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Isabelle Richelle
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State Aid Law and Business Taxation

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State Aid Law and Business Taxation

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Preface

In November 2015, the Max Planck Institute for Tax Law and Public Finance, the Université Catholique de Louvain and the Tax Institute of the University of Liège along with Leiden University and the University of Rennes convened two interlinked events in the Palais des Académies in Brussels to discuss fundamental and specific issues of European competition law in the field of fiscal aid. The open conference "Taxation and EU State Aid Law – Current Practice and Policy Issues" was followed by the closed symposium "State Aid Law and Business Taxation: Selected Issues". This volume consists of papers and presentations delivered in the course of the conference and the symposium. Its goal is to provide the reader with the most current account of where we currently stand with regard to the relationship between "business taxation and state aid law".

It is no secret that this area of European competition law has risen to global prominence due to the procedures initiated by the European Commission against several European Member States in the context of harmful tax competition and aggressive tax planning. But it is also well known that the interaction between state aid discipline and national tax legislation started several decades ago and both extensive Commission practice and highly sophisticated Court jurisprudence in this field have contributed to transform the prohibition on selective aid under Art. 107 (1) of the Treaty on the Functioning of the European Union (TFEU) not only into a substantial constraint to tax sovereignty in the Member States of the European Union but also into a powerful policy tool in the hands of the European Commission (which can take action under Art. 107 and 108 of TFEU, without the necessity to consult with the Council or to establish proceedings in the Court of Justice of the European Union (CJEU)). In April 2016, the European Commission emphasized the high relevance of state aid law in the field of business taxation when it published its long-awaited notice on the notion of state aid under the Treaty.

Against this background, this volume tries to present both foundational questions—regarding central notions like "advantage", "selectivity" and "discrimination"—and recent challenges stemming from the practical application of state aid control, e.g. in highly discussed sectors like energy taxation, research and

development incentives or leasing transactions. Given the state of the debate in the European Union and beyond, most contributions in this volume focus on different aspects of international taxation seen through the lens of Art. 107(1) of the TFEU: double taxation and double non-taxation, tax avoidance, beneficial ruling practice, transfer pricing, harmful tax competition, the code of conduct and so on. In this respect, this volume claims to contain not only the most recent account of state aid discipline in fiscal matters at large but also the first extensive multi-voice debate on the interaction between state aid law and international tax cases.

We were happy that many high-level speakers and further participants from the European Commission, academic and judicial institutions and private practice were willing to join us for two days, sharing their views and proposals for the future development of this area. The editors of this book hope that the findings presented in this volume are well received by an international audience, giving rise to further debate on the requirements of the European tax order when Member States are willing to deliver aid through the tax code to the benefit of their national and international business.

The editors express their gratitude to Leopoldo Parada for his diligent work on the publication of this book.

Liège, Belgium — Isabelle Richelle
Munich, Germany — Wolfgang Schön
Louvain-la-Neuve, Belgium — Edoardo Traversa
June 2016

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Part I
Fundamentals

Tax Legislation and the Notion of Fiscal Aid: A Review of 5 Years of European Jurisprudence

Wolfgang Schön

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Abstract State aid discipline under Art. 107, 108 TFEU has established itself as a major constraint to the tax sovereignty of national legislators. By analyzing a great number of CJEU judgments delivered during the last 5 years, this article lays out both the conceptual and the political issues which arise when tax benefits are subject to control under European competition law. This affects the concepts of "advantage", "selectivity" and "discrimination" as well as special cases like "negative state aid", "indirect selectivity" or "de-facto selectivity". The author proposes to apply Art. 107 par. 1 TFEU only if a tax provision deviates beneficially from a "normal" or "benchmark" treatment and rejects the trend to interpret Art. 107 par. 1 TFEU as a general ban on discrimination. Moreover, this article pleads for a limited reading of "selectivity" which is only given when a tax advantage confers a financial benefit on certain branches of the economy or certain individualized enterprises.

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1 Legislation, Administration, Enforcement

It is a well-known feature of state aid control that the constraints established by Art. 107 and Art. 108 TFEU for Member States who intend to provide financial benefits to economic actors also apply in the area of taxation.[1] The main difference between fiscal aid and (most) other means of subsidization stems from the fact, that any tax as such is just the opposite of a financial benefit. It is a financial burden established under the laws of a Member State and rigorously enforced by domestic tax authorities. Nevertheless, the CJEU has from the very beginning of its jurisprudence concerning state aid discipline pronounced the view that state aid can be provided under the law of taxation as well.[2] This wide approach requires us to turn the perspective upside down: You do not ask whether a Member State has transferred public resources to a private party, you rather ask whether a Member State has decided not to prescribe or enforce the transfer of private funds to the public coffer. State aid measures in the area of taxation look just like the negatives we used to have in photography before the digital age: You immediately recognize the contours of the picture but black and white have been switched. Taking account of this change of perspective is the major task in this province of state aid law.

Taking a closer look, state aid control in the fiscal field can set in at different institutional and procedural levels.

- A fairly straightforward case comes to the fore when a tax claim exists under the law of a given state, i.e. when the tax base has been ascertained, the tax rate has been applied and the tax bill has been sent to the taxpayer. The resulting tax receivable must be enforced by the authorities in accordance with the procedures provided for under domestic law[3]; state aid rules prevent the taxman from granting a more lenient treatment, e.g. deferral of payment or even a fully-fledged waiver of the existing tax claim.[4] In this situation the generosity of the tax authorities can be scrutinized under the "private creditor test", as the extension or the non-enforcement of a tax claim shows substantial similarity to the extension or non-enforcement of any private loan granted to the beneficiary.[5]

[1]For an overview see: Schön (2012), at § 10; Quigley (2015), at Part I.3; for indirect taxation see: Englisch (2013).

[2]Case 30/59 (Gezamenlijke Steenkolenmijnen), judgment of 23 February 1961, ECR 1961, p. 1 (19).

[3]Any favorable general rules under domestic procedural law, e.g. a short limitation period for tax debt, do not qualify as selective advantages (AG Kokott, Case C-105/14 (Taricco) opinion of 30th April 2015 para 61); for a general settlement of all tax claims pending for more than 10 years in the courts see: Case C-417/10 (3 M Italia) judgment of 29 March 2012; European Commission (2016), at para 165–169.

[4]Schön (2012), at para 10-036.

[5]Case C-73/11 P (Frucona Kosice), judgment of 24th January 2013, para 71–72; for a skeptical view of this judgment see Luja (2012), p. 120 at 122 et seq.

