and its subsidiary”. The Commission concluded that “*La*

²⁹ *Ibid.*, see in particular para. 26: “the sums paid to the Aziende [the public undertaking], a significant proportion of those charges, come out of the State budget and therefore constitute State resources”.

³⁰ Such situation may occur whenever the parent company either makes available to its subsidiaries the use of certain infrastructures (logistical assistance), or it provides them its goodwill, know-how, customer base, etc. (commercial assistance).

³¹ See Case C-39/94, *SFEI and Others* [1996] ECR I-3547, see in particular para. 57: “the provision of logistical and commercial assistance by a public undertaking to its subsidiaries, which are governed by private law and carry on an activity open to free competition, without normal consideration in return, is capable of constituting State aid within the meaning of Article 92 of the Treaty”.

³² Joined Cases C-341/06 P and C-342/06 P, *Chronopost and La Poste v UFEX and Others* [2008] ECR I-4777. It is worth recalling that 66% of the shares of SFMI were owned by *La Poste*, the French public company entrusted with postal services. Moreover the operation and marketing of the express delivery service, provided under the name of EMS/Chronopost, was set out in an order from the French Government, according to which *La Poste* was to provide SFMI with logistical and commercial assistance.

³³ Commission Decision 98/365/EC of 1 October 1997 concerning alleged State aid granted by France to *SFMI-Chronopost*, OJ 1998 L 164, p. 37.

Poste provided logistical and commercial assistance to its subsidiary under normal business conditions and that assistance therefore did not constitute State aid”.³⁴

In light of the above, it is therefore interesting to note that since the provision of logistical and/or commercial assistance by a public company to its subsidiaries may fall within the scope of Article 107(1) TFUE, to comply with State aid rules, even intra-group transactions should be carried out under normal business conditions.

The fact that the economic analysis of the transactions plays a fundamental role in the assessment of the compatibility of the measures at issue with Article 107 TFUE seems to confirm the principles outlined in the preceding paragraph and, in particular, that a primary concern of European institutions is to assure that, through their participations, Member States do not pursue objectives other than commercial ones.³⁵

At this regard it should be recalled that in the *Chronopost* Case the State had explicitly ordered to *La Poste* to provide its assistance to *SFMI-Chronopost*, and that, by doing so, it had exercised a decisive influence on the decision-making process of the two companies.

It could then be inferred that, if it is necessary to show that the State has influenced the decisions of a public owned company for a measure adopted by the latter to be imputable to the State, the same principle should be applied to intra-group transactions. The provision by a public company of logistical and/or commercial assistance to its subsidiaries, even if at favourable conditions, would therefore not fall within the scope of Article 107(1) TFUE if the State has not exercised any influence over the decision-making process of the companies involved in the transactions.

Once again, therefore, the distinctive element between schemes falling within the scope of Article 107(1) TFUE and measure not involving any State aid appears to be, in essence, directly linked with the risk that Member States may pursue “objectives other than commercial ones”.

³⁴ See *Chronopost*, cited *supra*, fn. 32, para. 21.

³⁵ See *Stardust Marine*, cited *supra*, fn. 9, para. 39.

IV. Financing through *ad hoc* instituted/appointed funds

Ad hoc instituted/appointed funds present some peculiar characteristics, the most interesting being that these funds are often subsidized by contributions made by undertakings and/or users of the same market in which the fund operates. Thus, these funds are, in some cases, financed by contribution from undertakings that may themselves, at least potentially, be the beneficiaries of the aid.

