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Public Services and State Aid – is a Decentralisation of State Aid Policy Necessary?

Abstract

The impact of European Union law on the regional and local levels in the Member States has been underestimated for a long time now. Today, however, it is clear that the impact of European Union law on these levels is important, not least as a consequence of the deregulation that has been carried out in most Member States in recent years. As local markets open up for competition, the scope of EU law is extended. Competition and state aid rules, for instance, become applicable. Naturally, EU law allows for considerations to be taken other than those of free competition, but the Member States must avail themselves of the possibilities that exist. One precondition is that they in such a situation use the tools provided by European Union law in order to correct markets that do not function satisfactorily. This is primarily a matter of classifying certain services as "services of general economic interest" and of respecting the EU law requirements connected with the provision of such services. The relevant part of EU law is, however, complex and constantly evolving. This analysis aims to comment on the current state of EU law and the Commission's proposed revision of the EU state aid rules with regard to services of general economic interest. The author is of the opinion that a decentralisation of state aid policy should be considered in order to ensure a correct and rational application of the state aid rules as regards the financing of services of general economic interest.

1 Introduction

Services of general economic interest is an EU legal term for the provision of public services, e.g., postal services, public transport and public television.[1] It was only in the 1990s that the impact of EU law on the possibility of procuring these public services became visible. EU integration has led to a reinforcement of competition in the Single Market and has thus contributed to a deregulation of national monopoly markets. Greater demands have generally been placed on the Member States to explain and give reasons for why they have maintained public market regulations. Due to the Commission's interpretations and the case law of the Court of Justice of the European Union (CJEU), the current Article 106 in the Treaty on the Functioning of the European Union (TFEU), which specifies the conditions for public undertakings, has acted as a proportionality test and it has been the responsibility of the Member States to show to what extent it is indispensable and necessary not to subject certain undertakings to competition.[2] The concern of Member States about this development resulted in a new provision in the EC Treaty through the Treaty of Amsterdam, which underlined that the provision of these services was the responsibility of the Member States.

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1 See, e.g., the Commission White Paper on Services of General Economic Interest, COM(2004) 374 final.

2 cf. Damjanovic, D. and De Witte, B., *Welfare Integration through EU law: The Overall Picture in the Light of the Lisbon Treaty*, EUI Working Papers, Law 2008/34, p. 9.

This development has been reinforced through the Lisbon Treaty. It is still not, however, absolutely clear how the rules on the four freedoms, state aid and competition, and the Commission's power to regulate certain markets with the support of Article 106 TFEU shall be interpreted.

Experience from the last few decades has shown that deregulation does not per se lead to a better society from the citizen's perspective. In order to ensure positive socio-economic effects, the citizens must experience a real improvement in living conditions. Mario Monti stressed the importance of renewed consumer faith in the Single Market in his report from 9th May 2010. He pointed out that the Single Market is "less popular than ever, [but] more needed than ever"[3] and that an objective of the Lisbon Treaty in Article 3.3 TFEU is that the EU is founded on a highly competitive social market economy. A category that was pointed at as being of particular importance was services of general economic interest and the real and experienced threat against these services.[4] A new protocol and a new legislative basis with regard to these services were introduced with the same aim through the Lisbon Treaty. These changes are discussed below.

The Commission Communication *"Single Market Act – Twelve levers to boost growth and strengthen confidence* (with the subheading *"Working together to create new growth"*),[5] can be regarded as a follow-up of the Monti report. In the Communication, the Commission emphasises that the citizen's faith in the Single Market must be reinforced and that its advantages must benefit the consumers. The Communication stresses the importance of services of general economic interest and in particular the important role of these services when it comes to promoting social and territorial cohesion (p. 17). The Commission expresses that it wishes to guarantee that all community citizens are ensured access to important public services with reasonable conditions in order to be able to participate in the economic and social life of the Member States.

