

Case “A-Brauerei” C-374/17 or on selective deafness of the European Court of Justice

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Abstract

The case note analyses the judgment of the European Court of Justice “A-brauerei”, concerning the application of State aid control to fiscal measures. The contribution focuses on the analytical method deployed by the Court and is intended to highlight the criticalities of the current interpretation of ‘selectivity’. The latter is a fundamental element of the notion of State aid, at the core of the practical application of Article 107 TFEU in tax matters by the Commission and EU judges. The contribution is structured as follows: firstly, the facts of the case are presented; then, the German legal framework, relevant to the case at hand, is briefly defined; this is followed by the examination of the logical and argumentative path adopted by the Court; finally, critical considerations are proposed. The comments of the author focus on both the internal coherence of the reasoning in the case and, more generally, on the yardstick to assess selectivity, as recently defined in the European Community case law and confirmed in the present judgment.

Il contributo analizza la sentenza “A-brauerei” della Corte di giustizia, relativa all’applicazione del controllo sugli aiuti di Stato in materia di tassazione. Il contributo si concentra sul metodo di analisi adottato dai giudici del Kirchberg ed intende evidenziare le criticità dell’attuale interpretazione della “selettività”, elemento costitutivo della nozione di aiuto di Stato, su cui, in materia tributaria, si concentra l’analisi di Commissione e Corte nell’applicazione dell’art. 107 TFUE. Dopo aver brevemente fatto cenno ai fatti di causa ed alla cornice normativa tedesca rilevante nel caso di specie, il contributo segue il percorso logico-argomentativo adottato dalla Corte e propone considerazioni critiche, sia in relazione alla coerenza interna della motivazione, avuto riguardo alle diverse parti della stessa, sia, più in generale, per quanto concerne il metro d’analisi della selettività, come recentemente definito nella giurisprudenza eurounitaria e confermato nella presente sentenza.

Keywords: State Aid; real property transfer tax; selectivity; rule of law.

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1. Introduction

On 19 December 2018, the Grand Chamber of the European Court of Justice handed down its ruling on the preliminary question referred by the *Bundesfinanzhof* (German Federal Tax Court), before which a dispute between A-Brauerei and the German tax authorities was pending.¹ The question concerned the compatibility with European law — and, in particular, with State aid rules — of an exemption from the real property transfer tax. The conditions for exemption are that: (a) the transfer takes place within a corporate group; (b) the companies involved have a capital holding or capital control relationship of at least 95% (“controlling and dependent companies” under German commercial law); (c) this relationship is held for the five years before and five years after the transfer operation.

The Court of Justice ruled that the exemption in question was “*a priori* selective” in that it distinguished between companies which were part of a group and companies which were independent in relation to the payment of the tax in question. However, it also held that such a selective exception was justified by the nature and overall structure of the German transfer of property tax system. The importance of the judgment, also shown in the composition of the Court as Grand Chamber, stems from the fact that it has identified a possible justification for the selectivity of a measure in the avoidance of double taxation, thereby enriching the case law relating to the “third step” of the selectivity test, to date, extremely meagre. In this way, the Court seems to shift the focus of the analysis of selectivity from the assessment of discrimination to that of justification: whereas the first part of the test is carried out in such a way as to include within Article 107 TFEU most of the national tax provisions on the sole assumption that they have a derogatory character in relation to the general reference framework, it is only in the third and final step that the real features of the regime are duly examined.

The present case note focuses on the method of analysis used by the Court of Justice and intends to highlight its most puzzling and controversial elements. By contrast, other equally relevant issues in the area of fiscal state aid, such as the relationship between EU law and national competences on direct taxation, and the growing distance between state aid rules and competition policy, will not be examined. Thus, it is here argued that the legal analysis of selectivity is characterised by an extremely broad discretion, which makes it difficult to verify the logical pattern followed by those called upon to apply Article 107 TFEU. Despite the numerous criticisms — among which the Opinion of Advocate General Saugmandsgaard Øe² stands out for severity — the Court appears firm in applying the method of analysis of selectivity *a priori*, as codified in *World Duty Free*.³ In doing so, however, it fails to really confront itself with the issues already mentioned regarding the way selectivity is understood, without offering a convincing reasoning on its own interpretative choice, which appears increasingly distant from the literal datum and from the very rationale of Article 107 TFEU.

1. Judgement of 19 December 2018, *A-Brauerei*, C-374/17, ECLI:EU:C:2018:1024.

2. Opinion of the Advocate General Saugmandsgaard Øe of 19 September 2018, *A-Brauerei*, C-374/17, ECLI:EU:C:2018:741.

3. Judgement of 21 December 2016, *European Commission v. World duty Free and others*, joined cases C-20/15 P e C-21/15 P, ECLI:EU:C:2016:981.

In the next paragraph, the facts of the case will be briefly presented, together with the provisions of the German law cited by the Court in the decision. This will be followed by a summary of the most significant passages of the judgment, accompanied by some general remarks. The three sections of the Judgement will then be examined in greater detail: the analysis of the measure through the "traditional method"; the reference framework method; and the justification of the measure. Finally, the conclusions to this piece will be presented.

