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STATE AID CASE LAW

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Judgment of the General Court of 6 April 2017 in joined cases T-219/14 (*Regione autonoma della Sardegna/European Commission*) and T-220/14 (*Saremar– Sardegna Regionale Marittima S.p.A./European Commission*)

I. INTRODUCTION

1. An interesting "Italian" case has lately come to the attention of the Commission and of the ECJ (Saremar - ferry services to Sardinia). The judgment on Saremar is important because it clarifies a number of questions concerning the definition of public service obligations and the applicability of the 2011 Commission decision on services of general economic interest¹.

2. The present note aims at providing a brief overview of the main issues dealt by the General Court in its judgment in Case T-220/14, delivered on 6 April 2017 on the action lodged by maritime transport operator Saremar – Sardegna Regionale Marittima S.p.A..

The action, lodged under Article 263 TFUE, concerned the annulment of Commission Decision C (2013) 9101 final of 22 January 2014 by which the European Commission has stated that part of the support measures that Regione Sardinia (“RAS”) had granted to the maritime company Saremar in 2011 and 2012 was incompatible with EU state aid rules. In particular, the Decision ascertained that a capital injection not approved on market conditions and the compensation for carrying out certain maritime services have provided an undue economic advantage to Saremar that its competitors did not have. The Commission concluded that Saremar had to pay back this undue advantage of around €10.8 million in total, to remedy the distortion of competition this has created. By contrast, the Commission concluded that two letters of comfort issued by the Region did not guarantee any financial obligation of the company and did not therefore constitute State aid to Saremar; besides, the promotional activities carried out by Saremar were considered to be priced at market value.

¹ Decision 2012/21 allowing Member States under certain conditions to grant aid to providers of SGEI without prior notification to the Commission

3. The Decision was also challenged by Regione Sardinia in Case T-219/14. Nevertheless, the General Court rejected the two actions, thereby confirming the Commission's decision.

II. THE GENERAL COURT'S ASSESSMENT

(i) *The compensation measure*

1. First of all, the Court's assessment on the compensation measure foreseen in Article 1 (3) of Regional Law no. 15 of 2012, by which Regione Sardinia authorized the expenditure of 10 million euros in order to cover Saremar's potential losses resulting from its operating the routes between Sardinia and the mainland, was based on the criteria introduced by the Altmark judgment².

2. In the present case, more specifically, the Court verified the existence of the second Altmark condition concerning the need to define in advance the parameters for calculating the amount of the compensation in a transparent and objective manner (paragraphs 93 to 106 of the Judgment).

3. In this respect, the Court, although implicitly acknowledging the existence of an obligation on Saremar to carry out the public service mandate conferred on it, concluded that the second Altmark condition was not satisfied. This, because, according to the Court, "*none of the regional decisions [...] by which the RAS mandated Saremar to operate routes to and from the mainland and specified the associated public service obligations, makes any express or even implicit provision for the payment of public service compensation corresponding to the costs incurred in fulfilling the aforementioned obligations*" (paragraph 102 of the Judgment).

4. The General Court emphasized the fact that such regional decisions were moving from the assumption that the performance of the aforementioned public service obligations had to be carried out in accordance with market conditions, and thus safeguarding the company's viability without recurring to public service compensation paid by the RAS. In its assessment, the Court made explicit reference to the wording of

² The judgment of 24 July 2003 in *Altmark Trans and Regierungspräsidium Magdeburg*, C 280/00, EU:C:2003:415, sets out the conditions (so called "Altmark criteria") which must be satisfied in order to exclude that a financial compensation granted for a service of general economic interest could be qualified as State aid. In short, these criteria can be summarized as follows:

- i. the recipient undertaking must have public service obligations and the obligations must be clearly defined;
- ii. the parameters for calculating the compensation must be objective, transparent and established in advance
- iii. the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit;
- iv. where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical well-run company.

the Regional Resolution no. 48/65 which expressly endorses the obligation to maintain the economic balance of the routes to and from the mainland, referring to the objective of avoiding payments of incompatible State aid (paragraph 102 of the Judgment). In this respect, the General Court also rejected an argument put forward by Saremar that the absence of explicit reference to public service compensation in the public service mandate of Saremar was not contrary to the second Altmark condition.

5. Against this background, the Court concluded that the second condition is satisfied only when explicit and objective parameters are defined in advance and such an advance definition must be contained in the act of imposing the public mission.

6. Thus, taking into account the cumulative nature of the Altmark conditions, the Court concluded that, lacking the second Altmark condition, the challenged Commission decision correctly applied the relevant Treaty provisions concerning State aid and the financing of SGEIs.

7. As the other pleas are concerned, and in particular the first part of the third plea concerning the application of the SGEI Decision 2011, the Court, firstly, confirmed the correct application *ratione temporis* of the decision and secondly, in order to justify its assessments, repeatedly referred only to the failure to comply the second Altmark requirement. On this matter the judgement stated: “*the regional decisions referred to in paragraphs 6 to 9 above did not provide for the grant of public service compensation or, consequently, the definition of objective and transparent parameters for calculating that compensation. Thus, on that basis alone it may be held that the condition laid down in Article 4(d) of the 2011 SGEI Decision is not fulfilled, which is sufficient to conclude, given that the conditions laid down in that decision are cumulative, that the disputed compensation measure could not be deemed compatible with the internal market and exempt from notification under that decision*” (paragraph 155 of the Judgment).

8. Finally, the Court rejected further arguments concerning the incorrect qualification of Saremar as a firm in difficulty. In that regard, the judgment states that the European Commission correctly identified and demonstrated the existence of a series of specific indices which demonstrate the seriousness of the economic and financial situation of the undertaking in question. Under these *de facto* circumstances, in accordance with “*Community Guidelines on state aid for rescuing and restructuring firms in difficulty*” (2004/C 244/02, p. 2), the Commission could conclude that Saremar was “*unable (...) to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term*” (paragraph 175 of the Judgment).

(ii) *The capital increase*

9. The Court also rejected all the arguments advanced by Saremar concerning the Commission’s assessments with regard to the contested compensation measure, the Court also rejected the plea in law relating to the capital increase realized in favour of Saremar, mainly because such public intervention: (i) constituted a transfer of State resources to Saremar liable to confer an economic advantage; (ii) did not appear to be founded on

economic assessments similar to those a rational private investor would have carried out before making such as investment.