

## **The rebus of selectivity in fiscal aid: a nonconformist view on and beyond caselaw<sup>1</sup>**

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### 1. Introduction

Selectivity, specifically material selectivity, is currently at the heart of the main interpretative difficulties in the field of the notion of aid. More precisely, the application of selectivity criteria to taxation matters can be said to be an unsolved rebus in light of relevant caselaw and the Commission's practice. It is worth analysing why.

Multiple factors contribute to shaping this situation. One of them is reflected by simple statistics. The European Commission's 2015 State aid scoreboard shows that tax exemptions are by far the main State aid instrument used by Member States, on average more than one third in the last 10 years. In the past, the most-used categories of aid were grants, soft loans, guarantees and equity. More recently, however, tax measures have taken a clear lead. But something the statistics do not show is the ever increasing complexity and level of sophistication of tax exemptions and other tax tools. Although perhaps a speculation, it is highly likely that one of the main reasons (even though certainly not the only one<sup>3</sup>) for such a burst of creative fiscal advantages is that State aid taxation cases allow for a broader

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<sup>1</sup> All views expressed in this opinion paper are strictly personal and unrelated to the position taken by the author in his professional activity. No case involving the author is mentioned here. These views are nonconformist because the author deliberately partially departs from the assessment criteria traditionally used in caselaw. His sole goal is to launch a methodological debate on how to approach the assessment of controversial cases of fiscal aid.

<sup>2</sup> The author wishes to thank Filippo Caliento for his highly valuable contribution to the research carried out for this paper. Responsibility for all errors and omissions remain with the author.

<sup>3</sup> Indeed, the financial crisis and economic downturn is another factor that is very likely to have contributed to the shift in the form of aid measures. Fiscal tools offer more flexibility to national governments yet do not impinge on State budgets directly. Moreover, they expose politicians to fewer controls and less criticism.

margin of defence for Member States, and the more complicated the tax mechanisms used, the broader the margin of defence.

Consequently, the Commission has stretched the notion of aid to tackle this strategy employed by Member States. And it is not surprising that it has attracted criticism in doing so. For instance, Quigley stated that “*the Commission has caused unnecessary confusion in relation to such matters as economic sovereignty, regional autonomy, free movement of capital, and the status of tax relief for investments*”<sup>4</sup>. However, the Commission did not make the first move: it simply reacted to circumventing practices of Member States. Nevertheless, whether its reaction was the most appropriate is, of course, a question for debate.

In 2016 the Commission published the long-awaited Notice on the notion of aid<sup>5</sup>, aimed at clarifying and objectively summarising its decisional practice and traditional EU caselaw on the subject. A section of the Notice is devoted to specific issues concerning tax measures. However, given the number and importance of pending cases on selectivity in tax matters and the need to remain entirely objective and neutral, the Commission understandably does not enter into this debate in the Notice, which therefore makes no reference to any possible solutions of the current most controversial issues.

Against this background, this opinion paper focuses (in a deliberately simplified and concise manner)<sup>6</sup> on the reasons surrounding the controversy on the notion of selectivity in tax matters (section 2), the delimitation of the respective competences of the Commission and the Member States (section 3), the lessons to be drawn from the relevant caselaw of the EU Courts (section 4), and the tasks for legal interpreters in the near future if the rebus is to be solved (section 5), before offering

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<sup>4</sup> A. Biondi, P. Eeckhout, J. Flynn, *The Law of State Aid in the European Union*, Oxford, 2004, p. 207.

<sup>5</sup> *Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union*, OJ C 262, 19 July 2016, pp. 1–50.

<sup>6</sup> The reader should not expect to find a comprehensive analysis of the caselaw in this paper. The paper deliberately takes a distant view of the details of the cases and the legal and political debate surrounding them. Cases are referred to only to provide examples of given categories of tax measures.

some conclusive remarks.

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## 2. The reasons for controversy

One reason that can help explain the high degree of controversy surrounding the assessment of selectivity in tax measures is that taxation policy is the perfect example of multi-purpose State measures: many tax measures serve, in addition to the typical goals of collecting money for the State's missions and redistributing wealth conditions, ancillary (or sometimes predominant) objectives of both a macroeconomic and a microeconomic nature.

Generally speaking, macroeconomic and microeconomic measures are designed differently. Macroeconomic measures take a top-down approach, targeting economy-wide phenomena, such as the rates of growth, inflation, national income and unemployment, which means that the effects on specific industries are only indirect. Microeconomic measures are instead based on a bottom-up approach, targeting specific industries or activities; they may – or may not – benefit the economy as a whole, depending on whether they allocate available financial resources in the best possible way. However, microeconomics and macroeconomics are, of course, inevitably intertwined, and taxation policy is the ideal field for multi-purpose measures that tend to generate both economy-wide and more specific effects. Some tax measures can even simulate macroeconomic goals but in fact only or mainly target very specific microeconomic objectives. In this case, Member States use non-genuine macroeconomic measures to target particularistic goals.

In terms of the application of State aid rules to multi-purpose State measures, the fundamental idea underpinning State aid control is that Member States should not interfere with competition between undertakings in the internal market. Furthermore, State aid control refers to the effects of the measures in the market rather than simply considering its declared goals. Distortive effects are therefore sufficient to trigger the application of State aid rules, even in the absence of any aim to

discriminate. Thus, the field of State aid is that of microeconomics: what matters is the ultimate impact, whether direct or indirect, on business decisions made by the recipient and competitors, and the impact on the prices and supply of the assisted products.

The exact same rationale applies to other forms of State intervention: State-owned undertakings, the granting of special or exclusive rights and measures entrusting undertakings with public service missions, are all lawful tools available to Member States provided they do not become vehicles of competition distortions between undertakings in the internal market, as this would circumvent competition rules.

Genuine macroeconomic measures fall within the scope of application of State aid rules only to the extent that they either inherently discriminate between categories of undertakings (in this case macroeconomic and microeconomic effects are linked and not severable, as is the case with some regional measures), or are in practice applied in a discriminatory way, due, for instance, to the limited financial resources available and the need to select given projects (in this case, the selectivity element is not in the design of the measure but in its practical application, and this situation is referred to as ‘de facto selectivity’).

Given this rationale of the legal background, multi-purpose tax measures belong to a “grey zone” and are therefore an obvious area of controversy between Member States and the Commission, which has the duty to enforce compliance with the European Treaties. Two opposing trends have emerged in this respect.

The first trend is that, as already discussed, Member States no longer use tax measures for the sole aim of collecting money from taxpayers and pursuing objectives of general interest. Although taxation is one of the State’s most commonly used basic strategic tools to influence the economy as a whole, together with monetary policy, nowadays it is increasingly also used to serve more specific goals, such as fostering supply in given sectors or economic activities, or promoting horizontal or regional objectives, to name but a few. In their constant quest for popularity, national politicians (and, consequently, national administrations) show an increasing tendency to design measures

of this nature.