2. The facts of the case and the *Bundesfinanzhof* preliminary reference

A-Brauerei is a commercial company which holds a 100% stake in T-GmbH, which, in turn, owns real estate in Germany. On 1 August 2012, the companies carried out a merger by absorption (cd. *restructuring*⁴), through which A-Brauerei acquired all the buildings owned by the incorporated company, which ceased to exist. On 7 June 2013, the German tax authorities claimed payment of the property transfer tax, for which A-Brauerei would have been liable under the general rules on transfers of real estate, because the exemption invoked by the company was considered inapplicable. The tax advantage in question is contained in Paragraph 6a of the *Grundwerbsteuergesetz* (Law on property transfer tax),⁵ as amended in 2009.⁶ The provision introduced an exemption from property transfer tax for *restructuring* operations carried out under German or other Member States' commercial law, provided that such an operation is carried out between a "dominant undertaking and one or more dependent companies" (i.e. companies in which the dominant undertaking holds a participation in the capital or control over the assets of at least 95%) and that the participation ratio is maintained for the five years before and five years after the operation.

The tax authorities held that the exemption in question did not apply since the merger by absorption resulted in the elimination of the merged entity, making the requirement of shareholding ownership unfulfilled for the 5 years following the transfer. The resulting dispute came, first, before the *Finanzgericht Nürnberg* (Nuremberg Tax Court) and then, before the *Bundesfinanzhof* (Federal Tax Court), which, despite considering the interpretation initially proposed by the tax authorities to be incorrect, asked the Court of Justice whether it was possible to set aside the exemption in question because it was contrary to State aid law. The question asked by the *Bundesfinanzhof* is, in particular, whether Article 6a violates European law in so far as it exempts intra-group transactions from property transfer tax (provided that the abovementioned conditions are met), whereas that advantage is not granted to economic operators who have adopted a different legal form.

Before examining the Court of Justice's reply in detail, it is necessary to consider briefly the other articles of the German law on transfer tax which have been considered relevant by the Court of Justice. According to Section 1(1) of the *Grundwerbsteuergesetz*, the tax liability arises from a purchase agreement or another legal act establishing the right to transfer ownership (*Anspruch auf*

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4. The term "restructuring" under German commercial law does not indicate the change of legal form between partnerships or corporations, other legal persons or entities, as provided for by Art. 2948 – 2500-nonies of the Italian Civil Code. Rather, the term refers to special corporate operations like mergers, demergers and transfers of companies, which are governed by the *Umwaldungsgesetz* (Law on Company Transformations). In particular, art. 2 of the said law indicates the possibility of carrying out a merger "by absorption" through the transfer of the internal assets from the merged entity to the acquiring entity, as happened in the present case.
 5. The "Law on property transfer tax" came into force on 17 December 1982 and has been subject to numerous amendments, the most recent of which at the date of writing of this contribution dates back to 25 March 2019. The full text is available at the following link: https://www.gesetze-im-internet.de/grestg_1983/BJNR017770982.html.
 6. The reform of Article 6a was implemented by the *Wachstumsbeschleunigungsgesetz* (Law on the acceleration of economic growth) of 22 December 2009 (BGBl. 2009 I, p. 3950).

Übereignung)⁷ (No. 1). The following are also taxable events: the conclusion of a conveyance agreement where there has been no prior legal act establishing the right to transfer ownership (no.2) and the transfer of ownership where there has been no prior legal act establishing the right to transfer ownership and nor is a conveyance agreement required (no.3). Paragraph 2 of the same article provides that legal transactions which, without establishing a right to transfer ownership, enable another person legally or financially to make use, for its own account, of property located in Germany, shall also be subject to real property transfer tax. Finally, paragraphs 2a and 3 subject to taxation changes above 95% of the shareholding of companies owing real estate realized in a period of 5 years, whether made through formal transfers of shares or through transactions that, directly or indirectly, make it possible to dispose of the company's shares. Paragraphs 2a and 3, lastly mentioned, are in a relation of mutual exclusivity: transactions having as their object the transfer of shares in real estate companies are taxable only if the same change of shareholding is not directly taxed under any other provision of the law under scrutiny.

3. Art. 6a is *a priori* selective but the distinction between operators is justified

The Court of Justice, after emphasizing the link between the analysis of selectivity and the principle of non-discrimination,⁸ examined Article 6a of the *Grundwerbsteuergesetz* both through the method defined "traditional" by the Advocate General⁹ and through the reference framework method. Having regard to the first analytical technique, the selectivity of the measure was identified in that the exemption was precluded to entities which do not have the legal form of a group¹⁰ whereas, by applying the "reference framework" method, the Court found that the derogatory tax advantage discriminated in favour of corporate groups against autonomous companies.¹¹

At this stage, some general considerations on the methodology adopted by the Court should be made: first, selectivity, which should be only one of the conditions for State aid rules to apply, absorbs the other components of the notion of aid, so that the analysis under Article 107 TFEU is reduced to the finding of a selective advantage; secondly, the selectivity assessment is made through the application of a plurality of methods of analysis, which, however, rather than enriching the reasoning, weakens its justifying effectiveness.