It is well known that the Court of Justice, as well as the General Court, has repeatedly maintained that the resources granted by a public body established by a Member State for collecting and managing, under State supervision, mandatory contributions are to be regarded as State resources.³⁶

In light of the aim of the present study, it is particularly interesting the *Essent Network Noord* Case.³⁷ The Court, in assessing if the funds at issue could be categorised as State resources, has affirmed that “[i]t is of little account that that designated company was at one and the same time the centralising body for the tax received, the manager of the monies collected and the recipient of part of those monies”.³⁸

³⁶ The first fundamental case on this matter was the Case 78/76, *Steinike & Weinlig v Germany* [1977] ECR 595, subsequently confirmed by several judgments: Case C-256/97, *DM Transport* [1999] ECR I-3913, in which the Court affirmed that “in the case in the main proceedings the payment facilities which the ONSS granted DMT were granted through State resources for the purposes of Article 92(1) of the Treaty, inasmuch as the ONSS is a public body established by the Belgian State which has been made responsible, under State supervision, for collecting mandatory employers’ and workers’ social security contributions and managing the social security system”, para. 18; in Case C-355/00, *Freskot* [2003] ECR I-5263, the Court affirmed that “the benefits provided by ELGA [a private legal person wholly owned by the State and financed by compulsory contributions] are granted through State resources and are imputable to the State within the meaning of the Court’s case-law”, para. 81; in Cause T-8/06, *FAB Fernsehen aus Berlin v. Commission* [2009] ECR II-00196*, the General Court upheld the Commission’s finding that State resources were used to finance an aid scheme since “*les redevances radiotélévisées allemandes financent le budget de la MABB, que les paiements aux radiodiffuseurs privés sont financés à partir du budget de la MABB, que celle-ci est placée sous le contrôle juridique de l’État et que son budget est contrôlé par le Rechnungshof Berlin*”, paras. 49 and 50.

³⁷ Case C-206/06, *Essent Netwerk Noord and Others* [2008] ECR I-05497, in which the Court of Justice held that the first requirement set by Article 107(1) TFUE was fulfilled. Under Dutch law, domestic purchasers of electricity were required, during a transitional period, to pay to their net operator a price surcharge on the amounts of electricity transmitted to them. The so-collected funds were then paid by the net operator to a company designated by the legislature for the purpose of defraying non-market-compatible costs which had arisen as a result of obligations incurred, or investments made, by that company prior to the liberalisation of the electricity market (see para. 39 of the judgment).

³⁸ *Ibid.*, para. 70.

What mattered was that “[t]he mechanisms provided for by the Law and, more specifically, the detailed accounts certified by an auditor, [made] it possible to distinguish those different roles and to monitor the use of the monies”.³⁹ The Court concluded that the resources at issue constituted “intervention by the State through State resources”.⁴⁰

Therefore, on the basis of *Essent Network Noord*, it appears that it is not necessary that a separate legal entity is appointed for the collection, management and receipting of a given fund, in order to assess if State resources are involved. A rigid account separation is sufficient to make it possible, even within the same legal entity, to verify what role has played the State in the collection, management and distribution of the proceeds, in order to assess if such funds are to be considered as State resources and being imputable to the State.

The way these funds are usually financed has been closely analysed in the *AEM* case.⁴¹ On this matter, it is sufficient to recall that where an aid has been declared incompatible, also the compulsory contributions that were imposed by the competent Authorities to finance the aid measure are to be considered incompatible.⁴²

Given the Courts’ position on aids financed by *ad hoc* instituted funds, it has to be assessed if, within the scope of Article 107(1) TFUE, the use of the resources of the fund to pay for a service provided in favour of the undertakings contributing to the fund itself could as well be deemed imputable to the State.

On this point the Court of Justice has maintained that the relevance under State aid rules of such aid schemes cannot be excluded by the fact that the subsidies are not granted to the direct beneficiaries, but to private undertakings entrusted with the provision, at favourable

³⁹ *Ibid.*

⁴⁰ *Ibid.*, para. 75.

⁴¹ Joined Cases C-128/03 and C-129/03, *AEM and AEM Torino* [2005] ECR I-2861. The resources allocated to the fund were first obtained, in the form of increased charges, from undertakings accessing the electricity transmission network, then it was managed by a public body (“*Cassa conguaglio per il settore elettrico*”) in order to be subsequently transferred to certain electricity undertakings, according to predefined criteria.

