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The selectivity condition in tax cases - where do we stand? Introductory remarks

EU/EEA State aid rules and Tax law – workshop
26 November 2019, Brussels

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Fiscal sovereignty v State aid law

- In the **absence of harmonisation** at EU level in tax matters, MS are **free to decide** which events or undertakings to tax and at what rate (Case 204/90 *Bachmann* and Case C-374/04 *Test Claimants*)
- The exercise of reserved powers **cannot permit** the unilateral adoption of **measures prohibited by the Treaty** (Case 6/69, *France v Commission*)
- Although base and rates of direct taxation not harmonised, **tax measures must comply with Treaty** (Case 173/73 *Italy v Commission*; Case T-131/16 *Belgium v Commission*)
- **MS are free to set their policy objectives** (e.g. tax environmentally harmful activities), but they **must comply with Treaty** (Case C-487/06 P *British Aggregates*).

Typical examples of fiscal aid

Fiscal aid ➤ **reduced tax revenue** (plus all 107(1) / TFEU/61(1) EEA conditions met):

- exemption from tax base
- reduction of tax rate
- accelerated depreciation
- tax forgiveness
- failure to collect tax
- rescheduling of tax debt...

❑ **Questions:** economic advantage, state resources, selective.

Imposition of a tax or charge as aid itself?

- Can I claim relief from a higher rate of tax?
- **General rule: taxes do not fall within scope of Arts 107(1)/61(1) EEA, but:**
 - 1) Taxes are linked (hypothecated) to aid measures**, i.e. they form an integral part of aid measures – under binding national rules tax is used to finance aid and it has direct impact on the amount of aid (Case C-390/98 *Banks*)
 - 2) Aid measure as tax itself** – not exemption from tax (Case Case C-53/00 *Ferring* - two directly competing medicine distribution channels in France - the wholesale distributors and the pharmaceutical laboratories which sold directly to pharmacies).

Article 107(1) TFEU / 61(1) EEA

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.

Is there a selective advantage?

Selectivity - general remarks

- **Selective measures** – not of purely general application
- Even if a tax measure benefits a **large number of beneficiaries** in several sectors, it may be selective (Case C-75/97 *Maribel*; Case C-143/99 *Adria-Wien Pipeline*)
- A tax measure with **narrow scope** can be general measure, if applicable to all liable tax payers (e.g. reduction of landing charges - Case C-524/14 P *Commission v Hansestadt Lübeck*).

Selectivity - general remarks (II)

- **Material** v **regional** selectivity
- **Material selectivity:**
 - *de jure* - directly from the legal criteria for granting a measure that is formally reserved for certain undertakings (size, sector)
 - *de facto* - conditions or barriers imposed by MS preventing certain undertakings from benefiting from the measure (brief period, certain threshold)
- **Discretionary administrative practice** - where meeting the given criteria does not automatically result in an entitlement to the measure (vague criteria, criteria not related to tax)
- Prior administrative authorisation?

Aid schemes v individual tax measures

- **Aid scheme - Procedural Regulation 2015/1589 - 1d**
 - **General aid scheme:** 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
 - **Individual aid scheme:** 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
- **Individual aid – Procedural Regulation 2015/1589 - 1(e):** aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme.

MOL presumption – Case C-15/14 P *MOL*

- 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**. By contrast, when examining a general scheme of aid, it is **necessary to identify** whether the measure in question, **notwithstanding the finding that it confers an advantage** of general application, does so **to the exclusive benefit of certain undertakings or certain sectors of activity** (para. 60)
- C-211/15P *Orange*: Selectivity presumed if advantage shown
- T-314/15 *Cosco*: No comparability analysis needed.

Schemes: three-step test

- 1) Identification of the **reference system**
- 2) **Discrimination** between comparable undertakings
- 3) **Justification** by the nature and logic of the reference system

Burden of proof:

- 1) and 2) on the Commission/ESA
- 3) on Member State.

- Recently confirmed in C-374/17 *A Brauerei* (para. 35).

Step 1: reference system

- The EU Court: “general” system, “reference” system, “ordinary” system, “normal” system
- The Commission – NOA (para. 133): reference system is composed of **consistent set of rules that generally apply — on basis of objective criteria — to all undertakings falling within its scope as defined by its objective**. Those rules define the scope of the system, the conditions under which the system applies, the rights and obligations of undertakings subject to it and the technicalities of the functioning of the system.
- **Taxes**: the tax base, the taxable persons, the taxable event and the tax rates, e.g. the corporate income tax system, the VAT system or the general system of taxation of insurance.
- **Special-purpose (stand-alone) levies** (environment, health) - the **reference system** is, in principle, the levy itself.

Step 2: comparability analysis

- Does the given measure **favour** certain undertakings or the production of certain goods as **compared** with other undertakings which are in **a similar factual and legal situation**, in the light of **the intrinsic objective of the system of reference**?
- If so, **prima facie selectivity**
- **External policy objectives** — such as regional, environmental or industrial policy objectives — **cannot be taken into account**
- **Special-purpose levies** will normally **integrate the policy objectives** pursued - a differentiated treatment for activities or products whose situation is different from the situation of those activities or products which are subject to the tax as regards the intrinsic objective pursued – **no derogation**.

Step 3: Justification

- Differentiation between comparable undertakings may be **justified by the nature and logic of the reference system**
- **Only measures inherent in the tax system which are necessary for the achievement of its objectives** can be objectively justified (Case C-88/03 *Azores*, para. 81)
- The measure must be **appropriate and proportionate** to achieve the stated **objective** (C-78/08 to C-80/08 *Paint Graphos*, paras 73-5)
- **Not possible to rely on external policy objectives**
- Examples: the need to fight fraud or tax evasion, the need to take into account specific accounting requirements, administrative manageability, the principle of tax neutrality, the progressive nature of income tax and its redistributive purpose, the need to avoid double taxation or the objective of optimising the recovery of fiscal debts.

Regional selectivity

- In principle, only measures applicable within the **entire territory** of the MS escape the regional selectivity criterion
- Yet, the **reference system** is **not always the entire MS**
- Measures with a regional or local scope of application may not be selective if
 - 1) **symmetrical devolution of tax powers** — distribution of tax competences in which all infra-State authorities at a particular level have the same autonomous power in law to decide the applicable tax rate within their territory of competence, independently of the central government – no normal tax rate, no reference framework
 - 2) **asymmetrical devolution of tax powers** — only certain regional or local authorities can adopt tax measures applicable within their territory (three cumulative criteria of autonomy are fulfilled: institutional, procedural and economic and financial autonomy), the region in question is the reference framework.

...and

there is much more!

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