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WINE PROMOTION AND THE STATE - A LEGAL PERSPECTIVE FROM EUROPE

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ABSTRACT

This paper examines the legal consequences to the wine sector of State intervention in promotion and advertising activities, drawing on the specific case of the European Union (EU). Promotion and advertising activities are essential to guarantee success in the wine business. In most wine-producing countries, the State plays an active role in promotion and advertising, the intensity of which may vary from the setting up of a legal framework enabling trade organizations and bodies to carry out promotion activities, to the organisation of promotion campaigns directly by state bodies. Under EU law, whenever a promotional operation is financed by an EU Member State or indirectly through “State resources”, State aid rules may apply. The paper discusses the main challenges of the application of EU State aid rules to promotional and advertising activities in the wine sector, which may result in several limitations regarding, for instance, its beneficiaries, the contents of the campaigns or the amounts which may be employed.

RESUMÉ

La présente communication analyse les conséquences juridiques, pour le secteur du vin, de l'intervention de l'Etat sur les activités de promotion et publicité, en ce qui concerne spécifiquement le cas de l'Union Européenne (UE). Les activités de promotion et de publicité sont essentielles pour garantir le succès dans le secteur du vin. Dans plusieurs pays producteurs, l'État joue un rôle en ce qui concerne la promotion et publicité des vins, dont l'intensité peut varier considérablement, dès la création d'un système juridique qui permet aux organismes professionnels de réaliser des actions de promotion, à l'organisation d'actions de promotion par les propres institutions publiques. Il ressort du droit de l'UE que quand une opération de promotion ou de publicité est financée par un État membre ou indirectement au moyen de ressources d'État, les règles relatives aux aides d'État sont applicables. La communication examine les principaux défis posés par l'application aux actions de promotion et de publicité des règles européennes relatives aux aides d'État, ce qui peut entraîner plusieurs limitations, en ce qui concerne, par exemple, les bénéficiaires, le contenu des campagnes ou les montants qui peuvent être accordés.

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1. Introduction

Promotion and advertising activities are essential to guarantee success in the wine business, a sector which has been increasingly characterized by a fierce competition on a global basis, especially as traditional wine producers (mostly in western Europe) are ever more confronted by competition from “New World” countries. The fragmented nature of the wine industry, and the fact that in most producing countries the wine sector is perceived as an essential part of the economy, mean that many governments and public bodies play an active role in promoting wine.

In the European Union (EU), when “State resources” from national governments are involved, the EU rules on State aid control will probably apply. State aid enforcement by the European Commission often creates a number of challenges for Member States, trade bodies and wine companies alike, in terms of form, substance and procedure. We endeavour to present in this paper the main aspects of EU State aid law as applied to wine promotion and advertising, and discuss briefly how the implications of these rules can be overcome by public authorities and businesses of the wine sector.

For this purpose we start by recalling in Section 2 the reasons behind the importance of promotion activities in the wine sector and by describing in Section 3 the role played by governments and public bodies in marketing and advertising in and outside Europe. Section 4 analyses the applicable EU State aid law as construed by the European courts, focussing first on the several limbs of the concept of “State aid”, and second on the requirements set by the European Commission in its regulations and guidelines to consider that State aid wine promotion measures are compatible with EU law. Section 5 concludes.

2. The promotion of wine

There are few consumer products which may be as differentiated as wine. Indeed, an average consumer going to a supermarket or a specialty shop to purchase a bottle of wine may find himself hesitating, given the wide array of choice available: multiple countries, regions and grape varieties (all with its underlying characteristics and specificities) brands, labels or package forms... Fierce competition for his preference evidences the need for, *inter alia*, an adequate promotion strategy.

Two general trends can be identified in the present-day wine industry, which highlight the importance of promotion of wine for producing companies (and countries):

First, demand for wine has changed considerably. For much of the last three decades, the world’s wine consumption has steadily decreased (10% between 1983 and 2003) although with significant disparities between countries. For instance, consumption in northern European countries is increasing, as it is in the United States². Consumption patterns, especially in traditional wine-drinking countries, have evolved from an “every-meal” basis to somewhat of a “special moment” or “social” basis. As frequency of consumption is decreasing, consumers are

² See *The Economy of the Wine Sector* (2006), p. 45. Since 2004, world consumption increased modestly and forecasts likely to remain so (*The Business of Wine* (2008), p. 187). See also the Wine Institute World Wine Consumption by Volume 2010, available at www.wineinstitute.org/resources/worldstatistics/article127.

more demanding as regards quality, and therefore premium or “quality wine” consumption has increased, conversely to “table wine” consumption³.

These trends can also be explained in part by increased consumer sophistication⁴, meaning that understanding and shaping consumer preferences and behaviour is increasingly important for a wine business to remain competitive.

Second, although for centuries wine has very much been a European product, this situation has changed dramatically. Despite existing obstacles to trade (such as import tariffs, alcohol taxation, distribution, sales⁵ and advertising restrictions⁶), in the last decades there has been a profound change in the relationship between wine producing nations, and competition in the wine industry today is truly global.

The European Union is still the world’s leading wine exporter, and it is also the world’s leading importer. In fact, imports from Australia, Chile, South Africa and the United States – the so-called “New World” producers – into the EU have increased exponentially, almost tenfold, in the space of only ten years, going from 0.85 million hl in 1993 to 8 million hl in 2003, and 9.5 million hl by 2004⁷. This means that not only the emphasis is moving away from consumption in the traditional wine-producing countries, but there is also increasing penetration of coveted importing markets (such as the UK market) by efficient New World producers⁸. These producers were amongst the first recognising the need to evolve from traditional supply-driven production to market-oriented business models, and have enjoyed, and are still enjoying, a significant growth.

The recent changes experienced by the wine sector have increased the importance of promotion activities for companies to maintain and increase sales in their own market and expand to new export markets. In particular, as consumers move towards “premium” wines, wine producers invest in marketing activities aimed at strengthening their position in the market and increasing consumer awareness for the quality and specific characteristics of their products, a form of “consumer training”. Perhaps for this reason consumer behaviour around the world is also thought to be converging in a number of ways, in part due to the increasing globalisation of marketing and the growth of multinational business, a powerful force for converge of values and behaviours⁹.

³ See *The Economy of the Wine Sector* (2006), pp. 45-46.

⁴ See *The Economy of the Wine Sector* (2006), p. 47, and *The Business of Wine* (2008), pp. 22-23.

⁵ US States have the power to set the rules on the transportation of alcohol within their boundaries, which has led to a complicated structure of laws controlling alcohol retailing in the United States, with many restrictions on distribution, final sale, inter-state shipments, online sale, etc. See *Wine Politics – How Governments, Environmentalists, Mobsters and Critics Influence the Wines we Drink* (2008), pp. 88 *et seq.*

⁶ See *Alcohol Advertising Bans, Consumption and Control Policies in Seventeen OECD Countries, 1975-2000* (2006).

⁷ See *The Economy of the Wine Sector* (2006), pp. 58 and 65.

⁸ See *The Business of Wine* (2008), p. 25.

⁹ See *The Business of Wine* (2008), pp. 190 and 195. Actually there appears to be a movement toward a type of equilibrium in consumption between the countries of Europe, as the northern European countries increase their consumption and southern European decrease. Convergence in wine consumption in Europe could be reached within the next fifteen years.

Branding in particular has always played a crucial role in the wine industry; today its importance is even more significant. Not only loyalty to a specific label or wine variety is sought, but one can identify a trend of increased promotion of national and regional quality brands, particularly in Europe, in order to differentiate the wines of each country or region based on its specific characteristics¹⁰.

Examples of promotion and “public relations” activities where wine is commonly advertised are wine fairs, wine tasting sessions, wine tourism, the organisation of press trips, non-commercial events to present wines (press meetings during cocktail, lunch or dinner, etc.), newsletters or educational programs. Trying to obtain recommendations from wine journalists or critics also plays an important factor in promoting a wine, since recommendations are an important factor in many wine purchasing decisions, for people feel more secure with the endorsement of a wine journalist or a specialized retailer – it is said that “wine consumers love critics”, such as the renowned US wine critic Robert Parker¹¹. The Internet is also naturally a powerful medium for wine promotion and it has great potential for advertising, although on-sales of wine appear to be still considerably underdeveloped.

Promotion strategies commonly also include traditional advertising campaigns on the media – radio, TV, the Internet, generalist press or specialty magazines – on outdoors, information campaigns and in-place advertising. However, wine advertising in a number of countries faces a number of differing public policy restrictions regarding alcohol advertising¹², and TV advertising of all alcoholic beverages in the European Union should comply with the rules set by Directive 2010/13/EU¹³.

3. The role of the State and public bodies in wine promotion

The industry of wine production and distribution has traditionally been highly fragmented, with many small producers selling locally or through small-scale merchants. This is especially true in Europe, where approximately 1.27 million agricultural holdings have less than one hectare of

¹⁰ Finally, although competition is fierce between wine countries, regions and businesses, it also takes place to a lesser degree against other drinks, such as spirits, as consumers are increasingly conscious of the health benefits of drinking wine as opposed to hard spirits. In this regard, the association of wine as a nutritionally healthy beverage (a key issue for wine industry organisations) is likely to continue to influence consumption choices favouring wine over other alcoholic beverages. See *The Business of Wine* (2008), p. 194.

¹¹ Robert Parker is a leading U.S. wine critic, whose 100-point scale wine rating and newsletter *The Wine Advocate* have become very influential in American wine buying. Despite controversy as to its reviews and scores, he continues to be the most widely-known wine critic in the world. See *Wine Politics – How Governments, Environmentalists, Mobsters and Critics Influence the Wines we Drink* (2008), pp. 118-119.

¹² See *Alcohol Advertising Bans, Consumption and Control Policies in Seventeen OECD Countries, 1975-2000* (2006), and in particular the Appendix (pp. 30-31), which has information by country on advertising bans.

¹³ Directive 2010/13/EU of the European Parliament and of the Council, of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 095, 15/04/2010, p. 1, which replaced Directive 89/552/CEE. Pursuant to Article 22, Television advertising and teleshopping for alcoholic beverages must not: (a) be aimed specifically at minors or, in particular, depict minors consuming these beverages; (b) link the consumption of alcohol to enhanced physical performance or to driving; (c) create the impression that the consumption of alcohol contributes towards social or sexual success; (d) claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts; (e) encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light; and (f) place emphasis on high alcoholic content as being a positive quality of the beverages.

vines, and account for 70% of farms with vines and 12% of the total cultivated area¹⁴. By contrast, in “New World” countries, such as the United States or Australia, there are fewer wine producers, and few very powerful companies have a significant share of the wine market¹⁵.