The second trend is that when the Commission naturally attempts to tackle the above drift of Member States, it tends to overreact: not only does it stretch the notion of aid to combat the opportunistic use of tax measures, it also increasingly uses State aid rules to counter general fiscal measures that foster State competition (as opposed to fiscal measures that distort competition between undertakings), thus extending the reach of the Treaty's provisions on competition to macroeconomic effects.

An early example of this approach dates as far back as the 1998 Communication on the application of State aid rules in the field of direct taxation. The Communication was strictly linked to the 1997 Code of Conduct on harmful tax competition between Member States, and the notion of aid was seen as one of the tools to combat harmful tax measures. Unsurprisingly, initiatives like this from the Commission prompted accusations in legal doctrine of the increasingly intrusive nature of the notion of aid<sup>7</sup>. Interestingly, however, the 1997 Code of Conduct failed to achieve its objectives mainly due to the lack of effective cooperation by the Member States, which did not adopt measures suitable to implement it. This should not be forgotten when considering the means available to overcome the current impasse<sup>8</sup>.

The above two trends inevitably clash with each other and give rise to contradictions, thereby creating a permanent conflict between national fiscal policy and State aid enforcement.

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### 3. The respective boundaries for the Commission and the Member States

Both national sovereignty in fiscal matters and the Commission's

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<sup>7</sup> See footnote 4 above. See also, among recent papers, R. Cisotta, *Criterion of Selectivity* in H. C. H. Hofmann and C. Micheau, *State Aid Law of the European Union*, OUP, 2016, specifically p. 149 and fn. 108.

<sup>8</sup> See section 6 below.

enforcement power in the field of State aid are confined within clear boundaries. It goes beyond the limits of this opinion paper to review and comment on the “constitutional” framework of the EU and the sharing of competences between EU institutions and Member States. Similarly, the question of whether the notions of selective or discriminatory taxation in State aid law and internal market law should coincide can be left open for our purposes here<sup>9</sup>. What should instead be highlighted is that advocating a restrictive or prudent interpretation of the selectivity criterion in State aid law when applied in the fiscal sector on the basis of the general risk to impinge on national sovereign powers<sup>10</sup> is unconvincing for two reasons. First, it can be argued that the notion of aid, as an objective and legal notion, should be the same regardless of the form of aid. Second, the argument could be reversed to suggest that Member States should prudently use their sovereign powers in the fiscal domain when the type of measure adopted risks conflicting with the basic principles of EU law, such as the principle of undistorted competition. Moreover, the concept of “prudence” is too vague and undefined to be used as a criterion to guide the interpreters in such a crucial area of EU law.

Taxation is a domain reserved exclusively to the State’s sovereignty insofar as it remains on a macroeconomic level. This means that it remains outside the reach of State aid rules if it is used genuinely as a strategic policy tool to influence the economy as a whole. By contrast, when it is used to serve (only or also) particularistic purposes, it becomes subject to State aid control, which is enforced by the Commission, in which case there is no justification whatsoever for treating it differently from other State measures.

Genuine macroeconomic measures with no discriminatory effect are excluded from the scope of application of State aid rules because State competition as such, if it does not entail indirect distortive effects, is, in principle, not under examination; in this field, internal market rules are the only suitable means of intervention when applicable, and the typical tool at the

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<sup>9</sup> See the opinion of AG Kokott in *Finanzamt Linz v Bundesfinanzgericht, Außenstelle Linz* (C-66/14, EU:C:2015:242).

<sup>10</sup> *Ibidem*, paragraphs 113 *et seq.*

Commission's disposal is to propose measures of harmonisation of national legislation. Internal market rules ensure that undertakings from other Member States draw full advantage from a favourable business environment in all EU countries. Competition rules applicable to the public sector only complement internal market rules and do not replace or match them.

Therefore, macroeconomic measures that tend to create a favourable business environment are, at least in principle, supposed to benefit all undertakings from EU Member States. Consequently, if the internal market works as it should, the Commission does not need to stretch the notion of aid to encompass these measures because they would also favour companies from other Member States, whereas the financial burden would be borne by taxpayers of the granting Member State only. This should induce Member States to limit these measures to the minimum.

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#### 4. Lessons to be drawn from relevant caselaw

Caselaw on State aid and taxation dates back to the early seventies (*Italy v Commission*)<sup>11</sup> or even earlier if one considers the landmark *Steenkolennijnen* judgment in 1961<sup>12</sup>, which however referred to the ECSC Treaty. The key message in these judgments was very simple: the fiscal nature of State measures does not prevent the application of State aid rules if the requirements of Article 107(1) are met. By contrast, in recent years, European judges have been analysing more and more highly complex cases relating to tax matters, focusing on both the concept of public resources and the concept of selectivity.

With regard to selectivity, caselaw has not been of great help in striking the right balance between avoiding unfair tax competition that results in disguised State aid and preventing the notion of

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<sup>11</sup> Judgment of 2 July 1974, *Italy v Commission* C-173/73, EU:C:1974:71.

<sup>12</sup> Judgment of 23 February 1961, *De gezamenlijke Steenkolenmijnen in Limburg v High Authority* C-30/59, EU:C:1961:2.

State aid from becoming too intrusive (a sort of catch-all provision that can be used as a substitute for fiscal harmonisation against tax competition between Member States). The Court of Justice has been unsuccessful in providing legal certainty as to the exact boundary between lawful tax competition (which should be addressed through harmonisation) and disguised State aid.

The caselaw that has been developed in this field applies very case-specific solutions to complex situations, without providing sufficient guidance of a general value. It also includes legal standards tailored to specific cases, which immediately create difficulties when transferred into a different factual context. At most, relevant caselaw distinguishes between aid schemes and “ad hoc”/individual aid<sup>13</sup>, but this clearly falls short of providing a comprehensive systematisation of the matter.

One case offers a very telling example of how caselaw has been developing on this topic. The famous three-step analysis to selectivity (i.e., define the benchmark, identify derogations from the benchmark, inquire/assess whether the derogation is justified by the nature and economy of the specific tax system under examination) was proposed to solve the specific problem of regional selectivity for regions with autonomy status (the well-known *Azores* case<sup>14</sup>).

However, once extended from regional to material selectivity, an additional criterion was immediately required (see the *Gibraltar* case<sup>15</sup>): Member States should indeed not abuse their competence to define the reference system (i.e., setting the tax base) or otherwise fiscal techniques could be used to favour undertakings that are in a comparable situation to others with regard to the system’s underlying logic.

Legal doctrine in this field has mainly followed the same path. Although many commentators devoted their attention to the issue

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<sup>13</sup> Judgment of 30 June 2016, *Belgium v Commission* C-270/15 P, EU:C:2016:489, paragraph 49.

<sup>14</sup> Judgment of 6 September 2006, *Portugal v Commission* C-88/03, EU:C:2006:511.

<sup>15</sup> Judgment of 18 December 2008, *Government of Gibraltar v Commission*, joined cases T-211/04 and T-215/04, ECR, EU:T:2008:595.



of selectivity in taxation matters and provided interesting contributions<sup>16</sup>, a comprehensive theoretical framework, such as to enable the Commission and the Court of Justice to solve specific cases by applying commonly accepted general principles, has not yet been developed.

