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Fiscal State Aid Law

Material selectivity

Aid instruments for EU 28 (as % of total)

- Grants (more than 60%)
- Tax exemptions (30%)
- Others: tax deferral, equity, guarantee, soft loan

(data from 2017 from the State Aid Scoreboard)

CEE countries

Slovakia: 41% of aid measures are tax exemptions

Slovenia: 33%

Lithuania, Estonia: 24%

Poland, Romania: 11- 12%

Hungary: 6-7%

Article 107(1) of the Treaty

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

107(3) exemptions

Notion of SA- five elements

- Granted by MSs (imputable to the State) and through State resources (State transfers)
- Aid (grants an advantage to undertakings)
- **Selective-** favours 'certain undertakings or the production of certain goods'
- Distorts competition
- Affects trade between MSs

Fiscal law

Centred around the conditions of

- advantage
- selectivity (**material and regional**)

In any form whatsoever. Forms: tax exemptions, reduced tax rates, reductions in taxable base, payment rescheduling, tax credits....

Selectivity

Two sides

- Material selectivity
- Regional selectivity

C-88/03. Portugal Republic v COM

Lower tax rate adopted by the Azores region compared to Portugal

What is the reference framework for regional taxes?

Regional selectivity

- ECJ: The mere fact that a measure is applicable only in a limited geographical area of a Member State does not lead to the conclusion that the measure is selective.
- If it is adopted by **an autonomous body that has an institutional, procedural and fiscal autonomy-** than the ref. framework is the region.

Material selectivity

favouring certain undertakings or the production of certain goods

Jurisprudence: **placing the recipient undertakings in a position that is more favourable** than that of other undertakings, although all those undertakings are in a comparable factual and legal situation

Different treatment can be justified by the MS

De jure and de facto selectivity

De jure selectivity results directly from the legal criteria for granting a measure that is formally reserved for certain undertakings only (for instance: those having a certain size, active in certain sectors or having a certain legal form; companies incorporated or newly listed on a regulated market during a particular period; companies belonging to a group having certain characteristics or entrusted with certain functions within a group; ailing companies; or export undertakings or undertakings performing export-related activities). COM Notice on the Notion of aid, para 121.

De facto selectivity can be established in cases where, although the formal criteria for the application of the measure are formulated in general and objective terms, the structure of the measure is such that **its effects significantly favour a particular group of undertakings** (as in the examples in the preceding sentence).

C-20-21/15 P. Autogrill Espana, World Duty Free (2016)

Facts: The measure confers a tax advantage that consists in a deduction from the taxable base for corporation tax in the form of an amortisation of the goodwill resulting from the acquisition by undertakings resident for tax purposes in Spain of at least 5% shareholdings in undertakings resident for tax purposes outside that Member State.

C-20-21/15 P. Autogrill Espana, World Duty Free

That measure must, since it is capable of conferring an advantage on all such undertakings which carry out such transactions, be regarded as capable of constituting an aid scheme.

C-20-21/15 P. Autogrill Espana, World Duty Free

It was therefore for the Commission to establish that that measure, notwithstanding that it confers an advantage of general application, **confers the benefit of that advantage exclusively on certain undertakings or on certain sectors of activity.**

C-20-21/15 P. Autogrill Espana, World Duty Free

Requires a determination 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 discrimination.

C-20-21/15 P. Autogrill Espana, World Duty Free

The COM relied, in the contested decisions, in order to establish that the measure at issue was selective, on the fact that the consequence of that measure was that resident undertakings were not treated equally. Pursuant to that measure, only resident undertakings who acquired at least 5% shareholdings in foreign companies could, under certain conditions, qualify for ..

C-20-21/15 P. Autogrill Espana, World Duty Free

...the tax advantage at issue, whereas resident undertakings making the acquisition of such a shareholding in undertakings taxable in Spain could not obtain that advantage, notwithstanding the fact that, according to the Commission, they were in a comparable situation in the light of the objective pursued by the ordinary Spanish tax system.

General Court

Not a selective measure

ECJ annulled the GC judgement.

C-20-21/15 P. Autogrill Espana, World Duty Free

General Court considered that the measure did not affect any particular category of undertakings or the production of any particular category of goods, that it was applicable **regardless of the nature of an undertaking's activity** and that it was accessible, a priori or potentially, to all

C-20-21/15 P. Autogrill Espana, World Duty Free

... undertakings that wanted to acquire shareholdings of at least 5% in foreign companies and that held those shareholdings without interruption for at least one year, had to be regarded not as a selective measure but as a **general measure.**

In so doing, the General Court erred in law.

Commission

derogation from a reference system, in that the effect of that measure was the application to undertakings taxable in Spain, acquiring shareholdings in companies established outside Spain, of a tax treatment that differed from that applied to undertakings taxable in Spain making such acquisitions in companies established in Spain...

... although those two categories of undertakings were in comparable situations in the light of the objective pursued by that reference system, namely the general Spanish system for the taxation of companies and, more specifically, the rules relating to the tax treatment of financial goodwill

GC: that measure was accessible, a priori, to any undertaking and it was directed not to a particular category of undertakings, which would have been the only undertakings favoured by that measure, but to a category of economic transactions.

C-20-21/15 P. Autogrill Espana, World Duty Free

Neither can it be required of the Commission, in order to establish the selectivity of such a measure, **that it should identify certain specific features that are characteristic of and common to** the undertakings that are the recipients of the tax advantage, by which they can be distinguished from those undertakings that are excluded from the advantage.

