OVERVIEW OF THE PRINCIPAL DEVELOPMENTS IN STATE AID POLICY AND CASE LAW (2016–17)

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Abstract: This paper offers a concise overview of the most significant developments that occurred in the last year in the field of State Aid control. The first part of the paper is devoted to the developments in the Commission practice in the context of the State Aid Modernization, and in particular to the main legislative (or soft law) innovations, namely the “Notice on the notion of State aid” and the amendment of the General Block Exemption Regulation. The second part, instead, focuses on the evolution of the case law on three topics selected for their relevance: the selectivity criterion, with special attention to tax selectivity, a topic which is strictly intertwined with the Commission’s policy objective of fighting at once tax evasion and harmful unilateral tax measures adopted by member States; the recovery of unlawful aid, with the emphasis placed on the difference between direct and indirect aids when calculating the amount to be recovered; and the role of national judges in the assessment of aid measures and the inherent predictable development of private enforcement in the field of State Aid. The paper ends with a forward-looking perspective on developments expected in the next future.

1. INTRODUCTION

This paper covers the most significant developments that occurred in the last year (i.e., the last two quarters of 2016 up to the first quarter of 2017 – “the reference period”) in the field of State aid control.2

The first part of the paper – devoted to the developments in Commission practice – opens with a reference to the main legislative initiatives taken by EU institutions during the reference period, namely the adoption of the long-awaited “Notice on the notion of State aid” and the amendment of the General Block Exemption Regulation. After five years since the launch of the State Aid Modernisation programme, these initiatives are aimed at completing the programme. They therefore offer the possibility of a preliminary assessment of whether the ambitious objectives set out in the State Aid Modernisation programme have been achieved or at least earnestly pursued. Beyond this, in the

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2 This paper is based on the presentation delivered by the Author at the Italian Antitrust Association’s 2017 Conference, held in Capri (Italy) on 25–26 May 2017. This paper reproduces and reorganises that presentation, with only slight updates and adaptations. The reader should therefore expect to find a reasoned selection of the most significant developments and a fairly comprehensive bibliography to be able to explore each topic in more depth. Some comments are devoted to the developments in case law, but with no pretension of a thorough or exhaustive analysis.
reference period the Commission also faced two main challenges, which added to its priorities: (a) the development of concrete strategies to fight tax evasion and tax competition between Member States, and (b) the Brexit phenomenon. Therefore, these two issues will also be briefly discussed in the first part of the paper.

The second part of the paper focuses on the evolution of case law on three main topics: (i) the selectivity criterion, with special reference to tax selectivity (a topic that is strictly intertwined with the Commission’s policy objective of fighting, simultaneously, tax evasion and harmful unilateral tax measures adopted by Member States); (ii) the recovery of unlawful aid, with emphasis on the difference between direct and indirect aid when calculating the amount to be recovered; and, last but by no means least, (iii) the role of national courts in assessing aid measures and the inherent predictable development of private enforcement in the field of State aid.

This short, but hopefully accurate, overview of the current situation in the field of State aid enforcement will not only help to identify unresolved problems but also offer tools to understand the expected developments for the coming months and evaluate the positive or negative outcomes of the actions to be taken at several levels in the near future. From this perspective, EU judges will again play a crucial role, as they are called to rule on certain landmark cases in the next few months.

2. THE COMMISSION’S PRACTICE AND THE EU’S POLICY ON STATE AID

The reference period was marked by the last phase of implementation of the modernisation programme through the adoption of a few legislative measures that remained in the pipeline. As is well known, in May 2012 the European Commission launched the 2012–2014 State Aid Modernisation programme, which set three main objectives: fostering growth, focusing enforcement on cases with the largest impact on the internal market, and streamlining procedure, thus accelerating the decision-making process. As the modernisation programme was launched in the aftermath of the financial and economic crisis, it also placed great emphasis on State aid control as a means of limiting public spending, which in turn is expected to contribute to budgetary consolidation.³

The modernisation programme was ambitious and extensive, covering virtually all secondary legislation and soft law instruments relating to State aid. In this framework, the EU institutions introduced some landmark changes to the State aid secondary legislation. For instance, the Council adopted amendments to the Procedural Regulation.⁴ The main change was an increase of the Commission’s investigative powers, which can now request information directly from undertakings in given circumstances, and under the threat of fines in the event of non-

³ See recital 5 to the Communication on EU State Aid Modernisation.

compliance. The Council also amended the Enabling Regulation to permit widening the recourse to block exemptions. By broadening the Commission’s powers to block-exempt certain aid categories, it provided strong support to the Commission in focusing enforcement on cases with an important impact on the internal market. Building on this, in 2017 the Commission enacted and published the new General Block Exemption Regulation. The purpose of this initiative is to focus enforcement on cases with the largest impact on the internal market. Furthermore, the Commission is currently consulting Member States and stakeholders on a newly revised de minimis regulation.

Likewise, the Commission reviewed a huge number of pieces of soft law. With the aim of fostering economic growth, the Commission published specific guidelines including the regional aid guidelines (RAG) for 2014–2020, and further guidelines on research, development and innovation (R&D&I), environmental aid and risk capital. The guidelines based on which investment aids are to be assessed are inspired by the common principles to assess compatibility of State aid. These principles essentially require that three main conditions are fulfilled (appropriateness of the aid to address identified market failures, incentive effect and proportionality), whilst ensuring that aid spending is kept to a minimum and does not cause huge negative effects on competition and trade that are not outweighed by the expected benefits. Through the revision of the guidelines and their harmonisation around a few common requirements, the Commission has tended to shape its compatibility assessment to orientate State spending towards common objectives of industrial policy, in line with the broader Europe 2020 agenda goals.

2.1 The notion of State aid

On 19 May 2016, as part of the modernisation initiative, the Commission issued the long-awaited “Notice on the notion of State Aid”.


9 The Europe 2020 agenda is the EU’s strategy for growth and jobs and “it emphasizes smart, sustainable and inclusive growth as a way to overcome the structural weaknesses in Europe’s economy, improve its competitiveness and productivity and underpin a sustainable social market economy”. On this topic, see P. Jansen, The Interplay Between Industrial Policy and State Aid: Natural Combination or Strange Bedfellows?, EStAL 4, 2016, 575–602.


The Notice, which presents “the Commission’s understanding of Article 107 of the Treaty, as interpreted by the Court of Justice and the General Court”, had long been in the pipeline due to a few controversial points (mainly concerning infrastructure investment) on which it had been difficult to reach a consensus with Member States. Sixty years after the signing of the Treaty of Rome, the very text of Art. 107(1) of the Treaty on the Functioning of the European Union (TFEU)\(^\text{12}\), which has remained unchanged since then, is still the subject of debate, controversy and even discovery. The notion of State aid comprises five cumulative constituent elements\(^\text{13}\): (i) the existence of an economic advantage, which implies that an economic activity is affected and the recipient qualifies as an undertaking; (ii) a supplementary charge for the public budget to fund the granting of such an advantage; (iii) the selective nature of the advantage itself; (iv) a distortion of competition (which is inherent in the granting of the advantage whenever the affected market is open); and (v) the potential of the advantage affecting trade between Member States\(^\text{14}\).

The notion of “State aid” is deemed to be a legal notion based on objective criteria\(^\text{15}\), and the Commission enjoys no discretion when assessing whether a measure constitutes State aid, except for the technical discretion inherent in complex economic assessments when needed\(^\text{16}\). The Commission’s Notice emphasises the role of EU case law as the primary reference for interpreting the Treaty and, at the same time,

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clearly states its limited discretionary power in applying State aid rules.\textsuperscript{17}

The Commission’s guidance is therefore irrelevant for assessing the legality of a Commission decision under Art. 107(1) TFEU.\textsuperscript{18} Nevertheless, the Notice pursues a clarification objective. It is intended to provide help to: (i) inexperienced granting authorities, mainly at a decentralised level; and (ii) unskilled undertakings, particularly SMEs, for a self-assessment of measures based on the key concepts relating to the notion of “State aid” under Art. 107(1) TFEU. The Notice therefore primarily has “educational” aims, coupled with the secondary goal of contributing to an easier, more transparent and more consistent application of State aid law across the EU.

Examining the content of the Notice is, of course, beyond the scope of this paper. Suffice it to note that, for the purpose of this overview, two sections are particularly relevant or controversial:

(i) the section on infrastructure aid, which has kept the Notice on hold for a long period due to the opposition from the (or some) Member States: the Notice eventually recalls the developments following the Leipzig-Halle judgment\textsuperscript{19}, reminds Member States that public administrations and all entities deemed to manage public funds for infrastructure investment must now deal with the possible application of EU law on State aid and, to facilitate the task of such public administrations, provides analytical grids on the application of State aid rules\textsuperscript{20}; and

(ii) the section on tax measures and selectivity, which, however, has already become obsolete as a result of the developments in case law and in the Commission’s practice that have closely followed the adoption of the Notice and that will be briefly examined in the second part of this paper.

