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Selectivity in European State Aid?

– A comprehensive review of the selectivity criterion applied to tax measures

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To my family.

Contents

Summary

Economic differences between countries and undertakings on a worldwide scale creates necessities for regulation on the granting of subsidies or State aid at the international level. In its absence, countries would be able to grant benefits to products and circumventing competition with unfairly displacement of goods that would have needed the same subsidies to have a decent chance at competing. This would contribute to an increased gap between the countries with more economic power and the countries with less economic power. Thus, an unstable world policy could, as a result, emerge.[1]

The founding Member States of the EEC Treaty agreed on a common definition of the terminology around 'state aid' including the criteria which encompasses State aid; the elements of an advantage, selectivity, affection on trade, distortion of competition and originating from the State.[2]

Article 107(1) TFEU prohibits any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, insofar as it affects trade between Member States.

As have been previously mentioned, for a measure to constitute a State aid measure: four different cumulative criterion has to be met.[3] However, when it comes to fiscal State aid, one can easily understand that the Commission can prove most of the criteria easily; National tax measures are set out by the Member State; underpayment of tax will create a downfall which will give an advantage; this advantage will possibly threaten to distort competition;

[1] Luengo, G. p. 3-4.
[2] Hofmann, H & Micheau, C. p. 20.
[3] Article 107 (1) TFEU; see also Commission notice *on the application of the State aid rules to measures relating to direct business taxation*, (C/1998/384/03), paras 8-12.

and, if the distortion is substantial enough, can have an effect on trade between Member States.[4]

The selectivity criterion is, one of the most defining criteria for State aid.[5] The criterion additionally raises complex questions to the fiscal measures since there is no community-level harmonisation of the tax provisions of the Member States.[6] In addition to this, multinational companies pay taxes in different jurisdictions which have different tax rates. Therefore, the assessment of the compatibility within article 107 (1) TFEU must be done through the consistency of the national tax system of the State conferring the aid.[7]

The Member States tax authorities may give companies specific rulings relevant to their business models to clarify how the undertaking will be taxable under certain circumstances. While such tax rulings are legal in general, they may violate State aid rules if they use methodologies to establish transfer prices with no economic justification that depart from the arm's length principle and which unduly shift profit to reduce the taxes they pay.

However, bearing in mind, that State aids traditionally have been tied to the State's sovereignty, the regulation of State aid law is a delicate matter.[8]There is no surprising emotion, that the area at hand awakes rather large concerns from undertakings relying on a State's fiscal autonomy.

[4] Andrews, Philip & Ryan, Michael. *The Apple Case, august, 2016.* McCann FitzGerald. [Online] Available at: http://www.mccannfitzgerald.com/McfgFiles/knowledge/7300-The%20Apple%20Case_1.pdf [Accessed 11 April. 2017].
[5] C-200/97 *Ecotrade,* EU:C:1998:579, para 40; see also the opinion from the AG Fennelly on the same judgment C-200/97 *Ecotrade,* EU:C:1998:378, para 25; C-217/03 *Belgium and Forum 187 v Commission,* ECLI:EU:C:2006:416, para 119; C-295/97 *Rinaldo Piaggio,* EU:C:1999:313, para 39; and C-172/03 *Heiser,* EU:C:2005:130, para 40.
[6] T-308/00 *Salzgitter,* EU:T:2004:199, para 81, furthermore; C-408/04 P *Salzgitter,* EU:C:2008:236. - The judgment was appealed and referred to the GC, although for other reasons not of importance.
[7] Hofmann, H & Micheau, C. p. 133.
[8] Luengo, G. p. 4.

This thesis reviews the legal, historical and modern scope of State aid applied to tax measures, especially when addressing the derogation method and the criterion of selectivity. It analyses the recent case-law and ends up in the conclusion of an area somewhat more transparent although with a remaining existing blur on matters relating to selectivity in tax measures especially when applying the derogation method in tax measures.

Sammanfattning

Ekonomiska diskrepanser mellan länder och företag globalt skapar krav och behov för reglering av beviljande av bidrag eller statligt stöd på internationell nivå. I dess frånvaro skulle länder kunna ge vinster till produkter och kringgå konkurrens med otillbörlig förskjutning av varor som skulle ha behövt samma subventioner för att ha en ärbar chans att konkurrera med. Detta skulle bidra till ett ökat gap mellan medlemsstater med mer ekonomisk makt och de med mindre ekonomisk makt. Således, hade det gett bränsle åt en tillsynes instabil världspolitik att emanera ifrån.

De grundande medlemsstaterna i EEG-fördraget kom överens om en gemensam definition av begreppet "statligt stöd", inklusive de kriterier som omfattar statligt stöd. Elementen av en fördel, selektivitet, påverkan på handeln, snedvridning av konkurrensen och härrörande från staten.

Artikel 107 (1) i TFEU-fördraget finner att något stöd som beviljas av en medlemsstat eller genom statliga medel, i vilken form som helst, som vanställer eller hotar att snedvrida konkurrensen genom att gynna vissa företag eller produktionen av vissa varor, i den mån det påverkar handeln mellan medlemsstaterna - är otillbörlig.

Som tidigare nämnts måste en åtgärd för att kunna utgöra en statligt stödåtgärd, i EU:s mening, innehålla fyra olika kumulativa kriterier som måste vara uppfyllda.

När det gäller statligt statsstöd i form av skatteåtgärder kan man dock lätt förstå att kommissionen enkelt kan bevisa de flesta kriterierna. Nationella skatteåtgärder fastställs av medlemsstaten. Underbetalning av skatt kommer att skapa en nedgång som kommer att ge en fördel för någon annan (selektivitet). Denna fördel kan eventuellt hota att snedvrida konkurrensen

och om förvrängningen är tillräckligt stor kan den påverka handeln mellan medlemsstaterna.

Selektivitetskriteriet är ett av de mest definierande kriterierna för statligt stöd. Kriteriet ställer komplexa frågeställningar eftersom det inte finns någon harmonisering på gemenskapsnivå av medlemsstaternas skattebestämmelser. Lägg till omständigheten att multinationella företag betalar skatter i olika jurisdiktioner som har olika skattesatser och resultatet av ett svårligen komplext rättsområde tar vid. Således måste bedömningen av förenligheten i artikel 107 (1) i TFEU-fördraget ske genom att det statliga skattesystemet i den stat som beviljar stödet överensstämmer.

Medlemsstaternas skattemyndigheter kan ge företagen specifika beslut som är relevanta för deras affärsmodeller för att klargöra hur företaget ska bli skattepliktigt under vissa omständigheter. Medan sådana skattebeslut är lagliga i allmänhet kan de bryta mot reglerna om statligt stöd om de använder metoder för att fastställa överföringspriser utan ekonomisk motivering som avviker från armlängdsprincipen och som otillbörligt ändrar vinsten för att minska de skatter som de betalar.

Men med tanke på att skatteåtgärder traditionellt har knutits till statens suveränitet är regleringen av statligt stöd en känslig fråga. Det finns inga överraskande känslor att det aktuella området väcker ganska stora farhågor från företag som åberopar en medlemsstats fiskala autonomi.

Denna avhandling granskar det rättsliga, historiska och sedermera moderna utvecklade omfattningen av statligt stöd som tillämpas på skatteåtgärder inom EU, särskilt när man tar itu med undantagsmetoden och kriteriet för selektivitet. Den analyserar den senaste tidens rättspraxis och kommer fram till slutsatsen att transparensen inom rättsområdet inte är lika klart genomsyrat ur ett rättsdogmatiskt perspektiv. Det visar på ett väl genomarbetat område i konstant förändring med ett visst diffust

ställningstagande i frågor som rör selektivitet i skatteåtgärder, särskilt vid tillämpning av undantagsmetoden vid skatteåtgärder.

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To my supervisor, Justin Pierce for his acknowledgement and understanding of my more “practical” rather than “theoretical” approach towards my legal studies. He has been one of the most influential persons I’ve stumbled upon during my academics. Some people just have the ability to inspire in ways they probably themselves wouldn’t imagine.

Lastly but not least I want to thank everyone who has supported me during my continuous journey towards the end. It’s truly remarkable how fast time flies by… - And that’s a good thing!

Non, je ne regrette rien, c’est la vie en rose!

Abbreviations

AG	Advocate General
APA	Advanced Pricing Arrangements
ALP	Arm's Length Principle
CJEU	Court of Justice of the European Union
COM	The European Commission
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EC	European Commission
EU	European Union
GATT	General Agreement on Tariffs and Trade
GC	General Court
NCA	National Competition Authorities
OECD	Organisation for Economic Cooperation and Development
SAAP	State Aid Action Plan
SAM	State Aid Modernisation Plan
SCM	Agreement on Subsidies and Countervailing Measures
TEU	Treaty on the European Union
TFEU	Treaty of the Functioning of the European Union
Union	The European Union
WTO	World Trade Organisation

1 Introduction

State aids - a global welfare tool

One of the most related consequences of globalization is the growing economic *interdependence* among countries. As a matter of fact, one of the main characteristics of the 21st century when it comes to describing the world is - interdependence. [9]

Economic differences between countries on a worldwide scale creates necessities for regulation on the granting of subsidies or State aid at the international level. In its absence, countries would be able to grant benefits to products and circumventing competition with unfairly displacement of goods that would have needed the same subsidies to have a decent chance at competing. This would contribute to an increased gap between the countries with more economic power and the countries with less economic power. Thus, an unstable world policy could emerge.[10]

The use of subsidies, could correct market failures and achieve objectives, such as social goals, that the market could not achieve on its own. Hence, the use of subsidies would enhance global welfare and is therefore a great set of tools - if used properly. However, bearing in mind, that State aids traditionally have been tied to the State's sovereignty, the regulation of State aid law is a delicate matter.[11]

The European Commission has been the pot stirrer in the interrelationship between national fiscal autonomy, larger multinational companies and the EU's State aid rules. And when the Commission released its press release on

[9] Jackson, J. Davey, W. and Sykes Jr, A. p. 1.
[10] Luengo, G. p. 3-4.
[11] Ibid. p. 4.

the 11 June 2014 stating that: *"The Commission investigates transfer pricing arrangements on corporate taxation of Apple (Ireland), Starbucks (Netherlands,) Fiat Finance and Trade (Luxembourg)"* the Commission initiated the contentious fiscal aid investigation that would lead to the largest fine in history of State aid; €13 billion, plus interest for Apple as it was announced in late august 2016.[12]

The European Commission concluded that two tax rulings issued by Ireland to Apple did substantially and artificially lowered the tax paid by Apple in Ireland since 1991. Tax rulings have developed globally as a consequence of a change in mentality from tax authorities, an aspiration for a higher degree of tax compliance and securer economic investments from multinational corporations and tax filers, as a consequence of pursuit of legal certainty. Tax rulings are one of the instruments towards a more reciprocal relationship between the tax authorities and the taxpayer.[13]

The rulings endorsed a way to establish the taxable profits for two Irish incorporated companies of the Apple group: Apple Sales International (ASI) and Apple Operations Europe (AOE). The Commission described that the companies: [14]

"*did not correspond to economic reality: almost all sales profits recorded by the two companies were internally attributed to a "head office".... and were not subject to tax in any country under specific provisions of the Irish tax law, which are no longer in force*. (cit.) [15]

[12] Press Statement by the European Commission, State aid: *Ireland gave illegal tax benefits to Apple worth up to €13 billion*, (2016). Hereinafter referred to as the "*Apple case*".
[13] Van De Welde, Elly, *'Tax rulings' in the EU Member States – Study for ECON Committee, august, 2015*. Directorate-General for Internal Policies, European parliament. [Online] Available at: http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563447/IPOL_IDA(2015)563447_EN.pdf [Accessed 11 April. 2017].
[14] Press Statement by the European Commission, State aid: *Ireland gave illegal tax benefits to Apple worth up to €13 billion*, (2016).
[15] Ibid.

As a result, the tax rulings endorsed an allocation which in turn resulted in that Apple only paid an effective corporate tax rate that declined from 1% in 2003 to 0.005% in 2014 on the profits of Apple Sales International.[16]

Since, the CJEU[17] has held that, as a matter of principle, illegal State aids should be repaid as a logical consequence upon finding that the aids were unlawful.[18] The remuneration applies for a ten-year period preceding the Commission's initial request for information, making the recoveries too large to be disregarded by the the larger multinational corporations.

Joaquín Almunia the Commission Vice President in charge of competition policy said in the first press release[19] that:

"In the current context of tight public budgets, it is particularly important that large multinationals pay their fair share of taxes. Under the EU's State aid rules, national authorities cannot take measures allowing certain companies to pay less tax than they should if the tax rules of the Member State were applied in a fair and non-discriminatory way."(cit.).[20]

But what is the framework of European State aid, and how and can it apply to national tax regulations that normally would be perceived as to fall within the Member States national fiscal autonomy? Furthermore, how can a tax measure be classified as selective and then is it a natural part of a general tax system?

