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The Recent CJEU Decision in the *Santander/Autogrill* Case

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This article analyzes the recent decision of the Court of Justice of the European Union in the *Santander/Autogrill* case and considers its impact on other state aid cases in tax matters.

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On December 21, 2016, the Court of Justice of the European Union ("CJEU") rendered its decision in the European Union ("EU") state aid cases T-399/11 *Banco Santander* and T-219/10 *Autogrill* (now *World Duty Free Group*), ruled in favor of the European Commission and referred them back to the General Court of the European Union ("GC"). The Court considered that the lower court had erred in law in deciding that the European Commission was wrong in concluding that the Spanish tax regime of tax amortization of financing goodwill was selective and thus constituted illegal state aid.

I. Background

On January 12, 2011, the European Commission decided that the Spanish regime of tax amortization of financing goodwill derogated from the "normal" tax regime applicable to undertakings taxable in Spain and ordered Spain to recover the aid granted.

Under Spanish tax law, whereas the financial goodwill (i.e., the difference between the price paid and the value of the underlying assets) resulting from the acquisition by a Spanish tax resident undertaking of shareholdings in a "foreign company" can be amortized, the financial goodwill resulting from the acquisition of shareholdings in a company established in Spain cannot be amortized. Taking as its basis the fact that the two categories of undertaking were treated differently even though they were in comparable situations, the Commission concluded that the measure at issue constituted an exception to the reference system and qualified the measure as illegal state aid.

In its two decisions of November 7, 2014, the GC annulled the decision of the Commission. The GC considered that the Spanish measure was not selective since it applied to all shareholdings of at least five percent in foreign companies which are held for an uninterrupted period of at least one year, and that it was aimed not at any particular category of undertakings or production, but at a category of economic transactions.

II. Decision of the CJEU

On December 21, 2016, the CJEU canceled the decisions of the GC in the two cases and referred them back to the GC. The CJEU considers that the GC erred in law in annulling the contested decisions of the Commission on the ground that the Commission had failed to identify a category of undertakings that was exclusively favored by the tax measure.

The CJEU states that the only relevant criterion in order to establish the selectivity of a national tax measure consists in determining whether that measure is such as to favor certain undertakings over other undertakings which, in the light of the objective pursued by the general tax system concerned, are in a comparable factual and legal situation and who accordingly suffer different treatment that can, in essence, be classified as discriminatory.

The CJEU states further that for the Commission to qualify a measure as selective and thus as an illegal state aid, the Commission is not always required to identify a particular category of undertakings that exclusively benefit from that measure. The CJEU adds

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that a condition for aid may be finding that a measure represents discrimination against undertakings that are excluded from it.

III. The Decision under Review

On the technical aspects of the case, the CJEU's decision is quite narrow in that it reverses the GC's decision on one specific ground, returning the case to the GC for consideration of the other three grounds that were advanced by the taxpayer and Spain in the GC case. It will be interesting to see how the GC addresses the selectivity point.

Unfortunately, the CJEU has missed an opportunity to define the concept of selectivity in a meaningful manner and, thereby, to reduce the immense legal uncertainty in tax matters in the EU which is fueled by the state aid investigations of the EU Commission. The GC's decision on the need to identify a specific category of taxpayers seemed like a promising way to bring some clarity to the concept of selectivity.

IV. Continued Situation of Chronic Legal Uncertainty

Simply put, at present we have a legal framework that identifies any distinction in a tax system as being potentially state aid. This can be either a legal provision providing a benefit to taxpayers (as in the *Santander* case) or the application of a legal provision to a specific case (as in the cases of *Apple*, *Starbucks*, *FIAT*, etc.).

If the legal definition is so wide, it potentially means that there are an almost infinite number of possible state aid cases outstanding. However, the financial consequences only become relevant when the Commission chooses to pursue a case which, ironically, introduces some kind of selectivity on its own. When reviewing the list of multinationals involved, many of them are prominent U.S. groups with strongly identifiable brands, which suggests an element of selectivity or bias in the process. As a result, there is a political dimension to the state aid debate, which adds to the uncertainty.

On August 24, 2016, the U.S. Department of the Treasury released a white paper entitled "The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings," in which concerns were expressed that the European commission is applying new approaches that are inconsistent with international norms and that the Commission's investigations focus on U.S. multinationals. After being accused of anti-U.S. bias, the Commissioner conveniently announced that a European multinational enterprise was being pursued (i.e. the *Engie* [formerly *GDF Suez*] case) when being in Washington. The choice of the case seems to have been at least partly politically motivated.

While some tax regimes might be questionable by today's standards, the means of addressing this state aid, as opposed to four fundamental freedoms case, Code of Conduct or specific BEPS-inspired provisions, such as those included in the Anti-Tax Avoidance Directive, is debatable. As long as state aid is used as a catch-all technique to manage more political subjects (tax competition between states) as opposed to distortions of competition between companies (for which state aid was designed), an environment of uncertainty will persist which is not conducive to business confidence.

V. Political Dimension

It was interesting that the ramifications of the case caught the attention of a number of governments. Spain was joined by Ireland and Germany in arguing that no state aid existed. While it is not unusual to have states filing briefs in support of another government to argue against having to refund taxes (common in tax discrimination cases), it is paradoxical to see states lining up to argue against having to charge more tax. The reason isn't hard to find. An unlimited application of the state aid doctrine in tax matters may severely limit members' sovereignty in tax matters, creating an uncomfortable tension in the triangular relationship between Member States, the Commission and the CJEU.

VI. The Way Forward: Will the Decision impact Other State Aid Cases?

At first glance, the position taken by the CJEU may impact the outcome of other pending cases, because in most state aid cases in tax matters selectivity is very often the most relevant requirement to be analyzed by the CJEU to conclude whether a measure constitutes illegal state aid or not.

The fact that the CJEU concluded that it is not necessary to identify a certain category of undertakings, and that the fact that a measure applies to a lot of undertakings is irrelevant to demonstrate its selective nature, shows that the Court is taking an approach to selectivity in state aid matters which is very broad and favorable to the European Commission; which, by the way, welcomed the decision in a press release published only a few hours after the CJEU decision. The fact that the approach of the CJEU on selectivity is very wide may illustrate a trend and may mean that the same approach could be taken by the CJEU in other state aid cases in tax matters.

However, while at first glance the case seems to shut one avenue of escape for taxpayers and states, it leaves a number of open questions in the particular case of *Santander* and more generally. The *Santander* case was dealing with a specific legal provision, whereas some of the recent high profile cases are dealing with individual application of (uncontested) law to a particular fact pattern and in particular to transfer pricing matters. One consequence of a very wide view of state aid is that every individual tax authority decision becomes selective, leading to an almost infinite number of state aid cases (each advance pricing agreement, each tax assessment, etc.). At some point, clarity will be needed to avoid the triangular relationship becoming a kind of Bermuda triangle for taxpayers.

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