

SWITZERLAND

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I. Preliminary remarks

“State Aid” is a concept of European Community law. The legal definition of State aid is to be found exclusively within European Community law. Although it covers subsidies in a strict sense, the concept of State aid includes other forms of direct or indirect advantages given to undertakings.

Switzerland is not a member of the European Union. This should always be borne in mind when considering the application of State aid rules in Switzerland. The concept was introduced into the Swiss legal order through international commercial agreements between the EC and Switzerland. The Swiss legal order does not contain State aid provisions as understood under European law¹. Although Swiss law has provisions dealing with the concept of subsidies, this concept is both somewhat larger and, in certain respects, narrower than that of State aid in Community law.

In 1972 Switzerland concluded with the European Community a Free Trade Agreement (hereafter referred to as FTA)² governing the trading of certain goods. Article 23 of the FTA reads as follows:

The following are incompatible with the proper functioning of the agreement in so far as they may affect trade between the Community and Switzerland :

all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which

¹ P. ZURKINDEN/E. SCHOLTEN, “State Aids in Switzerland: The Air Transport Agreement between the EU and Switzerland”, *European State Aid Law Quarterly*, 2004/2, p.217.

² OJ 1972 L 300, p.189. See also Regulation (EEC) No 2841/72 of the Council of 19 December 1972 on the safeguard measures provided for in the Agreement between the European Economic Community and the Swiss Confederation, OJ 1972 L 300, p.284. See in general A. MAAG, *Das Verbot wettbewerbsverfälschender Beihilfen im EWG-Vertrag und im Freihandelsabkommen zwischen der Schweiz und der europäischen Wirtschaftsgemeinschaft*, Stämpfli 1979.

have as their object or effect the prevention, restriction or distortion of competition as regards the production of or trade in goods;

abuse by one or more undertakings of a dominant position in the territories of the contracting parties as a whole or in a substantial part thereof;

any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

Should a contracting party consider that a given practice is incompatible with this article, it may take appropriate measures under the conditions and in accordance with the procedures laid down in article 27.

According to the Swiss Federal Court, the Free Trade Agreement between the EC and Switzerland does not confer rights on individuals³. The agreement merely determines the practices that are incompatible with the agreements, but does not prohibit them⁴.

The “Cantonal Corporate Taxation” case is an example of the FTA limitations in the field of State aid. In December 2005, the European Commission expressed its concern about the cantonal tax relief granted to taxing management companies, mixed companies and holding companies, in existence since the first half of the twentieth century⁵. The Commission held that this preferential tax regime was incompatible with the FTA concluded with Switzerland. In its response of March 2006, Switzerland submitted that, first, the FTA governs exclusively the trading of certain goods, which precludes the

³ ATF 104 IV 175, *Adams*, point 2c). See also D. HOFMANN, *La liberté économique Suisse face au droit européen*, Stämpfli 2005, p.386.

⁴ According to the Federal Court, “Art. 23 FHA schafft sodann kein Verhaltensrecht für Private (Amtsbericht EJPD, act. 415a); er stellt lediglich fest, welche Praktiken mit dem guten Funktionieren des Freihandelsabkommens unvereinbar seien, verbietet diese aber nicht, bezeichnet sie auch nicht als rechtswidrig und erklärt sie im Gegensatz zu Art. 85 und 86 des EG-Vertrages weder als nichtig noch sieht er Sanktionen vor; er ermächtigt die Vertragsparteien lediglich, gemäss den in Art. 27 FHA festgelegten Voraussetzungen und Verfahren geeignete Massnahmen zu treffen.” (Ibid).

⁵ See FEDERAL TAX ADMINISTRATION/INTEGRATION OFFICE, “Disposition cantonales sur l'imposition des entreprises”, December 2005, available at http://www.europa.admin.ch/europapol/off/fha/medien/f/fd_kantonale_steuergesetze.pdf. For a recent action of the European Commission in similar cases towards Luxembourg and Malta, see IP/06/132 of 8 February 2006, “Commission opens formal investigation into Luxembourg's 1929 tax-exempt holdings”; IP/06/363 of 23 March 2006, “Commission requests phasing out of distortive tax regimes in Malta”, and the measures taken by Malta: IP/06/608 of 12 May 2006, “Commission welcomes phasing out of preferential tax regimes for offshore trading companies in Malta.”

application of FTA to services. Second, the provisions on public aid do not lay down detailed criteria for determining the compatibility of public aid with the proper functioning of the FTA. Third, that the provisions of the FTA could not be interpreted in the sense of the recent EC law in the field of State aid⁶.