This very case-specific approach from the courts and doctrine, with little or no holistic view of the phenomenon of fiscal aid, has seemingly ended up limiting the capacity of the judges themselves to innovate in this field, as they are constrained by standard formulas that are difficult to set aside (also given the number of precedents that take account of them), despite the fact that they are not, theoretically speaking, considered entirely conclusive<sup>17</sup>. And when the General Court has endeavoured to propose an innovative approach to the issue of selectivity, it has been overruled by the Court, which tends to revert to a traditional approach on appeal<sup>18</sup>.

In light of the above, the truly conclusive lessons to be drawn from caselaw on this topic are limited to the traditional basic principles underpinning State aid law in tax cases: (i) fiscal tools cannot be used as a shield against State aid rules; and (ii) tax measures fall within the scope of application of State aid rules as

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<sup>16</sup> See P. Rossi-Maccanico, *Commentary of State Aid Review of Multinational Tax Regimes*, EStAL I/2007, pp. 25-41; R. H. C. Luja, *Group Taxation, Sectoral Tax Benefits and De Facto Selectivity in State Aid Review*, EStAL 4/2009, pp. 473-487; A. Bartosch, *Is There a Need for a Rule of Reason in European State Aid Law? Or How to Arrive at a Coherent Concept of Material Selectivity?*, *Common Market Law Review* 47: 729-752, 2010; W. Schoen, *State Aid in the Area of Taxation*, in L. Hancher, T. Ottervanger, P. J. Slot, *EU State Aids*, Sweet & Maxwell, 2012; G. Matsos, *Systematic Misconceptions of State Aid Law in the Area of Taxation*, EStAL 3/2014, pp. 491-504; C. Micheau, *Tax Selectivity in European Law of State Aid: Legal Assessment and Alternative Approaches*, *E.L. Rev.* 2015, 40(3), 323-348; and C. Quigley, *European State Aid Law and Policy*, Hart Publishing, 2015.

<sup>17</sup> The General Court judges are in a particularly difficult position, as they either continue applying the usual standard formulas and, in so doing, inevitably add complexity and uncertainty to caselaw, or try to distance themselves from precedents and blow the whistle on a fragmented and unsatisfactory judicial practice. The second option would, of course, expose them to being disowned by the Court and damage their reputation (a sort of prisoner's dilemma).

<sup>18</sup> This happened, for instance, in the *British Aggregates* case, referred to in footnote 44 below. For other examples, please see below, at footnote 50.

long as: (a) they discriminate between undertakings which are in a legal and factual situation that is comparable in light of the objective pursued by the measure in question<sup>19</sup>, and (b) this discrimination is not justified by the nature and economy of the relevant tax system (i.e., as will be explained later, it is not the inherent and unavoidable consequence of the strategic macroeconomic objectives pursued through the tax system under examination). Beyond this, the interpreters still have to clarify these concepts and shape a theoretically satisfactory (i.e., systematic and all-inclusive) framework for the analysis of fiscal aid, and the EU judges should first reacquaint themselves with their function of setting clear guidance and fostering legal certainty.

#### 5. Tasks for interpreters moving forward

As we have seen, a holistic view of the phenomenon of fiscal aid is still missing. In order to reach legal certainty, the starting point is still the set of basic principles on State aid control and Member States' tax sovereignty developed by early caselaw on the topic. These principles must be applied with regard to specific categories of fiscal aid, and a simple set of criteria should be defined for each of these categories of measures.

An exhaustive classification of the categories of measures goes far beyond the objectives of this short opinion paper and the author's area of expertise. However, leaving aside the classic examples of non-controversial measures – i.e., all measures that either target selective beneficiaries for their location or sector of activity or leave national administrations a margin of discretion in selecting the beneficiaries or determining the conditions and volume of the State support, which clearly fall within the scope of Article 107(1), or, conversely, genuine general measures with no identifiable microeconomic effects – there appear to be two broad types of controversial measures that are increasingly

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<sup>19</sup> This expression, which is mostly used in relevant caselaw in this field, can in itself raise difficulties in defining the exact meaning of both the “factual” and “legal” categories. See judgment of 7 November 2014, *Autogrill España v Commission*, T-219/10, ECR, EU:T:2014:939, paragraph 29, which will be discussed below.

common and complex:

- (i) fiscal measures of a general nature as such but designed to produce indirect microeconomic effects downstream; and
- (ii) “virtual” general measures, which, although not directly selective (not even downstream), target specific industrial policy and not broad economic policy objectives.

Selectivity is also at stake in the recent tax ruling cases but these will only be mentioned briefly here<sup>20</sup>, as these cases raise a different problem (i.e., the correct definition of the arm’s length principle) and involve a fact-intensive analysis. In addition, experience suggests that the reach of State aid rules may soon be extended to include innovative measures, such as patent box schemes, which tend to exploit the sophistication of the fading boundary between genuine and virtual general measures. It is worth briefly analysing these types of State measures.

- (i) General fiscal measures designed to produce indirect microeconomic effects downstream

Fiscal measures are sometimes of a general nature and serve true macroeconomic goals (such as combatting unemployment, fostering investments in industrial equipment or stimulating lending) but also target selected sectors downstream, thus producing side effects that distort competition between undertakings. In this case, only the indirect effects should be subject to State aid control as indirect aid.

For example, the State offers tax advantages to all taxpayers investing in industrial or financial products, or investment entities or transactions. No selectivity can be seen at the level of the stockholders, who simply receive an incentive for placing their savings in investments that are more beneficial than others for the economy as a whole. If no criteria are imposed by the State (both in the law scheme as such and in its implementation) for the selection of the type of industrial/financial product, or of the investment entity or transaction, the tax scheme can be considered a genuine general measure. However, if the industrial products/investment entities/transactions downstream are

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<sup>20</sup> See below, at footnote 45.

selected with the aim of favouring certain activities or areas, the assessment under State aid rules should focus on this indirect aid.

In the *Associazione Italiana del Risparmio Gestito* case, Italy granted a tax reduction for stakeholders investing in specialised investment vehicles. Although the direct beneficiaries of this measure were the investors, the Commission found (and the General Court confirmed the Commission decision<sup>21</sup>) that the measure qualified as State aid only in relation to the indirect beneficiaries which were specialised investment vehicles and small- and mid-cap companies (and not in relation to its direct beneficiaries)<sup>22</sup>. Focussing on the indirect aid and assessing whether the measure was selective in relation to its indirect beneficiaries, the General Court found that “[t]he mere fact that the advantage may benefit any investment vehicle fulfilling the conditions laid down does not suffice to establish that the measure at issue is general in scope”<sup>23</sup>. Indeed, this does not preclude the measure from being selective downstream.