⁴² *Ibid.*, para. 47.

prices, of services of public interest in favour of those same undertakings financing the fund.⁴³

Therefore, within the scope of Article 107(1), the resources financing an aid may be deemed imputable to the State even when Public Authorities merely impose mandatory contributions to finance a fund that is set up to pay for a service of public interest provided to the same undertakings financing the fund.⁴⁴

V. Mere control of the resources

Even resources that are not permanent assets of the public sector have been found to be imputable to Member States.⁴⁵

What matters, under Article 107(1), is not whether the resources used to finance a measure are permanent assets of the public sector or not. On the contrary “the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State aid and for the measure to fall within Article 92(1) of the Treaty”.⁴⁶

⁴³ See Case C-126/01, *GEMO* [2003] ECR I-13769, para. 26. According to French legislation, the sums generated by a meat purchase tax were paid into a fund to finance the collection and disposal of animal carcasses and animal material seized in slaughterhouses found unfit for human or animal consumption, operated by the *Centre national pour l'aménagement des structures des exploitations agricoles*.

⁴⁴ In such cases the actual existence of an aid, or the compatibility of it with the internal market, should however be assessed carefully, taking into account, in particular, the public interests involved and the actual advantage that such a measure could grant.

⁴⁵ One of the earliest judgments on this was in Case 290/83, *Commission v French Republic (Poor farmers)* [1985] ECR 439, where the Court of Justice upheld the Commission's argument that if a decision adopted by a fund “presents all the characteristics of a decision taken under pressure from the public authorities, the fact that those authorities do not have a majority on the governing board is irrelevant” and that, as a consequence, the aid measures should be regarded as imputable to the State.

⁴⁶ Case C-83/98, *France v Ladbroke Racing and Commission* [2000] ECR I-3271, para. 50. Commenting the judgment it has been affirmed that “[i]t is therefore difficult to conclude that *Ladbroke* stands for the proposition that, as long as certain assets are subject to constant State control, this is sufficient, irrespective of their origin or nature, to bring them within in the scope of Article 87(1). The nature of the control in question is an additional element but not an alternative one in categorizing a particular measure as State aid or otherwise”, *Hancher*, Case-83/98P, *French Republic v. Commission*, Judgment of 16 May 2000, Full court. Appeal against the judgment of Court of First Instance, T-67/94, *Ladbroke Racing v. Commission*, [1998] ECR II-1, CMLR 4/2002, p. 876.

In the recent *Greece v. Commission* Case, the Court of Justice, confirming its previous judgments, has also underlined the fact that the measure at issue was imputable to the State since Greece had a dominant influence, direct or indirect, on the use of the financial resources used to support the undertakings.⁴⁷

Thus, once again, it can be concluded that also with regard to the measures under scrutiny, the key factor for a measure to be imputable to the State is the effective capacity of the State to influence the decisions of the undertakings involved, regardless of the degree of independence that such undertakings in theory have.⁴⁸

Such conclusion has been recently upheld by the General Court, that has explicitly affirmed that “the relevant criterion in order to assess whether the resources are public, whatever their initial origin, is that of the degree of intervention of the public authority in the definition of the measures in question and their methods of financing”.⁴⁹

The cited case law confirms then the idea, suggested by the French doctrine, that the Commission and the European Courts have introduced an “economic comprehension of public resources” (*compréhension économique de la ressource étatique*), which entails the idea that it should be controlled the way in which public resources are granted for pursuing objectives of public economic interest, regardless of the way in which such resources have been collected.⁵⁰

VI. Border-line cases in which the first requirement set by Article 107(1) TFUE has not been deemed fulfilled

⁴⁷ C-278/00, *Greece v Commission* [2004] ECR I-03997, paras. 52 and 53.

