SLAUGHTER AND MAY

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ECJ rules on the European Commission's application of the State aid selectivity requirement in two recent judgments

Background

Article 107 of the Treaty on the Functioning of the European Union (TFEU) prohibits (absent prior approval from the European Commission) the grant of State aid by Member States. To be considered State aid a measure must, amongst other things, be 'selective' in the sense that it "favour[s] certain undertakings or the production of certain goods".[1] It is well established as a matter of principle that a measure can be *de facto* selective even where it is, on its face, of general application.[2] However, the application in practice of the selectivity requirement to State laws and regulations that do not identify particular undertakings, particularly fiscal and tax measures, is a complex and controversial topic. This is demonstrated by the two recent judgments handed down on 21 December 2016 by the European Court of Justice (ECJ) in the **Spanish tax amortisation case** (Spanish Tax Case)[3] and the **schedule of charges at Lübeck Airport case** (Lübeck Case).

Both cases involved appeals against Commission decisions finding that a law or regulation was in breach of the State aid rules, primarily on the basis that the Commission considered the relevant measures to be selective. In each case, on appeal the General Court (GC) had found in favour of the appellants, holding that the Commission had misapplied the selectivity requirement. These decisions were both appealed by the Commission to the ECJ.

The ECJ found in favour of the Commission, and reversed the GC judgment, in the Spanish Tax Case. It dismissed the Commission's appeal in the Lübeck Case.

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[1] Art. 107(1) TFEU.
[2] See, for example, para. 122 of **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/C 262/01).
[3] Generally known as Santander / Autogrill and, subsequently, World Duty Free Group.

The judgments

The Spanish Tax Case

This case concerned Spanish legislation granting corporation tax deductions to companies resident in Spain that bought and held shares in foreign companies for a prescribed period (but did not allow for equivalent deductions for acquisitions of Spanish companies). The Commission had found that the legislation was selective, and thus unlawful State aid, because it resulted in significant advantages for companies acquiring shares in non-Spanish entities as against companies purchasing shares in Spanish entities. It considered that the relevant provisions represented a derogation from the general approach to the deductibility of goodwill under the Spanish tax code. The GC disagreed and held that "the mere finding that a derogation from the common or 'normal' tax regime has been provided for cannot give rise to selectivity"[4], in particular when the measure in question does not exclude any category of undertakings.[5] As all companies had the ability to take advantage of the provision by purchasing shares in foreign entities, the GC held that the measure was not selective. Accordingly, the GC found that to establish that a measure is selective the Commission is required to identify a category of undertakings exclusively favoured by the measure.

The ECJ rejected what it called this "supplementary" requirement and confirmed that all the Commission was required to demonstrate to establish selectivity is that there is a derogation from the reference tax regime that applies a different treatment to companies in a comparable situation, except where this difference is justified by the nature of the tax regime. On the facts of the Spanish Tax Case, the ECJ considered that this was the case even though the measure was in principle open to all companies.

The ECJ has remitted the case back to the GC for reconsideration of the additional grounds of appeal to the GC against the Commission's original decision.

The Lübeck Case

The Lübeck Case concerns the regulation of airport charges in Germany. Under German law in place at the time, airport operators were required to submit to the authorities draft regulations governing, amongst other things, charges for use of their airports. Once approved, these then took the form of specific regulations for each airport governing the relevant charges payable by airlines using that airport. Consequently, each airport had its own set of rules and charges. The regulations at issue were those governing the charges for Lübeck Airport, which came into force on 15 June 2006.

A Commission decision to open a formal investigation into Lübeck Airport in 2012 preliminarily considered the regulations to be selective (and therefore to involve State aid) as fees payable under them only applied to airlines using Lübeck Airport.[6] The Commission expressed doubts over whether airlines using Lübeck Airport paid a market price under the regulations, noting in particular the poor financial results of Lübeck Airport's operator and the substantially higher charges payable at Hamburg Airport. This, the

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[4] Para. 45, Case T-219/10 *Autogrill España, SA v European Commission*, judgment of 7 November 2014 and para. 49, Case T-399/11 *Banco Santander, SA and Santusa Holding, SL v European Commission*, judgment of 7 November 2014.
[5] Para. 61, Case T-219/10 *Autogrill España, SA v European Commission*, judgment of 7 November 2014 and para. 65, Case T-399/11 *Banco Santander, SA and Santusa Holding, SL v European Commission*, judgment of 7 November 2014.
[6] No SA.27585 and SA.31149 (2012/C) (ex NN/2011, ex CP 31/2009 and CP 162/2010) – Commission Decision of 10 August 2012, *Alleged State aid to Lübeck airport, Infratil and airlines using the airport (Ryanair, Wizz Air and others).*

Commission argued, conferred on airlines using Lübeck Airport a selective advantage over competitors flying from other airports.