2 The impact of EU law

As a consequence of their EU membership, the Member States must justify any encroachments on the Single Market. The previous sovereign and unreserved right of the Member States to prioritise other interests than market-oriented ones has been replaced by an overarching European order where any encroachment on market mechanisms must be explained and justified. The reason for this is that national decisions, which have an impact on market conditions in one individual Member State, also have an impact on other Member States and EU citizens in the Single Market. Another way of describing this development is that many national decisions (at the central, regional or local levels) are placed in a legal context where legal requirements are set if there is a risk that the common interest of a functioning internal market will be jeopardised. The political decision-makers must therefore indicate which public interest they are aiming at, ensure that there is no discrimination of EU citizens from other Member States and in many cases also show that the political measure that has been chosen is necessary in order to achieve the result and that it stands in proportion to this aim. One might call this a judicalisation of politics, which requires a greater awareness and more knowledge about Union law. [6]

This has meant that it has become necessary to break up publicly funded operations in order to clarify how and where the general interest is to be promoted. What is known as cross-subsidisation, where profitable parts of an undertaking contribute to maintaining public service activities in other parts, is a far too vague way of promoting the interests that are at stake. There must be separate accounting. Otherwise there will be a suspicion, justified or otherwise, that parts of the public service operations subjected to competition are unduly favoured at the cost of the competitiveness of private actors. From the EU perspective, where the competitive conditions shall be the same throughout the Single Market, such regimes which are protected from transparency are not acceptable. This is why EU law makes fairly far-reaching demands on transparency.

EU law, however, makes different demands depending on how national policies are shaped. If an undertaking is fully exempt from the market rules, it can be regarded as non-economic and thus fall outside the scope and catalogue of requirements of EU law. If, on the other hand, state-regulated markets are liberalised and what used to be public companies are privatised, an increasing number of areas are added to the scope of EU law. This explains why the fundamental principles of EU law with regard to the freedom of movement and competition have become increasingly important at the local and regional levels in many Member States. The liberalisation and privatisation

3 A New Strategy for the Single Market (9 May 2010), p. 20.
4 Ibid, p. 26.
5 COM(2011) 206/4.
6 cf. Azoulai, L., *The Court of Justice and the Social Market Economy*, CMLrev 2008, p. 1335, see p. 1342 in particular.

trend has obviously continued for a long time in most Member States and has in part been encouraged by EU initiatives.

3 The term services of general interest

In the TFEU, the term services of general economic interest is used to emphasise that the Member States have the possibility of regulating a market according to other premises than purely market economy ones. The term can be found in the introductory articles (Article 14), in a special protocol (no 26), in the chapter on competition policy (Article 106) and in the Charter of Fundamental Rights of the European Union. It is obvious that the term relates to the difference between general and individual interests. In a pure market economy, it is assumed that competing individual interests will also lead to the sought after general interests. As a rule, efficient competition benefits society at large. When individual interests do not lead to the desired result, however, there is a need for some form of state intervention.

Naturally, this may take different shapes but it is reflected in the TFEU above all in the provisions on services of general economic interest. The reason why services of "economic" interest are mentioned is that non-economic services were originally presumed to fall outside the scope of the Treaty. Given the expansion of EU law and its broader scope, many services that were originally understood to fall outside the scope of the Treaty are now covered by it. This applies, for instance, in part to publicly funded medical care. This is why services of general interest are often spoken of in many different contexts and include both economic and non-economic services. It is obvious that the difference is in many cases subtle.[7]

There is no definition of services of general economic interest in the Treaty. Instead it is up to the Member States themselves to decide whether a service should be regarded as such. This means that a service that is regarded as a public service in one Member State may not necessarily be regarded as one in another. The CJEU, however, set a number of criteria that shall be fulfilled for a service to be regarded as being public.[8] The service shall be:

- Important for the consumers
- Be open to all consumers
- Provided on similar conditions

4 EU state aid rules and services of general economic interest

The TFEU rules on state aid form a part of the law that shall ensure that competition in the Single Market is not distorted. The rules can be found in Articles 107-109 TFEU. Their aim is to prevent the conditions for competition in the EU being distorted by Member States economically favouring certain companies or production of certain goods. State schemes shall not give certain companies unwarranted advantages that put market forces out of the running, which in turn reduces the general competitiveness of the EU. State aid may above all not be used to set up barriers impeding access to the market. If competition is distorted in this way, there is a risk that consumers may have to put up with higher prices, a deterioration in the quality of the products and less innovation.[9]

