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Jacques Derenne
Partner, Sheppard Mullin, Brussels
Professor, University of Liège & Brussels School of Competition

LIÈGE université Droit, Science Politique & Criminologie

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Selectivity in case law -Nov 2019-Nov 2020

- 11 December 2019, *Mytilinaios Anonymos Etairia v Commission*, C 332/18 P
- 16 January 2020, *Iberpotash v Commission*, T-257/18
- 13 May 2020, *Volotea v Commission*, T-607/17; *Germanwings v Commission*, T-716/17; *easyJet v Commission*, T-8/18 (Volotea and easyjet on appeal: C-331/20 P and C-343/20 P)
- 15 July 2020, *Ireland v Commission*, T-778/16; *Apple Sales International and Apple Operations Europe v Commission*, T-892/16 (Commission on appeal: C-465/20 P)
- 23 September 2020, *Spain a.o. v Commission*, T-515/13 RENV and T-719/13 RENV

- AG Kokott, 13 June 2019, *Vodafone HUN*, C-75/18 (judgment on 20 March 2020 did not rule on the aid issue)

- No case planned until the end of 2020 re selectivity

Principles

"*favouring certain undertakings or the production of certain goods*" (Article 107(1) TFEU)

- **Not selective: general measures**
  - Measures which apply to all companies in all sectors of a Member State
  - No discretionary power
    - e.g.: corporate tax rate
- **Material selectivity:**
  - *de iure* – it derives from the "law"; measures reserved to certain undertakings
  - *de facto* - although formally measure seems general, structure of measure is such that it "*significantly favours a particular group of undertakings*" (C-106/09P, *Gibraltar*)
  - 3-step test
    - Identification of correct reference system
    - Derogation: differentiation between economic operators who, in light of objective of system, are in comparable factual and legal situation
    - Justification by nature or general scheme of system (includes proportionality assessment)
- **Regional selectivity**

AG Wahl in *MOL* (C-15/14 P)

- Selectivity to be distinguished from advantage
- To show that the measure creates differences between undertakings which, with regard to the objective(*) of the measure, are in a comparable situation, placing certain undertakings in a more favourable situation than others [(*) however, under a constant case law, the aims and objectives of the State measures are irrelevant to qualify as aid]
- But, selectivity cannot be completely disconnected from the "*concomitant, albeit separate, identification of an economic advantage*"
  - selectivity plays a role which differs depending on whether the measure in question is envisaged as individual aid or as aid scheme
    - individual measure (*ad hoc, not an individual measure of an aid scheme*): presumption of selectivity if advantage identified
      - Article 1(e) Regulation 2015/1589: "*aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme*"
    - aid scheme: show that the presumed advantage is, in light of the objective criteria which it selects, of benefit only to certain types of undertakings or groups of undertakings
      - Article 1(d) Regulation 2015/189: "*any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount*"

Tax rulings (for the Commission)

- Can create legal certainty and predictability but should comply with State aid rules
- Does the tax ruling just apply the ordinary tax rules or does it misapply the tax rules, resulting in a lower amount of tax? - selective advantage
- Tax ruling on transfer prices for intra-group transactions: selective advantage if it does not respect arm's length principle
  - standalone company would be taxed on accounting profits (reflecting prices determined on the market)
  - principle requires that transfer pricing must result in a reliable approximation of a market-based outcome, which requires approximation and should be as precise as it can be under the circumstances
- OECD Transfer Pricing Guidelines: capture international consensus and provide useful guidance; if complied with, unlikely selective advantage

- Comment: *ALP is not MEOP. This is merely an OECD tax consensus for profit allocation methods, not to find the "fair price" (MEOP)*

Commission's approach following *Fiat (T-755/15, T-759/15)*

- The Commission considers it was endorsed for its selectivity assessment
  - this is "presumption of selectivity as provided by the case law"
  - It claims that it can now argue that tax rulings constitute "individual aid"
- The Commission alleges that, in any event, the measure was selective on the basis of the 3-step test
  - group and standalone companies legally and factually comparable?
- The Commission alleges that the existence of advantage needs to be determined by reference to the ordinary rules of taxation

- Comments: (*Fiat*)
  - "[the Commission] *had not examined whether the tax ruling at issue complied with the arm's length principle, as laid down in Article 164(3) of the Tax Code or in the Circular, but that it had sought to determine whether the Luxembourg tax administration had conferred a selective advantage on FFT for the purposes of Article 107(1) TFEU*"
  - The Commission stated that the arm's length principle applies "*independently of whether* [it] *has, expressly or impliedly, been incorporated into national law*"
  - GC does not clarify if the Commission duly took account of the national reference system or another element