In addition, Switzerland holds that cantonal tax regulations do not constitute State Aid within the meaning of the FTA. Indeed, cantonal tax reliefs take into account the fact that the public infrastructures are not used by these undertakings. Moreover, Switzerland considers these regulations as general measures which therefore do not fulfil the selectivity condition. In the joint response of the Federal Tax Administration and the Swiss Integration Office, the existing difference in the taxation level within the EU is also highlighted.

In June 1999, Switzerland concluded several sectoral agreements with the European Community⁷, understood as “classical” international law agreements⁸. Two of them are of interest for this report, namely the agreement on rail transport and the agreement on air transport. The first aims the gradual liberalisation of the market concerning contracted parties; the second aims the harmonisation of the legislation on the field of air transport, with the application of the Community law being extended gradually to Switzerland⁹.

Article 38 (6) of the Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road¹⁰ states a general prohibition of State Aids to transport undertakings:

The Contracting Parties shall not grant to firms, including transport undertakings, any direct or indirect State aid designed to make it easier for those firms to bear the burden of the transport charges levied under the charging systems provided for in this Agreement.

Although the provision states a general prohibition, the rule is not clear, precise, or unconditional enough to be invoked by the parties.

⁶ See FEDERAL TAX ADMINISTRATION/INTEGRATION OFFICE, “Cantonal Corporate Taxation and the Switzerland-EC Free Trade Agreement of 1972”, March 2006, available at http://www.eda.admin.ch/brussels_miss/f/home/press.ContentPar.0349.UpFile.tmp/xy_yymmdd_0123456789_1.pdf.

⁷ The agreements are available on the Internet site of the Integration Office DFA/DEA (Suisse Confederation), <http://www.europa.admin.ch/ba/e/index.htm>.

⁸ See A. EPINEY, “Zu den 'bilateralen' Verträgen der EG bzw. ihren Mitgliedstaaten und der Schweiz - einige Gedanken zur Einbindung der Schweiz in den *acquis communautaire*“, *European Community Private Law Review*, 1/2006, p.2.

⁹ C. KADDOUS, “Les accords sectoriels dans le système des relations extérieures de l'Union européenne”, in: *Accords bilatéraux Suisse - UE (Commentaires)*, Felder/Kaddous (ed.) *Dossiers de droit européen*, Helbing & Lichtenhahn/Bruylant 2001, pp.77-118, 81ff.

¹⁰ OJ 2002 L 114, p.91.

The most explicit reference to State aid rules was made in the agreement between the European Community and the Swiss Confederation on Air Transport (hereafter referred to as ATA)¹¹. Article 13 of the ATA gives a clear definition of State Aid based on European law and declares them incompatible with the Agreement insofar as it affects trade between Contracting Parties. Interestingly, the disposition inspires itself from Article 87 CE:

1. Save as otherwise provided in this Agreement, any aid granted by Switzerland or by an EC Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Contracting Parties, be incompatible with this Agreement.

2. The following shall be compatible with this Agreement:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences.

3. The following may be considered to be compatible with this Agreement:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Contracting Party;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

The text of this provision is clear, precise, and unconditional; nevertheless, the reference to the “compatibility” of State Aids with the agreement suggests

¹¹ OJ 2002 L 114, p.73. On competition law provisions, see S. HIRSBRUNNER, „Die kartellrechtlichen Bestimmungen des Abkommens über den Luftverkehr“, in: *Accords bilatéraux Suisse - UE (Commentaires)*, Felder/Kaddous (ed.) Dossiers de droit européen, Helbing & Lichtenhahn/Bruylant 2001, pp.463-477.

that it is not directly applicable¹². A Joint Committee composed of the representatives of the contracting parties is responsible for its implementation¹³. It acts by mutual agreement¹⁴. Under Article 14, upon the request of one Contracting Party, the Joint Committee shall discuss any appropriate measures required by the purpose and functioning of this agreement. If a measure is found to be incompatible with the functioning of the agreement, the parties are entitled to adopt temporary safeguard measures under Article 31 of the ATA.

The public aid granted to Swissair by the federal and cantonal governments¹⁵ constitutes the first case of aid in the air transport sector after the signature of the ATA. However, the decision pertaining to the granting of the aid was taken before the coming into force of the ATA (1st June 2002). In this respect, the jurisprudence questioned the application of the Vienna Convention¹⁶. The European Commission considered that the application of the EC-Switzerland agreement must be brought forward¹⁷, which was not accepted by Switzerland. As a consequence, the aid granted to Swissair was not examined under the ATA rules¹⁸.

