European Union; Germany

ECJ Advocate General Opines that Order of General Court of European Union in *Fachverband Spielhallen and LM v Commission* (Case T 510/20) Should Be Annulled (*Fachverband Spielhallen and LM v Commission (Case C-831/21 P)) (State Aid)* – Details

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Report from Andreas Perdelwitz, Principal Associate, IBFD

Advocate General Pikamäe of the Court of Justice of the European Union (ECJ) has opined that the order of the General Court of the European Union in *Fachverband Spielhallen and LM v Commission* (Case T 510/20) should be annulled. In the case of *Fachverband Spielhallen eV and LM v European Commission* (Case C-831/21 P) Pikamäe considered whether or not the existence of an economic advantage and selectivity must be assessed together where the contested measure is of a fiscal nature. Details of the opinion are summarized below.

(a) Facts. The appellants brought an action for annulment of the order of the General Court of 22 October 2021 in *Fachverband Spielhallen and LM v Commission* (T-510/20)(*see* General Court Decides on State Aid Case Concerning Action for Partial Annulment of Decision to Open In-Depth Investigation into Possible Advantages for Public Casino Operators in Germany: Fachverband Spielhallen eV (Berlin, Germany) and LM (Case T-510/20) (20 December 2021)), by which the General Court dismissed their action for the annulment of Commission Decision C(2019) 8819 final of 9 December 2019 on State aid SA.44944 (2019/C). The appellants challenge, in particular, the General Court's decision not to examine their line of argument on the ground that it did not concern the Commission's finding relating to the absence of an advantage within the meaning of Article 107(1) Treaty on the Functioning of the EU (TFEU).

(b) Issue. The issue of the case was whether or not the two conditions, i.e. the existence of an economic advantage and selectivity, must be assessed together where the contested measure is of a fiscal nature.

(c) Advocate General's Opinion. The AG opined that the General Court erred in law in declaring the action brought by the appellants to be manifestly unfounded. The AG noted that the General Court seemed to have considered that, according to a general rule which also applies in tax matters, the assessment of the existence of an advantage cannot overlap with that of selectivity. The General Court, further, seemed to have indicated that in some cases relating to taxation, those two conditions may be assessed together on the ground that for both conditions to be satisfied, it must be verified whether the contested measure has the effect of mitigating the tax burden that the recipient would normally have to bear.

In the AG's opinion, the General Court's view on the relationship between examining the conditions relating to advantage and selectivity in tax matters is incorrect. The AG recalled that the Commission must carry out a three-step analysis in order to categorize a measure as selective. As a first step, the

reference framework must be identified which is the "normal" tax system applicable in the Member State concerned. The question whether the tax measure at issue is selective depends on the prior assessment of the reference framework, which implies that an error made in that determination necessarily impairs the whole of the analysis of the condition relating to selectivity. Also, the existence of an economic advantage for the purposes of Article 107(1) TFEU may be established only when compared with "normal" taxation", i.e. the reference framework. The determination of the reference framework is thus a necessary prerequisite for the purposes of assessing not only the selective nature of a tax measure, but also the existence of an advantage. It follows that the examination of those two conditions must be carried out together in the context of taxation, with the sole exception being where an aid scheme confers an advantage the granting of which depends on the broad discretionary powers of the tax administration with regard to its beneficiaries and its conditions, which is not at issue in the underlying case.

The AG noted that it is undisputed that the appellants expressly criticised in their written pleadings at first instance the accuracy of the Commission's assessment that the contested measure is not selective, and referred on several occasions to the "normal" tax system to demonstrate that that measure amounts to a derogation from general taxation rules under the normal tax system applicable in the Member State concerned, which form the basis of the assessment of selectivity. The AG opined that if the General Court had examined the appellants' arguments criticising the Commission's interpretation of German tax law in the contested decision, it might have considered, as the case may be, that the determination of the reference framework constituting the "normal" tax system, as is apparent from that decision, was incorrect. Such an error would necessarily have impaired not only the assessment of the condition of selectivity in its entirety, but also the assessment of the condition of advantage, since the "normal" tax system is the comparator used in the counterfactual assessment to determine whether any economic advantage has been granted. Accordingly, the conclusion drawn by the General Court that the appellants had failed to demonstrate that the assessment of the information and evidence before the Commission should have given rise to doubts and serious difficulties as to whether the deductibility of the levy on the profits constituted an advantage within the meaning of Article 107(1) TFEU, and that they were therefore manifestly unfounded in claiming that the contested decision infringed their procedural rights, would not have been justified.

The AG further dismissed the argument put forward by the Commission that the principle *ne ultra petita*, according to which the power of the General Court to adopt a decision is limited to the questions submitted to it by the parties. According to the Commission, the General Court could not examine the question relating to the existence of an advantage without disregarding that principle, since the criticisms put forward before the General Court by the appellants directed against the determination of the reference framework formally targeted the sole finding of non-selectivity in respect of the contested measure.

The AG opined that irrespective of the fact that the appellants' criticisms referred only to the assessment of the condition of selectivity in the contested decision, the General Court was thus required to consider, by applying the case-law that has been crystallized by the judgment in Fiat Chrysler Finance Europe (Case C-885/19 P), that challenging the determination of the reference framework necessarily involves the examination of the existence of an advantage, in addition to the examination of the selective nature of the contested measure.

The AG concluded that the ECJ should set aside the order of the General Court of the European Union of 22 October 2021 in case T-510/20 and refer the case back to the General Court for it to rule on the single plea in law raised before it by the appellants.
