STATE AID MONITORING OFFICE

VRIJE UNIVERSITEIT BRUSSEL

PRACTICAL APPLICATION OF THE GBER AFTER BMW AND EESTI PAGAR

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ÚOHS ÚŘAD PRO OCHRANU HOSPODÁŘSKÉ SOUTĚŽE
OFFICE FOR THE PROTECTION OF COMPETITION

AGENDA

- The stories of *BMW* and *Eesti Pagar*
- Incentive effect
- Legal certainty and practical implications

THE STORY OF *BMW*

SA.32009; T-671/14; C-654/17

THE STORY OF *BMW* – SA.32009

INTRODUCTION

- In November 2010, Germany notified regional aid to BMW to produce electric vehicles in Leipzig
- New establishment for two models (i3 and i8)
- Eligible costs: EUR 368 million
- Proposed aid: EUR 45.3 million (ca. 12%)
- Assessment under 2007 Regional Aid Guidelines and 2009 Communication on the in-depth assessment of regional aid to large investment projects

THE STORY OF *BMW* – SA.32009

AN INTERESTING PROCEDURAL POINT

➔ Market share

- Under the 2007 RAG, COM was required to open an in-depth investigation before authorising aid if the aid beneficiary has a 25% market share before or after the investment, unless it is a new product market

- COM decided to open an in-depth investigation (innovative product ≠ new market)
- Very difficult to define segments (conventional market or electric car market?)
- Turns out rather a procedural issue → COM approves aid regardless (no comments from competitors in the in-depth investigation phase)

THE STORY OF *BMW* – SA.32009

COM'S DECISION

- COM opened in-depth investigation (13 July 2011) but eventually approved EUR 17 million of aid (9 July 2014)
- Compatible aid:
  - appropriate,
  - incentive effect,
  - proportional,
  - positive effects outweigh negatives
- Only a fraction of the promised aid was approved, which was below what was allowed under the GBER
- BMW challenged the decision before the CJEU

European Commission

THE STORY OF *BMW* – T-671/14

12 SEPTEMBER 2017

- BMW asked the GC to annul the part limiting the amount of aid to EUR 17 million
- GC confirmed incentive effect but also that aid was only proportional up to EUR 17 million (only the location decision related costs were eligible), costs arising after the start of the project were not eligible
- Notification excludes the application of the GBER (for the entire amount)
- Presumption of compatibility under the GBER cannot enjoy priority over the in-depth individual assessment of the project subject to notification
- BMW appealed the judgment

THE STORY OF *BMW – C*-654/17

29 JULY 2019

- CoJ confirmed COM's and GC's assessment
- Only full compliance with the GBER is acceptable; otherwise illegal aid
- Member States cannot give assurances over compatibility; MS authorities only check conformity with the GBER
- No existing aid without COM decision
- No legitimate expectations