- A bit less straightforward but still more in line with general rules on state aid is the examination of the tax authorities' behaviour at the level of the tax assessment. As a rule, tax authorities do not enjoy any leeway when they calculate the tax bill. And the mere application of binding laws as such does not amount to self-standing fiscal aid. Nevertheless there are two situations where state aid examinations may set in with regard to the handling of a tax case by the domestic authorities: the first case concerns the "misapplication" of the law by the tax authorities—here we have to decide whether any "misapplication" favouring the taxpayer can be wiped out by the European Commission under Art. 107/108 TFEU or whether only qualified cases like "intentional" misapplications or "indefensible" deviations from the correct construction of the law or the facts can be attacked.[6] The second case refers to the law granting certain discretionary powers to the tax authorities. While it is evident that some limited leeway will always exist when tax assessments are performed (e.g. to reach settlements on the factual and on the legal side in complex cases[7]) the Court is wary about such discretionary features of fiscal law which allow tax authorities to dole out benefits for reasons outside the practical necessities of the tax system.[8] The current debate on the admissibility of "rulings" for multinational enterprises circles around this fine balance between providing legal certainty and granting illegal benefits to taxpayers.[9]

But the most problematic level to apply state aid rules to is tax legislation. This is due to the well-known fact that (outside harmonized areas like VAT and some excises) there exists no general rule as to which economic events arising within a jurisdiction must be taxed. To the contrary, following democratic principles and the rule of law, unless the competent legislative bodies have decided to levy a tax on a certain economic event, there is no tax.[10] This is a generally accepted emanation of the tax sovereignty granted to all Member States under the European Treaties and this foundational principle cannot be called into question under the flag of state aid control. Non-taxation of economic behavior as such is not an issue under European law. We need additional factors to identify state aid in the area of tax legislation.

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[6]Quigley (2015), pp. 10, 106–107; Schön (2012), at 10-014; it is evident that mere reimbursement of illegally assessed taxes does not amount to state aid (Case 61/79 (Amministrazione delle finanze dello Stato) judgment of 27th March 1980 para 29–32).

[7]European Commission (2016), at para 172–173; Quigley (2015), pp. 104–105.

[8]Case C-6/12 (P Oy) judgment of 18th July 2013, para 24–30.

[9]European Commission (2016), at para 169–174; European Commission (2015); De la Blétière (2015), pp. 51 et seq.; Leclercq and du Pasquier (2015a), pp. 60 et seq.; Rossi-Maccanico (2015), pp. 73 et seq.; Luja (2015), p. 379 at 383 et seq.; Lang (2015), p. 391 at 394 et seq.; Gunn and Luts (2015), p. 119; Lyal (2015).

[10]In "Eventech" the Court held that no state is obliged to levy fees for the use of public roads (Case C-518/13 (Eventech) judgment of 14th January 2014, para 43–44; see also AG Wahl, opinion of 24th September 2014 para 29.

2 Fiscal Aid and the Market Economy Actor

The specific character of taxation being an expression of the fundamental sovereignty of each Member State makes it impossible to simply submit tax advantages to the "market economy operator test" as applied in other cases. No private person is able to levy taxes and no private person is able to grant tax relief. But there are hybrid situations. In "Electricité de France", the French Republic had provided for a tax exemption regarding capital gains realized by a large utility company in the context of a restructuring of the commercial and tax accounts. This utility company was wholly-owned by the French state. In his opinion, Advocate General *Mazak* had drawn a clear line between the state as a shareholder and the state as a public authority.[11] In his view, the legislative tax exemption could not be re-characterized as a mere waiver of a tax claim equivalent to a capital injection by a private investor. Both the General Court[12] and the Court of Justice[13] took a different stance.[14] For them, it does not make a material difference whether an existing tax claim is waived (just like any other debt claim) or whether tax legislation prevents the tax claim to come into being in the first place. Against this background the French Republic was heard with the argument that a private investor would have contributed a similar financial benefit to the utility company.

From a legal perspective, this is a slippery line of argument as it requires a material comparison between the fiscal state and a private actor who would never be able to confer to the business a congruent advantage. This can only work by analogy and brings along intricate measurement issues—e.g. when the "cost of capital" principle has to be applied to a tax waiver[15] or when the state is obliged to "prove" having acted in its capacity as a shareholder.[16] The formal view taken by Advocate General *Mazak* seems to be more in line with the necessity to apply strict discipline against subsidies and to provide legal certainty in the area of fiscal aid.[17] In any case the "private investor test" should remain restricted to the narrow field of tax measures initiated by the State in its rare double role as shareholder and legislator.

[11] AG Mazák, Case C-124/10 P (Electricité de France), opinion of 20th October 2011, para 76 et seq.; sympathetic Jaeger (2012), pp. 1 et seq.

[12] Case T-156/04 (Electricité de France), judgment of 15th December 2009, para 221–237.

[13] Case C-124/10 P (Electricité de France), judgment of 5th June 2012, para 79, 92; Debroux (2012), pp. 6–7; Baeten and Gam (2013); Leclercq and du Pasquier (2015b), pp. 9 et seq.

[14] Cornella (2015), p. 553 at 557 et seq.

[15] Nicolaides (2013), p. 243.

[16] Soltesz (2012), p. 134 at 135.

[17] Piernas López (2015), pp. 93 et seq.

3 Advantage, Selectivity and Discrimination

3.1 A Conundrum

It is common ground that state aid in the area of fiscal legislation consists of a specific financial benefit which can be ascertained by way of comparison amongst a sample of economic operators who are potential or actual taxpayers. The functioning of the Internal Market shall not be distorted by "Member States favouring some actors to the detriment of others".[18] But this is where the consensus stops and where both terminological ambiguities and substantive differences begin. This debate circles around three overlapping concepts: the notion of "advantage", the notion of "selectivity" and the notion of "discrimination".

The historical starting point is the concept of "advantage".[19] According to the wording of Art. 107 par. 1 TFEU, state aid law is about "favours".[20] Against this background, from its early judgments, the Court of Justice has put forward that an enterprise receives state aid if it is relieved from charges "normally borne" by similar firms.[21] This strand of jurisprudence established the view that any tax exemption, tax deduction or tax deferral which creates a benefit when compared to regular treatment amounts to state aid. This approach requires the definition of a benchmark, an "average sea level" against which preferential treatment can be measured and identified. The Court put it succinctly in the recent "France Telecom" case: fiscal aid constitutes an "exception to the general law regime"[22] and the Commission in their recent guidance on the notion of state aid explicitly requires a "shortfall" in tax (and social security) revenue due to exemptions or reductions granted by the Member State.[23]

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[18]European Commission (2012), at para 1.2.

