CONFEDERATION FISCALE EUROPEENNE

Opinion Statement ECJ-TF 2/2017

on the judgment of the Court of Justice of the EU of 21 December 2016 in Joined Case C-20/15 P and C-21/15 P, *World Duty Free Group and Others*, concerning the requirements of selective aid in the sense of Art. 107 TFEU

Prepared by the CFE ECJ Task Force

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This is an Opinion Statement prepared by the CFE ECJ Task Force[1] on Joined Cases C-20/15 P and C-21/15 P, World Duty Free Group (formerly Autogrill España); Banco Santander and Santusa Holding*, in which the Grand Chamber of the Court of Justice of the European Union (ECJ) delivered its judgment on 21 December 2016,[2] following judgments of the General Court of the European Union of 7 November 2014 in Autogrill España[3] and of 7 November 2014 in Banco Santander and Santusa[4] and the Opinion of Advocate General Wathelet of 28 July 2016.[5] The case concerned Spanish tax rules which allowed Spanish enterprises tax amortization of financial goodwill arising from the acquisition of shareholdings in foreign companies, but not fromthe acquisition of shareholdings in domestic companies. The Grand Chamber reversed the judgments of the General Court and clarified the meaning of selective aid as the term is used in Art. 107 TFEU. It held that an aid can be regarded as selective if the national tax measure deviates from the reference framework: it is not necessary to show that the national tax measure actually favours a specific group of undertakings or the production of specific goods.*

I. Background and Issues

1. The Spanish corporate tax law at issue provided: If an undertaking taxable in Spain acquires a shareholding in a foreign company equal to at least 5% of that company's capital and retains that shareholding for an uninterrupted period of at least one year, the goodwill resulting from that shareholding may be amortized. Such amortization is not possible if the undertaking acquires a shareholding in a domestic company.

2. The Commission brought infringement proceedings against Spain and ultimately delivered two decisions. By its first decision, it declared the Spanish provisions incompatible with the internal market insofar as they allowed amortization of goodwill resulting from acquisitions of shareholdings in foreign undertakings located in the EU.[6] By its second decision, the Commission held the Spanish provisions incompatible with the internal market insofar as they were applied to shareholdings in foreign undertakings located outside the EU.[7] In both decisions the Commission ordered Spain to recover the aid granted under the preferential amortization regime.

3. Autogrill España, now World Duty Free Group, and Banco Santander and Santusa Holding each brought an action against the Commission's decisions seeking annulment of the decisions.

4. In two judgments, the General Court decided – on the basis of largely identical grounds – in favour of the applicants and annulled several parts of the Commission's decisions. With regard to the question of whether a tax regime can be regarded as selective the General Court applied its three step approach. As a first step, it is necessary to identify the common or normal tax regime (reference framework) in the Member State concerned. The second step, is to examine whether the relevant provision derogates from the reference framework by differentiating between economic operators who, in the light of the objective assigned to the reference framework, are each in a comparable factual and legal situation. The third

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[2] EU:C:2016:981.

[3] General Court, 7 November 2014, T-219/10, Autogrill España, EU:T:2014:939.

[4] General Court, 7 November 2014, T-399/11, Banco Santander and Santusa, EU:T:2014:938.

[5] EU:C:2016:624.

[6] Commission Decision 2011/5/EC of 28 October 2009.

[7] Commission Decision 2011/282/EU of 12 January 2011.

step is to analyse whether the measure can be justified by the nature or general structure of the system of which it forms part.[8] However, the General Court added an additional requirement concerning the second step. It held that a derogation from the common or normal tax regime does not automatically make a tax measure selective. For the General Court the condition of selectivity is only satisfied if a category of undertakings which are favoured by the tax measure at issue can be identified. As a result, a tax measure which constitutes a derogation from the common or normal tax regime but which is general in nature and is potentially available to all undertakings cannot be regarded as selective aid.[9]

5. The General Court found that the Spanish tax rules applied to all shareholdings of at least 5% in foreign companies which are held for an uninterrupted period of at least one year. As a consequence, the Spanish tax rules were not aimed at favouring any particular category of undertakings or productions. According to the General Court, a tax measure which is applied regardless of the nature of the activity of the undertaking is not, in principle, selective.[10]

6. The Commission appealed against the two judgments arguing that the General Court erred in law in the interpretation of the selectivity condition in Article 107(1) TFEU. The Court of Justice joined the cases.

