

# Annual conference on European State Aid Law 2019

## Case Law Developments

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Unpacking Complexity  
Unfolding Opportunity



# **Case law developments**

(Nov 2018-Nov 2019)

- 1. Selectivity**
- 2. Procedure & national judge**



# Selectivity – general principles (1)

- Advantage can be not selective
  - two conditions to not collapse
- Measures applying to all ('general measures')
- Measures applicable to all but not applying to all
  - 'Behaviourial' selectivity (*World Duty Free*)
- Legal technique not relevant (*Gibraltar*, C-16/09 P & C-107/09 P)
- Material selectivity (*Gibraltar*, *POL/HUN Progressive taxes*) - discrimination
- Administrative discretion (not limited)
- Aid schemes and individual aid
  - Individual measure presumed selective if advantage (biased interpretation of *MOL*, C-15/14 P)
- "Three steps" test
  - for fiscal measure (*Azores*, *Gibraltar*, *British Aggregates*, *Paint Graphos*, *World Duty Free*, *Spanish Tax Lease*)
  - (but also non-fiscal measures): *Lübeck*

# Selectivity – general principles (2)

The 3 Steps in reality		Burden of Proof	
Normal Tax System *		= Reference System <i>latu sensu</i>  <i>*Not applicable to dedicated taxes</i>	Commission
Exception	Differences between the beneficiaries and other undertakings	= Reference System <i>strictu sensu</i>	Commission
	That are in a similar situation, •both <i>de jure</i> •and <i>de facto</i> ,	= Comparability test <i>Applicable in all cases</i>	
	With regard to the objectives of the legislator.**	**conflicting case law: the objective of the measure or the objective of the system?	
Justification by the logic of the tax system		Requirements: •Consistency •Proportionality?	Member State

Source: Alfonso Lamadrid de Pablo, Garrigues, ULB, 12.11.19



# Selectivity

- T-77/16, *Ryanair & Airport Marketing Services v Commission*, 13.12.2018 (Zweibrücken airport)
- Annulment – selectivity not established
- Commission considered only airport charges rebates not other measures
- In any way, the fact that only airlines from that airport obtained rebates not decisive
- And, Commission should have shown that more favourable conditions than other airlines



# Selectivity

- C-374/17, *Finanzamt B vs. A-Brauerei*, 19.12.2018
- Annulment on reference system step 1
- Exception to exception (real estate tax intragroup)
- Rejection AG Øe
  - same result but rejection change of reasoning
  - Confirmation *World Duty Free*
- Differentiation *a priori* selective but justified by nature and economy of the tax system
- No longer *probatio diabolica*?



# Selectivity

- C-128/16 P *Commission vs. Spain e.a*, 25.12.2018 (tax leasing – ships)
- Annulment GC (no selectivity) following *World Duty Free*
  - Erroneous premiss that no aid to IEG (only investors)
- Discretionary power to autorise amortisation for IEG
- Behaviourial selectivity



# Selectivity

- T-129/07 and T-130/07, *Ireland and Aughinish Alumina Ltd vs. Commission*, 17.09.2019
- Alumina II decision (2007) – excise duties
- Exemption only for fuel in production of alumina
- No evidence (by MS/beneficiary) of justification by nature or logic of taxation system





# Selectivity

- T-696/17, *Havenbedrijf Antwerpen NV and Maatschappij van de Brugse Zeehaven NV v Commission*; T-673/17, *Port autonome du Centre et de l'Ouest e.a. v Commission*; T-674/17, *Le Port de Bruxelles and Région de Bruxelles-Capitale v Commission*, 20.09.2019
- Exemption of corporate income tax for ports – existing aid
- Reminder of three-step test
  - General taxation rules (taxation of companies)
  - Limited taxation system of port is derogatory
  - Same situation with regard to the objective of reference system
  - No justification



# Selectivity

- T-755/15 and T-759/15, *Luxembourg vs. Commission and Fiat Chrysler Finance Europe vs. Commission*, 24.09.2019
- *Starbucks*: no selectivity examination
- Premiss of individual aid (underlying legislation presumed not selective) – where is the reference system?
- GC: "presumption of selectivity"
  - 'individual aid' (not a scheme)
  - 'advantage' previously proven (ALP – FFT tax ruling tailor made measure)
- **But this is based on questionable interpretation of *MOL C-15/14 P***
- Contra:
  - the measure was the tax ruling scheme for all multinationals
  - FFT's tax ruling is then a mere application of an aid scheme – not selective, no examination of comparison with other rulings