Another example is tax advantages granted to all taxpayers investing in capital goods. If the capital goods cannot be freely selected by the investors but are identified based on criteria provided by the State, either in the scheme itself or in implementing measures, the criteria may result in indirect sectorial advantages. Thus, the tax measure combines macroeconomic and microeconomic goals. This analysis does not change if the direct beneficiaries are not the investors themselves but rather an investment pool or a vehicle entity whose mission is to reinvest in capital goods and which is entirely transparent for tax purposes, so that the stockholders receive the fiscal benefits. Likewise, this analysis remains unchanged if the benefit downstream is limited

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<sup>21</sup> Judgment of 4 March 2009, *Associazione Italiana del Risparmio Gestito v Commission*, T-445/05, ECR, EU:T:2009:50 and Commission decision of 6 September 2005, C(2005)3302. The measure (which had not been notified to the Commission) was designed as follows: the rate of corporation tax was set at 5%, instead of at the standard rate of 12.5%, for capital revenue accruing to specialised investment vehicles fulfilling certain requirements. These were the undertakings for collective investment in transferable securities, specialised in shares in small- and medium-capitalisation companies listed on a regulated market of the EU.

<sup>22</sup> Judgment in *Associazione Italiana del Risparmio Gestito v Commission*, footnote 21 above, EU:T:2009:50, paragraphs 127-132.

<sup>23</sup> *Ibidem*, paragraph 152.

to given territorial areas rather than sectors. In all these cases, State aid control is warranted but limited to the indirect effects produced downstream and not to the tax benefit as such.

Clearly, the scheme can be designed in such a way that it is impossible to isolate the State aid element downstream from the tax advantage granted upstream (or vice versa). The “severability” issue should be examined carefully in accordance with the principles set out in the *Iannelli* case<sup>24</sup> and subsequent developments<sup>25</sup>, as only in cases of an inextricable measure can the assessment (and possible ban) encompass the whole measure, rather than only part of it.

However, even in cases of this kind, when the whole measure is considered incompatible with the internal market, it remains open to debate whether the recovery order should target the removal of the anticompetitive advantage and thus affect the indirect selective effect (i.e., the indirect aid recipient downstream in our examples) rather than generically affect the broader category of beneficiaries of the tax advantage upstream, which legitimately pursues macroeconomic goals. This issue of recovery policy, however, falls outside the scope of this paper.

An example of possible future controversy is the dividend taxation systems of EU Member States. Outgoing dividends (i.e., distribution of dividends to foreign investors) may be subject to different tax treatment than domestic dividends (i.e., distribution of dividends to national investors) and, overall, these tax regimes differ from one Member State to another. These asymmetries obviously influence foreign investors’ financial choices. A Member State might reform its dividend taxation system by introducing a general fiscal measure that pursues a pure macroeconomic goal (e.g., to foster investments in industrial activities). But the State measure might also combine this macroeconomic goal with a microeconomic goal. In that case, the measure is designed in such a way as to produce indirect location

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<sup>24</sup> Judgment of 22 March 1977, *Iannelli v Meroni* C-74/76, EU:C:1977:51.

<sup>25</sup> See, among others, judgment of 24 November 1982, *Commission v Ireland* C-249/81, EU:C:1982:402; judgment of 7 May 1985, *Commission v France* C-18/84, EU:C:1985:175.

advantages, for example by encouraging domestic investments in one or more designed third countries (the target territories) or by encouraging investors from other countries to choose that Member State to establish their “investment hub” for investments in the target territories. Again, only the indirect advantage may therefore fall within the scope of State aid rules.

(ii) Virtual general measures

Another trend developing at Member-State level concerns new types of measures that, despite being general in nature, reflect a given industrial policy or horizontal objective. The inherent characteristic of measures of this nature is the explicit, undisguised objective of industrial policy (as opposed to broad macroeconomic objectives), which is, however, pursued without any limitation in terms of potential recipients (i.e., no category of undertakings is definitely excluded from the range of beneficiaries, as any undertaking can, in principle, satisfy the requirements to obtain the benefit).

Carefully designed by governments to avoid selective elements (in the traditional sense of this expression, as reflected in relevant caselaw), these measures can, however, indeed be considered elusive of State aid control. This is clear from the fact that States, by using public financial resources in the form of tax reductions or exemptions, pursue horizontal objectives that are fully comparable to those pursued through typical State aid, but try to exploit the limits (weaknesses?) of the notion of aid (as far as the selectivity requirement is concerned). In other words, measures of this type rely on a strict (or narrow, depending on the point of view) interpretation of selectivity, whereas all other elements of the notion of aid are clearly met. Moreover, in most cases the horizontal objective pursued by the State is not eligible for the application of any of the derogations laid down in the Treaty. It is therefore crucial to establish whether the measure is selective.

What distinguishes these measures is their automatism: they are designed to ensure that the tax benefit is automatically granted to all companies that freely decide to pursue the industrial policy objective set by the State and thus comply with the related legal conditions. Rather than pursuing the proposed objective by

selecting specific undertakings to perform in a certain way, States leave to the undertakings themselves the decision to be involved in the tax scheme in question by taking a certain course of action, thus acting as a vehicle for the State's objectives.

Measures of this kind have become very common and varied. One typical example is the State's support of the internationalisation of domestic companies and the expansion of domestic venture capital investments in foreign markets. This goal can be pursued through various means, some of which would patently fall within the scope of application of the State aid Treaty provisions (e.g., export credits, export credit insurance, organisation of fairs or contribution to establishment expenses in foreign countries). Others, such as simply fostering investment in foreign companies through tax advantages, would possibly escape these provisions, because any undertaking can, in principle, meet the requirement (i.e., investing abroad)<sup>26</sup>.

But two questions remain unanswered: does it make sense to treat tax advantages for the export of goods differently from tax advantages for the export of capital? And, does it make sense to treat subsidies or soft loans or guarantees granted to domestic companies to invest in other EU countries differently from fiscal advantages intended to attain the same result? The application of current legal standards may lead to this very result.

It must be acknowledged that, if any undertaking can meet the requirements set by the State to obtain a given tax advantage, it is

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<sup>26</sup> According to the Commission, this was the situation in the *Spanish goodwill* case, whereas Spain and the undertakings concerned contested this. The measure provided that where an undertaking, taxable in Spain, acquired a shareholding in a 'foreign company' of at least 5%, held without interruption for at least one year, the goodwill resulting from that shareholding, which was recorded in the undertaking's accounts as a separate intangible asset, could be deducted, in the form of an amortisation, from the basis of assessment for the corporate tax for which the undertaking was liable (the same was not possible for the acquisition of shareholdings of a company established in Spain). The General Court found that no category of undertakings was definitely excluded from the scope of application of the law. Accordingly, there was no selective treatment according to the General Court. See judgment of 7 November 2014, *Banco Santander and Santusa v Commission*, T-399/11, ECR, EU:T:2014:938 and judgment in *Autogrill España v Commission*, footnote 19 above, EU:T:2014:939.

very reasonable to argue that the measure falls beyond the reach of State aid law. Indeed, this interpretation remains faithful to the wording of the Treaty. As mentioned, the analysis of selectivity requires defining the appropriate benchmark and then identifying a derogation from it, i.e., a discriminatory treatment between undertakings that are in a legal and factual situation that is comparable “in light of the objective pursued by the measure in question”. This formula seems to assume that the State has sovereign power to define the objective. It therefore provides legal grounds to those advocating that measures of this kind should fall outside the scope of application of Article 107(1) TFEU.

