HILO Y ENCABEZADO

Judgement of the Court (First Chamber) of October 6th, 2021 Scandlines Danmark Aps. and Scandlines Deutschland Gmbh V. Commission, in Joined Cases C-174/19 P And C-175/19 P. Article 107(1) TFEU does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects. The fact that a Member State assigns a public service subject to a legal monopoly to a public undertaking does not, in certain circumstances, entail a distortion of competition. An advantage granted to the operator of an infrastructure subject to a legal monopoly cannot, in such circumstances, distort competition. It is necessary, for such a distortion to be able to be excluded in such circumstances, that the legal monopoly not only excludes competition 'on' the market, but also 'for' the market, in that it excludes any possible competition to become the exclusive provider of the service in question. For the purpose of assessing the effect on competition of the measures granted to a company there is need to take account of the activities of which that undertaking is itself specifically and actually in charge. (CRM).

KEY WORDS: state aid, competition on the market, competition for the market, monopoly.

CONTEXT

The case concerns the financing of the project for the Fehmarn Belt link between Denmark and Germany. The project, signed between Denmark and Germany, consists on the construction of a tunnel between Rødby in Denmark and Puttgarden in Germany and in the expansion and upgrade of the road and rail hinterland connections in Denmark and Rødby.

Two Danish public undertakings had been granted the implementation of the project. Femern is responsible for the financing, construction, and operation of the fixed link and Femern Landanlæg A/S, which is responsible for the financing, construction and operation of the road and rail hinterland connections in Denmark. Fermen is a subsidiary of Femern Landanlæg, which is also a subsidiary of Sund & Bælt Holding A/S, owned by the Danish State.

The conditions of the project are the following: it is financed by Femern and Femern Landanlæg through loans raised on the international financial markets and covered by the Danish State's guarantee, or by means of subsidiary loans from the National Bank of Denmark. However, those companies will be unable to obtain loans for activities other than the financing, planning, construction and operation of the fixed link and the road and rail hinterland connections in Denmark. Besides, those two undertakings will also get a capital contribution from the Danish State. Additionally, Femern will receive the fees paid by users of the fixed link and will pay dividends to Femern Landanlæg, oriented to discharge its own debt. Furthermore, Femern Landanlæg will collect 80% of the amount of the fees paid by the rail operators for use of the rail connections. Finally, Banedanmark will cover all the costs relating to the operation of the rail hinterland connections in Denmark, whereas the costs relating to their maintenance will be shared with Femern Landanlæg.

The Commission concluded that those measures relating to the financing of the planning of the project did not constitute state aid and eventually, they would be considered compatible with the internal market. When Danish authorities informed the

Commission of the arrangements for public financing of the project, they were also approved, since they did not constitute a state aid. The justification by the Commission is that they would not give rise to any distortion of competition, since there was no competition ‘on’ or ‘for’ the market for the operation and management of the national railway network and the rail connections owned by that undertaking would be upgraded and operated by Banedanmark under the same conditions as the other parts of the Danish national railway network. Additionally, the Commission understood that the measures are not to affect trade between MMSS, since the management and operation of the network was to be carried out on a closed market, not open to competition.

The appellants, after a partial annulment of the Commission’s decision concerning Femern, claim that the General Court erred by understanding that the measures granted to Femern Landanlæg are not able to affect competition even both individual projects may be seen as constituting an overall project, especially if considering that the measures granted to Femern are liable to distort competition. They considered that, even if performed by two different companies, the measueres are the same and there is no reason for an independent assessment.

In their opinion, the General Court made a mistake in finding that Femern Landanlæg’s activities do not include the provision of transport services across the Fehmarn Belt. They assert further argue that the purpose of the measures granted to Femern and those granted to Femern Landanlæg are the same and consist in the provision of transport services across the Fehmarn Belt. However, subsidiarily, in any case, the measures granted solely for the rail connections distort competition in the same way as those intended for the railway infrastructure of the fixed link.

As for the second and third parts of the appeal, the appellants argue that the General Court erred in law by holding that the market for the management of the railway infrastructure in Denmark was not open to competition. They bring evidence of a licensing system for the operation, management and maintenance of the Danish railway infrastructure in the Danish legislation. Even in 2015 the system was replaced by an approval system, they understand this as an evidence for competition, at least as regards competition ‘for’ the market for the management of railway infrastructure. Besides, they say, there are several railway infrastructure operators in Denmark.

In this vein, the appellants argue that the General Court also erred by considering that the fact that undertakings other than Banedanmark have obtained licences and carried out their management and operation activities on sections of the railway network which form a kind of ‘natural monopoly’ was not sufficient to show that there is competition ‘on’ or ‘for’ the market. Nor should be deemed relevant the fact that EU law does not require the management of the railway infrastructure to be opened up to competition and that operators from other MMSS need to rely on permits issued by their countries to participate in the market. Besides, they also bring evidence of competition in some local market where companies authorised to manage local railway networks, separate from the national network. In their opinion, and as stated in the Communication from the Commission on the EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, the only relevant criteria for considering a measure a state aid is whether operator received financing on conditions which correspond to market conditions.

