State Aid and Taxation – All Clear?

This edition of ESTAL is dedicated to fiscal aid. It boasts a long list of well-written and stimulating Opinions, Articles and Case Notes, which from different angles explore some of the many complex questions facing companies, authorities and courts confronted with fiscal aid issues.

Fiscal aid is a topic having received considerable attention in the past year. Undoubtedly, the main reason is the four opening decisions from 2014 concerning Apple in Ireland, Starbucks in the Netherlands, and Fiat Finance and Trade and Amazon in Luxembourg, where the Commission is challenging national tax rulings concerning multinational companies’ transfer pricing (TP) arrangements.

The four Opening Decisions have given rise to considerable debate on the Commission’s powers in the field of taxation and have undoubtedly been an eye-opener to many, both within and outside the State Aid Community. General news media such as Financial Times and Bloomberg have dedicated reporters that regularly report on the topic. And a large number of tax advisors all over Europe have started to attend State aid conferences.

And for good reason: the amounts involved are extremely high – and so is the exposure of both the taxpayers and their legal advisors. Reportedly, JP Morgan has estimated that, in a worst-case scenario, Apple alone is ‘on the hook’ for about $19 billion (source: Financial Times, 13 July 2015).

But the Opening Decisions merit attention not only due to the high amounts at stake. As is clear from the contributions in this edition of ESTAL, the Opening Decisions also raise important issues of both a political, legal and practical/procedural nature.

The political implications are amply described in the Opinion by Edoardo Traversa and Alessandra Flamini (‘Fighting Harmful Tax Competition Through EU State Aid Law: Will the Hardening of Soft Law Suffice?’). The two authors place the Opening Decisions – together with other recent State aid initiatives taken by the Commission – in the context of the lack of coordination between Member States to tackle harmful tax competition within the European Union. They remind us that it is almost twenty years since the 1997 Code of Conduct for Business Taxation was adopted as a first attempt to address harmful tax competition within the European Union, but that no harmonisation has yet taken place.

From a legal perspective, although quoting Court cases such as Forum 187 and Kimberly Clarke, there is no doubt that the Opening Decisions go beyond the boundaries of existing case-law and constitute an attempt by the Commission to test – and arguably also push – the limits of Article 107 TFEU.

This is perhaps most clear in relation to the advantage notion, where the Commission seems to introduce a new hybrid of the ‘market economy operator test’ applicable in the context of intra-group trading. Where the market economy operator test normally applies to the conduct of a public authority, it is here used in the relationship between two private companies which are required to trade at arm’s length. In this way, the cases offer an interesting link to other cases such as SFEI and Chronopost, which, however, relate to trade within groups of public companies – and, moreover, raise important questions on the imputability requirement (cf. Stardust Marine). Neither SFEI, nor Chronopost are quoted in the Opening Decisions.

In the Opening Decisions the Commission also accept the use of various transfer pricing methods to establish arm’s length pricing, which may be contrasted with settled case-law and consistent guidance from the Commission according to which market terms must be established either through public procurement or an independent ex-ante evaluation. Recourse to
other methods such as ‘cost plus’-method is normally permissible only in ‘exceptional circumstances’ (cf. Chronopost).

The Opening Decisions also raise interesting - and arguably novel - issues about the ‘selectivity’ requirement. Somewhat surprisingly, the issue of selectivity does not receive much attention in the Opening Decisions. Citing mainly Kimberly Clarke case-law the Commission seems to find that tax rulings that do not lead to an arm’s length price per se lead to discrimination between “companies in a similar legal and factual situation”. However, the Commission does not examine if the administrative practices do in fact entail discrimination between taxpayers in a similar legal and factual situation, seemingly assuming that this is so when arm’s length pricing does not occur (and the advantage condition is satisfied).

Again, the Opening Decisions differ from classic cases on fiscal aid where the main issue is that of selectivity, while the advantage criterion is rarely debated. As accurately expressed by Thomas Jaeger in his article, ‘From Santander to LuxLeaks – And Back’, when it comes to taxes the advantage test normally has a status as ‘a mechanical appendix of the selectivity test’, which the author deplores. In the view of Thomas Jaeger, the judgments in the Spanish Goodwill cases (Santander and Autogrill España) may herald an increased emphasis on the advantage criterion and a more effects-based approach.