Although investments in promotion and marketing may be undertaken directly by larger individual corporations (this is particularly the case of deep-pocketed multinational wine companies), the generally fragmented nature of the industry means that most individual producers lack the necessary resources. Professional and inter-branch (“interprofessional”) organisations and trade bodies therefore commonly carry out important promotion activities, which are often funded through levies or charges paid, voluntarily or mandatorily, by its members.

The wine sector is also considered a “vital economic activity” in most producing countries, especially as regards employment and export revenues. Wine production represented 5.4% of the EU’s agricultural output in 2004, and around 10% of the value of total agricultural production in countries such as France, Italy or Portugal¹⁶. For this reason, in most wine-producing countries, the State plays an active role in promotion, the intensity of which may vary considerably, from the setting up of a legal framework enabling trade organisations and bodies to carry out promotion activities, to granting of government funds to organizations and corporations or even the organisation of promotion campaigns by public bodies themselves, such as foreign trade agencies.

This is the case of both traditional wine producers, such as France, Spain, Portugal or Germany, and “New World” producers, such as Australia and the United States. Even at the European Union level, there has been a substantial increase in financial support for wine promotion and marketing measures in recent years.

In France, inter-branch agricultural organisations (*organisations interprofessionnelles*) may impose on their members a levy which is decided by the organisation but is rendered compulsory by Government order¹⁷. The appropriately named “compulsory voluntary levies” (*contributions volontaires obligatoires*) are the primary source of financing of inter-branch regional wine organisations, such as the *Conseil Interprofessionnel du Vin de Bordeaux* (CIVB),

¹⁴ On the other hand, less than 30% of holdings have over 5 hectares of vines, and there are 3,000 cooperatives in the EU taking the grapes produced from mostly small winegrowers. See *Wine –Economy of the Sector* (2006), p. 106, and *The Business of Wine* (2008), p. 24.

¹⁵ Although there are almost 3,000 commercial wineries in the United States (approximately a third of which in California), the top 10 wineries in the USA sold in 2003 nearly 76% of all US wine. E&J Gallo represented in 2003 more than 27.3% of the US market, with Constellation Brands Inc., the world’s biggest wine company, having a market share of 15.5% - see *The Business of Wine* (2008), p. 7. In Australia, of the 1,465 wine-producers, the top 8% make 93% of the country’s wine, and both the domestic and export markets are dominated by a small number of major wine companies (in 2008, 14 winemakers accounted for 70% of the total wine grape crush). The two largest Australian wine companies are Accolade Wines (formerly Hardy Wine Company), part of Constellation Brands, and Treasury Wine Estates, of the Foster’s Group (currently being de-merged from Foster’s, which will keep the beer division. See Wall Street Journal on-line of April 28, 2011, *Foster’s Group Shareholders Approve Demerger of Treasury Wine Estates*, at <http://online.wsj.com/article/BT-CO-20110428-727743.html>, accessed on 14 May 2011). See also *The Business of Wine* (2008), p. 60.

¹⁶ European Commission (2006), *Communication to the Council and the European Parliament Towards a sustainable European wine sector*, COM (2006) 319 final, p. 2.

¹⁷ Law of 10 July 1975. See the Report of the French Court of Auditors (Cour des comptes) (2007), *Les cotisations volontaires obligatoires prélevées par les interprofessions agricoles*, p. 62.

many of which organise promotion activities in the interest of its members¹⁸. *FranceAgrimer – VINIFLHOR*, a French government agency¹⁹ also funds advertising campaigns for French wines in France and abroad and financially supports the professional and inter-branch organisations of the sector in their own advertising campaigns²⁰. Most wine promotion in France is contracted to *SOPEXA*, the French marketing organization for the agricultural industry²¹, which carries out promotion of French wines and other agricultural products in France and abroad, on behalf of its clients and shareholders (mostly the professional and inter-branch agricultural organisations)²².

Similarly, in Spain regional inter-branch wine organisations (*consejos reguladores*) may impose mandatory charges on its members, which fund *inter alia* promotion activities of the regions' quality wines, both in Spain and abroad²³. The Spanish foreign trade agency *Instituto Español de Comercio Exterior* (ICEX) carries out significant promotion activities for Spanish wines outside Spain, including the managing of the national quality brand "*Vinos de España*"²⁴.

In Germany, the *Deutsches Weininstitut* (DWI) is the wine industry's marketing organisation responsible for the generic promotion of German wines, domestically and in foreign markets²⁵. Its activities are supervised by the *Deutscher Weinfonds* (DWF), a public law entity which is itself supervised by the Federal Ministry for Agriculture and is funded through a statutory levy, raised from German wine businesses²⁶.

¹⁸ For instance, as part of its promotional missions, "[t]he CIVB must promote the interests of its members on a national and international scale via publicity campaigns (billboards, written press and television), promotional activities (in cafés, hotels, restaurants, supermarkets), as well as public and press relations" (see <http://www.bordeaux.com/Civb.aspx?culture=en-US&country=OTHERS>, accessed on 13 May 2011).

¹⁹ Office National Interprofessionnel des Vins, des Fruits, des Légumes et de l'horticulture (VINIFLHOR).

²⁰ See *VINIFLHOR's* 2007 Annual Report at <http://www.viniflor.fr/upload/Rapportactivite2007.pdf> (accessed on 14 May 2011), p. 142, and Commission Decision of 13 January 2009 in case N 697/2004, *Aide à la publicité en faveur des produits viticoles*.

²¹ The *Société pour l'Expansion des ventes des produits agricoles et alimentaires* (SOPEXA) is a private corporation where the majority of the stock is held by French trade bodies, *interprofessions* (49.33%) and *organisations professionnelles* (36.79%) (see Annual Report of 2009/2010, p. 63, at http://www.sopexa.com/rapport_activite.php, accessed on 13 May 2011).

²² In 2009, SOPEXA spent Euro 75.3 million in promotion activities, 42.6% of which on wine & spirits (see Annual Report of 2009/2010, pp. 60-61, at http://www.sopexa.com/rapport_activite.php, accessed on 13 May 2011).

²³ See Articles 25(9) and 39(2)(e) of Law 24/2003, of 10 July 2003 (Vine and Wine Law). Several *consejos reguladores* engage in promotion activities, such as the *Consejo Regulador de la Denominación de Origen Calificada Rioja*, which for 2010 approved a budget of Euro 14.9 million, 70% of which is to be used on promotion (see <http://www.riojawine.com/en/promos.php?op1=4&op2=1&sec=2&opcionCombo=0&ano=2006>, accessed on 13 May 2011), or the *Consello Regulador D.O. Rias Baixas* (see 2009 Annual Report at <http://doriasbaixas.com/public/ficheros/memorias/8be9a9d992d455bba8e24b8873fd84c7.pdf>, accessed on 13 May 2011).

²⁴ See the 2009 Annual Report of ICEX at www.icex.es/ICEXmemoria2009/contenido_icex/index.html (accessed on 13 May 2011), Chapter 2, as well as Aldama I. (2006), *El caso de la promoción de Vinos de España*, MK Marketing+Ventas, N.º 218, Noviembre 2006, Editorial ESPECIAL DIRECTIVOS, available at <http://pdfs.wke.es/9/6/0/2/pd0000019602.pdf> (accessed on 13 May 2011).

²⁵ The DWI is a public limited company, whose associates include a number of trade association and cooperatives (see <http://www.deutscheweine.de/icc/Internet-EN/nav/656/65620c41-2768-a401-be59-26461d7937aa&uCon=407606dc-5b89-3501-e76c-d461d7937aae&uTem=0e3307d7-19ff-e401-e76c-d461d7937aae&back=h>, accessed on 13 May 2011).

²⁶ The special levy in favour of the DWI was challenged before the German courts as being allegedly against the German constitution, following a judgment of the Federal Constitutional Court of 3 February 2009 ruling that the mandatory levy charged by the broader Agricultural Marketing Fund was incompatible with the constitution (2 BvL 54/06, English press release 10/2009). However, the Higher Administrative Court of Koblenz decided in

Wine promotion in Portugal is financed by a parafiscal charge collected by the Portuguese wine sector regulator, the *Instituto da Vinha e do Vinho*, a part of which is statutorily allocated to the generic promotion of wine²⁷. At present the charge funds mainly promotion activities carried out by *ViniPortugal*, a non-profit inter-branch association of the main wine professional bodies in Portugal²⁸, as well as promotion efforts by regional wine commissions (*comissões vitivinícolas regionais*)²⁹.

Promotion activities by EU Member States also benefit from funding from the EU budget and are complemented by campaigns financed directly by the European Commission. The European Union's Common Agricultural Policy (CAP) contains a number of Common Market Organisations (CMOs), which set out the rules for the operation of particular sectors of the agriculture industry, including wine. The Wine CMO, first established in 1962, was profoundly reformed in 2008, with the objective of increasing the competitiveness of the EU's wine producers and simplifying and clarifying the existing rules³⁰. One of the key features of the reform is the gradual replacing of market intervention subsidies and plantation rights with "national envelopes" made available to EU Member States for funding a number of measures, according to their needs, including the promotion of wines outside the EU's internal market. Most wine-producing Member States allotted a significant part of their national support programs (which set out the use of national envelopes) to third-country wine promotion efforts, most of which will be carried out by national and regional organisations and bodies such as those described above³¹.

In parallel, the European Union runs its own agricultural information and promotion program, in the EU internal market and in third countries alike, to emphasize the general characteristics and added value of European products, including wine (regarding quality, safety, health, specific methods, environmental concerns), and to complement national promotion initiatives³².

15 September 2009 that the levies raised by the DWI satisfy the strict constitutional requirements imposed by the Federal Constitutional Court (OV Koblenz, Urteil vom 15.09.2010 – 8 A 10246/10.OVG) (see <http://www.loschelder.de/en/lawyers/news-legal-issues/details/artikel/deutscher-weinfonds-successful-with-loschelder-rechtsanwaelte.html>, accessed on 13 May 2011).

²⁷ Decree-Law 119/97, of 15 April 1997.

²⁸ See <http://www.viniportugal.pt/index.php> (accessed on 13 May 2011).

