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The EU Court of Justice reinforces its strict approach and holds that alterations to an approved aid scheme are to be cleared by the Commission *(Dilly's Wellnesshotel)*

STATE AID, ENERGY, AUSTRIA, EUROPEAN UNION, STATE AID (NOTIFICATION), STATE AID (EXISTING), STATE AID MODIFICATION, STATE AID (NEW), STATE AID SCHEME

EU Court of Justice, *Dilly's Wellnesshotel*, Case C-585/17, ECLI:EU:C:2019:969, 14 November 2019

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The EU's State aid procedures are complex and often slow and not always easy to navigate. Many companies may be content to leave the process of obtaining a green light from the European Commission (the "**Commission**") to government authorities. Or they may take comfort from the fact that a large proportion of national State aid schemes is actually 'block exempted' – i.e., it is automatically cleared as compatible State aid. However, several recent cases involving an Austrian wellness center serve to underline that vigilance may still be required.

If a government relies on the block exemption approach, it must publish a notice that it has done so. This is in the interests of transparency. It can then proceed to give the intended financial support to qualifying companies. The EU Court of Justice (the "**CJEU**") ruled in 2016 that if a government fails to publish the notice, the State aid becomes illegal and has to be repaid by the beneficiary. [*1*] This might seem excessively formalistic. In a ruling of 14 November 2019, the CJEU reinforced its strict approach when it held that any alteration to an approved aid scheme – and even in cases where the available aid would be restricted to fewer beneficiaries – would also have to be cleared by the Commission. [*2*] The CJEU ruled that where EU Member States change an existing, approved State aid scheme by altering who can benefit from it, they must, in principle, [*3*] notify such changes to the Commission, failing which the scheme will constitute unlawful aid.

Companies relying on national aid schemes are well-advised to monitor carefully whether all the requisite formalities have been fully complied with by the national authorities in question. This note explains the risks in greater detail against the background of the judgment of 14 November 2019.

Factual background

The CJEU responded to several questions referred to it by an Austrian court which arose from a dispute between local tax authorities and a hotel operator, Dilly's Wellnesshotel. At the core of the dispute was a restriction, under Austrian law, of the beneficiaries eligible for a rebate of energy taxes on natural gas and electricity (the "**energy tax rebate**"). In 2011, the provisions governing the energy tax rebate in Austria were amended in such a way that it was now available only to undertakings whose activity consisted primarily in the manufacture of goods, thus excluding service providers such as Dilly's Wellnesshotel. According to the referring Austrian court, that amendment had not been notified to the Commission. Dilly's Wellnesshotel brought an action before the Austrian courts when local tax authorities rejected its application to benefit from the energy tax rebate on the ground that it was a service provider. Against that background, the questions arose, in particular, (i) whether the restriction of the beneficiaries of the energy tax rebate ought to have been notified to the Commission, with the result that aid granted under the revised scheme should be regarded as unlawful aid, and, (ii) if so, whether the Austrian tax authorities were under an obligation to grant the energy tax rebate to service providers such as Dilly's Wellnesshotel.

The CJEU's ruling

The CJEU summarized previous case-law and State aid regulations according to which Member States are, in principle, required to notify any new aid to the Commission, including alterations to existing aid. The CJEU explained that State aid regulations defined an alteration to existing aid as any change other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the EU internal market. In the case at hand, the CJEU ruled that an amendment of the criteria used to identify those eligible for aid (in this case, a restriction of eligible beneficiaries) constituted an alteration to existing aid, thus giving rise to new aid:

- First, the CJEU considered that such an alteration could affect the assessment of whether a measure had to be classified as aid within the meaning of EU State aid rules, in particular its selectivity (a key criterion to determine whether a measure amounts to State aid).
- Second, the CJEU observed that such an alteration could distort competition by favoring certain undertakings or certain industries.
- Third, the CJEU noted that, under the State aid Implementing Regulation, the tightening of the criteria for the application of an authorized aid scheme is specifically regarded as an alteration to existing aid which must, in principle, be notified. As a consequence, alterations which restrict the beneficiaries of existing State aid schemes have, in principle, to be notified to the Commission, failing which they will constitute unlawful State aid. The CJEU indicated that, as an exception to this principle, aid schemes such as the energy tax rebate scheme could still be exempted from the notification requirement where they meet all requirements of an applicable block exemption regulation such as the GBER. [*4*]

Key takeaways and implications

- Any alterations to existing, approved State aid schemes or individual aid measures that are not modifications of a purely formal or administrative nature require prior notification to the Commission. This is a strict approach, since this broad definition can capture many alterations, some of which may appear insignificant at first glance. As illustrated by *Dilly's Wellnesshotel*, a notification is, in particular, required where the alteration relates to the criteria which identify the eligible beneficiaries of the aid. This would be the case, for example,

where it restricts the eligible beneficiaries.

- Aid schemes or individual aid measures may still be exempted from the notification requirement where they are covered by the GBER. This supposes that all relevant conditions of the GBER are met, which should be carefully verified.
- Where a State aid scheme or an individual aid measure is found to be unlawful because significant alterations were not notified to the Commission, beneficiaries may have to reimburse the aid. As a consequence, they are well-advised to monitor carefully whether any alterations to such schemes require prior notification. Such an active monitoring is all the more advisable as it is clear from the recent *Eesti Pagar* case [*5*] that beneficiaries may not hold legitimate expectations that they received lawful aid based on actions or assurances of the national authorities which granted the aid.
- Where third parties (in particular, competitors) become aware that alterations to an existing State aid scheme were not notified to the Commission, they may consider submitting a complaint to the Commission or bring proceedings before national courts.
- The interpretation by the CJEU of what constitutes an alteration to existing aid is not limited to a particular industry. Nevertheless, in the energy sector, the strict approach to notification obligations, highlighted by the judgment, adds to the current lack of guidance on aid compatibility. Indeed, the Commission's guidelines on State aid in the energy sector, [*6*] which were extended until January 2022 and are currently under review, are somewhat out of date as they do not reflect the latest market developments.

[*1*] CJEU, judgment of 21 July 2016, Case C-493/14, *Dilly's Wellnesshotel*, ECLI:EU:C:2016:577.

[*2*] CJEU, judgment of 14 November 2019, Case C-585/17, *Dilly's Wellnesshotel*, ECLI:EU:C:2019:969.

[*3*] As noted below, State aid is not subject to a notification requirement if it is covered by the Commission's General Block Exemption Regulation (the "**GBER**"). The GBER enables Member States to implement certain State aid schemes and individual measures without prior notification to the Commission.

[*4*] However, in the judgment, the CJEU only clarified that the energy tax rebate scheme met one particular condition of the GBER, which related to aid in the form of reductions in environmental taxes, but it did not rule on whether all other applicable conditions of the GBER were met.

[*5*] CJEU, judgment of 5 March 2019, Case C-349/17, *Eesti Pagar*, ECLI:EU:C:2019:172.

[*6*] Commission, Guidelines on State aid for environmental protection and energy 2014-2020.