In that context, one may also refer to recent judgments such as British Aggregates [III], Greek Casinos and Irish Travel Tax Cases (Aer Lingus and Ryanair), where the General Court has required a more detailed assessment of the competitive effects of the tax measure – seemingly supporting a more effects-based approach under Article 107. One may also allude to the – often unnoticed – dicta in Mediaset (para. 62) where the Court of Justice held that ‘a measure is to be considered selective only if it is likely to create an advantage for one recipient while not doing so for other persons whose situation is comparable to that of the recipient’.

Finally, the Opening Decisions also raise important practical/procedural issues. As described by Pierpaolo Rossi-Maccanico in his article ‘A new Framework for State Aid Review of Tax Rulings’, the approach taken by the Commission in the Opening Decisions – if upheld in the final decisions – may trigger a wave of notifications to the Commission from Member States seeking legal certainty about future tax rulings, whilst suspending their application until cleared by the Commission. Moreover, a wave of complaints could be brought to the Commission by third parties suspicious of tax rulings favouring their competitors. Also, national courts may be asked to examine TP arrangements resulting from tax rulings, which – if they are constitutive of State aid – have been adopted in breach of the stand-still requirement in Article 108(3) TFEU, which may trigger a duty of suspension and payment of illegality interest in accordance with the CELF-doctrine.

In the light of the above implications and interests at stake, there is little doubt that the four TP decisions will be subject to lengthy litigation before the Union judiciary adopted.

It remains to be seen whether the Union Courts will be favourable to the Commission. The Gibraltar case – and to some extent Forum 187 – show that the Court of Justice may accommodate the Commission’s use of State aid law to address problems of interstate tax competition (the problem of alleged ‘tax havens’).

But the question is if the legal climate has changed within the EU Courts since the judgment in Gibraltar. In the last two years, the General Court has been critical of the Commission’s qualification of the contested fiscal measures as State aid, as evidenced by cases such as Spanish Goodwill (Santander and Autogrill España), Hansestadt Lübeck, Greek Casinos and Irish Travel Taxes (Aer Lingus and RyanAir).
Admittedly, all of those cases are currently under appeal to the European Court of Justice which may disagree with the General Court on its interpretations of the fiscal aid notion, as it has done a many occasions already (cf. e.g. the rulings in Gibraltar, British Aggregates (I), NOx and BNP Paribas).

That being said, recent judgments by the Court of Justice in cases such as Eventech (aka London Black cabs), 3M Italia and MOL may be seen as the Court allowing greater latitude on part of the national authorities in cases involving complex socio-economic choices.

The Opening Decisions – together with the appeal cases pending before the Court of Justice – illustrate one fundamental problem in the area of fiscal aid: the lack of legal certainty. As highlighted in most of the pieces in this edition, increased legal certainty in this area is badly needed.

In the Azores judgment, the Court of Justice – following the landmark opinion of Advocate General Geelhoed – laid down a three-prong test, which has served as a clear analytical grid in later cases of regional selectivity. In a related area, the Court of Justice in Altmark set out a four-prong test that has served as an important analytical grid in relation to public service compensation.

Regrettably, the Court of Justice does not offer such clarification very often. Instead, case-law in this field is mostly characterized by a case-by-case approach, with many questions left unanswered. Moreover, the General Court and the Court of Justice often disagree on the exact scope of State aid in the area of fiscal aid, which does not make life easier for companies and authorities trying to navigate in the State aid universe.

The much-awaited State aid Notice (which has been on its way since January 2014) may perhaps help clarify a few issues, but the Notice remains soft law and does not bind the Union courts in any way. Legal certainty and clear guidance on the ramifications of Article 107 in the field of fiscal aid must ultimately emanate from the Union Courts.

It is hoped that the Union Courts will soon seize the opportunity to clarify some of the many questions that remain unanswered in the field of fiscal aid. Until this happens, everything is not clear.

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