²⁹ See Decrees (*Portarias*) 744/2009 and 1384-B/2009, as amended. See also www.ivv.min-agricultura.pt/np4/456 (in Portuguese). The financing of wine promotion activities by the parafiscal charge (*taxa de promoção*) was considered by the Commission in part incompatible with EU law (Decision 2011/6/EU, of 20 July 2010, case C 43/04 (ex NN38/03), *parafiscal charge for the promotion of wine applied by Portugal*, OJ L 5, of 8.1.2011). An appeal before the EU General Court is currently pending (case T-475/10).

³⁰ See Communication (2006) "Towards a Sustainable Wine Sector", as well as Council Regulation (EC) 479/2008 of 29 April 2008, approving the new Wine CMO (OJ L 148, of 6.6.2008, p.1), which has meanwhile been codified into Council Regulation (EC) 1234/2007 of 22 October 2007 establish a common organization of agricultural markets and on specific provisions for agricultural products (Single CMO Regulation). See also Botelho Moniz and Gouveia e Melo (2008), *O Sector do Vinho Moderniza-se: O Novo Regulamento da Organização Comum do Mercado Vitivinícola*, Special MLGTS Newsletter (www.mlgts.pt/pub_newsletters.php?aID=742, accessed on 14 May 2011).

³¹ See Articles 103-I to 103-M of Regulation (EC) 1234/2007. In the five years between 2009 and 2013, Member State measures on wine promotion in third countries are to receive a budgeted total of nearly Euro 800 million, 185 of which in 2009 and 2010. http://ec.europa.eu/agriculture/markets/wine/facts/annex_4_en.pdf.

³² This program is now governed according to the rules of Council Regulation (EC) 3/2008 of 17 December 2007 on information provision and promotion measures for agricultural products on the internal market and in third countries, as amended (OJ L 148, of 6.6.2008, p.1), the provisions of which are also relevant to assess the compatibility of (Member) State Aid advertising measures in third countries, as it will be seen below in Section 4.

Proposals submitted by interested professional organisations (through the Member States) are evaluated by the European Commission, which decides on their eligibility³³.

Outside Europe, government support for wine promotion is also significant. For instance, in the US, the Wine Institute, the main association of California wineries, manages an export promotional program in over 20 countries, which is primarily funded by the US Department of Agriculture's Market Access Program³⁴.

In Australia, wine promotion is the responsibility of the Australian Wine and Brandy Corporation (AWBC), a government statutory authority established in 1981 to provide strategic support to the Australian wine sector. AWBC is the sector regulator (with responsibility for export regulation and compliance, maintaining the integrity of wine labels and winemaking practices and defining the boundaries of wine producing areas), but also takes the lead role in the strategic marketing of the Australian wine category, including the implementation of strategies and activities in key markets and the identification of new markets. In overseas markets AWBC operates as Wine Australia³⁵. The AWBC is partly financed by three statutory levies: the Wine Grapes Levy, paid by wine and brandy producers, the Wine Export Charge, paid by exporters, and the Grape Research Levy, imposed on grape producers³⁶.

As it would be expected, the promotion activities of all national and regional organisations mentioned above are to a large extent similar, and their differences result mainly from the sums available in each country or region for wine promotion and marketing. Larger organisations maintain permanent trade agents in their main export markets to assist wine producers with promotional efforts and to provide critical market information. In addition, most organise their country's or region's participation in international wine trade shows or fairs; develop targeted or generic media advertising campaigns in selected export markets; hold tasting and other events for media and consumers; organise visits to local estates and wineries by foreign key buyers, as well as by wine and lifestyle writers, critics and journalists; promote wine education and research; and provide marketing training to retailers, among others. There are frequent collaborations with academics, restaurants, chefs and organisations promoting other quality products (such as cheese or olive oil). All organisations also manage dynamic websites with information about national or regional wines and export markets.

³³ The EU finances up to 50% of the cost of these measures, the remainder being met by the professional/inter-branch organizations and/or by the Member States concerned. For 2010, the Commission approved 19 programs, with a total EU contribution of Euro 30 million (Commission Press Release of 1 July 2010, IP/10/873).

³⁴ See <http://www.calwinexport.com/> (accessed on 14 May 2011). The Market Access Program (MAP), authorised by Section 203 of the Agricultural Trade Act of 1978, uses funds from the U.S. Department of Agriculture's Commodity Credit Corporation to aid in the creation, expansion, and maintenance of foreign markets for U.S. agricultural products. The MAP forms a partnership between non-profit U.S. agricultural trade associations, non-profit U.S. agricultural cooperatives, and non-profit state-regional trade groups. In 2010, the Wine Institute received \$7,043,762 out of a total program of USD 200 million. See www.fas.usda.gov/mos/programs/map.asp (accessed on 13 May 2011).

³⁵ See the AWBC's website at <http://www.wineaustralia.com/australia/>, as well as the 2009/2010 annual report, available at <http://www.wineaustralia.com/australia/Default.aspx?tabid=148> (accessed on 14 May 2011).

³⁶ Pursuant to the Primary Industries (Excise) Levies Act 1999 and Regulations, as well as the Primary Industries Levies and Charges Collection Act 1991 and Regulations (<http://www.wineaustralia.com/australia/Default.aspx?tabid=280>).

Particular effort in recent times has been dedicated by some organisations to the creation and development of national or regional quality brands and symbols serving as common element in market campaigns and a reference to (especially foreign consumers), in order to reinforce and consolidate the country's image and reputation as a quality wine producer, its specific characteristics and diversity. Thus for instance the brands "*Wines from Spain/Vinos de España*"³⁷, "*Wines of Portugal – a World of Difference*"³⁸ or "*Australia Plus*"³⁹.

4. EU law and its impact on wine promotion

One of the core foundations of the European Union is the creation of an internal market in which goods, services, persons and capitals move freely, and where competition is not distorted. For this reason, besides generally prohibiting State measures restricting movement of goods between the Member States⁴⁰, Articles 107 and 108 of the Treaty on the Functioning of the European Union ("TFEU", formerly the EC Treaty) prohibit EU Member States from distorting competition by granting state aid favouring certain firms.

Due to the existence of the Common Agricultural Policy (CAP), which traditionally has included a number of intervention and market stabilisation mechanisms that by themselves restrict competition, EU competition rules are only applicable to production and trade in agricultural products to the extent determined by the EU legislature (the Council and the European Parliament)⁴¹. However, pursuant to the Single CMO Regulation, the Treaty rules on State aid control are generally applicable to the production and trade of wine⁴².

4.1. The EU rules on the control of State aid

Control of State aid measures in the European Union comes, according to the European Commission, from the need to maintain a level playing field for all undertakings active in the Single European Market, no matter in which Member State they are established, as well as to avoid State aid measures which provide unwarranted selective advantages to some firms, preventing or delaying market forces from rewarding the most competitive firms and thereby decreasing overall European competitiveness. The underlying concern is that, as a result of such distortions of competition, European customers may be faced with higher prices, lower quality goods and less innovation⁴³.

Article 107(1) TFEU therefore sets forth that "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by

³⁷ www.winesfromspain.com/icex/cda/controller/pageGen/0,3346,1549487_6759264_6759252_0,00.html (accessed on 14 May 2011), as well as Aldama I. (2006), *El caso de la promoción de Vinos de España*.

³⁸ See <http://www.winesofportugal.info/> (accessed on 14 May 2011).

³⁹ See <http://www.australiaplus.com/66/about-a.aspx> (accessed on 14 May 2011).

⁴⁰ See Articles 28 to 37 TFEU.

⁴¹ See Article 42 TFEU.

⁴² See Article 180 of the Single CMO Regulation.

⁴³ European Commission, *State Aid Action Plan – Less and better targeted state aid: a roadmap for State aid reform 2005-2009*, COM (2005) 107 final, 7 June 2005, para. 7.

favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”.

In spite of this general prohibition, the EU State aids rules have considerable flexibility. Under Articles 107(2) and (3), particular types of aid that are beneficial for the common interest may be approved. Of particular relevance for our purposes is Article 107(3)(c), under which State aid measures may be declared compatible with EU law if they “*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*”⁴⁴.

The Treaty entrusts the European Commission with the responsibility of keeping under constant review all systems of aid existing in Member States. For this reason, Member States must notify to the Commission any plans to grant new aid or alter existing aid measures⁴⁵, although the Commission can exempt certain categories of aid from notification by a so-called “block exemption regulation”, of which there are several in force⁴⁶. The Commission has exclusive jurisdiction to decide whether a measure constituting State aid incompatible with EU law – that is to say, it has sole competence to rule on the substance of the aid, under the control of the European courts⁴⁷.

When, subsequent to a preliminary examination of the notification (usually within two months of the notification), the Commission decides that the proposed measure does not constitute aid or does not raise doubts as to its compatibility with EU law, it decides that the measure is compatible with the common market. When doubts are raised, the Commission must initiate a formal investigation, in which the Member State concerned and other interested parties must be heard. The investigation is closed by a positive decision, by a conditional decision (if conditions are attached in order for the aid to be considered compatible with EU law) or by a negative decision, if the Commission concludes that the aid is incompatible with the internal market. In the latter case, the aid cannot be put into effect and, if already granted, the Member State concerned should take all necessary measures to recover the aid from the beneficiary, including interest at a rate determined by the Commission⁴⁸.

⁴⁴ Under 107(2) aid measures *are* compatible if they (a) have a non-discriminatory social character and are granted to individual consumers (b) make good the damage caused by natural disasters or (c) are to compensate the economic disadvantages caused by the division of Germany (previously to reunification). Under Article 107(3), aid may be considered by the Commission compatible with the internal market (a) if it aims to promote areas where the standard of living is abnormally low or where there is serious underemployment, (b) if the aid is to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State (such as, for instance, the 2008 and 2009 financial crisis), (d) to promote culture and heritage conservation, and (e) other categories of aid specified by decision of the Council (the EU legislative body which represents Member State governments).

⁴⁵ A State aid measure can be an “aid scheme” (a general and abstract act on the basis of which, without further implementing measures, individual aid awards may be made to several undertakings under the terms of the act, or for an indefinite period and/or an indefinite amount) or an individual, “ad hoc” aid.

⁴⁶ See Article 108(4) of the TFEU. The most widely-applicable block exemption currently in force is Commission Regulation (EC) 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the EC Treaty (General Block Exemption Regulation), OJ L 214, 9.8.2008, p. 3.

⁴⁷ See Article 108(1) of the TFEU and Article 2 of Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [presently Article 108 TFEU], OJ L 83, of 27.3.1999, p. 1 (“Implementing Regulation”).

