

RECENT DEVELOPMENTS IN STATE AID LAW CONCERNING FREE TRADE ZONES

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Abstract: This article examines a recent ruling alongside EU legislative advancements concerning the application of EU State aid regulations to free trade zones. The correct application of state aid rules to free trade zones is crucial for several reasons, encompassing legal, economic, and political dimensions. State aid rules help to maintain a level playing field for all market participants. By ensuring that state aid is applied correctly in free trade zones, unfair advantages or disadvantages are minimized, promoting fair competition among businesses. The correct applicability of state aid rules aligns with international trade agreements and standards. It ensures that a region or country is in compliance with broader economic and trade practices which could affect international relations and trade partnerships. Further, State aid rules aim to prevent market distortions that could arise from improper subsidies or aid. By applying these rules correctly in free trade zones, economic efficiency can be better achieved, and resources can be allocated more optimally. Lastly, predictability and legal certainty are essential for investor confidence. When state aid rules are correctly applied, investors have a clearer understanding of the legal and economic environment, which may lead to increased investment and economic growth.

One of the most recent case-law of the European Court of Justice ("ECJ") is the ruling of September 21, 2022, in the case T-95/21 concerning the Madeira Free Zone State aid scheme. The ECJ affirmed that the European Commission's (hereinafter: Commission) conclusion, which stated that the implementation of the Madeira Free Zone State aid scheme (Regime III) did not adhere to the approved conditions, was accurate. The scheme was not implemented according to State aid law, and therefore it must be recovered. The primary objective of the scheme was to enhance the economic development of Madeira through tax incentives. Consequently, the General Court dismissed Portugal's appeal against the Commission's decision (KPMG et al., 2022).

The authority however, which was involved in granting the State aid, was not only Portugal but also Região Autónoma da Madeira (Autonomous Region of Madeira, Portugal, hereinafter "RAM") and therefore, it decided to appeal the Commission's decision, as individual applicant. Same as Portugal, RAM which seeks annulment of Articles 1 and 4 to 6 of Commission Decision (EU) 2022/1414 of 4 December 2020 on the aid scheme SA.21259 (2018/C) (ex 2018/NN) implemented by Portugal in favour of the free zone of Madeira (Zona Franca da Madeira - ZFM) - Scheme III (OJ 2022, L 217, p. 49).

Therefore, on June 12, 2023, the General Court was required to render a judgment on the same subject matter as its decision on September 21, 2022 (Case T-131/21 Região Autónoma da Madeira v Commission, 2023). The only distinction is that the current applicant is different from the previous case.

Keywords: State Aid; Free Trade Zones; EU law; Madeira Free Trade Zone Scheme; European Court of Justice

Field: Social science.

1. I.A BRIEF HISTORY OF THE CASE OF SEPTEMBER 2022 (T-95/21)

The General Court of the European Union rendered its decision on September 21, 2022, in case T-95/21 concerning the Madeira Free Zone State aid scheme. In this case, the Court affirmed the Commission's finding that the implementation of the Madeira Free Zone State aid scheme (Regime III), which aimed to enhance the economic development of the outermost region of Madeira through tax incentives, deviated from the approved conditions. From the many raised points which were found by the Commission as incompatible with the internal market, the main issue was that the Madeira Free Zone Scheme was supposed to enhance more employments in the free zone. The creation or maintenance of jobs in the region concerned was one of the main conditions of the scheme, which led to its initial approval by the Commission. However, in the Commission's and court's proceedings turned out that this condition was not fulfilled, i.e., the scheme was found incompatible with the internal market. The Madeira Free Zone State aid scheme, which aimed to provide corporate income tax reductions and other tax benefits to companies operating in the region, received initial approval from the Commission in 1987 as compatible regional aid. Over time, the scheme underwent several amendments and received successive approvals from the European Commission. The final version of the scheme, known as Regime III, was approved by the Commission through two decisions covering the period from January 1, 2007, to December 31, 2014. The approvals were tied explicitly on the condition that jobs are maintained and created in the region of Autonomous Region of Madeira (RAM) and the activities of the registered companies are being carried

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out in the RAM.

On July 6, 2019, an in-depth investigation was initiated by the Commission. On December 4, 2020, the Commission concluded that the implementation of the Madeira Free Zone State aid scheme (Regime III) did not fulfill the below mentioned approved conditions (European Commission, Press Release of 4 December 2020, State aid: Commission concludes that the Madeira Free Zone (“Zona Franca da Madeira”) scheme not implemented in line with approved conditions). Specifically, the Commission argued that tax benefits were being granted based on income derived from sources outside the RAM (and they were supposed to derive only from the RAM) and to companies that did not create or maintain jobs in this region. Consequently, the Commission determined that the disputed aid scheme violated EU State aid regulations (hereinafter: the Decision). Therefore, Portugal was instructed by the Commission to recover aid provided to companies that did not meet the approved conditions. Following to the Commission’s decision, Portugal appealed, but the General Court dismissed the appeal, supporting the Commission’s decision (Stromsky, B., 2023).

