Public enterprises as policy instruments in the intersection of the EU and WTO legal frameworks on state aid

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I. INTRODUCTION

Public enterprises, or enterprises which, at least partly, belong to public authorities, play a key role in the national economies of many European Union Member States.\(^1\) Using private law tools to pursue public interests, public enterprises can help ensure the supply of many basic public services and have favoured industrialization and growth in many countries, supporting employment and contributing to even out differences between regions. On the other hand, they are an instrument which bears some risks, from being a potential haven of corruption to possibly determining a waste of public resources.

With regard to the supranational dimension, public enterprises become relevant when they interfere with trade relations among States and, in particular, in connection with the rules which limit State aids.

First of all, it is important to point out that State aid rules, while they apply to both public and private undertakings alike, become of particular importance with respect to public enterprises. In many countries, in fact, public enterprises have been and are the main beneficiaries of public subsidies and, in some cases, the loss of these subsidies has had disruptive effects on the very existence of such undertakings. Often, the destiny of public enterprises and the supranational regulation of State aids are deeply intertwined. Therefore, when reflecting upon present and future margins of operation of public enterprises, it is necessary to keep in due consideration State aid regulation.

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Secondly, in the Members States of the European Union (EU), there are two different sets of rules on State-owned enterprises and State aid which overlap; the rules set by the EU Treaties and related secondary legislation and the rules deriving from World Trade Organization (WTO) agreements. These two sets of rules have some common aspects and some significant differences, notably, that they are binding in different degrees. Consequently, they are both worthy of consideration and analysis. A State aid granted by an EU Member State to one of its public undertakings, in fact, may be relevant in both legal systems and, as we will see, will not necessarily be evaluated by them in the same way.

Therefore, to verify what margins are left for EU Member States to establish or maintain public enterprises and to employ them in their policies, it is necessary to address the position of both legal frameworks towards public enterprises and, in particular, to compare the two sets of rules on State aids.

An attempt in this direction is the subject of this paper. First of all, two paragraphs are dedicated to the individual analysis of the rules on State trading enterprises and subsidies in the WTO legal framework and the rules on public enterprises and State aid in the EU. Then, the fourth paragraph attempts to compare the two systems, while the fifth addresses the possible outcomes of the overlap of the two sets of rules. Finally, in the closing paragraph, some considerations on the survival of public enterprises and the possibility for EU Member States to utilize them as an instrument for public policies in the light of the two analysed frameworks are made.

II. STATE TRADING ENTERPRISES AND SUBSIDIES IN THE WORLD TRADE ORGANIZATION LEGAL FRAMEWORK

The WTO legal framework specifically regulates public enterprises since the first version of the General Agreement on Tariffs and Trade (GATT) in 1947. In particular, Article XVII is dedicated to ‘State Trading Enterprises’, requiring that if contracting parties establish or maintain a State enterprise, or grant to any enterprise exclusive or special privileges:

such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-
discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

Furthermore, according to Article XVII, purchases and sales involving imports or exports must be made by State trading enterprises ‘solely in accordance with commercial considerations’.²

Article XVII does not define State trading enterprises, but it clearly does not limit the concept to actual public ownership of the undertaking, extending its scope to enterprises upon which public authorities have bestowed exclusive or special privileges, much like Article 106.1 of the Treaty on the Functioning of the European Union (TFEU).³ On the other hand, public enterprises only become relevant to the WTO legal framework when they are involved in imports or exports; hence the name of State ‘trading’ enterprises.

The GATT rules are relatively mild; Article XVII establishes a self-reporting procedure whereby the Contracting Parties provide information on State trading enterprises under their jurisdiction. Such procedure ‘was not noted for its success’,⁴ possibly due to the fact that no clear definition of these enterprises was provided by the 1947 GATT. On these grounds, during the Uruguay Round (1986-1994), an ‘Understanding on interpretation of Article XVII’ was signed, providing a working definition of State trading enterprises, describing them as ‘governmental and non-governmental enterprises... which have been granted exclusive or special rights or privileges... in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.’ According to the Understanding, if a State believes that another Member has not adequately met its notification obligation and the matter is not satisfactorily resolved after being raised with the concerned Member, it may ‘make a counter-notification’.