In Article 107.1 TFEU, four cumulative conditions are set which must be fulfilled for a public measure to be categorised as a state aid. Exemptions from the prohibition on state aid are stipulated in Articles 107.2 and 107.3 TFEU. The Court has on numerous occasions stated that a measure might constitute aid only if all the conditions in Article 107.1 TFEU are fulfilled.[10]

The aid must:

1) constitute a selective economic benefit, i.e. favour a certain company or production of certain goods,
2) be publicly funded directly or indirectly,
3) distort or threaten to distort competition and
4) have an impact on trade between the Member States

In this context it is important to note that the conditions for granting funds for the provision of services of general economic interest (compensation for the public service) have developed in recent years. In the crucial *Altmark*

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7 See Louis, J-V. and Rodrigues, S., *Les sevices d'intérêt économique général et l'Union européenne*, Bruylant 2006, p. 3 ff.

8 cf. case C-393/92, Commune d'Almelo and others v NV Energiebedrijf Ijsselmij [1994] ECR I-1477, para 48.

9 cf. the Commission State Aid Action Plan, COM (2005) 107 final, p. 4.

10 See case C-142/87, Belgium v Commission [1990] ECR I-959, para 25, joined cases C-278/92–C-280/92, Spain v Commission [1994] ECR I-4103, para 20, case C-482/99, France v Commission [2002] ECR I-4397, para 68, and case C-280/00, Altmark Trans and Regierungspräsidium Magdeburg [2003] ECR I-7747, para 74.

case[11], the question was whether it was possible for the bus company Altmark Trans to receive public funds to run an intercity service in the German region Landkreis Stendal without this being regarded as state aid according to EU law. The Court pointed out that the company in question had to be favoured economically and had to receive a more favourable competitive position for the funding to be regarded as state aid. It could not be ruled out that the intercity service in question was so unprofitable that it is was not possible to run it under normal competitive conditions and that public funding could therefore be justified.

The CJEU, however, set a number of conditions to verify that that really was the case. *Firstly,* the company in question should have been under an obligation to provide a public service, and this obligation should have been clearly defined. *Secondly,* the criteria on which the compensation for the public service was based should have been determined in advance in an objective and transparent manner. *Thirdly,* the compensation should not have been allowed to exceed what was required for covering all or some of the costs accrued due to the obligation to provide a public service with consideration being taken to the relevant receipts and a reasonable profit for discharging those obligations. *Fourthly,* in the absence of a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit.

In the light of this legal development, the Commission has, with Article 86.3 TEC (now 106.3 TFEU) as the legal basis, adopted a special decision stating the conditions for granting state compensation for the provision of public services in e.g. healthcare and the public housing sector, i.e. the Commission Decision on the application of Article 86.2 of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest[12] as well as a specific Community framework for State aid in the form of public services compensation, which has a broader application.[13] These rules (often called the post-Altmark package) are now in the process of being reviewed.

On 23 March 2011, the Commission presented a Communication on the Reform of the EU State Aid Rules on Services of General Economic Interest.[14] The aim being to initiate a political discussion with stakeholders concerned as regards the future revision of the post-Altmark package. The Commission established with reference to Protocol 26 to the TFEU that services of general economic interest play a central role for the common values of the union. These services do not only promote social and territorial cohesion and the wellbeing of people in the EU, they also contribute in an important way to the economic development of Europe and cover everything from major commercial services to social services. Against that background, the Commission has put forward proposed legal acts where the aim is to replace the former post-Altmark package.[15] This concerns:

- A new Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (the Communication)
- A new Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing Services of General Economic Interest (the Regulation)
- A new Decision on the application of Article 106.2 of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (the Decision)
- New Community framework for State aid in the form of public service compensation (Community framework)

Of particular interest in this context is the new Regulation concerning *de minimis* aid granted to undertakings providing services of general economic interest. This Regulation is a complement to the previous general so-called *de minimis* Regulation, i.e. Regulation 1998/2006.[16]

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[11] Case C-280/00, Altmark [2003] ECR I-7747, para 88 ff. Of interest in this context is the decision from the Court of First Instance in the BUPA case where the criteria in the Altmark case were adapted to new and different circumstances. In this case, the Court of First Instance examined alleged funding to a risk equalisation scheme established by Ireland in the private medical insurance market. Case T-289/03, BUPA [2008] ECR II-81.