In relation to the first of these profiles, the difference between the question referred for a preliminary ruling by the national court and the answer given by the Court of Justice should be noted: while the first asked for an interpretation of the concept of State aid in its entirety, the Court of Justice focused solely on the selective nature of the measure, neglecting the other components of the concept, which were only incidentally mentioned at the beginning of the judgement.¹² In this

7. As is well known, the transfer of ownership in German law is governed by the principle of abstractness (*Abstraktionssprizip*), from which it follows that the transfer of ownership is subject, in addition to the valid conclusion of a first contract with purely mandatory effects, to the simultaneous or subsequent conclusion of a second contract of transfer of ownership (*Auflassung*). See in general, F. GALGANO, *Il trasferimento della proprietà mobiliare per atto fra vivi*, in (eds.) F. GALGANO, *Atlante di diritto privato comparato*, Bologna, 2011, p. 105; S. VAN ERP, *Cases, Materials and Text on Property Law*, Cambridge, 2012, chapter VIII; T. KADNER GRAZIANO, *Comparative Contract Law*, London, 2009, p. 389.

8. Judgement *A-Brauerei*, cit., par. 22.

9. Opinion of the Advocate General to the case *A-Brauerei*, cit., par. 5.

10. Judgement *A-Brauerei*, par. 31.

11. *Ibidem*, par. 50.

12. *Ibidem*, par. 21, "In that respect, as regards, in particular, national measures that confer a tax advantage, it must be recalled that a measure of that nature which, although not involving the transfer of State resources, places the recipients in a more favourable position than other taxpayers is capable of procuring a selective advantage for the recipients and, consequently, of constituting State aid, within the meaning of Article 107(1) TFEU".

way, the concept of "selective advantage"¹³ replaces the wording of the Treaty, which identifies, as is well known, four distinct and cumulative conditions: State origin, advantage, selectivity and effect on trade and competition.¹⁴ It is precisely the strong reduction of the motivational burden on the judge (and of the evidential burden for the Commission) that should lead, at least in the context of selectivity, to adopt a concrete and empirically verifiable test.¹⁵ On the contrary, as it will be explained in more detail below, the method of analysis established in *World Duty Free* is abstract and does not require any concrete assessment of the impact of the measure on the market or of the characteristics of the undertakings benefiting from it. It should also be noted that the effect produced by the measure on competition and trade between Member States is not taken into consideration in the present case, not even to refer the relevant assessment to the national court. This element is the so called "jurisdictional" component of the notion of aid, since only measures whose distorting effects are transnational in nature fall within the competence of the European institutions.¹⁶ It is true that these elements are supported by presumptions, so it is sufficient that the measure is abstractly capable of distorting competition and trade for the State aid rules to apply;¹⁷ however, in cases such as the one examined here, where very common rules in national tax systems are at stake, which do not, moreover, directly or indirectly discriminate against foreign operators, it would seem appropriate to apply a much higher motivational burden to justify the contraction of national fiscal autonomy on the basis of the distortive potential of the measure.¹⁸

Turning to the plurality of methods of analysis and *rationes decidendi* contained in the judgement, this methodology follows the structure of the *Commission Notice on the notion of aid*¹⁹ and the Opinion that preceded the judgement, since both documents illustrate a plurality of techniques to assess selectivity. The Opinion of the Advocate General is of interest in this respect, as it effectively demonstrates the criticalities of the current interpretation of selectivity: by applying different methods — and even the same one — the Court and the Advocate General reach opposite solutions. Such wide margins of uncertainty are hardly compatible with the legal and objective nature of the notion of State aid.²⁰ Finally, the very function of the motivation risks being compromised because, if it is possible to easily justify diametrically opposed solutions, the motivation is reduced to a style clause. This is even more problematic in the present case, given that selectivity is assessed in *abstracto*

13. It remains unclear whether the requirements of 'selectivity' and 'advantage' retain their conceptual autonomy or, in the case of state regulatory measures, correspond to a single assessment. See, *ex multis*, judgment of 13 December 2018, *Ryanair v. European Commission*, T-165/16, ECLI:EU:T:2018:952, para. 82-83 and case law cited therein.

14. Article 107, par. 1 of the Treaty on the Functioning of the European Union states that "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".

15. See the Opinion of the Advocate General to the case *A-Brauerei*, cit., par. 47-60.

16. See, in general, J. DERENNE – V. VEROUDEN, *Distortion of Competition and Effect on Trade*, in *Eu State aid Control. Law and Economics*, P. WERNER – V. VEROUDEN (eds.), Alpheen Aan Den Rin, 2016, capitolo 5; A. BIONDI – P. EECKOUT, *State aid and Obstacles to Trade*, in *The Law of State aid in the European Union*, J. FLYNN – P. EECKOUT – A. BIONDI (eds.), Oxford, 2004, p. 103.