However, it can also be argued that other interpretations are similarly consistent with the wording of the upper norm. Indeed, State measures supporting the expansion of domestic companies in other EU markets are typically mercantilist and thus at odds with the principles of the internal market. It is therefore difficult to believe that the Treaty’s authors had this kind of measure in mind when excluding general policy measures from the definition of aid and, therefore, from the Commission’s control. As to the caselaw formula under discussion, it can be argued that it is precisely because it assumes that the State has sovereign power to define the objective of the tax system that it refers only to a truly general (macroeconomic) objective; an objective that is not, in itself, at odds with the Treaty’s underlying logic.

This antinomy shows that current standard formulas, repeatedly and almost mechanically used in caselaw, can themselves be interpreted differently and are therefore open to controversy.

The landmark *Italian textile* case, particularly the Court of Justice’s second ruling on the matter, illustrates this argument clearly<sup>27</sup>. The social security reduction examined in the case is very similar to a tax benefit, such as in the *Spanish goodwill* case<sup>28</sup>. Following the first *Italian textile* case<sup>29</sup>, the State had decided to grant the reduction of social security allowances in relation to female

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<sup>27</sup> Judgment of 21 March 1991, *Italy v Commission* C-303/88, EU:C:1991:136.

<sup>28</sup> See footnotes 19 and 26 above.

<sup>29</sup> Judgment of 2 July 1974, *Italy v Commission* C-173/73, EU:C:1974:71.



employment overall, regardless of the sectors involved. It therefore pursued a genuine horizontal objective. Clearly, however, not all economic sectors were equally affected by the measure. Accordingly, the Court of Justice ruled that this was sufficient to generate a selective effect within the meaning of Article 107(1). Statistically speaking, undertakings operating in sectors such as textile or leather production had a long tradition of hiring female employees and were, as such, the major aid recipients. However, they were not the only beneficiaries, despite being proportionately the most affected by the measure<sup>30</sup>.

Other cases resulted in a different solution, which demonstrates how complex and controversial the issue is. The case involving Italian measures for the regularisation of the underground economy granted in 2000 and 2001 provides a good example<sup>31</sup>. In 2000, the Italian Republic notified a one-year aid scheme to the Commission that aimed to regularise the underground economy in southern Italy. The Commission considered the measure selective because it was targeted at the six southern regions of Italy. However, the aid was declared compatible under Article 87(3)(a) of the Treaty as it contributed to the development of those economic areas: the statistics and analysis produced by Italy indicated that those regions – and some economic sectors in particular, such as the agricultural sector – were far more affected than others, thus constituting a structural (territorial) difference between southern and northern Italy. One year later, Italy notified a new measure that addressed the same issue and had the same goal. This time the measure did not target any specific region but the entire Italian State. The Commission found that the measure was not selective in any way as it did not identify specific beneficiaries, neither by its wording, nor by its application and effects (nor did it grant discretionary powers to the public

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<sup>30</sup> This factor marks an important difference from other cases such as *Maribel*. In this case, although the State pursued an horizontal objective (e.g., favouring the employment of manual workers at *Maribel*), the State also directly selected some sectors that were considered the most in need of manual workers, and limited the application of the benefit to them at least for a given period of time. See Commission Decision 97/239/EEC, *Maribel*, OJ 1997 L 95/25; and judgment of 17 June 1999, *Belgium v Commission* C-75/97, EU:C:1999:311.

<sup>31</sup> State Aid No. N 236/A/2000 – Commission decision of 17 October 2000, SG(2000) D/107593.

administration to apply the measure)<sup>32</sup>. Nevertheless, statistics continued to show a differing magnitude of impact on different regions.

Again, in the *Austrian goodwill* case, the Austrian court expressed doubts on a provision under which companies within a group, although legally separate, could be treated as a single taxable entity and, therefore, amortise the so-called goodwill associated with a newly acquired shareholding. The judge's doubts were due to the fact that this tax benefit did not apply to acquisitions of foreign shareholdings or acquisitions by natural persons. The referring judge suggested three different benchmarks against which the amortisation benefit could be assessed regarding selectivity: (i) the amortisation regime available to natural persons; (ii) the amortisation regime for corporation tax outside of group taxation schemes; and (iii) the group taxation regime available to undertakings acquiring foreign shareholdings. What legal and factual situations were to be considered comparable in light of the objective pursued by the amortisation benefit under consideration? This was not an easy question, and the remarks provided by Advocate General Kokott on this issue, albeit interesting, were inevitably slightly subjective. The Court was ultimately able to avoid embarking into uncharted waters, as the measure was considered an infringement of the freedom of establishment and thus prohibited on that basis. This is not surprising, as nothing prevents a measure from infringing internal market rules and competition rules simultaneously, in which case the principles set by the Court in *Iannelli* and *Du Pont de Nemours* apply<sup>33</sup>.

The same would probably have not been possible in the *Spanish goodwill* case, due to both the lack of cross-border effects and the limits set by the reverse discrimination doctrine<sup>34</sup>. Therefore,

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<sup>32</sup> State Aid No. 674/2001 – Commission decision of 13 November 2001, C(2001)3455fin.

<sup>33</sup> For the *Iannelli* case, please see footnote 24 above. For the *Du Pont de Nemours* case, see judgment of 20 March 1990, *Du Pont de Nemours Italiana v USL di Carrara* C-21/88, EU:C:1990:121.

<sup>34</sup> The tax advantage in itself does, of course, stimulate rather than hinder cross-border transactions and the circulation of capital, whereas the exclusion of acquisitions of shares in Spain from the tax advantage is a purely internal

there would have been no alternative to State aid rules to challenge this measure on the basis of the Treaty. The General Court chose to follow the line of reasoning of the *Italian underground economy* case and also provided further intellectual support to that position by developing the idea that the selectivity requirement of Article 107(1) necessarily implies the exclusion from the tax benefit of certain undertakings belonging to the same legal and factual category as the beneficiaries. In doing so, the General Court was aiming to better define (and therefore limit) a legal concept that would otherwise remain very elusive, and it should certainly be praised for that effort.

However, it can also be argued that: (i) the concept of “same legal and factual category” is also vague and open to different interpretations as mentioned above<sup>35</sup>; (ii) it is at least plausible that, based on the legal requirements to be eligible for the amortisation benefit, not all the undertakings were equally affected by the tax measure, as in some sectors (or for undertakings of a certain size) investing abroad is certainly more common than in (or for) others<sup>36</sup>; and, above all (iii) the only line of reasoning supported by jurisprudential authority is that of the second *Italian textile* case, which the General Court set aside. Although a slight difference exists between the two cases due to the *Italian textile* case involving an actual over-benefit for some sectors and the *Spanish goodwill* case entailing only a potential higher impact on some sectors, this is arguably not enough to justify a different approach.

