

THE TREATY OF ROME AND COMPETITION IN THE VOLUNTARY SECTOR¹

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Let me make some preliminary remarks. First, nothing that I say is to be taken as an indication of the views of any person or body with which I may be connected. Second, I am not a lawyer. Third, I interpret the voluntary sector as including foundations, trusts, and charities, as we understand that term in the UK.

My remarks will deal with Article 92 of the Treaty, which prohibits under certain conditions the grant of aid by a Member State.

To be caught by the prohibition an aid must fall into a number of successive traps:

First, it must be an aid.

Second, it must distort competition, or threaten to distort it, by favouring certain undertakings or the production of certain goods; note that it can only fall into this trap if there is competition or the possibility of competition for it to distort. In passing, observe that I am not wasting your time by discussing whether a voluntary organisation, whether it be a trust, foundation, association, or take some other shape, is an undertaking. Of course it is.

Third, it must affect trade between Member States.

There are mandatory exemptions, of which only one seems relevant this afternoon: aid to make good the damage caused by natural disasters or exceptional occurrences. Some activities of disaster-relief organisations might benefit from this; in which case some of the remarks that follow may be inapplicable.

There are also discretionary reliefs, for forms of aid that may be considered compatible with the common market. Possibly relevant under this head is aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the community to an extent that is contrary to the common market. Where this applies, some of the following remarks may again be inapplicable. I am not at all clear what is meant by the promotion of culture in this context. Does it, for example, include education?

¹ The text of an intervention at a seminar organised by CEDAG on 14th September 1994.

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There is also provision (Article 92.3(e)) whereby other categories of aid may be exempted by decision of the Council acting on a proposal from the Commission. If, as is probable, some general form of exemption is needed for a wide range of voluntary organisations, it is, I suggest, under this provision that it should be sought.

Enforcement provision is made by Article 93, under which the Commission may find aid incompatible with the common market or may decide that it is being misused. The Commission can then after consultation direct the Member State concerned to abolish or alter the aid. To this possibility I shall return later.

Aid may take forms other than direct payment; it may be, for example, complete or partial relief from taxation. A payment or relief granted by a government to a voluntary organisation has to be aid before it is caught by the prohibition. If it is a payment for goods or services bought from the organisation it is not aid. Attempts have been made to extend this line of thought. It has been suggested that any general system of aid or tax-relief to the voluntary sector or to significant sub-sectors of it is really payment by the State for services that the sector provides to society at large; for services, moreover, that the State might itself feel compelled to provide if the sector were not there to relieve it of the burden. This is an elegant and ingenious argument, with great moral force, and may be right in spirit, but is it good law, will it stand up in court? Manifestly, there is no explicit contract for the sale and purchase of the goods and services. Is there some kind of implicit contract? To those who are accustomed to the systems of legal thought in the common law countries, the argument is, I fear, very unpersuasive. The ways of legal thought on the mainland of Europe are different, however; and I suppose that it is possible that the argument might succeed in the European Court. I simply do not know.³ Even if it did succeed, would our troubles be over? Would it not follow that the arrangements in question were within the scope of the legislation on procurement? What would be the effect of that? Should we simply be exchanging one set of troubles for another?

Article 92 may be irrelevant to some forms of activity in the voluntary sector since it bites only on aid that may affect competition. As a rule there must be trade before competition can be affected. Bodies that do not sell any goods or services are, I suggest, safely outside the reach of the legislation, unless the services that they provide are such as someone else might be willing to provide for payment.

In what follows I need to distinguish between two forms of trade in which voluntary organisations may be engaged. They may carry on some commercial activity unrelated to their purposes simply to raise funds; I shall refer to this as "unrelated trading"; or they may trade in direct pursuance of their purposes; I shall refer to this as "related trading".

The extent to which voluntary organisations may engage in unrelated trading varies from one Member State to another, and is normally very limited; but it does occur and the profit derived from it is sometimes exempt from direct taxation - e.g., income tax or corporation tax. When this happens other traders are apt to complain of unfair competition. Is their complaint justified?

Does such exemption distort competition contrary to Article 92?

³ In some remarks made earlier in the seminar, Dominique de Crombrughe, a Belgian lawyer and consultant to DG XXIII, seemed to be indicating that he did not think this argument would be successful.

Does the tax-relief enable the organisation to undercut the prices charged by its competitors? If the trade is purely to raise funds, I suggest that the tax-exemption may not be caught by the Treaty. Direct tax is not a factor of production taken into account in fixing prices; this is evidenced by, *inter alia*, the fact that prices generally do not fall when income tax and corporation tax come down. Rational traders fix prices at such a level as to maximise their profits, irrespective of what happens to the profits after they are made. Take two traders, one subject to tax and the other exempt. Assume that all their other circumstances are similar. Each of them will seek to fix his prices at such a level as to produce most profit. If they get their sums right, each will charge exactly the same price for the same goods, and competition will not be affected by the fact that one of them is allowed to keep more of the profits after he has made them. I must warn you that, while I like the sound of this argument, I am not absolutely certain that it is in all circumstances completely water-tight. Moreover, it applies only to relief from direct taxes on income. It does not apply to relief from other forms of tax, including indirect taxes, such as cadastral taxes, taxes on property occupied. That relief does affect costs in the same way as would a low rent, and does help the organisation to charge a low price, so it does distort competition. So will any grants in aid that the organisation receives from public authorities.

