

EU/EEA State aid rules and Tax law
– workshop SPIRE Workshop

The recent case law of the ECJ – looking for clarity

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Maarten Aalbers LLM; Phd Fellow Leiden Law School



Universiteit Leiden



“The discussion on the precise contours of the selectivity of the aid has given rise to a rich debate amongst Advocates General. It is, however, fair to admit that in spite of these efforts, the assessment of selectivity continues to be ‘a difficult exercise with an uncertain outcome’ in practice.” (AG Bobek, C-270/15, *Belgium v Commission (BSE)*, par 19)

“There is no doubt that the heart of the selectivity test is establishing the ‘reference framework’. However, as far as the relationship between its textual expression and its genuine content are concerned, that heart reminds one of a Russian doll: only by opening the external layer does one see that the key notion is in fact that of discrimination. And again, hidden further within the notion of discrimination is comparability.” (AG Bobek, C-270/15, *Belgium v Commission (BSE)*, par 29)

Overview

1. The principle of equal treatment as the foundation of the material selectivity test in tax cases.
2. The objective justifications for tax derogations: distinction between intrinsic reasons for tax collection and horizontal and sectoral objectives.
3. Interplay between the objective justification test of article 107 (1) TFEU and internal market tests.
4. Marking out the material selectivity test in comparison to the balancing tests for compatibility.

The principle of (fiscal) equal treatment as the core of the material selectivity test

- Case law ECJ 2013-2019: The ECJ further builds on the principle of non-discrimination as the foundation of the three tier test (ECJ , C-15/14 P *MOL*, ECJ joined cases C-20/15 P en C-21/15P *World Duty Free*);
- Legal debate between AG's Bobek, Wahl, Wathelet, Kokott on the scope of the three tier test;

Case law has focussed especially on assessing the reference framework and determining the legal and factual comparability of undertakings (*World Duty Free*). The scope of application of the objective justification test remains still underdeveloped.

Restructuring the three tier test: finding a balance between legitimate objectives of national tax policy and the effect based approach

- 1) Is there a general applicable reference tax framework applicable?
 - Non – discriminatory;
 - Legitimate objective;
 - Applicable to every market operator in the autonomous (national/regional) territory.
- 2) Is there a prima facie selective measure/effect?
 - Derogation from the normal reference framework;
 - Different treatment between (groups of) undertakings/products, which given the objective of the reference framework are in the same factual and legal situation
- 3) If yes, is there an objective justification for this differentiation?
 - The derogation flows from an intrinsic legitimate objective of the reference framework; (*ANGED*, C-233/16, Hungary?)
 - The derogation makes no distinction between market operators in a comparable factual and legal situation (*Eventech*, *Hansestadt Lubeck*)

Objective justifications: *terra incognita* or internal market playing ground?

➤ Reasons of legitimate tax policy:

Preventing tax fraud, progressive tax system/redistribution, preventing a “double tax”

(ECJ C-480/16, *Fidelity Funds*; ECJ C-374/17, *A-Brauerei*; GC T-20/17, *Hungary v Commission*);

➤ Derogations for reasons of horizontal or sectoral policy:

- ECJ C-518/13 *Eventech* (safety, transport coordination);
- ECJ C-524/14 *Hansestadt Lübeck* (regional airport policies);
- ECJ joined cases 233/16, 234/16 & C-235/16 *ANGED* (environmental protection, spatial planning, regional investment policy).

Situating selectivity within the context of internal market tests

- Non – economic vs (economic) general interests;
- The objective justification test requires MS and national courts to conduct a balancing test (sometimes *strictu sensu*) between policy objectives and potential effects on market condition and market access (*ANGED, Eventech*);
- Invoking objective justifications based for horizontal and sectoral (autonomous) policies may result in invoking internal market exceptions (inherent or mandatory reasons as objective justifications)
 - > This may lead to a balancing test within article 107 (1) TFEU which allows conflicting interests to be appraised by national authorities and national courts (*ANGED*)

Blurred lines between the objective justification test and the compatibility test

- In case of a simultaneous application of one of the four freedoms and the material selectivity test a national court cannot make a balancing test between the tax derogation and the effects on the internal market (ECJ, C-598/17, *A-Fonds*)
- The standstill clause of article 108 (3) TFEU prevents in such a case the national court to assess an objective justification for a tax derogation (according to article 107 (1) TFEU or 63 TFEU)
-> (ECJ, C-598/17, *A-Fonds*)
- Currently the ECJ's case law lacks clarity and consistency in setting applicable standards and limits for invoking objective justifications (lenient *ANGED* approach vs the strict *A-Fonds* approach).

Conclusions

- The ECJ has founded the three tier test on the directly traceable non – discrimination test of EU internal market law;
- By restructuring this test there an improved balance between goals and effects was created;
- However the scope of the third tier allows for a balancing test which allows invoking internal market exceptions which can affect the objective nature of article 107 (1) TFEU and has implications for application and enforcement on the national level;
- There is a need for guiding precedents with in-depth assessment + effective judicial protection on the national level.

Thank you for your attention



m.aalbers@law.leidenuniv.nl