[12] EUT L 312, 29 November 2005, p. 67.

[13] EUT C 297, 29 November 2005, p. 4.

[14] Commission, Reform of the EU State Aid Rules on Services of General Economic Interest, COM(2011) 146 final.

[15] See http://ec.europa.eu/competition/state_aid/legislation/sgei.html.

The proposed criteria for the application of the Regulation, however, give rise to a number of questions. Firstly, according to the Commission's proposal, the Regulation only applies when it is a matter of a "local authority representing a population of less than 10 000 inhabitants". Bearing in mind that the aim of the Regulation is to create relief at the regional and local levels, this type of restriction is understandable. It is, however, difficult to see that such a criterion in the actual application would really lead to a fair application in all the Member States. Why, for example, should the limit be 10 000 inhabitants? There are a number of different ways of dividing inhabitants into local units in the Member States without there being any link whatsoever to the relevant geographical market for the services in question. The point of departure for the criteria that restrict the scope of the Regulation should be that they ensure that trade and competition in the Single Market are not distorted in the way described in Article 107 TFEU. As regards the impact on trade and distortion of competition, however, it is the size of the local market that is interesting, not the number of inhabitants which a certain local authority represents. The inhabitant criterion appears somewhat irrelevant in this context.

Secondly, the Commission proposes that it is only companies with an annual turnover of less than EUR 5 million which should be able to receive aid. This criterion does not either stand out as particularly adequate. The size of a company is not crucial for the size of the market, although one might presume that there is more likely to be an impact on trade between Member States if major companies are involved. Prioritising smaller companies must however be balanced against the risk that local authorities choose to favour companies with a lesser ability to provide the public service as a consequence of such a criterion. This might lead to unnecessary efficiency losses.

Thirdly, there is a ceiling in the Regulation which means that the aid may not exceed EUR 150 000 per fiscal year. Bearing in mind that this amount lies relatively close to the ceiling of EUR 200 000 over a three-year period (Regulation 1998/2006), the risk that this change would have an impact on the internal market in the EU is probably fairly small. It must also be taken into account that the Regulation includes a provision about the Member States not being allowed to favour domestic products at the cost of imported products (Article 3e). Therefore the ceiling of EUR 150 000 and the general precondition that it should be a matter of a service of general economic interest appear to constitute an adequate restriction in the scope of the Regulation. The amount itself, EUR 150 000, seems to be set at a fairly low level, in particular if one compare to the ceilings that are used in the Decision on the application of Article 106.2 where it is stipulated that:

"… small amounts of compensation granted to undertakings entrusted with the provision of services of general economic interest do not affect the development of trade and competition to such an extent as would be contrary to the interests of the Union. An individual State aid notification should therefore not be required for compensation below an annual amount of compensation of EUR 15 million, provided the requirements of the Decision are met."

5 Time to decentralise state aid policies?

The new Regulation can be seen as a reaction to the need for the introduction of special rules at the regional and local levels. The EU's transnational rules are not always adequate for local national markets. There is thus a risk that legitimate interests are not met. It is true that rules linked to the term services of general economic interest are aimed at "reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and preservation of the unity of the common market."[17] The relevant rules are, however, difficult to apply since the idea is that they should function in very different situations. The question is whether a *carte blanche* in the shape of a new *de minimis* Regulation, surrounded by a number of restrictions, which do not seem to bring the real market situation into focus, is really the way to resolve the problem. To a certain extent it would appear as if the Commission is trying to quieten the growing criticism against the complexity of Union rules with a questionable exemption. The question of whether it is time for a more far-reaching reform is discussed below.

The principle of subsidiarity is often cited as support for enhanced autonomy at the regional and local levels. The principle of subsidiarity is, however, only applicable "in areas which do not fall within its [the Union's] exclusive

[16] Commission Regulation (EG) nr 1998/2006 of the 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minmis* aid, EUT L 379, p. 5.