7. On 28 July 2016, Advocate General Wathelet delivered his opinion. He argued in favour of the Commission and proposed setting aside both judgments of the General Court. In his opinion the selectivity of a tax measure was not dependent on the identification of a specific sector or category of undertakings which benefits from the measure.[11] According to him, a tax measure which derogates from the general tax regime and differentiates between undertakings performing similar operations is selective, unless the differentiation created by the measure is justified by the nature or general scheme of the system of which it is a part.[12] A tax measure is selective in nature where undertakings benefiting from the measure enjoy a tax advantage to which they would not be entitled under the normal tax regime and which cannot be claimed by undertakings performing similar operations because it does not apply to all economic operators.[13] The essential question to be asked is whether a measure distinguishes between undertakings which are in a comparable situation.[14] With regard to comparability the Advocate General referred to the judgment of the General Court stating that undertakings acquiring shareholdings in a foreign company are in a similar situation to undertakings acquiring shareholdings in a company established in Spain.[15]

8. As an additional argument against the view of the General Court the Advocate General explained that seeking to identify undertakings with specific characteristics would be an

[8] See General Court, 7 November 2014, T-219/10, Autogrill España, EU:T:2014:939 para.33 and General Court, 7 November 2014, T-399/11, Banco Santander and Santusa, EU:T:2014:938 para.37.

[9] See General Court, 7 November 2014, T-219/10, Autogrill España, EU:T:2014:939 paras 44 and 45 and General Court, 7 November 2014, T-399/11, Banco Santander and Santusa, EU:T:2014:938 paras 48 and 49.

[10] See General Court, 7 November 2014, T-219/10, Autogrill España, EU:T:2014:939 para.57 and General Court, 7 November 2014, T-399/11, Banco Santander and Santusa, EU:T:2014:938 para.61..

[11] Opinion of AG Wathelet, 29 July 2016, Joined Case C-20/15 P and C-21/15 P, *World Duty Free Group, Banco Santander and Santusa Holding*, EU:C:2016:624 para.86.

[12] Opinion of AG Wathelet, 29 July 2016, Joined Case C-20/15 P and C-21/15 P, *World Duty Free Group, Banco Santander and Santusa Holding*, EU:C:2016:624 para.91.

[13] Opinion of AG Wathelet, 29 July 2016, Joined Case C-20/15 P and C-21/15 P, *World Duty Free Group, Banco Santander and Santusa Holding*, EU:C:2016:624 para.85.

[14] Opinion of AG Wathelet, 29 July 2016, Joined Case C-20/15 P and C-21/15 P, *World Duty Free Group, Banco Santander and Santusa Holding*, EU:C:2016:624 para.85.

[15] Opinion of AG Wathelet, 29 July 2016, Joined Case C-20/15 P and C-21/15 P, *World Duty Free Group, Banco Santander and Santusa Holding*, EU:C:2016:624 para 77.

extremely imprecise exercise that would create legal uncertainty.[16] While in most situations it will be possible to identify a specific sector which benefits from the tax measure such identification will be more difficult with regard to tax benefits which are not sector-specific.

9. The Advocate General acknowledged that the Court of Justice held in the *Gibraltar* judgment that a tax system must, in order to be capable of being recognized as conferring selective advantages, "be such as to characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category."[17] AG Wathelet came to the conclusion that this finding was due to the particular circumstances of the case. In *Gibraltar*, the tax advantage for offshore companies was not granted through a derogation from the normal tax regime but rather from a general tax system that in fact benefitted such companies. In those particular circumstances, even a general tax regime can be regarded as selective if it is possible to identify a category of undertakings favoured by it.[18] On the other hand, in situations where a tax measure derogates from the general scheme the additional requirement of identifying a specific category of undertakings which benefit from the tax advantage is not necessary.

10. In the case at hand, he concluded that the benefit of being able to amortize goodwill does not apply to all economic operators. The measure favours only economic operators which satisfy the legislative conditions laid down, that is to say undertakings taxable in Spain which acquire shareholdings in a foreign company. And so it discriminates against economic operators which carry out similar operations but have acquired shareholding in a company established in Spain.[19]

II. The Judgment of the Court of Justice

11. The Court of Justice addressed two issues, namely the notion of selectivity and the concept of export aid. The two issues are closely connected. However, in this Opinion Statement we only focus on the first: the notion of selectivity when considering the application of the State aid rules to tax matters.