Appellants also maintain that the General Court erred in law by distinguishing, for the purpose of assessing the effects on competition of the measures granted to Femern Landanlæg, between the activities of constructing and maintaining the railway infrastructure, on the one hand, and those of managing and operating that infrastructure. For justifying such an assertion, they maintain that the licencing and safete approval system covers both activities without distinction and that there is not reason for distinguishing them in Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area.

They also understand that there is no reason for the General Court to say that in the Danish legislation, the Decision or the articles of association to establish that the

undertaking is responsible for carrying out the tasks of constructing and maintaining the railway network in competition with other operators.

Finally, the appellants argue that the measures granted to Femern Landanlæg are such as to affect trade between Member States since they are able to affect competition both on the market for the management of railway infrastructure and on the market for transport across the Fehmarn Belt. They state that account should also be taken of the cross-border nature of the project, which connects two Member States.

DOCTRINE

89. *The question whether Femern and Femern Landanlæg are undertakings within the meaning of Article 107(1) TFEU is also irrelevant ...*

90. *Lastly, the nature of the objectives pursued by State measures and their grounds of justification have no bearing whatsoever on whether such measures are to be classified as State aid. Article 107(1) TFEU does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects (judgment of 4 March 2021, Commission v Fútbol Club Barcelona, C 362/19 P, EU:C:2021:169, paragraph 61 and the case-law cited).*

92. *It follows ... that the measures granted to Femern Landanlæg, adopted in connection with the same project which granted measures for Femern in respect of the fixed link and categorised as State aid by the Commission, cannot, for that 'sole reason', constitute State aid, since those two types of measures have a different purpose and different beneficiaries. The General Court was therefore also right to draw a distinction, ..., between the effects on competition of the measures granted to each of the undertakings.*

129. *... classification as 'State aid', within the meaning of Article 107(1) TFEU, requires, inter alia, that the measure at issue distorts or threatens to distort competition within the meaning of that provision.*

130. ... *the fact that a Member State assigns a public service subject to a legal monopoly to a public undertaking does not, in certain circumstances, entail a distortion of competition, and an advantage granted to the operator of an infrastructure subject to a legal monopoly cannot, in such circumstances, distort competition. ..., it is necessary, for such a distortion to be able to be excluded in such circumstances, that the legal monopoly not only excludes competition 'on' the market, but also 'for' the market, in that it excludes any possible competition to become the exclusive provider of the service in question (see, to that effect, judgment of 19 December 2019, Arriva Italia and Others, C 385/18, EU:C:2019:1121, paragraph 57).*

137 *In addition, the General Court, after finding, ..., that the Danish legislation allowed operators established in other EU Member States to rely on permits issued in their country of origin, inferred from that, without erring in law, that the market for the management and operation of railway infrastructure in Denmark was not, for that reason alone, open to competition.*

140. *... General Court was right to find, ..., that the Danish legislation establishing the licensing system for the management of railway infrastructure did not imply that there was 'de lege' competition 'on' or 'for' the market for the operation and management of the national infrastructure for which Banedanmark holds a statutory monopoly.*

146. *As regards the appellants' argument that the relevant criterion for the purposes of the analysis is in reality whether or not Femern Landanlæg received financing on conditions which correspond to market conditions, it must be borne in mind that this is a separate condition, necessary for classification as State aid within the meaning of Article 107(1) TFEU, which is irrelevant to the question whether the market on which the undertaking operates is open to competition.*

161 *As the Commission states, it is necessary, for the purpose of assessing the effect on competition of the measures granted to Femern Landanlæg, to take account of the activities of which that undertaking is itself specifically and actually in charge.*

176 *As regards the appellants' argument alleging that the project is cross-border in nature, inasmuch as it will make it possible to connect two Member States, it must be noted that the measures examined in the context of the present ground of appeal concern in any event only the rail hinterland connections in Denmark, which are not 'cross-border' in nature in the sense in which the appellants rely on. Moreover, their financing is the subject of an assessment that is separate from that of the financing of the fixed link, as follows, in particular, from paragraph 88 of the first judgment under appeal and from paragraph 63 of the second judgment under appeal.*

On those grounds, the Court (First Chamber) hereby:

1. **Dismisses the main appeals and the cross-appeals;**
2. **Orders Scandlines Danmark ApS, Scandlines Deutschland GmbH and Stena Line Scandinavia AB to pay, in addition to their own costs, those incurred by the European Commission in connection with the main appeals;**
3. **Orders the European Commission to bear its own costs in connection with the cross-appeals;**
4. **Orders the Kingdom of Denmark, Föreningen Svensk Sjöfart and Naturschutzbund Deutschland (NABU) eV to bear their own costs;**
5. **Orders Nordö-Link AB, Trelleborg Hamn AB and Aktionsbündnis gegen eine feste Fehmarnbeltquerung eV to bear their own costs.**