C-20-21/15 P. Autogrill Espana, World Duty Free

All that matters in that regard is the fact that the measure, irrespective of its form or the legislative means used, should have the **effect of placing the recipient undertakings in a position that is more favourable** than that of other undertakings, although all those undertakings are in a comparable factual and legal situation **in the light of the objective pursued by the tax system concerned.**

Gibraltar

C-106/09 P and C-107/09 P, COM and Spain v
Govenment of Gibraltar and the UK

Corporate taxation abolished and the payroll
and business property occupation tax was
introduced.

- Payroll taxes: imposed on the employers/employee and calculated as a percentage of the salary
- Business property occupation tax:
all companies occupying property in Gibraltar for business purposes will have to pay a tax on the occupation of that property at a rate equivalent to a percentage of their liability to the general rates charged on property in Gibraltar

ECJ in Gibraltar

instead of laying down general rules applying to all undertakings from which a derogation is made for certain undertakings, achieves the same result by adjusting and combining the tax rules in such a way that their very application results in a different tax burden

ECJ in Gibraltar

The national tax rules would fall from the outset outside the scope of control of State aid merely because they were adopted under a different regulatory technique although they produce the same effects in law and/or in fact.

ECJ in Gibraltar

It is apparent that the regime at issue, by combining those bases, even though they are founded on criteria that are in themselves of a general nature, in practice discriminates between companies which are in a comparable situation with regard to the objective of the proposed tax reform, namely to introduce a general system of taxation for all companies established in Gibraltar.

ECJ in Gibraltar

Combining those bases of assessment not only results in taxation according to the number of employees and the size of the business premises occupied, but also, due to the absence of other bases of assessment, excludes from the outset any taxation of offshore companies, since they have no employees and also do not occupy business property.

In the absence of EU rules it falls within MS competence to designate bases of assessment and to spread the tax burden across various factors of production and economic sectors

BUT ...

Gibraltar

...in this case the measure by its effects, favour certain undertakings, in that case 'offshore' companies, on account of the specific features characteristic of those undertakings. Operated *de facto* discrimination against undertakings that were in a comparable situation in the light of the objective pursued by that regime,...

Gibraltar

...in that case the objective of putting in place generalised taxation of all resident companies.

The selectivity of a tax measure can be established even if that measure does not constitute a derogation from an ordinary tax system, but is an integral part of that system.

Gibraltar

Selective. But there is no derogation from the reference system.

Objective: introduction of a general system for corporate taxation. In the light of this objective offshore companies were factually favoured over others.

C-106/09 P. Gibraltar

- General tax scheme based on criteria that were, in themselves, also general
- No de jure discrimination
- BUT de facto discrimination against undertakings (offshore companies)

Situation after Autogrill

Two different type of fiscal measures- de facto discriminatory (Gibraltar) or de iure discriminatory (there is a derogation from the overall system or ref. framework)

DE IURE discrimination:

1. Step- What is the reference system?
2. Step- derogation
3. Step- Justification

1. The MSs define the reference system (tax sovereignty) For corporate tax-corporate tax system, for special taxes, the special tax regime. The COM or Court has the right to define the ref system differently
2. Is there a derogation from the reference system?

If there is, it is a priori selective

Derogation

differentiates between economic actors, who in light of the objective assigned to the reference system, are in a comparable factual and legal situation

It is not required to identify the category of undertakings which are the only ones that can benefit from the tax measure (no concrete selectivity is required, abstract sel. is enough)

- Distinctions permissible in the second step are of an exceptional nature. See for example Paint Graphos (C-78/08)

The mere fact that a tax benefit is potentially available to every undertaking does not make it a general measure

3. MSs still have the room to justify any derogation from the ref. system by the internal logic of the system (internal consistency arguments). Differentiation flows from the **nature or overall structure** of the system of which it forms part. Measure results **directly from the basic or guiding principles of the tax system.**

- External objectives not inherent to the tax system cannot be relied upon. (E.g. social cohesion, environmental protection, employment protection, etc.)
- The measure should be proportionate to the objective of the measure. The derogation does not go further than what is necessary to achieve the legitimate objective.

COM Notice on the notion of state aid lists some justifications

- Need to fight fraud, tax evasion, administrative manageability, principle of tax neutrality, progressive nature of income tax.
- **MSs bear the burden of proof**

Justification

C-377/17. Finanzamt v A-Braurei

Justification accepted the ECJ: to avoid double taxation, to avoid excessive taxation

To prevent abuse of the tax measure

C-233/16. ANGED (2018)

Preliminary reference from the Spanish Supreme Court.

Spanish tax levied on large (sales are more than 2500m²) retail establishments

Purpose of the tax: environmental protection, town and country planning. (traffic flows, environment, infrastructure).

C-233/16. ANGED (2018)

Exempted:

- collective large retail establishments
- certain types of individual large establishments (garden centres, machinery)

- Is it compatible with Article 107?
- How would you proceed to resolve the case as a national judge?

Which are the crucial questions under Art. 107?

C-233/16. ANGED (2018)

Question 1. Is sales area as a condition consistent with the objective of the ref. system?

Question 2. It must be determined whether the retail establishments excluded from its scope are in a comparable situation in light of the objective asseigned to the reference system?

Question 1

- Yes, the larger the sales area, the higher the attendance of the public- the greater the adverse effects
- The small and large establishments are not in a comparable situation in the light of the objectives of the legislation.
- Differentiation between categories that are not in a comparable situation.
- No selective advantage given for smaller establishments.

Question 2-exemptions

Collective larger establishments were excluded: distinction between categories of establishments that are objectively in a comparable situation in the light of the objectives- ECJ: selective

C-233/16. ANGED (2018)

Other exemptions (certain types of large individual shops): Government argues that garden centres, etc are not intended to attract the greatest number of consumers-will have fewer adverse effect on environment

ECJ: may justify the distinction, it is for the national court to verify

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