[19]Case 30/59 (Gezamenlijke Steenkolenmijnen), judgment of 23 February 1961, ECR 1961, p. 19; Piernas López (2015), pp. 67 et seq.; European Commission (2016), at para 66 et seq.; Engelen and Gunn (2013), pp. 138 et seq.; Micheau (2014), pp. 189 et seq.

[20]Case C-105/14 (Taricco) judgment of 8th September 2015, para 61–62; Case C-417/10 (3 M Italia) judgment of 29 March 2012, para 37 et seq.

[21]Case C-78/08 – 80/08 (Paint Graphos) judgment of 8th September 2011, para 45; case C-279/08 P (Commission vs. Netherlands) judgment of 8th November 2011, para 61, 86; Case C-73/11 P (Frucona Kosice), judgment of 24th January 2013, para 69; Case C-5/14 (Kernkraftwerk Lippe-Ems) judgment of 4th June 2015, para 71; Case C-522/13 (Navantia) judgment of 9th October 2014, para 22; European Commission (2016), at para 68; Micheau (2014), p. 195; Quigley (2015), pp. 8, 50.

[22]Case C-81/10 P (France Telecom) judgment of 8th December 2012, para 16–18.

[23]European Commission (2016), para 51.

Over the years, both in the jurisprudence of the CJEU,[24] the Advocate Generals' pleadings[25] and in academic writing,[26] this notion of "advantage" has been conflated with another important feature of state aid discipline: the notion of "selectivity".[27] According to Art. 107 par. 1 TFEU only measures which aim at favouring "certain undertakings or the production of certain goods" qualify as unlawful state aid requiring clearance under Art. 107 par. 2 or 3 TFEU. This leads to a distinction to be made between "certain undertakings" or "certain goods" which benefit from the tax measure, and other undertakings or other goods which do not—although they are in a similar factual or legal situation. But in practice, we often find the two-pronged test of "advantage" and "selectivity" merged into the question of whether a taxpayer enjoys a "selective advantage" under the examined tax legislation.

This confusion of "advantage" and "selectivity" is clearly visible in the test applied by the Court to tax benefits since its judgment in "Adria-Wien Pipeline"[28]:

> (41) The only question to be determined is whether, under a statutory scheme, a State measure is such as to favour certain undertakings or the production of certain goods (. . .) in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question (. . .).
>
> (42) According to the case-law of the Court, a measure which, although conferring an advantage to its recipient, is justified by the nature or general scheme of the system of which it is part does not fulfil that condition of selectivity (. . .).

Indeed there exist strong similarities between the "advantage" test and the "selectivity" test. Both distinguish between one group of taxpayers enjoying a tax benefit and another group of taxpayers subject to reference treatment.[29] Both tests involve the necessity to identify a benchmark defining the foil against which forbidden state aid can be ascertained. Nevertheless, the recent "Commission Notice on the notion of State aid pursuant to Article 107 (1) TFEU" explicitly separates the two tests from each other.[30] And also the larger part of the Court's recent judgments still adheres to this analytical approach.[31]

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[24]Case C-6/12 (P Oy) judgment of 18th July 2013, para 17–19; Case C-78/08 – 80/08 (Paint Graphos) judgment of 8th September 2011, para 49; AG Kokott, Case C-66/14 (Finanzamt Linz) opinion of 16th April 2015, para 74 et seq.; The Court did not address these issues in its final judgment as the judges found the questions raised with regard to state aid law to be inadmissible (Case C-66/14 (Finanzamt Linz) judgment of 6th October 2015, para 16 et seq.

[25]While AG Kokott supra (note 24) does not dwell on the notion of "advantage" any more, she reaches a similar dichotomy by separating from each other the notion of "selectivity" and the notion of "specificity".

[26]Micheau (2015), p. 323 at 236 et seq.; Romariz (2014), p. 39 at 40 et seq.

[27]Kühling (2013), p. 113 at 115; Tomat (2012), p. 462 at 465 et seq.; López López (2010), p. 807 at 808 et seq.; Quigley distinguishes between "economic advantage", "selective advantage" and "competitive advantage". See Quigley (2015), pp. 4 et seq.

[28]Case C-143/99 (Adria-Wien Pipeline GmbH) judgment of 8th November 2001, para 41 et seq.

[29]Nicolaides and Rusu (2012), p. 791 at 792.

[30]European Commission (2016), at section 4 (Advantage) and section 5 (Selectivity); see also López López (2010), p. 809; Quigley (2015), pp. 5–6, 99, 110–111.

[31]Case C-15/14 P (MOL) judgment of 4th June 2015, para 59; Case C-522/13 (Navantia) judgment of 9th October 2014, para 34.

In recent writing, it has been proposed to do away with benchmarking altogether and to reduce the examination of fiscal state aid to a mere "discrimination" test.[32] The core issue shall be whether two groups of taxpayers who are in a comparable factual and legal situation are treated differently without any visible justification. The sometimes aporetic quest for a reference system under national tax legislation should be abandoned and replaced by a rule-of-reason examination of existing differentials. Such a non-discrimination test would also lead to an alignment with the theory behind other tax-relevant provisions of the Treaties like the non-discrimination and non-protection clauses in Art. 110 TFEU and the way the fundamental freedoms are brought to bear in the context of taxation.[33]

3.2 Benchmark Test Versus Discrimination Test

3.2.1 British Aggregates, Sardinian Stopover Tax and Government of Gibraltar

The deeper problem informing the debate on "benchmarking" is related to the ongoing sovereignty of Member States in the tax area. Given the fact that Member States are in principle free to decide which events should be taxed and how to set the tax base and the tax rate, the relevant benchmark treatment cannot be derived autonomously from European law and it cannot be determined by reference to fiscal standards as applied in other States inside or outside the European Union. In order to protect the Member States' prerogative in tax matters, the decisive benchmark for fiscal state aid can only be the tax legislation of the relevant country itself.[34] If and so far as a taxpayer benefits from a lowering of the tax burden in the context of domestic legislation, Art. 107 par. 1 TFEU can be applied. This approach has been criticized as both circular and subcritical. According to critics,[35] once it can be shown that different treatment of two groups of taxpayers cannot be justified in the light of the factual and legal circumstances Art. 107 par. 1 TFEU should intervene. The focus should not be on the often futile search for a real or hypothetical norm level but on the justification of the differential as such.