[16] Press Statement by the European Commission, State aid: *Ireland gave illegal tax benefits to Apple worth up to €13 billion*, (2016).
[17] The Court of Justice of the European Union.
[18] See i.e. C-70/72 *Commission of the European Communities v Federal Republic of Germany*, EU:C:1973:87, para 13; C-310/85 *Deufil GmbH & Co KG v Commission*, EU:C:1987:96*;* and C-277/00 *Germany v Commission*, EU:C:2004:238.
[19] Press Statement by the European Commission, State aid: *Commission investigates transfer pricing arrangements on corporate taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg)*, (2014).
[20] Ibid.

Purpose

This thesis aims to describe what *de lege lata* of European State aid is and its development within the European legal framework to become a usable tool against unfair State-enforced endorsements to certain undertakings.

The primary aim is to identify how Article 107 TFEU applies to tax measures, particularly in regards to the selectivity criterion. More exactly, the thesis aims to examine the application of the derogation method and the selectivity criterion and their relation. They are in my view, one of the most complex issues in the field of fiscal State aid. The partially secondary aim of the thesis is to present alternative reasoning's for the reader to explore the application to tax measures as *de lege feranda*.

In the newly cast spotlight the *Apple case* highlights the area of European State aid and national fiscal autonomy. The objective is to provide you as a reader a further understanding of the interrelationship between State aid rules and tax regulation and how the European State aid rules have a rather great effect and impact on the seemingly reserved right to the fiscal autonomy of the Member States.

Methodology & Materials

This thesis will adopt the legal dogmatic method with influence of the historical method. The legal dogmatic method will be mainly used for analysing the legislation and related cases on from the EU treaties, regulations and directives, case law from the CJEU, the decisions of the Commission, press release on these decisions, guidelines released by Union bodies, and study papers and reports released by the Commission. This is

used to examine *de lege lata*. Initially the scope will seemingly be wide, especially during the sections regarding to the evolution of European State aid rules, however this is necessary for the reader to then narrowly approach the question of how European State aid applies to tax measures, and specifically what kind of measures.

It must be, additionally, noted that EU State aid rules are of great political interest, which creates a potential influence threat to the legal decision-making. Nonetheless, this thesis aims to follow a legal analysis.

Furthermore, by the utilisation of a descriptive legal dogmatic approach the thesis will provide the reader with the background information needed to understand this specific area within the legal framework within the European Union.

The historical method will be used to illustrate the development of CJEU and the European Commission's developed attitudes and objectives on State aid law since the beginning of the Union to now. The method will be used in a descriptive and illustrative way to present the reader about the shifting landscape of State aid rules and its objectives.

The material aim is to provide a solid base of up to date literature mixed with a wide span of case law from both the CJEU but also the Court of First Instance. As the reader will acknowledge, the area of State aid is an everchanging legal entity with reformation, codification and a lot of guidelines. Therefore, I have included all the previously mentioned in addition to the decisions of the Commission, press release on these decisions, guidelines released by Union bodies, and study papers and reports released by the Commission. This documents in are in bibliographical sense described of the thesis referred as *Commission Policy Framework* others may find the definition of '*soft-law'* as more appropriate. However, for the purpose of clarity and the discrepancies that to a certain extent exists by the

Courts and the Commission under circumstantial aspects, I personally find the definition as framework more suitable for the purposes of this thesis.

There are also some semi-new published articles included in the Bibliography, which provide both a practitioner's approach as well as an emphasis on the overall public interest in European State aid law. The articles mainly relate and give emphasis to the Apple case which is one of the reasons they are included.

Disposition

The disposition of this thesis will be divided into chapters and sections. The Chapters will cover an overall area of interest and are very widely presented for the classification of subjects. The sections followed by sub-sections on the other hand, will be more informative in regards to specific subjects that fall within the chapter. Of course, the more sub-sections in the more narrowly the scope of information will be. I will below describe the different chapters with highlighted sections of interest.

In chapter 2 'State Aid Law' the reader receives an overview of information with regards to EU State aid. The Chapter is divided into three main parts (*General Objectives of State aid, State aid in the history of the European Union and The Legal Framework*) where the two latter will go more into detail. The first part, *General Objectives of State aid*, will briefly discuss the incentives for State aid law.

Secondly comes the *State aid in the history of the European Union* section. Here I will discuss the history, development and present *de lege lata* of European State aid. Within this section there will be an analogical timeframe from the birth of EU State aid to its present, this will be discussed in sections 2.1.1-2.1.4.

Lastly, I will in the section, *The Legal Framework*, discuss what the present legal frameworks scope is (section 2.1.5.) and how Article 107 (1) TFEU is applied in general including the different conditions that apply therein section (2.1.6).

In chapter 3 'Selectivity in Tax Measures' the reader is introduced to the concept of State aid through tax measures. As the reader, will understand, the area has is largely complex and to somewhat context controversial (this is further developed in chapter 4. Nonetheless, the reader is aimed to acknowledge the importance of the 'when' and 'how' of the selectivity criterion in tax measures. Therefore, in sections 3.1.1.-3.1.2 the view on tax measures in relation to selectivity, albeit its already narrowly kept legal areas will be presented generally.

Furthermore, in chapter 3, the thesis casts light on the abovementioned derogation method. Here, midways, the thesis reaches its epicenter as to the conditions that have echoed the halls of the CJEU from undertakings' commotion of legal disparity. The derogation method and its circumstantial criteria is explained in detail, in sections 3.1.2.1.-3.1.2.1.4.

Moreover, in section 3.1.3 the reader is given the somewhat result and response from tax authorities around the different Member States to combat legal uncertainty and provide counsel within the area. A part of this counsel is in the form of advanced pricing agreements which will initially introduced in the first section (3.1.3). This is followed by the arm's length principle and will hopefully enforce the critical thought of the reader to see all perspectives of State aid affecting national fiscal autonomy. This is further examined in the last part, albeit obviously, as the title entails describing the Commission's view on tax rulings and State aid.

Upon reaching chapter 4, the thesis has been structured to function as a balanced, somewhat, discrepant legal area for the purpose of having an unbiased reader towards the analysis. In this chapter I will analyse the recent

case-law and see if it's in line with any parties' view. Here I will develop more of the secondary aim of the thesis to hopefully provide insight to *de lege ferenda* within the relationship of selectivity and tax measures. This is shown in the personal remarks section (4.1.5) where I give a more personal view on the

The analysis part is followed up by chapter 5, that entails a brief conclusion of remarks to the findings of the thesis. Lastly but not least the bibliography is found containing the bibliographical references for all the footnotes contained of the thesis therein.

Delimitations

Given the broad context of European State aid I have in this thesis made several delimitations which I will present, in general, below:

No comparative analysis with other legal regulations outside the Union

This thesis partially aims to give the reader a better understanding of European State aid law, its history and present. There is however, no comparison or comparative analysis with other governing State aid rules across the globe. It must therefore be taken into account that other regulatory systems such as the General Agreement on Tariffs and Trade[21] and the Agreement on Subsidies and Countervailing Measures[22] of the World Trade Organization[23] is not discussed but merely mentioned in the thesis.

Notion of Undertaking

[21] General Agreement on Tariffs and Trade hereinafter referred GATT.
[22] Agreement on Subsidies and Countervailing Measures hereinafter referred SCM.
[23] World Trade Organization hereinafter referred WTO.

The definition of an undertaking in the European legal context is not further discussed. The thesis is directed to people with a solid base of knowledge of EU legislation, thus certain definitions such as abovementioned have been disregarded. The thesis however, emphasises on legal statuses of undertakings when addressing the criterion of State origin (section 2.1.6.2.) as well as describing the selectivity criterion (section 2.1.6.4.). Furthermore, the notion of undertakings as economic operators in the context of the derogation method is, however, discussed upon as well.

Focus on Article 107 (1) TFEU and the Selectivity Criterion and how it applies to tax measures

Despite the wide notion of interest that emerges when citing the famous wording of Article 107(1), this thesis primarily aims to discuss in depth with regards to the criterion of Selectivity and its application in tax measures more specifically in tax rulings.

Procedure and recovery

Since, the CJEU has held that, as a matter of principle, illegal State aids should be repaid as a logical consequence upon finding that the aids were unlawful.[24] The remuneration applies for a ten-year period preceding the Commission's initial request for information, making the recoveries too large to be disregarded by the larger multinational corporations. The Articles governing this,108-109 TFEU, will not receive the same amount of emphasis, and are thus merely discussed upon. Nor will the procedural rules in relation to Article 107 TFEU be discussed. It is important however to understand the concept and moreover I further advise to read upon legal certainty in relation to the recoveries, which I believe will give a better insight, as to the importance, for State aid.

[24] See i.e. C-310/85 *Deufil GmbH & Co KG v Commission*, EU:C:1987:96*;* and C-277/00 *Germany v Commission*, EU:C:2004:238.

2 State Aid Law

General objectives for State aid

The modern European economies rely heavily on markets and undertakings to decide what markets to expand into, what goods to sell and what R&D to undertake etc... The underlying fundamental principle to ensure that the clockwork keeps on ticking is free competition based on equal and non-discriminatory treatment of every undertaking will ensure optimal economic efficiency.[25]

Hence, an uneven treatment towards certain undertakings in the form of State measures providing aid might level the playing field and may result in a distortion in competition. Exercising effective State aid control is, by no means, an easy task considering the size of the EU Internal Market and the differences both economically and socially between the Member States.[26]

From a broad perspective, States give aid to achieve certain political objectives, policies or goals. For example, the State might be interested in maintaining certain industries in a region as it brings regional welfare, creates work opportunities for underrepresented members of the workforce and preserves economic development in that area.[27]

Economists are persuaded by the quotation of the first and second welfare theorems, that State aid, with regards to certain circumstances, market

[25] This principle is based on the belief that competitive markets are acting on an important role for liberty. Yergin, D & S, J. p.16-17.
[26] Pesaresi, N & Van Hoof, M. p. 4.
[27] Hofmann, H & Micheau, C. p. 3.

allocations will achieve static efficiency: no one can be better off without someone being worse off as a result.[28]

By subsidising the industry or geographical area the State can attain policy goals without the utilisation of more traditional means of public law and control structures.[29]

State Aid in the history of the EU

In this section I will provide the reader a general descriptive history of European State aid and its objectives from its origins to its present role. From its commencement built up like the Fenix from the aftermath of World War II to the Modernisation of a structured complex area of European law.

2.1.1 The Treaty of Paris and the European Coal and Steel Community

The evolution of European State aids began with the Treaty of Paris in 1951, which gave rise to the ECSC[30]. The objective at that time was to maintain post-war peace and reconcile two political powers, Germany and France. In an era marked by the restructuring of Europe, the most common aid was subjected to objectives within Research and Development.[31]

Some years later, the Member States of the ECSC crated the EEC[32]. The EEC Treaty dealt with more general matters than the other treaties at the time (ECSC Treaty and the EAEC Treaty). One of the objectives set out by

[28] Friederiszick, HW, Röller, L-H, Verouden, V. p. 632.
[29] OECD, Directorate for financial, fiscal and enterprise affairs committee on competition law and policy, *Competition Policy in Subsidies and State Aid.* p. 7-10.
[30] The European Coal and Steel Community.
[31] Luengo, G. p. 292.
[32] The European Economic Community.

the EEC Treaty was to integrate markets and encourage competition. Hence, the regulation of State aid was more detailed in the EEC Treaty, and were originally contained in Articles 92-94.[33]

The founding Member States agreed on a common definition of the terminology around 'State aid' including the criteria which encompasses State aid; the elements of an advantage, selectivity, affection on trade, distortion of competition and originating from the State.[34] Albeit, the Commission's actions at the time to apply the regulation, mainly consisted in the form of the establishment of Commission Decisions, communications and guidelines for the Member States giving State aids.[35]

2.1.2 Evolution on State aid, post the EEC Treaty

Despite the fact, that State aids formed a part of the EEC Treaty the provisions had a rather unobtrusive role due to the abovementioned fact of the Commission's actions. Not until the 1970s and 1980s the control of State aids gained more importance since the attempts of creating a 'real' internal market. Many measures were hereinafter established, amongst them the adoption of the Single European Act in 1985. During this time the Commission relied heavily on private parties' complaints in order to exercise its powers. The so called *soft law or Commission Policy Framework* issued during the 1970s and forward constituted for a long time the main tools for the regulation.[36] Thus, the Commission started focusing more on State aids that distorted competition due to the current objective of a borderless community.[37]

[33] Luengo, G. p. 293.
[34] Hofmann, H & Micheau, C. p. 20.
[35] Luengo, G. p. 294.
[36] Stefan, O. p. 52-53.
[37] Ibid.