Apple judgment

- Commission decision SA.38373 – Ireland - Two tax rulings for Irish subs, Apple Sales International ("ASI") and Apple Operations Europe ("AOE"), non-resident in IRL - Allocation of taxable revenue:
  - IP licences outside Americas significantly contributed to ASI and AOE revenues seats of ASI and AOE unable to operate activities and profits should have been attributed to branches of ASI and AOE (taxable in Ireland)
- GC annuls decision on 15 July 2020
- Primary line of reasoning: errors of appraisal and erroneous conclusion as to the selective advantage as a result of profit deriving from intellectual property licences held by ASI and AOE not being allocated to the Irish branches
  - The Commission could examine the conditions of advantage and selectivity together when there is an advantage and that this advantage does not benefit undertakings in a comparable legal and factual situation (135 – 138)
  - No need to examine the pleas on selectivity (312-313) because:
    - The Commission correctly identified the reference framework but wrongly assessed normal taxation under Irish law (143-187)
    - The Commission was entitled to apply the arm's length principle but misapplied it (204-229)
    - The Commission could rely on the OECD guidelines, but it applied them incorrectly (243-249)
    - The Commission erred in its assessment of the activities within the Apple group (283-309)
- Subsidiary line of reasoning: errors as to the selective advantage as a result of the inappropriate choice of methods of allocating profits to ASI and AOE's Irish branches
  - Examination of the evidence of the existence of advantage, not of selectivity
- Alternative line of reasoning: error of appraisal as to the selective advantage because of derogation from the reference system — even assuming it was constituted by Section 25 TCA 97 only — by the contested tax rulings, which do not comply with the arm's length principle
  - Discretionary power not sufficient (493)

Comments

- Advantage & selectivity: comparisons of different natures
  - Advantage: "normal market conditions" (not other companies):
    - compare what a State is doing with what it should ideally have been doing
  - Selectivity: actual treatment reserved by the State for other undertakings in a comparable situation in fact and in law
    - compare what a State does with what it does "normally/usually"
- Advantage may be non-selective if applied to all in the same situation
  - *MOL* (C-15/14 P) & *Lübeck* (C-524/14 P) – contra: *World Duty Free* (C-20/15 P and C-21/15 P)
  - *DMT*, C-256/97, point 28
  - *a contrario* - *Umicore* (C 76/2003 and decision of 26 May 2010, OJEU (2011) L 122/76)
- Concurrent but separate analysis (*Belgium v Commission*, C-270/15 P)
- Reference framework?
- Standalone companies comparable to multinationals (transfer pricing, profit allocation)?
- Shift of the comparison by the Commission
  - actual treatment of beneficiaries v. ideal model reflecting "economic reality" (inspired by the "arm's length" principle – para. 172 NoA)

11 December 2019, Mytilinaios Anonymos Etairia (1)

- Preferential electricity supply tariff granted by a contract
- Aid compatible (existing aid) in 1992 - Termination of the contract (2006)
- National court: interim measure, suspension of the effects of termination
- 2011 Commission's decision: (new) aid unlawful
- GC, 8 October 2014, T-542/11: annulment decision
- CJ, 26 October 2016, C-590/14 P: annulment judgment
- GC, 3 March 2018, T-542/11 RENV: annulment decision
- Aspects of the appeal on the selective nature of the tariff:
  - the appellant was not the only company to have benefited from the preferential tariff
  - ref. to *MOL* and aid schemes: the national court, in granting interim measures, has simply applied the general provisions of Greek law protecting any party claiming deprivation of its contractual rights
  - nothing indicates that, in a comparable situation, measures similar could not granted to any other company.

11 December 2019, Mytilinaios Anonymos Etairia (2)

- Judgment: dismisses the appeal
- The first order for interim measures constitutes individual aid
- Ex nunc effects confined solely to the parties to the dispute in question. Not an aid scheme.
- This cannot be challenged by the argument that another industrial consumer could have obtained similar interim measures
- The national judge hearing the application for interim measures has discretion to grant or not measures intended to protect the interests of the parties to the dispute; this varies according to the circumstances
- It cannot be assumed that an undertaking other than the appellant could, if it had so requested, have obtained measures analogous to those granted to the latter under the first order for interim measures
- Erroneous premiss that the measure in question constitutes an aid scheme.