17. See, *ex multis*, judgement of 17 September 1980, *Philip Morris v. European Commission*, C-730/79, ECLI:EU:C:1980:209, par. 11; judgement of 24 July 2003, *Altmark*, C-280/00, ECLI:EU:C:2003:415, par. 81; Judgement of 15 December 2005, C-148/04, *Unicredito italiano*, ECLI:EU:C:2005:774, par. 54; Judgement of 3 March 2005, *Heiser*, C-172/03, ECLI:EU:C:2005:130 par. 32-35.

18. See the position expressed in the Opinion of Advocate General Kokott of 16 April 2015, *Finanzamt Linz*, C-66/14, ECLI:EU:C:2004:678, par. 103 e ss.

19. European Commission, *Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union*, C/2016/2946, in *OJ C 262*, 19 July 2016, p. 1, par. 117-141.

20. *Ex multis*, Judgement of 22 December 2008, *British Aggregates Association v. European Commission*, C-487/06 P, ECLI:EU:C:2008:757, par. 111 "According to the Court's case-law, however, State aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors" See also, J. L. BUENDIA SIERRA, *Finding Selectivity or the Art of Comparison*, in *European State aid law quarterly*, 2018, I, 85 e ss; A. BIONDI, *Per una teoria della gravità selettiva: evoluzioni della giurisprudenza della Corte europea di giustizia in materia di aiuti fiscali*, in Vv. Aa. (eds.), *Liber Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Torino, 2018, p. 216.

with reference solely to regulatory provisions and the empirical data relating to the persons who actually benefited from the measure are irrelevant.²¹

4. The “traditional method revisited”

The first part of the Court’s reasoning (paragraphs 21 to 34) seems to be based on the “traditional” selectivity analysis, apparently in line with what was proposed by the Advocate General Saugmandsgaard Øe, who advocated for the overruling of the three-step reference framework test.²² However, although formally applying the same analytical tool, the Advocate General and the Court came to opposite conclusions: the first considered the measure to be non-selective because it is effectively open to all,²³ the second, on the other hand, concluded that it is selective because the benefit is limited to groups of companies only. This divergence stems from the fact that the Court applied the “traditional method” only seemingly, but, substantially, the cited precedents are reinterpreted in light of the *World Duty Free*, a judgment in many ways incompatible with them.

In its long and insightful Opinion, the Advocate General criticizes the method of analysis of the “reference framework”, putting forward reasons of substantive²⁴ and formal nature. In particular, as far as the latter is concerned, four critical points are highlighted: firstly, the test used is extremely uncertain; secondly, the analysis required is unjustifiably complex in the face of very common tax regulation mechanisms; thirdly, the parameter adopted is formalistic because it focuses on abstractly considered legislation rather than on economic operators; and finally, the analysis required could be difficult for national courts called upon to apply State aid rules.²⁵ For these reasons, the Advocate General proposes to return to a method of analysis that looks at the actual availability of the measure for all economic operators from an *ex ante* perspective. It follows that, in the case of benefits which are effectively available to all undertakings and which are conditional only upon the adoption of a certain course of action (in the present case, the choice of consolidating their corporate structure), the measure should be qualified as non-selective.²⁶ On the contrary, the nature of aid should be demonstrated by proving that “certain undertakings or certain economic sectors are irrevocably excluded” from the benefit²⁷ either directly, because of the criteria provided for by the law (*de jure* selectivity)²⁸ or indirectly, because the measure is only apparently general but is in fact intended to benefit a certain sector or entities with specific characteristics (*de facto* selectivity)²⁹ or, finally, because of the discretion enjoyed by public authorities when granting the advantage.³⁰ Having applied this method of analysis, the Advocate General qualifies the measure in question as non-selective, since the tax exemption is not limited to any sector and the use of the

21. See, Judgement *World Duty Free*, cit. nt. 3, par 43. The Court considered irrelevant the fact that Spain had demonstrated (during the Commission’s administrative investigation procedure) that the benefit had been enjoyed by undertakings active in many economic sectors which were different from each other and not in competition.

22. Opinion of the Advocate General to the case *A-brauerei*, cit., par. 8-9.

23. *Ibidem*, par. 112.

24. See, *Ibidem*, par. 63-81, for the analytical presentation of the critical points of a substantial and systematic nature that the AG identifies in relation to the use of the reference framework method.

25. *Ibidem*, par. 82-88.

26. *Ibidem*, par. 112.

27. *Ibidem*, par. 101.

28. *Notice on the notion of aid, cit., paragraph 121*, and the case-law cited therein. See, in particular, judgment of 8 November 2001, *Adria-Wien Pipeline*, Case C-143/99, ECLI:EU:C:2001:598, in which the selective nature of the measure was identified in the fact that only manufacturing undertakings could benefit from the tax advantage at issue, and not those active in the provision of services.