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² The need to specify that State trading enterprises must be driven by no other considerations than those which would determine the choices of a private undertaking stems from the depends on the conviction that State enterprises ‘might be operated so as to create serious obstacles to trade’ (S McCorriston and D MacLaren, ‘State Trading, the WTO and GATT Article XVII’ [2002] 25 World Economy 107, 123).
⁴ See paragraph 3.
⁴ McCorriston and MacLaren (n 2) 112.
The Panel, ie, the first tier quasi-judicial body in the WTO dispute settlement system, has clarified that the provision in Article XVII imposes 'a legal obligation' on Members establishing or maintaining State trading enterprises.\(^5\) On the other hand, the provision does not require such enterprises 'to refrain from using the privileges and advantages that they enjoy because such use might 'disadvantage' private enterprises'.\(^6\)

Regarding State aid, Article XVI of 1947 GATT requires that Contracting Parties granting or maintaining subsidies which increase exports or reduce imports must notify the other Contracting Parties and, in cases in which the subsidy is determined to threaten serious prejudice to other Parties, the Party granting the subsidy shall 'discuss' with the other Parties concerned 'the possibility of limiting the subsidization'. As part of the 1994 WTO Agreement, a specific and more detailed Agreement on Subsidies and Countervailing Measures was signed (SCM Agreement). This Agreement provides a definition of what constitutes a subsidy relevant to the GATT framework, indicating that a subsidy shall be deemed to exist if there is a financial contribution of any kind from a public body\(^7\) or there is any form of income or price support which operates directly or indirectly to increase exports or to reduce imports and a benefit is thereby conferred. A subsidy is relevant for the SCM Agreement only if it is 'specific', ie if it is explicitly or implicitly limited to certain enterprises. Subsidies which are contingent upon export performance or upon the use of domestic over imported goods are always prohibited, others are actionable, ie subject to challenge by other Members.

The sanction for Members who do not comply with such rules consists essentially in multilateral remedies. Basically, the SCM Agreement recognizes Members a right\(^8\) to impose countermeasures to other Members who grant or maintain subsidies, which are regulated to ensure that they are legitimate and proportionate.

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\(^5\) WTO Panel, Canada - Wheat Exports and Grain Imports (6 April 2004).
\(^6\) Appellate Body of WTO Panel, Canada - Wheat Exports and Grain Imports (30 August 2004).
\(^7\) See C Micheau, State aid, subsidy and tax incentives under EU and WTO law (Wolters Kluwer 2014).
\(^8\) A Ligustro, Le controversie tra Stati nel diritto del commercio internazionale: dal GATT all' OMC (Cedam 1996), 457.
In general, the WTO rules on subsidies do not provide for exemptions connected to the reason for which the subsidy is being granted. There are two exceptions, which show a clear preference for the privatization of public enterprises; the subsidies which are part of a privatization process in a developing country (Article 27) and those necessary for the transformation ‘from a centrally-planned into a market, free-enterprise economy’ (Article 29) are both allowed.

III. PUBLIC ENTERPRISES AND STATE AID IN THE EUROPEAN UNION

While the WTO legal framework explicitly provides a specific set of rules on State owned enterprises, the EU Treaties declare themselves indifferent towards their existence. The so-called ‘principle of neutrality’ is today enshrined in Article 345 TFEU, guarantying that EU law will not interfere with national choices regarding property ownership. This principle, however, must be balanced with other principles of EU law, and, in particular, with those related to competition and the internal market. As the case law of the European Court of Justice (ECJ) has made clear, Article 345 ‘does not have the effect of exempting [the system of property ownership] from the fundamental rules of the Treaty’.9

The alleged indifference of the EU Treaties towards the public or private ownership of enterprises in fact meets its limit in the possible violation of other rules,10 primarily the ones on competition, which apply to all undertakings, including those which are publicly owned.11

In fact, it is no coincidence that the main point of contention between the EU and Member States regarding State-owned enterprises has always been the implementation of the Treaty provisions on State aid, which also apply to both private and public enterprises.12

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9 Case C-302/97 Klaus Kone v Republik Österreich [1999] ECR I 3099.
11 Except for undertakings who operate services of general economic interest or revenue-producing monopolies, which are only subject to the rules on competition ‘in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them’ (Article 106, TFEU).
12 Article 106 TFEU directly refers to Articles 107-109.
The set of rules on State aid set by the Treaty are placed in the Chapter dedicated to competition. Article 107 TFEU states that:

[...] any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

The provision bears a general prohibition, which corresponds to the incompatibility of the aid with the internal market, which is defined by Article 26 TFEU as the ‘area without internal frontiers in which the free movement of goods, persons, services and capital is ensured’, the creation and preservation of which is one of the main aims of EU policies.

