

Current Intelligence

Commission v World Duty Free Group a.o.: Selectivity in (Fiscal) State Aid, quo vadis Curia?

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Judgement of the Court of Justice of 21 December 2016 in joined cases C-20/15P and C-21/15 *Commission v World Duty Free Group* (formerly *Autogrill España*), *Banco Santander & Santusa Holding*, EU:C:2016:981.

The selectivity criterion can be satisfied even though the measure is available to all undertakings and its application merely depends upon the choice of undertakings adopting the relevant activity. It is not necessary to identify a particular category of undertakings for a fiscal measure to be selective.

I. Legal context

On 21 December 2016, the Court of Justice of the European Union (CJEU) assessed how and to what extent fiscal measures can fall within the meaning of State aid under Article 107(1) of the Treaty on the Functioning of the European Union (TFEU). The condition of selectivity, undoubtedly the most problematic condition, especially when it comes to fiscal measures, was on the chopping block. To date, neither the Commission's decisional practice nor the EU case law have succeeded in bringing the necessary clarity to this discussion.

II. Facts

The *World Duty Free Group/Santander* case concerns a Spanish tax measure which provided that, in the event that an undertaking taxable in Spain acquires a shareholding in a foreign company of at least 5 percent of that company's capital, the goodwill stemming from the shareholding could be deducted, in the form of an

amortisation, from the corporate tax for which the undertaking is liable.

In two 2011 decisions, the Commission declared the contested scheme unlawful and incompatible with the internal market. *Autogrill España* (now *World Duty Free Group*) challenged the first decision before the General Court; *Banco Santander and Santusa Holding* the second.

On 7 November 2014, the General Court annulled the Commission decisions (T-219/10 *Autogrill España*, EU:T:2014:939 and T-399/11 *Banco Santander and Santusa Holding*, EU:T:2014:938). The General Court identified a violation of the notion of selectivity without examining the other pleas (lack of selectivity due to the nature of the system, failure to correctly identify the reference system, lack of advantage and lack of reasons). In that regard, it is well known that the conditions for a measure to constitute State aid are cumulative and thus, failure to meet one requirement results in there being no aid.

The General Court found that the measure was not selective for several reasons: firstly, where the measure at issue, even though it constitutes a derogation from the common or 'normal' tax regime (*a point not ultimately decided by the General Court*), is potentially available to all undertakings, it is not possible to compare the legal and factual situation of undertakings which are able to benefit from the measure with that of undertakings which cannot benefit from it; secondly, for a measure to be selective, one must identify a category of undertakings which are favoured by it; thirdly, selectivity cannot result from the mere finding that a derogation from a common or 'normal' tax regime has been introduced, especially if that measure is *a priori* accessible to any undertaking; fourthly, the contested measure is not limited to any particular type of business or economic operation and a national measure does not constitute State aid if it applies to all undertakings in the national territory regardless of their activity.

III. Analysis

The European Commission relied on a single ground of appeal comprising two limbs, based on an erroneous interpretation of the condition of selectivity.

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A. No need to identify a group of undertakings with specific characteristics

By the first limb, the Commission claimed that the General Court erred in law by holding that the Commission should identify a group of undertakings with specific characteristics in order to demonstrate that the measure is selective.

According to the CJEU, the crux of the issue is whether a measure can be classified as ‘discriminatory’: what should be assessed is whether ‘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 who accordingly suffer different treatment that can, in essence, be classified as discriminatory’ (para. 54 of the judgement). With regard to national measures ‘conferring a tax advantage’, the CJEU considers that when they place their beneficiaries in a more favourable position than other taxpayers, they are likely to provide a ‘selective advantage’. However, they do not constitute aid if the tax advantage results from a general measure applicable without distinction to all economic operators (para. 56).

The CJEU then sets out the three steps the Commission must take to identify a national tax measure as selective: (i) the Commission must identify the ordinary tax system; (ii) the tax measure at issue must be a derogation from that system and the measure must differentiate between comparable operators, in the light of the objective pursued by that ordinary tax system (para. 57); and (iii) differentiating measures may, ultimately, not be construed as selective if the Member State concerned is able to demonstrate that that differentiation is justified since it flows from the nature or general structure of the system of which the measures form part (para. 58); however, the mere fact that only taxpayers satisfying the conditions for the application of a measure can benefit from it cannot in itself make it selective (para. 59).