[17] Case C-202/88, France v Commission [1991] ECR I-1223, para 12, case C-157/94, Commission v Netherlands [1997] ECR I-5699, para 39, and case C-67/96, Albany [1999] ECR I-5751, para 103.

competence" (Article 5.3 TEU). It follows from Article 3 TFEU that the Union has exclusive competence when it comes to establishing the competition rules necessary for the functioning of the internal market." Under Title VII, Chapter 1 "Rules on Competition" there are both rules applicable to undertakings (Section 1) and "Aids granted by States" (Section 2). It can thus be concluded that the principle of subsidiarity does not lend support to the view that the state aid rules should not be applicable when it is a matter of local communities. The principle of subsidiarity, in the meaning of the Treaty on the European Union, is quite simply not applicable in that regard.

There is, however, another restricting principle that can serve as a guide when making an assessment of when the interests of the Union end and the national, regional and local interests begin. The Community's rules shall according to the Treaty on the European Union be limited to what is "necessary for the functioning of the internal market". In other words, the EU's rules may not be in contravention of the *principle of proportionality* (cf. Article 5.4 TEU). It is in this light that a discussion on the limits of the scope of state aid rules can be conducted. The criteria that is used in practice to determine what is necessary for the functioning of the internal market is the impact on trade criterion which is stipulated in Article 107 TFEU. The CJEU has interpreted this element extensively. In practice therefore, not a great deal is required for this criterion to be regarded as being fulfilled. According to the case law, it is not, for example, *a priori* excluded that certain aid of a fairly minor importance or the recipient company being relatively small may affect trade between Member States.[18]

This has in turn led to an extreme centralisation of state aid policies. The Commission alone has the competence to approve also fairly harmless aid measures and the notification obligation is very extensive. It might for example have to do with determining the correct level of bail for municipal guarantees[19] or approve in advance public contributions to local sports activities. The question whether the Union interest is really at stake in these situations is often overshadowed. State aid rules are to a large extent applied automatically. This can have serious ramifications. The notification obligation includes minor aid schemes which upon closer examination can appear to be insignificant from the Union perspective but which may support a legitimate policy at the regional and local levels, for instance, ensuring vital socio-economic functions in markets with a declining demand due to urbanisation.

An objection to this line of reasoning might be that it is fully possible to apply the measures in question and get them approved by the Commission. A notification is, however, normally accompanied with substantial delays due to, for example, extensive forms that must be filled in.[20] This bureaucracy is understandable from the Union perspective but not if the Union interest is minor. The amount of work a notification entails can instead be a strong deterrent for a region or local authority wishing to resolve local problems through aid schemes. Nor is it probable that the Commission has the possibility of prioritising local measures to any extent. The speeding up of the process brought about by the financial crisis dealt with very different – and from a Union perspective much more important – aid schemes.

This situation is reminiscent of the situation in the past as regards competition rules applicable to undertakings (Articles 101 and 102 TFEU), before the so-called modernisation reform in 2003. Centralisation went very far also here. In the end it became necessary to give the competition authorities in the Member States a more prominent role. The prior authorisation procedure in place at the time, in the shape of individual exemptions, negative clearances and the so called comfort letters issued by the Commission, were done away with. The Commission has since then been able to focus on intervening where there

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18 Case 142/87, Belgium v Commission [1990] ECR I-959, para 43 and joined cases C-278/92, C-279/92 and C-280/92, Spain v Commission [1994] I-4103, paras 40-42.

19 See, e.g., the judgement from the District Court in Gothenburg of 23 March 2011, Bååth and Daal (Borgensavgift Renova AB), case nr 7739-09.