⁴⁸ See Article 108(2) of the TFEU and Articles 4, 6, 7 and 14 of the Implementing Regulation.

Member States are subject to a standstill obligation under Article 108(3) TFEU, in the sense that the proposed measures cannot be put into effect until the Commission has decided that the notified measure does not constitute State aid, or that the aid is compatible with EU law under one of the exceptions of Article 107(2) and (3)⁴⁹. Any State aid measure implemented in violation of the standstill obligation is formally “illegal”. The European courts have ruled in this regard that breach of the notification and the stand-still obligations produces “direct effect” and can be relied on before national courts by individuals whose rights and interests may have been harmed by the measure⁵⁰.

National courts cannot rule on the compatibility of the aid (that is the exclusive role of the Commission), but if called upon by harmed individuals – such as the competitors of the beneficiary of the aid – are obliged to give effect to individual rights under Article 108(3), and should draw “all appropriate conclusions” from the infringement of the standstill obligation, including appropriate remedies, according to national procedural rules, which could include interim relief or, ultimately, the recovery of aids illegally granted⁵¹. However, the European Court of Justice recently clarified that if in the meanwhile the Commission has issued a positive decision on the aid measure, EU law does not impose an obligation of full recovery of the unlawful aid, although it should order the measures appropriate to remedy the consequences of the standstill infringement (such as the interest the beneficiary would have paid on the amount received before clearance from the Commission, if it had borrowed it on the market)⁵².

According to the case law of the Court of Justice, companies who are the beneficiaries of an aid may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedural rules of Article 108 TFEU, since the Court considers that a diligent businessman should normally be able to determine whether that procedure has been followed⁵³.

Given the potentially serious consequences resulting from this case law, Member States and aid beneficiaries alike should take care in ensuring that an aid measure does not constitute State aid under Article 107 TFEU, or is covered by a Block Exemption Regulation, or, if the measure does constitute a State aid and is not covered by a block exemption, that it is not implemented (for instance, no money is transferred) before the projected measure is notified and cleared by the Commission.

In order to assess the implications of State aid rules on wine promotion campaigns with some degree of State intervention, we will now turn briefly to the wide concept of “State aid”. We will then centre our analysis in the criteria provided by the Commission to determine that wine promotional campaigns can be declared compatible with EU law.

⁴⁹ Under Article 108(3) of TFEU and articles 2 and 3 of Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [presently Article 108 TFEU], OJ L 83, of 27.3.199, p. 1 (“Implementing Regulation”).

⁵⁰ See, inter alia, cases 6/64 *Costa v ENEL* [1964] ECR 585 and C-39/94 *SFEI* [1996] ECR I-3547.

⁵¹ See cases C-354/90, *FNCE*, ECR I-5505, paras. 12 and 14, and *SFEI* (note 50 above), para. 40.

⁵² See case C-199/06 *Centre de l’exportation du livre français (CELF) and Ministre de la Culture e de la Communication v Société internationale de diffusion d’édition (“CELF I”)*, ECR [2008] ECR I-469, as well as Vajda QC C. and Stuart P. (2010), “Effects of the Standstill Obligation in National Courts – all said after CELF ? An English Perspective”, *European State Aid Law Quarterly* 3/2010, p. 629.

⁵³ See case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland (Alcan II)* [1997] ECR I-1591, para. 25.

4.2. What measures constitute “State aid”?

The concept of State aid has been construed widely by the case law of the European courts. It is not limited to a subsidy given directly by a State to a company out of the general State budget, but applies to any measure that has similar effects to such subsidy. Considering the wide scope of application of Article 107(1), and the Member States’ intervention in the wine sector described in Section 3 above, it is not surprising that the Commission in recent years has assessed and issued decisions on a significant number of State aid measures concerning specifically the promotion of wine⁵⁴.

In order to be considered as State aid, a given measure, such as a media advertising campaign, for instance, must fulfil all the following conditions: (i) must constitute an advantage, (ii) granted by a Member State or through state resources, (iii) favouring in a selective way certain undertakings or the production of certain goods, (iv) be liable to affect trade between Member States and (v) distort or threaten to distort competition.

As a result of the broad interpretation given by the European courts to Article 107(1), wine promotion campaigns with some degree of State support will usually constitute an advantage which selectively benefits some undertakings. For this reason, as we will see below, the key issues in this regard are whether a measure is financed by the State or through “State resources” (mandatory levies are a controversial issue in this context), and if it is capable of affecting trade and distorting competition – as a rule it will, except if the amount of aid per beneficiary is low, and it can benefit from exemption under the *de minimis* rules.

4.2.1. Economic advantage

According to the European courts, measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect, are also considered to be aid⁵⁵. In other words, if the beneficiaries of the measure would not have obtained the economic advantage under market conditions, this condition is met⁵⁶. It does not matter whether the advantage is permanent or of limited duration⁵⁷, and a measure can still be an

⁵⁴ See *inter alia* Decisions of 13 March 2000 (N 439/99, *Italy/Strade del Vino*), 23 March 2000 (N 398/98, *Italy/Strada del Vino*), 18 July 2001 (N 312/2001, *France/Publicité et promotion VQPRD et Vins de Pays*), 5 November 2001 (N 484/2001 – *France/Aides au secteur vitivinicole*), 2 July 2002 (N 57/2002, *Germany/Bayerische Weinabsatzes*), 23 September 2002 (N55/02, *Italy/Promozioni vini tipici locali*), 17 October 2002 (N 54/02, *Italy/Strade del Vino*), 28 October 2002 (N 305/02, *France/Taxe parafiscale CIVC*), 13 November 2002 (N 167/2002, *France/Promotion marchés extérieurs*), 22 November 2002 (N 419/2002, *France/Filière vitivinicole*), 11 December 2003 (N 100/2003, *Italy/Rotte del Vino*), 19 January 2005 (C(2005) 50, *France/Rivesaltes Plan*), 9 November 2005 (2007/55/EC, *France/Liqueur Wines*), 2 July 2008 (N 180/2008, *Spain/Consejos Reguladores*), 10 December 2008 (N 561/2008, *France/Interprofessions*), 13 January 2009 (N 694/2007, *France/Publicité produits viticoles*) and 20 July 2010 (C 43/2004, *Portugal/Wine promotion charge*).

⁵⁵ See C-335/00, *Freskott* [2003] ECR I-5263, C-200/97 *Ecotrader* [1998] ECR I-7907, para. 34, Commission Decision of 19 January 2005 *on the Rivesaltes Plan and CIVDN parafiscal charges operated by France*, OJ L 112, 30.4.2007, p. 1, para. 75, Decision 2011/06/UE, *Portuguese wine promotion charge* (cit. note 29 above), para. 69.

⁵⁶ See Commission Decision 2007/55/EC of 9 December 2005 *concerning the aid scheme that France plans to implement in favour of producers and traders of liqueur wines*, OJ L 32, 6.2.2007, p. 37, para. 84, and case C-280/00, *Almark Trans* [2003] ECR I-07747, para. 84.

⁵⁷ See case C-78/90 *et al*, *Compagnie Commerciale de l’Ouest* [1992] ECR I-1847.

advantage where the beneficiary contributed wholly or partially to finance it as a result of a mandatory levy (although this can be relevant for the “State resources” condition)⁵⁸.

Most companies promote its products in the normal course of business and therefore promotion is usually a charge which is included in a company’s operating budget⁵⁹. For this reason, a wine producer will have an economic advantage in the meaning of Article 107(1) if its products are covered by a campaign, as it is presumed that it will have an economic advantage, which in the absence of the campaign it would not have⁶⁰.

4.2.2. State resources – the case of mandatory levies

Although there is no doubt that a wine promotion campaign financed directly by funds from the general State budget (or from the budget of a regional or local authority) constitute an aid “granted by State resources”, the answer is less straightforward when it comes to funding from mandatory levies (also called parafiscal charges) collected from wine sector operators, who will benefit from the campaign⁶¹. This issue has also significant practical relevance, given that as we saw in Section 2 above, in most Member States at least a part of the funding of wine promotion activities results from mandatory levies or charges.

Pursuant to settled case law, for an advantage to be considered as aid, two cumulative conditions must be met: first, advantages must be granted by “State resources” and, second, must be attributable to the State⁶².

Although the case law on what constitutes “State resources” is not completely clear, according to the Court an aid should be considered as granted by State resources when *the resources are directly or indirectly under State control*. The relevant test in this regard is whether the resources involved “*constantly remain under public control, and therefore available to the competent national authorities*”, “*even though the sums involved in the measure are not permanently held by the Treasury*”⁶³.

⁵⁸ See case 323/82 *Intermills v Commission* [1984] ECR 3809, as well as *Bellamy & Child’s Competition Law*, p. 1506.

⁵⁹ The Commission considers that normally, producers and traders would be expected to bear the costs of advertising themselves, as part of their normal economic activities, see *Community Guidelines for State Aid in the Agriculture and Forestry Sector 2007 to 2013* OJ C 319, of 27.12.2006, para. 152(d); See also Decision 2011/06/UE, *Portuguese wine promotion charge* (cit. note 29 above), para. 78.

⁶⁰ In other types of measures providing public funds (such as loans, capital injection or purchase of shares), it will be necessary to assess the measure under the terms of a private investor operating in normal conditions in a market economy. On the other hand, if the public funds are granted as a compensation for services provided in order to discharge public service obligations, those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, provided that a number of conditions must be satisfied (See *Altmark*, cit. note 56 above, para. 87).

⁶¹ The expression of Article 107(1) “by a Member State or through State resources” does not mean that there can be aid granted by a Member State even where no State resources are being used or foregone, but only to preclude circumvention of the State aid rules though decentralized or “privatized distribution of aid” (*Bellamy & Child European Community Law of Competition* (2008), p. 1513).

⁶² See Cases T-360/04, *France v Commission (Stardust Marine)*, [2007] ECR II-92, para. 24, and C-345/02, *Pearle*, [2004] ECR I-7139, para. 35.

⁶³ See *Stardust Marine* (cit. note 62 above), para. 37. See also opinion of AG Mengozzi in case C-206/06, *Essent* [2008] ECR I-05497.

Secondly, the aid measure should be attributable to the State, in the sense that the public authorities must have been involved, in one way or the other, in the adoption of that measure⁶⁴.