29. *Notice on the notion of aid, cit.*, par. 121 to 122, and case law cited therein. See, in particular, judgment of 15 November 2011, *Commission v. Government of Gibraltar*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732.

30. *Notice on the notion of aid, cit.*, par. 123 and case law cited therein.

legal form of the group is genuinely open to all undertakings.³¹ On a closer look, the correctness of this interpretation is confirmed both by the intuition that measures available to the generality of the economic operators are less distortive, but also by the rationale that should inform State aid control: only by assuming the existence of an (unlikely) competition between subjects organized in the form of a group and subjects who opt for different legal structures, in Germany or in other European States, would it be possible to declare a derogation such as that examined in the present case harmful for competition and the Internal Market. If the Court had followed the Advocate General's proposal, the selectivity test would have been substantially modified *from World Duty Free* by reintroducing objective limits to the scope of State aid control.³² Such an interpretation also corresponds to the original meaning of the quotation made by the Court of Justice in paragraph 24 of the judgment: "The fact that only taxpayers satisfying the conditions for the application of a measure can benefit from the measure cannot, in itself, turn it into a selective measure."³³ Indeed, before that this statement was reinterpreted in subsequent case-law,³⁴ the Court had identified with it an objective method of analysis for selectivity, which was independent from the legislative technique used.

On the contrary, the Court, while formally applying the reasoning set out in its old case law, came to the opposite conclusion that the measure is selective because it is reserved to corporate groups only. This interpretation is in fact entirely based on what it has recently stated in *World Duty Free*: "while the regulatory technique used is not decisive in order to establish that a tax measure is selective, so that it is not always necessary for that technique to derogate from a common tax system, the fact that it is, like the measure at issue in the main proceedings, a derogation is relevant for those purposes where the effect of that technique is that two categories of operators — those who fall within the scope of the derogating measure and those who continue to fall within the scope of the ordinary tax system — are distinguished and are subject, *a priori*, to different treatment, even though those two categories are in a comparable situation in the light of the objective pursued by that system (...)."³⁵

This interpretation of selectivity is indeed contrary to what the Advocate General proposed and, more generally, to the method of analysis that was established in the cases before *World Duty Free*. The Court disregards the fact that the structure of the group of companies can be adopted by all economic operators, without restrictions linked to economic activity or the product sector and that, consequently, the exemption under Article 6a is genuinely available to all. In a nutshell, the selective nature of the measure is the consequence of the legislative technique used alone, regardless of the assessment of the subjects who are actually favoured by the measure. In *Cassa di Risparmio di Firenze*, cited by the Court in support of its argument, on the contrary, the selective nature of the advantage was identified in the fact that the benefit was limited to entities active in the banking sector and not only with reference to an abstractly considered legal transaction.³⁶ The analogy between the exemption in the present case and the one referred to by the Court is therefore inappropriate: in the latter case, the distorting nature of the measure (and the consequent classification as State aid) stemmed from the fact that the exemption applied only to the banking sector and was therefore effectively capable of altering the conditions of competition between those banks which

31. Opinion of the Advocate General to the case *A-brauerei*, cit., par. 112.

32. *Ibidem*, par. 115. See, also, the Opinion of the Advocate General Kokott of 9 November 2017, *ANGED*, C-233/16, ECLI:EU:C:2017:852, par. 85, where the Advocate General interprets restrictively *World Duty Free*, in line with what it had already proposed in its Opinion to the *Finanzamt Linz* case, cit.

33. Judgement of 29 March 2012, *3M Italia*, C-417/10, ECLI:EU:C:2012:184, par. 42.

34. Judgement *World duty Free*, cit. par. 59; Judgement of 28 June 2018, *Dirk Andres*, C-203/16 P, ECLI:EU:C:2018:505, par. 94.

35. Judgement *A-Brauerei*, cit., par. 33.; Judgement *World Duty Free*, cit., par. 77. See, in relation to the relevance of fiscal exemption for infra-group transactions, the *Commission Notice on the application of the State aid rules to measures relating to direct business taxation*, OJ C 384/03, 10.12.1998, par. 20.

36. Judgement of 10 January 2006, *Cassa di risparmio di Firenze*, C-222/04, ECLI:EU:C:2006:8, par. 136., Judgement *Unicredito Italiano*, cit., par. 49.

carried out the transactions provided for in the measure and other credit institutions, active on the Italian market or in other European countries.

This way of analysing selectivity seems contradictory to what the Court itself stated at paragraph 24 of the judgment in relation to the irrelevance of the legislative technique used: it is, in fact, sufficient to demonstrate the existence of a derogation from a general system.³⁷ Rather than surreptitiously reinterpreting its own precedents, it would have been more rational if the Court had openly confronted the criticisms made by the Advocate General, so as to confer authority to its recent case law. To date, the most complete explanation of the reasons that should justify this way of understanding selectivity is contained in the Opinion of Advocate General Wathelet in the cited *World Duty Free* case,³⁸ a document where, however, he addresses the issue solely on the basis of his own interpretation of the precedents cited in the judgment of the General Court under appeal at the time.³⁹ That analysis, which is indeed rather assertive,⁴⁰ does not present arguments of a systematic or teleological nature in support of its own interpretation. In conclusion, the reasons why such an understanding of selectivity is to be preferred to the literally more faithful interpretation of the expression "favouring certain undertakings or the production of certain goods" remain obscure.