# Procedure

- T-793/14, *Tempus Energy and Tempus Energy Technology*, 15.11.2018
- GB capacity market
- Tempus Energy: a clean-tech start-up group focusing on electricity Demand-Side Response (“DSR”)
  - ensure the continuous balance between electricity supply and demand in the electricity system
  - prevent frequency loss (blackouts), regardless of demand levels
  - DSR enables TSO to increase capacity on the network by asking the “demand-side” (i.e. energy customers) to temporarily shift or reduce peak energy demand in return for payment
  - technology managing electricity usage of customers with flexible load (air conditioning chiller units, storage heating, heat pumps with storage, electric vehicles and non-time critical industrial processes).
  - DSR removes artificial price barriers from the electricity market, bringing transparency and connecting customers with the cheapest available energy.



# Procedure

- T-793/14, *Tempus Energy*, 15.11.2018 (2)
- Protection of the procedural rights of interested parties under Article 108(2) TFEU (and Article 4(4) and 6(1) of the Procedural Regulation)
- The Commission is obliged to initiate a formal investigation procedure if it has doubts on the compatibility of a State measure
- If “doubts” exist, Commission must initiate an investigation:
  - The concept of “doubts” is exclusive
  - The Commission is under an obligation
  - The concept is objective
- To challenge the lack of opening, third parties bear a burden of proof of:
  - Circumstances and length of the preliminary phase
  - Content of the contested decision, i.e. sufficient to show that “*the Commission has not researched and examined, thoroughly and impartially, all of the relevant information ... or it has failed duly to take them into account ...*”



# Procedure

- T-793/14, *Tempus Energy*, 15.11.2018 (3)
- Doubts:
  - the Commission failed to properly assess the potential role of DSR in the GB Capacity Market;
  - restrictions on the duration of DSR contracts under the Capacity Market
  - requirement for DSR operators to choose between transitional and enduring market auctions
  - CM's cost recovery methodology
  - use of open-ended rather than time-bound capacity agreements in the enduring auctions of the CM
  - CM's bid bond requirement to obtain access to the auctions



# Procedure

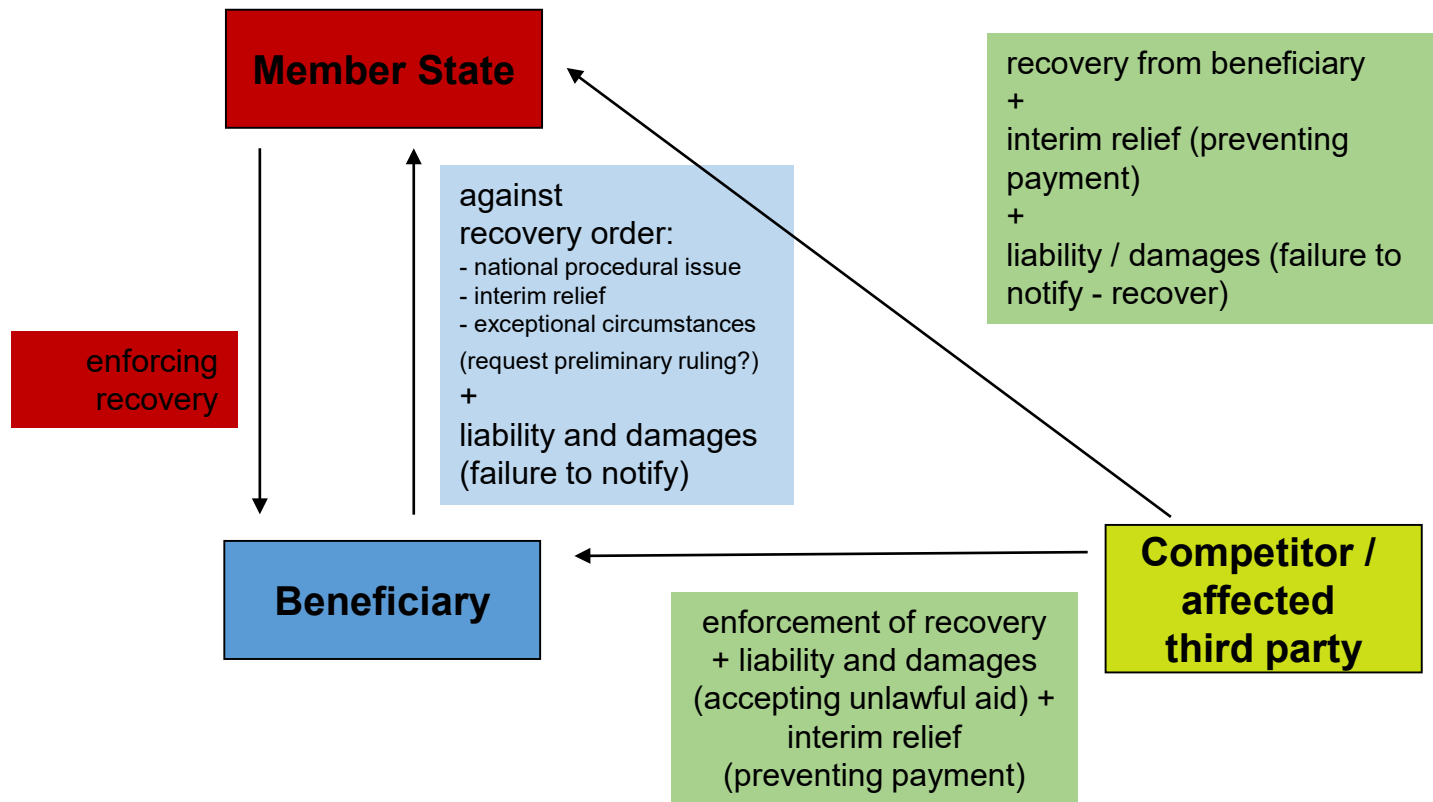
- T-793/14, *Tempus Energy*, 15.11.2018 (4)
- GC:
  - length of the discussions
  - circumstances surrounding the adoption of the contested decision
  - notified measure is significant, complex and novel
  - it gave rise to a long pre-notification phase (with a number of questions on important matters)
  - notified measure challenged in three respects by various operators
  - no Commission's specific investigation during its preliminary examination