Given that there is distortion of competition, the next question is, does it affect trade between Member States? Remember that we are still talking about unrelated trade. It is, I believe, generally on a very small scale and of limited range. I doubt whether there is any effect on trade between Member States; if there is, it must be minimal, but it exists, at least potentially.

I turn now to related trade, that is trade which is not pure fund-raising but is carried on in direct pursuance of the organisation's objects. The range and variety of activities carried on by our sector are so great that I can choose no more than a few scattered examples. A children's home or an old people's home provides care for its inmates, and makes charges that are payable by a public authority or by the families of the residents. A charitable hospital or hospice may make charges for its services. A university or school provides education and charges fees. A workshop for blind people sells the products of their labour. A society for the dissemination of religious publications sells such publications. A dispensary for sick animals treats cats and dogs of the poor for very low fees; a sporting club charges for admission to its ground, or for the use of its facilities. I know that those who carry on these institutions may not think of themselves as traders; but traders they are.

Some of these bodies may receive, in addition to any contractual payments, grants in aid from the state or public authorities. They may also be relieved of certain taxes. We do not have to concern ourselves with relief of tax on their trading profits, for they make none. They may, however, enjoy relief of tax on investment income, gifts and bequests, or on the premises that they occupy. They provide their services for less than cost, and any grants or reliefs that they receive from the state assist them in doing so. Is competition distorted? Is there competition? Not in every instance, perhaps, but in most. They compete with similar bodies. They may also compete with commercial rivals. A university, for example, may be said to be competing with profit-making educational institutions. In Oxford, where I live, there are the university and its colleges, all in receipt of aids of one kind or another. There are also commercial institutions providing tuition for foreign students. They may be said to be competing with the university, and it with them.

Again, the dispensary for the sick animals of the poor is in competition with veterinary practitioners.

Is competition distorted? Of course it is. I am tempted to say that since one of the purposes of some of the bodies that I have mentioned is to trade at less than cost, it is one of their purposes to distort competition. It is to enable them to do so that donors and benefactors have over the centuries made gifts to them. The whole purpose of the dispensary for sick animals of the poor, for example, is to trade unfairly; normal, commercial vets' bills are too high for the people that it wants to help. The vets could in theory say that it was unfair; to do them justice, in practice, they do not complain. Some of them may even give some free assistance to the dispensary. Nevertheless, the distortion of competition occurs.

Does the distortion of competition affect trade between Member States? In many cases, no. The volume of activity is too small and it is limited to a particular locality. Even then, however, the Treaty may bite. Consider the dispensary for sick animals again. Suppose that it is in a town on the Franco-German border, for example. People may bring their animals across the river to be treated in France so that they do not have to pay German vets' bills, and vice versa. Or consider a sporting club on the border between two states, in one of which such clubs are relieved of some taxes and in the other not.

I doubt whether these possibilities will concern the Commission very much, but there will be much more serious examples. Some charities, we know, are seeking contracts to provide services in other Member States than their homelands. Or again, take universities and schools for an example. International trade in education is big business in both the profit-making and non-profit-making sectors. If, as we must concede, there is distortion of competition in education, then it affects trade between Member States, and the Treaty bites. The distortion is assisted by tax-reliefs, a form of State aid. Might the Commission decide that such aid is not compatible with the common market? Yes it might. And might it go on to direct the Member States to terminate it? It might. There are possibilities of very serious conflict here.

At this point, while revising my text last night, I rebelled. "Come, come," I told myself, "this is all absurd. Do not be so superficial. Look below the surface."

Obediently I looked below the surface. If the Commission took issue over this matter, they would be saying "it is wrong for States to help charities and the like to provide services at less than cost". If they said that, it follows that they would say "it is wrong for charities to provide services at less than cost"; but to provide services at less than cost is the purpose for which we exist. The Commission would be striking at the heart of the charitable sector. This they will not willingly do, for they are neither bad nor mad; but perhaps we have to help them to avoid it. Look again at the possibility of a further range of exemptions under the last paragraph of Article 92(3).

POSTSCRIPT

In my remarks recorded above I have not touched on the effect on competition between associations of the variations, both qualitative and quantitative, between one Member State and another in the range of grants, subventions, fiscal reliefs and other aids afforded to associations. These variations could be seen as leading to distortion,

and their nature and effect should be considered in any further treatment of the subject.