5. The reference framework method

The second part of the judgment (paragraphs 35 to 43) focuses on the analysis of selectivity by means of the reference framework method, which is reaffirmed as the privileged instrument to examine the compatibility of tax measures with Article 107 TFEU.⁴¹ The way in which this analysis is practically carried out, however, is questionable for three reasons: firstly, the choice of the legislative provisions considered relevant for the purposes of the decision is unjustifiably restricted; secondly, the finding of discrimination is carried out in a formal manner and without giving reasons on the comparability between companies and corporate groups. Finally, as will be seen in paragraph 5 of this piece, the Court's reasoning is vitiated by a clear contradiction between the first two phases of the analysis and the last passage on justification.

The reference framework method "requires a determination, in the first place, of whether, under a given legal regime, a national measure is such as to favour" certain undertakings or the production of certain goods" over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can essentially be classified as discriminatory".⁴² Thus, the first part of the test requires the identification of the "common" or "normal" tax regime applicable in the Member State,⁴³ i.e. "a consistent set of rules that generally apply — on the basis of objective criteria — to all undertakings falling within its scope as defined by its objective (...). In the case of taxes, the reference system is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates"⁴⁴. The second step focuses on the analysis of the discrimination, i.e. the proof that "the

37. See, for the first reference to the concept of "derogation" in relation to State aid control, the Opinion of the Advocate General Darmon of 17 March 1992, joined cases C-72/91 e C-73/91, *Sloman Neptun* ECLI:EU:C:1993:97, par. 50.

38. Opinion of the advocate General Wathelet of 28 July 2016, *World Duty Free and others v. European Commission*, joined cases C-20/15 P e C-21/15 P, ECLI:EU:C:2016:624.

39. Judgement of 7 November 2014, *World Duty Free and others v. European Commission*, T-290/10, ECLI:EU:T:2014:939.

40. See, M. MEROLA, *The rebus of selectivity in fiscal aid: a non-conformist on and beyond case law*, in *GCLC Working paper*, 2016, available at: <https://www.coleurope.eu/research-paper/rebus-selectivity-fiscal-aid-nonconformist-view-and-beyond-caselaw>, p. 21.

41. Judgement *A-brauerei*, cit., par. 35 e 36.

42. *Ibidem*.

43. *Notice on the notion of aid*, cit., par. 132- 134.

44. *Ibidem*.

measure favours certain undertakings or the production of certain goods over others which are in a legal and factual situation which is comparable in relation to the intrinsic objective of the reference scheme.⁴⁵ The assessment of discrimination consists of two sub-sections: it is not sufficient to identify a different treatment between economic operators, but it is also necessary to demonstrate that these subjects are in a comparable situation in the light of the objective of the reference system.⁴⁶

In the present case, the "normal system" was identified in the German tax law on the transfer of real estate, without further specification. Leaving aside the issue of the real relevance of this first stage of analysis for the assessment of discrimination,⁴⁷ it should be noted that it is hard to carry out the selectivity analysis correctly focusing only on the legislative text containing the basic elements of the tax. Since the Court's objective was to examine national taxes in the light of the principle of non-discrimination, it would have been appropriate to extend the scope of the investigation to include the rules contained in the German Constitution and the way in which those rules are interpreted in tax matters.⁴⁸ Moreover, it is surprising that the Court did not even mention sources of European origin — and in particular the Directive 2009/133/EC on transformations within groups of companies⁴⁹ — as the Advocate General did in his Opinion.⁵⁰

Moving on to the second stage of the analysis, the Court identified the intrinsic objective of the tax system in question as "to tax any change in owner of the rights (*Rechtsträgerwechsel*) attaching to a property or, in other words, to tax any transfer of the right of ownership in a property from one natural or legal person to another natural or legal person within the meaning of civil law."⁵¹ Article 6a is therefore allegedly discriminatory, since companies which are part of a group are treated more favourably than independent companies as a result of the exemption from property transfer tax. The conclusion reached by the Court, even taking for good the reference system so narrowly defined, does not appear entirely correct. First, a passage from the analysis is missing as it is not clarified why corporate groups and autonomous companies are comparable. The discriminatory nature of a measure, as mentioned above, cannot be based on purely formal assessments; on the contrary, it would have been necessary that the Court had shown that in most similar situations groups and autonomous companies are treated in the same way. Moreover, in the absence of reasoning on the point, it is not possible to understand why the term of comparison is to be found in the autonomous companies rather than in the treatment of other persons, including corporate groups which do not have the characteristics provided for in Article 6a.