One example of the Court and the Commissions new approach is shown in the *Kohlgesetz* case of 1973, were the Court manifests the principle of recovery of illegal aids based on Article 108 (3).[38] It is important to bear in mind that the Treaty does not provide the recovery of unlawful and incompatible aids. Additionally, the CJEU in the abovementioned case established that the Commission was entitled to require the recovery.[39] Even tough, it was not until the early 1980's the Commission adopted its first recovery decision.[40]

At the end of 1980s the Commission launched a new plan for revising its regulation of State aids. Calling for a more transparent and decisive approach due to the fact of an increased amount of received complaints with respect to European State aid.[41]

2.1.3 The Golden Era: The 1990s

The most significant period for development with respect to the regulation in State aids was during the 1990s. Not due to the fact of the introduction of the Maastricht Treaty in 1992 nor the Treaty of Amsterdam in 1997 but rather due to the Commissions actions and increased decisive control of the State aid regulation during the period. Thus, a lot of Commission decisions were delivered during the 1990s.[42]

The Commission published several sets of guidelines for a wide span of different sectors, so that both the Member States and the individuals subjected to aid would be able to examine the compatibility of the aid

[38] C-70/72 *Commission of the European Communities v Federal Republic of Germany*, EU:C:1973:87, para 13.
[39] Hofmann, H & Micheau, C. p. 22.
[40] Commission Decision of 10 March 1982 concerning the aid granted by the Belgian Government to an industrial and commercial group manufacturing wall coverings, 82/312/EEC, Official Journal L138, 19/51982.
[41] Luengo, G. p. 295.
[42] Hofmann, H & Micheau, C. p. 31.

received with the common market. In addition, the Commission established a *de minimis* threshold, where aids below the thresholds were presumed to cause no relevant distortion in competition.[43]

2.1.4 The recent decade: A codification of modernisation

Since, the past two decades the legal framework of State aid in the Union has gone through a review and produced a large amount of texts with the aim of making the legal framework simpler and more understandable as well as transparent in relation to State aid review. A so called 'codification' manifested in the Commissions Practice and the Courts case law.[44]

The Commission saw a concern to scrutinize aid as being one of the key actions for the future of the internal market.[45] Thus the contribution of tax policy to the Community objectives has been closely linked to the development of the Internal market.[46] Two major measures must however be highlighted; The setup of the State Aid Action Plan in 2005.[47] Furthermore, the State Aid Modernisation initiative in 2012.[48]

2.1.4.1 The State Aid Action Plan 2005-2009

The setup of the State Aid Action Plan was not initiated as a result from the aftermath of the financial crisis in 2008 contrary to popular belief. The

[43] Ibid.
[44]Ibid. p. 30.
[45] Steiner, J & Woods, L, p. 728.
[46] See the introduction to in Commission communication of 23 May 2001, *Communication tax policy in the European Union – priorities for the years ahead*. Brussels, 23.5.2001, COM (2001) 260 final.
[47] State Aid Action Plan: *Less and better targeted State aid: a roadmap for State aid reform*, Brussels 2005-2009.
[48] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the committee of the Regions, *EU State Aid Modernisation (SAM)*, COM/2012/0209.

Commission had planned the SAAP and acted on the SAAP long before the crisis.[49] It was in March 2000 Member States of the EU met at the Lisbon summit to discuss the future and development of the EU. The result led to the 'Lisbon Strategy' with the focus to develop growth and employment within the Union. The '*Lisbon Strategy'* marked a new period in the EU filled with modernisation and reform that had effect on all areas within the EU, including the EU State aid regulation.[50]

The Commission sets out its current view about State aid control in the SAAP. The Commission starts off with emphasizing on the importance of competition with regards to the European economy that guarantees raising living conditions and the benefits and promotion of efficient allocation of resources.[51] The objectives set out by the SAAP can be roughly categorized down to three types of groups; better targeted aids, a more economic approach, and lastly a more streamlined process.[52]

2.1.4.2 The State Aid Modernisation Initiative 2012-

Unlike the SAAP, The State Aid Modernisation Initiative shows more influences from the aftermath of the financial crisis.[53] The State Aid Modernization Initiative was a large reform that was, with the support of the European parliament,[54] instigated by Joaquín Almunia the Commission Vice President in charge of competition policy in 2012.[55]

[49] Hancher, Ottervanger and Slot, 2012, p. 3 and 7.
[50] Bacon, K. p. 5.
[51] State Aid Action Plan: *Less and better targeted State aid: a roadmap for State aid reform*, Brussels 2005-2009, paras 5-6.
[52] Hofmann, H & Micheau, C. p. 31.
[53] Ibid. p. 33.
[54] European Parliament, *Resolution of 17 January 2013 on State Aid Modernisation*, 2012/2920(RSP).
[55] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the committee of the Regions, *EU State Aid Modernisation (SAM)*, COM/2012/0209.

The initiative has three main closely linked objectives: The first one refers to foster growth in a strengthened, dynamic and competitive internal market.[56] This objective is particularly important considering the aftermath of the financial crisis as it appears vital to strengthen the public incentives and imposing a better national budgetary discipline.[57]

The second objective refers to the focusing on cases with the biggest impact on the internal market.[58] The Commission expresses a will to review the *de minimis* Regulation but also a prioritisation of measures covering large and potentially distortive aid, including fiscal aid.[59]

The third objective refers to streamlining and faster decision making. The Commission states that:

"*Over time, State aid rules have developed into a complex legal framework. There is scope to clarify and simplify the rules, enhance consistency and streamline the assessment process. There is a need to better explain State aid concepts and to consolidate our horizontal and substantive rules.*" (cit).[60]

It is too early to assess the latest reform process, although the commission has emphasised the importance of transparency as one of the key components of modernization. [61]

[56] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the committee of the Regions, *EU State Aid Modernisation (SAM)*, COM/2012/0209, para 2.1.
[57] Ibid, paras 3, 5.
[58] Ibid, para 2.2.
[59] Ibid, para. 19.
[60] Ibid, para 22.
[61] Communication from the Commission, *Amending the Communication from the Commission on EU guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks, on Guidelines on regional State aid for 2014-2020, on State aid for films and other audio-visual works, on Guidelines on State aid to promote risk finance investments and on Guidelines on State aid to airports and airlines*. COM 2014/3349/2. p. 3.

2.1.5 Remarks

Different opinions exist on what forces shaped European competition policy and the more decisive regulation of State aids, one of the opinions are that the ECJ at the time adopted a consistent and powerful competition doctrine set forth by two principal objectives: economic integration and the protection of competition 'as such', in other words – the Union had the task to ensure that the common market was not distorted.[62]

As in most legal frameworks, the legal framework of European State aid has gone through several changes, reforms and reviews. There is still a margin of uncertainty however, State aid rules have, according to the doctrine, a distinctive feature in comparison to other areas of competition law and that is that there is a necessity for constant change and development.[63]

Bearing in mind of the historical aspects of European State aid law, what is proven is that the area is truly an ever-changing legal spine, unlike other competition law areas, where the Commissions policy framework brings flesh to the Court's bones. One thing can be said for certain: and that is that both the Court and the Commission has served in pioneering roles in adjusting, designing and developing rule-makers.[64]

The Legal Framework

The first case[65] where the concept of State Aid was mentioned was when the European Court of Justice stated that "*in the sense in which they are normally defined, subsidies or aids granted by the States are incompatible*

[62] Ramírez Pérez, S. M. and Van de Scheur, S. p. 21-23 and 52-53.
[63] Hofmann, H & Micheau, C. p. 35.
[64] Hofmann, H & Micheau, C. p. 23-24.
[65] C-30/59, *De gezamenlijke Steenkolenmijnen in Limburg v High Authority*, EU:C:1961:2.

with the common market because they constitute an obstacle to one of its essential aims".[66] Additionally, the Court ruled that one of the principal tasks for the communities is to "*ensure the establishment, maintenance and observance of normal competitive conditions.*".[67] However, as mentioned earlier EU State aid rules was included in the Treaty of Paris in 1951.[68]

It's evident that the court early on saw a potential competitive discouragement would arise if the Member States would start endorsing national undertakings and that derogations from the general principle must be construed narrowly.[69]

In the following sections I will discuss the legal framework that lies at hand for when addressing EU State aid law.

2.1.6 Scope

The legality or otherwise of State aid granted by EU Member States is regulated by Articles 107-109 TFEU[70] together with a large amount of case law, Commission decisions and guidelines. [71] The provisions confer powers to the Commission and the Council.[72] As mentioned in the *Delimitations* section, this thesis aims towards the legal framework of State aid and focuses mainly on Article 107 (1) TFEU. Thus, for obvious clarifications, I will not discuss Articles 108-109 TFEU in the same extent as to Article 107 TFEU.

The following can be said with regards to the Commissions reformative work in previous sections: Contrary to the popular belief that the

[66] Ibid, para 20.
[67] Ibid, para 20 (3).
[68] See section 2.1.1.1.
[69] see i.e. Case C-156/98 *Germany v Commission*, EU:C:2004:238, para 49, and Case C-334/99 *Germany v Commission*, EU:C:2003:55, para 117.fy

[70] Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C-326/01.

[71] See Articles 107-109 TFEU.
[72] Cf. Article 13(2) TEU.

Commission desire for development in the area was a result of the aftermath of the financial crisis in 2008, the Commission had already plans on reforming the area since 2005, when it setup the State Aid Action Plan.[73] Furthermore, the European Commission adopted a Communication on State Aid Modernisation, setting out an ambitious reform package in 2012. [74]

The reforms aim was that State aid policy should focus on facilitating well-designed aid targeted at market failures and prioritize the focusing on cases with the biggest impact on the internal market together with objectives of common European interest. [75] I ask the reader to bear this in mind when reviewing the following sections, and seek consensus as too why the Court has had the approach it has had throughout the case law when it comes to Article 107 (1) TFEU. [76]

2.1.7 Article 107 (1) TFEU

Article 107(1) TFEU prohibits any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, insofar as it affects trade between Member States. The wording has been unchanged since the Treaty of Rome.[77]

In order for a measure to constitute State aid, the following must be proven:

It's a measure

(i) "*granted by a Member State or through the State's resources*"[78];

[73] Hancher, Ottervanger and Slot, 2012, p. 3 and 7.
[74] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the committee of the Regions, *EU State Aid Modernisation (SAM),* COM/2012/0209.
[75] Ibid. paras 2.1-3.
[76] For more information about the reforms see section 2.1.1.4.
[77] Hofmann, H & Micheau, C. p. 1.
[78] See i.e. C-379/98 *PreussenElektra v Schleswag*, EU:C:2001:160, para 58; C-345/02 *Pearle*, EU:C:2004:448, para 35; and C-303/88 *Italy v Commission* EU:C:1991:136, para 11.

(ii) conferring an advantage (or "aid") that is *selective* (i.e., that favours "*certain undertakings or the production of certain goods*"[79]);

(iii) which "*distorts or threatens to distort competition*"[80]; and

(iv) "*affects trade between Member States*".[81]

These four abovementioned conditions are cumulative; all must be fulfilled before the Member State measure will fall within the scope of Article 107 TFEU.[82] The article itself, doesn't define State aid. The CJEU and Commission has thus, developed a broad view through its case law, decisions and guidelines. Where the raison d'être for the aid are not primarily relevant in the defining of aid, and where substance and not form is the criterion when defining aid.[83]

I will for the sake of understanding Article 107(1) TFEU briefly go through the four different criterions in the following sections below.

2.1.7.1 Objective definition of 'Aid' in the context of Article 107 TFEU

The granting of an aid may take many forms.[84] It includes direct grants, loans, guarantees capital investments and more. No actual transaction is necessary.[85] The concept of aid within Article 107 (1) TFEU is a legal concept which is to be interpreted on the basis of objective factors.[86]

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[79] See i.e. C-143/99 *Adria-Wien Pipeline,* EU:C:2001:598, para 41; C-200/97 *Ecotrade,* EU:C:1998:579, para 40; and C-172/03 *Heiser,* EU:C:2005:130, para 40.
[80] See i.e. C-148/04 *Unicredito,* EU:C:2005:774, para 55; and C-372/97 *Italy v Commission,* EU:C:2004:234, para 44.
[81] C-280/00 *Altmark Trans,* EU:C:2003:415, para 74; and cf. Article 107 (1) TFEU.
[82] Craig, P & De Búrca, G, 2015. p. 1133.
[83] Ibid. See also C-173/73 *Italy v Commission,* EU:C:1974:71; Case C-241/94 *France v Commission,* EU:C:1996:353.
[84] Cf. The wording of Article 107 (1) TFEU '*...In any form whatsoever'.*
[85] C-387/92, *Banco Exterior de Espagna SA v Ayuntamiento de Valencia*. EU:C:1994:100. para. 14.; joined cases C-399/10 P & C-401/10 P *Bouygues and Bouygues Telecom v Commission and Others,* EU:C:2013:175; C-404/97 *Commission v Portugal,* EU:C:1999:530.
[86] T-98/00 *Linde v Commission,* EU:T:2002:248, para 40; T-152/99 *HAMSA v Commission,* EU:T:2002:188, para 159; C-248/84 *Germany v Commission,* EU:C:1987:437, para 17; and C-83/98 P *France v Ladbroke Racing and Commission,* EU:C:2000:248, para 25.

"*The concept of an aid is wider than that of a subsidy because it embraces not only positive benefits, such as subsidies them self, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect*". (cit).[87]

Article 107 (1) TFEU does not distinguish the aids objectives or aims but rather it's effects.[88] Hence, there is no objective of general interest that *per se* would exclude the application of the Article.[89] However, please note that this doesn't contradict the principle that a measure which is excluded from the Article 107(1) due to the fact of its nature or general scheme of the system which then would result in it falling outside the scope of the selectivity criterion.

