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By PwC Deutschland | 21. Juli 2025

ECJ to clarify EU State aid rules on non-profit status of service corporations

In a request for a preliminary ruling, the Supreme Tax Court has referred several questions to the ECJ regarding the compatibility of non-profit tax status and the prohibition of state aid under EU law. The question to be answered is whether the extension of tax relief for special-purpose entities to companies that provide services for remuneration in cooperation with a corporation that is recognized as a non-profit organization (so-called service corporation) constitutes illicit state aid in accordance with Art. 107 of the Treaty on the Functioning of the European Union (TFEU).

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Furthermore, the ECJ must decide whether „old aid“ is at issue here which is not subject to the prohibition of present state aid because Section 57 (3) of the German Fiscal Code is only similar to a regulation that already existed before the TFEU came into force on 1 January 1958.

The EU regulation dealing with state aid:

Article 107 TFEU provides that *(save as otherwise provided in the Treaties) any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.“* Article 107 further lists and specifieswhich individual aids are permissible.

Section 57 Fiscal Code on tax-privileged purpose:

(1) *A corporation shall pursue the tax-privileged purposes set out in the statutes directly if the corporation itself achieves these purposes. (…).*

(3) *A corporation also pursues its tax-privileged purposes directly within the meaning of paragraph 1 sentence 1 if it realizes a tax-privileged purpose in accordance with its articles of association through planned cooperation with at least one other corporate body that also fulfils the requirements of Sections 51 to 68 (stating the prerequisites for tax-privileged purposes). Sections 14 (definition of economic activity) and 65 to 68 (as regards dedicated activity, welfare, hospitals, sporting activities) shall apply with the proviso that the activities of the corporations cooperating in accordance with sentence 1 are to be combined to determine whether the respective corporation is a special-purpose entity.*

The case before the Supreme Tax Court:

The plaintiff (a GmbH) was founded in February 2022 in the legal type of a limited liability entrepreneurial company (“*Unternehmergesellschaft*“) with the purpose to provide financial accounting and bookkeeping services to I-foundation (foundation) in return for remuneration. The foundation had previously obtained these services from a third party. The plaintiff did not take over any of the foundation's assets when it was first established. „*Unternehmergesellschaft*“, often referred to as a “mini-GmbH”, is a special form of limited liability company. It was designed to facilitate the entry of founders with lower capital requirements into a limited liability company.

According to its articles of association, the plaintiff pursues exclusively and directly non-profit and charitable purposes by promoting public health and public health care, by supporting people in need, and by promoting science and research, as well as art and culture. The foundation pursues exclusively and directly the same tax-privileged purposes as the plaintiff and is recognized as a tax-privileged institution.

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The tax court of first instance had upheld the complaint. The statutory requirements for non-profit character were fulfilled.

Supreme Tax Court - reasons given for ECJ referral

The direct pursuit of tax-privileged statutory (non-profit) purpose presupposes that the benefiting corporation itself fulfils these purposes. Due to the new Section 57 (3) Fiscal Code introduced in 2020, this prerequisite can be satisfied under less stringent conditions. If, for example, a hospital outsources a laundry that was previously run as a non-profit making special-purpose enterprise to an independent GmbH, the new regulation - according to the ideas expressed in the legislative process - should also allow the laundry GmbH to be regarded as a tax-privileged corporation if there is a planned cooperation with the hospital. As a result, GmbH is in a preferential situation compared to other competitors.

The specific case in dispute illustrates the above. As a service corporation, the plaintiff intends to provide financial accounting and bookkeeping services for a charitable foundation. If, after compliance with statute-related preconditions laid down in Section 60a Fiscal Code has been confirmed, a direct tax-privileged purpose can be established on the basis of the new regulation, the plaintiff, who is not eligible for input VAT deduction, may provide its services to the foundation at the reduced VAT rate whereas competitors can only provide the same services at the standard VAT rate. The new provision of Section 57 (3) Fiscal Code can therefore be regarded as relevant to competition regarding the provision of any marketable services of tax-privileged corporations to the disadvantage of other providers.

Therefore, the ECJ will have to decide, by interpreting Article 107 and Article 108 TFEU, whether there is a relevant business advantage from a state aid point of view. In particular, it will have to be established whether the existing restrictions to the disadvantage of the tax-privileged corporations - namely in relation to the use of funds and allocation of sources - can preclude the assumption of state aid.

According to **Article 108 (3) TFEU** the Commission shall be informed, in sufficient time, of any plans to grant or alter aid. Notification to the Commission does not necessarily mean that the aid must distort competition. Rather, it is for the Commission to check whether the aid can be approved. However, according to the Federal Ministry of Finance, such a notification procedure was not conducted in the case of dispute.

Should the ECJ rule that Section 57 (3) Fiscal Code constitutes new aid that distorts competition the provision should no longer be applied. Service corporations such as the plaintiff would be denied tax-privileged non-profit status.

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Schlagwörter

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