2.2 The broadening of the General Block Exemption Regulation

It is well known that, under the TFEU, Member States are normally required to notify the Commission of their plans for State aid and should only go ahead if they have received the Commission’s approval. The Treaty does not encompass any assignment of power to the Commission to adopt group exemptions, i.e., the approval of given categories of aid, subject to specific conditions. In the late nineties, the Commission, finding that the instrument of block exemption was crucial to achieve the objectives of the first wave of modernisation of State aid rules (which was to prepare for the

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\textsuperscript{17} Commission Notice on the notion of State aid under Art. 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19 July 2016, paras. 3–4.

\textsuperscript{18} Judgment of 12 September 2013, Germany v Commission, Case T-347/09, ECLI:EU:T:2013:418, para. 51. Specifically, the Commission is precluded from narrowing the notion of aid through soft law and from acting against the objective of State aid control.


\textsuperscript{20} European Commission, Analytical Grids on the application of State aid rules to the financing of infrastructure projects, September 2015. See G. M. Galletti, Remarks on the Infrastructure Section of the Commission Notice on the Notion of State Aid, State Aid Hub, 22 June 2016.
enlargement from EU-15 to EU-25), launched a legislative proposal to adopt an enabling regulation based on Art. 94 of the EC Treaty, whereby the Council could adopt all the regulations useful for the application of Arts. 92 and 93 of the EC Treaty. The proposed regulation was eventually enacted in May 1998 (Regulation EC No. 994/1998) and enabled the Commission to adopt block exemption regulations to cover given categories of State aid, spanning from R&D to regional aid to SMEs, etc. Using its delegated powers, the Commission first adopted a few exemption regulations for specific categories of aid. It then adopted the General Block Exemption Regulation (GBER), which declares numerous categories of State aid compatible with the EC Treaty – provided they fulfil precise conditions – and exempts these categories from the requirement of prior notification and approval. This allows Member States to implement State aid measures directly, with full legal certainty and without prior control by the Commission.

Initially adopted on 17 June 2014, the GBER was amended on 14 June 2017 to implement the modernisation plan. With this amendment, the Commission extended the scope of the exemption significantly. Commission Regulation (EU) 2017/1084 exempted, for the first time, aid for ports and airports and amended the notification thresholds for aid for culture, heritage conservation, multi-functional sports arenas and businesses in the EU’s outermost regions. The new GBER pursues two objectives: (a) to reduce administrative burdens for public authorities and other stakeholders, which will allow the Commission, among others, to focus State aid control on larger cases that significantly impact competition in the single market; and (b) to enhance public investments that support common European goals such as growth, jobs, climate, innovation and social cohesion.

In the period covered by the 2014 GBER, Member States implemented a wide range of State aid measures without prior Commission approval. As a result, close to 90% of all State aid measures implemented by Member States (with a combined annual expenditure of approximately EUR 28 billion) relied on the application of the GBER. Consequently, the number of notifications of both individual aid and aid schemes has fallen significantly over the last few years. For example, in the area of research, development and innovation, the number of state aid notifications has decreased by half since 2014. The 2017 revision of the GBER is expected to further strengthen this trend.

It must be stressed that the fact of belonging to one of the categories included in the GBER is a necessary condition to qualify for the exemption from the prior notification requirement – but it is not the only condition. A State measure can only benefit from the exemption if it complies with further conditions intended to reflect an automatic screening of the large panoply of possible State measures and, thus, to ensure that the aid is compatible with the internal market within the meaning of Art. 107(2) or (3) TFEU in accordance with the general compatibility

assessment criteria. Specifically, to be exempted the aid must:

i) comply with specific thresholds, as defined in Art. 4 of the GBER;

ii) ensure transparency (the aid should take a form that allows the gross grant equivalent to be quantified ex ante without any need to conduct a risk assessment); and

iii) generate an incentive effect – in accordance with Art. 6 of the GBER – that the granting authorities are supposed to check beforehand.

The counterweight of the exemption regime provided under the GBER is a set of provisions regarding Member States’ duty of transparency (information and publication of issued aid within six months) and a self-assessment through an evaluation plan for aid schemes exceeding 150 million per year, even though they are covered by the GBER.

With a view to assisting the building up of appropriate competencies at national level, the Commission offers an IT platform to which national authorities can submit questions on interpretation with a view to receiving rapid feedback, particularly for measures that fall under the GBER. The Commission is also available to send its own resources to the offices of national administrations responsible for granting State aid and to host Member States’ administrators at the Commission’s premises to further develop their expertise.

In specific cases of interpretational uncertainties or novel situations, national authorities can start a pre-notification process through which they seek the Commission Services’ views on the application of the GBER to the case under examination and acquire sufficient legal certainty. For individual aid, beneficiaries should ideally be involved in dealing with the Commission Services as suggested by the Commission itself in its best practices, but this is not always the case. Indeed, the involvement of beneficiaries in pre-notification proceedings varies significantly depending on the approach taken by the granting authority. Much more progress is still needed in this respect. The pre-notification process ends with: (i) an administrative letter issued by the Commission Services stating that, based on the available information, the aid in question indeed seems to be covered by the GBER; or (ii) an invitation to the granting authority to proceed with the official notification.

With a view to ensuring transparency, monitoring and compliance, and also in light of the extension of the GBER, in June 2016 the Commission signed a Protocol of Common Understanding with Italy, which addresses the needs, benefits and means of ensuring appropriate supervision over three distinct phases of State aid interventions: (i) upstream preparation of the aid measure; (ii) implementation (including the eligibility checks of beneficiaries and compliance with the transparency provisions); and (iii) ex-post controls. For this purpose, the Italian government has implemented a comprehensive State aid registry to facilitate compliance and monitoring. The registry was activated in August 2017 and allows for automatic checks on State aid compliance, such as cumulation rules (including de minimis) and compliance with the Deggendorf principle. The registry is managed by the Ministry of Economic Development and fed into by granting authorities, under their own
responsibility. It is accessible to the public and linked with the aid database on managed by the Ministry of Agricultural, Food and Forestry Policies.

2.3 EC agenda priorities: the fight against tax evasion and harmful tax competition between Member States

In the last few years, concerns have been growing within the Commission regarding the ill effects of tax competition between Member States and the contribution that a more efficient battle against tax avoidance, tax evasion or tax exemption could give to economic recovery in the wake of the economic and financial crisis and to long-awaited stronger economic growth in the EU. These two aspects are strictly intertwined and must therefore be examined together. In 2017, reflection within the Commission regarding these concerns became sufficiently mature as to translate into actual policy and enforcement measures, which must necessarily be accounted for in a review – however succinct – of the main developments in the field of State aid.

In the tax policy debate, the basic principle is: “to pay taxes where profits are actually made”. On this simple, yet clear and unobjectionable basis, over the last year the Commission has put forward several remarkable initiatives to boost tax transparency and reform corporate taxation. Back in October 2015, Member States approved the Commission’s proposal on the automatic exchange of information on tax rulings.\(^\text{22}\) The second step came in March 2016, when Member States consented to the Commission’s proposal to oblige large EU-based multinationals to provide detailed tax-related information to tax authorities.\(^\text{23}\) In June 2016, the Council adopted a new directive that targets the main forms of tax avoidance by large multinationals, according to global standards developed by the OECD on Base Erosion and Profit Shifting (BEPS).\(^\text{24}\) Once implemented\(^\text{25}\), the legislation will empower Member States to tax profits that are moved to low-tax countries where the company has no genuine economic activity (the “Controlled Foreign Company rules” – “CFC rules”). However, these new rules complement and do not replace the rules on State aid, which have their raison d’être when national governments tolerate or even encourage similar practices to attract businesses to their territory.

Although the Commission focused more on implementing its own policy initiatives, it did not entirely overlook the international extent of this phenomenon. Tax avoidance is indeed undoubtedly a global problem\(^\text{26}\), for which a

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\(^\text{24}\) Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

\(^\text{25}\) Member States must, by 31 December 2018, adopt and publish the laws, regulations and administrative provisions necessary to comply with this directive. They must apply those provisions from 1 January 2019.

common approach is needed at international level. The EU took the first step in this direction with the launch of the Commission’s reflection paper on harnessing globalisation (May 2017). In the paper, the Commission recognises the “positive force” of globalisation whilst warning against the related challenges and the dysfunctions that can consequently arise in the absence of an appropriate legal framework and careful control. Large businesses can take advantage of loopholes in international rules and shift profits to low-tax jurisdictions rather than pay taxes where they produce and sell. This strategy deprives EU governments of tax revenues and is a source of economic unfairness.