The Commission's decision to open a formal investigation was appealed.[7] Both the GC and ECJ rejected the Commission's application of the selectivity test on the basis that, in assessing selectivity, only the impact on firms in a "comparable situation" is relevant. In this case, these were only the airlines who used or intended to use Lübeck Airport. The GC and ECJ found that this followed from the essential nature of the German system, i.e. each airport operator setting the schedule of charges for their airport.

The ECJ upheld the comments of the GC that "in order to assess the potentially selective nature of a fee scale drawn up by a public entity for the use of a product or service in a given sector in relation to certain undertakings, it is necessary, in particular, to refer to all of the undertakings using or able to use that specific product or service and to examine whether only some of them obtain or are able to obtain a potential advantage".[8] The fact that undertakings procuring goods or services from another public authority are subject to different fees is not relevant. The judgment also rejected the Commission's position that any "measure laying down the conditions on which a public undertaking offers its own goods or services always constitutes a selective measure".[9]

Conclusions

The decision of the ECJ in the Spanish Tax Case confirms that the Commission is not required to identify specific categories of undertakings which are exclusively favoured by a measure in order to establish selectivity, so long as it is able to point to a derogation from the reference legal or tax regime that applies a different treatment to companies in a comparable situation, save where this difference is justified by the nature of that regime. However, it is clear from the decision in the Lübeck Case that context will continue to be important to this assessment. More specifically, it highlights the need to define the relevant frame of reference and that where public authorities set charges autonomously, only the entities using, interested in using or able to use the goods or services of a single authority will be in a comparable situation for the purposes of a selectivity assessment.

Other developments

Merger control

European Commission alleges Facebook provided misleading information during WhatsApp takeover

On 20 December 2016 the European Commission **issued** a Statement of Objections to Facebook, alleging that the company provided incorrect or misleading information during the Commission's 2014 review of Facebook's acquisition of WhatsApp.

[7] The GC allowed the City of Lübeck to appeal the Commission's decision to open a formal investigation as, in the absence of a final decision, the initial decision either continued to produce legal effects or, at the very least, the City of Lübeck retained an interest in bringing proceedings in respect of its period of ownership (Lübeck airport was privatised in 2013). The ECJ upheld this reasoning.
[8] Para. 53, Case T-461/12 *Hansestadt Lübeck v European Commission*, judgment of 9 September 2014.
[9] Para. 50, Case T-461/12 *Hansestadt Lübeck v European Commission*, judgment of 9 September 2014.

During its review of the transaction, the Commission considered, among other factors, the possibility of Facebook matching its users' accounts with WhatsApp users' accounts. In both its notification of the transaction and a reply to a request for information, Facebook indicated that it would be unable to establish reliable automated matching between the user accounts. However, in August 2016 WhatsApp announced plans to update its terms and privacy policy, including the possibility of linking its users' phone numbers with Facebook user identities. The Commission has taken the preliminary view that the technical possibility of automatically matching user accounts already existed in 2014, and therefore has concerns that Facebook intentionally or negligently provided incorrect or misleading information during the merger review.

The Statement of Objections has no bearing on the 2014 clearance decision; while the Commission took the alleged misleading information into account during its review, it was not the only evidence relied upon by the Commission in reaching its decision. Instead, this is an investigation into an alleged breach of the procedural rules of the EU Merger Regulation (EUMR) as companies have an obligation to provide accurate information during merger reviews. If the allegations are found to be true, Facebook could be the first company to be fined for the provision of incorrect or misleading information in a merger notification under the current EUMR, which came into force on 1 May 2004 and allows fines of up to 1% of a company's annual worldwide turnover.[10] Facebook has until 31 January 2017 to respond to the Statement of Objections.

Antitrust

UK government publishes response to consultation on implementing the Damages Directive

On 20 December 2016 the UK government published its **response** to its consultation on the implementation of Directive 2014/104 (the Damages Directive). The Damages Directive seeks to facilitate the bringing of private damages actions for competition law infringements in national courts and harmonise the private damages regimes across Member States. All Member States were required to transpose the Damages Directive into their national law by 27 December 2016, a deadline which a number of Member States (including the UK) have not met.

The government response states that it will take a "light-touch" approach to implementation (as opposed to a "copy out" approach) as the UK's established rules relating to claims for competition damages are similar to those in the Damages Directive. It will therefore rely wherever possible on existing UK

For further analysis of the varying approaches to implementation of the Damages Directive across key EU jurisdictions, and the likely implications for bringing or defending competition damages claims in the UK, please see our upcoming briefing on the topic.

[10] The old EUMR provided for fines of between €1,000 and €50,000 per infringement and the Commission only imposed fines on five occasions. The most recent fine (a total of €90,000, representing two fines of €45,000 each for providing incorrect or misleading information in a notification and in response to information requests) was imposed on Tetra Laval in 2004 in relation to its acquisition of Sidel.

legislation, case law and court rules, but will legislate where necessary to ensure full implementation.