Such general ban has a number of exceptions, listed in Article 107. In some cases, aids are always considered compatible with the internal market, such as aids ‘having a social character, granted to individual consumers’. In others, aids may be considered compatible, like aids aiming at promoting ‘the economic development of areas where the standard of living is abnormally low’.

The incompatibility of the aids is presumed but a procedure is established to verify it case by case. The institution responsible for this evaluation is the Commission, which decides on the matter with broad discretionary powers. Article 108 requires all plans granting aids to be notified to the Commission. The Member State concerned may not put its proposed measures into effect until the procedure has resulted in a final decision. If the Commission finds the aid incompatible with the internal market, it requires the State concerned to abolish or alter it within a period of time. If the State does not comply, the Commission may refer the matter to the ECJ. The rules for the procedure are presently set by Council Regulation 2015/1589,\(^\text{13}\) which also provides for the recovery of unlawful aids.

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These rules reflect the economic ideas that have characterized the process of European integration in a direction markedly in favour of a free market economy and therefore, have had a dramatic impact on State-owned enterprises.

In fact, while the rules today enshrined in Articles 107-109 TFEU have remained almost unchanged in the succession of Treaties marking the path of European integration, the rules on State aid were not immediately implemented. Subsequently, as the European legal order progressively gained effectiveness, the provisions on State aid were gradually brought to life thanks to the activity of the Commission and the ECJ. Since the 1980s, the Commission has renewed its role in the control of aid by the Member States\(^\text{14}\) and negative decisions have become more frequent, in particular those concerning the relation between Member States and their public enterprises.\(^\text{15}\)

With the Maastricht Treaty in 1992, the stringent regulation of public deficits has reinforced the trend of reducing public intervention in the economy. At that time, a broad interpretation of the rules on State aid and a restrictive one of the related exemptions has undoubtedly encouraged the privatization processes of national public enterprises.

For instance, one of the main causes of the 1990s privatization of Italy’s consolidated public enterprise system, which had for a long time been the main beneficiary of State aids in the Country,\(^\text{16}\) has definitely been the tighter EU standards for State aids.\(^\text{17}\) A meaningful example of such development is the ENI-Lanerossi case. In 1962, Lanerossi S.p.A., a historical Italian wool industry, had been taken over by the State holding company Ente Nazionale Idrocarburi (ENI). Lanerossi S.p.A., in turn, had absorbed several other private companies in the textile sector. Following the continued losses of some of its subsidiaries, Lanerossi benefited from a number of aids by the Italian Government. In 1980, the Commission informed the Italian Government that these measures could only be exempted from the incompatibility rule of Article 92 provided that the assistance

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\(^{15}\) F De Cecco, State Aid and the European Economic Constitution (Hart 2013), 69.

\(^{16}\) Mazzoni (n 14).

\(^{17}\) OECD, Reviews of Regulatory Reform: Regulatory Reform in Italy 2001, 24.
was granted for a limited period and under the condition of the implementation of a restructuring program, aimed at making the company self-sufficient.\textsuperscript{18}

These aids became the object of a lively discussion between the Italian Government and the European Commission. Nevertheless, Italy continued to subsidize the Lanerossi group companies, with measures that were sanctioned in a 1988 Decision, in which the Commission applied the so-called private investor test, considering the aids illegal because:

\begin{quote}
no private company or investor, basing its or his decision on the foreseeable possibility of profit, and disregarding any social considerations or considerations of regional or sectoral policy, would have made capital subscriptions to cover the operating losses over such a long time.\textsuperscript{19}
\end{quote}

This Decision was appealed by Italy, but confirmed by the ECJ.\textsuperscript{20}

The Italian Government initially tried to oppose the new trend, but, after having repeatedly clashed with a united front between the Commission and the ECJ, Italy initiated an extensive process of privatization of public industries, which had for a long time been the main beneficiaries of State aids in the Country and which would unlikely have survived in the absence of public economic intervention.

