Reports of Cases

Joined Cases C-164/15 P and C-165/15 P

European Commission
v
Aer Lingus Ltd
and
Ryanair Designated Activity Company

(Appeal — State aid — National tax on air transport — Application of differentiated rates — Lower rate for flights to destinations no more than 300 km from the national airport — Advantage — Selective nature — Assessment where the fiscal measure is likely to constitute a restriction on the freedom to provide services — Recovery — Excise duty)

Summary — Judgment of the Court (Third Chamber), 21 December 2016

1. *State aid — Concept — Grant by the public authorities of favourable tax treatment to certain undertakings — Included — Tax reduction in the form of a general measure applicable to all economic operators without distinction — Not included*

   (Art. 107(1) TFEU)

2. *State aid — Concept — Selective nature of the measure — National measure such as to favour certain undertakings or the production of certain goods in comparison with others in a comparable factual and legal situation*

   (Art. 107(1) TFEU)

3. *State aid — Concept — Selective nature of the measure — Assessment taking account of the legislative technique used — Precluded*

   (Art. 107(1) TFEU)

4. *State aid — Concept — Tax measure at odds with the provisions of EU law other than Articles 107 TFEU and 108 TFEU — Whether an exemption from such a measure enjoyed by certain taxpayers may be precluded from classification as State aid — Conditions*

   (Art. 107(1) TFEU)

5. *Appeal — Grounds — Plea against a ground of the judgment not necessary to support the operative part — Ineffective plea*

   (Art. 256 TFEU; Statute of the Court of Justice, Art. 58)

6. *State aid — Commission decision finding aid incompatible with the internal market and ordering that it be abolished — Determination of the obligations of the Member State — Obligation of recovery — Scope — Restoration of the prior situation*

(Art. 108(2), first subpara., TFEU)

7. *State aid — Recovery of unlawful aid — Restoration of the prior situation — Breach of the principles of proportionality and equal treatment — None*

(Arts 107 TFEU and 108 TFEU)

1. The definition of 'aid' is more general than that of a 'subsidy', because it includes not only positive benefits, such as subsidies themselves, but also State measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect.

Consequently, a measure whereby public authorities grant certain undertakings favourable tax treatment which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than other taxpayers amounts to State aid within the meaning of Article 107(1) TFEU. On the other hand, advantages resulting from a general measure applicable without distinction to all economic operators, which is not therefore selective, do not constitute State aid within the meaning of Article 107 TFEU.

(see paras 40, 41)

2. When appraising the requirement of selectivity, Article 107(1) TFEU requires assessment of whether, under a particular legal regime, a national measure is such as to favour certain undertakings or the production of certain goods in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation.

(see para. 51)

3. Article 107(1) TFEU does not draw a distinction between measures of State intervention on the basis of the techniques used by the national authorities.

The only decisive factor for determining whether a tax measure is to be classified as State aid and, in particular, for ascertaining whether that measure gives rise to more favourable tax treatment for its beneficiaries by comparison with other taxpayers, is the effects produced by the measure.

(see paras 58, 68)

4. The fact that a tax measure is contrary to provisions of EU law other than Articles 107 and 108 TFEU does not mean that the exemption from that measure enjoyed by certain taxpayers cannot be classified as State aid, as long as the measure in question produces effects vis-à-vis other taxpayers and has not been either repealed or declared unlawful and, therefore, inapplicable.

In such a case, the Commission is obliged, in determining whether a tax measures is to be classified as State aid, to take account of those effects and cannot ignore them simply on the basis that the taxpayers subject to less favourable tax treatment might obtain reimbursement of the excess tax which they have paid by commencing proceedings before the national courts.

(see paras 69, 77)

5. In an appeal, complaints directed against a ground included in a judgment of the General Court purely for the sake of completeness must be immediately dismissed as ineffective, since they cannot lead to the judgment under appeal being set aside.

(see para. 86)

6. The obligation on the Member State concerned to abolish, through recovery, aid considered by the Commission to be incompatible with the single market has as its purpose to restore the situation as it was before the aid was granted.

That objective is attained once the aid in question, together, where appropriate, with default interest, has been repaid by the recipient, or, in other words, by the undertakings which actually enjoyed the benefit of it. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored.

Moreover, the recovery of unlawful aid with a view to re-establishing the status quo ante does not imply reconstructing past events differently on the basis of hypothetical elements such as the choices, often numerous, which could have been made by the operators concerned, since the choices actually made with the aid might prove to be irreversible.

Recovery of such aid entails the restitution of the advantage procured by the aid for the recipient, not the restitution of any economic benefit the recipient may have enjoyed as a result of exploiting the advantage. That benefit may not be the same as the advantage constituting the aid and there may indeed be no such benefit, but that cannot justify any failure to recover that aid or the recovery of a different sum from that constituting the advantage procured by the unlawful aid in question.

With regard, in particular, to unlawful aid granted in the form of a tax advantage, recovery of aid means that the transactions actually carried out by the recipients of the aid in question must be subject to the tax treatment which the recipients would have received in the absence of the unlawful aid.

Lastly, the recovery of an amount equal to the difference between the tax that would have been payable in the absence of an unlawful aid measure and the lesser amount paid pursuant to that measure does not constitute a new tax imposed retroactively. What is at issue is the recovery of the part of the original tax which was not paid due to the availability of an unlawful exemption. The recovery of such an amount does not constitute a penalty.

(see paras 89-92, 93, 114)

7. The imposition of the obligation to recover aid infringes neither the principle of proportionality nor the principle of equal treatment. First, abolishing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful. Accordingly, the recovery of such aid, for the purpose of restoring the previously existing situation, cannot in principle be regarded as disproportionate to the objectives of the provisions of the FEU Treaty relating to State aid.

On the other hand, the aid recipients, which are required to repay the aid, are obviously not in the same situation as undertakings which did not receive the aid and are not affected by the recovery, so that there can be no question of different treatment of similar situations, in breach of the principle of equal treatment.

(see paras 116, 117)