As stated above, the most common situation in the wine sector (and in other agricultural sectors) concerns mandatory levies or charges – essentially, where the resources needed to finance the measures derive from charges imposed on private persons and are allocated to the beneficiaries via undertakings or bodies acting as intermediaries.

The established position of Court of Justice has been that “*that there is no need to draw any distinction according to whether the aid is granted directly by the State or by public or private bodies appointed by the State*”⁶⁵. In addition, in older case law the Court ruled that funds which are financed through compulsory contributions imposed by State legislation and are managed and apportioned in accordance with the provisions of that legislation must be regarded as State resources within the meaning of Article 107(1) TFEU, even if they are administered by institutions distinct from the public authorities⁶⁶. This case law may have been implicitly superseded by more recent jurisprudence⁶⁷, in particular *Pearle* (2005)⁶⁸, although this judgment is in a number of respects far from clear⁶⁹.

In *Pearle*, the Court ruled that the funding by a Dutch trade board, governed by public law, of a joint advertising campaign decided by its members, through the imposition of compulsory levies on those members, did not involve “State resources”. The court established that the funding had been carried out using resources which the board never had the power to dispose of freely, as the compulsory levies were earmarked for the organisation of that advertising campaign. In addition, the costs incurred by the public trade board for the advertising campaign were offset in full by the levies imposed on the undertakings, and therefore the board’s action “*did not tend to create an advantage which would constitute an additional burden for the State or that body*”⁷⁰.

Finally, the Court attached particular importance to the fact that the initiative for the organisation and operation of the campaign belonged solely to its members. The campaign therefore “*had a purely commercial purpose*”, and “*had nothing to do with a policy determined by the Netherlands authorities*”. For this reason, the board “*served merely as a vehicle for the levying and allocating of resources*”⁷¹.

⁶⁴ Opinion of AG Mengozzi in *Essent* (cit. note 63 above), para. 105. When the aid measure is not decided by the public authorities themselves, but by a body or company, the fact that it is controlled by the State is not sufficient for the measure to be imputable to the State, since a public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. The imputability to the State of an aid measure taken by a public undertaking should therefore be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken. See *Stardust Marine* (cit. note 62 above), paras. 52-58.

⁶⁵ Case C-379/98, *PreussenElektra* [2001] ECR I-02099, para. 58.

⁶⁶ Case 173/73 *Italy v Commission* [1974] ECR 709.

⁶⁷ Opinion of AG Mengozzi in *Essent* (cit. note 63 above).

⁶⁸ C-345/02, *Pearle*.

⁶⁹ See *Pearle*: So Much Unsaid (2005).

⁷⁰ See *Pearle* (cit. note 62 above), para. 36.

⁷¹ See *Pearle* (cit. note 62 above), para. 37.

The Court's short and very fact-focused reasoning does not make express reference to the imputability criterion set by its earlier case law, and suggests that the court apparently decided to analyse the measure only from a "State resources" perspective. However, the fact that the advertising campaign was organised by a private association of opticians (who were members of the board), and did not result from a policy determined by the authorities – to which the Court attached weight to conclude that no State resources were involved – appears to us as more relevant to evidence that the measure is not imputable to the State, than to characterise the resources employed as public.

This apparent confusion has been continued by the Commission in its practice subsequent to *Pearle*. The Commission considers that in *Pearle* the Court set out four cumulative conditions in order for the funding of an aid measure not to constitute State resources:

- a) the measure in question is established by the professional body that represents the undertakings and the employees of a business sector and does not serve as an instrument for the implementation of policies established by the State;
- b) The goals of the measure in question are fully financed by the contributions of the undertakings of the sector;
- c) The method of financing and the percentage/amount of the contributions are established in the professional body of the business sector by representatives of employers and employees, without any State interference; and
- d) The contributions are obligatorily used for the financing of the measure, without the possibility of the State to intervene⁷².

It is questionable whether condition (a) and (c) above should be relevant to qualify the resources as being available to the State, as it may be argued that the adoption of the measure and the establishment of its financing mechanism are only relevant to attribute responsibility of the measure to the State, and therefore to determine whether the imputability criterion is met.

Instead, the relevant questions in regard to the "State resources" criterion should perhaps be, on one hand, whether the costs of the measure are offset in full by the levies imposed on the beneficiaries (and therefore do not create any burden to the State)⁷³, and, on the other, whether public authorities have the possibility of intervening in the use of the financial contributions.

According to the case law, funds should be considered "State resources" *if they remain directly or indirectly under State control* after they are collected from private undertakings⁷⁴. This means that if a promotion campaign is fully funded by a mandatory levy imposed on its

⁷² See, *inter alia*, Decisions *Plan Rivesaltes* (cit. note 55 above), *French Liqueur Wines* (cit. note 56 above), para. 81, and *Portuguese Wine Promotion Charge*, (cit. note 29 above), para. 63. See also Decision of 23 June 2010, NN 12/b/2006, *Belgium/Promotion des produits des cultures arables*.

⁷³ In the Decision *Plan Rivesaltes* (cit. note 55 above), paras 43-44, the Commission found that one of the aid measures at stake was funded simultaneously by the mandatory contributions and from the CIVDN's general budget. On the other hand, in some cases the broad scope of the financed measures casts doubt as to whether the beneficiaries of the support measures are always the businesses subject to the mandatory levy (see also Decision of 10 December 2008, N 561/2008 – *France/Actions conduits par les interprofessions*, para. 55).

⁷⁴ See in this regard case C-206/06, *Essent* [2008] ECR I-05497, para. 71.

beneficiaries, and the funds are exclusively allocated to the same campaign, without any possibility of the State to intervene in how the funds are employed, two conclusions should be drawn. First, there is no financial burden to the State or to any public body, as the campaign expenses are fully met by sector contributions. Second, the State does not retain any control over the funds, as it will be the beneficiaries themselves (or their representative organisations) to decide how the campaign will be carried out and how the moneys should be spent⁷⁵.

The Commission has been applying the *Pearle* strictly, and in recent cases has consistently rejected Member States' arguments that mandatory contributions to fund wine promotion campaigns do not constitute "State resources" in the meaning of Article 107(1) TFUE⁷⁶. This suggests that the Commission still maintains its longstanding view "*that compulsory contributions from undertakings in a sector that are allocated to funding financial support measures are para-fiscal support charges and therefore constitute state resources when those contributions are imposed by the state or when the proceeds of those contributions pass through a body established by law*"⁷⁷. As there are several pending court cases on the concept of "State resources", it is hoped the EU courts may in the near future shed some light into these *muddy waters*⁷⁸.

Finally, European Union resources do not constitute State resources, and therefore the granting of EU funds to wine promotion campaigns does not constitute State aid in the meaning of Article 107(1)⁷⁹. However, if a wine promotion measure is simultaneously funded by Member State and EU resources – as it can be the case in promotion campaigns in third-country markets under the new wine CMO – State aid rules will still apply⁸⁰.

4.2.3. Selectivity

This criterion is met when an economic advantage is reserved for one or more undertakings, which are active in a given region, for instance⁸¹, or to an industry or business sector in

⁷⁵ By contrast, in case T- 136/05 *EARL Salvat Père & Fils v Commission*, [2007] ECR Page II-04063, the Commission found that the French State was perfectly capable, by exercising its dominant influence over CIVDN (the inter-branch committee for quality liqueur wines), of directing the use of its resources in order, as occasion arises, to finance specific advantages in favour of certain undertakings.

⁷⁶ See above note 72.

⁷⁷ See Decision *French Liqueur Wines* (cit. note 56 above), para. 77.

⁷⁸ See *inter alia* Cases T-79/09, *France v Commission* (annulment action brought on 20 February 2009), T-293/09, *CNIEL v Commission* (annulment action brought on 29 July 2009), and T-475/10, *Portugal v Commission* (annulment action brought on 4 October 2010), all pending.

⁷⁹ See case 213/81, *BALM* [1982] ECR 3583.

⁸⁰ See article 103-N of the Single CMO Regulation, pursuant to which Member States may grant national aid to complement EU funding to the national support programs, insofar as it is done in accordance with the relevant State aid rules. The maximum aid rate as laid down in the relevant EU State rules (in order to justify a State under Article 107(3)(c)) shall apply to the "global public funding", including both Community and State aid. In any event, the granting of this additional national aid is not subject to the notification rules of Article 108 TFEU, as it was already notified and approved by the Commission under the CMO rules (see Article 180 of the Single CMO Regulation).

⁸¹ However, an exception can be identified when the advantage arises from measures adopted by a regional government in exercise of its autonomy over the territory for which it is responsible. In such case, the relevant territory is not the territory of the Member State, but the region (see case C-88/03 *Portugal v Commission* (*Açores*) [2006] ECR I-7115).

particular⁸². The selectivity criterion therefore normally be met in the case of promotion campaigns targeted specifically at wine, even if the campaign is general and national in scope – and is therefore capable of benefitting the whole wine sector in a Member State – since it will be considered that the campaign benefits selectively the businesses of the wine sector.

4.2.4. Affection of trade between Member States

According to the Court of Justice, when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade, the latter must be regarded as affected by that aid⁸³. The only question in this regard is therefore whether there are trade exchanges in the sector relevant to the contested measure. In this regard, the Commission considers that the existence of a common market organisation for the sector is enough evidence of trade between Member States⁸⁴.

The Commission often analyses the conditions of affection of trade between Member States and distortion of competition as a single criterion. For instance, in a 2005 decision regarding a wine conversion and advertising scheme in France, the Commission stated that the “*aid granted is likely to affect trade between Member States and to distort or potentially distort competition since it favours the production of certain national wines to the detriment of production in other Member States. The wine sector is extremely open to competition at Community level and is consequently very sensitive to any measure favouring production in a particular country*”⁸⁵.

Trade between Member States may be affected even if the aided measures are intended to be carried out outside the European Union. According to the Court, in view of the interdependence of the markets on which European undertakings operate, it cannot be ruled out that aid could distort intra-EU competition by strengthening the competitive position of certain operators, even though the aid benefits products for export outside the community⁸⁶.

Finally, the Commission considers that advertising campaigns can affect commercial exchanges “*since, by definition, advertising has the objective of augmenting the consumption of products*”⁸⁷. In view of the wine imports and exports between Member States, and the Court’s position, it is likely that promotion campaigns will always be deemed to affect trade between Member States, except if the amount of aid per beneficiary and Member State falls under the *de minimis* threshold set by the Commission, as we will see below.

⁸² See Decisions *Plan Rivesaltes* (cit. note 55 above), para. 76, and *Portuguese Wine Promotion Charge*, (cit. note 29 above), para 67.