As these examples demonstrate, there is room for debate and controversy in establishing whether the selectivity criterion can be considered met when a measure, despite being (at least theoretically) generally applicable to all undertakings in a given country, has (real or potential) different effects across the economic sectors or areas of the country, and these proportionally different effects can be proved – even at the level

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issue that can, to some extent, be equated to a reverse discrimination.

<sup>35</sup> See, for example, judgment in *Associazione Italiana del Risparmio Gestito v Commission*, footnote 21 above, EU:T:2009:50.

<sup>36</sup> This observation does not refer to de facto selectivity, which was not under discussion to the author’s knowledge (and is not dealt with in the judgment).

of de jure and not de facto selectivity – based on statistic data or a plausibility analysis.

Unlike in the case of a simple reduction of the fiscal burden, which is the paradigmatic example of a general measure not entailing State aid, here the State sets the requirements to be complied with to benefit from the tax advantage, and these requirements are such as to generate a proportionally higher effect (or higher probability of effect) for some undertakings than for others. Still, the application of current legal standards gives rise to uncertainties as the criteria developed in relevant caselaw allow Member States some room for manoeuvre.

Advocate General Wathelet, in his opinion delivered last July in the *Santander* and *Autogrill* cases, strongly criticised the General Court's judgments of 7 November 2014<sup>37</sup>, according to which a derogation from the normal tax regime “cannot, in itself, establish that the measure at issue favours ‘certain undertakings or the production of certain goods’ within the meaning of Article 87(1) EC, since that measure is available, a priori, to any undertaking”<sup>38</sup>. In the Advocate General's view, the General Court, in so doing “favoured an excessively formalistic and restrictive approach in seeking to identify a particular category of undertakings that are exclusively favoured by the measure at issue”<sup>39</sup>. Such an assessment, according to the Advocate General, could be carried out in the particular circumstances of the *Gibraltar* case<sup>40</sup>, in which there was no derogation from the normal tax regime<sup>41</sup>. However, given the remarkable differences between the *Gibraltar*

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<sup>37</sup> Judgment in *Banco Santander and Santusa v Commission*, footnote 26 above, EU:T:2014:938 and judgment in *Autogrill España v Commission*, footnote 19 above, EU:T:2014:939.

<sup>38</sup> Judgment in *Autogrill España v Commission*, footnote 19 above, EU:T:2014:939, paragraph 52.

<sup>39</sup> Opinion of AG Wathelet in *Commission v World Duty Free Group* (C-20/15 P, EU:C:2016:624, paragraph 85). *Ibidem*, paragraph 91: “a tax measure which derogates from the general tax regime and differentiates between undertakings performing similar operations is selective, unless the differentiation created by the measure is justified by the nature or general scheme of the system of which it is a part”.

<sup>40</sup> Judgment of 15 November 2011, *Commission and Spain v Government of Gibraltar and United Kingdom* joined cases C-106/09 and C-107/09 P, EU:C:2011:732.

<sup>41</sup> Opinion of AG Wathelet in *Commission v World Duty Free Group* (C-20/15 P, EU:C:2016:624, paragraph 102).

and *Santander* cases, the caselaw of the *Gibraltar* case is inapplicable to the facts of the *Santander* case<sup>42</sup>. Once more, a case-by-case solution is proposed and the Advocate General's opinion makes no attempt to reconcile all the fragmented caselaw involving selectivity in taxation matters.

Furthermore, although the Advocate General criticises the General Court's approach as being "formalistic", his own approach appears equally formalistic (and somewhat "circular"). Indeed, his approach seems to imply that any tax regime of given operations or transactions that differs from the tax regime applicable to similar operations or transactions satisfies the selectivity requirement. The Advocate General's approach implies not only that there is no need to assess de facto selectivity in these cases but also – and this is the crucial point – that any such tax regime satisfies the selectivity requirement regardless of whether it genuinely affects the economy as a whole or pursues given horizontal objectives (and is therefore tailored to the particular needs of given categories of undertakings) even if all undertakings are eligible for the regime. In other words, undertakings performing the operation subject to derogation would be "selected" within the meaning of Article 107 TFEU only due to their being in a different situation from undertakings that do not perform the same operation<sup>43</sup>.

Following this reasoning, the concept of "discrimination between economic operators which, in light of the objective pursued by the regime under discussion, are in a comparable factual and legal situation" loses significance, as the decision to perform an operation or transaction is sufficient to put certain undertakings in a different factual or legal situation from others.

Overall, the current debate is, as the above considerations show, entirely unsatisfactory. Based on the text of the upper norm and the caselaw, very reasonable arguments can be invoked to support both the test proposed by Advocate General Whatelet and that applied by the General Court. However, neither provides a convincing solution for the whole category of virtual general

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<sup>42</sup> *Ibidem*, paragraphs 100-101.

<sup>43</sup> *Ibidem*, paragraph 102.

measures in view of the underlying principles of State aid control.

The situation is clearer, however, if we assess the same controversial issues from a law policy standpoint. Indisputably, as much as the more lenient approach (i.e., the approach adopted by the General Court in the *Spanish goodwill* case) may be justified as a pure interpretative exercise, it does not represent a very satisfactory outcome from the standpoint of the underlying logic of the Treaty. From this perspective, it is objectively difficult to see any significant difference between the *Spanish goodwill* case and cases in which States pursue other horizontal objectives (e.g., environmental objectives as in *British Aggregates*<sup>44</sup>) through a special-purpose levy. Nor can any difference be seen between the amortisation benefit granted in the *Spanish goodwill* case (to foster the export of capital) and the tax exemption granted in the *Gibraltar* case (to foster the import of capital). Moreover, no convincing reason has been provided to differentiate between the export of goods and the export of capital. But above all, if the selectivity criterion is construed in such a way as to embody a (new) requirement, i.e., providing evidence that a category of undertakings is excluded from the benefit, this would allow Member States a broad margin of manoeuvre. Indeed, it would be sufficient to ensure that no undertaking is completely excluded from the benefit (de jure or de facto) in order to circumvent the rules on State aid, despite the measure being designed in such a way that the large majority of the related budget is allocated to specific categories of recipients.

All the State measures discussed in this section are, strictly speaking, of general application, as the State does not directly select recipients or categories of recipients. However, the State does determine the initiatives that the undertakings (all of which are potential beneficiaries) should take in order to be entitled to the tax advantage, and these requirements match the horizontal/industrial policy objectives that the State pursues. Hence, the State targets effects of a horizontal/industrial policy nature as opposed to purely macroeconomic nature.

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<sup>44</sup> Judgment of 13 September 2006, *British Aggregates v Commission*, T-210/02, EU:T:2006:253 and judgment of 22 December 2008, *British Aggregates Association v Commission* C-487/06 P, EU:C:2008:757.

