

• LEXCELLENCE •

**EEUSTAID - BUILDING OF CENTRAL AND
EASTERN EUROPEAN JUDICIAL CAPACITIES
FOR THE ENFORCEMENT OF EU STATE AID LAW**

Budapest, 31 May 2019





SMALL GROUP SESSION: THE DILLY'S WELLNESSHOTEL CASE

ROLES AND POWERS OF NATIONAL COURTS AFTER A PRELIMINARY
RULING OF THE CJEU RELATING TO A STATE AID MEASURE



(Questions 1-5)

- ❖ Which is the Member State in the dispute in the main proceedings? (**Austria**/Hungary/Germany/Belgium)
- ❖ What kind of State measure is the subject of the dispute in the main proceedings? (**tax measure**/State loan/State guarantee/direct grant)
- ❖ Which measure of EU State Aid law do the questions refer to? (**general block exemption regulation - GBER**/Article 107(3)c) TFEU/Article 106(2)TFEU/Directive 2003/96/EC)
- ❖ What type of block exempted aid measure is the subject of the case? (**aid for environmental protection**/aid for local infrastructure/aid for SMEs/aid for sport and multifunctional recreational infrastructure)
- ❖ What is the exact form of the aid at issue? (**entitlement for energy tax rebate**/lower energy tax rate/total exemption from energy tax/VAT exemption)



(Questions 6-11)

- ❖ Which economic sector was eligible for the tax rebate according to the new Austrian legislation (applicable from February 2011)? (**manufacturing sector/ services sector/both/none**)
- ❖ What kind of aid measure was it? (**aid scheme/individual aid**)
- ❖ Was the applicant (Dilly's Wellnesshotel) a beneficiary of the aid? (yes, during the whole period of the measure/no/**only before its personal scope was limited/only after its personal scope was limited**)
- ❖ Was it necessary to explicitly refer to the former GBER in the national legislation which introduced the block exempted aid scheme? (**yes/no**)
- ❖ Without explicit reference to the former GBER was a measure able to be block exempted?(**yes/no**)
- ❖ Where does the original dispute before national courts stand currently? (dismissed by a final judgment, case closed/upheld by a final judgment, case closed/ dismissed by a final judgment, case open (extraordinary remedy)/**upheld by a final judgment, case open (extraordinary remedy)**)



RECAP ON THE FACTS AND THE RELEVANT
CJEU INTERPRETATION OF THE CASE



In 2004, Austria introduced an energy tax rebate system according to which undertakings in every sector could ask for a rebate of a fixed part of the energy tax they paid. This tax relief was notified to the Commission which approved it as a State aid compatible with the common market. From February 2011, Austria limited the personal scope of the aid measure to the undertakings in the manufacturing sector, on the condition that the Commission approves this modification of the aid scheme. However, the modification was not notified to the Commission. Dilly's Wellnesshotel, the applicant in the main proceedings, asked for the tax rebate for the year 2011, claiming that the exclusion of the undertakings in the services sector from the aid scheme was contrary to EU law. The Austrian court hearing the dispute asked for a preliminary ruling.



In its judgment of 21 July 2016 *Dilly's Wellnesshotel* (C-493/14, EU:C:2016:577), the CJEU held that the tax relief scheme applicable from February 2011 did not fulfil all the conditions of an aid for environmental protection according to the former GBER since the Austrian legislation which limited the personal scope of the aid did not contain an explicit reference to the former GBER. The referring court interpreted the judgment that the exclusion of the undertakings in the services sector from the aid scheme was an unlawful modification so it decided that *Dilly's Wellnesshotel* was still entitled to the tax relief. This judgment is now under extraordinary judicial review before the administrative court of Austria. There is a parallel case before the same court between the same parties concerning the tax rebate for the year 2013.



In the latter case, the administrative court of Austria asked for a preliminary ruling on the interpretation of the transitional provision of the new GBER which states that the new GBER “shall apply to individual aid granted before the respective provisions of this Regulation have entered into force where the aid fulfils all the conditions laid down in this Regulation, with the exception of Article 9.” (Article 9 of GBER lays down the publication obligations of the Member States.)