The final blow for the Italian public enterprise system was the so-called ‘Andreatta-Van Miert agreement’ of 1992, which marked a significant acceleration of the privatization process. The ‘agreement’, which was essentially an informal deal between the Italian Government represented by the Foreign Affairs Minister Beniamino Andreatta and the European Commissioner for Competition, Karel Van Miert, allowed the Italian State and its public holdings to fully honour the obligations of the struggling public subsidiaries. However, at the same time, the Italian Government undertook to reduce by 1996 the debt of public enterprises to levels which would be acceptable for a private investor in a market economy.\textsuperscript{21}

This reduction of debt was to be obtained from the income arising from the

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\textsuperscript{18} Case 303/88 \textit{Italian Republic v Commission of the European Communities} [1991] ECR I 1433 \\
\textsuperscript{20} Case 303/88 \textit{Italian Republic v Commission of the European Communities} [1991] ECR I 1433. \\
\end{flushleft}
privatisation of some of the subsidiaries of IRI, the public holding company established in 1933 to rescue bankrupt banks and private companies which later became one of the protagonists of the ‘Italian economic miracle’ and was then gradually liquidated.

The criteria for the implementation of the rules set by the Treaty were gradually outlined by the Commission itself, between the late 1970s and the 1980s. The private investor test, which we have seen put into practice in the ENI-Lanercossi case, is particularly relevant and interesting in relation to the potential use of public enterprises as policy instruments. More recently, the European Commission has re-branded the test as a more general ‘market economy operator’ (MEO) test. The test assesses whether a range of economic transactions—not only direct investments—carried out by public bodies take place under normal market conditions and, therefore, whether they constitute illegal State aid.

In fact, the decision of whether a certain economic transaction carried out by a public body would also have been carried out by an MEO is prone to a high degree of subjectivity and is ultimately entirely left to the Commission’s discretion.

In the recent Notice on the notion of State aid as referred to in Article 107(1) TFEU of 19th May 2016, the European Commission has clarified that the MEO test is normally not applicable if the State acts as a public authority rather than as an economic operator. For example, if a State intervention is driven by public policy reasons, such as reasons of social or regional development, the State’s behaviour, while being rational from a public policy perspective, may at the same time include considerations which an MEO would normally not consider. So, according to the Commission, all considerations which exclusively relate to a Member State’s role as a public authority, like social, regional or sectoral policy considerations, should be left aside.

Nevertheless, due to the broad discretion with which it is endowed in the evaluation of the compatibility of State aids with the EU legal order, the Commission itself does, at times, take these same aspects into consideration. For

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22 Acronym for Istituto per la Ricostruzione Industriale, ie Institute for Industrial Reconstruction.
example, in the Philip Morris Case, the Commission formulated the ‘compensatory justification’ principle, according to which, in assessing the compatibility of a proposed measure with the internal market, it is entitled with a discretionary power which implies social and economical evaluations, to be made on a European level. In that occasion, the Commission found that none of the exemptions provided for in the Treaty were applicable, due to ‘the relatively favourable socio-economic situation in the Netherlands when compared to the rest of the Community’.\(^\text{23}\)

In the more recent Alitalia case, the Commission proved that it exercises its powers in the field of State aid with very broad discretion. In 2008, the Commission had ordered Italy to recover a loan granted to its flag carrier,\(^\text{24}\) but the Italian government instead placed the company under extraordinary administration and issued a Decree allowing the disposal of the company’s assets by a private contract procedure to acquirers able to guarantee rapid intervention and continuity of service.\(^\text{25}\) The Commission authorized the operation and the ECJ confirmed that the loan should not be recovered from the buying consortium.\(^\text{26}\)

Such discretion is evident even in general regulations, in which the Commission has at times decided that State aids in particular sectors have an intrinsic value that justifies their exemption from the Treaty’s rules, as, for example, in the Regulations on training aid,\(^\text{27}\) on aid to small and medium-sized enterprises,\(^\text{28}\) on aid for employment\(^\text{29}\) and on public service compensation to undertakings entrusted with services of general economic interest.\(^\text{30}\) Such decisions may be

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\(^{26}\) *Ryanair Ltd v European Commission* [2013] OJ C 225/36.


considered, in a broad sense, of a political nature and, while they are a welcome balance to an otherwise strict discipline, they also raise the common question of the Commission’s lack of democratic legitimacy.