⁸³ See case 730/79, *Phillip Morris* [1980] ECR 2671, para. 11, and Decision *Plan Rivesaltes* (cit. note 55 above), para. 78.

⁸⁴ Decision *Plan Rivesaltes* (cit. note 55 above), para. 79.

⁸⁵ Decision *Plan Rivesaltes* (cit. note 55 above), para. 81.

⁸⁶ See cases 6 and 11/69, *Commission v France* [1969] ECR 523, para. 20, and case C-142/87, *Belgium v Commission* [1990] ECR 959, para. 35, as well as *French Liqueur Wines* (cit. note 56 above), para. 87.

⁸⁷ Decision of 2 July 2008, N 180/2008 *Spain/Actividades de publicidad de la calidad-Consejos Reguladores*.

4.2.5. Distortion or threat of distortion to competition

The test in this regard is whether the proposed measure is capable of distorting competition, and not whether competition was in effect distorted. In contrast with the enforcement of the other competition provisions of the Treaty (Articles 101 and 102), no definition of the relevant market or analysis of its structure is considered necessary under Article 107. The Court takes instead the formalistic approach that “*improvement in the competitive position of an undertaking resulting from a State aid generally points to a distortion of competition compared with other competing undertakings not receiving such assistance*”⁸⁸. In addition, the Commission has already considered that an aid to wine advertising threatens to distort competition because it “*reduces the advertising costs for the beneficiaries*”⁸⁹.

4.2.6. A safe harbour – the de minimis rules

The European courts have not recognised a *de minimis* rule for State aids⁹⁰. On the contrary, according to the case law, there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of an aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States be affected and competition threatened to be distorted⁹¹.

Although the position of the Commission has evolved over time, a general *de minimis* block exemption regulation has been in force since 2001 for most economic sectors⁹². Agriculture was one of the exceptions, as the Commission felt that in view of the special CAP rules applying to the sector, there was the risk that even low levels of aid could fulfil the criteria of Article 107(1) TFEU.

By 2004, the experience acquired since 1999 made the Commission consider that very low levels of aid do not fulfil the criteria of Article 107(1) TFEU, and adopted Regulation (EC) 1860/2004, under which aid measures were deemed to be exempt from notification requirement where both the amount of aid received by individual producers remained small (less than a total of Euro 3,000 per producer over any period of three years), and the overall level of *de minimis* aid granted to the agriculture sector by each Member State did not go above a small percentage (0.3%) of that State’s agricultural production⁹³. Regulation (EC) 1860/2004 has since been

⁸⁸ Case C-730/79, ECR 1980, p. 2671, paragraphs 11 and 12.

⁸⁹ Decision of 13 January 2009, N 694/2007, *France/Aide à la publicité en faveur des produits viticoles*.

⁹⁰ By contrast, a *de minimis* rule was recognized by the case law regarding Article 101 TFEU (which prohibits agreements between undertakings and other collective practices which restrict competition), stating that Article 101(1) applies only if the agreement restricts *appreciably* competition on the market.

⁹¹ See *Altmark Trans* (cit. note 56 above), para.81.

⁹² The Commission approved Regulation (EC) 69/2001, the first *de minimis* block exemption regulation, after being given the power to adopt a regulation laying out a *de minimis* rule by the Council through Regulation (EC) 994/98 of 7 May 1998. Regulation (EC) 69/2001 has since been replaced by Regulation (EC) 1998/2006.

⁹³ See Commission Regulation (EC) 1860/2004 of 6 October 2004 on the application of Articles 87 and 88 of the Treaty [presently 107 and 108 TFEU] to *de minimis* aid in the agriculture and fisheries sector OJ L 325, of 28.10.2004, p. 4.

replaced by Regulation (EC) 1535/2007⁹⁴, which is the regulation currently in force setting out the requirements for aid measures to *producers of agricultural products*⁹⁵.

On the other hand, aid granted to “processing and marketing of agricultural products activities” is now covered by the general *de minimis* regulation (Regulation (EC) 1998/2006⁹⁶), given the similarities between processing and marketing of agricultural products activities and general industrial activities⁹⁷.

Pursuant to Article 1(2)(b) of Regulation (EC) 1998/2006, ‘*processing of agricultural products*’ means any operation on an agricultural product resulting in a product which is also an agricultural product, except on farm activities necessary for preparing an animal or plant product for the first sale. Wine production falls within this definition, as both fruit and wine from fresh grapes are agricultural products under Annex I of the TFEU.

Therefore, in order to determine whether a wine promotion campaign with State intervention falls below the *de minimis* ceilings – which would mean that Article 107(1) is not applicable, and that the measure is exempt from notification to the Commission – the provisions of Regulation (EC) 1998/2006 apply.

The thresholds of Regulation (EC) 1998/2006, the general *de minimis* regulation, are substantially higher than those applicable to the *primary production of agricultural products* referred to above: the total *de minimis* aid granted to any one company cannot exceed Euro 200,000 per period of three fiscal years, and there is no cumulative amount limit of *de minimis* aid per Member State, although the national aid measures must fulfil a number of additional criteria⁹⁸.

Member States are required to monitor closely the amounts of *de minimis* aid granted, and should only grant new *de minimis* aid after having checked that the statutory ceilings are not exceeded. For this purpose Member States should set up a central register of *de minimis* aid containing complete information on all *de minimis* aid granted by any authority with that Member State⁹⁹.

⁹⁴ Commission Regulation (EC) 1535/2007 of 20 December 2007 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the sector of agricultural production, OJ L 337, 21.12.2007, p. 35.

⁹⁵ Pursuant to Regulation (EC) 1535/2007, (i) the total *de minimis* aid granted to any one company cannot exceed Euro 7,500 per period of three fiscal years; and (ii) the cumulative amount of *de minimis* aid granted by the Member State concerned to the agriculture production sector, during a three-year period, cannot exceed the value set out in the Annex, which corresponds to 0.75% of its total agricultural output (for instance, Euro 438.3 million for France, Euro 59.4 million for Denmark or Euro 47.7 million for Portugal).

⁹⁶ Commission Regulation (EC) 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379, 28.12.2006, p. 5.

⁹⁷ See recital 2 of the preamble of Regulation (EC) 1535/2007.

⁹⁸ Aids cannot be considered as *de minimis* if the amount of the aid is fixed on the basis of price or quantity of products placed on the market, if the aid is for certain export related activities (namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity), if the aid is contingent on the use of domestic over imported goods, or if the aid is granted to undertakings in difficulty (see Article 1 of Regulation (EC) 1998/2006).

⁹⁹ See Article 4 of Regulation (EC) 1998/2006. In the absence of a central register, Member States should inform the beneficiary undertakings in writing of the prospective amounts of aid, and are to obtain a declaration from each beneficiary demonstrating that the amount of aid received by it does not exceed the ceilings. Member States should keep records on all *de minimis* aid granted for 10 years after the date on which the aid was granted,

General aid measures, with a wide range of beneficiaries, raise specific issues in this regard, given that in some cases it will be very difficult or even impossible to determine precisely the economic advantage each undertaking receives from the measure. General promotion measures – an advertising campaign on the quality wines of a given region or country, for instance – are a good example of such measures. On the one hand, the universe of beneficiaries is very broad, with possibly thousands of businesses benefitting, directly or indirectly, from the campaign. On the other hand, it is impossible to determine the exact amount of economic advantage received by each undertaking, as moreover economic benefits resulting from promotion campaigns are usually indirect and not easy to estimate.

Often such general measures are unlikely to affect trade between Member States and to distort competition, even if the total amount is substantial, in view of the wide number of beneficiaries involved and of the very low amounts per beneficiary. The *de minimis* rules should therefore apply, despite the difficulties in the calculation of the amounts granted to each beneficiary, as recognised by the Commission¹⁰⁰.

It is therefore submitted that in the case of general wine promotion measures, Member State should be able to consider the available information on the number of businesses that are likely to benefit from the measure (taking into account the businesses registered in a given country or region), and make reasonable estimates of the approximate advantages per beneficiary. The estimated economic benefits for each beneficiary would be recorded in the central *de minimis* register, and would be relevant for the application of the *de minimis* rules in further cases.

4.3. Compatibility of State aids for wine promotion with EU law

If a given wine promotion measure constitutes State aid under Article 107(1) TFEU, it may still be authorised by the European Commission if it meets the conditions of Article 107(3). The most frequently used exception in this regard is Article 107(3)(c), which authorises “*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*”.

Article 107(3) confers on the Commission a wide discretion to authorise aid by way of derogation from the general prohibition contained in Article 107(1). The assessment in such cases presupposes the examination and appraisal of economic facts and conditions which may be both complex and liable to change rapidly¹⁰¹. On the other hand, the Court has considered

and should provide the Commission upon request all the information necessary to assess that the conditions of both Regulations are met.

¹⁰⁰ See for instance Decision of 4 April 2007 in case NN 68/2002, *Individual advertising campaign – lamb (MLC)*, where the Commission considered as *de minimis* a promotion scheme financed by a parafiscal levy to promote sales of UK lamb (to address the surplus due to the lack of export markets following the outbreak of foot and mouth disease). The budget was £5.2 million, but since the number of beneficiaries was 69,500 (equivalent to the number of lamb producers in Great Britain, all of whom would have benefitted from the campaign), the amount of aid per beneficiary was therefore only £ 74,82, and therefore well below the applicable ceiling (at the time, of Euro 3,000 per three fiscal years, pursuant to Regulation (EC) 1860/2004). See also Decision of 13 July 2009, N 377/2008 *Italy – Promotion and Advertising aid for agricultural products (Sardinia)*, where the Commission accepted the Italian authorities reasoning that aid (with a total budget of Euro 5 million) granted to “processing and marketing” agricultural companies would stay below the ceiling of Regulation (EC) 1998/2006.

¹⁰¹ See case C-301/87 *France v Commission (Boussac)*, [1990] ECR I-307, para. 14.

that Article 107(3)(c) introduces a derogation from free competition, based on the aim of EU solidarity, and that in exercising its discretion, the Commission has to ensure that the aims of free competition and EU solidarity are reconciled, while complying with the principle of proportionality¹⁰². The judicial review by the EU courts of a Commission complex assessment under Article 107(3) is therefore necessarily limited.