THE STORY OF *EESTI PAGAR*

C-349/17

THE STORY OF *EESTI PAGAR* – C-349/17

COMPANY PROFILE

600 employees

Tradition

Eesti Pagar and private labels

13 production lines

Exports 2020
EUR 12 million

THE STORY OF *EESTI PAGAR* – C-349/17

THE INVESTMENT AND THE AID

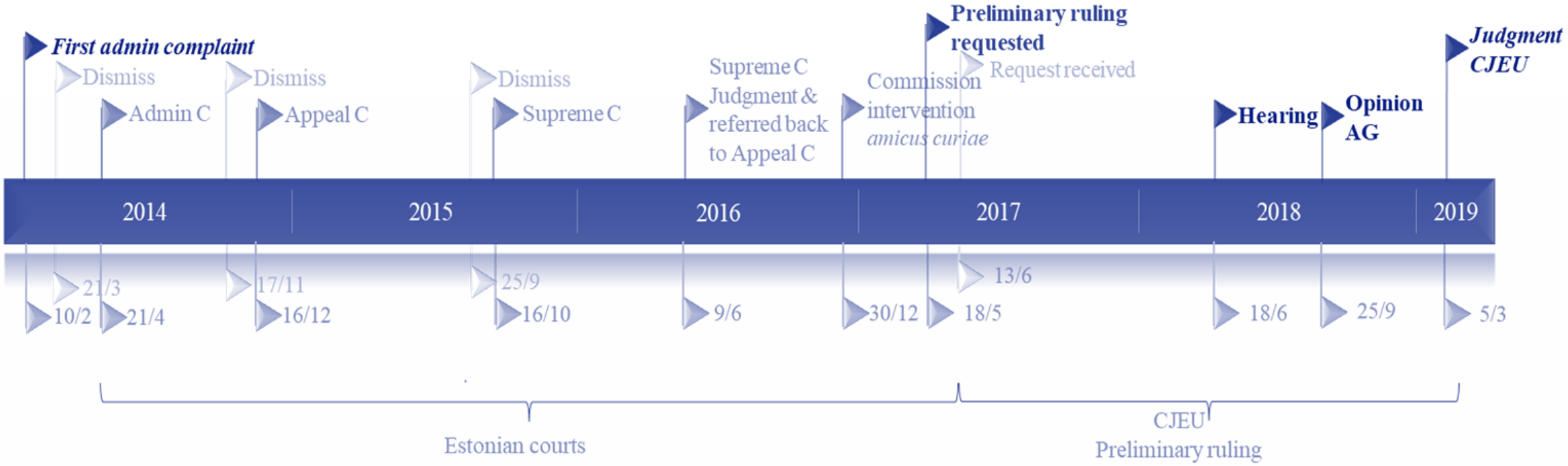
- A new thin loaf and sandwich loaf production line from Kauko-Telko Oy
- Lease via AS Nordea Finance
- Price: EUR 2 770 000
- Enterprise Estonia
- GBER
- Aid: EUR 526 300

THE STORY OF *EESTI PAGAR* – C-349/17

TIMELINE

THE STORY OF *EESTI PAGAR* – C-349/17

TIMELINE



THE STORY OF *EESTI PAGAR* – C-349/17

QUESTIONS FOR THE CJEU

Q1: In the framework of assessing the incentive effect, what is meant by the start of the project or activity?

A1: A project has started when construction commenced, but also when the first legally binding commitment is made to order equipment.

Q2: Should a national authority recover unlawful aid in the absence of a Commission decision, e.g. when it has found a breach of GBER conditions?

A2: Yes.

Q3: Can an aid beneficiary hold legitimate expectations about the lawfulness of an aid measure granted by a national authority, that wrongfully applied the GBER?

A3: No.

Q4: In the framework of recovery in the absence of a Commission decision, which limitation period applies?

A4: Four years if the conditions for the application of Regulation No 2988/95 are satisfied, or alternatively, the period laid down by the applicable national law.

Q5: In the framework of recovery in the absence of a Commission decision, which interest rate and period shall apply?

A5: Recovery of the full amount, plus interest in accordance with the applicable national law, for the entire period of the advantage.

INCENTIVE EFFECT

BMW

SA.32009; T-671/14; C-654/17

BMW - INCENTIVE EFFECT

FOLLOW-UP INVESTMENT / COSTS

- Scenario 2 case (DE argued for Scenario 1 but COM dismissed the argument)
- Aid approved by COM: only EUR 17 million! (the amount necessary to bring the project from Munich to Leipzig)
- DE argued that additional costs arose after the start of the project
- But COM concluded that additional costs related to i8 not i3 production, investment decision for i8 was only made in 2011 (original location decision was made in 2009)
- **No incentive effect for the investment costs of i8 production** (EUR 45 million)
- DE argument that the notification relates only to aid above the GBER notification threshold (EUR 22.5 million) was dismissed ➔ no obligation on COM to allow aid up to the maximum allowed by the GBER if the aid is notified

BMW - INCENTIVE EFFECT

FORMAL VS SUBSTANTIVE INCENTIVE EFFECT

CoJ judgment paragraph 164: COM must authorise aid if it complies with the GBER

- BMW case: the 2008 GBER required, for regional aid, that large beneficiaries prove that the project would not have been carried out as such in the assisted region without the aid – this coincides with the RAG

- Under the current GBER, this requirement only applies to ad hoc aid for large enterprises

  ➔ if you grant aid under a scheme to a large enterprise below the notification threshold but you still notify, can you avoid a full assessment under the RAG?

