

Recovery of unlawful tax advantages remains a thorny EU State aid law issue

Regulating for Globalization

12/12/2017

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Please refer tot his post as: Pieter Van Cleynenbreugel, 'Recovery of unlawful tax advantages remains a thorny EU State aid law issue', Regulating for Globalization, 12/12/2017, <http://regulatingforglobalization.com/?p=224>



Since 2013, the European Commission has taken an increasing interest in Member States' practices of granting tax benefits to mainly multinational undertakings by means of individual tax rulings or specifically tailored tax agreements. In this respect, the Commission in October 2015 found that the Netherlands has given unlawful aid to Starbucks and Luxemburg to Fiat Chrysler (http://europa.eu/rapid/press-release_IP-15-5880_en.htm). In January 2016, it held that Belgium had given advantages to at least 35 undertakings benefiting from an excess profit ruling regime (http://europa.eu/rapid/press-release_IP-16-42_en.htm). In August 2016, Ireland was condemned for having granted over €13 billion tax advantages to Apple (http://europa.eu/rapid/press-release_IP-16-2923_en.htm). In October 2017, Luxemburg's treatment of Amazon was deemed also to constitute State aid (http://europa.eu/rapid/press-release_IP-17-3701_en.htm). At this moment, Luxemburg's tax treatments of McDonalds (http://europa.eu/rapid/press-release_IP-15-6221_en.htm) and GDF Suez (http://europa.eu/rapid/press-release_IP-16-3085_en.htm) are still under investigation, as is the United Kingdom's tax scheme for multinationals (http://europa.eu/rapid/press-release_IP-17-4201_en.htm). Member States having granted unlawful State aid by means of tax rulings have been required to recover the advantages from the beneficiary undertakings concerned.

The issue of the selective nature of tax rulings under Article 107 TEU attracted attention and comments (see among others,

<http://kluwertaxblog.com/2016/12/27/clarifying-the-scope-of-selectivity-how-to-autogrill-a-commission-decision-on-fiscal-state-aid/> and <https://eutaxblog.com/2017/06/16/state-aid-national-courts-struggling-with-selectivity-requirement/>).

What seems to have been neglected, however, are the legally thorny issues also accompanying the recovery of State aid. Those questions are all the more relevant given that the European Commission starts to initiate Court actions against Member States taking insufficient steps to recover unlawful advantages (see in case of Ireland, the Commission's announcement of 4 October 2017, http://europa.eu/rapid/press-release_IP-17-3702_en.htm).

In the context of State aid recovery procedures, European Union law obliges the Member States concerned to take all necessary steps fully to recover unlawful and incompatible advantages granted to the undertakings concerned. The only way to escape from such obligation (as outlined in Article 16(1) of Regulation 2015/1589) is to invoke the Commission's violation of general principles of European Union law. Member States invoke, in annulment proceedings before the General Court, generally two reasons – the protection of legitimate expectations and legal certainty – to seek to limit recovery.

A general principle of EU law, the principle of the protection of legitimate expectations ensures that Member States and undertakings can trust that the Commission does not detract from previously adopted policy guidelines. The Court of Justice only accepts the invoking of legitimate expectations if and to the extent the Member State or undertaking concerned was given consistent, unconditional and precise assurances that the EU would act in a specific way (C-630/11 P, para 132).

In the particular context of tax rulings, it presently remains uncertain to what extent the EU has given precise assurances that tax rulings do not constitute State aid. In its 2014 *Autogrill* (T-219/10, para 45) and *Banco Santander* (T-399/11, para 49) judgments, the General Court held that tax rulings did not constitute selective State aid measures. The Court of Justice in its *World Duty Free* judgment seemed to hint at the potentially selective nature of tax rulings (Joined Cases C-20/15 and C-21/15, para 82) as did the Commission in its 2016 notice on State aid ([2016] OJ C262/1, para 170). Although one could argue that before 2016, it could be doubted whether tax rulings would constitute selective aid measures, this is now no longer the case given the Court's and Commission's confirmation of the selectivity of such measures. It would therefore seem that no reasonable Member State or undertaking could have expected, at least after this time, that tax rulings would not constitute selective aid measures.

The question therefore remains as to whether Member States and undertakings could be led to believe that before 2016 they were proceeding in a State aid compatible way. Following questions will have to be answered in particular in that regard.

- Can two judgments by the General Court be considered sufficiently precise, unconditional and clear assurances that tax rulings do not concern State aid?

- What impact do the Court's judgment and the Commission notice have on the assessment as to whether legitimate expectations existed previously?

It will fall upon the General Court, and on appeal to the Court of Justice, to clarify those questions in the appeals currently pending against the Commission recovery decisions (e.g. T-778/16, *Ireland v Commission* in the Apple case). Given that the EU Courts have strictly interpreted the conditions giving rise to legitimate expectations, it will be interesting to see whether the tax ruling cases will result in somewhat more *souplesse* in the interpretation of those conditions.

In addition to the principle of legitimate expectations, the principle of legal certainty could also come into play. In general, legal certainty calls for the non-retroactive application of new legal rules in place. Within the context of State aid law, the principle could be invoked as an additional means to limit the temporal effects of a recovery decision (in itself already limited to 10 years according to Article 16 of Regulation 2015/1589) against the background of a changing legal framework.

In the particular context of tax rulings, it only became unequivocally clear in 2016 with the Court of Justice's *World Duty Free* judgment and the Commission's Notice on State aid that tax ruling measures could be considered selective advantages. Prior to the judgment and notice, the only relevant provision was Article 107 TFEU and the notion of selectivity as applied in that context. It could therefore be questioned whether, before 2016, Article 107 TFEU and the Commission decision-making practice were not sufficiently clear and predictable so as to limit recovery to advantages granted after 2016?

Again, it will fall upon the General Court to assess to what extent the principle of legal certainty could be invoked successfully.

Given the uncertainty surrounding their application, it can only be hoped that the EU Courts will use the opportunity offered by the cases to clarify or nuance their position on the scope of those principles and the obligations for Member States to recover unlawfully granted tax advantages. To be continued without any doubt...