State aid may be exempt from notification if it complies with the conditions set by a block exemption regulation adopted by the European Commission. The Court of Justice has also recognised that the Commission may publish guidelines setting out the approach it will follow in the application of Article 107(3)(c), as long as it does not derogate from the provisions of Articles 107 and 108. The Commission has published a large number of guidelines specifying the principles and conditions that a State aid measure must satisfy to be compatible with the Internal Market under Article 107(3)(c). Although the Commission does not have to set out its policy in written guidelines, once it does so the Commission is bound by them, and may only depart from its guidelines in exceptional and duly reasoned circumstances.

The Commission's policy on the application of Article 107(3)(c) to agricultural promotion aids have long consisted of very detailed guidelines, which are currently contained in the *Community Guidelines for State Aid in the Agriculture and Forestry Sector 2007 to 2013*¹⁰³ ("2007-2013 Guidelines").

The Commission differentiates at the outset between aid to "advertising", on the one hand, and aid to "promotion operations", on the other.

Advertisement is defined as "*any operation which is designed to induce economic operators or consumers to buy the relevant product. It includes all the material which is distributed directly to consumers for the same purpose, including advertising activities aimed at consumers at the point of sale*"¹⁰⁴. The Commission guidelines further separate between advertising campaigns within the European Union¹⁰⁵, and advertising campaigns in third-country markets¹⁰⁶.

The Commission considers that certain promotion operations are not advertising and should be assessed as "technical support aid". Such operations include the dissemination of scientific knowledge, organisation and participation in trade fairs or exhibitions, forums to share knowledge between businesses and competitors, vulgarisation of scientific knowledge and factual information on quality systems, and similar public relations exercises. Technical support aid to companies active in the wine sector, i.e. in the "*processing and marketing* of agricultural

¹⁰² See case T-380/94, *AIUFASS v Commission* [1996] ECR II-2169.

¹⁰³ OJ C 319, of 27.12.2006, p. 1. Past guidelines published by the Commission include: in 1986 a Communication concerning State involvement in the promotion of agriculture and fisheries products (OJ C 272, 28.10.1986, p. 3); in 1987 the Framework for national aid for the advertising of agricultural products and certain products not listed in Annex I to the EC Treaty (OJ C 302, 12.11.1987, p. 6); in 2000 the Community guidelines for State aid in the agriculture sector (OJ C 28, 1.2.2000, p. 2), applicable to "promotion" operations; and in 2001 the Community guidelines for State aid for advertising of products listed in Annex I to the EC Treaty and of certain non-Annex I products (OJ C 252, 12.9.2001, p. 5) ("2001 Guidelines").

¹⁰⁴ 2007-2013 Guidelines, para. 152(a).

¹⁰⁵ 2007-2013 Guidelines, para. 153-158.

¹⁰⁶ 2007-2013 Guidelines, para. 159 and Regulation (EC) 3/2008.

products”, is subject to the rules of Regulation (EC) 800/2008, the General Block Exemption Regulation¹⁰⁷.

A number of promotion activities in the wine sector which are not traditional advertising campaigns nevertheless contain a strong advertising element, and certainly appear to be closer to advertising in terms of intended effects than to the dissemination of scientific knowledge or other “technical support” promotion activities. Activities such as wine tastings or similar events, or press visits to wine regions and wine estates, are subtler forms of advertising and marketing, with the express objective of inducing large buyers and consumers to acquire one’s products¹⁰⁸. According to the Commission’s practice, promotion activities which may contain elements of advertising benefit from the aid according to the conditions laid down for advertising aids¹⁰⁹.

Finally, the application of EU State aid rules to agricultural products remains subordinate to the applicable common organisation of the market (CMO)¹¹⁰. For this reason, “under no circumstance” can the Commission approve an aid which is incompatible with the provisions of a CMO or which would interfere with the proper functioning of the common organisation¹¹¹.

4.3.1. Aid to “advertising” activities

All proposed national measures containing State aid for wine advertising must be previously notified and cleared by the Commission, unless they are below the *de minimis ceilings* discussed in section 4.2.6 above, in which case they do not constitute State aid under Article 107(1) TFEU.

One rule common to all advertising aids is the absolute prohibition of aid granted to advertising of one or more individual companies, as the Commission considers that it presents an immediate risk of competition distortion and provides no lasting benefits for the development of the sector as a whole¹¹².

(a) Advertising in the internal market

As a general rule, to be eligible for State aid, advertising campaigns must comply with EU law on labelling and advertising (Directive 2000/13/EC¹¹³). In addition, advertising activities with

¹⁰⁷ See note 46 above.

¹⁰⁸ In the 2001 Guidelines, the Commission stated it was necessary to extend the definition of “advertising” to include activities outside the media which had the similar effects on competition to advertising using the media, as well as advertising which is addressed to economic operators, for example food processors, wholesale or retail distributors, restaurants hotels and other catering establishment (2001 Guidelines, para. 5)

¹⁰⁹ See Decision of 30 June 2008 in case N 364/2007 – *Hungary/Community agricultural marketing support*, para. 33.

¹¹⁰ As stated above, the wine CMO is presently contained in the Single CMO Regulation (see note 30 above).

¹¹¹ See 2007-2013 Guidelines, para. 11.

¹¹² 2007-2013 Guidelines, paras. 152(j) and 153(b). Similarly, under Regulation (EC) 3/2008, whose “principles” are applicable to advertising actions in third-country markets, advertising should not be oriented towards specific brands or to encourage the consumption of any product on grounds of its origin (Article 1(2)).

¹¹³ 2007-2013 Guidelines, para. 153(c). Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, OJ L 109, 6.5.2000, p. 29, as amended.

an annual budget above Euro 5 million should be notified individually to the Commission. Guidance then differs depending on whether advertising makes a reference to the product's origin.

Origin is mentioned. It should be noted at the outset that advertising campaigns where origin of the product is mentioned should be earmarked for quality products¹¹⁴, essentially products with a EU-recognised denomination such as Designations of Origin (DO) or Geographical Indications (GI)¹¹⁵ or for national or regional quality labels. These rules are stricter than those of previous guidelines; the Commission states that experience has shown that advertising campaigns are very often aimed at reinforcing the preferences of domestic consumers in favour of products from the same Member States, which makes aids related to them incompatible with EU law¹¹⁶.

However, under the 2001 Advertising Guidelines advertising of home-grown products by a Member State was already considered a measure having equivalent effect to a quantitative restriction on imports, and therefore prohibited under Article 34 TFEU (formerly Article 28 EC), and advertising campaigns where the origin was the primary message were only allowed when their objective was to introduce consumers to products with which they were not familiar (and as rule outside the Member State concerned), which appears to be a rather more proportionate restriction¹¹⁷.

Under the present rules, reference may be made to the origin of the products, but the reference must correspond exactly to those references which have been registered by the Community. Also, in the case of national or regional quality labels, the origin of the product may be mentioned as a “*subsidiary message*”. To assess this rule, the Commission takes into account the overall importance of the text and/or symbol, including pictures and general presentation, referring to origin, and the importance of the part of the advertising message which does not focus on origin¹¹⁸. Usually the Commission will ask to be consulted on drafts of symbols, and will request Member States to commit on sending drafts before their approval or use¹¹⁹.

When origin is mentioned, the rate of direct aid shall not exceed 50% of the eligible costs. If the sector contributes to at least 50% of the costs, “*whichever the form of the contribution*”, the Commission allows the aid rate to go up to 100%¹²⁰. This is an express recognition of the important role of mandatory charges in the promotional efforts of Member States, and that these charges truly reflect a contribution by the sector involved.

¹¹⁴ Quality products are defined as products fulfilling the criteria established pursuant to Article 32 of Council Regulation (EC) 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), OJ L 277, 21.10.2005, p. 1, as amended.

¹¹⁵ 2007-2013 Guidelines, paras. 153 and 154. See also Articles 118-A et seq. of the Single CMO Regulation for DOs and GIs in the wine sector.

¹¹⁶ 2007-2013 Guidelines, para 152 (e).

¹¹⁷ 2001 Guidelines, paras. 35-38.

¹¹⁸ 2007-2013 Guidelines, paras. 154 and 155.

¹¹⁹ See *inter alia* Decision of 10 December 2008, N 561/2008 – *France/Actions conduits par les interprofessions*, para. 105.

¹²⁰ 2007-2013 Guidelines, para. 156.

Origin is not mentioned. If the advertising campaign is generic in character, and benefits all producers of the type of product concerned, 100% of the costs may be financed. No mention may be made of product origin whatsoever; generic actions can be carried out by producer groups or other organizations, regardless of their size¹²¹.

(b) Advertising in third-country markets

The Commission acknowledges that State aid for advertising in third countries normally does not create risks for the functioning of the internal market. However, it can still have an impact on competitiveness of EU companies, notably if such advertising is used to the detriment of companies from other Member States. It is therefore understandable that the only restriction in the 2007-2013 Guidelines applicable to advertising outside the EU (besides the general prohibition of campaigns for specific enterprises) is the prohibition of campaigns which risk endangering sales or denigrate products from other Member States.

The Commission also states, however, that so far it has gained little experience with State aid for advertising in third country markets, which makes it difficult to draw up detailed criteria for evaluating such state aid¹²². To solve this difficulty, the Commission proposes that Regulation (EC) 3/2008 – which governs promotion of agricultural products undertaken by the EU – is an appropriate reference to evaluate State aid in third countries. Thus, in order to be authorised, State aid in third countries must “be in line with the principles of” Regulation (EC) 3/2008¹²³.

The applicability of the framework of Regulation (EC) 3/2008 to advertising in third countries, which is even more detailed and restrictive than the guidance on advertising in the Internal Market described above, raises doubts as to its proportionality, considering moreover that “*advertising in third countries does not normally create risks for the functioning of the internal market*”.

According to the “principles” of Regulation (EC) 3/2008, advertising campaigns in third countries benefitting from State aid should comply with the following rules¹²⁴:

- Should not be oriented towards specific-brands or encourage the consumption of any product on grounds of its specific origins. The origin of a product may however be indicated in the case of designations conferred under Community rules¹²⁵;
- Campaigns should draw attention to intrinsic features and advantages of EU products, notably the quality and safety of food, respect for the environment, etc; Regulation (EC) 3/2008 also contains a list of eligible actions¹²⁶;

¹²¹ 2007-2013 Guidelines, para. 157.

¹²² This approach had already been followed by the Commission in the Decision *French Liqueur Wines*, cit. note 56 above, para. 103.

¹²³ 2007-2013 Guidelines, para. 159.

