Press and Information

Court of Justice of the European Union
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Judgment in Case C-452/10 P
BNP Paribas and Banca Nazionale del Lavoro Spa (BNL) v Commission

The Italian scheme on realignment for tax purposes applicable to the banking sector, adopted in 2004, constitutes illegal State aid which must be repaid by the banking entities

That scheme includes a selective advantage, not justified by the nature of the tax system

EU legislation[1] on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares in companies situated in two or more Member States introduced a system of fiscal neutrality for transfers of assets between companies.

Where assets are transferred, the 'tax misalignment' or 'fiscal neutrality' mechanism consists of the tax value not being adjusted immediately to the book value. On the other hand, the 'fiscal realignment' mechanism is a tax operation by which the tax value is adjusted to the book value of the assets, giving rise to recognition of the capital gain for tax purposes arising on the transfer which is then subject to tax.

In 1990, Italian legislation provided that the transfer of assets was regarded, for tax purposes, as a sale of company assets and was subject to a tax on the capital gains (the difference between the book value of the transferred asset and its value for tax purposes).

The objective of Law 218/90 was to rationalise banking activities in Italy and, primarily, to allow public banking entities to change their legal form into that of joint stock companies. In order to facilitate those transactions, that legislation provided for a system of partial fiscal neutrality in respect of 85% of the capital gain realised on the transfer of banking assets. That system of partial fiscal neutrality brought about a dual misalignment, both as regards the assets transferred (in the accounting records of the recipient companies) and the shares received by way of consideration (in the accounting records of the transferring entities). The transferring entities were immediately taxed on the remaining 15% of the capital gain at the normal rate of corporation tax.

A law of 1993 then made it mandatory for public entities operating in the banking sector whose capital funds were held by the State to have adopted the form of joint stock companies. Subsequently, in 2000, a scheme providing for accounting revaluation of assets and a scheme for tax realignment of the book values were set up for the purposes of the companies referred to in Law 218/90 and for the purposes of the other companies[2]. The Finance Laws of 2002 and 2004 extended the revaluation and realignment scheme set up in 2000. However, the 2004 Finance Law did not extend the scheme for realignment for tax purposes applicable to transfers of company assets beyond transfers carried out under Law 218/90.

In 2008 the Commission adopted a *decision* [3] according to which the tax realignment schemes set up in 1990, 2000 and 2001[4] constituted general tax measures justified by the inherent logic of the system and could not be characterised as State aid. The substitute tax was applied under identical conditions to all companies, whether or not they were banking companies.

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[1] Council Directive 99/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1).
[2] Several laws extended this scheme for the recognition of the capital gain for tax purposes.
[3] Commission Decision 2008/711/EC of 11 March 2008 on State aid C 15/07 (ex NN 20/07) (OJ 2008 L 237, p. 70)
[4] By Laws 218/90, 342/00 and 448/01

On the other hand, **the Commission held that the 2004 Finance Law** – which moreover had not been notified to it – **did not constitute a general measure because it reserved advantages to certain credit institutions, in connection with solely the reorganisations implemented under Law 218/1990.** The other credit institutions and the other companies were not able to benefit from the same tax realignment scheme. Consequently, the Commission considered that **the scheme applicable to the banking sector included a selective advantage which had an impact on improving the competitiveness of certain undertakings, not justified by the nature of the Italian tax system.** Therefore, that scheme constituted **State aid incompatible with the common market,** illegally implemented by Italy, and that aid had to thus be recovered from the recipient banks[5].

By a judgment delivered in 2010[6], the General Court dismissed the action for annulment of the Commission decision brought by BNP Paribas and BNL, recipients of the aid at issue.

In their appeal before the Court of Justice, BNP Paribas and BNL criticise the General Court, *inter alia*, for not having verified whether the tax scheme at issue was justified or not by the nature and general structure of the Italian tax system.

The Court points out that State aid is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Union judicature must, having regard to the specific features of the case before it and to the technical nature of the Commission's assessments, carry out a comprehensive review of the national measures.

The Court considers that the General Court, by not having carried out a comprehensive review of whether the tax realignment scheme constituted State aid, erred in law: its judgment must consequently be set aside.

The Court nevertheless considers that the state of the proceedings is such that judgment can be given on them. It thus examines the argument put forward by BNP Paribas and BNL before the General Court, according to which the tax scheme at issue is justified by the Italian tax system as a whole.

The Court observes in this connection that the concept of State aid does not refer to State measures which differentiate between undertakings where that differentiation arises from the general scheme of the system of which they form part.

It holds that the Italian legislation successively put in place two different systems of fiscal neutrality in respect of gains realised following transfers of assets between companies, one in the context of the restructuring of the banking sector and the other in respect of transfers of assets in exchange for shares carried out between other companies.

In 1995, a tax realignment scheme was reserved to the gains accruing from transfers of assets in exchange for shares carried out in the context of the restructuring of the banking sector.

The Court acknowledges that the realignment schemes provided for in Laws 342/00 and 448/01 enabled realised gains to be recognised in consideration for payment of a substitute tax set at the same level for all the undertakings and could be considered to be general fiscal measures, justified by the inherent logic of the Italian tax system.

On the other hand, the 2004 Finance Law extended the scheme only for companies to which assets had been transferred following transactions carried out under Law 218/1990. The Italian Government indeed admitted that the scheme conferred a tax advantage on banking entities, while the other companies could no longer benefit from it.

[5] The Commission held that the advantage granted amounted to €586 million. (Commission Decision, recital 92) It nevertheless limited the amount to be recovered to the difference between the tax which should have been paid on the basis of the revaluation for tax purposes and the tax actually paid on the basis of the scheme at issue. (Commission Decision, Art. 3)
[6] Case T-335/08 *BNP Parisbas and BNL*

Consequently, the Court holds that the tax scheme at issue in favour of banking entities **was not justified by the inherent logic of the Italian tax system** and thus dismisses the action brought BNP Paribas and BNL.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

Press contact: Christopher Fretwell ☎ (+352) 4303 3355