In the joined cases C-399/10 P & C-201/10 P *Bouygues and Bouygues Telecom v Commission and Others* the CJEU expressed an opposite view from the GC and stated that the GC had wrongly required a close link between the advantage identified and the commitment from the States resources. The CJEU ruled that, according to the case-law, such correspondence was not necessary since a connection may very well be indirect.[90]

Indirect measures may include measures that mitigate burdens normally included in the budget for certain undertakings that result in the equivalent

[87] C-387/92, *Banco Exterior de Espagna SA v Ayuntamiento de Valencia*. EU:C:1994:100, para 13.
[88] C-173/73 *Italy v Commission*, EU:C:1974:71, para 13; C-56/93 *Belgium v Commission*, EU:C:1996:64, para 79; C-310/85 *Deufil GmbH & Co KG v Commission*, EU:C:1987:96, para 8; C-172/03 *Heiser*, EU:C:2005:130, para 46; C-75/97 *Belgium v Commission*, EU:C:1999:311, para 25; and C-241/94 *France v Commission*, EU:C:1996:353 para 20.
[89] Bacon, K. p. 25.
[90] Joined cases C-399/10 P & C-401/10 P *Bouygues and Bouygues Telecom v Commission and Others*, EU:C:2013:175, paras 80, 89 and 99-102.

effect from subsidies.[91] Moreover, a State aid may be granted through various forms of tax measures.[92]

2.1.7.2 The State Origin Criterion

State Aid means that the State favours a selected undertaking compared to others and is prohibited since the principle of equal treatment between private and public undertakings shall apply.[93] The regulation of State aid does not only exist in the EU but also internationally, most known in the General Agreement on Tariffs and Trade[94] and the Agreement on Subsidies and Countervailing Measures[95] of the World Trade Organization[96].[97] I will in the section (2.1.6-2) below disassemble the word and meaning of 'State Aid' in the context of Article 107 TFEU for the readers ability to further understand its context and regulation within the EU.

2.1.7.2.1 Definition of 'State' in the context of Article 107 TFEU

Defining whether a measure emanates from the State or not, is essential for the regulation of Article 107 TFEU. [98] The concept of by the State in the European State Aid Law does not limit its context to only include beneficial treatment from the central governance or highest authority of the Member States.[99]

The definition of State is very broad and may include any body in the public sector which includes both regional and local bodies.[100] Disregarded, their legal status.[101]

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[91] Ibid.
[92] C-173/73 *Italy v Commission*, EU:C:1974:71, para 13.
[93] C-303/88, *Italy v Commission*, EU:C:1991:136, paras 19-20.
[94] General Agreement on Tariffs and Trade hereinafter referred GATT.
[95] Agreement on Subsidies and Countervailing Measures hereinafter referred SCM.
[96] World Trade Organization hereinafter referred WTO.
[97] Hofmann, H & Micheau, C. p. 66.
[98] Further discussed in section 2.3.2.
[99] Hofmann, H & Micheau, C. p. 1.
[100] Bacon, K. p. 26 and T-358/94 *Air France v Commission*, EU:T:1996:194, para. 57.
[101] C-78/76 *Steinike und Weinling v Germany*, EU:C:1997:52, para 21.

What is important is the following questions: *firstly*, is the resource within the public sector?[102] *Secondly*, whether the State is liable, hence, in control to the direct usage of the aid or resource?[103] If both questions are answered positively, the measure is considered in the European State Aid context to fall within the performance of the State.[104]

2.1.7.2.2 The Imputability criterion

It is well established in the case law that a measure is only State aid if it is attributable[105] or imputable[106] to the State. When legislative power is one of the constitutional powers of a State, aid resulting from legislative measures taken has to or at least appear to be imputable to the State.[107] When a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State, even though the authority in question would enjoy legal autonomy from a public authority.[108] Although, this will not be the case if the measure would derive from EU Legislation or the Member State is under an obligation to implement it under Union law.[109] Regardless if the State has a choice to adopt legislation that would not distort competition.[110]

Moreover, the Court has held that funds financed through compulsory charges imposed by the legislation of the Member State, thus dealt with in accordance with that legislation, can fall within the scope of Article 107

[102] C-358/94 *Air France v Commission*, EU:T:1996:194, para. 56.
[103] C-482/99 *France v Commission*, EU:C:2002:294, para. 38.
[104] C-78/76 *Steinike und Weinling v Germany*, EU:C:1997:52, para 21.
[105] See Cases: T-358/94 *Air France v Commission*, EU:T:1996:194, para 61; C-303/88, *Italy v Commission*, EU:C:1991:136, para 11; and the combined Cases 67, 68, and 70/85 *Van der Kooy v Commission*, EU:C:1988:38, para 28.
[106] See Cases: T-358/94 *Air France v Commission*, EU:T:1996:194, para 55; C-482/99 *France v Commission*, EU:C:2002:294, para 24; and the joined Cases C-182/03 & C-217/03 *Belgium and Forum, 187 v Commission*, EU:C:2005:266, para 127.
[107] T-358/94 *Air France v Commission*, EU:T:1996:194, paras 57 and 62.
[108] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 39.
[109] C-460/07 *Sandra Puffer v Unabhängiger Finanzsenat, AuBenstelle Linz*, EU:C:2009:254, para 70, See also Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 44.
[110] T-351/02 *Deutsche Bahn AG v Commission*, EU:T:2006:104, paras 104-106.

TFEU to be classified as State resources, even though they are administered by entities separate from the public authorities.[111]

The Commission has in its notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), given a set of indicators for imputability.[112] Amongst the indicators are the following; Public autonomy;[113] factors of organic nature which link the public undertaking to the State;[114] the undertaking considering directives issued by governmental bodies;[115] the integration of the undertaking in the structures of the public administration;[116]the undertakings activities, for example, when a measure is taken to pursue a public policy goal;[117] the legal status, although, as mentioned before the legal form is not sufficient enough to exclude imputability; [118] the degree of supervision and management of the undertaking by the public authorities;[119] and lastly the scope, contents and conditions of the measure with regards to the likelihood of involvement of the public authorities.[120]

[111] C-379/98 *PreussenElektra*, EU:C:2001:160, paras 57-58; and C-217/03 *Belgium and Forum, 187 v Commission,* EU:C:2005:266, para 128.
[112] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para; 43. See also: C-482/99 *France v Commission,* EU:C:2002:294, paras 55 and 56; additionally the Opinion of the AG Jacobs to the judgment C-482/99 *France v Commission,* EU:C:2001:685, paras 65 and 68.
[113] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 43 (a).
[114] Ibid. (b).
[115] Ibid. (c), see also C-242/13, *Commerz Nederland,* EU:C:2014:2224, para 35.
[116] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 43 (d).
[117] Ibid. (e), see also T-387/11,*Nitrogenmuvek Vegyipari,* EU:T:2013:98, para 63 and T-507/12 *Slovenia v Commission,* EU:T:2016:35, para 86.
[118] Ibid. (f); see also Bacon, K. p. 26; and T-358/94 *Air France v Commission*, EU:T:1996:194, para. 57.
[119] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 43 (g), see also the combined Cases 67, 68, and 70/85 *Van der Kooy v Commission,* EU:C:1988:38, para 36; T-358/94 *Air France v Commission*, EU:T:1996:194, para 57, and C-305/89 *Italy v Commission,* EU:C:1991:142, paras 14-16.
[120] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 43 (h).

2.1.7.3 The Distorion of Competion and its effect on trade

Another condition under Article 107 (1) is that it has to be a measure that "*distorts or threatens to distort competition*"[121]; and "*affects trade between Member States*".[122] These two conditions are often considered together. [123] For practical purposes the Commission states in its notice, *on the notion of State aid as referred to Article 107 (1) TFEU,* that in cases where the State grants a financial advantage to an undertaking in a liberalised sector this is often considered to distort or threaten to distort competition.[124]

2.1.7.3.1 Distortion of Competition

The often characteristically referred test for distortion of competition is whether the aid strengthens the position of the undertaking in relation to its competitors.[125] Furthermore, compare this fact with what has been previously stated in regards to the Economists welfare theorems.[126] Moreover, the Commission does not need to establish the existence of actual competitors on the specific market affected.[127]

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[121] C-148/04 *Unicredito,* EU:C:2005:774, para 55; and C-372/97 *Italy v Commission,* EU:C:2004:234, para 44.
[122] C-280/00 *Altmark Trans*, EU:C:2003:415, para 74; cf. Article 107 (1) TFEU.
[123] See Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU,* (C/2016/2946), para 186; T-288/97 *Regione Friuli Venezia Giulia v Commission,* EU:T:2001:115, para 41; and joined Cases T-298/97, 312-3/97, 315/97, 600-7/97, 1/98, 3-6/98, and 23/98 *Alzetta Mauro v Commission,* EU:T:2000:151, para 81.
[124] See C-730/79 *Philip Morris Holland BV v Commission,* EU:C:1980:209, para 11; Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU,* (C/2016/2946), para 271; joined Cases T-298/97, 312-3/97, 315/97, 600-7/97, 1/98, 3-6/98, and 23/98 *Alzetta Mauro v Commission,* EU:T:2000:151, and C-280/00 *Altmark Trans,* EU:C:2003:415.
[125] C-730/79 *Philip Morris Holland BV v Commission,* EU:C:1980:209, para 11; and C-148/04 *Unicredito,* EU:C:2005:774, para 56.
[126] Friederiszick, HW, Röller, L-H, Verouden, V. p. 632; see also the section *'General Objectives'.*
[127] See for ex. the Opinion of the AG Darmon to the joined Cases C-72/91 and 73/91 *Firma Sloman Neptun Schifffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG, EU:C:1992:130, para 61.*

2.1.7.3.2 Affecting intra-Member States' trade

When addressing the condition of the measure considered to be an encumbrance for intra-Member States' trade, the amount or size of the beneficiary are irrelevant.[128] Since, a very low amount might still potentially affect the competition in areas where the competition is very high.[129]

In the famous case *Heiser*[130] the CJEU ruled that despite the low amounts of aid to medical practitioners in Austria, it was 'not inconceivable' that the practitioners would be in competition with those established in another Member State.[131]

It might be hard to see, given the abovementioned facts and wide scope the Commission has set out for measures to fall within the inter-State trade, how a measure would exist exemptions of the general rule that is having a potential affect on inter-State trade. However, there is some exceptions to the general rule. In the case *Italy and Sardegna Lines v Commission*, the Court ruled that the Commission had failed to take into account that the subjected market at the time had not been liberalised.[132] A similar decision was adopted by the Commission later on.[133] However, there are limited situations when an undertaking will be able to claim the absence of effect in intra-Member States' trade.

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[128] C-280/00 *Altmark Trans*, EU:C:2003:415, para 81; C-351/98 *Spain v Commission*, EU:C:2002:530, para 67; and T-55/99 *Confederación Española de Transporte de Mercancías v Commission*, EU:T:2000:223, paras 89 & 94.
[129] C-303/88, *Italy v Commission*, EU:C:1991:136 para 27; and C-259/85 *France v Commission*, EU:C:1987:478, para 24.
[130] C-172/03 *Heiser*, EU:C:2005:130.
[131] Ibid, paras 33, 35; Furthermore, see the Opinion of AG Tizzano in the same judgement, EU:C:2004:678, para 58.
[132] Cases C-15/98 & C-105/99 *Italian Republic and Sardegna Lines v Commission*, EU:C:2000:570, paras 68-70.
[133] See Commission Decision of 20 July 2007, *Aid to the Sardinian shipping sector*, 2008/92/EC, Official Journal L29/24.

2.1.7.3.3 De minimis rules

Even though the possibility to fall outside the scope due absence of effect in intra-Member States' trade is relatively small,[134] all aids do not have a perceptible impact on trade and competition which is why the Commission developed a set of rules that regulated and reformed the so called *de mimimis* aids since 2001.[135] The Commission had actually been searching for a legal basis for the *de minis* rules since 1992, but it wasn't until the *Enabling Regulation* was introduced in 1998 that the legal basis was found for certain State aids.[136]

The main purpose of the *de minimis* rules are to provide exemption for aid that amount to smaller sums to ease the workload of the Commission.[137]The CJEU has however not recognized a general *de minimis* rule.[138]

Seeing as the Court, has consistently held that there is an insignificance in relation to the amount of the aid for it to potentially distort competition and affect trade between the Member States, one can say that the CJEUs attitude towards the *de minimis* is different than that of the Commission. [139] The Court has held a close grip around that even though the benefit of an aid is

[134] See section above 2.1.6.3.2. *Affecting intra-Member States' trade.*
[135] Commission Regulation *on the application of Articles 87 & 88 of the EC Treaty to de minimis aid*, 2001/69/EC, Official Journal L10/30; and Commission Regulation *on the application of Articles 87 & 88 of the Treaty to de minimis aid*, 2006/1998/EC, Official Journal L379/5; and the recent one Commission Regulation *on the application of Articles 107 & 108 of the Treaty on the Functioning of the European Union to de minimis aid*, 2013/1407/EU, Official Journal L352/1.
[136] See Council Regulation *on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal aid*, 1998/994/EC, Official Journal L142/1.
[137] Hofmann, H & Micheau, C. p. 160.
[138] See i.e. Case C-156/98 *Germany v Commission*, EU:C:2004:238, paras 39 & 40; C-172/03 *Heiser*, EU:C:2005:130, para 34; joined Cases T-298/97, 312-3/97, 315/97, 600-7/97, 1/98, 3-6/98, and 23/98 *Alzetta Mauro v Commission*, EU:T:2000:151, para 86; C-409/00 *Spain v Commission*, EU:C:2003:92, para 76; C-382/99 *Netherlands v Commission*, EU:C:2002:363, paras 59 & 60.
[139] C-57/86 *Greece v Commission*, EU:C:1988:284, paras 17 & 18; C-310/99 *Italy v Commission*, EU:C:2002:143, para 86; and C-142/87 *Belgium v Commission*, EU:C:1990:125, para 43.

limited to the undertaking, competition is, to a lesser extent, still distorted.[140]

2.1.7.4 The Selectivity Criterion

Article 107 (1) TFEU bears the condition that the aid must "…*favour certain undertakings or the production of certain goods…".*[141] It is one of the most defining criteria for State aid.[142]It is also one of the cornerstones in this thesis.

