State Aids and Environmental Taxes: The Northern Ireland Exemption to the UK Aggregates Levy

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Case T-359/04 British Aggregates Association and others v. Commission [2010] NYR

The General Court annuls Decision C(2004) 1614 final, in which the Commission declared that the modified exemption to the aggregates levy in Northern Ireland, as notified by the United Kingdom, fell within the scope of Article 87(1) EC [107(1) TFEU] but was compatible with the common market on the basis of Article 87(3)(c) EC [107(3)(C) TFEU] (author's headnote).

I. Legislation

Articles 107, 108 and 110 TFEU.
Community Guidelines on State aid for environmental protection.

II. Facts

The British Aggregates Association ["BAA"]– an association of small independent quarrying companies – together with two aggregates producers established in the Republic of Ireland brought an action of annulment against Decision C(2004) 1614 final of 7 May 2004 ["the contested decision"], whereby the Commission decided not to raise objections to a State aid notified by the United Kingdom. The aid in question was the special relief scheme from the aggregates levy established for Northern Ireland ["the exemption"].

Aggregates are granular materials used in construction. They may be simply used as construction fill, or they may be mixed with binders such as cement, to produce concrete, or bitumen, for road surfacing. Aggregates are a non-renewable natural resource and their extraction has a negative impact on the environment in terms of noise, dust, damage to biodiversity and visual amenity.

The aggregates levy ["AGL"] was introduced in the United Kingdom with effect from 1 April 2002. Its purpose was to internalise the environmental costs of aggregates production in order to discourage the extraction of virgin aggregates and to promote the use of recycled and alternative materials. The introduction of the AGL itself formed the subject matter of a previous case decided by the Court of First Instance[1] and, on appeal, by the European Court of Justice[2] [*British Aggregates I*].

The Northern Ireland exemption was not at stake in *British Aggregates I*. The applicant challenged its legality in the course of the administrative procedure that took place before the Commission, but it did not restate this argument in any of the pleas it put forward before the European Courts. This is probably due to the fact that the extent and the functioning of the exemption were modified in the course of the proceedings.

The original relief scheme established for Northern Ireland was a decreasing exemption. It was phased over a period of five years, during which the exemption would gradually decrease from 100% – total exemption – to 0% of the AGL – no exemption. In order to benefit from the exemption, it was necessary to be located in Northern Ireland and to utilise aggregate for the purpose of manufacturing processed products. The exemption was justified as a necessary measure to prevent a temporary loss of international competitiveness of companies within Northern Ireland, which is a unique territory in the United Kingdom in that it has a land boundary with another Member State.

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1 Case T-210/02 *British Aggregates Association v. Commission* [2006] ECR II-2789.

2 Case C-487/06 P *British Aggregates Association v. Commission* [2008] ECR I-10505.

The modified relief scheme entered into force on 1 April 2004. From then on, the Northern Ireland exemption would remain fixed at 80% for a period of seven years but its concession would not be automatic anymore. The undertakings wishing to benefit from it would have to enter into environmental agreements with the UK government, committing themselves to a programme of environmental performance improvements over the duration of the relief.

The contested decision declared that the new exemption constituted State aid within the meaning of *ex* Article 87(1) EC [107(1) TFEU] but was compatible with the common market in accordance with Article 87(3)(c) EC [107(3) TFEU]. It is against this decision that the action was brought before the General Court [GC].

III. Judgment

The applicants put forward three pleas in law in support of their action. The first plea alleged infringement of *ex* Articles 23 and 25 EC [28 and 30 TFEU] or Article 90 EC [110 TFEU]. The second plea alleged infringement of the 2001 Community Guidelines on State aid for environmental protection[3]. The third plea alleged infringement by the Commission of its procedural obligations, inasmuch as it did not open the formal investigation procedure foreseen in *ex* Article 88(2) EC [108(2) TFEU][4].

In its preliminary remarks, the GC recalled that the formal investigation procedure laid down by Article 108(2) TFEU is essential whenever the Commission has *serious difficulties* in determining whether an aid is compatible with the common market[5]. It also recalled that, according to settled case law, if the examination carried out by the Commission during the preliminary examination is insufficient or incomplete, this constitutes evidence of the existence of serious difficulties[6]. The GC concluded that it was appropriate to consider all the applicants' pleas in law put forward against the contested decision, in order to ascertain whether they enabled any serious difficulty to be identified which should have led the Commission to open the formal investigation procedure[7].

It is with this aim that the GC then considered the first plea. Although the procedure provided for in Articles 107 and 108 TFEU leaves a margin of discretion to the Commission for assessing the compatibility of an aid with the common market, it is clear from the general scheme of the Treaty that the procedure must never produce a result which is contrary to specific provisions of the Treaty. The obligation on the part of the Commission to ensure that the rules on State aid are applied consistently with other provisions of the Treaty is all the more necessary where those other provisions also pursue the objective of undistorted competition in the common market, as Articles 28 and 30 or 110 TFEU do in the present case when seeking to safeguard the free movement of goods and competition between domestic and imported products[8].