This case, however, did not end here. The RAM as governmental authority which was also involved in approving the State aid scheme, appealed the Commission’s decision with the General Court. The appeal was dismissed by the General Court in this case as well.

2. THE MAIN FINDINGS OF THE CASE

The ruling of the General Court maintained its findings with the same arguments as in its previous ruling of September 21. The difference, however, is that in this case a different applicant appealed, and therefore in the following the main findings of this State aid case on the “admissibility” for lodging an appeal with the General Court will be elaborated. According to Risueño (2023), “the Madeira Free Trade Zone case highlights complexities in the classification of state aid”.

3. “ADMISSIBILITY” ACCORDING TO 263 (4) TFEU IN STATE AID LAW

The main questions of this court’s decision is whether RAM can be admitted as “applicant” according to 263 (4) TFEU, despite the fact that Portugal had already appealed against the Commission’s decision. In order to assess the case, it is necessary for the court to examine first, whether RAM can be deemed as “applicant”.

In the Case T-131/21, *Região Autónoma da Madeira v Commission* (2023) the General Court held that:

“In this respect, the Commission submits that, according to the case-law, an infra-State entity is considered to be individually concerned by a decision addressed to a Member State only when two cumulative conditions are met, namely when that body is the author of the act or acts referred to by that decision and when the decision prevents it from exercising its own powers as it sees fit, so that its interest in challenging that decision is thus distinct from that of the Member State concerned” (Case T-131/21 *Região Autónoma da Madeira v Commission*, 2023, para 17).

Further, the Commission stated in this respect that Portugal was the addressee of the decision and not the applicant.

In addressing the complexities of regional aid, the General Court noted further:

“In the present case, the two acts which serve as the legal basis for the ZFM regime, namely Decreto-Lei no 500/1980 que autoriza a criação de uma zona franca na Região Autónoma da Madeira (Decree-Law no 500/1980 authorizing the creation of the ZFM), of October 20, 1980 (Diário da República I, series I, no 243, of October 20, 1980, p. 3493), and Decreto-Lei no 215/1989 aprovar o Estatuto dos Benefícios Fiscais (Decree-Law no 215/89 approving the status of tax benefits), of July 1, 1989 (Diário da República I, Series I, no 149, of July 1, 1989, p. 2578), were adopted by the central authorities of the Portuguese Republic and not by the applicant. Moreover, the authority responsible for granting the aid was the Portuguese Ministry of Finance and Public Administration”. (Case T-131/21 *Região Autónoma da Madeira v Commission*, 2023, para 18).

“Under the fourth paragraph of Article 263 TFEU, any natural or legal person may, in accordance with the conditions laid down in the first and second paragraphs, bring an action against an act addressed to that person or which is of direct and individual concern to that person, or against a regulatory act which is of direct concern to that person and does not entail implementing measures”. (Case T-131/21 *Região Autónoma da Madeira v Commission*, 2023, para 21).

“In this respect, according to the case-law, an infra-State entity is directly and individually concerned

by an act of the European Union when the latter prevents it from exercising its own powers as it sees fit (see judgments of 10 June 2009, *Poland v Commission*, T-257/04, EU:T:2009:182, paragraph 56 and case-law cited, and of 2 October 2009, *Cyprus v Commission*, T-300/05 and T-316/05, not published, EU:T:2009:380, paragraph 249 and case-law cited)” (Case T-131/21 *Região Autónoma da Madeira v Commission*, 2023, para 24).

The issue in this case is, however, that despite Portugal being the addressee of the Commission's decision, the aid was granted by RAM from its own resources, namely, from the income tax applicable to legal entities on profits resulting from activities carried out in Madeira (*Região Autónoma da Madeira v Commission*, 2023, para 25). Further, RAM was also responsible for monitoring of the scheme and its correct implementation.

The Court decided that RAM shall be regarded as directly and individually concerned according to the second clause of the fourth paragraph of Article 263 TFEU (Case T-131/21 *Região Autónoma da Madeira v Commission*, 2023, para 28). It does not matter that RAM was not the author of the State aid scheme.

Notably is in this case also the fact, that despite being Portugal the addressee of the decision, it was stated in the decision that RAM should recover the incompatible State aid with the internal market, i.e., the unlawful aid.