Another important initiative in 2017 was the establishment of the first EU list of non-cooperative tax jurisdictions. The Commission launched the process in January 2016 and the final list was published on 5 December 2017. This is an extremely positive development, as a common EU list will carry much more weight than the current patchwork of national lists when dealing with non-EU countries that refuse to comply with international tax good governance standards. It will also provide stronger tools to tackle external tax avoidance.

In parallel with its policy and legislative initiatives, the Commission has finally resolved to act through State aid enforcement to strengthen its combat against harmful tax competition and tax avoidance. State aid enforcement is indeed one of the most effective instruments at its disposal, and the Commission considered the issue crucial enough to dare to face criticism for allegedly stretching the scope of State aid rules beyond reasonable limits.

Back in June 2013, the Commission started an inquiry into the use of tax rulings in all Member States and, from 2014 to early 2016, it opened formal investigations into Starbucks (the Netherlands), Apple (Ireland), Fiat

27 See December 2017 Council conclusions on the list of non-cooperative jurisdictions in taxation matters of 5 December 2017. The Commission set a three-step process for establishing the list of non-cooperative tax jurisdictions. The first step is the drafting of a scoreboard through which the Commission presented information on every country under three neutral indicators: (i) economic ties to the EU, (ii) financial activity, and (iii) stability factors. The jurisdictions that feature strongly in these three categories have been set against risk indicators, such as their level of transparency or potential use of preferential tax regimes. The second step is the screening of third countries’ tax good governance standards, carried out by the Commission and the Council Code of Conduct Group on Business Taxation. The third step is listing.

28 The Commission will also continue negotiating international rules that prevent companies established in third countries from avoiding direct and indirect tax obligations, thereby safeguarding Member States’ tax base. From this perspective, the EU signed a deal on the automatic exchange of tax data with Andorra in February 2016. See press release available at http://www.consilium.europa.eu/en/press/press-releases/2016/02/12/eu-andorra-deal-on-automatic-exchange-of-tax-data/.


Finance & Trade (Luxembourg)\textsuperscript{32}, Amazon (Luxembourg)\textsuperscript{33}, McDonald’s (Luxembourg)\textsuperscript{34} and the Belgian “excess profit” tax scheme\textsuperscript{35}. In three of these cases, the Commission adopted negative decisions and issued recovery orders\textsuperscript{36}. Important developments occurred in this direction in the second half of 2016 and throughout 2017, as the Commission adopted two additional negative decisions with record recovery amounts (in the Apple and Amazon cases). It also opened three new formal investigations into GDF Suez-Enegie (Luxembourg)\textsuperscript{37}, the UK tax scheme for multinationals\textsuperscript{38} and Ikea (Netherlands)\textsuperscript{39}, thus demonstrating that its intention was not to target only US multinationals.

These decisions confirm the Commission’s approach in the field. In short, its reasoning is based on the following key concepts: (i) use the arm’s length principle as a benchmark to assess the existence of an advantage; (ii) use the general corporate income tax system as the reference system in the three-step analysis of selectivity; and (iii) reject the idea that multinationals are in a different factual or legal situation from that of domestic independent companies and therefore entitled to different treatment under the same tax system.

In this context, particular attention must be paid to the Apple case because of its high level of sophistication, its notoriety and its paradigmatic role. The investigation concerned two consecutive tax rulings issued by Ireland, which endorsed a method of internally allocating profits within two Irish companies, Apple Sales International and Apple Operations Europe. The Commission assessed whether this endorsed method to calculate the taxable profits of each Irish company gave Apple an undue advantage. The Commission demonstrated that the tax rulings endorsed an artificial allocation of sales profits to “head office”, where they were not taxed. This internal allocation had allegedly no factual or economic justification. Indeed, “head office” had no operating capacity to handle and manage the distribution business – nor any other substantive business. Only the Irish

\textsuperscript{32} Commission Decision to initiate the formal investigation procedure of 11 June 2014, SA. 38375 (2014/NN) (ex 2014/CP), Luxembourg alleged aid to FFT.

\textsuperscript{33} Commission Decision to initiate the formal investigation procedure of 07 October 2014, SA.38944 (2014/C), Luxembourg alleged aid to Amazon by way of a tax ruling.

\textsuperscript{34} Commission Decision to initiate the formal investigation procedure of 03 December 2015, SA.38945 (2015/C) (ex 2015/NN), Luxembourg alleged aid to McDonald’s.

\textsuperscript{35} Commission Decision to initiate the formal investigation procedure of 03 February 2015, SA.37667 (2015/C ex 2015/NN), Belgium - Excess profit tax ruling system in Belgium – Art. 185§2 b) CIR92.


\textsuperscript{37} Commission Decision to initiate the formal investigation procedure of 19 September 2016, SA.44888 (NN/2016) (ex EO/2016), Luxembourg - Possible State aid in favour of GDF Suez.

\textsuperscript{38} Commission Decision to initiate the formal investigation procedure of 26 October 2017, SA.44896 (2017/C ex 2017/NN), United Kingdom - CFC Group Financing Exemption.

\textsuperscript{39} Commission Decision to initiate the formal investigation procedure of 18 December 2017, SA.46470, Netherlands - possible State aid in favour of Inter IKEA.
branch of Apple Sales International had the capacity to generate any income from trading, i.e., from the distribution of Apple products. Therefore, the sales profits of Apple Sales International should have been recorded with the Irish branch and taxed there.

In conclusion, the tax benefits Ireland granted were considered illegal under EU State aid rules, because they allowed Apple to pay substantially less tax than other businesses.\(^40\) In its assessment, the Commission argued that profits must be allocated between companies in a corporate group and between different parts of the same company in such a way that reflects economic reality. The allocation should therefore be in line with the arrangements made under commercial conditions between independent businesses (the arm’s length principle).

2.4 EC agenda priorities: Brexit

Another key issue that was added to the Commission’s agenda in the second half of 2016 – and occupied a great deal of it throughout 2017 – was Brexit. Among the several and critical consequences of the United Kingdom’s withdrawal from the EU, the application of State aid rules is by no means the least important. Indeed, State aid policy is almost entirely based on the EU treaties, as interpreted by the case law of the European courts, and on directly applicable legal acts that do not require transposition at national level, such as regulations and decisions. Consequently, in the absence of an agreement between the United Kingdom and the EU or of a unilateral transposition of EU State aid rules into the UK legal system, these provisions will entirely cease to apply to the UK from March 2019, when the withdrawal becomes effective.

However, the EU and the United Kingdom are negotiating the “European Union Withdrawal Bill 2017–2019”, which will regulate the relationships between the two parties after Brexit and will be key to regulating the withdrawal\(^41\). This agreement will likely contain provisions on State aid, as they are essential for the functioning of any cooperation on trade. Specifically, from a State aid perspective, two main phases will be regulated in the agreement or, in the absence of an agreement by the UK alone: the post-Brexit phase and the transitional phase\(^42\).

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\(^{41}\) According to Art. 50 TEU, paras. 2–3: “A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3)[5] of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council [of the European Union], acting by a qualified majority, after obtaining the consent of the European Parliament. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.”

\(^{42}\) This concerns the two-year (or four-year) period starting from the day of the withdrawal notification (29 March 2017).
With regard to the post-Brexit phase, the main scenarios can be described as follows:

i) If the UK joins the European Economic Area (EEA), it will be bound by the EAA Agreement, which contains almost identical State aid provisions to those applicable within the EU.

ii) If the UK joins the EFTA but not the EEA, it will be in a position comparable to that of Switzerland. Therefore, like Switzerland, it would not be bound by State aid provisions, except for the WTO rules, as the EFTA does not regulate State aid. However, the UK could still negotiate bilateral agreements with the EU concerning State aid or adopt a domestic system similar to that of the EU.

iii) If the UK does not join the EFTA but concludes a specific free trade agreement (FTA) with the EU, State aid rules will have to be set out in this agreement. However, it is important to distinguish between FTAs that contain provisions substantially equivalent to the EU ones – such as the FTAs with EU accession candidate countries – and FTAs with third countries – such as the CETA with Canada.

iv) If the UK fails to reach an agreement with the EU at all or the withdrawal agreement contains no rules on State aid, it will be bound exclusively by the WTO Agreement on Subsidies and Countervailing Measures. It could, of course, also adopt its own State aid system. Most (although not all) of the concerns that such a scenario would raise could be removed by adopting a national law that reflects the GBER, as the large majority of all State aid granted by the UK nowadays is actually covered by the GBER.

