



CJEU provides groundbreaking clarifications on the identification of the reference system for the purpose of identifying selectivity of tax measures under State Aid rules

The Court of Justice of the European Union (“CJEU”) issued today its judgment in Case C-203/16 P which annulled the judgment of the General Court of the European Union (“General Court”) of 4 February 2016, *Heitkamp BauHolding v Commission* (T-287/11).

The case concerns the compatibility with State aid rules of German tax provisions dealing with the carry-forward of tax losses in the case of restructuring of companies in difficulty (*Sanierungsklausel*).

Relevant German legislation and findings of the Commission

Under the relevant German tax law, losses could be carried forward to later tax years (‘the loss carry-forward rule’), unless the ownership of the loss-making company had changed to a significant extent after the losses had been incurred (‘loss forfeiture rule’). In the latter case, however, German legislation still allowed the losses to be carried forward in the case of restructuring of companies in difficulty (‘the restructuring clause’).

The Commission found that the restructuring clause constituted State aid within the meaning of Article 107(1) TFEU. According to the Commission, such clause provided an exception to the loss forfeiture rule and, as a consequence, it conferred a selective advantage to the entities eligible for its application, which were in a comparable factual and legal situation *vis-à-vis* those entities which were not eligible for it.

Findings of the General Court

The General Court upheld the Commission’s findings that the restructuring clause constituted State aid within the meaning of Article 107(1) TFEU. With regard to the assessment of selectivity, the General Court maintained that the loss forfeiture rule, rather than the loss carry-forward rule, constituted the reference system. According to the General Court, the Commission was therefore right in assessing the existence of a derogation from such a limited reference system.

More in detail, the General Court held that “*the Commission did not err when, while noting the existence of a more general rule, namely the loss carry-forward rule, it determined that the legislative framework of reference established in order to assess the selectivity of the measure at issue was constituted by the rule governing the forfeiture of losses*” (T-287/11, § 107).

Findings of the CJEU

The CJEU upheld the opinion of AG Wahl and annulled the judgment of the General Court.

According to the CJEU, it was not disputed that the loss forfeiture rule constituted itself an exception to the loss carry-forward rule. Thus the General Court erred in maintaining that the loss forfeiture rule constituted the correct system of reference (§ 102). In the CJEU’s view the selectivity of a tax measure cannot be assessed on the basis of a reference framework that includes only a

limited set of provisions that have been artificially taken from a broader legislative framework. Accordingly, in the case at stake, the CJEU concluded that the general rule of loss carry-forward was the correct reference system (§ 103). The CJEU also clarified that the regulatory technique used by the legislator cannot be decisive for the purposes of determining the reference framework. In this respect, the CJEU recalled that the assessment selectivity does not always require the identification of a tax measure derogating from the common tax system. Indeed, if such a derogation were a necessary element of the selectivity analysis, the assessment of selectivity would be made dependent on the regulatory technique adopted by the national legislator (§§ 92-93 and § 104).

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