

Commission decisions reinforce the position on when measures adopted by publicly owned companies will be classed as state resources for the purposes of the state aid rules

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The Commission has recently published two decisions (SA.52489 and SA.52658) concerning two member states, Denmark and Sweden, and PostNord Logistics in which the Commission have given some useful guidance on when financing can be seen as imputable to the State for the purposes of State aid Rules. The Commission was asked to consider whether investments made by state-owned postal companies could be imputed to the state and whether PostNord Logistics had received state aid from Denmark and/or Sweden.

Background

PostNord Logistics, a company based in Denmark, are wholly owned by PostNord Group and PostNord Group based in Sweden, are wholly owned by PostNord AB. Sweden holds a 60% share and Denmark a 40% share in PostNord AB, but both states have equal voting rights. The Board of Directors of PostNord AB are made up of eleven board members, four nominated by Denmark, four nominated by Sweden and three nominated by subsidiaries of PostNord Group, within the eleven board members, two individuals are civil servants, one from Denmark and one from Sweden.

Three claims of state aid being granted were made. These were:

- Statements made in the annual reports of PostNord Logistics which referenced that PostNord Group would provide capital injections on market conditions in order to ensure liquidity;
- A capital injection made by PostNord Group in to PostNord Logistics which was approved by PostNord AB; and
- That PostNord Logistics was receiving subsidised use of facilities from Post Danmark (a subsidiary of PostNord Group) who was using compensation under a different state aid decision to fund this subsidy.

In the case of all three claims, the complainant argued that the relevant measures were imputable to Denmark and Sweden due to their ownership of PostNord AB.

What did the Commission consider?

In relation to the first claim based on the annual statements, the Commission indicated that under Danish Law annual statements are non-binding thus capital cannot be deemed to be granted simply because it is mentioned in a statement. Furthermore, the statements referred to the capital being injected on market conditions, so if it was the case that the statements could be considered as granting this capital then it would be on market conditions and provide no advantage to PostNord Logistics, therefore this did not constitute state aid.

In relation to the capital injection, when the Commission looked at whether this would fall within state resources, they decided it did. This was because PostNord Group could be seen as being 100% owned by the State due to its parent company PostNord AB being 100% owned by Denmark and Sweden.

It then considered whether this could be imputed to the state, and looked at other case law, in particular Stardust Marine. In this case the court had said that even if the state is in a position to control and to exercise a dominant influence over the operations of that undertaking, it cannot be automatically presumed that this has taken place. The mere fact an undertaking, such as PostNord AB, is under state control, is not sufficient for measures taken by that undertaking to be imputed by the state. In order for an action to be imputable to the state it has to be demonstrated on a case by case basis that the public authorities had some involvement in the adoption of the measures (in this case it had to be shown that Denmark and Sweden were in some way involved in the decision of PostNord Group to provide the cash injection) and EU case law has established a set of indicators in order to help with this analysis. These include:

- whether the public undertaking which granted the aid could not take that decision without taking account of the requirements of the public authorities;
- whether it had to take account of directives issued by governmental bodies such as an inter-ministerial committee;
- the level of integration of the public undertaking into the structures of the public administration;
- whether the public undertaking operates in competitive markets and whether it is subject to public law or ordinary company law; and
- the intensity of the supervision exercised by the public authorities over the management of the undertaking.

Various factors were considered by the Commission when deciding whether the states influenced the decision of PostNord Group to inject capital into PostNord Logistics, using the indicators above as a framework for their decision. The pertinent points the Commission made were:

- Whilst it was highly likely that Sweden and Denmark were aware of the injection as PostNord AB was consulted in line with internal governance policies (and two of those board members were also active civil servants), it did not appear from minutes from board meetings that the states or civil servant board members expressed any view regarding the injection.
- There was no suggestion that PostNord AB was under any obligation to take account of particular directives issued by Sweden or Denmark in relation to the capital injection and in fact no such directives had actually been given.
- The fact that both States and PostNord AB cooperated with each other throughout the investigation did not suggest imputability of PostNord AB decisions to the States, it was merely standard practice.
- The governance of PostNord Group meant that it generally operated independently and indeed operated independently with regards to the capital injection, and there was no evidence of direct supervision from the states over the management of PostNord Group.

Therefore, the Commission concluded that there was no evidence that the states were involved in the adoption of the decision by PostNord Group to provide the cash injection and therefore it was not imputable to the State.

The allegation of PostDanmark (a subsidiary) cross subsidising PostNord Logistics was also found to not involve aid. Deloitte were asked to carry out an audit, particularly between PostNord Logistics and Post Danmark, which considered possible sharing of things such as vehicles, equipment, management services and IT services, and found that proper invoicing had always taken place between the company groups. Additionally, the State aid decision relied on by PostDanmark included an ex-post overcompensation test, which included a mechanism for preventing overcompensation and should exclude the possibility of cross-subsidisation. As a result of this, the Commission concluded that the alleged cross-subsidisation was unsubstantiated and did not involve aid.

It was decided by the Commission that there was no evidence of state aid in relation to any of the claims made. No state aid had been granted to PostNord Logistics as there was no transfer of state resources in its favour and no cross-subsidisation could be detected, further the Commission could not find evidence of the two States interfering in PostNord Group's actions.

Points to note:

The definition of State Aid within Article 107(1) of the Treaty on the Functioning of the European Union (TFEU), provides for four conditions which must all be met for the measure to be caught by the state aid rules:

- It is granted by the State or through State resources;
- It favours certain undertakings or the production of certain goods;
- It distorts or threatens to distort competition; and
- It affects or is able to affect trade between EU Member States.

When funds provided do not come directly out of a public authority budget, these may still be considered state aid if the funds are under the control of the state and the decision to grant the funds is attributed or imputed to the state.

This decision confirms that simply because a company is wholly owned by the state, does not mean that all resources or funding it grants to other bodies will automatically fall within the first limb of the state aid test. In order for such funding to be imputed to the state it needs to be demonstrated that the public authority which owns the entity has taken an active role in the grant of the applicable measure. This means in cases where companies which are wholly owned by public bodies decide on a measure independently without input from their parent public authority, then it is likely that such a measure will not be imputable to the state.

Contact



Athina Agrafioti

Associate

athina.agrafioti@brownejacobson.com

+44 (0)330 045 2650

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