In the jurisprudence of the Court, the 2006 judgment in the "British Aggregates" case led the way towards this non-discrimination test as the Court simply confirmed the existence of selective state aid when the UK Government was not able to show any justification for the tax differential between a tax levied on different kinds of

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[32] AG Kokott, Case C-66/14 (Finanzamt Linz) opinion of 16th April 2015, para 88; Azizi (2013), at XV; Heidenhain (2010), pp. 189 et seq.; Lang (2012), p. 411 at 418 et seq.; Cordewener (2012); Biondi (2013), p. 1719 at 1732; Lyal (2015), pp. 1032 et seq.

[33] AG Kokott, Case C-66/14 (Finanzamt Linz) opinion of 16th April 2015, para 103.

[34] European Commission (2016), at para 134; Hey (2015), p. 331 at 334 et seq.; Ismer and Piotrowski (2015), p. 559 at 561.

[35] Supra note 32.

granular materials.[36] In a similar vein, in the 2009 judgment on the Sardinian luxury tax on stopovers, the Court declared the tax differential between international and domestic air and sea traffic to run foul of Art. 107 par. 1 TFEU without caring about which one defined the "regular" treatment.[37] For many observers, the final breakthrough towards a mere discrimination test came with the "Gibraltar" judgment in 2011.[38] In the national legislation examined in this landmark case, the Government of Gibraltar had replaced its traditional corporate income tax by a corporate tax on expenditure for payroll and property occupation. The major beneficiaries of this tax reform were offshore companies whose payroll and property expenditure was typically small or non-existent. Commercially active local companies were subject to a higher tax base but they benefitted from the rule that the expenditure tax was capped at 15 % of the corporate profit—therefore they were factually treated like under the previous corporate income tax. While both the General Court in its decision[39] and the Advocate General[40] in his opinion failed to identify a reliable "benchmark" within the new tax system of Gibraltar, the Court found the tax system of Gibraltar to confer selective advantages to offshore companies.[41]

While some commentators[42] regard this judgment to herald a change of paradigm towards a mere discrimination test, the European Commission—in their recent "notice"—rightly emphasizes the exceptional nature of the case and the Court's reasoning.[43] Taking a closer view, the Court did not leave behind the concept of advantage and benchmark altogether: the judges rather took a "substance over form" view of how the benchmark should be ascertained.[44] This should not depend—to borrow from the language of the Court—on the "regulatory technique" employed by the legislator.[45] In the Gibraltar case, the fact that the business

[36]Case C-487/06 (British Aggregates) judgment of 22 December 2008, para 82–92; Honoré (2009), pp. 527 et seq.

[37]Case C-169/08 (Presidente del Consiglio) judgment of 17th November 2009 para 59 et seq.; see also AG Kokott, opinion of 2nd July 2009 para 123 et seq.; for a critical analysis see Engelen (2012).

[38]Joined Cases C-106/09 P and C-107/09 P (Government of Gibraltar) judgment of 15th November 2011.

[39]Joined Cases T-211/04 and T-215/04 (Government of Gibraltar) judgment of 18th December 2008, para 171–173.

[40]Advocate General Jääskinen, Joined Cases C-106/09 P and C-107/09 P (Government of Gibraltar), opinion of 7th April 2011, para 155 et seq.

[41]Joined Cases T-211/04 and T-215/04 (Government of Gibraltar) judgment of 18th December 2008, para 85 et seq.

[42]Lang (2011), p. 593 at 596 et seq.; Lang (2012), pp. 414 et seq.; Lyal (2015), p. 1039.

[43]European Commission (2016), para 129–130.

[44]Piernas López (2015), p. 144; Kühling (2013), pp. 118 et seq.; Nicolaides and Rusu (2012), p. 801; Rossi-Maccanico (2012), p. 443 at 446 et seq.; Rossi-Maccanico (2013), p. 39 at 50 et seq.; Dubout and Maitrot de la Motte (2012), pp. 44–54; for a critical assessment of this attempt to create a "hypothetical" benchmark, namely a mainstream corporate income tax see: Temple Lang (2012), p. 805 at 812.

[45]Joined Cases C-106/09 P and C-107/09 P (Government of Gibraltar) judgment of 15th November 2011, para 92; Quigley (2015), pp. 112–114.

expenditure tax was arbitrarily capped at 15 % of the corporate profit clearly showed that from a substantive point of view this tax was still a corporate income tax disguised as an expenditure tax. And against the baseline of a corporate income tax, offshore companies enjoyed huge advantages under this regime. The message to be derived from "Gibraltar" is clear: mere technicalities of legislative drafting and labeling are not relevant when it comes to the definition of the benchmark. But the concept of "advantage" and "normal tax treatment" has not been abandoned and it came up in a good number of other judgments later on.[46]

3.2.2 The Problem of the Missing Benchmark

Yet this reading of the Court's jurisprudence does not solve the fundamental issue whether a pure discrimination test would be superior to a benchmark test. To a large extent, the outcome would be the same anyway: all cases of unequal treatment which can be justified in the light of the inherent logic of the tax system would be in the clear: either because they comply with benchmark treatment or because they can be justified in the light of the legal and factual circumstances of the case. Moreover, it will not be possible to discuss the comparability of taxpayers and taxable events unless one has identified the underlying purpose and system of a given tax regime.[47] So what's the difference?

The test case is the "missing benchmark". Is it conceivable that domestic tax legislation is so chaotic and irregular that it is simply impossible or useless to identify any sort of benchmark? And should this lead to the non-application of Art. 107 par. 1 TFEU? I do not think this is a large problem. Basically, there are two kinds of taxes. Firstly, there are those which merely aim at raising revenue and which tap the ability to pay of taxpayers. For these—purely fiscal—taxes the benchmark is set by the ability to pay principle and the legislator's choice of a suitable indicator for this ability—like income, net wealth or consumption. Any tax rule that does not address ability to pay in this sense is deemed to deviate from the benchmark.[48] And secondly, there are taxes with a primarily regulatory goal. In this case, the achievement of this regulatory goal sets the benchmark for domestic legislation.[49]

One has to admit that there are some doubtful situations. A case currently pending before the European Courts concerns a special German tax provision on corporate loss carry-forward.[50] The German corporate income tax regime provides

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[46]Case C-452/10 P (BNP Paribas) judgment of 21st June 2012, para 66–68; Advocate General Szupnar, Case C-5/14 (Kernkraftwerk Lippe-Ems GmbH) opinion of 3rd February 2015, para 68.