    The Court followed the reasoning of its Advocate General and ruled that selectivity does not depend on whether a specific group of undertakings can be identified which benefits from the tax advantage. According to the Court, a measure must be considered selective if it derogates from the general scheme and cannot be justified by the nature or overall structure of the system.[20] As a consequence, the Court of Justice set aside the judgments of the General Court. It referred the case back to the General Court to examine whether the undertakings that acquired Spanish shareholdings were in a factual and legal situation comparable to that of undertakings that acquired foreign shareholdings.

12. According to the Court of Justice, the General Court erred in law by requiring the Commission to identify certain specific features that are characteristic of and common to the

[16] Opinion of AG Wathelet, 29 July 2016, Joined Case C-20/15 P and C-21/15 P, *World Duty Free Group, Banco Santander and Santusa Holding*, EU:C:2016:624 para.84.

[17] See ECJ, 15 November 2011, Case C-106/09 P and C-107/09 P, *Commission and Spain v. Government of Gibraltar and United Kingdom*, EU:C:2011:732 para. 104.

[18] Opinion of AG Wathelet, 29 July 2016, Joined Case C-20/15 P and C-21/15 P, *World Duty Free Group, Banco Santander and Santusa Holding*, EU:C:2016:624 para. 102.

[19] Opinion of AG Wathelet, 29 July 2016, Joined Case C-20/15 P and C-21/15 P, *World Duty Free Group, Banco Santander and Santusa Holding*, EU:C:2016:624 para. 92.

[20] ECJ, 21 December 2016, Joined Case C-20/15 P and C-21/15 P, *World Duty Free Group, Banco Santander and Santusa Holding*, EU:C:2016:981 para. 60.

undertakings that are the recipients of the tax advantage by which they can be distinguished from those undertakings that are excluded from the advantage.[21] The Court of Justice stated that the condition of selectivity is satisfied where the Commission is able to demonstrate that the tax measure constitutes a derogation from the ordinary or normal tax system applicable in the Member State concerned, and thereby actually introducing differences in the treatment of comparable[22] operators.[23] The fact that the number of undertakings able to claim entitlement under a national measure is very large, or that those undertakings belong to various economic sectors, is not sufficient to call into question the selective nature of that measure and so its classification as State aid.[24]

13 Following the approach of AG Wathelet, the Court of Justice reaffirmed its settled case law on selectivity in tax matters as being separate from the approach in the specific context of *de facto* selectivity of a measure of general application (i.e., the Gibraltar case).

III. Comments

14. WDFG is another cornerstone in the increasingly important area of State aid control in direct taxation. The Court's judgment sets out a precise and instructive analysis of the notion of selectivity and this context. It follows the line of reasoning set out in *Commission v. Germany* where the Court identified a national measure as being selective wherethe grant of a tax advantage consisting in the transfer of hidden reserves was conditional on the location of the asset sold.[25] While the Court did not have to develop a specific analysis of the reference framework, it clearly ruled that domestic measures can be selective even where they do not identify the benefitting operators *ex ante*. However, this judgment could not address a number of pressing issues for the application of State aid in the direct tax area.

15. The identification of the reference system is left for the General Court to define in the light of the criteria provided by the Court. The Commission indicated that the reference system would be the general Spanish system for the taxation of companies and, more specifically, the rules relating to the tax treatment of financial goodwill within that system.[26] This shows the difficulty in identifying the level at which the reference framework is to be determined. In our view, in this case approaches to the reference framework could range from a broad approach to a narrow one, from the general corporate tax system, to the general amortization rules, to the specific tax amortization rules for financial goodwill, or even more specifically for foreign shareholding acquisitions. Furthermore, it remains to be determined whether such criteria operate bundled together, or separately.

16. The General Court had limited the scope of Article 107 TFEU by requiring the Commission to prove *ex ante* that the tax advantage benefits a specific group of undertakings or the production of specific goods. This view was also taken by Advocate General Kokott in her

[21] ECJ, 21 December 2016, Joined Case C-20/15 P and C-21/15 P, *World Duty Free Group, Banco Santander and Santusa Holding*, EU:C:2016:981 para. 78.

[22] In para. 63 the Court of Justice reports the position held by the Commission, according to which the companies buying shareholdings in foreign companies are in a comparable situation compared to companies acquiring shareholdings in companies established outside Spain in light of the objective pursued by the reference system for the taxation of companies and, more specifically, the rules relating to the tax treatment of financial goodwill within that tax system.