Moreover, the financial and economic crisis of 2008, as predictable, has had a strong impact on the Commission’s attitude towards State aid. Between October 2008 and October 2014, the Commission has authorized over 450 State aid measures to the financial sector.\textsuperscript{31} The so-called General block exemption Regulation of 2008 has declared many categories of aid compatible with the common market.\textsuperscript{32} The Commission also deemed the exemption regarding ‘a serious disturbance in the economy of a Member State’ applicable to measures taken in relation to financial institutions ‘in the context of the current global financial crisis’\textsuperscript{33} and simplified State aid procedures ‘to support access to finance in the current financial and economic crisis’.\textsuperscript{34}

In conclusion, the EU State aid rules, although primarily concerned with avoiding competition distortions in the internal market, also allow for the recognition of the circumstance that ‘public intervention in the economy may be warranted for various reasons, and these may be in the “Community interest”’.\textsuperscript{35} In this context, considerations on national economic policies or social values may, in theory, sometimes prevail, justifying exceptions to the rules protecting competition.\textsuperscript{36}

\textsuperscript{31} See http://ec.europa.eu/competition/state_aid/scoreboard/financial_economic_crisis_aid_en.html. As it has been noted, the Commission’s permissive approach also meant that very few decisions on State Aid were challenged in front of the Court in that timeframe (J.J. Piernas López, \textit{The concept of state aid under EU law}, Oxford, 2015, p. 229).


\textsuperscript{34} Commission, ‘Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis’ (Communication) 2009/C 16/01.

\textsuperscript{35} L Rubini, \textit{The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective} (OUP 2009), 40.

IV. THE WTO AND EU RULES ON STATE AIDS AND PUBLIC
ENTERPRISES: SIMILARITIES AND DIFFERENCES

With regard to State aids, both the WTO and EU legal systems offer a detailed
set of rules, with a number of common aspects. First of all, with regards to the
ratio of the regulation on subsidies, both systems regulate subsidies to avoid them
from offsetting the effects of a barrier to trade. Both sets of rules require the aid
to be granted by a public body or through State resources, an economic benefit
for the recipient and specificity of the subsidy and an adverse effect on trade.

As is easily imagined, the two sets of rules differ the most in terms of enforcement
and remedies, reflecting the different nature of the respective legal systems. While
the EU is an actual legal order, in which Member States have partly limited their
sovereignty and whose provisions are legally binding and effectively enforceable,
the WTO agreements represent typical international agreements, which do not
create an actual legal order, but simply to a set of rules established by the States
themselves, albeit assisted by a forum for the resolution of disputes.

At the same time, although economic freedoms retain undoubtedly a central
position in the EU legal order, the evolution of the Treaties and, above all, the
ECJ case law, at least attempt to deal with the issue of balancing economic
imperatives and social rights. On the contrary, in the GATT, the many
safeguards for free trade find limited counterweights.37

These aspects affect the regulation under consideration. In fact, in the EU set of
rules on State aids, the role of the European Commission is crucial, while in the
WTO system, there is no such competent authority on the matter. Furthermore,
the procedure provided for in the GATT and the SCM Agreement envisages a
sanction which consists essentially in multilateral remedies. EU Member States,
on the other hand, definitely may not unilaterally defend themselves against
subsidies granted by other Member States,38 whereas if the Commission decides

37 M D’Alberti, Poteri pubblici, mercati e globalizzazione (Il Mulino 2008), 122.
38 Rubini (n 35), 79.
that an unlawful aid has been granted, it must be fully recovered by the responsible Member State.\textsuperscript{39}

Moreover, the European Commission, as we have seen, is entrusted with relatively broad discretion in evaluating whether an aid falls into one of the categories of exemptions defined by the Treaty or by secondary legislation. On the contrary, WTO law does not provide for any exemption and all subsidies producing negative effects on international trade are actionable and countervailable.

V. THE POSSIBLE OVERLAP OF THE TWO SETS OF RULES

Hence, if an EU Member State grants one of its undertakings an aid which may affect trade between Member States and simultaneously cause adverse effects for the trade of other WTO Members, such aid may be subject to review under both legal systems.\textsuperscript{40} The overlap is most likely when the aid is directed to enterprises operating in the goods sector, since in this sector EU Member States are also bound by the SCM Agreement. Conversely, there is no specific WTO agreement regarding subsidies in the service sector and the GATS does not provide tools to effectively challenge subsidies.\textsuperscript{41}

Moreover, it must be considered that the EU itself is part of the WTO.\textsuperscript{42} Therefore, while it has its own set of rules on State aid, it is also bound, in the fields of its competence, such as Structural Funds and Common Agricultural Policy, by the international rules on subsidies. Also, Member State aids that the Commission has already deemed compatible with the EU internal market may subsequently be challenged in the WTO system.\textsuperscript{43}


\textsuperscript{40} P Wegener Jessen, ‘Rules on State Aids and Subsidies’, in SE Gaines, Liberalising Trade in the EU and the WTO A Legal Comparison, (BE Olsen and KE Serensen eds, CUP 2012), 288.