As mentioned, one of the most significant difficulties in designing a new State aid regime applicable in EU/UK relations is the definition of a system of judicial control or arbitration. This system will of course, be dramatically different depending on which of the above Brexit scenarios is adopted. In fact, if the UK joins the EEA, it will be controlled by the EFTA Surveillance Authority. In all the other scenarios, the issue of control will have to be addressed in the agreement with the EU. In the best-case scenario from a unionist perspective, the UK could agree to remain under the scrutiny of the Commission and the Court of

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45 Currently, the EU accession candidate countries are Albania, Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey.

46 Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada.

47 On this topic see G. Peretz, A Star Is Torn: Brexit and State Aid, EStAL 3, 2016, 334–337.

48 Ibid, 337.
Justice of the EU (CJEU) in order not to leave the internal market; conversely, it could entrust the UK Competition and Markets Authority (CMA) with the additional task of State aid control, following the example of Ukraine.\(^{49}\)

With regard to the transitional period, the problem involves the fate of State aid notified and not yet authorised by the Commission, alleged State aid granted before withdrawal, which is currently under investigation\(^{50}\) and State aid that is the subject of a Commission decision appealed and pending before the EU courts\(^{51}\). Additional issues could also exist, namely regarding the recovery of still outstanding unlawful State aid (because the deadline set in the recovery decision expired but effective reimbursement has yet to occur). All these problems will be addressed in the withdrawal agreement and will strictly depend on the post-Brexit scenario agreed by the parties.

Regardless of the scenario that materialises, it currently seems more likely that the UK will maintain a State aid control system, although it is premature to say how similar to, and how integrated with, the EU system it will be.

Traditionally, the UK has devoted a significantly lower budget to State aid than the budget of comparable EU countries, and this is unlikely to change in the foreseeable future given the level of liberalisation of the UK economy. This should work in favour of the conservation of a State aid regime, despite the temptation to reach higher levels of State funding after Brexit, particularly for the steel sector.

3. CASE LAW EVOLUTION

3.1 The assessment of selectivity: the case of tax selectivity

Turning now to the main developments in the case law of the European courts in the reference period, a few cases have been selected for the purposes of this paper among the many that deserve attention for their novel contribution to this field of law. It is certainly not an isolated opinion that the most significant development in State aid case law in the reference period concerns the selectivity requirement in fiscal matters. The selectivity requirement is expressed as follows in the TFEU: “any aid (…) which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods”. Typically, the application of this criterion involves drawing a distinction between general measures and specific (i.e., selective) measures. At a first level of approximation, general measures are those whose beneficiaries are not identified or identifiable. However, drawing such a distinction can be highly complex in practice, especially in the field of fiscal measures, in which the difficulty often stems from the absence of a “system of reference”

\(^{49}\) Based on the Ukraine-EU Association Agreement, Ukraine has transposed into its legal system all EU provisions on State aid and has entrusted its Competition Authority to control their compliance.

\(^{50}\) Commission Decision to initiate the formal investigation procedure of 26 October 2017, SA.44896 (2017/C ex 2017/NN), United Kingdom - CFC Group Financing Exemption. The case is still under investigation by the Commission.

\(^{51}\) Commission Decision of 08 October 2014, SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for support to the Hinkley Point C Nuclear Power Station. The case is still pending before the General Court.
that can be used as a benchmark for the qualification of the controversial measure.\footnote{For instance, when the beneficiary undertaking is unique in the Member State. See Commission Decision of 10 May 2007, C 2/06 (ex N 405/05), State aid related to the voluntary early retirement scheme applied to the Greek telecommunication operator OTE.}

For a better understanding of this problem, it is worth recalling that the selectivity element of the aid raises fewer difficulties in the analysis of positive advantages (i.e., grants of any kind, soft loans, guarantees and the like) than in the assessment of negative advantages. Tax benefits are the typical example of negative advantages (i.e., they do not involve any actual transfer of financial resources). Hence, the assessment of selectivity for tax measures raises the issue of whether a given tax regime should be regarded as favouring certain undertakings or the production of certain goods in comparison with others.\footnote{Faull and Nikpay, The EC Law of Competition, Third Ed., OUP Oxford, 2014.} This assessment is all the more complex when it involves the analysis of a general tax system (i.e., a prima facie general measure) rather than a specific derogation granted to select beneficiaries (or groups of beneficiaries). A general tax system is a system that is at least theoretically capable of being applied without distinction to all economic operators, regardless of their location, size, business sector or similar objective characteristics of the group of beneficiaries.

As direct taxation is a domain reserved exclusively to the State’s sovereignty, it has been argued that the Commission should refrain from stretching the notion of aid to encompass fiscal measures of a general nature and should rather apply a restrictive interpretation of the selectivity criterion. Therefore, the Commission should refrain from finding aid in a context in which doing so would entail a general risk of impinging on national sovereign powers in the field. In this line of thought, the Netherlands retains that “if the Commission were to impose its own interpretation of tax principles of the Member States, it would encroach on the sovereignty”\footnote{Commission Decision of 21 October 2015, SA.38374 (2014/C) (ex 2014/NN), Netherlands alleged aid to Starbucks, para. 186.} of the Member States.

However, according to the position expressed so far (predominantly, although perhaps not invariably) in the Commission’s practice and in the CJEU’s case law, the above criticism is unconvincing. According to the Commission, taxation, as an expression of a State’s exclusive sovereignty, remains outside the scope of State aid control insofar as it remains confined to a measure of a purely general nature. Indeed, a measure of general economic policy, although deemed to favour the national business environment, provides equal benefit to all undertakings from Member States. Nevertheless, if a tax measure serves (only or also) particularistic purposes, it should be ‘caught’ by State aid rules. As to EU case law, it has traditionally upheld that the fiscal nature of State measures does not prevent the application of State aid rules if the requirements of Art. 107(1) TFEU are met.\footnote{Judgment of 2 July 1974, Italy v Commission, C:473/73, ECLI:EU:C:1974:71 and judgment of 23 February 1961, De
In finding tax selectivity, EU case law refers to the well-known Gibraltar test, which is based on a three-step assessment: (i) the relevant ordinary tax system is identified; (ii) the Commission determines, in relation to this normal tax regime, whether the measure under scrutiny constitutes a derogation from that general tax system, so that a discrimination between undertakings in a comparable factual and legal situation ensues from the measure; and (iii) the derogation/discrimination is assessed to ascertain whether it can be justified based on the nature and economy of the relevant tax system. This test applies to determine the existence of regional selectivity (special treatment for companies located in given areas within the national territory) and material selectivity. The Gibraltar case is taken as the landmark reference because it involved an assessment of both regional and material selectivity.

As mentioned, difficulties arise when the controversial measure is by itself of general application, so that it becomes uneasy to identify the “reference system” that can be used as a benchmark for its qualification as aid within the meaning of Art. 107(1) TFEU. To illustrate this difficulty, two judgments handed down during the reference period have been selected (i.e., the Spanish goodwill case and the Lübeck case), although others may be equally relevant. Reference is also made to the Lico Leasing case, which is pending before the CJEU.

3.1.1 The Spanish goodwill case

The Spanish goodwill case has given rise to a heated debate, and many scholars and experts have commented on it. The limits of this paper unfortunately prevent the author from discussing all the opinions expressed about the case or adding further thoughts on them. However, it is clear that the case refers to an increasingly common and complex type of State measure, not to mention controversial. Measures of this type can be defined as “virtual” general measures, because although they are of general application and not directly selective, they still target specific industrial policy and not broad economic policy objectives. What distinguishes these measures is their automatism: they are designed to ensure that the tax benefit is automatically granted to all companies that freely decide to pursue the industrial policy.

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objective set by the State and, thus, comply with the related legal conditions. Rather than pursuing the proposed objective by selecting specific undertakings to perform in a certain way, States leave it to the undertakings themselves to decide to be involved in the tax scheme in question by taking a certain course of action, thus acting as a vehicle for the State’s objectives.

One typical example is the State’s support of the internationalisation of domestic companies and the expansion of domestic venture capital investments into foreign markets. This goal can be pursued through various means, some of which would deliberately fall within the scope of application of the State aid treaty provisions (e.g., export credits, export credit insurance, organisation of fairs or contribution to establishment expenses in foreign countries). Others, such as simply fostering investment in foreign companies through tax advantages, could escape these provisions, because any undertaking can, in principle, meet the requirement (i.e., investing abroad).