Secondly, also the objective of the system identified by the Court — namely, as stated above, the taxation of any formal change of ownership — does not seem to be reflected in the German provisions referred to in the judgment. Article 1(1), (2) and (3) and the relevant paragraphs, which are quoted at the beginning of the judgment, seem to define an "economic" rather than a "legal" concept of transfer of ownership as a condition for fiscal liability; it should logically follow that there is no

45. *Ibidem*, par. 135 and case law thereby cited.

46. See the Judgement *World duty free*, cit., par. 94. See also the reference to "selectivity strictu sensu" made by J. L. BUENDIA SIERRA, *Finding Selectivity or the Art of Comparison*, cit. See, on the convergence between State aid and fundamental freedom disciplines, J. P. WATTEL, *Comparing Criteria: State Aid, Free Movement, Harmful Tax Competition and Market Distorting Disparities*, in I. RICHELLE – E. TRAVERSA (eds.), *State aid and Business taxation*, Berlin, 2016, p. 59.

47. See the Opinion of the Advocate General Bobek of 21 April 2016, *Kingdom of Belgium v. European Commission*, C-270/15 P, ECLI:EU:C:2016:289, par. 23 e ss. where it is pointed out that the first step of the test is sometimes omitted by the Court without, however, altering the substance of the analysis.

48. See the Judgement of 8 September 2011, *Paint Graphos*, joined cases from C-78/08 a C-80/08, ECLI:EU:C:2011:550, par. 5, 25, 55-50, where the Court's comparison between cooperatives and other commercial companies considered both national constitutional provisions and secondary European legislation.

49. Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, OJ 2009 L 268, 25.11.2009, pp. 34–46.

50. Opinion of the Advocate General to the case *A-brauerei*, cit., par. 169.

51. Judgement *A-brauerei*, cit., par. 39.

comparability between groups and autonomous companies, since the transfer of ownership, understood as the economic availability of the property, is already taxed at the time when the company owning the property became part of the group or, if it is already part of the group, at the time of the acquisition of the property. Finally, the other provisions of the German legislation which, although not examined by the Court in the definition of the reference framework, should at least be mentioned,⁵² clearly show that the *Grundwerbsteuergesetz* embodies many other principles, including redistributive solidarity and the capacity to pay; the lack of a comprehensive analysis on the point arguably undermines the validity of the whole reasoning. An exhaustive examination of the fiscal, constitutional and corporate provisions, both national and European, as well as the concrete assessment of the comparability of autonomous companies and groups of companies, should have probably led to much more cautious conclusions in relation to the *a priori* selective nature of the measure.

Regardless of the decision taken in the present case, what should be emphasized is the abstract nature of the Court's reasoning, which is entirely based on the wording of the legislative provisions, without any empirically verifiable circumstances relating to the beneficiaries being relevant. This makes it difficult to identify objective limits to the concept of State aid, which potentially covers any derogating rule provided for in national tax systems. This is a source of substantial uncertainty, especially if one considers — as the Advocate General did in his Opinion — the difficulties in applying this case-law in litigations before national judges. If the domestic courts applied the present case-law formally, they would be forced to choose whether to set aside most of the exemptions and tax advantages provided for by national law or to flood the Court of Justice with requests of preliminary rulings.

6. The justification based on the nature or overall structure of the system

The last section of the judgment (paragraphs 44–52) focuses on the justification of the (*prima facie* discriminatory) measure based on the principles underlying the German property transfer tax system. The Court considered the distinction between operators to be justified by the need to avoid double taxation for groups of companies and consequently concluded for the compatibility of the German legislation with State aid rules. However, such an interpretation seems to contradict what was stated earlier in relation to discrimination, since the justification is identified on the basis of an 'economic' parameter of transfer of ownership, rather than a legal one, used for the purpose of establishing the existence of a discrimination.

The existence of a possible justification in State aid cases appeared for the first time in the well-known judgment on the Italian textile industry⁵³ as *obiter dictum* and then became an integral part of the selectivity test, as codified in the *Commission Notice on the notion of aid*.⁵⁴ The case *Paint Graphos*⁵⁵ certainly represents the most significant precedent on the point for the clarifications it made in relation to the conditions that must be satisfied for the discriminatory measure to be justified. The case concerned the Italian tax regime for production and labour cooperatives, to which, when certain conditions were met,⁵⁶ an exemption from income tax was allowed, by contrast with other commercial companies. In the judgment, the Court, while holding that, on the basis of the

52. See, in particular, the second section of the *Grundwerbsteuergesetz*, cit., § 3-7, entirely devoted to total and partial exemptions from the tax.

53. Judgement of 2 July 1974, *Italian Republic v. European Commission*, C-173/73, ECLI:EU:C:1974:71. See, on the case, P. ROSSI MACCANICO, *The specificity criterion in fiscal aid review: proposal for state aid control of direct business tax measures*, in EC TAX, 2007, II, p. 90 ff. J. J. PIERNAS LÓPEZ, *The notion of selectivity*, in *The Concept of State Aid Under EU Law: From internal market to competition and beyond*, Oxford, 2015, chapter V.