The contested tax measure confers an advantage on all undertakings which carry out the relevant transactions (acquisition of a shareholding in a foreign company of at least 5% of that company’s capital). In order to be selective, the CJEU considered that it was up to the Commission to establish, notwithstanding the general application of the measure, that it conferred a benefit on certain undertakings or certain sectors of activity. According to the CJEU, the General Court’s error stems from it requiring the identification, in all cases, of a particular category of undertakings which would be the only ones favoured by the measure at issue and which

could be distinguished by specific and common properties (para. 71). To the contrary, for the Court, the Commission should not be required to identify certain specific features that are characteristics of and common to the recipient undertakings, by which they must be distinguished from those undertakings that are excluded from the measure (para. 78). All that matters is that the measure has the effect of placing the recipient undertakings in a better position than other undertakings in a comparable legal and factual situation (para. 79).

The CJEU’s judgement is limited to this point: the General Court should not have required the Commission to define a particular category of undertakings favoured by the tax measure and should have determined whether the Commission had analysed the discriminatory nature of the measure.

B. A measure that benefits cross-border transactions, but excludes the same domestic transactions, is selective

The second limb requires less discussion. The Commission argued that the General Court erred in law by its application of the case law on export aid and that it had made an artificial distinction between export aid and aid for the export of capital (para. 115).

Relying on Advocate General Wathelet’s Opinion, the CJEU held that the case law cannot be understood as meaning that a national measure must necessarily be classified as selective where that measure benefits exclusively undertakings that export goods or services (paras. 117 and 118). On the contrary, a measure designed to facilitate exports may be regarded as selective if it benefits undertakings carrying out cross-border transactions and is to the disadvantage of other undertakings which, while in a comparable factual and legal situation, carry out transactions of the same kind within the national territory (para. 119).

C. Next steps

As the General Court failed to examine three of the four pleas relied on by the applicants and did not examine, within the first plea, whether the undertakings that did not meet the conditions for obtaining the tax advantage were in a comparable factual and legal situation to those favoured by the measure, the cases were referred back to it.

IV. Practical significance

As one of the cumulative conditions for the finding of State aid under Article 107(1) TFEU, selectivity is distinct from and not to be confused with the other four

conditions. A State measure conferring an advantage by means of State resources, distorting competition and affecting trade between Member States would not constitute State aid unless it is selective. Nevertheless, it has often been treated as an ‘accessory’ to the condition that there be an advantage.

It should be recalled that the two concepts require a ‘comparison’ which is distinct in nature: the ‘advantage’ results from a comparison with the ‘normal market conditions’ (in fact, a counterfactual analysis: what would have been done in these conditions?); the ‘selectivity’ results from a comparison with what the State actually does, not with what it should have done.

Rather than formulate a clear interpretation of selectivity insofar as it refers to a situation in which a differentiation is introduced between undertakings in a comparable legal and factual situation, the Court interpreted selectivity in an overly extensive manner. In doing so, the CJEU has contributed to the devaluation of the condition. Indeed, following the CJEU’s approach, even though the advantage from the measure is available to any tax contributor (without any condition but the ‘incited activity’), such a measure will constitute aid merely if it has the effect of conferring a benefit on a select few: those opting to carry out the activity concerned. The CJEU deduces the existence of selectivity from the mere fact that undertakings will be favoured over others being in comparable situations (a point still to be demonstrated *in casu*), thereby only retaining the effect of the measure (which rather relates to the ‘advantage’ criterion).

However, one could argue that this is not the effect of the measure itself but rather the effect of the choice of the undertakings selecting or not to invest in foreign companies. Here, it was not a measure which reserved

itself for certain undertakings, it was a measure which provided an advantage to those undertakings which chose to engage in a certain activity, a choice available to all, without any discrimination. An unconditional tax advantage linked to an activity accessible to any undertaking does not appear to be selective. Notwithstanding, one loophole remains: where a measure that is *a priori* selective escapes qualification as State aid due to the nature and general structure of the tax system. This last condition depends on evidence to be adduced by the Member State claiming the benefit of that exception, often qualified as a *probatio diabolica*.

Not only does this judgement fuel confusion and calls into question a number of fiscal measures which until now had not appeared to constitute State aid, it also fuels concern that the Commission could control virtually all measures of direct taxation, a competence fundamentally retained by the Member States (the CJEU did not respond to the arguments raised by the intervening Member States—see para. 52) . Of course, Member States are not immune from State aid control when adopting tax measures but one can wonder whether the notion of selectivity is not construed too broadly with the result of the application of State aid control instead of internal market rules in certain circumstances.

This case highlights the difficulty of applying the selectivity criterion in tax cases. A tax measure, which is available to all who chose, is selective because recipient undertakings were placed in a more favourable position than other undertakings in a comparable situation. Does that not then actually mean ‘advantage’?

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