INCENTIVE EFFECT

EESTI PAGAR

C-349/17

EESTI PAGAR - INCENTIVE EFFECT

START OF THE PROJECT

- Key role of incentive effect in compatibility assessment!
- Beneficiary cannot legally commit before applying for the aid

- Makes perfect sense:
  - Protects taxpayers' money from being wasted
  - No excessive or unreasonable spending

- "before work on the project or activity has started"
  - Start construction
  - First commitment to order equipment (excl preliminary feasibility studies)

  ➔ The contract was legally binding and took effect when the first installment (5%) was paid

EESTI PAGAR - INCENTIVE EFFECT

ESCAPE CLAUSE?

Is the purchasing contract the start of a project when there is an escape clause for a small fee?

- **No**
- Allowing such a clause would necessitate complicated assessments on a case-by-case basis
- This requires interpretation (a door the Court did not want to open)
- Would be against the spirit of the GBER
- Would not serve legal certainty

➔ When applying the GBER rules should be straightforward and strict

➔ Solution?

- ➔ Use the outcome of the aid as a condition in the purchasing contract
- ➔ Contract does not become binding until the aid has been awarded

LEGAL CERTAINTY & PRACTICAL

BMW

SA.32009; T-671/14; C-654/17

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BMW - LEGAL CERTAINTY

ONLY A COM DECISION WILL GIVE YOU LEGAL CERTAINTY

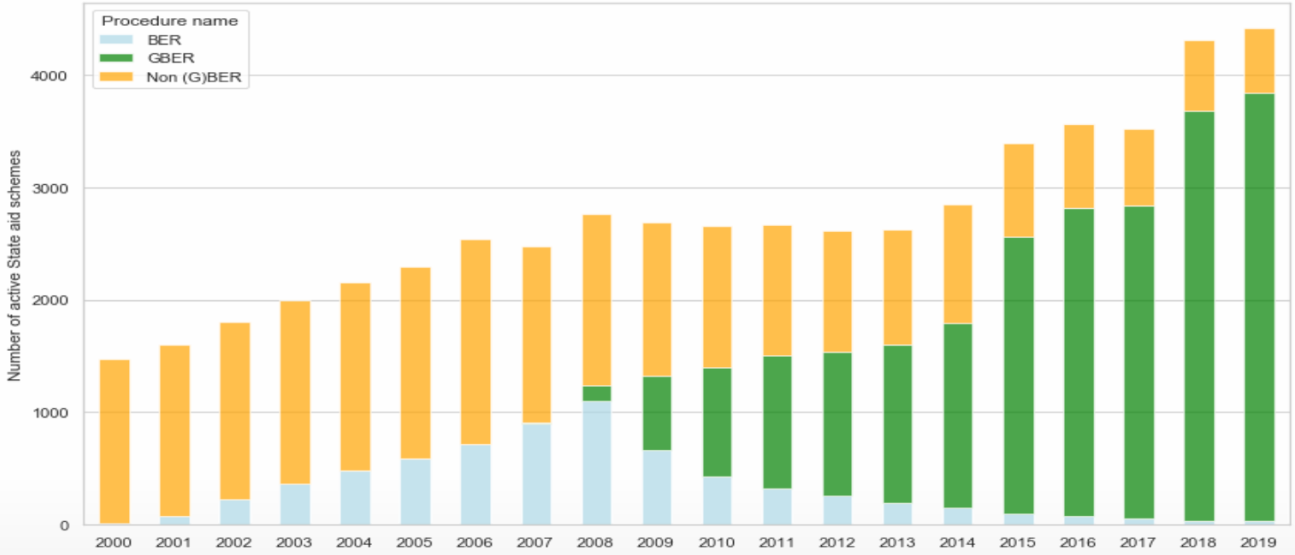
- Member States' authorities can only (but also must) check if the aid complies with the GBER – no assurance on compatibility (despite what the GBER says: "aid (…) shall be compatible" if conditions are fulfilled
- CoJ judgment paragraph 142: **this is NOT a final decision**
- If Member State authorities "misapply" the GBER: this violates the GBER and the notification obligation → illegal aid that can be challenged before national courts