54. European commission, *Notice on the notion of aid*, cit., par. 138-141.

55. Judgement *Paint Graphos*, cit.

56. *Ibidem*, par. 52 e ss.

information provided by the national court, cooperatives and other types of commercial companies were probably not comparable, stated that the possibility of justifying a *prima facie* discriminatory measure is conditional upon the fact that the objective pursued by the measure is internal to the regulatory regime constituting the reference framework; that the measure is proportionate and consistent; and, finally, that the Member State adopts appropriate mechanisms to ensure compliance with those conditions.⁵⁷

Precisely in light of this strict indication of the requirements that are necessary in the third step of the selectivity test, there have been very few cases where the Court considered that a *prima facie* selective measure could be justified.⁵⁸ It is therefore surprising that the Court found, in the present case, that the need to "avoid double taxation and hence excessive taxation"⁵⁹ in the context of property transfer tax was sufficient. Moreover, this contradicts what was established a few paragraphs earlier in relation to discrimination: if the aim of the system is to tax "any transfer of property for civil law purposes", there seems to be no room for justifications based on the prohibition of double taxation in this case. Either the German system adopts an 'economic' concept of transfer — based on the actual availability of the property — and consequently groups and autonomous companies are not comparable (nor can there be discrimination), or the system is governed by the stricter "legal" concept of transfer, in which case the objective of avoiding economic double taxation is manifestly extraneous to the system and therefore irrelevant to the justification of the measure.⁶⁰

If this "generous" application of the last stage of the test is clearly imposed by the need to curb the expansion of the concept of selectivity, which, as seen in the previous paragraphs, is potentially capable of covering most of the exemptions provided for in national tax systems, this should not be done at the expense of the inherent coherence of State aid rules. The last comment it should be made is therefore related to the necessary coherence that should guide the whole analysis of selectivity, in all three phases. If, as seems to be the case, the Court intends to affirm the use of the reference framework as a general parameter for the analysis of tax measures of a regulatory nature, it is necessary, for the concept of State aid to remain objective and legal, that the whole analysis is developed in a logically coherent manner and using uniform parameters in all three passages of the test.

7. Conclusions or on selective deafness of the European Court of Justice

This case note has analysed the A-Brauerei judgment of the Court of Justice (Grand Chamber), which confirmed that the method of analysing selectivity imposed by the recent *World Duty Free* case constitutes the general parameter for assessing the compatibility of national fiscal measures with the State aid rules. In applying that case-law, the Court classified the exemption from property transfer tax contained in Paragraph 6a of the *Grundwerbsteuergesetz* as *a priori* selective but justified by the logic of the system.

The analysis carried out in this piece has attempted to highlight the main issues arising from the reasoning of the Court, which seems to ignore the numerous criticisms received in relation to its most recent interpretation of selectivity. In this regard, it has been pointed out that the Court refers to its own precedents only formally and surreptitiously reinterprets its own jurisprudence in the light of the *World Duty Free* ruling. The strong reaffirmation of its recent jurisprudence in the

57. *Ibidem*, par. 65 e ss.

58. See, K. LENAERTS, *State aid and Direct Taxation*, in H. KANNINEN e a. (a cura di), *EU Competition law in context: Essays in honour of Virpi Tili*, Oxford, 2009, pp. 291 e ss.

59. Judgement *A-brauerei*, cit., par. 50.

60. *Notice on the notion of aid*, cit., par. 138. See, on the point, the judgement *British aggregates v. European Commission*, cit.; Judgement of 8 September 2011, *European Commission v. the Netherlands*, C-279/08 P, ECLI:EU:C:2011:551, par. 81.

present case is indeed puzzling, given the repercussions in terms of consistency and legal certainty that this brings about. In particular, the first two passages of the "reference framework" test are interpreted in an extremely formalistic manner, without adequate consideration for the principles underlying German tax law: if that method of analysis allows to include a large number of national rules within the scrutiny under Article 107 TFEU, that is made at the cost of the consistent application of State aid control, which loses its objective character, one of its fundamental connotations. Moreover, with regard to the third part of the test, which examines the possibility of justifying the measure considered *a priori* selective, the Court's analysis appears to contradict the assessments of the German legislation made in the first two parts of the analysis.

The numerous criticalities mentioned above would suggest a different attitude by the Court, more open to accept and confront the findings of scholars and the Opinions of Advocates Generals regarding the current way of understanding selectivity. While, in other contexts, the Court has proved to be very attentive to the correct balance between legal certainty, institutional balance and the need to achieve the basic objectives of the European Union,⁶¹ in fiscal state aid, it seems to suffer from "selective deafness", which does not allow it to recognise the problems inherent in its judgements and to offer adequate answers. On the contrary, it would be necessary to clarify, before classifying as State aid most of the exemptions and tax advantages contained in the national fiscal legislations, how these are able to undermine the construction of the Internal Market.

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61. See, in general, K. LENAERTS – J. A. GUTIÉRREZ-FONS, *To say what the law of the EU is: methods of interpretation and the European Court of Justice*, EUI AEL Working papers, 2013/09.