⁴⁸ Commenting the provisions of the first Transparency Directive (80/723/EEC, O.J. 1980 L195/35), it had been noted, in fact, that “the public undertakings themselves were prepared to recognize that in the context of the provisions of Article 90, it was important to go to the substance of the power of the State to regulate the activities of a body rather than look merely at the form of the legal structure employed”, *Brothwood*, The Commission Directive on Transparency of Financial Relations between Member States and Public Undertakings, CMLR 2/1981, p. 212.

⁴⁹ Case T-139/09, *France v. Commission* [not yet published], para. 63.

⁵⁰ *Berrod*, Répertoire de droit communautaire, Dalloz 2012, p. 19: “L'idée est en effet de contrôler la mise à disposition des ressources obtenues par des prélèvements obligatoires pour des objectifs d'intérêt général, quel que soit le mode de financement privilégié par l'État”.

In some border-line cases European Courts have excluded that State resources were involved at all, even if the factual grounds were very similar to those in which the opposite conclusion was reached.⁵¹

In these cases a common argument on which the Court of justice based its decisions was that the potential loss of tax revenues did not constitute an additional burden on State resources because it was “inherent in the system” and therefore it did not constitute “a means of granting a particular advantage to the undertakings concerned”.⁵²

In the light of the previously analysed case-law, it appears that there is a rather peculiar link between, on one hand, the imputability of the resources to the State and, on the other, the organisational model adopted by Public Authorities.

Under that perspective, it can be held that in some cases European Courts have excluded that the first requirement set by Article 107(1) TFUE may be deemed fulfilled if Public Authorities intervene in a way that will not distort competition. Or, in other words, in a way that can ensure their neutrality.⁵³

A very good example is provided by a comparison of the *PreussenElektra* case⁵⁴ and the Commission Decision on aid implemented by Luxembourg in the form of the creation of a

⁵¹ From the earliest cases, to the most recent, many measures, apparently problematic under Article 107(1) TFUE, have been deemed to not involve any State resource: (i) fixing of minimum retail prices with the objective of favouring distributors of a product at the exclusive expense of consumers (Case 82/77, *Van Tiggele* [1978] ECR 25, para. 24); (ii) the exemption from the application of national labour laws, including the payment of social contributions, to foreign crew members of vessels flying the national flag (*Sloman Neptune*, cited *supra*, fn. 6, paras. 19 et seq.); (iii) the exclusion of small businesses from the national system of protection against unfair dismissal (*Kirsammer-Hack*, cited *supra*, fn. 70, paras. 17 et seq.); (iv) the relief of a particular public economic entity from the obligation of complying with the generally applicable legislation concerning fixed-term employment contracts (*Viscido*, cited *supra*, fn. 70, para. 14.); (v) the exemption of large enterprises from the usual insolvency proceedings and the application of a system of special administration (*Ecotrade*, cited *supra*, fn. 70, para. 36, and *Piaggio*, cited *supra*, fn. 70, para. 43.); (vi) the obligation imposed on private electricity suppliers to purchase electricity produced from renewable energy sources at fixed minimum prices (Case C-379/98, *PreussenElektra* [2001] ECR I-2099, para. 59.).

⁵² See in particular, *Sloman Neptune*, cited *supra*, fn. 4, para. 21.

⁵³ On the link between the concept of “distortion of competition” and neutrality, as well as for a comprehensive analysis of the concept of neutrality itself, see *Virtanen/Valkama*, Competitive Neutrality and Distortion of Competition: A Conceptual View, WC 3/2009, p. 393 et seq.. In particular, according to the Authors, “[t]he problems of competitive neutrality may emanate from several sources”, i.e.: entry and exit barriers, special conduct requirements (i.e. State regulations), ownership policies, Government aid, Governmental tax and fees, property rights. According to the Authors, a lacking competitive neutrality of these elements may generate a distortion of competition.