According to the Commission, this was the situation in the Spanish goodwill case. The measure provided that if a taxable undertaking in Spain acquired a shareholding of at least 5% in a “foreign company” that it held without interruption for at least one year, the goodwill resulting from that shareholding – as recorded in the undertaking’s accounts as a separate intangible asset – could be deducted, in the form of an amortisation, from the corporate tax base for which the undertaking was liable (this was not possible for the acquisition of shareholdings in a company established in Spain). The Commission ruled that this constituted a tax aid for internationalisation of enterprises subject to Spanish taxation.

Spanish taxpayers that benefited from the measure challenged the decision before the EU General Court. In November 2014, the General Court annulled the Commission’s decision because the selective nature of the tax scheme had not been proved. The GC found that “where the measure at issue, even though it constitutes a derogation from the common or ‘normal’ tax regime, is potentially available to all undertakings, it is not possible to compare (...) the legal and factual situation of undertakings which are able to benefit from the measure with that of undertakings which cannot benefit from it”.⁶⁰ Therefore, no category of undertakings was definitely excluded from the scope of application of the law and no selective treatment resulted from the tax measure.⁶¹ Furthermore, “for the condition of selectivity to be satisfied, a category of undertakings which are exclusively favoured by the measure at issue must be identified in all cases and the mere finding that a derogation from the common or ‘normal’ tax regime has been provided for cannot give rise to selectivity”.⁶²

The Commission appealed the judgments before the CJEU, which, overruling the General Court, held that to determine whether a measure is selective under EU State aid rules, it a specific category of undertaking that benefits

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from the measure does not need to be identified. The CJEU further held that the appropriate criterion to establish the selectivity of a general measure is whether the measure favours certain undertakings over other undertakings that, in light of the objective pursued by the general tax system concerned, are in a comparable factual and legal situation. Selectivity can be found by assessing the existence of conditions such as “the fact that resident undertakings making acquisitions of shareholdings in companies resident for tax purposes in Spain could not obtain that advantage”.

It emerges that the key criterion in the CJEU’s approach is the provision of a different treatment (discrimination), albeit no distinction exits between companies favoured by the measure and companies excluded from the contested tax measure. At least three now hardly disputed conclusions stem from the judgment: (i) the lack of different treatment between different categories of companies is insufficient to exclude the “aid”; (ii) differential treatment could exist also when specific categories of recipients are the most likely or suitable to perform in the way the national measure encourages them to perform; and (iii) potentially broad consequences on tax autonomy do not hinder or impinge on the selectivity assessment.

However, the outcome and reasoning underlying this judgment have given rise to a spirited debate. Many practitioners and academics consider it a revolutionary judgment, which contradicts the well-settled case law of the CJEU and has introduced a concept of selectivity that is disconnected from any concrete discrimination, excessively wide and able to affect theoretically every tax measure. They consider the decisive element in assessing selectivity to be whether companies in the same legal and factual situation are subject to different tax treatment before they make their choices, whereas the choice itself (i.e., the course of action they decide to take) is totally irrelevant, and if a different tax treatment derives from their choices, this does not make the measure selective. Indeed, based on this line of reasoning, if a tax measure is virtually accessible to every company, it follows that the selection of benefitting companies is made by the companies themselves and not by the State; consequently, the measure may not be considered selective.

Conversely, a smaller part of the legal doctrine retains, along with the Commission’s legal services, that the CJEU’s judgment perfectly follows past case law on selectivity, without modifying this fundamental concept but only specifying some aspects that were at issue in this case. According to this line of reasoning, the CJEU simply clarified the functioning of the second step of the so-called three-step approach, explaining that every tax scheme –

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even if it is theoretically accessible to all companies – is selective when, by means of its conditions for the applicability, it discriminates between companies that are in the same legal and factual situation with respect to the objectives pursued by the general system.

As a last example of this vivid debate, which is by no means settled, the author of this paper has also expressed his views on the matter, albeit before the judgment was handed down⁶⁶. Leaving to a future opportunity a full commentary of the judgment and development of the opinion previously expressed on the case, it can, however, be opined here that the CJEU has not departed from its settled case law but rather has specified that a differential treatment could exist also when specific categories of recipients are the most likely or suitable to perform in the way the national measure encourages them to perform. Consequently, it is not sufficient to design a fiscal measure virtually applicable to all companies to escape selectivity. However, to limit and counterbalance the potential negative effects of this approach, it is fundamental to widen the third step of the three-step approach, which allows justifying a derogation from the reference system by the nature or general scheme of the system, to cover genuine measures of general economic policy, which are unintentionally selective and that only pursue macroeconomic objectives.

Lastly, it is interesting to compare the principle expressed in the Spanish goodwill case with the Gibraltar precedent on tax selectivity. The conclusion reached by the CJEU in Gibraltar is that “the fact that offshore companies (…) avoid taxation precisely on account of the specific features characteristic of that group gives reason to conclude that those companies enjoy selective advantages”.⁶⁷ At first sight, no difference emerges between the amortisation benefit granted in the Spanish goodwill case (to foster the export of capital) and the tax exemption granted in the Gibraltar case (to foster the import of capital). Moreover, no convincing reason has been provided to differentiate between the export of goods and the export of capital. However, above all, if the selectivity criterion were construed in such a way as to embody a (new) requirement, i.e., providing evidence that a category of undertakings is excluded from the benefit, this would allow Member States a broad margin of manoeuvre. Indeed, it would be sufficient to ensure that no undertaking is completely excluded from the benefit (de jure or de facto) to circumvent State aid rules, despite the measure being designed in such a way that the large majority of the related budget is allocated to specific categories of recipients.

### 3.1.2 The pseudo-tax selectivity: the Lübeck airport case

Another important judgment on tax selectivity handed down in the reference period (more precisely on the very same date as the Spanish

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goodwill judgment) concerns the Lübeck Airport case. In this case the Commission assessed the general tariffs applied to airlines (e.g., de-icing charges and airport charges). Under German law, all airport operators are required to adopt a schedule of charges. In 2006, Flughafen Lübeck GmbH (“FL”) – which operated Lübeck Airport until 31 December 2012 – adopted the 2006 schedule, which was approved by the aviation authority of the Land of Schleswig-Holstein and which was applicable from 15 June 2006 to all airlines using Lübeck Airport, unless otherwise agreed between the airport operator and an airline. In 2007, the Commission decided to begin a formal investigation into the FL 2006 Schedule, as the Commission suspected that the airport charges under the 2006 Schedule for airlines using Lübeck Airport could have provided a selective advantage over airlines operating at other German airports.

The airport operator challenged the decision before the General Court, which annulled it. The Commission then appealed the annulment before the CJEU, which upheld the General Court’s judgment. In its reasoning, the CJEU pointed out that the examination of selectivity converges with the examination of whether the measure applies to a set of economic operators in a non-discriminatory manner. The concept of selectivity is thus linked to that of discrimination. Furthermore, contrary to the Commission’s position, the CJEU ruled that a measure that sets conditions for a public company to offer goods and services is not always selective.

The judgment is noteworthy because it overturns the Commission’s practice regarding the framework to be taken into account in selectivity assessments. Indeed, the CJEU reiterated that the assessment of selectivity requires, as an unavoidable first step, defining the reference framework to be taken as the appropriate benchmark for assessing the measure under scrutiny. Hence, according to the CJEU, the

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69 Decision to begin the formal investigation procedure of 22 February 2012, SA.27585 and SA.31149 - C/2012 (ex NN/2012, ex CP 31/2009 und CP 162/2010), Lübeck-Blankensee Airport – Alleged State aid to the airport and Infratil (2).


72 Judgment of 14 January 2015, Essentel, C-518/13, ECLI:EU:C:2015:9, para. 53.


75 This method is not limited solely to the examination of tax measures, as the CJEU merely observed that determining the reference framework is of particular importance in cases involving tax measures, as the very existence of an advantage can be established only when compared with ‘normal’ taxation (judgment of 6 September 2006, Portugal v Commission, C-88/03, EU:C:2006:511, para. 56). On this topic, see G. Perotto, La selettività negli aiuti fiscali: estensione della nozione e limiti alla...
A typical Gibraltar test based on a three-step analysis applies to any kind of aid scheme, be it a tax scheme or not. Building on this novel assertion, the CJEU held that, contrary to the Commission’s contention, which was based on its traditional approach, a measure that benefits only one economic sector or some of the undertakings in that sector is not necessarily selective. Rather, it is selective only if, within the context of a given legal regime, “it has the effect of conferring an advantage on certain undertakings over others, in a different sector or the same sector, which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation.”