By contrast, all advantages aimed simply at nurturing economic growth in the country as a whole by creating an attractive business environment (e.g., through the lightening of the fiscal burden overall) or stimulating investments irrespective of their nature (e.g., through the reinvestment of profits) remain at a macroeconomic level. As such, they do not impact on competition between undertakings within the internal market, not even indirectly, but only on competition between States. They should, therefore, be addressed through harmonisation or internal market rules if applicable.

- (iii) Further exploiting the sophistication of the fading boundary between genuine general measures and virtual general measures

In addition to the cases mentioned above, other examples of sophisticated tax advantages can be drawn from the never-ending creativity of States in the fiscal domain. These advantages are even more potentially controversial than those examined by the EU judges so far and show how the boundary between genuine and virtual general measures appears to be fading.

The reference here is not to the highly debated tax ruling cases<sup>45</sup>. In fact, in the tax ruling cases currently pending, the measures under examination can be defined as agreements or administrative rulings that endorse a given transfer pricing methodology<sup>46</sup>. These

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<sup>45</sup> Commission Decision of 30 August 2016, Case SA.38373, *Aid to Apple*; Commission Decision of 11 January 2016, Case SA.37667 *Excess profit tax ruling system in Belgium*; Commission Decision of 21 October 2015, Case SA.38374 *Aid to Starbucks*; Commission Decision of 21 October 2015, Case SA.38375 *Aid to Fiat*. The last three decisions have been challenged before the General Court and the related cases are currently pending.

<sup>46</sup> It must be noted that Commissioner Vestager, answering a question on the Commission decision of 30 August 2016 on the Apple case, declared that: “[...] *this decision is not about transfer pricing, this is about allocation of profits within the company*” (Press conference by Margrethe Vestager on Apple’s antitrust case in Ireland, 30 August 2016). However, conceptually speaking, the difference is slim. As stated in the DG Competition Working Paper on State Aid and Tax Rulings, “*the inquiry [on tax rulings which endorse transfer pricing arrangements] led, in mid-2014, to the opening of three formal State aid investigations by the Commission on tax rulings granted by Ireland (to Apple), Luxembourg (to Fiat) and the*

practices are certainly not new. Although a lively debate exists on whether the Commission objectively and adequately applies the arm's length principle and whether it can develop its own methodology to fulfil that purpose and reject other methodologies that are generally accepted at OECD level<sup>47</sup>, there can be no serious contention that that principle is appropriate to establish whether a specific tax ruling confers a selective advantage on its addressees<sup>48</sup>. It is not the tax ruling as such which is at stake, nor the mere existence of a favourable level of taxation in a given country, but the combination of a generous tax treatment and the tax ruling that endorses it. It is also clear that the Commission has reason to intervene if the arm's length principle has been misapplied, as the scope of arbitrary discretion left to multinationals led to a huge tax base erosion on the EU side and considerable revenue loss for Member States. But this implies an international dimension of the problem, which is specific to the tax ruling issues. For these reasons, the tax ruling cases deserve a separate analysis and will not be further discussed here.

However, these specificities of the transfer pricing cases, which motivate the Commission to intervene, are not included in other new similar forms of tax advantages. To provide just one example, a tax ruling is not needed for an undertaking to benefit from a patent box tax regime<sup>49</sup>. Although patent box schemes are

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*Netherlands (to Starbucks)*”; DG Competition – Internal Working Paper – Background to the High Level Forum on State Aid of 3 June 2016, paragraph 8.

<sup>47</sup> Please refer to the US Department of Treasury's White Paper of 24 August 2016, available at <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf>.

<sup>48</sup> The opposite view expressed by former Commissioner Kroes in this respect is not convincing, as it is based on concerns on the retroactive application of State aid rules in the fiscal sector. Whatever its value, this criticism relates to the remedies (recovery) and not to the substantial assessment, which remains valid. See the press article authored by Ms Neelie Kroes on The Guardian's online edition on 1 September 2016. The article is available at: <https://www.theguardian.com/technology/2016/sep/01/eu-state-aid-tax-avoidance-apple>.

<sup>49</sup> A patent box is a special tax regime for IP revenues. The objective is to attract research activities and the management of IP rights in a given country and, in so doing, foster high-value growth.



applicable to all undertakings without distinction, they confer a clear advantage on beneficiaries and tend to attract investments in R&D in the granting Member States. Consequently, they directly and purposely use advantages granted to undertakings performing certain operations to distort State competition by targeting one horizontal activity (R&D) that is of special importance to the State due to the high revenues it produces. Cases of this kind are therefore likely to soon become the main field of controversy, because the selectivity test may well not be satisfied based on the current legal standards. However, it would make sense to have these cases scrutinised by the Commission based on the logic underpinning State aid rules.

Although taxation does always impact on competition between Member States (this is an inherent and unavoidable consequence of taxation measures and should normally be dealt with through harmonisation or internal market rules), in these cases the impact on State competition is direct and not the unavoidable result of genuine macroeconomic measures. Furthermore, advantages granted to undertakings are used as a vehicle for the State's goals. On the one hand, patent box schemes tend to create a favourable framework for businesses, much like general measures, and thus essentially affect competition between Member States. On the other hand, however, the State implements patent box schemes by targeting and pooling resources into a specific activity, just as it does with virtual general measures.

For these reasons, and also considering the tasks more clearly conferred on State aid enforcement following the modernisation process (i.e., directing budgetary expenses towards common interest objectives), the question of whether the reach of State aid rules should be extended to measures of this kind will likely come under scrutiny soon.

## 6. Conclusions and proposed methodology

The level of understanding of the selectivity requirement in the field of fiscal aid is highly unsatisfactory and legal uncertainty remains. This creates a serious flaw in the enforcement of State aid rules given the increasing importance of fiscal incentives as a

form of aid. The controversy surrounding fiscal aid is due to the typical multi-purpose nature of tax measures, which often combine macroeconomic and microeconomic goals (and effects).

Referring back to the basic rationale of the selectivity criterion (i.e., avoid any interference between State aid enforcement and a State's sovereign power in adopting economic policy measures that target pure macroeconomic effects) can, in most cases, help to find an appropriate solution. But in some cases, an objective and insurmountable conflict exists between the current legal standards, as developed through the fragmented caselaw of the EU courts, and the goals of State aid control as envisaged by the founding fathers.

The fragmentation of relevant caselaw is due to formulas that cannot appropriately be applied across the whole field of fiscal aid, as they have been developed using a very case-specific approach. This creates a vicious circle, as judges are caught in a sort of prisoner's dilemma and struggle to impose a new strain of caselaw. A side effect of this is the loss of trust in the Court of Justice's capability to contribute to the development of EU law in this field overall, as any time the General Court attempts to propose alternative approaches, it is almost invariably overruled by the Court of Justice<sup>50</sup>.