20 Commission Regulation (EG) nr 794/2004 of 21 April 2004 on the implementation of Council Regulation (EG) nr 659/1999 on implementation provisions for Article 93 in the EC Treaty (EUT L 140, p. 1) includes the standard form and the form for additional information that shall be filled in for the submission of a notification to the Commission for public aid schemes. The forms are extensive and require good knowledge both of the EU state aid system in general and the aid regulations in question in particular with regard to, for example, the scope of the aid (aid amount), length and set up (i.e. aid conditions, number of beneficiaries, size of the beneficiary, funding) and whether the aid is compatible with any of the guidelines drawn up by the Commission for different types of aid. Knowledge of a number of legal terms and definitions is also assumed. cf. Aldestam, M., *Kommunal förvaltning i statsstödsrättslig belysning*, i God förvaltning – ideal och praktik, red. Marcusson, L, Iustus förlag 2006, p. 36.

are serious infringements of the competition rules. The Commission has, however, at the end of the day still the possibility of initiating a procedure in a case that is being processed by a national authority and thus take over the case. The reform is largely regarded as being a success. The daily contacts between the national authorities and the Commission as well as the intensified cooperation within the *European Competition Network* has led to an entirely new climate of cooperation which is based on an expressed feeling of collegiality between equal parties.[21]

The state aid rules have not been applied to the same extent as the competition rules and the Commission has thus not been overburdened to the same extent. The centralisation of state aid policies has in reality emerged in a situation where there has been a total lack of national state aid monitoring. The question is, however, if it is not time for an increased decentralisation as has already been the case with competition policy as regards undertakings.[22] Why would it not be possible for the national competition authorities that exist in all Member States and which are part of the *European Competition Network* to be able to contribute to ensure that the EU state aid policy functions better at the regional and local levels? It would then be possible for the Commission to concentrate on state aid cases which include aid of more important levels, leaving to the national authorities to ensure the correct application of the rules at local and regional levels.[23] As is the case with the competition rules, the Commission would naturally have the power to take over and initiate cases of its own. Moreover, the decentralisation would to a great extent be much more limited than is the case with the competition rules. My view is that the national authorities should only have a monitoring responsibility when it comes to financing companies that provide services of general economic interest. There is now an extensive set of rules adopted in the shape of the above-mentioned Decision, Community framework, Regulation and Communication. The discretionary room for manoeuvre in the scope has thus been restricted which paves the way for decentralisation. National competition authorities should therefore together with the Commission be able to ensure a correct application of the new post-Altmark package at the regional and local levels.

If there is a national system for monitoring and control in this area, the limit for what must be notified to the Commission can be set much higher than it is today (currently EUR 200 000 over a three-year period or EUR 150 000 per year according to the Commission's new proposal, as described above). The limit could instead be set at EUR 15 million, as in the proposed decision upon the fulfilment of the conditions therein. Notifications with regard to the funding of services of general economic interest under this ceiling should instead be submitted to the national authorities. The Member States would then cooperate with the Commission in order to design monitoring systems and notification obligations that are adapted to the local and regional conditions, including less complicated application forms, and this would lead to shorter processing times. A major part of the work would, in any case, probably relate to the application of the Decision on the application of Article 106.2 TFEU, i.e. an evaluation of measures which, if the conditions set are met, shall not be notified to the Commission. The new proposal for the *de minimis* Regulation is based on a reasonable idea, namely that local conditions vary too much for them to be handled centrally. However, what is required is a reform of principle if the problem is going to be resolved in a more radical way. A decentralisation of state aid policy as regards the financing of services of general economic interest should therefore be considered.[24]

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21 cf. Norberg, S, *Moderniseringsreformen av EU:s konkurrensrätt – hur såg det ut 1998 och var kan/borde vi vara 2018?*, ERT Jubileumsnummer 2008, p. 133.

22 This has been discussed before, see Nicolaides, P., *Decentralised State Aid Control in an Enlarged European Union: Feasible, Necessary or Both?*, World Competition, Volume 26 (2003), No. 2, pp. 263-276. See also Simonsson, I., *On the Emerging Obligation for Member States Authorities to Supervise and Enforce EC State Aid Law* in Swedish Studies of European Law, vol 1, Hart Publishing, Oxford 2006, p. 233 ff.

23 I have previously argued in favour of such a line of development in the report *EU:s statsstödsregler i nationell tillämpning – Behövs en effektivare tillsyn och kontroll i Sverige* (Konkurrensverket 2008), written together with Maria Fritz.

24 A Swedish inquiry has recently dismissed the establishment of a state aid monitoring system at the national level in Sweden but not based on the arguments above (SOU 2011:69, olagligt statsstöd).

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