Global Competition Law Centre – College of Europe

Lunch talk of 6 March 2017 - Selectivity in State aid

The World Duty Free/Santander/Lübeck judgments of the CJEU: a welcome clarification or back to square one?

Critical comments

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SheppardMullin Unpacking Complexity Unfolding Opportunity



Outline

- World Duty Free Group
 - Limited scope vs principles stated
 - Elements of confusion within the case law
 - Selected critical comments of specific points
 - Potential impact of the judgment
- Lübeck
 - Reference system
 - Apparent logical consequence



World Duty Free - Limited scope vs principles stated

- Annulment limited to the first plea in law
- Case referred back to GC: outstanding points
 - Reference system
 - Comparability of "domestic" and "foreign acquisitions"
 - Justification by the nature of the system
 - Domestic acquisitions subject to other measures
 - Advantage?
 - Identity of beneficiaries (buyer sellers)
 - Statement of reasons
- Despite this, the CJEU established principles beyond the relevant point to adjudicate

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World Duty Free - Confusion in the case law

- Repeated divergences between Commission, GC and CJEU
 - British Aggregates, NOx, BNP Paribas/BNL, Gibraltar, MOL, etc.
- Selectivity the longest section in NoA Notice
- Selectivity not treated as a real separate condition
 - 4 or 5 conditions
 - Inconsistent *obiter dicta*?
- Diverging interpretation of judgments by EU courts

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World Duty Free - Critical comments of specific points

- Measure available to all undertakings
 - "behavioural selectivity" (the measure applies to all not investing, investing in domestic or foreign undertakings) - only the advantage matters
 - AG Kokkot in C-66/14, *Finanzamt Linz*: non-discriminatory conditions (call for conditions inherent to the measure?)
- "Differential treatment" / "discrimination"
 - only depends upon the choice made by undertakings
 - does not result from the measure in itself
- Collapse of advantage and selectivity
 - two separate, autonomous, conditions in their essence; "selectivity" should not depend consubstantially upon "advantage" different comparisons in nature

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- advantage: comparison with normal market conditions competition
- selectivity: comparison with the normal action of the State reference system
- selectivity merely became "discrimination" (inherent to the measure or exogenous?)
- Justification by nature of the system: *probatio diabolica*?
- Ultimately, for case law, an "advantage is selective if it is an advantage"...

World Duty Free - Potential impacts of the judgment

- Fiscal measures mainly: Member State's tax policy
 - See para 52: not addressed by the CJEU
- Current tax measures?
 - Most of existing tax deductions, tax incentives, etc., although not reserved to any specific tax contributors, may be regarded as unlawful and incompatible aid
- National courts
- Commission
 - Complaints and/or ex-officio investigations?
 - Article 106(3) decision?
 - Amended notice? Not likely, so what?
- Tax rulings?





Lübeck

- Reference system/framework
- If 2006 schedule at Lübeck only
 - Apparent logical consequence
 - Competing airlines at competing airports (advantage) not comparable (not selective)





Conclusion

- Legal uncertainty mainly came from the EU courts
- Extension of the notion of aid
 - Need to maintain strong State aid control
 - Need for strong legal foundations: structural approach
 needed
- Further guidance
 - EU courts?
 - Commission
- Member States should clean their tax system
 - Complaints to national courts (Commission)
 - Commission's investigations



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