It is found through the CJEU case-law that the term of 'undertaking' covers any entity which transmits in any economic activity, disregarded the legal status or method of financing the entity has.[143] A measure is in principle considered selective if it produces an advantage for certain undertakings or a certain area of activity.[144] Disregarded, if the aid was not aimed at one or more recipients in advance.[145]

Aid can be considered selective, even though it covers the whole of an economic sector.[146] However, general tax measures, arrangements for

[140] T-214/95 *Vlaamse Gewest v Commission,* EU:T:1998:77, para 46; see also T-55/99 *Confederación Española de Transporte de Mercancías v Commission*, EU:T:2000:223, para 94.
[141] Wording from Article 107 (1) TFEU.
[142] C-200/97 *Ecotrade,* EU:C:1998:579, para 40; see also the opinion from the AG Fennelly on the same judgment C-200/97 *Ecotrade,* EU:C:1998:378, para 25; C-217/03 *Belgium and Forum 187 v Commission,* ECLI:EU:C:2006:416, para 119; C-295/97 *Rinaldo Piaggio,* EU:C:1999:313, para 39; and C-172/03 *Heiser,* EU:C:2005:130, para 40.
[143] C-41/90 *Höfner and Elser,* EU:C:1991:161, para 21; joined cases C-159/91 & C-160/91 *Poucet and Pistre,* EU:C:1993:63, para 17, C-244/94 *Fédération Française des Sociétés d'Assurance,* EU:C:1995:392, para 14; and joined cases C-180/98 & C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* EU:C:2000:428, paras 74-76.
[144] T-152/99 *HAMSA v Commission,* EU:T:2002:188, para 156; and T-210/02 *British Aggregates v Commission,* EU:T:2006/253, para 105.
[145] T-55/99 *Confederación Española de Transporte de Mercancías v Commission,* EU:T:2000:223, para 40; and T-379/09 *Italy v Commission* , EU:T:2012:422, para 47.
[146] Nielsen, M & Vesterdorf, P. p 23; The authors reference to the cases C-148/04 *Unicredito,* EU:C:2005:774 & C-172/03 *Heiser,* EU:C:2005:130.

taxation, tax deduction that are regarded as general or economic policy measures can fall outside of the Article 107 (1) TFEU scope.[147] As a result the line between a general tax measure and a selective tax measure is often sprung into the air of discussion and debate. This I will return to discuss further in the thesis under chapter 3.

2.1.7.4.1 General measures

Since Article 107 (1) TFEU bears the condition that the aid must "…*favour certain undertakings or the production of certain goods…".*[148] It *e contrario* follows that a measure which benefits all operators within the national territory, without distinction, does not constitute State aid.[149]

In virtue a general measure entails a measure that favours all undertakings as well as their competitors in different Member States.[150]

2.1.7.4.1.1 Regional general measures

When a measure applies to all operators within a specific region the measure might, under certain circumstances, be considered as general. This is particular in tax measures, however if the measure contains a criterion relating to a specific territory of the Member State it may very well be considered as State aid.[151]

[147] Ibid.
[148] Wording from Article 107 (1) TFEU.
[149] C-143/99 *Adria-Wien Pipeline,* EU:C:2001:598, para 35; and Opinion of AG Alber on the judgment *Spain v Commission,* EU:C:2002:475, paras 60 & 65.
[150] Cf. Commission notice *on the application of the State aid rules to measures relating to direct business taxation,* (C/1998/384/03), para 13.
[151] T-308/00 *Salzgitter,* EU:T:2004:199, para 38; see also C-248/84 *Germany v Commission,* EU:C:1987:437, paras 18-19.

If a regional authority has the fiscal autonomy to set a lower tax rate than another region, this does not *de facto* constitute a measure of State aid.[152]

Three different scenarios was outlined by AG Geelhoed and accepted by the court in the case *Portugal v Commission,* when it comes to fiscal measures and regional autonomy:

1. Cases where the central government unilaterally adopts a tax rate that is reduced in a particular area within the State. The measure is likely to be regarded as selective as it only applies to a part of the entire State.[153]
2. Cases where the fiscal competence is distributed, resulting in all local authorities enjoying the fiscal autonomy to set the rates differently. This would according to AG Geelhoed not be considered as selective due to the fact that there wouldn't exist any normative (standard) tax rate to derogate from.[154]
3. The last category of cases is when the regional or local authorities have full fiscal autonomy and adopts a tax rate lower than the rest of the Member State. This could mean that the given tax measure would result in an equal treatment of all undertakings in the given region to have the same applicable tax rate. This would then according to the AG Geelhoed not be qualified as selective.[155]

2.1.7.4.2 De jure and de facto selectivity

The material selectivity of a measure that would fall within Article 107 (1) TFEU suggests that the measure may only be applicable to certain

[152]Cf. C-88/03 *Portugal v Commission,* EU:C:2006:511, para 57; and also joined cases C-428/06 to C-434/06 *Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and others,* EU:C:2008:488, para 47.
[153] Opinion of AG Geelhoed to the judgment C-88/03 *Portugal v Commission,* EU:C:2005:618, para 51.
[154] Ibid, paras 52 & 53; see also section 3.1.2.1.
[155] Ibid, para 54; see also joined cases C-428/06 to C-434/06 *Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and others,* EU:C:2008:488, paras 53-60.

undertakings or certain sectors of economy in the State. The material selectivity is recognized as either *de jure* or *de facto.*[156]

De jure selectivity is the outcome from measures that have formal legislative reasons for granting the measure. Thus, aimed at certain undertakings by the measure being reserved for certain actors on the market with certain size or legal form;[157]

De facto selectivity is when the application of the measure is hindered through general terms that applies only to a specific group. Including the fact if granted for just a short period.[158] Consequently, creating barriers for other undertakings from benefitting from the measure.[159]

As one can understand the criterion of selectivity is highly contentious, within the context of fiscal matters which the Commission in its notice[160] states the following:

"*States are free to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the various factors of production. Nonetheless, Member States must exercise this competence in accordance with Union law."(*cit.).[161]

The paragraph refers to the States fiscal autonomy with the limitation to follow Union law. In the following chapter (3) I will go through and analyse

[156] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 120.
[157] Ibid. para 121; and Joined Cases C-78/08, C-79/08 & C-80/08 *Paint Graphos and others*, EU:C:2011:550, para 52.
[158] Joined Cases T-239/04 & T-323/04, *Italy & Brandt Italia v Commission*, EU:T:2007:260, para 66; T-211/05 *Italy v Commission*, EU:T:2009:304, para 120; and C-458/09 P *Italy v Commission*, EU:C:2011:769, paras 59 & 60.
[159] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), paras 121-122; and T-92/00 and T-103/00 *Ramondín SA and Ramondín Cápsulas SA v Commission*, EU:T:2007:260, para 39.
[160] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946).
[161] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 156; See also C-182/08 *Glaxo Wellcome*, EU:C:2009:559, para 34.

the criterion of selectivity in relation to tax measures and national fiscal autonomy.

3 Selectivity in Tax Measures

As have been previously mentioned, for a measure to constitute a State aid measure: four different cumulative criterion has to be met.[162] However, when it comes to fiscal State aid, one can easily understand that the Commission can prove most of the criteria easily; National tax measures are set out by the Member State; underpayment of tax will create a downfall which will give an advantage; this advantage will possibly threaten to distort competition; and, if the distortion is substantial enough, can have an effect on trade between Member States.[163]

The selectivity criterion is, one of the most defining criteria for State aid.[164] The criterion additionally raises complex questions since there is no community-level harmonisation of the tax provisions of the Member States.[165] Therefore, the assessment of the compatibility within article 107 (1) TFEU must be done through the consistency of the national tax system of the State conferring the aid.[166]

Furthermore, the Court has ruled that even though the Member State when it adopted the measure resolved to a tax that in turn would approximate to other Member States is not excluding the measure to the application of the article.[167]

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[162] Article 107 (1) TFEU; see also Commission notice *on the application of the State aid rules to measures relating to direct business taxation*, (C/1998/384/03), paras 8-12.
[163] Andrews, Philip & Ryan, Michael. *The Apple Case, august, 2016.* McCann FitzGerald. [Online] Available at: http://www.mccannfitzgerald.com/McfgFiles/knowledge/7300-The%20Apple%20Case_1.pdf [Accessed 11 April. 2017].
[164] C-200/97 *Ecotrade,* EU:C:1998:579, para 40; see also the opinion from the AG Fennelly on the same judgment C-200/97 *Ecotrade*, EU:C:1998:378, para 25; C-217/03 *Belgium and Forum 187 v Commission,* ECLI:EU:C:2006:416, para 119; C-295/97 *Rinaldo Piaggio,* EU:C:1999:313, para 39; and C-172/03 *Heiser*, EU:C:2005:130, para 40.
[165] T-308/00 *Salzgitter*, EU:T:2004:199, para 81, furthermore; C-408/04 P *Salzgitter*, EU:C:2008:236, - The judgment was appealed and referred to the GC, although for other reasons not of importance.
[166] Hofmann, H & Micheau, C. p. 133.
[167] Joined Cases 6/69 & 11/69 *Commission v France,* EU:C:1969:68, para 21.

The Court has, however, developed a general rule, which often is referred to as the 'derogation method'[168] when a tax measure is considered compatible with the internal market because it is justified by the nature or general scheme of the system which it is part or by the logic of the system.[169]

Hence, the question of 'selectivity' is probably a key argument and issue raised by Apple Inc. and the Republic of Ireland in the event of an appeal: was Apple's subsidiaries' tax arrangements selective? – or were the same tax rulings available to others in a comparable situation.[170]

I will get back to the 'derogation method' and discuss it in relation to the selectivity criterion in the following sections along with how European State aid rules have a rather intrinsically importance to certain measures that, in some cases, would be seen as a natural part of the Member States fiscal autonomy.

3.1.1 How and when does State aid apply to tax measures?

In 1998, the Commission issued a notice on the application of State aid law to "*tackle harmful tax competition*".[171] The Commission reiterated its position stating that:

[168] Opinion of the AG Darmon to the joined Cases C-72/91 and 73/91 *Firma Sloman Neptun Schifffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG,* EU:C:1992:130, *para 50.*
[169] C-173/73 *Italy v Commission*, EU:C:1974:71, para 15; joined Cases C-72/91 & C-73/91 *Firma Sloman Neptun Schifffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG,* EU:C:1992:130, para 21.
[170] Andrews, P & Ryan, M. *The Apple Case, august, 2016.* McCann FitzGerald. [Online] Available at: http://www.mccannfitzgerald.com/McfgFiles/knowledge/7300-The%20Apple%20Case_1.pdf [Accessed 11 April. 2017].
[171] Commission notice *on the application of the State aid rules to measures relating to direct business taxation*, (C/1998/384/03).

"in applying the Community rules on State aid, it is irrelevant whether the measure is a tax measure, since Article 92 (Current Article 107 TFEU) applies to aid measures 'in any form whatsoever'.". (cit.).[172]

However, since then, the fiscal State aid has developed considerably both in its broad range and complexity.[173]

It falls within the competence of the Member States or of infra-State bodies having fiscal autonomy, in the absence of European Union rules governing the matter, to designate bases of assessment and to spread the tax burden across the different factors of production and economic sectors.[174]

The general objectives of the EU tax policy the Commission states in their report from 2001 is to focus on the removal of tax obstacles to exercise the four freedoms. And that the allocation of State resources must be made clear to the intended economic agents. Thus tax systems must be made simpler and transparent.[175]

In other words, direct taxation falls within the scope of the competence of the Member States and the Member States retain the right to set the manner (i.e., taxes on sold goods, taxes on property etc.) by which, and extent to which (i.e., taxable proportion of profits), direct taxation applies to corporations, so long as the national measures comply with State aid rules.[176] If a derogation from a normal tax system does not apply on a general basis it may be considered as selective and thus fall within Article 107 TFEU.