The determination of the set of undertakings that are in a comparable factual and legal situation depends on the prior definition of the legal regime. In this regard, the CJEU found that, according to German law, it is precisely the airport operator that, in exercising a power of its own, draws up the scale of airport fees applicable to that airport. Accordingly, “it is apparent that the relevant reference framework for examining whether the 2006 schedule had the effect of favouring certain airlines over others which were in a comparable factual and legal situation was that of the regime applicable to Lübeck Airport alone.” Based on this assumption, the airlines serving other German airports were not in a situation comparable to that of the airlines using Lübeck Airport. Consequently, the 2006 schedule cannot be considered discriminatory.

Although the Lübeck case has not been so widely commented on as the Spanish goodwill case, it is just as relevant, if not more so, in terms of both the novelty of some statements and the debate the case generates. Its implications are significant from both a theoretical and a practical point of view.

First, the judgment shows that, in applying the three-step test, properly identifying the reference system is fundamental and influences the entire selectivity assessment. Indeed, the definition of the reference system heavily influences the outcome of the second step of the test: to decide whether the measure involves a discrimination, the second step requires to determine which undertakings are in a comparable legal and factual situation in the light of the objective pursued by that regime, thus referring back to the first step. As the CJEU underlines, “determination of the set of undertakings which are in a comparable factual and legal situation depends on the prior definition of the legal regime in the light of whose objective it must, as the case may be, be examined whether the factual and legal situation of the undertakings favoured by the measure in question is comparable with that of those which are not.”

It follows from all this reasoning that identifying the reference system heavily depends on the competences attributed to the granting authority under national law. The role national law has to play is crucial as, according to the CJEU, the selectivity requirement is met only if a differential treatment exists within that system (i.e., Lubeck airport charges system), whereas differential

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Another important hint provided by the Lübeck judgment is that identifying the reference system does not create market definition issues. The definition of the relevant geographic market seems to have no bearing on the CJEU’s assessment. One can only infer from this that it is irrelevant if two or more airports are in competition with each other (i.e., they belong to the same catchment area). This is simply because the entire German airport system is based on the “regulatory” powers of the single airports and not on the concept of catchment areas. Again, how national law is structured drives the outcome of a selectivity assessment. This is already a well-known fact in the assessment of regional selectivity; however, it is entirely new that the same can also hold true in the assessment of material selectivity.

One may only wonder whether the CJEU’s approach – which seems to at least partly combine the assessment of regional and material selectivity – is intended to encourage decentralisation in State spending79, thus compensating somewhat for the broadened notion of aid that ensued from the interpretation of the selectivity requirement retained in the Spanish goodwill case (handed down on the same day). In any event, it is certainly already clear that the Lübeck case deserves as much attention by the legal doctrine as that reserved to the Spanish goodwill case, as the indications contained in the Lübeck case judgment are equally debatable.

3.1.3 De facto selectivity and discretion: the Lico Leasing case

The third case selected for this overview offers the ideal benchmark to check the solidity, scope and possible limits of the Spanish goodwill doctrine80. The “Spanish Tax Lease System” (STLS) granted a benefit estimated at a 20–30% price reduction on the value of a new ship when the STLS requirements were met. The STLS was based on a fiscal arrangement aimed at generating tax advantages for investors and transferring part of those advantages (85%–90%) to the maritime shipping company in the form of a rebate on the vessel price, with the investors retaining the other advantages as a return on their investment (10%–15%). The advantages derived from a mix of fiscal measures: (i) accelerated depreciation; (ii) early depreciation of certain goods (with prior administrative authorisation); (iii) fiscal transparency; and (iv) special regime of tonnage taxation. The measure could be deemed to apply directly or indirectly to three categories of beneficiaries: (i) investors; (ii)

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79 In the same vein we can also mention the judgment of 1 February 2017, Portovecchio Srl v European Commission, C-606/14 P, ECLI:EU:C:2017:75. Indeed, in this case the three-step methodology in assessing both regional and material selectivity led to a substantially different approach under Art. 107(1), depending on whether the measure was granted by national or local authorities: severe and rigid when granted by national authorities and flexible and lenient when granted by local authorities.

80 As the author is involved in this case, which is still pending before the CJEU, no reference is made here to the arguments developed by the party he represents or the position the CJEU may take.
economic interest associations (agrupaciones de interés económico, AIEs); and (iii) maritime shipping businesses. Although shipbuilders receive no direct benefit, they would also logically benefit – at least de facto – from increased business opportunities.

In July 2013, the Commission took the view that three of the four fiscal measures under examination constituted illegal State aid to the AIEs and their investors. Spain, Lico Leasing (a financial institution that invested in several EIGs that had participated in the STLS) and the Pequeños y Medianos Astilleros Sociedad de Reconversión (a company that cooperates with small and medium-sized shipyards to appropriately enable them to achieve their industrial objectives) applied to the General Court for annulment of the Commission’s decision.

The General Court annulled the decision because it found that it was vitiated by several errors and contained an insufficient statement of reasons concerning the classification as State aid. The General Court’s judgment relied extensively on the reasoning the General Court developed in the Spanish goodwill case (which was later rejected by the CJEU) but also identified other flows in the Commission’s decision. According to the General Court, the Commission was wrong to declare that the advantage was de jure selective. It held that, due to the fiscal transparency of the AIEs, the fiscal measures applied to the AIEs under the STLS could benefit only their members, i.e., the investors. In the absence of an economic advantage for the AIEs, the Commission was wrong to include them among the aid beneficiaries in its reasoning.

On de facto selectivity, the General Court found that the existence of an authorisation system did not necessarily imply a lack of equal access to the advantage. The conditions for granting the authorisation are indeed relevant to this effect. The benefits were available, under the same conditions, to any investor who decided to participate in the transactions within the STLS by purchasing shares in the AIEs. Those advantages were therefore of a general nature with regard to that category of beneficiaries, i.e., the investors. Instead, the Commission ordered the investors to repay the aid. Lastly, the General Court considered that, in the particular circumstances of the case, the Commission did not give sufficient reasons for its finding that the measures under examination were likely to distort competition and affect trade between Member States.

This case is relevant for several aspects of the selectivity assessment. As is well known, the discretionary power exercised by tax authorities in the application of a measure may result in selectivity. This is usually referred to as de facto selectivity, as it does not stem from the law itself but from its implementation or application by tax authorities. The judgment of the CJEU will be of particular interest in assessing the granting authorities’ discretionary power to provide the required administrative authorisation. In previous cases, the CJEU held that the individual application of a general measure can be regarded

as selective “where exercise of discretionary power goes beyond the simple management of tax revenue by reference to objective criteria”.82

As the review by the CJEU is limited to issues of law, the CJEU will likely refrain from assessing whether the criteria applied to grant the authorisation in the STLS are purely objective in nature as requested by the case law. It might have to refer the case back to the General Court if it believes this issue has not been properly examined. It might, however, also refer to the Commission’s decision, which made no mention of the factors on which tax authorities could exercise discretion, e.g., the choice of the beneficiaries, the amount of the benefit provided, and the conditions under which the benefit was granted.83

In terms of de jure selectivity, it will be interesting to compare this case with the Spanish goodwill case, as they present common aspects but also differences. Indeed, in both cases any operator could benefit from the tax advantages in question by carrying out a certain type of transaction that is open to any company without distinction and under the same conditions. However, in the Spanish goodwill case the tax advantage was given only to companies investing in foreign activities, whereas in the case under examination the possibility to invest in an AIG was open to all undertakings in all sectors, without discrimination. A limitation did exist, but it concerned solely the industrial assets (i.e., the ships) purchased. Therefore, time will tell us whether this limitation will be considered sufficient to support a State aid recovery decision that identifies the investors as the ultimate beneficiaries from which repayment of the aid should be obtained, while maritime companies and shipbuilders are left outside the scope of the decision.

Whether this constitutes a substantial difference from the Spanish goodwill case will have to be determined by the CJEU. Likewise, the CJEU will have to rule on the existence of a discrepancy between the reasoning based on a sectorial advantage and the operative part of the decision (i.e., the recovery order), which identifies the investors – belonging to all possible sectors – as the ultimate recipients of the aid, and whether the discrepancy, if any, warrants the annulment of the decision.

