Opinion Statement ECJ-TF 2/2017 on the ECJ Decision of 21 December 2016 in *World Duty Free Group and Others* (Joined Cases C-20/15 P and C-21/15 P), Concerning the Requirements of Selective Aid in the Sense of Article 107 of the TFEU

This CFE Opinion Statement, submitted to the European Institutions on 29 June 2017, discusses *World Duty Free Group (formerly Autogrill España); Banco Santander and Santusa Holding* (Joined Cases C-20/15 P and C-21/15 P), wherein the ECJ held that 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.

1. Introduction

This is an Opinion Statement prepared by the CFE ECJ Task Force on *World Duty Free Group (formerly Autogrill España); Banco Santander and Santusa Holding* (Joined Cases C-20/15 P and C-21/15 P), in which the Grand Chamber of the Court of Justice of the European Union (ECJ) delivered its decision on 21 December 2016,[1] following decisions of the General Court of the European Union of 7 November 2014 in *Autogrill España*[2] and of 7 November 2014 in *Banco Santander and Santusa*[3] and the Opinion of Advocate General Wathelet of 28 July 2016.[4] The case concerned Spanish tax rules that allowed Spanish enterprises tax amortization of financial goodwill arising from the acquisition of shareholdings in foreign companies, but not from the acquisition of shareholdings in domestic companies. The Grand Chamber reversed the decisions of the General Court and clarified the meaning of selective aid as the term is used in article 107 of the Treaty on the Functioning of the European Union (TFEU) (2007)[5]. 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.

2. Background and Issues

The Spanish corporate tax law at issue provided that: 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.

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 European Union.[6] In its second decision, the Commission held that the Spanish provisions were incompatible with the internal market insofar as they were applied to shareholdings in foreign undertakings located outside the European Union.[7] In both decisions, the Commission ordered Spain to recover the aid granted under the preferential amortization regime.

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1. ES: ECJ, 21 Dec. 2016, Joined Cases C-20/15_P and C-21/15 P, *European Commission v. World Duty Free Group, Banco Santander and Santusa Holding*, ECLI:EU:C:2016:981, ECJ Case Law IBFD.
2. ES: ECJ, 7 Nov. 2014, Case T-219/10, *Autogrill España SA v. Commission*, ECLI:EU:T:2014:939.
3. ES: ECJ, 7 Nov. 2014, Case T-399/11, *Banco Santander and Santusa*, ECLI:EU:T:2014:938.
4. ES: Opinion of Advocate General Wathelet, 28 July 2016, Joined Cases C-20/15 P and C-21/15 P, *Santander and World Duty Free Group*, ECLI:EU:C:2016:624, ECJ Case Law IBFD.
5. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), EU Law IBFD.
6. Commission Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain, L 7/48 (11 Jan. 2011).
7. Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions No C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (Text with EEA relevance), L 135/1.

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

In two decisions, 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 light of the objective assigned to the reference framework, are each in a comparable factual and legal situation. The third 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] The General Court added, however, 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 that are favoured by the tax measure at issue can be identified. As a result, a tax measure that 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]

The General Court found that the Spanish tax rules applied to all shareholdings of at least 5% in foreign companies that 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 undertaking or production. According to the General Court, a tax measure that is applied regardless of the nature of the activity of the undertaking is not, in principle, selective.[10]

The Commission appealed the two decisions, arguing that the General Court erred in law in the interpretation of the selectivity condition in article 107(1) of the TFEU. The Court of Justice joined the cases.

On 28 July 2016, Advocate General Wathelet delivered his Opinion. He argued in favour of the Commission and proposed setting aside both decisions of the General Court. In his Opinion, the selectivity of a tax measure is not dependent on the identification of a specific sector or category of undertaking that benefits from the measure.[11] According to him, a tax measure that 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 that 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 that are in a comparable situation.[14] With regard to comparability, the Advocate General referred to the decision 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]

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

The Advocate General acknowledged that the Court of Justice, in *Gibraltar* (Joined Cases C-106/09 P and C-107/09 P), held 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] Advocate General 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 in which a tax measure derogates from the general scheme, the additional requirement of identifying a specific category of undertakings that benefit from the tax advantage is not necessary.

