Interaction of Legal Systems: a perspective from the Leiden Expert Group on State Aid

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Agenda

- Vertical interaction between the European Union law concept of selectivity and tax law
- Horizontal interaction between the enforcement of State aid law in general administrative law and in tax law

Legal framework

- Art. 107(1) TFEU
  - definition of State aid
- Art. 108(1) TFEU
  - existing aid
- Art. 108(3) TFEU
  - direct effect of standstill requirement
- Art. 14 Reg. 659/1999/EC
  - procedural regulation and recovery obligation

Case C-143/99 Adria-Wien Pipeline

- Energy tax
- Rebate granted only to undertakings manufacturing goods

Case C-143/99 Adria-Wien Pipeline

"34. As is apparent from the terms of [Article 107(1) TFEU], an economic benefit granted by a Member State constitutes State aid only if, by displaying a degree of selectivity, it is such as to favour certain undertakings or the production of certain goods.
35. A State measure which benefits all undertakings in national territory, without distinction, cannot therefore constitute State aid."

Case C-143/99 Adria-Wien Pipeline

"38. The concept of aid is more general than that of a subsidy. It embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect".

Case C-143/99 Adria-Wien Pipeline

"41. (…). The only question to be determined is whether, under a particular statutory scheme, a State measure is such as to favour certain undertakings or the production of certain goods within the meaning of [Article 107(1) TFEU] in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question (…).
42. According to the case-law of the Court, a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part does not fulfil that condition of selectivity (…)".

Case C-143/99 Adria-Wien Pipeline

"48. It must be observed, first, that neither the large number of eligible undertakings nor the diversity and size of the sectors to which those undertakings belong provide any grounds for concluding that a State initiative constitutes a general measure of economic policy (…).
49. Second, any justification for the grant of advantages to undertakings whose activity consists primarily in the production of goods is not to be found in the nature or general scheme of the taxation system (…).
50. For one thing, undertakings supplying services may, just like undertakings manufacturing goods, be major consumers of energy and incur energy taxes above 0.35% of their net production value - the threshold above which undertakings manufacturing principally goods are eligible for the energy tax rebate."

Case C-143/99 Adria-Wien Pipeline

"52. For another thing, the ecological considerations underlying the national legislation at issue do not justify treating the consumption of natural gas or electricity by undertakings supplying services differently than the consumption of such energy by undertakings manufacturing goods. Energy consumption by each of those sectors is equally damaging to the environment.
53. It follows from the foregoing considerations that, although objective, the criterion applied by the national legislation at issue is not justified by the nature or general scheme of that legislation, so that it cannot save the measure at issue from being in the nature of State aid."

Case C-143/99 Adria-Wien Pipeline

"54. Besides, as the Commission has rightly observed, the statement of reasons for the bill which led to the enactment of the national legislation at issue indicates that the advantageous terms granted to undertakings manufacturing goods were intended to preserve the competitiveness of the manufacturing sector, in particular within the Community."

T-219/10 Autogrill and T-399/11 Santander

- Spanish rule for the amortization for tax purposes of financial goodwill in shares in newly acquired subsidiaries
  - but only in case of a *foreign* subsidiary

T-219/10 Autogrill and T-399/11 Santander

"47. Zoals in de punten 33 en 37 hierboven is uiteengezet, herinnert voorts het Hof eraan, wanneer het aan de in die punten beschreven onderzoeksmethode refereert, dat overeenkomstig artikel 107, lid 1, VWEU moet worden vastgesteld of een nationale maatregel binnen het kader van een bepaalde rechtsregeling „bepaalde ondernemingen of bepaalde producties" kan begunstigen ten opzichte van andere die, gelet op de doelstelling van de betrokken regeling, in een feitelijk en juridisch vergelijkbare situatie verkeren (…).
48. Wanneer mogelijkerwijs álle ondernemingen in aanmerking komen voor de betrokken maatregel – hoewel deze een afwijking van de algemene of „normale" belastingregeling vormt – is een vergelijking, in het licht van het met die regeling beoogde doel, van de feitelijke en juridische situatie van ondernemingen die van de maatregel kunnen profiteren met die van ondernemingen die er niet voor in aanmerking komen, echter niet mogelijk."