### 3.2 The recovery of direct and indirect aid: the Ryanair and Aer Lingus cases

Another significant development in the case law during the reference period concerns an issue as relevant as the quantification of the aid to be recovered following a finding of incompatibility of illegal aid. This was the issue under examination in the Ryanair and Aer Lingus cases. Where aid has been granted illegally and the Commission finds it incompatible with the common market, the main concern is to remove the competitive advantage afforded to the beneficiary and restore effective competition. For this purpose, quantifying the aid to be reimbursed is of crucial importance. In the case of ad hoc aid as opposed to general aid schemes, the

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82 Commission Notice on the Application of the State Aid Rules to Measures relating to direct business taxation, point 21 and case law referred to therein.

Commission carries out this task directly in its final decision, as it did in the cases under discussion.

Back in July 2012 the Commission found that the application of a lower national rate for short-haul flights constituted a State aid inasmuch as it unlawfully benefitted domestic flights as opposed to cross-border flights. The provision, also known as air travel tax (ATT), was included in Irish Finance Act No. 2 of 2008 (Section 55). The ATT was levied on the basis of the distance between the departure airport and the arrival airport, at the rate of EUR 2 in the case of a flight from an airport to a destination no more than 300 km from Dublin airport and EUR 10 in all other cases. The Commission ordered the recovery of that aid from the beneficiaries, stipulating that the amount of the aid corresponded to the difference between the lower rate of the ATT (EUR 2) and the standard rate (EUR 10), that being EUR 8 per passenger.

Aer Lingus and Ryanair, both of which were among the beneficiaries of the aid, brought actions before the General Court against the Commission’s decision that ordered the recovery of the unlawfully received aid. Specifically, the airlines argued that the Commission could not merely calculate the size of the advantage as the difference between the high rate and the low rate but instead had to take into account any passing-on of the advantage to passengers (known as the “passing-on defence”). By its judgments delivered on 5 February 2015, the General Court partially annulled the Commission’s decision on the ground that the Commission had failed to show the actual value of the benefit received from the State aid by the beneficiary. According to the General Court, in doing so, the Commission committed an error of assessment and an error of law because “the ATT was formally intended to be passed on through the price of the flight ticket bought by the passenger.” Furthermore, the Commission did not perform an exhaustive investigation and the conclusion was not supported by sufficient reasoning. In particular, the Commission should have determined the extent to which the individual airlines had actually passed on the economic benefit resulting from applying the low rate to their passengers, in order to be able to precisely quantify the advantage the airlines actually received, given the particular market situation and the competitive constraints.

Following the Commission’s appeal, the CJEU reversed the GC’s judgment. The CJEU found that airlines able to benefit from the reduced rate actually received a competitive advantage of EUR 8 compared to airlines that paid the standard rate. Thus, restitution of that advantage required Ireland to recover from the

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airlines EUR 8 per passenger for each flight concerned, just as the Commission had ruled in its decision. The CJEU therefore noted that “the recovery of aid entails the restitution of the advantage the airlines were able to procure from the application of the reduced rate, not the restitution of the economic benefit that may have been conferred on those companies by the aid as a result of the exploitation of the advantage” (emphasis added). Therefore, “there is no need to examine whether and to what extent those airlines actually utilised the economic advantage arising from the application of the lower rate”.88

In other words, the advantage in question did not consist in the fact that those airlines were able to offer more competitive prices than their competitors, but rather “it resulted quite simply from the fact that those companies had to pay a lower amount than they would have had to pay if their flights had been subject to the standard rate”.90 Indeed, the question whether that advantage enabled them to offer more competitive ticket prices, or whether they exploited that advantage differently, relates to the assessment of any benefit they were able to accrue from exploiting the advantage granted. According to the CJEU, this assessment is irrelevant to the recovery of the aid.

The judgment recalled that the purpose of recovery of unlawful aid is to restore the situation as it was before the aid was granted. That purpose is achieved when the beneficiary has repaid the aid and any interest. Hence, the purpose of recovery is not the same as that of Directive 2014/104 (antitrust private enforcement). That directive seeks to ensure that any person having been adversely affected by an infringement of the competition rules under Arts. 101 and 102 TFEU may effectively exercise the right to claim compensation for the harm he/she believes he/she has suffered. The passing-on defence is allowed under these circumstances.91 Conversely, the purpose of aid recovery is not to seek compensation for individual harm of any kind, but to restore – on the market in question – the situation as it was before the aid was granted.92

Further, the CJEU discarded the test supported by the General Court, as the recovery of unlawful aid does not imply reconstruction of past events based on hypothetical elements. The object of recovery is the advantage obtained rather than the economic benefit driven by exploiting that advantage.93 Moreover, although the recovery of unlawful State aid qualifies as public enforcement, it is not a sanction. Unlike antitrust law enforcement, which is directed at companies


and private undertakings, State aid law is addressed to Member States. Therefore, even when the enforcement has a negative impact on private undertakings (beneficiaries of the measure), the decision cannot qualify as a sanction. As mentioned, the idea behind recovery is to put the enterprise and the Member State in the position they would have been in had the aid not been granted. Therefore, the recovery measure is the amount of tax the enterprise would have paid had the aid not been granted, plus interest.

The legal doctrine has extensively commented on this judgment and the author, among other scholars, has also expressed his views on it, which are not reiterated here given the limits of this paper. In short, the judgment under examination give rise to at least two important considerations on the recovery of unlawful State aid.

First, the CJEU, in overturning the General Court’s judgment, endorsed the idea that, at least in cases involving direct State aid, the amount to be recovered corresponds to the nominal amount granted to the beneficiaries, and the Commission, the competent national authorities and national courts cannot assess the economic advantage the recipients concretely obtained. This means that the effects of the aid, which are fundamental in assessing its compatibility with the internal market, are of no relevance in determining the amount to be repaid, as recovery aims to restore the (financial) situation that existed before the aid was granted. Restoring the previous situation must thus be understood in a formal sense and not in a substantial one, as recovery is neither a penalty nor compensation. However, this concept of recovery has been developed by the CJEU itself and has no legal basis in EU treaties or EU secondary law. Additionally, this view appears to contrast with the non-formalistic nature of EU law and, in particular, with some cornerstones of EU competition law, such as the Commission’s economic approach and the need to avoid solutions that could encourage violations of the EU treaties. For these reasons, a proposal by the Commission to reform the recovery system would be a welcome initiative.

Second, the judgment gives rise to uncertainties concerning the application of this concept of recovery also to indirect State aid. It is a fact that the CJEU did not refer to indirect aid in its reasoning, nor did it distinguish between direct and indirect aid. However, applying the same principles to a case of indirect aid would once again call into question the solution that the European courts adopted in previous cases, namely Mediaset III and Spanish Taxlease.

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95 Judgment of 13 February 2014, Mediaset S.p.A. v Ministero dello Sviluppo Economico, Case C-69/13, ECLI:EU:C:2014:71. It is known as Mediaset III to distinguish it from the dispute arising from the action for annulment brought against the Commission decision before the General Court (Mediaset I) and the Court of Justice (Mediaset II). On this judgment see N. Niejahr, It may be zero! CJEU highlights national courts’ authority to review and determine amounts of aid to be recovered, in EStAL 4, 2014, 707–711.
Specifically, in Mediaset III, the CJEU clarified that both national courts and national authorities, when determining the precise amount to be repaid, may also conclude that the recovery amount is zero. With this clarification, the CJEU endorsed an “economic” concept of the advantage, according to which recovery is necessary only when aid proves effective in improving the beneficiaries’ financial situation. Consequently, case law in the field of recovery remains uncertain, as two different concepts of advantage appear to apply to direct and indirect aid. It is once again clear that this is a field in which further developments would be warranted in the near future.

3.3 The role of National Courts: the DEI case

The third and last jurisprudential development selected for this overview brings the reader’s attention to the role of national courts in State aid enforcement, which is rapidly increasing (albeit still embryonic). In late 2016, the CJEU upheld the appeal lodged by DEI – a publicly owned Greek energy company – against the General Court’s ruling that had annulled Commission Decision No. 2012/339/EU of 13 July 2011 concerning individual aid allegedly granted to the applicant.

The legal basis of the aid under scrutiny was found in an agreement between DEI and a private undertaking, whereby the private undertaking was granted the right to be supplied electricity at preferential tariffs. The Commission authorised the agreement in 1992 and the preferential tariffs were due to remain in force until 2006. However, in 2004 DEI decided not to renew the agreement beyond its initial term and, in compliance of the termination provision, DEI unilaterally ended the agreement in 2006. The private undertaking challenged the termination before the national courts (Single-member Court of First Instance, Athens) and obtained a ruling in interlocutory proceedings on 5 January 2007.

