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*Tax legislation and the notion of State aid
in the case law of the European Court of Justice*

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Case C-169/08 of 17.11.2009

Presidente del Consiglio dei Ministri

v

Regione Sardegna

(Reference for a preliminary ruling from the Corte Costituzionale)

The decision in comment was taken by the Court of Justice on a Reference for a preliminary ruling under Article 234 EC from the Corte Costituzionale (Italy), concerning the interpretation of Articles 49 EC and 87 EC. It was made in proceedings for constitutional review between the President of the Council of Ministers and the Region of Sardinia regarding the establishment by that region of a tax on stopovers for tourist purposes by aircraft used for the private transportation of persons, or by recreational craft, to be imposed only on operators whose tax domicile is outside the territory of that Region.

The legal framework:

The community law

Art. 49, 1st par., EC : *Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.*

Art. 87, 1st par., EC: *Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain*

goods shall, insofar as it affects trade between Member States, be incompatible with the common market.

The national law

The Italian Constitution, under art.117, 3rd par., provides: *Legislative power shall be exercised by the State and the Regions in accordance with the Constitution and within the limits set by Community law and international obligations.*

The regional law

Article 4 of Law No 4 of the Region of Sardinia of 11 May 2006 provides as follows:

- From 2006, a regional tax on stopovers for tourist purposes by aircraft used for the private transport of persons or by recreational craft, or craft used for recreational purposes, of a length exceeding 14 metres, shall be established.
- The persons liable for the tax shall be the natural or legal persons who operate the aircraft or the recreational craft and whose tax domicile is outside the territory of the region.

The reference

With regard to the relevance of the questions referred, the Corte Costituzionale states that, in direct actions for constitutional review, the provisions of Community law serve as interstitial rules through which the conformity of the regional legislation with the Constitution must be tested; in other words, the Community law makes it possible in practice to apply the limits laid down in the first paragraph of Article 117 of the Constitution, with the result that a regional provision held to be incompatible with such Community provisions will be declared unconstitutional.

With regard to the substance of the questions referred, the Corte Costituzionale states that, by imposing a tax on undertakings which do not have their tax domicile in Sardinia, Article 4 of Regional Law No 4/2006 appears to discriminate against such non-resident undertakings by increasing the cost of the services they provide, as compared with undertakings which, carrying out the same activity but not being required to pay the tax solely because they have their tax domicile in Sardinia, gain an economic competitive advantage.

The questions

In those circumstances, the Corte Costituzionale decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

I) Is Article 49 EC to be interpreted as precluding the application of a rule, under which the regional tax on stopovers for tourist purposes is levied only on undertakings which have their tax domicile outside the territory of the Region of Sardinia?

II) Does Article 4 of the Regional Law No 4/2006, by providing for the imposition of the regional tax on stopovers for tourist purposes only on undertakings which have their tax domicile outside the territory of the Region of Sardinia, constitute, within the meaning of Article 87 EC, **State aid** to undertakings carrying on the same activities which have their tax domicile in the Region of Sardinia?

The Decision

The first question is beyond the scope of our discussion and can be left aside. We will focus on the second question however, since the matter of State aid represents a genuine fiscal issue.

According to the case law of the Court, for a measure to be categorised as State aid within the meaning of the Treaty, each of the four cumulative conditions laid down in Article 87(1) EC must be fulfilled:

- 1) there must be an intervention by the State or through State resources;
- 2) the intervention must be liable to affect trade between Member States;
- 3) it must confer an advantage on the recipient;
- 4) it must distort or threaten to distort competition (see, in particular, Case C-237/04 *Enirisorse* [2006] ECR I- 2843, paragraphs 38 and 39 and the case-law cited).

In the present case, it is common ground that the tax at issue in the main proceedings satisfies the second and fourth criteria since it applies to services provided in connection with stopovers by aircraft and recreational craft, which concern intra-Community trade, and that such a tax, by giving an economic advantage to operators established in Sardinia, can distort competition (see Case C-353/89 *Commission v Netherlands* [1991] ECR I- 4069, paragraph 25; Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I- 11135, paragraph 37; and Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I- 1683, paragraph 50).

The questions relating to the interpretation of Article 87 EC thus concern the application of the two remaining criteria for categorising the regional tax on stopovers as State aid. The Region of Sardinia maintains that the tax cannot be regarded as State aid, both because it does not involve the use of State resources and because it is selective in nature. The Commission contends, in its written observations, that the tax satisfies all the criteria set out in Article 87 EC.

Use of State resources

According to the Region of Sardinia, the regional legislation at issue does not involve any intervention using regional resources.

There is no renunciation of regional revenue, since the resident undertakings already contribute to environmental expenditure through the revenue deriving from the taxes paid by them. The regional tax on stopovers increases that revenue by extending the obligation to pay to those who, as non residents, do not contribute to that expenditure through general taxes.