Although the Apple case undoubtedly raises novel issues and awakes a broader spectrum of interest amongst people with regards to the €13 billion recovery fine and the current stir the competition legal area has seen over

[172] Ibid, para 8.
[173] Craig, P & De Búrca, G. p. 1133-37.
[174] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 156; See also C-182/08 *Glaxo Wellcome,* EU:C:2009:559, para 34.
[175] Commission communication of 23 May 2001, *Communication tax policy in the European Union – priorities for the years ahead*. Brussels, 23.5.2001, COM (2001) 260 final, para 2.3.
[176] Ibid; and C-106/09 *Commission v Gibraltar*,EU:C:2011:732, para. 97.

the recent years,[177] fiscal State aid has been recognised by the European Courts since the 1960s.[178]

In the famous case 30/59 *De gezamenlijke Steenkolenmijnen in Limburg v High Authority*, Germany had introduced a bonus to miners, which gave all miners working underground a tax-free shift bonus paid by the undertakings through a deduction from taxes paid on wages. The Court therefore held in the case that the shift bonus relieved the undertakings from an expense they would other have had.[179]

What is essential to understand is when a fiscal State measure is considered selective and consequently applies to Article 107 (1) TFEU.

3.1.2 When is a fiscal State measure labelled *'selective'?*

As mentioned above, a fiscal or economic benefit granted by a Member State constitutes State aid only if, by displaying a degree of selectivity, a State measure which benefits all undertakings which are in a similar legal or factual situation within the national territory without distinction cannot, therefore, constitute State aid.[180] Hence, any derogations made from the normal taxation rules that does not apply on a general basis for all relevant undertakings, that is in a "legal or factual situation that is comparable in the

[177] Heath, R & Hirst, N. *In Apple case, Europe thinks different*, august, 2016. POLTICO. [Online] Available at: http://www.politico.eu/article/in-apple-case-europe-thinks-different/ [Accessed 24 April 2017].
[178] C-30/59, *De gezamenlijke Steenkolenmijnen in Limburg v High Authority*, EU:C:1961:2.
[179] Ibid, para 20.
[180] Nicolaides, P, Kekelekis, M & Kleis, M. p. 32; C-143/99 *Adria-Wien Pipeline*, EU:C:2001:598, para 35; For additional reference, see section 2.1.6.4.

light of the objective pursued by the measure"(Cit.)[181] in a Member State may be selective.[182]

In the commissions notice[183] the commission expresses that depending on which Member State and on the status of the undertaking, tax rules apply differently. Furthermore, that rules which accord to preferential treatment towards undertakings having certain legal status and carrying out an economic activity, may constitute State aid according to Article 107(1) TFEU.[184]

The Commission very clearly states in their notice[185] that Member States freely can decide upon the most appropriate economic policy and tax burden they see fit and fall within their competence due to natural fiscal autonomy. However, when exercising such policies must be in compliance with Union Law.[186] The *World Duty Free Group and Banco Santander* cases proved that there was and still is a seemingly apparent legal hotspur within the area of European State aid;[187] it is not clarified and settled in how the selectivity criterion ought to be interpreted in fiscal State measures.

3.1.2.1 The Derogation Method

The selective advantage may derive from an exemption to the tax provisions of a legislative, regulatory or administrative nature or from a discretionary

[181] C-143/99 *Adria-Wien Pipeline,* EU:C:2001:598, para 41; and C-75/97 *Belgium v Commission,* EU:C:1999:311, paras 28-31.
[182] C-75/97 *Belgium v Commission,* EU:C:1999:311. paras 34-35; furthermore, see section 2.1.6.4.1.
[183] Commission notice *on the application of the State aid rules to measures relating to direct business taxation*, (C/1998/384/03).
[184]Ibid, para 19.
[185] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946).
[186] Ibid, para 156.
[187] Joined Cases C-20/15 P & C-21/15 P *Commission v World Duty Free Group SA, (formerly Autogrill España SA), Banco Santander SA & Santusa Holding SL,* EU:C:2016:981. Appealed, overruled and referred back to the General Court by the CJEU.

practice on the part of the tax authorities. However, the selective nature of a measure may be justified by 'the nature or general scheme of the system'. [188]

Sometimes the justification has also been referred by the Court as the 'nature or structure' or 'logic' of the system, and applies almost exclusively to tax measures.[189] This is what sometimes is called as the 'derogation method'.[190]

The derogation method has been recognised by both the Courts[191] and the Commission since the First Survey on State aid rules applied to tax measures.[192]

The test for whether a measure can be justified on aforementioned grounds relates to the internal functioning of the fiscal system and not to external objectives assigned to it.[193] The Court has consistently held that Article 107 (1) TFEU does not distinguish between measures of State intervention by

[188]Ibid, para 12; C-173/73 *Italy v Commission*, EU:C:1974:71, para 15; joined Cases C-72/91 & C-73/91 *Firma Sloman Neptun Schifffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG*, EU:C:1992:130, para 21.

[189] Kociubinski, J, *Selectivity Criterion in State Aid Control*, 2012. Wroclaw Review of Law, Administration & Economics. De Gruyter. [Online] Available at: https://www.degruyter.com/view/j/wrlae.2012.2.issue-1/wrlae-2013-0016/wrlae-2013-0016.xml?format=INT [Accessed 27 April 2017].

[190]Cf. Opinion of the AG Darmon to the joined Cases C-72/91 and 73/91 *Firma Sloman Neptun Schifffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG*, EU:C:1992:130.

[191] The derogation method has consistently been up on the table however the CJEU has been reluctant in the conclusion that selectivity can only stem from a system to which all the undertakings are subject see i.e. joined Cases C-106/09 & C-107/09 P *Commission and Spain v Government of Gibraltar and UK*, EU:C:2011:732, para 92.

[192] Commission Survey on 13 December 1988, *First Survey on State Aids in the European Community*, Luxembourg: Office for Official Publications of the European Communities, SEC (88) 1981 final. p. 6-8.

[193] C-173/73 *Italy v Commission*, EU:C:1974:71, para 15; joined Cases C-72/91 & C-73/91 *Firma Sloman Neptun Schifffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG*, EU:C:1992:130, para 21; C-75/97 *Belgium v Commission*, EU:C:1999:311, paras 33-34; C-390/98 *H.J Banks v The Coal Authority and Secretary of State for Trade and Industry*, EU:C:2001:456, paras 33 & 43; C-143/99 *Adria-Wien Pipeline*, EU:C:2001:598, para 42; C-159/01 *Netherlands v Commission*, EU:C:2004:246, para 42; Joined Cases C-78/08, C-79/08 & C-80/08 *Paint Graphos and others*, EU:C:2011:550, para 64; and joined Cases C-106/09 & C-107/09 P *Commission and Spain v Government of Gibraltar and UK*, EU:C:2011:732, para 145.

reference of their objectives, but rather defines the effects and the techniques used to attain such objectives.[194]

The CJEU has ruled that in order to justify a selective measure on the basis of the 'nature of the system' it is necessary for such a measure to be supported with specific and detailed argumentation. Leaving the burden of proof entirely on the Member States and keeping the exemption from the rule narrowly.[195] In that context, in order to classify a national tax measure as selective the Commission must conduct a three-step test commencing with;

a. *identifying the ordinary or 'normal' tax system applicable*, and thereafter demonstrate that;
b. *the tax measure is a 'derogation' from that ordinary reference system or general scheme* in the sense that it *differentiates from other operators that are in a comparable factual and legal situation;* [196] and lastly;
c. that the measure is not *justified by 'the nature or general scheme of the system'*. [197]

The three components of the test will be presented followingly.

3.1.2.1.1 First step: Identification of the reference system

The reference system constitutes the frame of which the selectivity of the measure is assessed.[198] It consists of a system of general applicable rules –

[194] T-210/02 *British Aggregates v Commission*, EU:T:2006/253, paras 85 & 89; joined Cases C-106/09 & C-107/09 P *Commission and Spain v Government of Gibraltar and UK*, EU:C:2011:732, para 87; and C-279/08 P *Commission v Netherlands*, EU:C:2011:551, para 51.
[195] Opinion of the AG Cosmas to the judgment C-83/98 P *France v Ladbroke Racing & Commission*, EU:C:1999:577, para 26.
[196] Joined Cases C-20/15 P & C-21/15 P *Commission v World Duty Free Group SA, (formerly Autogrill España SA), Banco Santander SA & Santusa Holding SL*, EU:C:2016:981, para 57.
[197]Ibid. para 12; C-173/73 *Italy v Commission*, EU:C:1974:71, para 15; joined Cases C-72/91 & C-73/91 *Firma Sloman Neptun Schifffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG*, EU:C:1992:130, para 21.
[198] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 132.

on the basis of objective criteria, to all economic entities falling within the scope of the objective.[199]

In tax measures the reference system can be based on elements such as the tax base, tax rate, the entities taxable and so on. For example, it can be identified within the general VAT-system[200] or the corporate income tax system.[201]

A common mistake is to regard the system as in the means of the aid itself, and reason the measure by policy justifications. The result would entail every aid as justified by itself. Hence, it is important to view the system in a wider context. Furthermore to look at the amount of operators that fall within the scope of the measure, and more importantly the ones that don't.[202]

3.1.2.1.2 Second step: Scope of operators in a comparable legal and factual situation

One of the most problematic issues with the derogation test is that the CJEU determines which operators that are to be taken into account.[203] Furthermore when assessing if the undertakings are in the same legal and factual situation the Court frequently looks at the perspective of the objectives of the measure.[204]

As an example: In the CJEU judgment *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*[205] the Court examined the tax

[199] Ibid, para 133.
[200] C-172/03 *Heiser*, EU:C:2005:130, para 40.
[201] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 134; Joined Cases C-78/08, C-79/08 & C-80/08 *Paint Graphos and others*, EU:C:2011:550, para 50; Cases C-182/03 & C-217/03 *Belgium and Forum, 187 v Commission*, EU:C:2005:266, para 95; and C-66/02 *Italy v Commission*, EU:C:2005:768, para 100.
[202] Bacon, K. p. 92.
[203] Hofmann, H & Micheau, C. p. 135.
[204] Ibid.
[205] C-143/99 *Adria-Wien Pipeline*, EU:C:2001:598.

regime regarding the gas and electricity consumption aimed at reducing emissions. Instead of narrowly scope the subjected undertakings to only include the ones manufacturing goods, the CJEU stated that, in light of the perspective of the objective for the measure – to reduce energy consumption, whether supplying services or manufacturing goods the energy consumption of the sectors were equally harmful, thus it widened the scope and included both types of sectors.[206]

The CJEU has long continued to view the scope of operators in the same comparable factual and legal situation as relatively wide. [207] And when the Court looks at the scope of the scheme it is evident that the Court tends to use the objective pursued by the tax measure as a reference point from which the undertakings that are in a comparable factual and legal situation stem from.[208]

The Commission states in their Notice that if a measure favours certain undertakings or production of certain goods in the abovementioned situation they are *prima facie* selective.[209]

3.1.2.1.3 Third step: Justification of the measure by the nature of the general scheme of the system itself.

The last step in the three-step assessment is to assess the question given that a measure is justified by the nature of the general scheme of the system itself.[210]

[206] Ibid, para 52.
[207] C-279/08 P *Commission v Netherlands*, EU:C:2011:551, paras 74-76; and Joined Cases C-78/08, C-79/08 & C-80/08 *Paint Graphos and others*, EU:C:2011:550, para 50.
[208] Hofmann, H & Micheau, C. p. 136.
[209] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 137.
[210] Ibid. paras 138-141; Commission Report of 9 February 2004 on the *Implementation of the Commissions Notice on the Application of Aid Rules to measures to Direct Business Taxation*, Brussels 09.02.2004. C (2004)434, paras 34-37.

There is a distinction between justifiable and unjustifiable selective measures relates to the objectives set forth by the reference system and that are *inherent to the tax system* and objectives which are found to be *external.*[211]

An instance of a measure that would fall within the justification of the system is a tax structure covering economic policy-driven discrepancies, the taxpayers in the higher level of the tax rate would not be able to claim that the ones at the lower rate would receive beneficial treatment due to State aid.[212]

The Court and the Commission has continued to take the view on the justification must be based on the intrinsic features of the general scheme of the system concerned. Moreover, it is up to the Member State to display how the derogation that of the tax measure is justifiable.[213]It is not sufficiently enough for the Member State to base the scope of the measure on objective means.[214]

Additionally, it is also necessary to show that the exemptions don't beyond what is necessary in relation to the principle of proportionality to achieve the legitimate objective of the system.[215]

Moreover, the State is required[216] to apply necessary control and supervision procedures to ensure that the derogation is consistent within the logic and general scheme of the tax system in order to avoid tax elusion.[217]

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[211] Joined Cases C-78/08, C-79/08 & C-80/08 *Paint Graphos and others,* EU:C:2011:550, paras 67-75; Hofmann, H & Micheau, C. p. 139.
[212] Bacon, K. p. 90.
[213] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 141.
[214] C-409/00 *Spain v Commission,* EU:C:2003:92, para 49; and T-379/09 *Italy v Commission,* EU:T:2012:422, paras 47-48.
[215] Joined Cases C-78/08, C-79/08 & C-80/08 *Paint Graphos and others,* EU:C:2011:550, para 75.
[216] See Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 140 (emphasis added).
[217] Ibid; and Joined Cases C-78/08, C-79/08 & C-80/08 *Paint Graphos and others,* EU:C:2011:550, para 74.