T-219/10 Autogrill and T-399/11 Santander

“49. Uit het voorgaande volgt dat in alle gevallen een groep ondernemingen die als enige door de betrokken maatregel worden bevoordeeld, moet worden aangewezen, wil aan de selectiviteitsvoorwaarde zijn voldaan, en dat in het in punt 48 hierboven bedoelde geval de selectiviteit van de maatregel niet kan volgen uit de enkele vaststelling dat een afwijking van de algemene of ‘normale’ belastingregeling is ingevoerd.”

T-219/10 Autogrill and T-399/11 Santander

“57. Om te beginnen zij erop gewezen dat de omstreden maatregel geldt voor alle verwervingen van deelnemingen van minstens 5 % in buitenlandse ondernemingen die gedurende een ononderbroken periode van ten minste één jaar in bezit blijven. Hij is dus niet bedoeld voor een bijzondere groep ondernemingen of producties, maar voor een groep economische handelingen.”

T-219/10 Autogrill and T-399/11 Santander

"72. Anders dan de … rechtspraak kan de door de Commissie verdedigde zienswijze leiden tot de vaststelling dat er sprake is van een selectieve belastingmaatregel zodra de toekenning ervan afhankelijk wordt gesteld van bepaalde voorwaarden, hoewel de begunstigde ondernemingen geen gemeenschappelijke eigen kenmerken vertonen op basis waarvan zij kunnen worden onderscheiden van andere ondernemingen, behalve dan het feit dat zij kunnen voldoen aan de voorwaarden voor toekenning van de maatregel."

T-219/10 Autogrill and T-399/11 Santander

“73. In de derde plaats heeft de Commissie in punt 154 van het bestreden besluit uiteengezet dat naar haar mening „in het onderhavige geval de omstreden maatregel erop gericht [was] de uitvoer van kapitaal uit Spanje te bevorderen, om de positie van Spaanse ondernemingen in het buitenland te versterken en aldus het concurrentievermogen van de begunstigden van de regeling te verbeteren”.

74. Dienaangaande zij in herinnering gebracht dat een maatregel van een staat die zonder onderscheid alle ondernemingen op het nationale grondgebied begunstigt, op basis van het selectiviteitscriterium geen staatssteun kan opleveren (arrest Adria-Wien Pipeline en Wietersdorfer & Peggauer Zementwerke, punt 41 supra, punt 35).”

T-219/10 Autogrill and T-399/11 Santander

"75. Terwijl bij de beoordeling van de voorwaarde van artikel 107, lid 1, VWEU inzake ongunstige beïnvloeding van het handelsverkeer tussen de lidstaten dient te worden onderzocht of de ondernemingen of producties van een lidstaat worden bevoordeeld ten opzichte van die van de andere lidstaten, kan de in hetzelfde lid van dat artikel genoemde selectiviteitsvoorwaarde slechts worden beoordeeld op het niveau van één enkele lidstaat, waarbij uitsluitend het verschil in behandeling tussen de ondernemingen of producties van die staat wordt onderzocht (…).
76. Bijgevolg is het feit dat een maatregel ondernemingen die in een lidstaat belastingplichtig zijn, begunstigt ten opzichte van ondernemingen die in andere lidstaten belastingplichtig zijn, met name omdat hij het voor ondernemingen die in een lidstaat zijn gevestigd gemakkelijker maakt om deelnemingen te verwerven in het kapitaal van in het buitenland gevestigde ondernemingen, zonder invloed op het onderzoek naar het selectiviteitscriterium."

T-219/10 Autogrill and T-399/11 Santander

“81. In de vierde plaats kan uit de rechtspraak waarop de Commissie zich beroept, niet worden afgeleid dat de rechterlijke instanties van de Unie reeds hebben aanvaard dat een belastingmaatregel wordt aangemerkt als selectief, zonder dat wordt aangetoond dat de maatregel in kwestie een bijzondere groep ondernemingen of producties begunstigt, met uitsluiting van andere ondernemingen of producties.”

What do these developments mean?