Advocate General Saugmandsgaard Øe in his opinion of 14 February 2019 (EU:C:2019:121) suggested the CJEU an interpretation according to which the transitional provision of the new GBER makes the modification of the personal scope of the Austrian energy tax rebate scheme lawful with a retroactive effect, with the result that Dilly’s Wellnesshotel is not entitled to the tax relief. The CJEU has not delivered its judgment yet.



CRITICAL REMARKS ON THE OPINION OF THE
ADVOCATE GENERAL



The relevant transitional provision of the new GBER says that its provisions shall apply to individual aid granted before its entry into force where the aid fulfils all the conditions laid down in it. However, the advocate general did not explain why it had considered that the modification of the personal scope of the aid scheme (which was unlawful under the former GBER) must be regarded as individual aid falling under the scope of the transitional provision.

- ❖ *Question to the judges*: what do you think about it? do you think that it (the lack of detailed explanation) is a shortcoming in the opinion of the advocate general?
- ❖ *Note to moderators*: please note that judges may not have a clear understanding of the distinction between an aid scheme and individual aid.



The relevant definitions in the GBER:

Article 2

(14) '**individual aid**' means:

(i) ad hoc aid; and

(ii) awards of aid to individual beneficiaries on the basis of an aid scheme;

(15) '**aid scheme**' means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be granted to one or several undertakings for an indefinite period of time and/or for an indefinite amount;

The relevant paragraphs of the opinion: 47-54

- ❖ *Note to moderators*: a possible answer to the question is that the advocate general should have underpinned its conclusion with detailed reasoning



SITUATION GAME 1



SITUATION GAME 1

Presuming that the CJEU gives the same interpretation of the transitional provision of the new GBER as suggested by the Advocate General, **what would you decide about the claim relating to the 2013 tax relief** if you were the referring court?

What you should take into consideration when making the decision (1):

- ❖ The referring court is bound by the interpretation given by the CJEU in the preliminary ruling.
- ❖ The interpretation given by the CJEU in a preliminary ruling has a quasi retroactive effect, in the sense that the provision of the EU law interpreted by the CJEU must have been interpreted according to the preliminary ruling from its entry into force. This means that the transitional provision of the new GBER should be interpreted as (will be) set out in the judgment of the CJEU from 1 July 2014.
- ❖ Whether you deem it relevant that the first judgment in the case of Dilly's Wellnesshotel was given on 21 July 2016, when the transitional provision of the new GBER had already been in force.



SITUATION GAME 1

Presuming that the CJEU gives the same interpretation of the transitional provision of the new GBER as suggested by the Advocate General, **what would you decide about the claim relating to the 2013 tax relief** if you were the referring court?

What you should take into consideration when making the decision (2):

- ❖ According to the judgment of 2016, the limitation of the personal scope of the aid was unlawful and so Dilly's Wellnesshotel remained entitled to the tax relief. According to the interpretation suggested by the Advocate General, the limitation was (became) lawful and Dilly's Wellnesshotel is not entitled to the tax relief.
- ❖ The delivery of the new judgment (laying down the presumed interpretation) would not render the previous one inapplicable.



SITUATION GAME 1

Presuming that the CJEU gives the same interpretation of the transitional provision of the new GBER as suggested by the Advocate General, **what would you decide about the claim relating to the 2013 tax relief** if you were the referring court?

Note to *moderators*: possible solutions

- ❖ Asking for a new preliminary ruling.



SITUATION GAME 2



SITUATION GAME 2

Presuming that the CJEU gives the same interpretation of the transitional provision of the new GBER as suggested by the Advocate General, **what would you decide in the extraordinary judicial review considering the tax relief for 2011** if you were the referring court?

Questions to consider:

- ❖ Did the referring court apply the interpretation of the CJEU enshrined in the 2016 judgment correctly when it decided that Dilly's Wellnesshotel was entitled to the tax relief? (If you think the answer depends on the rules of national law, than apply the rules of your national law.)

Note to moderators:

- ❖ when answering the question, judges should take into consideration the same rules and principles of EU law as listed at situation game 1
- ❖ when answering the question, judges can rely on rules in their national law



FINAL DISCUSSION



FINAL DISCUSSION

What interpretation do you expect from the CJEU?



Thank you for your cooperation