¹²⁴ See inter alia Commission Decisions of 28 October 2010, N 265/2010 – Italy/Advertising of agricultural products in third countries, 14 August 2009, N 225/2009 – United Kingdom/Advertising and Promotion Scheme, and 13 January 2009, N 694/2007 France/Aide publicité produits agricoles.

¹²⁵ Regulation (EC) 3/2008, article 1(2).

¹²⁶ Regulation (EC) 3/2008, article 2(1) and 2(2).

- Products should be intended for direct consumption for which export opportunities or potential new market outlets in third countries, or should be typical or high quality products displaying high added value¹²⁷;
- Third countries should be selected taking into account the markets where there is potential demand¹²⁸;
- All messages must be based on the intrinsic qualities of the product concerned and its characteristics, and must comply with local legislation; the origin of a product may be indicated as part of an information of promotion operation in the case of a designation under Community rules or a typical product needed to illustrate the information or promotion measure. Any reference to the origin of products shall be secondary to the central message of a campaign¹²⁹;
- The EU participation does not exceed 50% of eligible costs, and proposing organisations shall participate in the funding of at least 20% of the programs' cost, with the remaining being borne by the Member State concerned, where appropriate. Regulation (EC) 3/2008 recognises that payments made by Member States and organisations “may come from parafiscal charges or mandatory contributions”¹³⁰.

It may be argued that, by applying Regulation (EC) 3/2008 to all advertising aid in third-country markets, the Commission is placing limitations on references to the origin of products in third-country markets which are unnecessary to protect competition in the Internal Market (which is the aim of EU State aid rules), and may well prove to be too restrictive, in particular for the wine sector. In effect, the origin of a wine is an essential part of any general advertising campaign (not focussed on specific brands), as the qualities and specific characteristics of the wine produced in each region or country are closely associated with the unique combination of the geography, geology and climate of a certain location – the *terroir*.

State aid rules must be rigorously enforced to preserve competition in the Internal Market. However, as we saw in Section 2, wine is a global and fiercely competitive market, and “New World” producers – with whom EU wine companies compete, inside but especially outside the Internal Market – are not bound by such limitations, leaving EU companies at a comparative disadvantage. In the absence of substantive concerns on the internal market, it may therefore be argued that the Commission could adopt a less strict set of rules to the assessment of advertising aids in third-country markets¹³¹.

¹²⁷ Regulation (EC) 3/2008, Article 3(2).

¹²⁸ Regulation (EC) 3/2008, Article 4.

¹²⁹ See Article 5 of Commission Regulation (EC) 501/2008 of 5 June 2008 laying down detailed rules for the application of Council Regulation 3/2008, OJ L 147, 6.6.2008, p. 3, as amended.

¹³⁰ Regulation (EC) 3/2008, Article 13(3).

¹³¹ State aids of course must comply with the EU's international obligations, which in the case of agriculture are specified in the Agreement on Agriculture (WTO-GATT 1994).

4.3.2. Aid to promotion/technical support activities

The compatibility of aid to wine “technical support/promotion” activities is assessed under Regulation (EC) 800/2008, the General block exemption Regulation¹³². If covered by the regulation, wine promotion aid will not be subject to the notification and standstill obligations of Article 108 TFEU, although the Member State concerned must forward to the Commission a summary of the information regarding the aid measure subsequent to its implementation¹³³.

Under the General Block Exemption Regulation, aid to general promotion activities is considerably circumscribed. First, it is authorised only in relation to Small and Medium Enterprises (SMEs)¹³⁴, as the Commission considers that large companies should be able to finance the costs of such measures themselves¹³⁵; and second, the intensity of the aid is limited to 50% of eligible costs, which means that beneficiaries must contribute the remaining amount. In addition, aid for consulting in favour of SMEs may be granted, if the services do not concern a continuous or period activity or relate to the company’s usual operating costs. However, in what concerns participation in fairs, aid can only be granted to cover the eligible costs of the SME’s *first* participation in any given fair or exhibition¹³⁶.

In any event, it should be noted that, as seen in Section 4.2.6 above, if the amounts received by the beneficiary stay below the de minimis threshold (Euro 200,000 for a period of three fiscal years), the measure will not constitute State aid in the meaning of Article 107(1) TFEU, and will therefore be exempt from notification to the Commission.

4.4. The funding of State aid: compatibility of parafiscal charges with EU law

Taxes (together with parafiscal levies or charges) do not fall within the scope of the EU State aid provisions unless they constitute the method of financing an aid measure, so that they form an integral part of that measure¹³⁷.

Under the case law of the European courts, for a tax, or part of a tax, to be regarded as forming an integral part of an aid measure, it must be mandatorily earmarked to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid. In the event of such allocation, the revenue from the tax has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of the aid with the internal market¹³⁸.

¹³² 2007-2013 Guidelines, paras. 103 and 105.

¹³³ Information should be sent within 20 working days from the entry into force of an aid scheme or from the award of an *ad hoc* aid. See Regulation (EC) 800/2008, Articles 3 and 9. Individual aids for consultancy and participation in fairs exceeding Euro 2 million must be notified to the Commission (Regulation (EC) 800/2008, Article 6(1)(e) and (d)).

¹³⁴ The SME category is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding Euro 50 million, and/or an annual balance sheet total not exceeding Euro 43 million.

¹³⁵ 2007-2013 Guidelines, para. 102(b).

¹³⁶ See for instance Decision of 6 April 2009, N 333/07, *United Kingdom/Meat Industry Development Scheme*.

¹³⁷ See case C-174/02 *Streekgewest* [2005] ECR I-85, para. 25.

¹³⁸ See case 47/69 *France v Commission* [1970] ECR 487, paras. 17, 20 and 21.

Therefore, if a wine promotion measure constitutes State aid, in the meaning of Article 107(1) TFEU, and is financed by a mandatory levy imposed on the wine sector which constitutes an integral part of the measure, the notification of the aid pursuant to Article 108(3) must also cover the method of financing, so that the Commission may consider it on the basis of all the facts¹³⁹.

The funding of an aid by means of compulsory charges can affect the aid by having a protecting effect extending beyond the aid itself. In particular, if it is found that a mandatory charge discriminates imported or exported products (because, for instance, these products are subject to the charge and do not benefit, or do not benefit in equal measure, from the measures funded by the charge as domestic production), the charge will be incompatible with EU law.

In effect, pursuant to settled case-law, if the advantages stemming from the use of the revenue from a charge (which applies systematically to national products marked domestically, to exported products and to imported products alike) *fully offset* the burden borne by the national product marketed on the national market when it is placed on the market – because imported and/or exported products do not benefit at all from the activities financed by the charge – such charge constitutes a *charge having an effect equivalent to a customs duty* and is contrary to Article 30 TFEU¹⁴⁰.

On the other hand, if the advantages accruing from the use of the revenue generated by the charge to the taxed national products marketed on the national market *offset only partially the burden borne by those products* – given that imported and/or exported products benefit from the activities financed from the charge, but not to the same extent as domestic production – such a charge will constitute discriminatory taxation, in breach of the prohibition laid down by Article 110 TFEU¹⁴¹.

In both cases, the Commission cannot declare a wine promotion aid measure, of which the charge forms part, to be compatible with the common market, since pursuant to the case law of the European Courts the method by which an aid is financed may render the entire aid scheme incompatible with the internal market. This will be so even if the State aid measures fulfill the conditions set by the applicable Commission guidelines to be declared compatible with EU law under Article 107(3)(c) TFEU¹⁴².

¹³⁹ If this requirement is not satisfied, it is possible that the Commission may declare that an aid measure is compatible when, if the Commission had been aware of its method of financing, it could not have been so declared. See case C-262/01 *Van Calster and Others* [2003] ECR 0000, para. 50.

¹⁴⁰ Case C-17/91 *Lornoy and Others* [1992] ECR I-6523, para. 21, and Case C-72/92 *Scharbatke* [1993] ECR I-5509, para. 10.

¹⁴¹ See cases C-234/99 *Nygaard*, 2000 ECR I-3657, and C-347/95 *UCAL*, [1997] ECR I-4911, para. 22.

¹⁴² See case C-262/01 *Van Calster and Others* [2003] ECR 0000, para. 48.

5. Conclusion

EU State aid law, as enforced by the European Commission and the EU courts, imposes specific obligations on public authorities wishing to assist their wine sectors in promoting its products, both in the EU territory and in third-country markets. Serious negative consequences for beneficiaries may follow if a State aid measure is implemented before being approved by the Commission or, even worst, if it is declared incompatible with the internal market. When considering a promotion initiative for the wine sector, Member States and public authorities are therefore well advised to reflect carefully in advance on how they will approach State aid issues.

The first thought should go to avoid, if possible, that the promotion measure be considered as a State aid under Article 107(1). Depending on the national legal framework of the Member States, promotion activities of professional and inter-branch wine organisations may be financed through mandatory levies, and stay below the State aid radar, if the State limits its role to that of a “mere collection vehicle” and the promotion campaign is entirely defined and implemented by the sector without State interference. To be comfortable that no State resources are involved, the measure should ideally mirror as much as possible the *Pearle* factual situation, in view of the Commission’s strict (and confused) interpretation of that not-so-clear judgment.

The next step would be to conform the amounts granted through State resources to the existing *de minimis* ceiling (Euro 200,000 per beneficiary and three-year period), which would exempt the promotion measure from previous notification to the Commission. In certain cases this may present a challenge, but, on the other hand, with general promotion measures benefitting entire regions or countries, such difficulties may be surmountable, considering the generally fragmented nature of the industry.

If confronted with a measure undoubtedly financed by State resources and which cannot stay below the *de minimis* ceiling, public authorities should check whether the measure may nonetheless be covered by the block exemption of Regulation (EC) 800/2006, since in the affirmative the measure is considered compatible with EU law and no notification is necessary.

In case none of the above exceptions apply, public authorities should then prepare notification of the measure to the Commission well in advance of its planned entry into force. The Commission guidelines – even if spread through several documents and perhaps a bit too strict on third-country markets – provide a reasonably clear roadmap that can be followed as to what the requirements and boundaries are.

As competition for the increasingly demanding (and abstemious) consumers becomes fiercer in the global stage between all producer countries, it is likely that States and public authorities will continue to play a meaningful role in supporting wine promotion activities in the future. Let us expect that State aid law will continue to evolve in step with the industry, and that while continuing to protect vigorously competition in the internal market, it will also contribute to increasing the competitiveness of European wines.

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