The GC noted that the Commission had examined the exemption from the aggregates levy in the light of the Guidelines on State aid for environmental protection, but that it had not considered whether its effects led to tax discrimination contrary to Articles 28 and 30 TFEU or Article 110 TFEU[9].

According to the GC, it could be disputed that the new exemption scheme has led to crude aggregates extracted in Northern Ireland by producers having entered into environmental agreements being taxed at 20% of the AGL rate, whereas identical products imported from Ireland were taxed at the full AGL rates[10]. The GC also observed that aggregates producers established in Ireland could not enter into an environmental agreement and were not otherwise eligible to benefit from the exemption scheme by showing, for example, that their activities already complied with the agreements which aggregates producers in Northern Ireland could conclude[11]. The GC noted, finally, that BAA had claimed, in the complaint it had submitted to the Commission, that the aid scheme was intended solely to safeguard the competitiveness of aggregates producers in Northern Ireland and that it was liable to significantly distort trade between Member States[12].

In the light of the foregoing, the GC concluded that the failure by the Commission to examine the

3 OJ C 37, 3.2.2001, p. 3, now replaced by the 2004 Guidelines, OJ C 82, 1.4.2008, p. 1.

4 I will hereinafter refer, exclusively, to the numbering of the TFEU.

5 Case T-159/04, *supra* note 1, para. 55.

6 *Ibid.*, para. 57.

7 *Ibid.*, para. 59.

8 *Ibid.*, para. 91.

9 *Ibid.*, para. 97–98.

10 *Ibid.*, para. 99.

11 *Ibid.*, para. 100.

12 *Ibid.*, para. 101.

alleged discriminatory character of the exemption was indicative of the existence of serious difficulties. It followed that the Commission was not entitled to adopt the decision not to raise objections without opening the formal investigation procedure[13]. Their contested decision was therefore annulled.

IV. Comment

In the contested decision, the Northern Ireland exemption to the AGL was declared compatible with the common market on the basis of Article 107(3)(c) TFEU, following the Community Guidelines on State aid for environmental protection. The way in which the Guidelines were interpreted and applied by the Commission was at the chore of the second plea put forward by the applicants. However, the judgment offers no guidance on this point, since the GC found that the action of annulment could be upheld on the basis of the two other pleas.

Among the three pleas submitted by the applicants, the first and the second one challenged the contested decision on their merits, while the third one sought to safeguard the procedural rights recognised by Article 108(2) TFEU. In its preliminary remarks, the GC made it clear that it intended to focus on the latter, and that the substantive pleas would only be taken into consideration inasmuch as they could help assess the lawfulness of the Commission's refusal to open the formal investigation procedure. Throughout the rest of the judgment, the GC restricted itself to applying the 'serious difficulty test', according to which the Commission is obliged to open the formal investigation procedure if it is not able to overcome, during the preliminary phase, all the difficulties involved in determining whether the aid is compatible with the common market.

It should be noted that the decision to focus on the procedural plea is not neutral. Should the action be upheld and the decision annulled, as it was in this case, this implies that the case will be referred back to the Commission without qualifications, or with no qualification other than the obligation to open the second phase of the procedure. By declining to rule on the merits of the substantive pleas, the GC avoided prejudging the outcome of the procedure that will have to be opened before the Commission in order to assess, again, the compatibility of the controversial measure.

This approach is not new. The GC adopted it for the first time in *Thermenhotel*[14], and has since then followed it in other cases[15]. Yet, in those cases, the approach was imposed by the fact that the *locus standi* of the applicants was limited. They could challenge the decision of the Commission on the basis of the *Cook/Matra* rule of standing, according to which the persons intended to benefit from the procedural guaranties laid down by Article 108(2) TFEU can challenge the decision of the Commission not to open the formal investigation procedure. However, since they could not satisfy the stricter *Plaumann* test, they could not challenge the decision on the merits. In this type of situation, the *Thermenhotel* approach allows the GC to take into consideration, albeit indirectly, the substantive pleas made by the applicant, while respecting the narrow margin of judicial review allowed by the applicants' limited *locus standi*.

In the current case, however, there were no doubts as to the full *locus standi* of the applicants, as is shown by the fact that the Commission withdrew its plea of inadmissibility. It did so pursuant to the ruling of the ECJ in *British Aggregates I*, where the Court confirmed that BAA satisfied the *Plaumann* test[16]. It is difficult to see how a different conclusion could have been reached in this case. The fact that, apart from BAA, two other applicants were behind the action was irrelevant, since one and the same application was involved[17]. If the applicants were entitled to challenge the decision on the merits, the restrictive approach adopted by the GC was not necessary.

