



Reports of Cases

Case T-620/11

GFKL Financial Services AG
v
European Commission

(State aid — German tax legislation concerning loss carry-forward to future tax years (Sanierungsklausel) — Decision declaring the aid incompatible with the internal market — Action for annulment — Individual concern — Admissibility — Concept of State aid — Selectivity — Nature and general scheme of the tax system — State resources — Obligation to state reasons — Legitimate expectations)

Summary — Judgment of the General Court (Ninth Chamber), 4 February 2016

- 1. Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them — Person individually affected by a measure general in character — Conditions — Commission decision prohibiting a sectoral aid scheme — Action by an undertaking having an acquired right to make a tax saving by virtue of the said scheme — Admissibility*
(Art. 263, fourth para., TFEU)
- 2. Actions for annulment — Natural or legal persons — Interest in bringing proceedings — Commission decision finding aid incompatible with the internal market — Suspension of application of the aid scheme in question following the Commission's decision to open the formal investigation procedure — Action brought by a beneficiary of the said aid scheme — Admissibility*
(Art. 263, fourth para., TFEU)
- 3. Acts of the institutions — Statement of reasons — Obligation — Scope — Commission decision on State aid*
(Arts 107 TFEU and 296 TFEU)
- 4. State aid — Concept — Selective nature of the measure — Tax relief measure — Criteria for assessment — Justification based on the nature or general scheme of the tax system*
(Art. 107(1) TFEU)
- 5. State aid — Commission decision — Judicial review — Limits — Assessment of legality by reference to the information available at the time of adoption of the decision — Plea based on facts not raised in the administrative procedure — Admissibility*
(Arts 108 TFEU and 263 TFEU)

6. *State aid — Concept — Selective nature of the measure — Tax relief measure — Tax measure permitting carry-forward of losses where an undertaking in difficulty acquired for restructuring purposes — Included — No justification based on the nature or general scheme of the tax system*

(Art. 107 TFEU)

7. *State aid — Concept — Aid from State resources — Member State waiving tax receipts, enabling investors to take shares in certain undertakings on fiscally more favourable terms — Included*

(Art. 107(1) TFEU)

8. *State aid — Recovery of unlawful aid — Aid granted in breach of the procedural rules of Article 108 TFEU — Principle of the protection of legitimate expectations — Scope — National authority having communicated compulsory notification in contradiction to EU regulations — No legitimate expectations on the part of beneficiaries — Existence of allegedly similar measures in other Member States — Irrelevant*

(Art. 108 TFEU; Council Regulation No 659/1999, Art. 14(1), second sentence)

1. An undertaking may not, in principle, bring an action for annulment of a Commission decision prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. By contrast, where a decision affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of that group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of traders.

Thus, an undertaking which has an acquired right to make a tax saving pursuant to national legislation, classified as State aid by the decision prohibiting the sectoral aid scheme, must be seen as being part of a closed category of traders, who were identified or at least readily identifiable at the time of the adoption of that decision, within the meaning of the judgment of 15 July 1963 in Case 25/62 *Plaumann v Commission*. That conclusion is not called into question by the fact that, following the Commission's decision to open the formal investigation procedure, and subsequently the decision prohibiting the sectoral aid scheme, the national authorities adopted measures designed to ensure that the national legislation in question was not used.

Moreover, the elements which the case-law takes into account with respect to individual concern within the meaning of the fourth paragraph of Article 263 TFEU do not necessarily coincide with the elements constitutive of State aid within the meaning of Article 107(1) TFEU.

(see paras 55, 56, 64, 65, 70, 71)

2. See the text of the decision.

(see paras 76-80)

3. See the text of the decision.

(see paras 86-97)

4. In order to classify a domestic tax measure as 'selective', it is necessary, first of all, to identify and examine the common or 'normal' tax regime applicable in the Member State concerned. It is in relation to that common or 'normal' tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic

operators which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation, which it is for the Commission to demonstrate. At the outcome of those first two stages of the review, a measure may be described as *prima facie* selective.

However, a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the tax system of which it is part, which it is for the Member State concerned to demonstrate, does not satisfy that condition of selectivity. Following that possible third stage of the review, a measure is classified as selective.

For the purposes of that assessment, a distinction must be made between, on the one hand, the objectives attributed to a particular tax regime and which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives, since, as basic or guiding principles of the tax system in question, those objectives and mechanisms could support such justification.

(see paras 100-102, 153)

5. See the text of the decision.

(see para. 110)

6. A tax relief measure which, by way of derogation from a rule restricting the possibility of carrying losses forward in the event that 25% or more of the shares in a company are acquired, permits, on certain conditions, the carry-forward of losses where a company in difficulty is acquired for the purpose of restructuring is *prima facie* selective, since it does not cover all companies whose ownership has changed substantially, but applies to a very specific category of companies, namely those which, according to the wording of the restructuring clause at the time of acquisition 'are, or are likely to be, insolvent or over-indebted'. That measure, certain of the conditions of which are not linked to the objective of preventing abuse, and which does not cover all companies that are in a comparable legal and factual situation with regard to the objective of the tax system at issue, has the effect of favouring undertakings in difficulty. The Commission does not therefore err in finding that the measure at issue differentiated between operators which were, in the light of the objective assigned to the tax system, in a comparable factual and legal situation.

Nor is that tax measure justified by the nature or general scheme of the tax system given that its main objective of facilitating the restructuring of undertakings in difficulty does not come within the founding or guiding principles of the tax system and is therefore not intrinsic, but extrinsic thereto, without it being necessary to check whether the measure at issue is proportionate to the objective pursued.

(see paras 138, 139, 141, 142, 159, 160)

7. See the text of the decision.

(see paras 175-183)

8. See the text of the decision.

(see paras 186-192)