BMW – PRACTICAL IMPLICATIONS

BLOCK EXEMPTIONS ARE STRONGLY FAVOURED

Block exemptions are strongly favoured since the State Aid Modernisation initiative and before

- New aid categories, higher thresholds (over 95% of new measures now)
- Clear policy that GBER should be applied as much as possible (State aid scoreboard: *"GBER uptake is steady, but has not reached its full potential in terms of State aid expenditure"*)



BMW – PRACTICAL IMPLICATIONS

BLOCK EXEMPTIONS ARE THEREFORE APPEALING…

- But absolute legal certainty cannot be ensured, not even with COM's active involvement
- But failures are discovered later (e.g. complaint or COM monitoring), when aid has been granted – **illegal aid cannot be avoided** (which means a legal risk before national courts)
- And non-compliance with the GBER results in most likely non-compliance with the guidelines and incompatibility (depends on the flexibility of the guidelines) – **incompatible aid**
- And Member States are now required to correct their own mistakes (aid will most likely have to be recovered)

BMW – PRACTICAL IMPLICATIONS

BLOCK EXEMPTIONS CAN BE DIFFICULT TO APPLY IN PRACTICE…

- By nature, block exemption regulations are very general and give only a framework – **very easy to misapply**
- Their **interpretation changes over time** (e.g. formal incentive effect requirement vs. eligibility of costs)
- **Guidance** is provided by COM (eState Aid Wiki), but most of it is not public, gives no legal certainty, and national courts and legal practitioners may not have access to it
- Certain aid categories are extremely difficult to apply correctly (**funding gap categories**; environmental aid because of the **counterfactual**)

BMW – PRACTICAL IMPLICATIONS

WHAT CAN MEMBER STATES DO FOLLOWING THE BMW CASE?

Ensure simultaneous compliance to the guidelines especially for regional aid? This creates administrative burden for beneficiaries

Consult COM before setting up a GBER measure? This takes away a key advantage of block exemption

Notify projects for legal certainty that fit under the GBER? Risky: based on BMW, COM might find that some of the aid is unnecessary

Withdraw notification and use the GBER if they conclude in the procedure that COM might approve only a limited amount? Certainly possible but untested

LEGAL CERTAINTY & PRACTICAL

EESTI PAGAR

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EESTI PAGAR - LEGAL CERTAINTY

RECOVERY WITHOUT A COMMISSION DECISION

Can a company hold legitimate expectations that all GBER criteria are met?

- **No**
- Actions by a national authority that breach EU law cannot cause legitimate expectations for the beneficiary of the advantage

Recovery in the absence of a Commission decision?

- **Yes**
- When an infringement is found, such as the false interpretation of a GBER condition, also in the absence of a Commission decision, all necessary action must be taken to rectify:
  - Recover on own initiative
  - Including interest rate

EESTI PAGAR – PRACTICAL IMPLICATIONS

RECOVERY IN THE ABSENCE OF A COMMISSION DECISION

Interest rate

- Restore the situation which existed before the aid
  - ➔ Recover aid plus interest
- When recovering on own initiative, the EU State aid procedures and implementing regulation do not apply!
  - ➔ Market based interest rate
  - ➔ Acknowledges the illegal aid as a loan to be paid back, including market interest
- Valid in the spirit of State aid law, but burden on granting authorities

EESTI PAGAR – PRACTICAL IMPLICATIONS

RECOVERY IN THE ABSENCE OF A COMMISSION DECISION

Limitation period

- When the Commission orders recovery
  - ➔ Up to 10 years

- Recovery on own initiative
  - ➔ Period laid down by the applicable national law
  - ➔ (4 years if the conditions for the application of Regulation 2988/98 are satisfied)

  - Periods of less than 10 years can be accepted
  - The Commission can still recover after national limitation periods expired

  - What about limitation periods longer than 10 years?
  - What about parallel procedures by the EU and the national authority?

THANK YOU FOR YOUR ATTENTION

QUESTIONS?

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