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Clarifying the Scope of Selectivity: How to (Auto)Grill a Commission Decision on Fiscal State Aid?

Raymond Luja (Maastricht University) · Tuesday, December 27th, 2016

The European Union's Court of Justice finally rendered its judgement in the famous *Banco Santander* and *Autogrill* cases on 21 December 2016. For state aid specialists and tax lawyers this decision was bound to be a landmark case whatever way it would turn out.

In this decision the Court essentially had to decide on the 'future' scope of state aid rules within the Union, which limit opportunities for EU Member State to grant subsidies, tax benefits and alike to individual companies or to a specific group of companies. The judgement could have had a major impact on recently concluded as well as ongoing investigations into tax rulings of multinationals that got a lot of attention in recent years, such as *Apple* and *Starbucks.* But it does not…

Why is this still a landmark decision? The Court reiterated its older case law on how we need to determine whether a tax benefit is selective and it cleared the air after two rather surprising judgements of the EU's General Court – a court of first instance – in 2014. The essence of the cases is rather simple to explain. If a Spanish company would arrange for a takeover of a domestic company it would not be allowed to write off any payment of goodwill for tax purposes. In case it would acquire a foreign company, the Spanish company would be allowed to deduct such costs and lower its taxable base accordingly. This essentially would stimulate Spanish companies to engage in international takeovers and benefit (future) multinationals.

The Court held that "[all] that matters […] is the fact that the measure […] should have the effect of placing the recipient undertaking 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." The Commission more or less already argued in its 2009 decision that restricting a deduction of goodwill to international takeovers seems to make no sense as there does not appear to be a reason to exclude companies solely operating within Spanish borders from a tax point of view. (It will still be up to the EU's General Court to establish whether the Commission correctly assumed that there was no proper justification.)

For cases like *Apple* and *Starbucks* this decision brings little new. The essential issue in those cases is not whether there is a difference in tax treatment between group companies and stand-alone companies (there often actually is), but whether group companies and stand-alone companies are actually comparable to start with. Before we now conclude that the Commission correctly applied the CJEU's standard in those cases, let us wait and see what the Courts think of the comparability issue. If both had to be treated alike, then shouldn't tax authorities stop second-guessing business

decisions made by group companies? The fact that group companies are part of a network of related parties is often the main reason to fill up tax codes with rules allowing for at arm's length testing of transfer prices as well as other anti-abuse provisions (like CFC and interest deduction limitations). For me these are both relevant legal and factual differences, not even mentioning non-tax differences like groups being able to organize themselves more efficiently and enjoying possible economies of scale.

The Court used the opportunity to clarify the essence of two of its older decisions. It first dealt with the much discussed *Gibraltar* judgement of 2011. The Court clarified that this judgement merely indicated that there was *de facto* selectivity in that case because offshore companies were effectively excluded from a new tax regime that had the objective of putting in place generalised taxation of all resident companies. The Court considered the latter rather relevant for its analysis, something that was overlooked in many legal commentaries to that case.

The biggest surprise of the *Autogrill* and *Banco Santander* judgement came at the very end where the Court clarified a case from 1969 on fiscal aid to export activities, which was often interpreted as classifying export aid as selective per se. It pointed out that such aid can be selective if it benefits undertakings carrying out cross-border transactions, investments in particular, in cases where competitors engage in legally and factually comparable transactions domestically. The objective of the tax system might still justify specific provisions on export, but leeway seems limited here. For me, the Court's decision will most likely mean that most (direct) tax incentives conditional upon export still turn out to be selective, albeit with the awkward proviso that there might be no selectivity if similar goods or services would not be delivered or rendered domestically at all. I do expect that the Court will have to revisit this issue once more…

On the upside, as the Court clarified its position on export aid and selectivity we seem to have received more certainty about issues like R&D benefits and royalty payments. In these last few years questions came up whether generally available tax incentives for R&D could fall within the scope of state aid (*quod non*). Also, the Commission is currently investigating a second *Gibraltar* case where, *inter alia*, a general exemption of royalties from the corporate tax base is being looked into. With this judgement, I hope that these issues will finally be put to rest.

To conclude, from my perspective this judgement does not open up the door to a huge number of new state aid cases where we could not expect them before. I just wished the Court would have refrained from using "discrimination" and "selectivity" as interchangeable terminology because this may give cause to confusion as they both have their own legal history and interpretation under EU Law. Still, I cannot but wonder whether the Court would have been more sensitive to the General Court's much needed call to stick closer to the more restrictive text of the Treaty if it had not chosen a case so clearly aimed at multinationals to make a stand in the middle of EU-wide efforts to curb special tax treatment for those same multinationals.

One last side note for those interested in the tax ruling cases: in the *Aer Lingus/Ryanair* judgment handed down on the same day the Court seems to hold that recovery of an undue tax exemption (read: reduction) must be considered a recovery of the original tax due and not a new tax imposed retroactively. While that case was about an air transport tax, this line of reasoning might also be of use to national authorities that decide to follow tax procedure to recover corporate taxes when ordered to by the European Commission.

This post was first published on the blog of Maastricht University:

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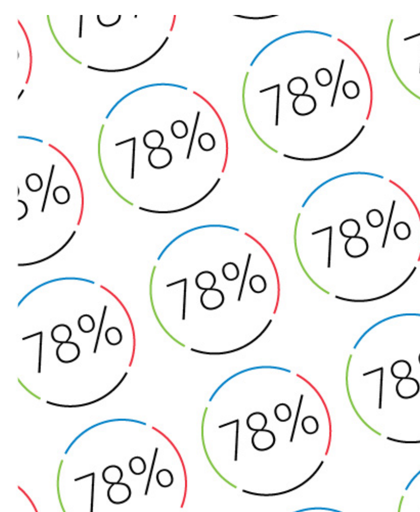

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