In particular, the government has decided:

(i) to implement the Damages Directive as a single regime that has the same procedures whether the original breach was of EU or domestic competition law;

(ii) to retain existing limitation periods but amend domestic limitation provisions to create a standalone competition claim limitation period to reflect the Damages Directive's provisions;

(iii) to implement the Damages Directive's specific requirements concerning disclosure (for example in relation to proportionality requirements and non-disclosure of leniency statements and settlement submissions);

(iv) to legislate to ensure that it is clear that the burden of proving that an overcharge has been passed on rests with the defendant and what an indirect purchaser must show to establish a claim;

(v) to introduce legislation in relation to the assessment of contributions between those jointly liable for an infringement; and

(vi) to allow final infringement decisions of other Member States' competition authorities or courts to be presented as *prima facie* evidence of an infringement.

The substantive new rules will only apply to claims where both the infringement and harm occurred after the implementing legislation has come into force. Procedural provisions will apply to proceedings that begin after the commencement of the implementing legislation and may apply to cases where the harm or infringement took place before the coming into force date.

The government's proposal is set out in the **draft** Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, which will introduce new provisions into the Competition Act 1998. The draft legislation has been laid before Parliament and is expected to be passed in early 2017.

KFTC imposes corrective order and US$ 865m fine on Qualcomm for abuse of dominance

On 28 December 2016 the Korea Fair Trade Commission (KFTC) **announced** its decision to impose a corrective order and a fine of KRW 1.03trn (approximately US$ 865m) on US chip maker and patent-licensing operator Qualcomm Incorporated and two of its affiliates for abuse of market dominance.

This is the largest fine levied on a single company in the KFTC's history and marks the second recent major Asian antitrust enforcement ruling against Qualcomm, following the Chinese National Development and Reform Commission levying a fine of RMB 6.08bn (approximately US$ 975m) for abuse of market dominance in early 2015. The size of the fine is indicative of the aggressive stance currently being taken by antitrust regulators in Asia; commentators have noted that 2016 was a record year for fining levels in

East Asia in particular and that regulators in South Korea and the PRC have levied the most substantial fines in that region.

The KFTC concluded that Qualcomm's business practices constituted a breach of its commitments to offer essential patent licences under fair, reasonable and non-discriminatory (FRAND) conditions. The KFTC identified in particular Qualcomm's practices of: (i) refusing or restricting the licensing of essential patents to rival modem chip makers; (ii) coercing mobile phone makers to sign unfair licence agreements by linking chipset supply with patent licence contracts; and (iii) imposing unfair terms on mobile phone makers, including offering only portfolio licences, not providing a fair compensation calculation process and coercing mobile phone makers to provide patents for free.

In addition to fining Qualcomm, the KFTC issued a corrective order requiring Qualcomm to: (i) engage sincerely in negotiations when signing licence agreements; (ii) refrain from coercing mobile phone makers into unfair licence contracts by linking chipset sales with licence contracts; and (iii) renegotiate previously-signed unfair licence agreements upon request by mobile phone companies. The scope of the corrective order covers mobile phone makers and chipset makers in Korea only.

Qualcomm has subsequently released a **statement** outlining its intention to file for an immediate stay of the corrective order and appeal the KFTC's decision to the Seoul High Court, as well as to appeal the size of the fine and the method used to calculate it. Qualcomm claims in the statement that, amongst other issues, there have been violations of due process rights owed to American companies under the Korea-U.S. Free Trade Agreement.

Regulatory

CAT dismisses BT's appeal against Ofcom's review of Sky's pay TV wholesale must-offer obligation

On 21 December 2016 the Competition Appeal Tribunal (CAT) handed down its **judgment** on BT's appeal against the Office of Communication's (Ofcom) decision to remove the wholesale must-offer obligation (WMO) imposed on Sky, dismissing the appeal in its entirety and upholding Ofcom's decision.

In November 2015 Ofcom decided that the WMO imposed on Sky in 2010, under which Sky was required to offer wholesale access to Sky Sports 1 and Sky Sports 2 to other pay TV retailers with prices and terms set by Ofcom, was no longer required to ensure fair and effective competition in the pay TV market. Instead, Ofcom would continue to monitor the pay TV market for competition concerns and intervene if necessary.

BT lodged an appeal with the CAT against this decision to remove the WMO. In its ruling, the CAT dismissed all five grounds of BT's appeal. Among other things, the CAT concluded that in making its decision to remove the WMO, Ofcom (i) had performed an adequate market analysis; (ii) had conducted a forward-looking assessment to judge the potential for future anti-competitive behaviour in the pay TV market; (iii) had reached a sound decision regarding Sky's wholesale pricing; and (iv) was justified in adopting a “wait-and-see” approach as to whether harm to competition arose from Sky’s “grant-back” conditions.[11]

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[11] The “grant-back” conditions were included in wholesale agreements and require retailers buying access to Sky’s content to grant their own content to Sky in return.