⁵⁴ *PreussenElektra*, cited *supra*, fn. 4.

compensation fund for the organisation of the electricity market.⁵⁵ While in the former case the Court of Justice concluded that the first requirement was not fulfilled, in the latter one, involving a very similar, but quite different, aid scheme, the Commission reached the opposite conclusion.

In the *PreussenElektra* case the national legislation provided that electricity supply undertakings were obliged to purchase the electricity produced in their area of supply from renewable energy sources and to pay for it according to fixed criteria that would assure to such producers a compensation up to 90% of the average sales price. In this case, therefore, it is clear that the State had a fundamental role in determining the level of compensation granted to specific producers, but the fact that its intervention was limited to setting up the legislative framework led to the conclusion that the measure could not “be regarded as constituting a means of granting to producers of electricity from renewable energy sources a particular advantage at the expense of the State”.⁵⁶

Similarly, in Luxembourg, the Grand-Ducal Regulation (GDR)⁵⁷ imposed an obligation to purchase green electricity⁵⁸ on the (sole) national distributor at fixed prices, set by the GDR at a higher level than that of conventionally produced electricity.

But after the liberalisation of the electricity market, and thus the multiplication of the electricity distributors, in order to spread equitably among them the burden of the costs resulting from the obligation to acquire green electricity, Luxembourg decided to set up, through a compensation fund, a compensation mechanism.⁵⁹ The compensation worked as follows: each electricity distributor was authorised to collect a contribution to the compensation fund from its final customers. The contribution was proportional to a final customer’s electricity consumption. The level of contributions was set each year by the State so that the fund’s income did not exceed the additional cost of purchasing green electricity.⁶⁰

⁵⁵ Commission Decision of 28 January 2009 on aid implemented by Luxembourg in the form of the creation of a compensation fund for the organisation of the electricity market OJ 2009 L159/11.

⁵⁶ *PreussenElektra*, cited *supra*, fn. 4, para. 62.

⁵⁷ Grand-Ducal Regulation (GDR) of 30 May 1994.

⁵⁸ Meaning “hydro, wind and solar energy, biogas and biomass, and cogeneration”.

⁵⁹ See para. 19 of the Decision.

⁶⁰ See para. 20 of the Decision.

It was the set up of such compensation mechanism that made the difference in comparison with the *PreussenElektra* case.⁶¹ The Commission based its assessment on the *Stardust Marine* case – according to which, in the words of the Commission, “once resources [come] under State control, they [remain] State resources”⁶² –, and therefore considered that, “the aid was granted directly or indirectly through State resources”.

The Court of Justice took a different view in the *Pearle* judgment.⁶³ It excluded that the first requirement set by Article 107(1) TFUE was fulfilled for two reasons: first, because in that case “the costs incurred by the public body for the purposes of that campaign were offset in full by the levies imposed on the undertakings benefiting therefrom”;⁶⁴ second, because “the initiative for the organisation and operation of that advertising campaign was that of [...] a private association of opticians, and not that of the Board”.⁶⁵ With regard to the latter reasoning, the Court stressed out the fact that “the Board served merely as a vehicle for the levying and allocating of resources collected for a purely commercial purpose previously determined by the trade and which had nothing to do with a policy determined by the Netherlands authorities”.

⁶¹ The conclusions reached in *PreussenElektra* have, however, been criticised by many Authors, see *Hancher/Ottevanger/Slot, EC State Aids*, 2006 para 3.15. In particular, *Koenig/Kühling*, EC control of aid granted through State resources, EStAL 1/2002, p. 18 have considered the judgment not reasonable from an economic point of view, and risky for enabling Member States to circumvent State aid law, since “[a]ccording to that judgement, whether State aid law is applicable largely depends on the organisation of the money transfers. Whereas monies part of a public fund financed through charges collected from undertakings constitute State resources, direct payments from undertakings to other undertakings are not considered as State aid even if they are collected and distributed by entities working as joint account managers”.