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<sup>50</sup> See, for instance, the *British Aggregates* case: judgment in *British Aggregates v Commission*, footnote 44 above, EU:T:2006:253, which was set aside by the judgment of 22 December 2008, *British Aggregates Association v Commission* C-487/06 P, EU:C:2008:757. Similarly, the *Gibraltar* case: judgment of 18 December 2008, *Government of Gibraltar v Commission*, footnote 15 above, EU:T:2008:595, which was set aside by the judgment of 15 November 2011, *Commission and Spain v Government of Gibraltar and United Kingdom* joined cases C-106/09 and C-107/09 P, EU:C:2011:732. The following judgments have been appealed (and the cases are still in progress): the General Court's judgments in the *Aer Lingus* case (appeal brought on 9 April 2015 by European Commission against the judgment of 5 February 2015, *Aer Lingus v Commission*, T-473/12, , EU:T:2015:78 - case C-164/15 P), in the *Ryanair* case (appeal brought on 9 April 2015 by European Commission against the judgment of 5 February 2015, *Ryanair v Commission*, T-500/12, EU:T:2015:73 - case C-165/15 P), and in the *Spanish goodwill* case (appeal brought on 19 January 2015 by the European Commission against the judgment in *Autogrill España v Commission*, footnote 19 above, EU:T:2014:939 - case C-20/15 P and appeal brought on 19 January 2015 by the European Commission against the judgment in *Banco Santander and Santusa v Commission*, footnote 26 above, EU:T:2014:938 - case C-21/15 P).

Furthermore, the doctrine has also failed to provide a decisive contribution to a holistic view of the phenomenon of fiscal aid. As to the Commission's Notice on the notion of aid, it provides no help on this either, as this is not a matter for soft law of a purely interpretative nature (as the Notice is).

Against this background, renewed efforts to build a suitable methodology to approach the phenomenon of fiscal aid appear necessary; the use of tax mechanisms should be neutral, and State aid rules should not be applied differently depending on the means used.

Ideally, a solution should be found by coupling a teleological analysis of the upper norm with considerations of law policy to reach a consensus with Member States. However, it is worth recalling that Member States did not implement the 1997 Code of Conduct satisfactorily, and they are highly unlikely to be any more willing to do so today. In the end, although Member States frequently complain, particularly of the lack of clarity of the caselaw in the field, they do not seem to be working towards any fiscal harmonisation or precise definition of the boundaries of their sovereign competence. The current uncertainty allows them to continue competing with each other rather than thinking as a unified block in legal and economic terms.

As an alternative to a political consensus, a very creative strain of caselaw that looks in a non-formalistic way at the legal standards, but fully takes into account the underlying objectives of the Treaty, would be a pragmatic way of properly serving the goal of transparency and legal certainty.

In the case of general fiscal measures designed to produce indirect selective effects downstream, the proposed solution is easy to implement: the Commission should target the indirect aid downstream rather than the fiscal advantage as such.

In the case of general measures with no downstream selectivity, the assessment should at some stage internalise a consideration of the nature of the system in order to determine whether it is genuinely macroeconomic or rather designed to attain a given

horizontal objective.

Although the three-step analysis could be left unchanged, some clarifications would need to be added (which go beyond those intended to avoid a circumvention of the selectivity test through fiscal techniques, as in the *Gibraltar* case).

Specifically, the concept of “comparable legal and factual category in light of the objective pursued by the tax system under discussion” would remain key to the analysis (because it allows the appropriate benchmark to be defined in each situation, and derogations to thus be identified). However, this should not result in the Commission being prevented from considering the system’s objective in its analysis. If that were the case, Member States could then shape a tax system that circumvents all controls by simply selecting specific actions, transactions or operations corresponding to their horizontal objectives. All undertakings performing those actions, transactions or operations would become vehicles of the State’s policy and would automatically set the limits of what is deemed comparable for the application of the test<sup>51</sup>.

To address this objection, the Commission’s review of what is deemed comparable should be refined. A differential treatment could be deemed to exist not only when it is possible to identify a category of comparable undertakings that is entirely excluded from the benefit, but also when the measure is designed in such a way that the related budget is allocated predominantly to specific categories of recipients (and less to others in a comparable situation). This is because specific categories of recipients are the most likely or suitable to perform in the way the national measure encourages them to perform.

However, the application of the third step of the selectivity test would help to minimise the impact of this change to what is

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<sup>51</sup> This creates the impasse that is well exemplified by the conflict between the General Court’s position in the *Spanish goodwill* case and the opinion of AG Whatelet of July 2016 (or the conflict between the opinion of AG Kokott in the *Austrian goodwill* case and that of AG Whatelet in the *Spanish goodwill* case, see footnotes 9 and 39 above).

strictly necessary to comply with the inner logic of State aid control. Under the third step, the nature of the tax system is analysed (i.e., whether the derogation from the benchmark is justified by the nature and economy of the specific tax system under scrutiny).

If the system is genuinely macroeconomic, any possible differential impact on different sectors or types of undertakings could be considered justified<sup>52</sup>, as that differential impact is the inherent and unavoidable consequence of the strategic macroeconomic objectives pursued through the tax system under examination. However, this would not be possible if the tax system is designed to attain a specific horizontal objective (whatever that objective may be: promoting the use of environmental-friendly products, fostering the internationalisation of domestic companies, attracting IP rights, etc.). Whether this objective is consistent with the principles of the Treaty will have to be examined as part of the compatibility assessment.

Admittedly, following the proposed approach (i.e., revisiting the current legal standards in terms of law policy by taking into full account the rationale of the upper norm as conceived by the founding fathers) may lead to stretching the notion of selectivity and, as a result, the notion of aid. However, this implication is not unreasonable, because the careful use of the third step of the selectivity test would still exclude genuine macroeconomic measures from the Commission's control. Moreover, if the same non-formalistic approach were also to be applied to other aspects of the notion of aid, this would likely rebalance the overall effect<sup>53</sup>.

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<sup>52</sup> This would be so, for example, in cases similar to the *Italian underground economy* case (see footnotes 31 and 32 above) or when the tax system pursues sufficiently broad objectives of employment policy, as long as no undertaking contributing to the defined objective is excluded from the advantage.

<sup>53</sup> For instance, the application of the measures examined in the *Spanish goodwill* case to acquisitions of stakes in third countries only should not raise any objections. Similarly, for the export of goods rather than capital, a limit should be set on the possibility to presume trade affectation within the EU without having to provide any concrete evidence. But this, “although [...] the very same, is a different story” (the expression is borrowed from Almudena Grande's *Los Besos en el Pan*, Guanda, 2016) and goes beyond the scope of this opinion paper.

In any event, the conclusion is clear. A new approach is needed if the aim is to reinforce the inner logic, effectiveness and credibility of an important component of European integration such as State aid control. Understandably, the approach proposed here implies either seeking to build a political consensus around a new code of conduct or carrying out a deep reconsideration of the caselaw. A difficult task indeed, but worthwhile. The order, ease, comprehensiveness and clarity provided by a set of rules often awake a sentiment of respect, compliance and positive emulation. This is the secret to effectiveness and is far more important than rigorous enforcement. Unnecessary complexity and fragmentation, by contrast, not only prejudice legal certainty, they also nurture attempts of circumvention and abuse.