23 September 2020, Spain a.o. v Commission

- **Commission's negative decision in 2013**
  - Spanish tax lease system (STL) to finance lease agreements for the purchase of ships - 20-30% price reduction to shipping companies when purchasing in Spanish shipyards
  - Tax advantages to EIGs and the investors passed onto shipping companies
- **GC 17 December 2015**
  - benefit obtained by the investors is not selective; decision annulled
- **CJ 25 July 2018, C-128/16 P - annuls the GC judgment**
  - error in GC's analysis of the selective nature of the tax measures; referred back to the GC
- **GC, 23 September 2020, T-515/13 RENV and T-719/13 RENV, dismissed the actions.**
  - discretionary power of national authorities when exercising taxation competences
  - STL system granted in the context of a system of prior authorisation on the basis of vague criteria requiring an interpretation exercise for which no provision was made
  - the tax authorities could set the start date for depreciation on the basis of circumstances defined in terms that gave that authority considerable scope for discretion
  - these discretionary aspects favour the beneficiaries over other taxpayers in a comparable factual and legal situation
    - other EIGs might not have benefited from accelerated depreciation under the same conditions.
    - in view of the de jure discretionary nature of the legislation, it did not matter whether or not their application was de facto discretionary.
    - since one of the measures enabling benefit from the STL system as a whole was selective, namely the authorisation of accelerated depreciation, the Commission had not erred in considering that the system as a whole was selective.

16 January 2020, Iberpotash

- Iberpotash: two potash mines in Catalonia, polluting mining activities, environmental obligations and charges for the operator
- However, the State has lightened these charges for the benefit of the company
  - in particular, operating permit sets the amount of the guarantees to be provided to a fairly low level
- Selectivity of a secondary importance in the case
  - Iberpotash challenged that the national provisions setting the amount of the guarantees at issue had been interpreted selectively: specific operating permit decision addressed to the operator, which was the only undertaking covered by that measure
  - "*the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective*" (para. 118 – ref to *MOL* and *Orange*, C-211/15 P)
  - no error of assessment by finding that the measure conferred a selective advantage.

13 May 2020, Volotea, a.o.

- State measures promoting air transport via Sardinian airports: indirect aid to airlines (not to airports)
- Airports compensated for the increase of traffic and promotion - plans by airport and contract with airlines
- Commission
  - selectivity in view of the sector concerned and not all airlines in contract
- GC (paras 160-170 - *Volotea*)
  - selectivity to be examined by reference to the total of enterprises, not only those benefiting from an advantage
  - the scheme favoured certain over others being in the legal and factual comparable situation with regard to the objective of the measure
  - in implementing the scheme, the airports negotiated individually the financial incentives: this discretionary power confirmed the selectivity of the measures.

AG Kokott, 13 June 2019, Vodafone HUN (1)

- Specific turnover-based tax for telecommunications undertakings. Tax steeply progressive: foreign undertakings mainly bear the actual burden of that tax
- Reference inadmissible: application for exemption from the special tax submitted by Vodafone
  - tax is not hypothecated to the exemption measure at issue in the main proceedings
  - Vodafone cannot rely, before the national courts, on the unlawfulness of that exemption in order to avoid payment of that tax or to obtain repayment of tax paid
- Does the reduced taxation of medium-sized undertakings or the exemption for smaller undertakings (in relation to turnover) constitute aid?
- Ref to AG Saugmandsgaard Øe in A-Brauerei :
  - '*To take an extreme example, a measure providing for progressive rates of taxation, defined according to the level of income, is indisputably a general measure under the traditional method of analysis, since any undertaking may benefit from the more favourable rates. By contrast, under the reference framework method, the more favourable rates constitute a differentiation which must be validated either by the lack of comparability (second stage) or by the existence of a justification based on the nature or overall structure of the system at issue (third stage). To be completely clear, I am clearly not claiming that the reference framework method would automatically result in the classification of progressive rates of taxation as "selective", but rather that it does carry with it that possibility since it prompts consideration of the legitimacy of measures previously excluded by the traditional method of analysis. This risk of extending the rules on State aid could concern, inter alia, measures similar to those which the Court has classified as "general" in the past.*'

AG Kokott, 13 June 2019, Vodafone HUN (2)

- Tax regime is not selective if it is applicable without distinction to all economic operators
- The fact that a tax regime grants an advantage only to those undertakings which satisfy its conditions — here not reaching certain turnover limits — is also not in itself capable of establishing its selectivity. In essence the selectivity test is ‘merely’ a discrimination test.
- General tax regimes create the reference framework for the first time: a modified examination must be applied to establish its selectivity. This is very different from that of a ‘normal’ individual aid. There was no reference framework from which the regime derogated, but rather the regime in question was itself the reference framework.
- The concerns raised for the determination of the correct reference framework can be addressed by a softer standard of review in respect of the fiscal consistency of general tax legislation.
  - general differentiations constitute selective measures, where the reference system is created, only if they have no rational basis in the light of the objective of the legislation
  - a selective advantage is possible only where the progressive tax rate differentiates between economic operators who, in the light of the objective attributed to the tax system, are in a comparable factual and legal situation
  - larger and smaller telecommunications undertakings differ precisely on account of their turnover and the resulting financial capacity
    - they are not in a legally and factually comparable situation
    - the same holds for the possibilities for larger undertakings to minimise profit-based taxation on income by means of tax arrangements. It is likewise not manifestly unreasonable that such a possibility increases with the size of an undertaking.
- Conclusion: no selectivity.