⁶² See para. 56 of the Decision in which the Commission refers to para. 37 of the *Stardust Marine* judgment.

⁶³ Case C-345/02, *Pearle v. Hoofdbedrijfschap Ambachten* [2004] ECR I-7139. The measure at issue consisted in charges imposed by a Dutch Trade Association on its members in order to fund a collective advertising campaign for the benefit of the undertakings in the field of optical services. Even if the Court qualified the Trade Association as a public body, nevertheless it excluded that the resources were imputable to the State.

⁶⁴ *Ibid.*, para. 36.

⁶⁵ *Ibid.*, para. 37.

Taken into due account the specific reasoning on which *Pearle* was delivered⁶⁶, arguably due to the specific circumstances of the case,⁶⁷ if compared with the *GEMO* Case⁶⁸, it offers a very interesting perspective on the role that Public Authorities should play in the implementation of an aid scheme.

The comparison between the two cases, in fact, seems to suggest that, in a situation where the measure is financed by the same beneficiaries of the measure itself, if the initiative to adopt such a measure comes from the private sector, then the fact that the funds are managed by a public body is not sufficient to fulfil the first requirement set by Article 107(1) TFUE.⁶⁹

From this perspective, the solution reached in *Pearle* may not be seen as necessarily narrowing the interpretation of the transfer of State resources.⁷⁰ On the contrary, it may be regarded as being coherent with the idea, well outlined in *Stardust Marine*, that State intervention may be critical only if it may divert undertakings from pursuing exclusively economic objectives. In fact, in *Pearle*, such risk was excluded by the fact that the initiative of the measure came from the private sector and thus it was irrelevant that the funds were then managed by a public body.⁷¹

⁶⁶ As pointed out by Commissioner *Kroes*, the was not based on the conclusions already reached in *PreussenElektra*, but instead it relied on the previous case law of the Court (i.e. *Steinike & Weinlig*, cited *supra*, fn. 36), thus posing the doubt that *PreussenElektra* was to be abandoned, see *Kroes*, Reforming Europe's State Aid Regime: an Action Plan for Change, cited *supra*, p. 398.

⁶⁷ See *Sinnaeve*, What to Expect from National Courts in the Fight against Unlawful State Aid, cited *supra*, p. 2, according to whom the conclusions reached in *Pearle* are “based on some case-specific arguments, from which the legal principles can only with great difficulty be deducted”.

⁶⁸ *GEMO* Case, cited *supra*, fn. 43. It is worth recalling that on that occasion the Court held that the first requirement was fulfilled in a situation in which Public Authorities merely imposed mandatory contributions to finance a fund that was set up to pay for a service of public interest provided to the same undertakings financing the fund.

⁶⁹ It has been observed, however, that the conclusion reached in *Pearle*, in order to stay coherent with the *PreussenElektra* Case, should be read as meaning that in such cases the first requirement may not be deemed fulfilled because the resources are not imputable to the State, see *Biondi*, Some Reflections on the Notion of State Resources in European Community State Aid Law, FILJ 5/2006, p. 30 p. 1446.

⁷⁰ See *Arhold*, The Case Law of the European Court of Justice and the Court of First Instance on State Aid in 2005/2006 (Part 1), European State Aid Law Quarterly 2/2006, p. 216.

⁷¹ Thus providing some coherence to a case law often criticised for the legal uncertainty caused by the “lack of systematic distinction between the legal interpretation of Article 87(1) EC and its application to a concrete set of facts” *Sinnaeve*, What to Expect from National Courts in the Fight against Unlawful State Aid, cited *supra*, p. 2.

It can therefore be concluded that the adoption of a particular organisational model by the State may become a key element when determining the applicability of State aid rules. In fact, even in circumstances in which it would have been concluded that the first requirement set by Article 107(1) TFUE was not fulfilled for the absence of a burden on State resources, the adoption by Public bodies of a particular organisational model may reverse that assessment. And vice versa.

