Brussels, 7 May 2018

ECJ Clarifies 'Selectivity' of Tax Measures in *ANGED v Asturias*

The First Chamber of the Court of Justice of the European Union ("ECJ") rendered a judgment on 26 April 2018 on the interpretation of Articles 49 and 54, and Article 107(1) Treaty on the Functioning of the European Union ("TFEU"), that clarifies the compliance of tax measures with the EU freedom of establishment, and the EU State aid rules.

Questions

Joined cases C-234/16 & C-235/16 *ANGED v Asturias* concern a preliminary ruling from the Spanish Supreme Court under Article 267 TFEU seeking to establish:

- Whether a regional tax on large retail establishments levied by a Spanish autonomous region is in breach of the freedom of establishment, constituting covert of overt discrimination of foreign companies in a host state scenario, contrary to the national treatment principle, and,
- Whether the exclusion of small companies from the scope of this tax constitutes selective advantage contrary to the State aid prohibition of Article 107(1) TFEU.

Judgment

The Court concluded the tax levied on large retail establishments by the Spanish Autonomous Region of Asturias does not constitute a restriction on the freedom of establishment, nor an overt of covert discrimination on cross-border operating businesses, in line with established case-law (cf. *Denkavit* and *ACT IV Group Litigation*).

Regarding the State aid assessment, the Court clarified the criterion of 'selectivity', establishing that the non-taxation of smaller retail establishments did not constitute a selective advantage for these undertakings, when compared with large retailers. In order to classify a tax measure as selective, it needs to differentiate between operators that are in a comparable factual and legal situation in light of the objective pursued by the reference system in question, in line with recent case-law (ie. *World Duty Free* C-20/15 & C-21/15, para 57 et seq.)

Furthermore, the Court has clarified that in establishing material selectivity of tax measures, it is not always necessary to prove a derogation from the system of reference (cf. *Adria-Wien Pipeline* C-143/99). Under the ECJ's interpretation of the EU State aid rules, the "effects" of a tax measure take precedence over the "regulatory technique" used (cf. *British Aggregates* C-487/06 and *Gibraltar* C-106/09 & C-107/09).

The issue of geographical selectivity was not raised, and was considered *acte clair,* in line with the *Azores* judgment criteria.

The first Chamber thus confirmed the approach of Advocate General Kokkott in her Opinion of 9 November 2017 in response to the preliminary ruling request by the Spanish Supreme Court.

Spain to Introduce Digital Services Tax

The Minister of Finance of Spain announced last week that the government of Prime Minister Mariano Rajoy will propose a new digital services tax (DST) in Spain effective by the end of 2018. The announcement lacked further detail, however, it is understood that the bill will follow the principles of the EU proposal of March 2018 that plans on introducing EU-wide digital services tax for the largest technology companies operating in the Single Market. Under these principles, the companies will face a turnover tax on revenues subject to threshold and significant (digital) footprint.

UK Parliament Vote on Beneficial Ownership Requirements

The lower House of the UK Parliament voted on 1 May to require companies registered in UK overseas territories to publicly disclose their beneficial ownership, thus expanding the scope of the Sanctions and Anti-Money Laundering Bill. Under the UK law, which has been in place for two years, all British companies are required to identify ultimate beneficial ownership of shareholders.

The UK Government Minister Alan Duncan said that Theresa May's government did not want to harm British overseas territories' autonomy by legislating directly. However, faced with a Labour- Conservative cross-party majority on this bill in the House of

Commons, the minister stated: "We have listened to the strength of feeling in the House on this issue and accept that it is without a doubt the majority view of this House that the overseas territories should have public registers."

Similar transparency trends are noted with the political agreement of December 2017 on EU's 5th Anti-Money Laundering Directive and OECD's Common Reporting Standard (CRS), through which more than 80 countries have agree to share information about financial accounts.

HMRC Guidance on 'Enablers' of Tax Avoidance

The UK tax administration set out further guidance as to who is considered an 'enabler' of tax avoidance. The list, published 30 April, seeks to clarify the definition of enablers, and how to address the related issue of legally privileged communications.

Under the UK law, schedule 16 to the Finance Act 2017 (No.2), an enabler of tax avoidance is a person who is responsible for the design and marketing of abusive tax arrangements which are later defeated, but also a person who is facilitating another person's entering into abusive tax arrangements.

Further, the updated guidance relates to penalties for enablers of defeated tax avoidance legislation, which was introduced in 2017. The guidance also sets out how the enablers' legislation interacts with the GAAR and the PCRT. The PCRT (Professional Conduct in Relation to Taxation) is a document that concerns the members of the UK professional bodies working in taxation, which sets out rules of conduct for tax professionals as well as the fundamental principles of professional standards.

EU Commission Approves Irish State Aid SMEs Scheme

The European Commission has approved an extension of an Irish €10 million State aid scheme on restructuring of small and medium-sized enterprises (SMEs) in financial difficulty. The extension of the State aid scheme of November 2017 will allow the granting of temporary restructuring support like loans to SMEs in financial difficulty in Ireland facing acute liquidity needs. The extension will apply until 2020 with all sectors of the Irish economy qualifying, save for the financial sectors as well as the coal and steel industry.

Under the EU State aid rules, companies may be allowed to receive State aid under certain strict conditions in accordance with the 2014 Guidance on rescue and restructuring aid.

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