[23] ECJ, 21 December 2016, Joined Case C-20/15 P and C-21/15 P, *World Duty Free Group, Banco Santander and Santusa Holding*, EU:C:2016:981 para 67.

[24] ECJ, 21 December 2016, Joined Case C-20/15 P and C-21/15 P, *World Duty Free Group, Banco Santander and Santusa Holding*, EU:C:2016:981 para. 80.

[25] ECJ, 19 September 2000, C-156/98, *Commission v. Germany*, EU:C:2000:467.

[26] ECJ, 21 December 2016, Joined Case C-20/15 P and C-21/15 P, *World Duty Free Group, Banco Santander and Santusa Holding*, EU:C:2016:981 para 77.

opinion in *Finanzamt Linz*.[27] Those attempts to limit to the selectivity criterion were perhaps driven by the uncertainty created by the *Gibraltar* judgment[28] and the wording of Article 107(1) TFEU ("certain undertakings or the production of certain goods"), as well as concerns as to the constitutional balance of powers between the Member States and the European Union.[29]

17. By contrast, the judgment of the Court of Justice does not endorse this strict approach to the application of State aid provisions. Tax advantages – even of a general nature – which are available for everybody who fulfils the requirements of the respective provision can now qualify as State aid under Article 107(1) TFEU where they derogate from the general or normal tax scheme. Advocate General Wathelet criticises the reasoning of the General Court as "excessively formalistic" and "restrictive".[30]

18. Even without regard to the open issue of State aid challenges concerning particular "tax rulings", all Member States apply different tax rules for individuals and corporations; many of them grant specific direct tax benefits for e.g. R&D, for the protection of the environment, for small enterprises, for ailing companies or for start-ups. It remains still to be decided which of these tax benefits are to be seen as State aid, how the three step approach for selectivity can be applied and whether the other criteria like effect on trade and on competition will play a more important role in the future. For many of these issues, the Commission has set out its views in the Notice of 2016.[31]

19. Moreover, WDFG reopens the debate as to the relationship between State aid rules and the fundamental freedoms because the solution suggested by AG Kokott in her opinion in Finanzamt Linz can now no longer be applied.[32] The Court in *Aer Lingus* applied both rules simultaneously, but also noted that reimbursement under the fundamental freedoms must not give rise to new aid incompatible with the TFEU.[33]

20. Finally, given the risk of recovery Member States are well advised to notify potential aid accordance with Article 108(1) TFEU.

IV. The Statement

21. The *Confédération Fiscale Européenne* welcomes the clarification of the notion of selectivity in the *World Duty Free Group* judgment. It is now clear that a tax measure which derogates from the normal tax scheme can constitute state aid even if the tax measure appears to be general in nature and does not lead to a benefit for a specific predefined group of undertakings. However, given the variety of tax rules in each Member State, further clarification on the determination of the reference framework, the comparability test and the scope of potential justification will be necessary.

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[27] Opinion of AG Kokott, 16 April 2015, Case C-66/14, *Finanzamt Linz*, ECLI:EU:C:2015:242 para. 105 et seq.

[28] The Court outlined at length the difference between this case and the Gibraltar case. Gibraltar had created a general rule which only *de facto* favoured certain undertakings. Here the *de facto* benefit for certain undertakings made the system selective. However, where a provision deviates from the reference framework it is not necessary to show that 'certain undertakings' or the 'production of certain goods' are favoured, see ECJ, 21 December 2016, Joined Case C-20/15 P and C-21/15 P, *World Duty Free Group, Banco Santander and Santusa Holding*, EU:C:2016:981 para. 72 et seq.

[29] Opinion of AG Kokott, 16 April 2015, C-66/14, *Finanzamt Linz*, ECLI:EU:C:2015:661 para 85.

[30] Opinion of AG Wathelet, 29 July 2016, Joined Case C-20/15 P and C-21/15 P, *World Duty Free Group, Banco Santander and Santusa Holding*, EU:C:2016:624 para. 85.

[31] See the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, [2016] OJ C 262/1.

[32] According to the opinion of AG Kokott, the fundamental freedoms will apply to all forms of discrimination unless a subsidy specifically targets 'certain undertakings' or 'the production of certain goods' in which case the State aid rules would have priority.

[33] ECJ, 21 December 2016, Joined Case C-164/15 P and C-165/15 P, *Commission v. Aer Lingus*, EU:C:2016:990 para. 123.