# Procedure

- C-349/17, *Eesti Pagar*, 05.03.2019
  - Incentive effect in GBER
  - Obligation for national authorities to recover unlawful aid on their own motion
  - Prescription: national rule not the provision of the Procedural Regulation
- C-654/17 P, *BMW vs. Commission*, 29.07.2019
- See judge Kreuzschitz presentation

# Actions before national courts







# National Judge

- C-598/17, *A-Fonds*, 02.03.2019
- Refund of dividend tax
- Scheme widened to companies established outside the Member State concerned
- State aid rules and free movement of capital
- Obligations of national courts
- *a national court cannot assess whether a residence condition, [...] complies with Article [63(1)] TFEU, where the scheme for the refund of dividend tax concerned constitutes an aid scheme*
- Old case law: *Iannelli/Volpi*, 74/76



# National Judge

- C-387/17, *Fallimento Traghetti del Mediterraneo*, 23.01.2019
- Subsidies before liberalisation of the market concerned cannot be "existing aid" because of the merely formal absence of liberalisation of that market at the time
  - to the extent that those subsidies were liable to affect trade between Member States and distorted or threatened to distort competition (for the referring court to ascertain)
- Article 1(b)(iv) Reg 659/1999
  - not applicable to this situation
  - subsidies granted in breach of the obligation of prior notification
    - State cannot rely on the protection of legitimate expectations
  - action for damages against MS by competitor of beneficiary
    - principle of legal certainty does not permit, by analogy, the limitation period of Article 15(1) Reg 659/1999



# National Judge

- C-585/17, *Finanzamt Linz, Finanzamt Kirchdorf Perg Steyr* (Dilly's Wellnesshotel), 14.11.2019
- Article 108(3) TFEU - GBER 800/2008 & 651/2014
- Article 108(3) TFEU
  - *national legislation which alters an aid scheme by restricting those eligible for such aid is, in principle, subject to the notification requirement laid down in that article*
- Article 58(1) Reg 651/2014 (transitional provisions)
  - *aid granted before the entry into force of that regulation, on the basis of an aid scheme [...] may be exempted, under that regulation, from the notification requirement laid down in Article 108(3) TFEU*
- Article 44(3) Reg 651/2014
  - *an aid scheme, [...] in which the amount of an energy tax rebate is specifically fixed in a calculation formula provided for by the national legislation establishing that scheme, complies with that provision*

**Thank you for your attention!**

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