This judgment suggests that the extent of the review carried out by the GC, when faced with decisions adopted by the Commission without opening the formal investigation phase, is the same irrespective of whether the claimants have full or limited *locus standi*. The review carried out by the GC is in any event restricted to whether the 'serious difficulties test' is satisfied, and to whether the Commission was therefore entitled to adopt a decision without opening the second phase of the State aid control procedure. While this approach could be praised as an example of judicial self-restraint which shows awareness of the central role recognised by the Treaty to

13 *Ibid.*, para. 102.

14 Case T-158/99 *Thermenhotel Stoiser Franz Gesellschaft and others v. Comission* [2004] ECR II-1.

15 See, for e.g., Case T-388/03 *Deutsche Post and DHL v. Commission* [2009] ECR II-199, para. 69.

16 Case C-487/06, *supra* note 2, para. 36.

17 Case C-313/90 *CIRFS v. Commission* [1993] ECR I-1125, para. 31.

the Commission in the enforcement of State aid law, it raises at least two questions.

It can be wondered, first, whether it makes sense to maintain two different tests of standing to determine the admissibility of actions for the annulment of State aid decisions adopted within the preliminary phase. As it currently stands[18], the case-law of the Court of Justice distinguishes two situations, depending on whether the applicants call into question the substance of the decision – *Plaumann* test – or whether they essentially challenge the approval of the aid and the closing of the file without initiating the formal review procedure – *Cook/Matra* test. If the approach of the GC in this case is correct, so that the review carried out by the Courts is materially identical in both situations, the existence of two different standing tests may be unnecessary[19].

Secondly, it can be wondered whether such an approach was justified in this case, given the elements that led the GC to conclude that the 'serious difficulties test' had not been satisfied. It should be recalled that the GC based its reasoning on the fact that the analysis of the Commission had been incomplete because it had not considered whether the relief scheme was compatible with Articles 28, 30 and 110 TFEU. In other words, the GC annulled the decision because the Commission had not examined the compatibility of the measure with the internal market rules on charges having equivalent effect and on discriminatory taxation.

Although the enforcement of these rules is not the object of the State aid control procedure, it is settled case-law that this procedure cannot lead to results which are contrary to other Treaty provisions[20]. If it were otherwise, the Commission would be using its discretion in the field of State aid law to authorise exceptions to other mandatory rules of the Treaty. While the argument based on Articles 28 and 30 TFEU was weak[21], the compatibility of the exemption with Article 110 TFEU was certainly problematic. The GC was therefore right in holding that the Commission could not approve the aid without previously considering its allegedly discriminatory character. However, since the Commission enjoys no discretion whatsoever with regard to Article 110 TFEU, the self-restraint shown by the GC and its refusal to give a ruling on the merits of this part of the application are hard to justify.

The question raised by the applicants was, furthermore, an interesting one. It was not the first time that the Commission had been called upon to review an aid falling simultaneously within Articles 107(1) and 110 TFEU[22]. However, the overlap between both provisions was particularly remarkable in this case, as a result of the combination of two features in the controversial measure. First of all, the selectivity of the aid was regional: the exemption was found to be an aid because it favoured companies situated in Northern Ireland to the detriment of companies in a comparable situation but located elsewhere, whether in Great Britain or in another Member State. The reason why the measure fell under both provisions was therefore the same: undertakings in an identical situation were taxed differently, depending on their location. Secondly, the aid took the form of a tax exemption. This means that the alleged tax discrimination tainted the whole aid, and not only its means of financing, for such a distinction cannot be established when tax exemptions are at stake. Consequently, the overlap of both provisions was almost perfect, in the sense that the *whole* measure was *equally* covered by both.

The judgment of the GC has not been appealed, and the Northern Ireland exemption to the AGL has been suspended, pursuant to the ruling of the GC, as of 1 December 2010.

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18 See, for e.g., Case C-319/07 P *3F v. Commission* [2009] ECR I-5963, paras. 31 and 34.

19 The standing requirements in State aid cases are again at stake in two pending cases: Case C-83/09 P *Comission v. Kronoply and Kronotex* and Case C-148/09 P *Belgium v. Deutsche Post and DHL*. See the Opinions of Advocate General Jääskinen of 24 November 2010 and 2 December 2010, respectively.

20 Case C-73/79 *Commission v. Italy* [1980] ECR 1533, para. 11.

21 Neither the tax nor the exemption was linked to the crossing of a frontier. See Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium v. Ville de Seraing and Province de Liège* [2006] ECR I-5293, para. 53.

22 See, for e.g., Case C-204/97 *Portugal v. Commission* [2001] ECR I-3175.