[47]Temple Lang (2012), p. 811; Bartosch (2010), p. 12.

[48]Schön (2012), para 10-022; Quigley (2015), pp. 114–115.

[49]European Commission (2016), at para 136, 138.

[50]Case C-102/12 (Germany vs. Commission); there are additional cases brought by individual claimants in the General Court.

in principle for losses to be carried forward in future fiscal years. This carry-forward has been restricted since 2008: when shareholders sell their participations mid-stream leading to a change in control, the loss carry-forward shall be reduced or fully suspended. But this exemption from the rule was meant to suffer a sub-exemption if the share sale was part of an overall restructuring deal saving the viability of the business. The European Commission declared this "exemption from the exemption" to violate Art. 107 par. 1 TFEU as only companies in distress would benefit from this rule.[51] In German academic writing, the majority view seems to be that this legislative technique simply leads back to the starting point, the benchmark of full loss carry-forward.[52] But the outlook for the Commission is good as in 2013, when the CJEU adjudicated on a similar case from Finland ("P Oy"), the Court of Justice sided with the Commission.[53]

This case seems to expose the unhelpfulness of the benchmark test. Under a discrimination test one might simply ask whether the distinction between regular corporate entities and those in distress can be justified in the light of the underlying tax system. Given the fact that this special treatment is meant to achieve non-tax goals of economic policy, it looks probable that Art. 107 par. 1 TFEU should be applied.

Taking a closer look, this is not a satisfying outcome. By definition, any discrimination test merely leads to the result that there exists an unjustified inequality which must be removed. But it is not clear what direction the adjustment shall take. Is it necessary (in the afore-mentioned German case) to extend loss carry-forward to all situations of change-of-control? Or should one abolish the helpful treatment of distressed companies? Art. 107 par. 1 TFEU does not simply address discrimination—it logically starts from a "favour", a "benefit" that can be measured and accounted for. All legal consequences for this "advantage" under Art. 107 and Art. 108 TFEU are built on this clear identification of positive "aid": *Ex ante* such aid has to be notified and it is prohibited to "put proposed measures into effect" (Art. 108 par. 3 s. 3 TFEU); *ex post* the unlawful aid has to be recovered in full.[54] In order to make these provisions operational, each state aid is awarded a "cash grant equivalent" which depends on the nature of the aid—full subsidy, soft loan, bank guarantee etc.—and which reflects the economic value of the benefit received.[55]

[51]European Commission, Decision of 26th January 2011, O.J. 2011, L-235/26.

[52]De Weerth (2012), pp. 414 et seq. (with further references).

[53]Case C-6/12 (P Oy) judgment of 18th July 2013, para 32; critical Lyal (2015), pp. 1034 et seq.; as to the repercussions of this judgment on the German tax provision see: Hackemann and Sydow (2013), p. 786; Ismer and Karch (2014), p. 130; in its recent judgments, the General Court applied the line taken in "P Oy" to the German provision on carry-forward of losses (Case T-620/11 (GFKL Financial Services AG), judgment of 4th February 2016, para 98 et seq.; Case T-287/11 (Heitkamp BauHolding GmbH), judgment of 4th February 2016, para 95 et seq.).

[54]For an account of the procedural rules in place see: Afonso (2013), pp. 57 et seq.

[55]Case C-81/10 P (France Telecom) judgment of 8th December 2012, para 22–27; Joined Cases C-106/09 P and C-107/09 P (Government of Gibraltar) judgment of 15th November 2011, para 47; Engelen and Gunn (2013), p. 140.

In "France Telecom" the Court recently confirmed for a special business tax levied from a public telecommunications company that the "exact amount of aid" has to be verified with hindsight for every given tax year. For this exercise it is essential to start from a benchmark.[56] A mere discrimination test will not be able to provide the necessary information as it will remain unclear where to start the calculation and how to apply the described procedural rules to it.[57]

This problem has been addressed in two highly interesting judgments,[58] which the General Court delivered in February 2015 and which are currently under review with the Court of Justice. These cases concern an Irish tax on air passengers whose rate is dependent on the length of the journey. Flights up to 300 km are subject to a 2 € flat rate; all flights beyond 300 km are subject to a 10 € flat rate. The lower rate benefitted mainly Irish airlines offering domestic flights. The Commission held this to infringe both on the freedom to provide services and the prohibition on state aids. *Pro futuro,* the Irish legislator quickly solved the issue by establishing an overall flat rate of 3 €. But with regard to the past, the matter went to the Court, which had to deal with the intricate question of whether the evident discrimination between domestic flights and international flights should be remedied by an upward or a downward adjustment of the tax rate.

The applicants asked for a downward adjustment as the high rate would be unlawful with regard to the infringement of the freedom to provide cross-border services anyway. But the Court made quite clear that the ascertainment of discriminatory treatment is not self-executing. It offers no guidance to the legislator how to align rates: abolish the low rate or abolish the high rate or choose some middle ground—as happened in reality.[59] Therefore, the Court rejected the applicant's view that the high rate was unlawful *per se*. With regard to state aid law, the Commission had recognized the necessity to identify a "normal tax level" which is not easily done when only two different rates exist without any internal logic of the system offering help. The Commission took recourse to statistics: As only 10–15 % of all flights subject to the airline tax were domestic flights (or flights to the Western part of the United Kingdom) the large majority of flights was subject to the high rate. This high rate, according to the Commission, had to be regarded as the "normal tax rate"[60] and the General Court accepted this view.[61] While this case illustrates

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[56] Quigley (2015), p. 104.

[57] See Heidenhain (2010), p. 192 who criticizes this point while adhering to the discrimination test as a matter of principle.

[58] Case T-473/12 (Aer Lingus) judgment of 5th February 2015; Case T-500/12 (Ryanair) judgment of 5th February 2015; Truby (2015), p. 232.

[59] Case T-473/12 (Aer Lingus) judgment of 5th February 2015, para 60; Case T-500/12 (Ryanair) judgment of 5th February 2015, para 85.

[60] Case T-473/12 (Aer Lingus) judgment of 5th February 2015, para 54–55; Case T-500/12 (Ryanair) judgment of 5th February 2015, para 79–80.

