

## *24. Berliner Gesprächskreis*

# **State aid without the State?**

 *Stardust Marine revisited*

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# 1. Introduction

- When does an aid measure constitute State aid?
- Art. 107(1) TFEU: aid granted “by a Member State or through State resources” - two elements:
  - The aid has been granted by a public authority; and
  - The measure results in a transfer of State resources.
- Can the following situations be qualified as State aid:
  - Aid imposed by a Member State is financed (chiefly) through private undertakings (C-379/98 *PreussenElektra AG*)?
  - Aid is granted by a so-called public undertaking (C-482/99 *Stardust Marine*)?



## 2. *Stardust Marine* (C-482/99) - Judgment

- EU Commission: The mere existence of an organic relationship between public undertakings and the State is enough for measures taken by the public undertaking to be imputable to the State.
- Central question: when is aid granted by a public undertaking imputable to a Member State?
  - When aid is granted under the element “through State resources”, it must also be the result of an action of a Member State (this follows from the title ‘Aids granted by States’, which is *de facto* aid the element “granted by a Member State”). Again, the two criteria are cumulative.
- Court of Justice: Imputability must be determined on the basis of a set of indicators arising from the circumstances of the case and the context in which a measure was taken, including:
  - the need to take account of public bodies’ directives, the undertaking’s integration into the public administration, the nature of its activities, its legal status, the intensity of its supervision, any other indicator showing an involvement by the public authorities (paras. 55-56).

### 3. Pending Case C-242/13 Commerz Nederland N.V. v Rotterdam Port Authority (HbR)

- Facts: the sole director of the Dutch public undertaking HbR has issued three guarantees to Commerzbank. When Commerzbank invoked the guarantees, HbR claimed that they constituted illegal State aid and were therefore null and void.

- Circumstances:

- The municipality of Rotterdam held all the shares in HbR;
- As the sole shareholder of HBR, the municipality of Rotterdam appointed all the board members and supervisory board members of HbR;
- The municipality of Rotterdam's alderman responsible for port affairs was the chairman of the supervisory board of HbR;
- According to its articles of association, HbR needed the approval of its supervisory board before it could issue guarantees like the ones concerned;
- The objects clause contained in the articles of association of HbR was in no way similar to that of a commercial undertaking since the public interest featured prominently in it.

- The sole director of HbR acted on his own authority;
- The sole director of HbR deliberately kept the issuance of the guarantees secret;
- The sole director of HbR ignored the articles of association by not requesting the supervisory board's approval;
- The sole director of HbR has been criminally prosecuted and convicted for his misconduct in the issuing of the guarantees;
- It must be assumed that the municipality of Rotterdam (and the Dutch State) did not want the guarantees to be issued.

- Question: how to determine whether the measure can be attributed to the State?