VII. Conclusion: the organisational perspective

In light of the above, it is hardly questionable the relevance of the organisational models adopted by public authorities under EU State aid rules. The way in which Member States are organised appears to be of primary importance.⁷²

Given the extent to which European Institution may (and the case-law shows that they will) investigate what role Public bodies have played in the implementation of the measures under scrutiny, it could be argued that State aid rules indirectly affect the way in which Member States should be organised.⁷³ The case-law analysed has shown that a distinctive

⁷² On the role of the organisation of the public sector under the Treaties, it has been affirmed that “[a]ccording to the Treaties it is up to the Member States to decide such an ideological and political question as that concerning the extent of the public sector. What the Treaty seeks to ensure is that its objectives should not be jeopardized by the unilateral decisions of the Member States”, *Marenco*, Public Sector, cited *supra*, p. 526

⁷³ In fact, according to *Galetta*, *Forme di gestione dei servizi pubblici locali ed in house providing nella recente giurisprudenza comunitaria e nazionale*, Riv. it. dir. pubbl. comunit. 1/2007, p. 49–50, even if at an European level no restriction is explicitly imposed on Public Authorities on the way in which they should organise the services of general economy interest of their competence, once they have chosen a certain organisational model, they must comply with community law. The Author concludes that it is a natural consequence of such reasoning that the Court of Justice analyses several aspects of the services of general economic interest, essentially all related to State aid rules, the principle of non-discrimination and the distortion of competition.

An actual application of that idea in the urban transport sector is described by *Kekeleki/Nicolaidis*, *Public Financing of Urban Transport: The Application of EC State Aid Rules*, WC 3/2008, p. 439–440. In relation to infrastructures owned by the State but constructed or operated by a private or public company, the Authors have observed that “even in case the infrastructure is awarded to one undertaking, the application of Article 87(1) EC can be excluded if the infrastructure is rented out at market conditions, and the operator pays adequate fees at the market price level (private investor principle). The use of a tendering procedure would remove any doubts that the rent reflects market conditions”; while “Article 87(1) EC does not apply if the State transfers ownership and operation to a private or public company that is chosen by an open and non-discriminatory procedure and support granted to it for construction and maintenance of transport infrastructure represents the market price to achieve the desired result”.

element in the assessment of the relevance, under Article 107(1) TFUE, of many State measures depends not only on the inherent characteristics of such measures, but also on the way in which Public bodies intervene in their implementation.⁷⁴ The more neutral such intervention will be, the less likely it will be that the first requirement set by Article 107(1) TFUE will be deemed fulfilled.

The case law shows that one key factor in the assessment of the “imputability” of the resources is the role that the State has played in the implementation of the aid scheme and, in particular, its effective capacity to influence the decision making process of the economic operators involved by the measure. A common pattern followed by European Courts to assess if the resources are imputable to the State, in fact, is to verify if the decisions taken when implementing an aid have been influenced by Public authorities.

Therefore it can be stated that European Courts have made clear enough that it is irrelevant the nature of the link between the State and the bodies implementing an aid. What matters is that the State can effectively influence the decision-making process leading to the adoption of aid schemes.

Under this perspective, two specular conclusions, or “two sides of the same coin”, can be drawn.

In light of the developments in EU competition law, it has been affirmed that “[t]here is mounting evidence that the Court is forcing national authorities and courts into establishing procedural principles for assessing non-discrimination and compliance with competition rules when entrusting public services obligation, as well as objectivity and transparency of compensation. [...] This might lead to much more scrutiny on the part of the Community about the content of services of general economic interest and public service obligations, thus indirectly transforming national structures for their provision”, *Gromnicka*, Services of General Economic Interest, cited *supra*, p. 460 In a different perspective, Galetta, L'autonomia procedurale degli Stati Membri dell'Unione Europea, Paradise Lost?, 2009, also underlines how the national procedural principles are influenced by the application of European law.