The Swiss Competition Commission is charged with the control of aids granted to air transport undertakings. One example of that task was the examination of the compatibility with the ATA of the airport tax rules put by the Geneva Airport on low cost carriers¹⁹. The Swiss Competition Commission held that the reduced airport tax did not constitute a selective measure reserved for the so-called low cost carriers; all carriers could use that terminal, but the services offered were also limited. It followed that the tax reduction did correspond to the services offered to the new terminal and therefore did not

¹² See ATF 104 IV 175, *Adams*, point 2c), note 4. Due to the precise nature of the provision, a change in the case law of the Federal Court is not excluded. See also F. FILLIEZ, "Application des accords sectoriels par les juridictions suisses: quelques repères", in: *Accords bilatéraux Suisse - UE (Commentaires)*, Felder/Kaddous (ed.) *Dossiers de droit européen*, Helbing & Lichtenhahn/Bruylant 2001, pp.184-208, p.196, which reads the provision as capable of being directly invoked by particulars.

¹³ Article 5 ATA. See also D. HOFMANN, note 3, p. 417.

¹⁴ See also FF 1999 5440, 5469.

¹⁵ The aid amounted to 600 million Swiss francs to the future recapitalisation of Crossair (the new company), in addition to the 400 million Swiss francs of cantonal aids.

¹⁶ D. HOFMANN, note 3, p.425.

¹⁷ IP/01/1477 of 23 October 2001. Indeed, the EC had bought forward the agreement on rail transport on the request of Switzerland, and expected a similar move from Switzerland.

¹⁸ See for a general appreciation D. HOFMANN, note 3, pp.429ff; P. ZURKINDEN/E. SCHOLTEN, note 1.

¹⁹ Opinion of the Swiss Competition Commission of 27 September 2004 declaring the measures on the reuse of the old terminal of the International Geneva Airport compatible with the ATA, DPC 2004/4, p.1300.

constitute an advantage within the meaning of Article 13 of the ATA. Consequently, the measure was found to be compatible with the functioning of the ATA.

II. Basic principles of Swiss law on subsidies

In Switzerland, the principle of legality governs state actions, including welfare state benefits²⁰. Nevertheless, a subsidy may be granted without a formal legal basis (parliamentary law). The Swiss law on subsidies (hereafter referred to as the Subsidies Act)²¹ does not provide a formal legal basis for the granting of a financial aid or payment²².

The Subsidies Act provides general conditions for the granting of federal subsidies²³. First, there should be clear justification for the financial aids or indemnities. Second, the aim should be reached in an economic and efficient manner. Third, the granting should respect the principles of uniformity and equity. Fourth, the financial aids or indemnities must respect the financial policy imperatives. Finally, they must respect the distribution of competencies between Cantons and the Suisse Confederation.

These conditions do not correspond with those for State Aid under Community law. Since the Subsidies Act does not aim for the maintenance of effective competition, there is no reference to the distortion of competition.

The Subsidies Act provides general principles for the drafting of legal acts granting a financial aid or support to individuals or undertakings. The addressees of these rules are the Federal administration and the Federal council: not individuals²⁴. Concerning financial aid, the normative acts may provide for such aid if it is necessary to fulfil a task in the interest of the Swiss confederation and if any possibility of the self-financing by the beneficiary has already been exhausted²⁵. The principles of the minimum costs, of the contribution of the beneficiary and of the respect of the financial policy imperatives, are also provided²⁶.

The Subsidies Act imposes a periodical ex post review for normative acts

²⁰ See ATF 103 Ia 369 ss; ATF 121 I 24 point 2; ATF 128 I 113 point 3c.

²¹ Federal Act on Financial Aid and Indemnities of 5 October 1990 (Subsidies Act), Systematic Compilation of Federal Law (SR) 616.1.

²² See the discussion provided for in the federal message accompanying the Subsidies Act, *Message à l'appui d'un projet de loi sur les aides financières et les indemnités*, FF 1986 I 369, 410.

²³ See Article 1 of the Subsidies Act.

²⁴ Art. 4 Subsidies Act.

²⁵ Art. 6 Subsidies Act.

²⁶ Art. 7 Subsidies Act. Namely, the imposition of maximum rates of the total aid.

that provide financial aid or compensation. The Federal Council reports to the Parliament and proposes, if necessary, the modification or abrogation of any act not satisfying these general principles provided for by the Subsidies Act²⁷.

From 1997 onwards the Federal Council has issued a report on federal subsidies²⁸. The report aims at increasing transparency in the field of subsidies. This transparency is seen as being important to evaluate the need for aid, which in turn will help eliminate unnecessary aid and grant more specific and effective aid to neglected sectors²⁹. Nevertheless, this report is not written with the objective of reducing the amount of aid, nor does it replace this kind of programme.