3.1.2.1.4 The CJEUs derogation from the derogation method

Often when the selectivity of measure is presented the measure is established not by the number of beneficiaries that are in the same comparable situation but rather from its effects, [218] - the undertaking excluded from the scope.[219] This in particular with cases where the category of aid beneficiaries is predominantly broad.[220] What is in important is the *effects* of the derogation.[221]

The abovementioned reasoning was used by the CJEU when they overruled the GC judgment in the joined cases *Commission and Spain v Government of Gibraltar and UK,*[222] The CJEU further explained that:

"*Such an interpretation of the selectivity criterion would require, that in order for a tax system to be classifiable as 'selective' it must be designed in accordance with certain regulatory technique; the consequence of this would be that national tax rules fall from the outset outside the scope of control of State aid merely because they were adopted under a different regulatory technique although they produce the same effects in law and/or in fact. (cit).*[223]

In conclusion, what should be principally acknowledged from the *Gibraltar-case* is that it is the very logic of the system *per se* and not the measure in

[218] T-210/02 *British Aggregates v Commission,* EU:T:2006/253, para 85 & 89; joined Cases C-106/09 & C-107/09 P *Commission and Spain v Government of Gibraltar and UK,* EU:C:2011:732, para 87; and C-279/08 P *Commission v Netherlands,* EU:C:2011:551, para 51.
[219] Nicolaides, P. p. 116.
[220] T-55/99 *Confederación Española de Transporte de Mercancías v Commission,* EU:T:2000:223, para 40.
[221] joined Cases C-106/09 & C-107/09 P *Commission and Spain v Government of Gibraltar and UK,* EU:C:2011:732, para 87.
[222] joined Cases C-106/09 & C-107/09 P *Commission and Spain v Government of Gibraltar and UK,* EU:C:2011:732.
[223] Ibid, para 92.

relation to the extent of effects of the measure taken.[224] It can in other words be said that there exists a blur in the derogation method or more humorously said there exists a derogation in the derogation method, this notion is supported by Hofmann, H & Micheau, C.[225]

3.1.3 APAs[226]: An Undertakings urge for transparency?

Following the recent sections one can feasibly understand the magnitude of complexity and judicial uncertainty with regards to certain areas of tax measures in relation to EU State aid law. One parallel solution to the encumbrances within the judicial area has been incentives for tax transparency to tackle the issue at hand.[227]

In order to answer to the increasingly demand for legal certainty and stability and combating corporate tax avoidance, the Commission presented the tax transparency package in 2015.[228] With the proposal comes an introduction for an automatic exchange of information of between Member States on their tax rulings.[229] Pierre Moscovici, Commissioner for Economic and Financial Affairs, Taxation and Customs, held that:

"Tolerance has reached rock-bottom for companies that avoid paying their fair share of taxes, and for the regimes that enable them to do this. We have to rebuild the link between where companies really make their profits and where they are taxed. To do this, Member States need to open up and work

[224] Hofmann, H & Micheau, C. p. 142.
[225] Ibid.
[226] Advanced Pricing Arrangements.
[227] See Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 169.
[228] European Commission Press Release, *Combating corporate tax avoidance: Commission presents Tax Transparency Package*, (2015).
[229] Ibid.

together. That is what today's Tax Transparency Package aims to achieve."(cit.).[230]

APAs are initiated on request from respective taxpayers, i.e. multinational corporations interested in eliminating uncertainty.[231] An APA is, a tax ruling, and:

"*An arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time*"(cit.).[232]

APAs can be categorized into three different types: unilateral, bilateral and multilateral APAs. Unilateral APAs in contrast to the other two categories cannot eliminate the juridical or economic double or non-taxation in the same extent.[233]This relates to a lack in consensus with other tax administrations and is underlined by OECD.[234]

Tax rulings have developed globally as a consequence of a change in mentality from tax authorities, an aspiration for a higher degree of tax compliance and securer economic investments from multinational corporations and tax filers. Tax rulings are one of the instruments towards a more reciprocal relationship between the tax authorities and the taxpayer.[235]

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[230] Ibid.
[231] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, para (F3) 4.142.
[232] Ibid, para (F1) 4.123.
[233] Ibid, para. (F3) 4.145; and para (F4) 4.147.
[234] Ibid.
[235] Van De Welde, Elly, *'Tax rulings' in the EU Member States – Study for ECON Committee, august, 2015.* Directorate-General for Internal Policies, European parliament. [Online] Available at: http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563447/IPOL_IDA(2015)563447_EN.pdf [Accessed 11 April. 2017].

One of the main objectives for an APA is to prescribe the taxpayer's transfer pricing over a period of time. However, great attention must be taken into account in relation to the specificity of the APA. If the APA goes beyond its methodology, the way it will be applied, due to the fact that it relies on predicaments of the future.[236]The grant of a tax rulings, must however follow the rules of State aid.[237]

Consequently, in the cases where a tax ruling gives an effect that departs from the ordinary tax reference system or general scheme in the sense that the tax ruling addressee differentiates from other operators that are in a comparable factual and legal situation, the ruling may confer a selective advantage.[238]

3.1.3.1 The arm's length principle

The Arm's length principle in the context of tax rulings and EU State aid regulation is the fact on which upon the Member States have agreed upon what should be used for determine transfer prices.[239] The authoritative statement for ALP is found in paragraph 1 of Article 9 in the OECD *Model Tax Convention*: "…where the conditions between two enterprises commercial or financial relations should not differ from those which would be made between independent enterprises.". (cit.)[240]

In the Commission notice, [241] the Commission states that ALP forms part of the assessment of tax measures under Article 107 (1) TFEU, disregarded whether the principle is incorporated in the subject Member States national

[236] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, para (F1) 4.124.
[237] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 170.
[238] Ibid.
[239] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, p. 23.
[240] Article 9, paragraph 1, OECD Model Tax Convention on Income and on Capital, 2014.
[241] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946).

legal system. The principle is used by the Commission when assessing transfer pricing rulings with Article 107 (1) TFEU.[242] However, the Commission points out in their notice that if a transfer pricing concurs with the guidance of ALP provided by the OECD, including the guidance on the most appropriate choice of transfer pricing method, a tax ruling approving that arrangement is unlikely to constitute State aid.[243]

According to Pinto all measures having the effect of altering the standard method in order to determine the final taxable income may, including measures affecting the calculation of items, be considered as a reduction in the tax base ergo could result in a benefit.[244]

3.1.3.2 The Commissions perspective on tax rulings and State aid selectivity

The Commissions approach towards tax rulings and their relationship towards State aid selectivity is very clearly put forward in the Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, by applying three main criteria. The following three criteria the Commission states may confer a selective element;[245]

I. The ruling is not in coherence with national tax law which would result in a lower amount of tax.[246]

This is when measure confers an advantage to the beneficiaries which would preclude or reduce costs that they normally would bear. Where a specific tax

[242] Ibid, para 172. See also Commission Decision of 21 October 2015, *State aid SA.38374 implemented by the Netherlands to Starbucks*, 2017/502/EC, Official Journal L 83, para 264.
[243] Ibid, para 173.
[244] Pinto, p. 119.
[245] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 174.
[246] Ibid. (a).

exemption constitutes a tax advantage and reduces the beneficiary's tax burden.[247]

II. The ruling is unavailable to undertakings that are in a comparable legal and factual situation.[248]

When assessing the scope of undertakings in a comparable situation, the Commission has had a wide perspective. When assessing the similar position the Commission has pointed out similar tax payers having comparable invested capital, turnover, employee situation amongst others.[249]

III. The tax administration applies a more 'favorable' approach towards the tax treatment for a taxpayer in comparison to other taxpayers in a comparable legal and factual situation.[250]

This, the Commission points out, could be the case if a tax administration deviates from the ALP due to the usage of a method that would depart from a reliable approximation of what would under normal circumstances be classified as a market-based outcome.[251]Furthermore, in addition, if the addressee of the ruling can use indirect methods for calculating taxable profits to its benefit.[252]

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[247] Commission Decision of 17 February 2003, *Foreign income aid scheme implemented by Ireland*, 2003/601/EC, Official Journal L 204. para 33.
[248] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 174 (b).
[249] Commission Decision of 24 June 2003, *Tax ruling system for US foreign sales Corporations*, 2004/77/EC, Official Journal L 23, para 58.
[250] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 174 (c).
[251] Ibid; and Commission Decision of 21 October 2015, *State aid SA.38374 implemented by the Netherlands to Starbucks*, 2017/502/EC, Official Journal L 83, paras 263-267 & 415-416*;* and Commission Decision of 21 October 2015, *State aid SA.38375 which Luxembourg granted Fiat*, 2016/2326/EC, Official Journal L 351, para 227.
[252] see Commission Decision of 16 October 2002, *State aid scheme C 50/2001 – Finance companies - Implemented by Luxembourg*, 2003/438/EC, Official Journal L 153. paras 43-44; Commission Decision of 16 October 2002, *State aid C 49/2001 Luxembourg Coordination centres*, 2003/501/EC, Official Journal L 170, paras 46, 47 & 50; Commission Decision of 13 May 2003, *French Headquarters and Logistic Centres*, 2004/76/EC, Official Journal L 23. paras 50 & 53; and Commission Decision of

The abovementioned incitement for the Commission to confer selectivity on tax rulings that would depart from a reliable approximation of what would under normal circumstances be classified as a market-based outcome,[253] has been a hot topic throughout the field of European State aid. I will in the next chapter discuss and analyse the recent case-law that shows the, intra-relationship between the tax measure and the selectivity criterion.

17 February 2003, *Belgian Coordination centres*, 2003/757/EC, Official Journal L 282, paras 89-95.

[253] Commission Decision of 21 October 2015, *State aid SA.38374 implemented by the Netherlands to Starbucks*, 2017/502/EC, Official Journal L 83, paras 263-267 & 415-416.

4 Analysis

Recent case-law distorting fiscal autonomy or levelling the playing field?

The most recent cases in the field of European State aid, selectivity and tax measures is the The Banco Santander, World Duty Free & Santusa Holding case[254] which the CJEU delivered its judgment in on the 21 of December 2016, and the Apple case[255] during the past year. In the following sections, I will discuss the recent case law with a certain emphasis on the two main cases mentioned above. Furthermore, I will review the application of the derogation method in those cases and how it corresponds to the selectivity criterion and arm's length principle.

4.1.1 The Banco Santander, World Duty Free & Santusa Holding case

Some of the most recent and influential decisions on fiscal selectivity are the decisions of the General Court in the World Duty Free Group and Banco Santander cases.[256]

[254] Joined Cases C-20/15 P & C-21/15 P *Commission v World Duty Free Group SA, (formerly Autogrill España SA), Banco Santander SA & Santusa Holding SL,* EU:C:2016:981. Appealed, overruled and referred back to the General Court by the CJEU.
[255] See Commission Decision of 30 August 2016, *Negative decision with recovery,* SA.38373, *Alleged aid to Apple, 2014/C* , Brussels.
[256] Joined Cases C-20/15 P & C-21/15 P *Commission v World Duty Free Group SA, (formerly Autogrill España SA), Banco Santander SA & Santusa Holding SL,* EU:C:2016:981.

The background of the cases was a tax advantage that was enabling Spanish companies to amortize the financial goodwill resulting from the acquisition of shareholdings in foreign undertakings.[257]

The General Court ruled that where a measure is *a priori* available to all relevant undertakings meeting relevant criteria, the measure will not be considered as selective.[258]

The General Court argued in accordance of paragraph 36 of the judgment of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* stating that:

" A measure which is to be applied regardless of the nature of the activity of undertakings is not, in principle, selective". (cit.)[259]

The General Court found the Commission had failed to identify a category of undertakings, or commercial operations, that was exclusively favoured by the tax measures. Therefore, not rendering the measures as selective in the sense of Article 107 (1) TFEU.

The Commission, however, appealed the General Court's verdict, claiming that the General Court had erred in law and leaving the case to the European Court of Justice to decide upon.

The call for a legal relevance had long been due. Advocate General Wathelet delivered an opinion asserting that:" the 'selectivity' criterion has long been one of the most controversial issues in the field of State aid. The appeals therefore offer the Court an opportunity to define the scope of that criterion, in particular with respect to tax measures.".(cit)[260]

[257] Ibid.
[258] C-143/99 *Adria-Wien Pipeline,* EU:C:2001:598, para 36.
[259] Ibid.
[260] Opinion of the AG Wathelet to the judgment C-20/15 P & C-21/15 P *Commission v Banco Santander and Santusa,* ECLI:EU:C:2015:676, para 5.