In a broader perspective, it has also been affirmed that, in comparison to US competition rules, “the European model requires market integration at the expense of member state autonomy in certain areas of economic regulation” *Collins*, Is the Regulation of State-Aid a Necessary Component of an Effective Competition Law Framework?, EBLR 2005, p. 380

⁷⁴ On this matter it has been underlined, in light of the *PreussenElektra* and *Strardust Marine* Cases, that “in the case where the bodies taking political decisions on the use of the budgets and those handling the budgets are one and the same, the granting of those resources has to be considered as attributable to the State. Then the granting of resources is not only influenced by general rules applying to all enterprises in a relevant market, but it is subject to a political decision. By contrast, State resources within the meaning of Article 87 EC are not being used if public undertakings have to decide policy according to entrepreneurial criteria within the context of a regulatory regime which applies to public and private enterprises alike without discrimination”, *Koenig/Kühling*, EC control, cited *supra*, p. 15.

On one hand, under a State aid law perspective, the applicability of Article 107(1) TFUE may be excluded any time that a measure is implemented in a manner that excludes that the State may interfere with the decision making process of the economic operators involved. Each measure, therefore, could be analysed (also) having regard to the way in which Public Bodies intervene in the market, and in particular to the organisational model chosen.

The imputability of the resources could be assessed evaluating, amongst other elements, the level of “neutrality” of State intervention, in respect to the economic operators, that such organisational model guarantees. The more neutral such model will be, the more it will be necessary to prove that the State has effectively influenced the decisions of the economic operators.

Whereas, if the organisational model adopted does not leave any doubt on the fact that the State could influence the decisions of the economic operators involved in the implementation of a measure, it could be required a much less strong evidence on the effective implication of the State in the adoption of a decision. Perhaps even to the point of transferring to the State the burden to prove that there has been no interference.⁷⁵

Following such reasoning, in light of the *Charleroi* Case, it may also be concluded that any authoritative decision taken by a Public Authority, in an economic field in which operates an undertaking anyhow controlled by that same Public Authority, should be taken with particular precautions. To exclude the applicability of Article 107(1) TFUE, it should be ensured that the adoption of any authoritative decision is not influenced by the economic objectives pursued by the participated undertaking.

On the other hand, under a public law perspective, it is well known that the economic intervention of the State in the Market, to pursue economic or social objectives, is not *per se* limited by Article 107(1) TFUE.⁷⁶ But only as long as such intervention is carried out in

⁷⁵ As suggested by *Seleco*, cited *supra*, fn. 24.

⁷⁶ In fact, it has been clarified that “[t]he objective of the Treaty provisions is not to deprive Member States of any kind of powers in delineating economic and social policies, it is to prevent the conferral by the State of an unduly and anticompetitive advantage in a specific undertaking”, *Biondi*, *Some Reflections*, cited *supra*, p. 1431

a way that will guarantee that the State will not illegitimately influence the functioning of the market.⁷⁷

To prevent that such a situation may occur, it seems that the first and, perhaps, most effective way to ensure the legitimacy of State intervention is the adoption of a public organisational structure that will limit as much as possible the chances of the State of influencing the decisions of the economic operators.

On these grounds, in conclusion, it may be explained why, in the above seen border line cases, European institutions have excluded that the resources used to finance certain State regulations were deemed not imputable to the State within the meaning of Article 107(1) TFUE. Amongst other elements, in light of the organisational model adopted in each one of them, it resulted that the State could not have had influenced the decisions of the economic operators affected by the measures.

⁷⁷ *Cervin/Zuleger*, Commission finds public participation in Austrian securitisation scheme is not State aid, CPN 2/2006, p. 64. has underlined the necessity that public intervention is carried out “without distorting competition, [i.e.,] when the intervention is made using market-based instruments”.