The Subsidies Act provides for a general duty to inform. The beneficiary is under the obligation to provide all necessary information, at any time³⁰.

III. Mechanism to ensure compliance with the notification obligation

In Switzerland, there is no *ex ante* control of aids. The agreements on air and rail transport have not foreseen any provision similar to Article 88 EC. The federal and cantonal authorities do not have an obligation to notify the plans to grant or alter new aids. Also, there is no prohibition to put the aid into effect³¹.

In 1999, a group of members of the parliament tabled a parliamentary request proposing a draft law on an obligation to notify State Aids³². The Commission for economic matters did not support the text. The draft law referred to “public aid”, proposing a similar definition with the European law definition of State Aid³³. Although this parliamentary request was motivated by the need to control

²⁷ Art. 5 Subsidies Act.

²⁸ See the information on the Internet site of the Federal Administration of Finance, <http://www.efv.admin.ch/f/finanzen/subven/index1.php>.

²⁹ See Press Release, “Rapport du Conseil fédéral sur l'examen des subventions fédérales” (Rapport sur les subventions), available at <http://www.admin.ch/cp/f/33B3C79D.2EF6@gs-efd.admin.ch.html>.

³⁰ Before the decision granting and after the execution of the aid. See Article. 11 of the Subsidies Act.

³¹ Art. 88 (3) EC ; Art. 3 of the Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 1999 L 83, p.1.

³² Parliamentary request 99.446, Leutenegger Oberholzer, “Aides publiques versées aux entreprises. Déclaration obligatoire” ; AB/BO 2000 N 1133.

³³ For example, the draft considered as State Aid “ [...] les aides de toute sorte qui sont versées par les collectivités publiques ou qui proviennent des collectivités publiques et qui, parce qu'elles favorisent les entreprises, publiques ou privées, ou encore certains secteurs particuliers de la production, modifient les conditions dans lesquelles s'exerce la concurrence. Sont notamment des aides publiques les allègements fiscaux.”

tax competition between cantons, it also showed a growing internal interest for State aid control aimed at protecting an undistorted competitive market. Interestingly, the report accompanying the parliamentary request referred to the European rules on State aid.

There is no national authority in charge of controlling State aids. The control of aids in the air transport sector constitutes an exception. Under Article 14 of the ATA, the European Commission and the Swiss authorities “shall keep under constant review [...] all systems of aid existing respectively in the EC Member States and in Switzerland.” In Switzerland, the Competition Commission examines the compatibility of new aids granted to air transport undertakings with the ATA agreement³⁴. The control covers the draft measures taken by the Federal Council, Cantons and local governments, as well as other public bodies. Nevertheless, the Competition Commission makes no decisions, but gives an opinion of compatibility³⁵.

IV. Mechanism to ensure the compatibility of aid and the application of the Block exemptions

In Switzerland, there are no State Aid rules within the meaning of Article 87 EC that confer rights in undertakings or which aim at protecting third parties (competitors). Therefore, there are no corresponding administrative procedures³⁶. Also, the sectoral agreements concluded in 1999 do not contain any reference to block exemption regulations.

V. Recovery of aid

The Subsidies Act provides rules for the recovery of aids granted or implemented in breach of the laws awarding these aids. On the one hand, the authority awarding the aid is empowered to request the full or partial recovery of the amount of aid when the beneficiary has not implemented it in accordance to the general interest³⁷. The situation is similar to measures taken for the recovery of misused aid in European Community law.

On the other hand, the authority may revoke the decision that has granted the aid when the latter has been awarded in violation of the law or when it has been granted on the basis of incomplete or inexact information³⁸. The revocation of

³⁴ Art. 103 Aviation Act (RS 748.0). For further details, see D. HOFMANN, note 3, p.419; P. ZURKINDEN/E. SCHOLTEN, note 1, p.219.

³⁵ Art. 103 (3) Aviation Act.

³⁶ P. ZURKINDEN/E. SCHOLTEN, note 1, pp.219ff.

³⁷ Art. 28 Subsidies Act.

³⁸ Art. 30 Subsidies Act.

that decision empowers the authority to request that the aid be refunded³⁹. It is submitted that this provision may also be used for federal aid granted in violation with international agreements signed by Switzerland⁴⁰. The beneficiaries of federal aid may challenge the revocation of aid the requirement to refund it before the courts⁴¹.

³⁹ Art. 30 (3) Subsidies Act.

⁴⁰ Nevertheless, under Article 30 (2) of the Subsidies Act, the authority does not revoke the aid when the appraisal of incompatibility of aid is very difficult for the beneficiary.

⁴¹ Article 35 Subsidies Act.