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 that satisfy the legislative conditions laid down, that is to say undertakings taxable in Spain that acquire shareholdings in a foreign company. Therefore, it discriminates against economic operators that carry out similar oper-

8. *See Autogrill España* (T-219/10), para. 33 and *Banco Santander and Santusa* (T-399/11), para. 37.
9. *See Autogrill España* (T-219/10), paras. 44 and 45 and *Banco Santander and Santusa* (T-399/11), paras. 48 and 49.
10. *See Autogrill España* (T-219/10), para. 57 and *Banco Santander and Santusa* (T-399/11), para. 61.
11. AG Opinion in *World Duty Free Group, Banco Santander and Santusa Holding* (C-20/15 P and C-21/15 P), para. 86.
12. Id., para. 91.
13. Id., para. 85.
14. Id.
15. Id., para. 77.
16. Id., para. 84.
17. *See* ES: ECJ, 15 Nov. 2011, Joined Cases 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, ECJ Case Law IBFD.
18. AG Opinion in *World Duty Free Group, Banco Santander and Santusa Holding* (C-20/15 P and C-21/15 P), para. 102.

ations but have acquired a shareholding in a company established in Spain.[19]

3. The Decision of the Court of Justice

The Court of Justice addressed two issues, namely the notion of selectivity and the concept of export aid, which are closely connected. In this Opinion Statement, however, the authors only focus on the first: the notion of selectivity in 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 that 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 decisions of the General Court. It referred the case back to the General Court to examine whether or not the undertakings that acquired Spanish shareholdings were in a factual and legal situation comparable to that of undertakings that acquired foreign shareholdings.

According to the Court of Justice, the General Court erred in law by requiring that the Commission identify certain specific features that are characteristic of and common to 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 introduces 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, therefore, its classification as State aid.[24]

Following the approach of Advocate General 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).

4. Comments

The case represents a further milestone in the increasingly important area of State aid control in direct taxation. The Court's decision sets out a precise and instructive analysis of the notion of selectivity in this context. It follows the line of reasoning set out in *Commission v. Germany* (Case C-156/98), wherein the Court identified a national measure as being selective where the 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 operators that benefit from the provision ex ante. This decision, however, could not address a number of pressing issues for the application of State aid in the direct tax area.

The identification of the reference system is left to the General Court to define in 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 the authors' view, in this case, approaches to the reference framework could range from a broad approach to a narrow one, i.e. 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.

The General Court had limited the scope of article 107 of the 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 Opinion in *Finanzamt Linz* (Case C-66/14).[27] Those attempts to limit the scope to the selectivity criterion were perhaps driven by the uncertainty created by the *Gibraltar* decision[28] and the wording of article 107(1) of the 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]

19. Id., para. 92.
20. *World Duty Free Group, Banco Santander and Santusa Holding* (C-20/15 P and C-21/15 P), para. 60.
21. Id., para. 78.
22. In para. 63, the ECJ reports on the position of the Commission, according to which companies buying shareholdings in foreign companies are in a comparable situation 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. *World Duty Free Group, Banco Santander and Santusa Holding* (C-20/15 P and C-21/15 P), para. 67.
24. Id., para. 80.
25. DE: ECJ, 19 Sept. 2000, Case C-156/98, *Commission v. Germany*, EU:C:2000:467, ECJ Case Law IBFD.
26. *World Duty Free Group, Banco Santander and Santusa Holding* (C-20/15 P and C-21/15 P), para. 77.
27. AT: Opinion of AG Kokott, 16 Apr. 2015, Case C-66/14, *Finanzamt Linz v. Bundesfinanzgericht, Außenstelle Linz*, ECLI:EU:C:2015:242 para. 105 et seq., ECJ Case Law IBFD.
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. Where, however, 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 World Duty Free Group, Banco Santander and Santusa Holding* (C-20/15 P and C-21/15 P), para. 72 et seq.
29. AG Opinion in *Finanzamt Linz* (C-66/14), para 85.

By contrast, the decision 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 – that are available to anyone who fulfils the requirements of the respective provision can now qualify as State aid under article 107(1) of the TFEU where they derogate from the general or normal tax scheme. Advocate General Wathelet criticizes the reasoning of the General Court as "excessively formalistic" and "restrictive".[30]

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 to, for example, R&D, the protection of the environment, small enterprises, ailing companies or start-ups. It remains to be decided which of these tax benefits will 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 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]

Moreover, *World Duty Free Group* reopens the debate as to the relationship between State aid rules and the fundamental freedoms because the solution suggested by Advocate General Kokott in her Opinion in *Finanzamt Linz* can now no longer be applied.[32] The Court in *Aer Lingus* (Joined Case C-164/15 P and C-165/15 P) 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]

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

5. The Statement

The Confédération Fiscale Européenne welcomes the clarification of the notion of selectivity in the *World Duty Free Group* decision. It is now clear that a tax measure that 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. Given the variety of tax rules in each Member State, however, further clarification on the determination of the reference framework, the comparability test and the scope of potential justifications will be necessary.

30. AG Opinion in *World Duty Free Group, Banco Santander and Santusa Holding* (C-20/15 P and C-21/15 P), para. 85.
31. *See* Commission Notice on the notion of State aid as referred to in art. 107(1) of the Treaty on the Functioning of the European Union, OJ C 262 (19 July 2016).
32. According to the Opinion of Advocate General 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. IE: ECJ, 21 Dec. 2016, Joined Cases C-164/15 P and C-165/15 P, *European Commission v. Aer Lingus and Ryanair Designated Activity Company*, EU:C:2016:990, para. 123, ECJ Case Law IBFD.