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**Selectivity on Trial: a Critical
Discussion of Recent State Aid
Developments**

82nd Lunch talk of the GCLC

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A quick overview:

- Today, selectivity is the fulcrum of the main interpretative difficulties on the notion of aid.
- Material selectivity, especially in taxation matters, is an unsolved rebus.

Some statistics - share of aid instruments - % of total

[2015 Commission Scoreboard]

	Tax exemption	Tax deferral
2014	29,786 %	0,032 %
2013	34,762 %	0,062 %
2012	34,628 %	0,223 %
2011	35,179 %	0,191 %
2010	36,765 %	0,208 %
2009	36,141 %	0,531 %
2008	39,054 %	0,538 %
2007	39,328 %	0,784 %
2006	28,583 %	0,740 %
2005	34,180 %	1,995 %

Fiscal aid accounts for more than one third of the total on average in the last 10 years.

→ **Why?**

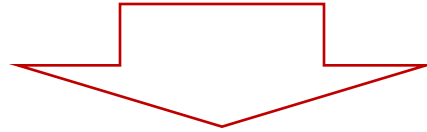
One important factor is that state aid taxation cases offer a broader margin of defence to Member States. The more complex the tax mechanism, the broader the margin of defence.

“The Commission has caused unnecessary confusion in relation to such matters as economic sovereignty (...) and the status of tax relief for investments”.

C. Quigley

However, the above figures help understanding the Commission’s reasons.

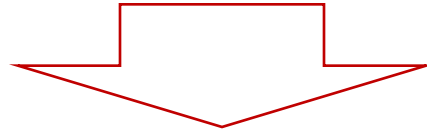
Why selectivity in tax measures is a highly controversial field?



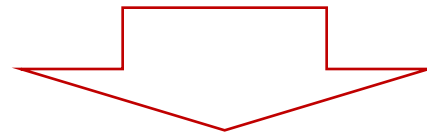
Taxation policy: the **perfect** example of multi-purpose State measures.

To address this issue we need to go back to the basic principles of State aid control.

What is the fundamental idea underpinning State aid control?



Member States should not interfere with competition between undertakings in the internal market.



MICROECONOMICS

Why are pure macroeconomic measures (with no microeconomic effect) excluded from the scope of application of State aid rules?

- Harmonisation of national legislation should ideally complement them.
- Internal market rules also have their role to play.

Has the case law been of help in addressing the problem overall?

- It has created legal standards tailored to specific cases, which however create difficulties when transferred to other cases (e.g. the three-step analysis)
- The General Court and the prisoner's dilemma

How can the Court lessen legal uncertainty?

- In light of the basic principles, define criteria for given categories/typologies of fiscal aid

Example n° 1

Fiscal measures with
indirect
microeconomic goals,
sectorial or horizontal

Example n° 2

Several types of
virtual general
measures

To conclude:

- The choice of the tools (taxation or others) should be neutral.
- Legal criteria, as interpreted so far, are unsatisfactory because they do not permit to achieve this result.
- The Notice is of no help on this.
- The basic rationale of the selectivity requirement can be of guidance in most cases (e.g., indirect effects).
- Residual cases such as patent box schemes require a political consensus or legislative solution or creative case law (but the judges need to overcome the prisoner's dilemma).