

Given that *Durham* was not appealed, can you confidently rely on the CAT's reasoning over the conferral of an economic advantage?

George Peretz KC (England & Wales) BL (Ireland)

Monckton Chambers

June 2024

Durham case

- *Durham Company v Durham CC* [2023] CAT 50
- Complaint about operation of in-house LA commercial waste collection service (“CWCS”)
 - The Council charged customers fees (subject to statutory “reasonableness” constraint)
 - The Company claimed that “real” costs of the CWCS, including costs of use of Council’s infrastructure, not covered by charges
 - The CWCS was carried out by the Council itself, not by a legally distinct entity

Timeline

- 2020 - Council reviews and decides basis on which future charges would be set
- 4/1/2023 – SCA22 enters into force
- 31/3/23 – Durham CC sets its 23/24 commercial charges

The “internal subsidy” issue

- EU law:

128 It must once again be recalled that, in the context of competition law, the concept of ‘undertaking’ covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. In this regard, it must be stated that, save for the reservation in Article 86(2), Article 87 EC covers all private and public undertakings and all their production.

129 It must also be pointed out that the existence or otherwise of legal personality distinct from that of the State, conferred by national law, does not prevent the existence of financial relations between the State and its organs carrying on economic activities and consequently, the possibility that those organs might receive State aid within the meaning of Article 87(1) EC.

130 Thus, just as it cannot be accepted that the rules on State aid can be circumvented merely through the creation of autonomous institutions charged with allocating aid, it cannot be tolerated that the mere fact of creating an SPV could exempt the latter from those rules. It must be considered whether that body carries on an economic activity and may therefore be classified as an undertaking and whether it obtained a transfer of State resources.

(Case T-443/08 *Freistaat Sachsen v Commission* ECLI:EU:T:2011:117)

SCA22 provision

2(1) In this Act, “subsidy” means financial assistance which—

(a) is given, directly or indirectly, from public resources by a public authority,

(b) confers an economic advantage on one or more enterprises,

...

CAT analysis

- “Given” suggests that something moves between distinct persons
- “from public resources” suggests that public resources are diminished
- No discussion of EU case-law

Implications?

- CAT leaves open question of transfer from public body to a company that it wholly owns (usual LA trading model)
- But
 - The “give” argument would not apply in that case
 - The “diminish public resources” might apply in that case (would it depend on whether LA had a right to call the money back?)
 - Better argument is that it would be a subsidy: need for “effective regime” (construction of the TCA): huge gap if it was not.

Implications? (2)

- Also NB that arguably *obiter* given other reasons (as CAT noted in refusing permission)
 - CAT thought CWCS probably not an “enterprise”
 - Charge regulation meant that Council could not overcharge > costs - so cross-subsidy could not lead to higher profits and so not an advantage

The scheme argument

- The Council:
 - “our 2020 decision was a subsidy scheme”
 - “March 2023 decision made under that scheme”
 - “so an (excluded) ‘legacy subsidy’ (s.48(1)(a))”
- The CAT:
 - 2020 decision not a “subsidy scheme”
 - Not “binding” on the Council

CAT was wrong on “scheme”

- CAT’s view did not mention EU law
- But very similar to EU concept of “scheme”:
no need for implementing measures => no discretion as to whether subsidy should be granted if in the scope of the scheme
- BUT SCA23 concept of “scheme” is very different and includes “block exemptions”

Practical position

- Dangerous to rely on s.48(1)(a) if scheme leaves discretion
- Especially for very vague/open ended “schemes”
- But in case of a precise scheme setting out clear classes of entitlement, good argument CAT is wrong

Thank You

George Peretz KC BL
gperetz@monckton.com

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