- IP boxes
- Tax Rulings
  - FIAT, Starbucks, Amazon, Apple

IP boxes – Commission 24 March 2014

“Over the last ten years, several Member States have also introduced special tax regimes for IP rights that are supposed to stimulate innovation and investments in new technologies. Such regimes include "patent boxes", which provide for tax reductions on income from patents. In 2008, the Commission reviewed such a regime in Spain and concluded that the scheme did not constitute aid (see IP/08/216). Since then, however, the Commission has received indications that special tax regimes seem to mainly benefit highly mobile businesses and do not trigger significant additional research and development activity. The Commission is therefore gathering information to assess whether the regimes grant a selective advantage to a particular group of companies, in breach of EU state aid rules.

The Luxembourg regime was introduced in 2008 and allows for tax exemption of 80% of profits derived from the use or licencing of IP rights such as patents, trademarks, designs, models, internet domain names and software copyrights.”

Draft Notice on the notion of State aid

"174. For reasons of legal certainty, many national tax authorities provide prior administrative rulings on how specific transactions will be treated fiscally. This may be the case in determining arm's-length profits for related party transactions where the uncertainty may justify an advance ruling practice designed to ascertain whether certain controlled transactions are conducted at arm's length".

Draft Notice on the notion of State aid

"175. Administrative rulings that merely contain an interpretation of the relevant tax provisions without deviating from the case law and administrative practice do not give rise to a presumption of aid. However, the absence of publication of tax rulings and the room for manoeuvre which tax authorities sometimes enjoy support the presumption of aid. This does not make Member States any less able to provide their taxpayers with legal certainty and predictability on the application of general tax rules."

Draft Notice on the notion of State aid

"176. As a result, tax rulings should only aim to provide legal certainty to the fiscal treatment of certain transactions and should not have the effect of granting the undertakings concerned lower taxation than other undertakings in a similar legal and factual situation (but which were not granted such rulings). As demonstrated by the Commission's decisional practice, rulings allowing taxpayers to use alternative methods for calculating taxable profits, e.g. the use of fixed margins for a cost-plus or resale-minus method for determining an appropriate transfer pricing, may involve State aid".

Draft Notice on the notion of State aid

"177. Advance administrative rulings involve selectivity in particular where:

- the tax authorities have discretion in granting administrative rulings;
- the rulings are not available to undertakings in a similar legal and factual situation;
- the administration appears to apply a more "favourable" discretionary tax treatment compared with other taxpayers in a similar factual and legal situation;
- the ruling has been issued in contradiction to the applicable tax provisions and has resulted in a lower amount of tax."

HORIZONTAL INTERACTION BETWEEN THE ENFORCEMENT OF STATE AID LAW IN GENERAL ADMINISTRATIVE LAW AND IN TAX LAW

Role of national courts in State aid cases

- Direct effect of standstill obligation
- 'Essential, but distinct' roles
- National courts' tasks:
  - State aid?
  - Does standstill obligation apply?
  - Has standstill obligation been met?
  - All necessary consequences
- Legal framework:
  - National procedural autonomy
  - Effectiveness, equivalence, effective legal protection

Competent courts in State aid cases

- Depends on national legal system

Administrative courts

- Article 8:1(1) General Administrative Law Act
  An interested party may appeal a decision to the district court
- Article 1:2 (1) General Administrative Law Act
  'Interested party' means a person whose interests are directly affected by a decision.

Tax courts

- Article 26a General Tax Code
  In derogation of Article 8:1 of the General Administrative Law Act, the appeal may only be lodged by (a) the interested party on whom the tax assessment is imposed […]

Civil courts

- Civil rights or claims
- 'Rest judge'

Raising State aid claims in administrative and tax courts (I)

Competitors of alleged aid recipients

- Access to administrative courts
  - Within limits → Vogelaar II (Administration Division of the Council of State ECLI:NL:RVS:2013:BZ0794): direct impact on competitive position….
- No access to tax courts

Solutions?

- Tax cases before civil courts … hardly effective
- Harmonious interpretation?
- 'Indirect review'?
- Amendment of General Tax Code

Raising State aid claims in administrative and tax courts (II)

State aid provider (State)

- Several cases before administrative courts
  - Refusing requests for grant of State aid
  - Recovering or stopping aid of own accord
  - Recovering aid after EC recovery decision
- Very few cases before tax courts

Solutions?

- Ex officio application
- Increased enforcement by EC as incentive

Thank you!

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