[61] Case T-500/12 (Ryanair) judgment of 5th February 2015, para 89.

the insight that it can be (next to) impossible to identify a “normal” tax rate in some cases,[62] we should also accept that a mere non-discrimination test would be unhelpful: just like under the rules governing the fundamental freedoms, one would have to leave open how to adjust the differential. In this situation, some proponents of a discrimination test seem to regard the differential as such to constitute the unlawful “advantage” in any case.[63] But this would lead to an enormously destructive outcome: all cases of discrimination would have to be solved by increasing the tax burden (with retroactive effect and without any protection of legitimate expectations) on those taxpayers who were subject to the more lenient treatment. That would result in an overkill effect under Art. 107, 108 TFEU.[64]

4 Negative State Aid

This controversy around the concept of advantage and benchmark on the one hand and mere discrimination on the other hand comes up again when we focus on situations where the national tax legislator has decided to levy a specifically high tax burden on certain enterprises or industries. This problem has been discussed under the heading of “negative state aid”. While the majority of writers share the view that Art. 107 par. 1 TFEU does not prohibit negative deviations from the “benchmark”.[65] I have some years ago tried to show that Art. 107 par. 1 TFEU can be applied by way of analogy to specifically burdensome tax rules.[66]

In previous judgments, the Court of Justice has so far not taken an explicit stance on this issue. In a recent German case, the claimants pushed hard for a more forceful approach.[67] The case concerned the “Nuclear Fuel Tax” introduced by the German Government in the aftermath of the Fukushima disaster. The claimants took the view that such an asymmetric high burden on a specific source of energy is not in line with Art. 107 par. 1 TFEU.[68] The Court rejected this view without openly addressing the issue of whether the concept of “negative state aid” can be applied as a matter of principle. Rather, the Court reached the conclusion that there exists no general tax system on energy production in Germany which sets a benchmark

[62] Schön (2012), para 10-029.

[63] Biondi (2013), p. 1734.

[64] Hey (2015), pp. 334 et seq.

[65] For references see Schön (2012), para 10-013; most recently Ismer and Piotrowski (2015), p. 564.

[66] Schön (2006), p. 495; Cordewener (2012), p. 288; Bacon (2013), at § 2.36, 2.90, 2.91.

[67] Case C-5/14 (Kernkraftwerk Lippe-Ems) judgment of 4th June 2015, para 69 et seq.

[68] Englisch (2012), pp. 318 et seq.

against which to test the nuclear fuel tax.[69] Rather, this tax had to be qualified as a self-standing implementation of the "polluter-pays" principle for nuclear waste.[70]

Taking a closer at the Court's findings it turns out that the Court had not really addressed the question of whether an extra burden on nuclear fuel runs foul of Art. 107 par. 1 TFEU; it rather had asked whether the non-taxation of all other fuels leads to an unlawful benefit for energy production outside the nuclear sector[71] a position which has been taken by some academic writers with regard to comparable special levies as well.[72]

In my view, this case is not a good example of what a negative state aid can be. This is due to the fact that the nuclear fuel tax was closely knit; it only affected one single type of economic events, not a range of events or situations which allows comparing tax levels and setting benchmarks.[73] But let us assume for a moment that it is possible to assess within a common framework the tax burden levied on all sorts of energy production. A clear example would be a hypothetical tax provision setting a disadvantageously high corporate income tax rate for companies running nuclear power plants. It would be hard to assume that the application of the mainstream corporate tax rate to profits from non-nuclear energy production amounts to recoverable state aid favoring power plants using coal, gas or petroleum. This would go far beyond the limits of Art. 107 par. 1 TFEU as conceived in the original context of the Internal Market.[74] Rather, the special burden on nuclear power plants requires justification; an infringement of Art. 107 par. 1 TFEU should lead to a restitution claim in the hands of the nuclear power plant's owner and not to a recovery of deemed tax benefits from all other energy producers.

This case shows again: a mere discrimination test would not be of any avail: While it could tell us that nuclear and traditional power plants might deserve equal tax treatment it would leave in the dark the actual consequences for the involved parties.

5 Advantage, Selectivity and General Measures

Once we decide (and the Commission has clearly done so) to keep the notion of advantage alive in the context of state aid law, one has to clarify whether it is necessary and possible to draw a line between the two tests regarding the existence

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[69]Case C-5/14 (Kernkraftwerk Lippe-Ems) judgment of 4th June 2015, para 77; AG Szupnar, Lippe-Ems supra (note 46), para 69–73.

[70]Case C-5/14 (Kernkraftwerk Lippe-Ems) judgment of 4th June 2015, para 78–79.

[71]Advocate General Szupnar, Case C-5/14 (Kernkraftwerk Lippe-Ems GmbH) opinion of 3rd February 2015, para 74.

[72]Quigley (2015), pp. 136–138; Metaxas (2010), p. 771; Nicolaides and Metaxas (2014), p. 51.

[73]Kühling (2013), p. 116.

[74]Quigley (2015), pp. 144–145; Hey (2015), pp. 334 et seq.

of an "advantage" and the "selectivity" of this advantage. To make the point clearer: Is it possible to identify tax measures which confer an advantage on the recipients but which are not restricted to certain enterprises or certain sectors of the economy? The Court has for many years accepted such distinction: Advantages which are conferred upon all economic operators are called "general measures" as they try to improve the economic climate in a general fashion.[75] A case in point is a tax benefit for research and development (R&D). Extra deductions for research expenditure or reduced tax rates for income from innovations clearly deviate from the benchmark treatment for investment, business expense and income under mainstream business taxation. The same holds true for a general introduction of accelerated depreciation of fixed assets.[76] These measures aim at achieving non-tax goals and have to be classified as "advantages" in the above-described sense. But if it can be shown that this advantage is available to all economic operators the requirement of selectivity is not fulfilled and Art. 107 par. 1 TFEU does not apply.[77]

There is a certain risk to confuse the borderline between benchmark tax treatment and tax advantages on the one hand with the borderline between selective benefits and general measures on the other hand.[78] Both aim at comparing different groups of taxpayers with each other. But there is a conceptual difference:

- Drawing the distinction between benchmark taxation and advantageous taxation is a purely internal matter of fiscal law—it is designed to put into effect the analogy between a direct subsidy and a tax subsidy. Therefore, the concept of advantage circles around the mechanics of the tax in question in the light of the factual circumstances and in the light of its overall fiscal or regulatory purpose. Here the fiscal sovereignty of the Member State comes to the fore.
- On the other hand, the distinction between general measures and selective advantages refers to the general aims of economic policy and the power of Member States to fuel the economic competitiveness of its tax system as

[75]Joined Cases C-106/09 P and C-107/09 P (Government of Gibraltar) judgment of 15th November 2011, para 73; Case C-417/10 (3 M Italia) judgment of 29 March 2012, para 39; Case C-522/13 (Navantia) judgment of 9th October 2014, para 23, 33; Case C-6/12 (P Oy) judgment of 18th July 2013, para 18; European Commission (2016), para 117–118; Bacon (2013), at para 2.113 et seq.