\textsuperscript{41} CD Ehlermann and M Goyette, ‘The Interface between EU State Aid Control and the WTO Disciplines on Subsidies’ [2006] European State Aid Law Quarterly 4, 696, see also Wegener Jessen (n 40), 293.


\textsuperscript{43} See V. Di Comite, Le sovvenzioni e le misure compensative nell’Organizzazione mondiale del commercio (Cedam 2009), 117.
In general, due to the many exemptions provided by the Treaty and by secondary legislation and due to the discretion with which the Commission applies them, there is a risk that certain measures may be considered prohibited subsidies according to the SCM Agreement, but not illegal State aid according to EU law.

This scenario has materialised itself, for example, in the Airbus case, a relevant chapter in the ancient rivalry between the world’s largest aircraft manufacturers: the European Airbus and the American Boeing. The United States claimed that the European Community and some of its Member States had granted subsidies to Airbus, whose ownership is partly public, in violation of WTO rules. Both the Panel and the Appellate Body concluded against the EC, finding that many subsidies granted to Airbus violated WTO rules.

In this case, subsidies which were not only deemed legitimate under EU law, but were actually granted by the EU itself, were at the same time considered to be in violation of WTO rules. Such difference in the evaluation of the same subsidies highlights the obvious circumstance that the EU, in the Airbus case, has made a ‘political’ decision, favouring the strengthening of the European aircraft manufacturing sector over the ideals of competition and free trade.

VI. SOME FINAL CONSIDERATIONS

In EU Member States, public enterprises of all kinds exist and operate. As much as the EU Treaties are intended to promote competition and a market economy, they do not forbid this kind of undertaking (and neither do the WTO Agreements). As we have seen, what is required is, rather, that public enterprises act like ‘ordinary’ economic operators, respecting the rules on competition and, in particular, those on State aids.

In other words, neither the WTO nor the EU legal systems prevent the survival of State-owned enterprises in EU Member States, but both frameworks establish

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44 15% of the company belongs to the French State, 29% to the Société de gestion de l’aéronautique, de la défense et de l’espace (SOGEADE), whose capital in turn belongs for 50% to the French State, and 15% to the Sociedad Estatal de Participaciones Industriales (SEPI) a Spanish public holding company (see www.airbusgroup.com).
rules which—in the various nuances, with the different scope and the varying degrees of enforceability that we have just addressed—affect their functioning and the relationship with the public authority which owns them.

This is the context in which to evaluate to what extent EU Member States may still utilize public enterprises as an instrument for their policies, issue which becomes of particular interest in years of financial and economic crisis. After all, the pursuit of social purposes appears to belong ‘naturally’ to an undertaking owned by a public authority.\textsuperscript{46}

The limit to the use of public enterprises for such purposes today can be identified in the respect of the limits set by both frameworks but, in particular, of those on State aids set by the EU Treaties and enforced by the European Commission. As we have seen, the European Commission is endowed with relatively broad discretion in the evaluation of the compatibility of State Aids and does, at times, factor considerations of a ‘political’ nature in its decision-making process.

Such a process is mostly beyond reach of the single Member States, who must bear in mind that it is necessary that public intervention, even when inspired by social purposes, takes place bearing in mind criteria of economic efficiency.\textsuperscript{47}

Nevertheless, the Commission’s decisions on State aid so far constitute further proof that there is no (legal) reason for States to back away from the public utility goals traditionally pursued by them through their public enterprises, as long as they bear in mind the abovementioned criteria of economic efficiency, or as long as the intervention falls into one of the categories of exemptions defined by the Treaty, the secondary legislation or the Commission’s practices.

In this context, for example, both public buy-outs of businesses in crisis (if, for instance, they are accompanied by a restructuring plan that may eventually lead to a positive financial result) and the establishment of a public undertaking to

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intervene in an area considered of strategic importance (for example, if equipped with a business plan that could lead to a real possibility of economic return) may be considered admissible.