The ruling ordered that the preferential tariffs be temporarily reapplied until a decision was issued by the national courts on the merits of the case. DEI challenged the order for interim measures before the Multi-member Court of First Instance (Athens), which, also in interlocutory proceedings, granted, _ex nunc_, DEI’s request to terminate the 1960 contract and the preferential tariff, by order of 6 March 2008. However, from 5 January 2007 to 6 March 2008 (“the relevant period”), the private undertaking continued to benefit from the preferential tariff.

In July 2008, the Commission received complaints concerning the application of the preferential tariff during the relevant period and started a formal investigation in 2010. At the end of the investigation, the Commission found that the preferential tariffs paid by the company amounted to an economic advantage compared to the usual tariff for large industries. This advantage qualified as State aid.

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incompatible with the internal market. The Commission concluded that the interim measure issued by the national court resulted in the extension of State aid, as a result of which the Hellenic Republic had unlawfully granted the private undertaking State aid of EUR 17.4 million. As the Commission had authorised the preferential tariff until the end of 2006, the extension constituted aid granted in violation of Art. 108(3) TFEU and incompatible with the internal market. The Commission should have been notified of the extension under Art. 108(3) TFEU. Consequently, the Commission ordered the recovery of the unlawful and incompatible aid.

The beneficiary challenged the decision before the General Court, which focused on the classification of the measure as “new aid” or “existing aid”. More precisely, the GC first affirmed that “it is clear from case-law that the extension of an existing aid creates a new aid which is distinct from the aid which was extended and the amendment of the duration of an existing aid should also be regarded as a new aid”. However, the GC specified that, according to the case law, “the emergence of new aid or the alteration of existing aid must be determined by reference to the provisions providing for it [and that] it is therefore only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme”. In the case under examination, the GC concluded that the application for interim measures, rather than granting new aid, merely gave an interim ruling in the dispute in terms of whether the contract under which the preferential tariff was granted had ceased to have effect. Consequently, the suspension of the termination of the contract after the first order for interim measures is not considered a new privilege separate from the existing aid.

The GC’s judgment was declared erroneous in law by the CJEU. The CJEU noted in its judgment that the existing aid ceased to exist on the date the agreement expired. Reinstating such a regime through the national court’s interim order equates to altering its time limits and, thus, the time limits taken into account by the Commission’s decision that authorised the regime in 1992. Therefore, the order of interim measures must be considered an alteration of

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101 The Court applied the reasoning adopted in the Namur case, which distinguished cases in which the subject concerns directly a State aid allegation from cases with no obvious direct link to State aid matters. In the opposite case, the national courts would be under the obligation to notify the Commission of any measure concerning the implementation or interpretation of the above agreement.

the aid, under Art. 108(3) TFEU, and the Commission should be notified.

Moreover, the CJEU clarified that the “new aid” nature of any measure only concerns its effects, i.e., in this case the alteration of its term, and not the legal instrument used to grant it. Specifically, no legislative intervention is necessary. In the case under examination, despite the fact that the purpose of the interim order was not to modify the framework of the preferential regime, the interim order did alter the time limits under the agreement, and the order consequently became the legal basis of the preferential scheme for the period in question. Consequently, the CJEU adopted a unified approach to the different State authorities and considered that a court decision on interim measures may well serve as the legal basis for the new illegal State aid. The CJEU concluded that, on that basis, the aid authorised by the Commission’s 1992 decision had been altered.

Lastly, the CJEU noted that the State aid control system is built on the essential and complementary roles of: (a) the Commission, and (b) the national courts. The national courts must behave according to their sincere cooperation duty under Art. 4(3) TEU and must ensure the safeguarding, until the Commission’s final decision, of the rights of individuals when the obligation to give prior notice to the Commission under Art. 108(3) TFEU has been infringed. In this light, the CJEU underlined that the ruling of the GC risks providing grounds for national courts to disregard their obligations in safeguarding the compliance with EU State aid law and, ultimately, jeopardising the effectiveness of Arts. 107 and 108 TFEU.

The judgment should be interpreted as an invitation to national courts to use caution when dealing with cases involving the assessment of State aid issues and to cultivate dialogue and intensify cooperation with the Commission (or the CJEU through requests for preliminary rulings) and, when necessary, liaise with national authorities in charge of notifying the Commission under Art. 108(3) TFEU. In the end, the national procedural autonomy of the Member States has clear delimitations given the necessity to safeguard the effective implementation of EU State aid provisions.

The DEI judgment should therefore be seen as an encouragement of national courts’ increased awareness and sensibility towards State aid matters and, ultimately, as an attempt to promote not only private enforcement in the field but also preliminary references to the CJEU. It is indeed disappointing that the cases were brought before the CJEU following annulment actions against the Commission’s decision and not on request of the national courts. It is true that preliminary references may very likely be incompatible with the nature of interlocutory proceedings, but it is equally true that alternative interim measures would have been possible to safeguard the speed of the

103 Art. 4(3) TEU reads as follows: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties”.

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interlocutory proceeding whilst referring the case assessment to the European Institutions104.

4. CONCLUSIONS

EU State aid law is experiencing a period of significant transformation, as is clear from the number of changes that have occurred during the reference period of this overview.

In terms of policy, this trend is partially due to the slow but steady implementation of the actions set out in the EU State Aid Modernisation Communication (“SAM Communication”)105 and, in particular, the implementation of the Commission’s “bigger on big, smaller on small” approach106. Additionally, this process is influenced by the pursuit of the Commission agenda’s priorities, notably the fight against tax evasion and tax competition between Member States. In this context, 2018 could well be a significant cornerstone in this evolution from several perspectives.

There is also great expectation for further steps in the year ahead towards the establishment of an effective ex-post scrutiny. In line with the SAM Communication, ex-post assessment of State aid is on the rise thanks to both the development of State aid evaluation107 and ex-post monitoring and reporting. The development of State aid evaluation mainly concerns the law-making level and is aimed at: (a) verifying, through evaluation plans, whether and to what extent the original objectives of an aid scheme have been fulfilled; and (b) determining the impact of the scheme on markets and competition, thus contributing to improving the design of future aid schemes and the rules governing State aid (secondary and soft law). Ex-post monitoring and reporting are instead aimed at ensuring that Member States implement Commission decisions properly, comply with the relevant legal provisions, and at increasing transparency. 2018 will likely bring further improvements on both counts.

2018 will likewise mark a turning point in the Brexit negotiations, and State aid will undoubtedly be part of the game. If a special arrangement is found (which is hoped), this will inevitably become a new model for bilateral or multilateral international trade agreements and may foster a new era of State aid control in international law.

2018 is also expected to mark new achievements in the area of fiscal State aid. Developments in this field are anticipated from both case law and enforcement practice. Important clarifications are warranted both in the field of the “virtual” general measures and for State aid in the form

104 One option would have been to create an escrow account for the repayment of the aid or the request of a first demand bank guarantee payable following the Commission’s or Court’s decision. This would have prevented the extension of the economic advantage and market distortion and simultaneously safeguarded the recipient’s right.

105 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU State Aid Modernisation COM/2012/0209 final.

106 Ibid, section 2.2 – Focusing enforcement on cases with the biggest impact on the internal market.

of tax rulings. With regard to the former, in the first half of the year the CJEU will rule in the Lico Leasing case, thus adding an important piece to the puzzle of selectivity and offering new ideas for the comparison with the Spanish goodwill case. And another contribution in this field is expected with the CJEU’s upcoming judgment in the Andres (faillite Heitkamp BauHolding) case\textsuperscript{108}.

With regard to tax rulings, the General Court will deliver two landmark judgments in the Starbucks\textsuperscript{109} and Fiat\textsuperscript{110} cases, giving a first indication of European judges’ approach to this issue and their assessment of the Commission’s reasoning in this area. The General Court will have to address some key questions such as the interpretation of the arm’s length principle, the identification of the correct reference system for evaluating tax rulings, and the assimilation of multinational and independent companies.

Everything indicates that in the space of one year an overview of recent developments concerning State aid control such as this one will be as rich as this year’s, if not more so. And this, of course, adds to the interest in the

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\textsuperscript{108} Andres (faillite Heitkamp BauHolding) v Commission, C-203/16 P.

\textsuperscript{109} See Commission Decision of 21 October 2015, SA.38374 (2014/C) (ex 2014/NN), Netherlands Alleged aid to Starbucks. The decision has been appealed by Starbucks (T-636/16) and the Netherlands (T-760/15) and the cases are pending before the General Court.

\textsuperscript{110} See Commission Decision of 21 October 2015, SA.38375 (2014/C) (ex 2014/NN), Luxembourg alleged aid to FFT. The decision has been appealed by Fiat (T-759/15) and Luxembourg (T-755/15) and the cases are pending before the General Court.
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