[76]General Court, Case T-140/13 (Netherlands Maritime Technology Association) judgment of 9th December 2014, para 90–91; the appeal against this judgment was dismissed by the CJEU (Case C-100/15 P (Netherlands Maritime Technology Association), judgment of 14th April 2016); Martinez (2015), pp. 69 et seq.; Nicolaides (2015), pp. 120 et seq.; European Commission (2016), para 177–180.

[77]Quigley (2015), pp. 9 and 100–103.

[78]European Commission (2016), para 126–128; a new twist has been brought to this debate by AG Kokott, Case C-66/14 (Finanzamt Linz) opinion of 16th April 2015, para 82, who wants to distinguish between derogations justified by the specific norm in question (no selective advantage) and those justified by the overall purpose and principles of the tax in question (no specific advantage).

opposed to the constraints for financial support granted to specific enterprises or certain sectors of the economy.

Last not least, these two issues—both the concept of "economic advantage" and the concept of "selective advantage" should not be confused with yet another notion: the concept of "competitive advantage".[79] This last factor comes in when the effect of a selective advantage on competition has to be assessed. Insofar—and only insofar—one has to ask whether the beneficiaries enjoy a benefit vis-à-vis their local or foreign competitors so that competition in the Internal Market is distorted. To give an example for this distinction: A corporate income tax reduction for German textile industry constitutes a selective advantage if other German sectors of the economy (car manufacturing or banking services) do not participate. It does not matter that there is no direct competition between textiles, cars and financial services. The comparison with competitors, e. g. foreign textile producers, only comes in when the distorting effects on the competitive landscape within the internal market are under review.

6 Dimensions of Selectivity

6.1 Availability to All Economic Operators?

Having identified an "advantage" within the tax system it is therefore necessary to go deeper into the concept of "selectivity" as the meaning of this notion is decisive for the political leeway of Member States in designing their domestic tax legislation.[80]

Unfortunately the starting point employed by the Court and the Commission for this distinction is unhelpful and clearly of a circular nature.[81] They ask whether the fiscal benefit in question is available to all economic operators in a jurisdiction—if not: the measure is regarded to be selective.[82] In my view this concept leads to two equally problematic possible outcomes.

First of all, we have to account for the fact that most tax legislation does not award individualized benefits to individual persons in an explicit manner. This has to be compared with the area of direct subsidies where it is evident that the state awards a specific sum to a specific firm. But tax legislation nearly always defines in a generalized fashion the requirements which have to be met to qualify for a certain tax benefit and it is up to each and every taxpayer to arrange his or her affairs in

[79]Quigley (2015), p. 7.

[80]Nicolaides and Rusu (2012), p. 791.

[81]AG Kokott, Case C-66/14 (Finanzamt Linz) opinion of 16th April 2015, para 80 et seq.

[82]Case C-522/13 (Navantia) judgment of 9th October 2014, para 23; Case C-78/08 – 80/08 (Paint Graphos) judgment of 8th September 2011, para 52; Case C-6/12 (P Oy) judgment of 18th July 2013, at 18; European Commission (2016), para 117.

order to meet those requirements. From an abstract point of view one could therefore say that most tax benefits are available for every taxpayer in a jurisdiction. Such a generous reading would lead to a highly reduced impact of European law for tax subsidies, which does not comply with the underlying competition law understanding of state aid rules. Competition law takes the existing arrangement of the economy as given—including the allocation of different actors to different sectors of the industry and asks whether all or only a limited number of these actors enjoy access to the benefits in question. We therefore have to check whether a specific benefit is available for all taxpayers *given their current economic activity*. To provide an example: If national tax legislation awards specific benefits to textile production, one should not deny selectivity on the grounds that companies running a steel mill or an insurance business can change their line of products in order to reap the benefit.

This does not exclude the possibility that the sheer number of taxpayers representing the "benchmark" is substantially smaller than the number of taxpayers benefitting from a tax break. This was shown by the CJEU in the "Adria-Wien Pipeline" Case where a reduction or exemption from an eco-tax was awarded to the manufacturing industry in general while only some service providers faced the tax bill in the end.[83] The regulatory aim of the eco-tax setting the benchmark was full taxation of energy consumption and the whole manufacturing industry had received advantageous treatment given the fierce competition they face in the global product market.

6.2 Availability to "Certain Enterprises" and "Certain Branches of the Economy"

From another perspective it seems overachieving when the CJEU simply declares all tax benefits to be selective which cannot be enjoyed by all existing taxpayers in the same fashion. Art. 107 par. 1 TFEU only prohibits advantages awarded to "certain enterprises" and "the production of certain goods". This wording does not cover each and every distinction made under national tax law. Such distinctions can refer to the legal form of an enterprise, to the size of its turnover or profit, to the number of the workforce or its previous record, e.g. when tax breaks for start-up businesses are under scrutiny. Does it make sense to prohibit all sorts of distinctions even if they do not aim at individual businesses or certain sectors of the industry?

Given the respect for national tax sovereignty I regard most of these widespread tax breaks to constitute "general measures" in the afore-mentioned sense. Contrary to the CJEU, selectivity should only be confirmed if the beneficiaries can be singled out for representing a certain branch of the economy or even a single business entity. This seems to be more in line with the underlying competition law

[83] Supra (note 28).

framework of state aid control. We should not try to transform state aid control in the field of taxation into a wide-reaching anti-discrimination prohibition streamlining national legislation.

There are three recent cases which clearly address this problem as the tax benefits in question are not related to the economic activity of a firm and rather refer to its corporate structure. These are the Spanish cases "Banco Santander" and "Autogrill España" and the Austrian "Finanzamt Linz" case.

In "Banco Santander" and "Autogrill España", two corporate taxpayers based in Spain acquired shares in foreign companies and made use of the option under Spanish tax law to fully write-off the acquisition cost in the first year.[84] This option does not exist when a Spanish company acquires shares in a local company. It is fair to say that this provision supports Spanish enterprises to extend their activities cross border. But does it constitute a selective advantage or is it simply a feature of the domestic tax system? In its 2014 judgments, the General Court held that the full amortization of acquisition cost does not fall under Art. 107 par. 1 TFEU. While this rule clearly constitutes a derogation from the normal tax regime (and thus an "advantage") it is not available only to "certain enterprises" or "certain branches of activity".[85] It is rather addressed at covering a certain "category of economic transactions".[86] The Court of Justice has not yet decided on the appeal. It will have to draw a fine line between selective advantages (e.g. tax benefits for export-oriented businesses) and general measures.