The (disputable) recovery of the aid was an additional argument for RAM to raise a complaint with the General Court. The main reason for lodging the complaint with RAM was that RAM was claiming that it was impossible to recover the aid, because the decision of the Commission did not state the exact amount of the aid which should be recovered. The General Court, however, clarified that, even though the RAM was not an addressee of the contested decision, according to the decision of the Commission is responsible for recovering the aid which it granted in the context of the State aid scheme (Case T-131/21 *Região Autónoma da Madeira v Commission*, 2023, para 169). Against this background, The General Court found the raise of the plea concerning the impossibility of recovering the incompatible aid as admissible (*Regional Operating Aid*, 2023, N. Phenaides).

Unlike the common cases where the General Court rules on the admissibility when the complaint of an applicant challenges the legality of a State aid scheme, the complaint is rather contesting the unlawful implementation of the State aid scheme, because the Commission stated in its decision that the State aid scheme was not legally implemented, i.e., not consistent with the Commission's decision of 2007 and 2013. According to the Commission's decision RAM was responsible for monitoring and implementing the State aid scheme.

Based on the aforementioned grounds, the admissibility of RAM's claim was upheld by the General Court, disregarding the need to evaluate whether the conditions outlined in the third aspect of the fourth paragraph of Article 263 TFEU were met.

4. RESULTS

This case is basically in line with the two leading cases where the ECJ ruled on “admissibility” for challenging the (decision) on recovery of an unlawful State aid:

1. Case C-199/06, *CELF and Ministre de la Culture et de la Communication v. SIDE* (2008)

In this case, the ECJ clarified the conditions for the admissibility of an action brought by an individual against a Member State's decision to recover unlawful State aid. The ECJ held that an individual may challenge the recovery decision if they can demonstrate a direct and individual concern resulting from the aid. The ECJ emphasized that the right to effective judicial protection requires that individuals have the opportunity to challenge the legality of recovery decisions.

2. Case C-279/08p, *Commission v. Netherlands* (2011)

This case dealt with the admissibility of actions brought by third parties affected by the recovery of unlawful State aid. The ECJ confirmed that third parties who are directly and individually concerned by the recovery decision have standing to challenge the decision. The ECJ clarified that individuals can demonstrate direct concern if they have a legal or economic interest that may be affected by the recovery of aid (*Mastroianni & Pezza*, 2015).

These cases have contributed to establishing the principles regarding the admissibility of claims related to the recovery of unlawful State aid. They emphasize the importance of ensuring effective judicial protection for individuals and third parties affected by such decisions.

The Madeira case is one of the cases where the ECJ followed the same line ruling on the admissibility on a complaint against the recovery of an unlawful State aid which was granted to a Free Trade Zone.

In addition, the legal intricacies of the Madeira Free Trade Zone case show the challenges of applying the concept of “existing aid” within the framework of EU regulations. The Court’s interpretation has significant implications for the administrative practices of Member States in monitoring and reporting aid measures (Risueño, 2023).

REFERENCES

- Court of Justice of the European Union. (2008). Judgement Case C-199/06, CELF and Ministre de la Culture et de la Communication v. SIDE, ECLI:EU:C:2008:79.
- Court of Justice of the European Union. (2011). Judgment Case C-279/08p, Commission v. Netherlands, ECLI:EU:C:2011:551.
- Enache, R., & Puscas, A. (2022, September). General Court decision on Madeira Free Zone scheme. KPMG Newsletter. <https://kpmg.com/xx/en/home/insights/2022/09/etf-485-general-court-decision-on-madeira-free-zone-scheme.html>
- European Commission. (2020, December 4). State aid: Commission concludes that the Madeira Free Zone (“Zona Franca da Madeira”) scheme not implemented in line with approved conditions. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2314
- European Commission. (2022). Commission Decision (EU) 2022/1414 of 4 December 2020 on the aid scheme SA.21259 (2018/C) (ex 2018/NN).
- General Court of the European Union. (2023). Judgment - 21/06/2023 - Região Autónoma da Madeira v Commission, Case T-131/21, ECLI:EU:T:2023:348.
- Mastroianni, R., & Pezza, A. (2015). Striking the right balance: Limits on the right to bring an action under Article 263(4) of the Treaty on the Functioning of the European Union. *American University International Law Review*, 30(4).
- Pheanades, N. (2023, July 10). Regional operating aid. *State Aid Uncovered*. <https://www.lexxion.eu/en/stateaidpost/regional-operating-aid/>
- Risueño, J. (2023). Madeira Free Trade Zone: New or Existing Aid? Annotation on the Judgment of the General Court (Fifth Chamber) of 21 June 2023, in Case T-131/21 Região Autónoma da Madeira v European Commission. *European State Aid Law Quarterly*, 22(3), 337-342.
- Stromsky, B. (2023). Existing aid: The General Court of the European Union has ruled that an aid scheme which does not comply with the conditions of compatibility laid down in the Commission decision authorising it constitutes unlawful aid (Madère). *Concurrences*, (3), Art. No. 113798, 145.