On this issue, the Court recalls that, according to settled case-law, the notion of aid can encompass not only positive benefits such as subsidies, loans or direct investment in the capital of enterprises, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict sense of the word, are of the same character and have the same effect (see Case C-156/98 *Germany v Commission* [2000] ECR I- 6857, paragraph 25, and Joined Cases C- 341/06 P and C-342/06 P *Chronopost and La Poste v UFEX and Others* [2008] ECR I- 4777, paragraph 123 and the case-law cited).

The tax legislation at issue, which grants certain undertakings exclusion from the obligation to pay the tax in question, **constitutes State aid**, even if it does not involve the transfer of State resources, since it involves the renunciation by the authorities concerned of tax revenue which they would normally have received (*Germany v Commission*, paragraphs 26 to 28).

As a consequence, the fact that the provision made under the tax legislation at issue is not the grant of a subsidy, but rather the exclusion from the obligation to pay the tax in question of operators who have their tax domicile in the territory of the region, means that that exclusion from tax liability may be regarded as constituting State aid.

The selective nature of the tax legislation

According to the Region of Sardinia, the difference in treatment as between resident undertakings and non-resident undertakings does not constitute a selective advantage. The tax legislation at issue in the main proceedings is not selective from a geographic perspective because, in accordance with the interpretation of the Court in Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, the framework for reference should be that of the infra-State body, if it enjoys sufficient autonomy. That is so in the case, since the Region of Sardinia has autonomous powers conferred on it by a statute having the authority of constitutional law which authorises it to establish its own taxes. In addition, in accordance with the more general principle of equal treatment in the area of taxation, that legislation taxes in a different way situations which are legally and factually distinct.

In that regard, the Court recalls that a measure adopted by an infra-State body is not selective for the purposes of Article 87(1) EC solely on the ground that it confers an advantage only in the part of the national territory in which the measure applies (see *Portugal v Commission*, paragraphs 53 and 57, and Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747, paragraphs 47 and 48): in fact, such a measure becomes selective if, with regard to the objective pursued by that measure, it constitutes an advantage for certain undertakings as compared with others which, within the legal framework in which that infra-State body exercises its competences, are in a similar legal and factual situation (see Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 41, and *Portugal v Commission*, paragraphs 56 and 58).

In that regard, it must be held that, in the light of the nature and objectives of that tax, all the natural and legal persons who receive stopover services in

Sardinia are in an objectively comparable situation, irrespective of their place of residence or the place where they are established. It follows that the measure cannot be regarded as general, since it does not apply to all operators of aircraft or pleasure boats which make a stopover in Sardinia.

Accordingly, tax legislation at issue constitutes a State aid measure in favour of undertakings established in Sardinia.

In those circumstances, Article 87(1) EC must be interpreted as meaning that the tax legislation in question, adopted by a regional authority, constitutes a State aid measure in favour of undertakings established in that territory.

Conclusions

The decision in question presents interesting profiles worth discussing, in order to compare the position expressed by the Court with prior judgements in the matter in hand, equally originated in Italian tax legislation allowing fiscal aid to certain undertakings, considered to constitute **a State aid measure** within the meaning of Article 87 EC.

- The notion of state aid: in the present judgement the Court follows an ample notion of state aid, which encompasses not only positive benefits such as subsidies, loans or direct investment in the capital of enterprises, but also interventions that mitigate the charges which are normally included in the budget of an undertaking and which therefore are of the same character and have the same effect.

It must be noticed that this wide notion coincides with the concept of state aid used by the European Judge in other cases concerning fiscal aid granted by the Italian Legislation to certain banks resulting from the process of privatization of public banking institutions, which have been considered contrary to the Community law as substantiating State aid, not compatible with the competition

and the market freedom, under Article 87, par. 3, lett. b) and c), EC (see Case C-148/2004 and Case T-335/08).

The territorial selectivity of the measure: in accordance with the interpretation of the Court in previous cases (see Case C-88/03 *Portugal v Commission* [2006] ECR I-7115), the framework for reference in which the ‘general nature’ of a regional measure should be assessed is that of the infra-State body, if it enjoys sufficient autonomy. In the present case, since the Region of Sardinia has autonomous powers conferred on it by a constitutional statute to establish its own taxes, it could be expected that the Court would not consider the measure at issue as a selective one, since it applies to the whole territory of the Region.

However the Court, while recalling the preceding decisions in the matter and after considering the measure within the limited scope of the regional territory, in order to decide on the selectivity of the regional tax, introduces a new element in the line of reasoning and ultimately takes into account also the “objective” pursued through the measure, to state that the regional tax can determine an unacceptable selective effect under the meaning of the EC Treaty.

We observe that the rejection of the regional tax in question confirms a stiff interpretation of the prohibition of state aid which absolutely grants the efficient and efficacious safeguard of competition equality, which is a fundamental value to protect.

On the other hand, the decision of the Court seems to disregard the peculiarities and the distinctiveness of the Sardinian insular situation.

It has also been noticed that, after all, the decision ends by denying legitimation to specific forms of levy oriented to the protection of environment and health, like the regional measure in hand .

Finally it is not useless to mention that some scholars have criticized the inconsistency of the position held by the Court with the renewed recognition and respect of “local and regional autonomies” under article 3, introduced by the Treaty of Lisbon, just entered into force.

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