In "Finanzamt Linz" the Federal Administrative Court in Vienna referred to the CJEU some questions concerning just the opposite legal situation. Under the provisions governing group taxation in Austria, a partial write-off on the good will of acquired companies is only available in case of the acquisition of shares in a local business entity. In principle such a benefit which is restricted to domestic investment is subject to scrutiny under the fundamental freedoms, in particular the freedom of establishment under Art. 49 TFEU. But the referring court also wanted to learn from the CJEU whether such distinction between local and foreign shareholdings amounts to prohibited state aid under Art. 107 par. 1 TFEU. In her pleadings, Advocate General Kokott has devoted an extensive analysis to this situation.[87] While she acknowledges that the Court has practiced a wide concept of selectivity on many occasions she supports the view that the mere distinction

[84]In the related cases "Banco Bilbao and Telefónica" C-571/13 P and C-588/13 P, order of 15th January 2015, the General Court did not adjudicate on the merits as the claimants had no standing.

[85]Case T-399/11 (Banco Santander) judgment of 7th November 2014, para 38–87; Case T-219/10 (Autogrill Espana) judgment of 7th November 2014, para 29–83; Temple Lang (2015), pp. 763–768.

[86]Case T-399/11 (Banco Santander) judgment of 7th November 2014, para 57; Case T-219/10 (Autogrill Espana) judgment of 7th November 2014, para 53; the narrow view taken by the General Court has been rejected by AG Wathelet in his recently published opinion (Joined Cases C-20/15 P and C-21/15 P (World Duty Free Groupo et al.) opinion of 28th July 2016, para 72 et seq.

[87]AG Kokott, Case C-66/14 (Finanzamt Linz) opinion of 16th April 2015, para 111 et seq.

between foreign and domestic shareholdings is not sufficient to fulfil the requirement of benefiting "certain enterprises" or "certain branches of activity". She pleads for a restrictive interpretation of the notion of "selectivity" which is in line with the protection of national sovereignty in tax matters. It was only for procedural reasons that the Court did not address this issue in the final judgment delivered in October 2015.[88]

Another element which showed up in these cases was the constraint as to the legal form of a business. The special elections awarded for the write-off of acquisition costs were only available to corporate taxpayers. This holds true for many features of national tax laws which distinguish between corporations and non-incorporated business in the context of individual income taxation (sole proprietors and partnerships) and corporate income taxation.[89] Does it make sense to bring in Art. 107 par. 1 TFEU if a state lowers the corporate tax rate but not the individual income tax rate? In its Draft Notice on the notion of State aid, the Commission considers "all undertakings having an income (. . .) to be in a similar legal and factual situation".[90] In "Paint Graphos" the CJEU explicitly stated that a special corporate tax benefit awarded to cooperative societies might be justified in the light of the nature of the corporate tax system as cooperative societies are required to distribute their income to the members.[91] Taking a closer look one has to distinguish between benefits which come with a legal form as such (no selectivity) and benefits which are awarded to a particular legal form which itself is materially related to a certain sector of the economy.

6.3 Justification Under the Relevant Tax System

One of the recurrent features of the jurisprudence of the Court in the area of fiscal aids concerns the possible justification of selective tax benefits. In many judgments the Court has stated that selectivity of a tax measure only confirms *prima facie* the existence of forbidden state aid.[92] The Member State in question is invited to show that the selective tax measure is fully in line with the underlying rationale of the tax system itself. Insofar one has to distinguish between selective measures, which introduce non-tax policy purposes into the tax system, and those selective

[88]Case C-66/14 (Finanzamt Linz) judgment of 6th October 2015, para 16 et seq.

[89]AG Kokott, Case C-66/14 (Finanzamt Linz) opinion of 16th April 2015, para 92.

[90]European Commission (2016), para 135, Fn. 195.

[91]Case C-78/08 – 80/08 (Paint Graphos) judgment of 8th September 2011, para 54 et seq.; Tomat (2012), p. 462.

[92]Case C-452/10 P (BNP Paribas) judgment of 21st June 2012, para 101 et seq., para 120 et seq.; case C-279/08 P (Commission vs. Netherlands) judgment of 8th November 2011, para 62; European Commission (2016), at para 128.

measures, which are meant to implement the tax system and its purpose for a specific group of taxpayers.[93] Cases in point are special accounting rules for the corporate income tax levied in the insurance or banking business. While on their face they create a special tax regime for certain sectors of the economy, their true purpose is to measure the profits and losses of these businesses in a fashion that is in line with the underlying principles of corporate income taxation, i.e. measuring the ability to pay of the company.

A confusing feature of this analysis lies in the fact that the European Commission separates two issues from each other: at the first level one has to ask whether two taxpayers are—in the light of the intrinsic purpose of the relevant tax system—in a comparable situation. If they are in a comparable situation, equal tax consequences should follow. At the second level one has to ask whether any derogation in favour of one of the involved taxpayers can be justified by "intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system".[94] This distinction is not easy to digest and basically superfluous[95] but it might carry some heuristic value: If your income is lower than the income derived by your neighbour, you are not in a comparable situation in the first place. If your income is equal to what your neighbour earns you should be obliged to pay the same amount of income tax unless there are some very special policy reasons for a tax reduction like the avoidance of double taxation (for granting a foreign tax credit or exemption) or administrative manageability (for applying a reduced flat rate to your income).[96] But one thing should be clear: the "justification" for a selective measure must not be derived from non-tax policies taken by the national legislator.[97]

6.4 "De-Facto-Selectivity" and "Indirect Selectivity"

Lines become blurred even more once we introduce concepts like "de facto selectivity"[98] or "indirect selectivity".[99] In the first case a tax provision which—taken at face value—does not grant a benefit towards a certain enterprise or a certain branch of activity factually does so as the requirements set to enjoy this benefit only can be fulfilled in practice by certain enterprises or sectors of the economy. Insofar one has to make an educated judgment about the practical effects:

[93]European Commission (2016), at para 135; skeptical Moscoso del Prado and Arranz (2013), p. 401 at 403 et seq.

[94]European Commission (2016), at para 138.

[95]Biondi (2013), p. 1736.

[96]Temple Lang (2015), pp. 765 et seq.

[97]Quigley (2015), pp. 119–123.

[98]European Commission (2016), at para 122.

[99]European Commission (2016), at para 115–116.