Moreover, other semi-recent judgements such as *GIL Insurance,*[261] *British Aggregates Association*[262] & *Netherlands v Commission,*[263] proves a more pro-derogation approach, where the measures seem to fall within the derogation method.[264]

According to the Opinion of AG Wathelet the General Court found a measure being selective based on the difference in treatment between categories of undertakings under the legislation of a single Member State rather than through the difference in treatment between undertakings of one Member State and those of other Member States in the World Duty Free Group and Banco Santander cases.[265] Additionally, the *a priori* consideration that aimed, not at any particular category of undertaking or production, at a category of economic transactions was invalid.[266]

It is clear to see that the Advocate General delivers an opinion supporting the Commissions view of selectivity. But the Commissions approach is not novel, albeit, it is relying heavily upon two leading European Court judgments: to assert that the point of view is not newly fashioned.[267]

The CJEU delivered its judgment, on the 21 of December, following in the line of the Commission and the AG Wathelet. The Court stated that when regarding case-law, a national measure has to be regarded as selective where the measure benefits exclusively undertakings that export goods or services, even though that may have been the case with respect to the particular tax measures at issue.[268]

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[261] C-308/01 *GIL Insurance and others v Commissioners of Customs & Excise,* EU:C:2004:252.
[262] T-210/02 *British Aggregates v Commission,* EU:T:2006/253.
[263] C-279/08 P *Netherlands v Commission,* EU:C:2004:246, also referred to as the *NOx-case.*
[264] C-308/01 *GIL Insurance and others v Commissioners of Customs & Excise,* EU:C:2004:252, paras 73-78; and T-210/02 *British Aggregates v Commission,* EU:T:2006/253, paras 122-138.
[265]Opinion of the AG Wathelet to the judgment C-20/15 P & C-21/15 P *Commission v Banco Santander and Santusa,* ECLI:EU:C:2015:676, para 30.
[266] Ibid. para 78.
[267] Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission,* ECLI:EU:C:2006:416 & C-106/09 *Commission v Gibraltar,* ECLI:EU:C:2011:732.
[268] Joined Cases C-20/15 P & C-21/15 P *Commission v World Duty Free Group SA, (formerly Autogrill España SA), Banco Santander SA & Santusa Holding SL,* EU:C:2016:981. para 118.

Moreover, the CJEU addressed the question of that the scope of undertakings that would fall into the category of being in a comparable legal and factual situation had to be defined as 'export undertakings', leaving the scope as have been shown through recent case-law admittedly broad.[269]

It is, undoubtedly, clear to see that the CJEU has continued to reason, this in particular with cases where the category of aid beneficiaries is predominantly broad;[270] what the essential burden on the element of selectivity is the effects of the aid given.[271] Thus the court has as previously mentioned developed a new approach that entails a derogation from the derogation method – leaving a blur in fiscal State aid law.

4.1.2 Belgium & Forum 187 v Commission[272] & the Belgian Coordination Centres[273]

In *Belgium & Forum 187 v Commission* the Court required that it be determined whether, under a statutory scheme; a State measure is such as to favour '*certain undertakings or the production of certain goods*' in comparison with others which, in the light of the objective pursued by the system in question, are in a comparable *'legal and factual'* situation.[274]

A Commission decision following the *Belgium & Forum 187 v Commission* – judgment was the *Belgian Coordination Centres* – decision[275]. In general, *Belgian Coordination Centres* involved tax benefits that Belgium granted to

[269] Ibid, para 117.
[270] T-55/99 *Confederación Española de Transporte de Mercancías v Commission,* EU:T:2000:223, para 40.
[271] joined Cases C-106/09 & C-107/09 P *Commission and Spain v Government of Gibraltar and UK,* EU:C:2011:732, para 87.
[272] Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission,* ECLI:EU:C:2006:416.
[273] Commission Decision of 17 February 2003, *Belgian Coordination centres,* 2003/757/EC, Official Journal L 282.
[274] Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission,* ECLI:EU:C:2006:416, para 119.
[275] Commission Decision of 17 February 2003, *Belgian Coordination centres,* 2003/757/EC, Official Journal L 282.

Belgian undertakings that provided certain services to members of a multinational group. In the decision, the Commission first found that the regime conferred an economic advantage because the benefits granted were not generally available under a normal application of the Belgian tax system. Secondly, the Commission separately analysed whether these advantages were selective.[276]

According to the US Treasury Department, the Commission has been relying heavily on the decision in its opening and final decisions in the State aid cases following the recent State aid investigations, However, stating that the Commission has assessed the case differently in the more up to date Apple-case.[277]

The criticism deriving from the U.S. Treasury Department claims that in the Apple-case the Commission adopted a more aggressive approach and intersected the advantage and selectivity criterion which is more evidently shown in the Fiat and Starbucks decisions where the Commission states:[278]

"*where a tax measure results in an unjustified reduction of the tax liability of a beneficiary who would otherwise be subject to a higher level of tax under the reference system, that reduction constitutes both the advantage granted by the tax measure and the derogation from the system of reference.*".(cit).[279]

[276] Ibid, paras 104-112.
[277] United States Department of the Treasury White Paper, *The European Commissions recent State aid investigations of transfer pricing rulings*, 24 august, 2016. [Online] Available at: https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf [Accessed 26 may. 2017**]**.
[278] Ibid, p. 8.
[279] Commission Decision of 21 October 2015, *State aid SA.38374 implemented by the Netherlands to Starbucks*, 2017/502/EC, Official Journal L 83; and Commission Decision of 21 October 2015, *State aid SA.38375 which Luxembourg granted Fiat*, 2016/2326/EC, Official Journal L 351.

I agree with the criticism deriving from the U.S. Treasury Department, but one has also to bear in mind, that the set forth objectives of the SAM 2014 was to target more specific States aids.[280]

4.1.3 Commission v Gibraltar[281]

Nevertheless, in the other case that often is referred to by the Commission is the case *Commission v Gibraltar*[282]. There the Court reaffirms its clear position of fiscal State aid selectivity as a tax measure derogating from the 'normal' tax regime.[283]

The Court stated in the *Gibraltar-case* that; tax measures, even though, founded on criteria that are in themselves of a general nature, can in practice discriminate between companies in a comparable situation with regard to the objective of the proposed tax reform; which was to introduce a general system of taxation and therefore be regarded as selective.[284]That it is the very logic of the system *per se* and not the measure in relation to the extent of effects of the measure taken.[285]

It is clear that the distinction between general and selective measures is subject to considerable controversy and continues to fuel quite a large debate. This in part, explains the US Treasury's claim that the Commissions approach deviates from prior EU case law following the Apple Inc. investigation.[286] However bearing in mind of the historical aspects of European State aid law, what is proven is that the area is truly an ever-changing legal spine where the Commissions policy framework brings flesh to the Court's bones.[287]

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[280] Cf. Section 2.1.4.2.
[281] C-106/09 *Commission v Gibraltar*, ECLI:EU:C:2011:732.
[282] Ibid.
[283] Ibid, paras 36 and 90; see also section 3.1.2.1 *The Derogation Method.*
[284]C-106/09 *Commission v Gibraltar*, ECLI:EU:C:2011:732, paras 100-101.
[285] Hofmann, H & Micheau, C. p. 142.
[286] United States Department of the Treasury White Paper, *The European Commissions recent State aid investigations of transfer pricing rulings*, 24 august, 2016.
[287] Cf. Chapter 2 *History of State aid law in the EU.*

4.1.4 The Apple case

The Commission with both the *Belgium and Forum 187* as well as the *Gibraltar*-cases find the Apple case in accordance with EU case law and the only thing deviating, are Apple subsidies receiving preferential treatment in comparison to the 'normal' tax regime. The commission has stated that the:

"*decision does not call into question Ireland's general tax system or its corporate tax rate*."[288]

Although, the statement is in my opinion fairly controversial. We have seen from the previous chapters on the very importance of a functional fiscal autonomy to the extent that an arm's length principle or 'normal' tax policy remains may be derived from it. It furthermore questions the given pseudo-legal tax ruling that attempts to resolve the issue of legal uncertainty at hand. Notwithstanding, there are given reasons to not look as far too kindly on the Apple case, as due to the allocation method used in the tax rulings, Apple only paid an effective corporate tax rate that declined from 1% in 2003 to 0.005% in 2014 on the profits of Apple Sales International.[289]

In the Commission press release for the Apple case the Commission states that, the Commission's investigation reveals that the tax rulings issued by Ireland endorsed an artificial internal allocation of profits within ASI and AOE, *which has no factual or economic justification.*[290] What the commission aims for with the statement is in my opinion the derogation method. Or more precisely held that the derogation cannot be applied towards the Apple case rendering it incompatible with Union Law.

[288] Press Statement by the European Commission, State aid: *Ireland gave illegal tax benefits to Apple worth up to €13 billion,* (2016).
[289] Press Statement by the European Commission, State aid: *Ireland gave illegal tax benefits to Apple worth up to €13 billion,* (2016).
[290] Ibid.

However, the Commission also stresses in the letter to the Member State the Republic of Ireland, published on the 20 of March 2017, that with regards to the selective nature of an advantage, the CJEU has previously held that in the case of an individual aid measure, as opposed to a scheme, "*the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective"*[291], without it being necessary to analyse the selectivity of the measure according to the derogation method devised by the CJEU for fiscal State aid schemes[292]

This entails, in my perspective, that the Commissions view of the advantage in the Apple case would already be found to be selective in nature. This is supported the commissions reasoning in the letter to the Member State.[293] The reasoning is also falls within according to, my opinon, the CJEUs ruling of the Gibraltar case - that it is the very logic of the system *per se*.[294] Although, the Commission still examines the tax benefits Apple case through the three-step-analysis (derogation method).[295] This illustrates, in my opinion, how inclined the Commission is when it comes to the derogation method in defining tax measures as selective.

Apple argues in the case that the reference system should be understood as the commission interpreted it in the *Groepsrentebox* Decision[296]. In the decision, the Commission allegedly acknowledged economic dealings between undertakings belonging to a corporate group and intra-group transactions. The motive was that they weren't driven by the same competitive and economic rationale as those between unrelated

[291] C-270/15 P *Belgium v Commission*, EU:C:2016:489, para 49; and C-15/14 P *Commission v MOL*, EU:C:2015:362, para 60.
[292] Cf. T-385/12 *Orange v Commission* EU:T:2015:117, para 53.
[293] Commission Decision of 30 august 2016, *State aid SA.38373 implemented by Ireland to Apple*, Brussels, C (2016), 5605 final, paras 223-224.
[294] Hofmann, H & Micheau, C. p. 142.
[295] Ibid, para 224.
[296] Commission decision of 8 July 2009, *State aid C 4/2007 (ex N 465/2006) on the Groepsrentebox scheme which the Netherlands is planning to implement*, 04.11.2009, Official Journal L 288.

companies.[297] Albeit, the Commission here considers in the terms of ALP. In other words, according to the Commission the ALP declares that, it shouldn't differ between independent companies and financial relations between related companies conducting internal dealings.[298]

The commission states in the letter to the Member State the Republic of Ireland, published on the 20 of March 2017, that the purposes of tax rulings are to on the forehand establish an application of the ordinary tax system to a particular case in view of its specific facts and circumstances. Although, indifferent from other tax measures, the ruling must adhere to Union law. [299]

If a ruling derogates from the general scheme or nature of the 'norm' tax system it has to be justified without justification, that ruling may confer a selective advantage upon the addressee.[300]

One thing the commissions does not collaborate on it letter is that the CJEU has had the derogation method consistently up on the table however the CJEU has been reluctant in the conclusion that selectivity can only stem from a system to which all the undertakings are subject. [301]

4.1.5 Personal remarks

When looking back on the presented material and the development of the recent case-law in combination of the underlining interrelationship between national fiscal measures and European State aid rules. In the light of the objectives of a tax measure the selectivity criterion tax are precipitously applied where the Courts and the commission seemingly apply a wide scope

[297] Ibid, para 85.
[298] Ibid, para 251.
[299] Commission Decision of 30 august 2016, *State aid SA.38373 implemented by Ireland to Apple*, Brussels, C (2016), 5605 final, para 244.
[300] Ibid.
[301] see i.e. joined Cases C-106/09 & C-107/09 P *Commission and Spain v Government of Gibraltar and UK*, EU:C:2011:732, para 92.

on the application of the derogation method.[302] There exists however considerable controversy in the distinction of general and selective fiscal State measures and tax rulings that continuously fuels the debate.

The entire legal question boils down into two key ingredients; on one hand the freedom and sovereignty for each Member State to enjoy fiscal autonomy and on the other the pursuit of following State aid regulations to safeguard an effective level of internal market competition. It is working as a scale between these two interests, seeing, as there is a need for balance in order to reach certain consensus.

Both the Courts and the Commission express that it falls within the competence of the Member States or of infra-State bodies having fiscal autonomy, in the absence of European Union rules governing the matter due to a lack of Member State fiscal harmonization, to designate bases of assessment and to spread the tax burden across the different factors of production and economic sectors. [303] However, when conducting such burdens, adhere to Union law.[304]

Therefore, in my opinion, there is no surprise that when following the steps of reforms such as SAAP[305] and SAM[306], the Commission requires a more unilateral approach of ALPs - or at least in the area of fiscal rulings. It was therefore, no coincidence, that along with the tax transparency package in 2015[307] the proposal came with an introduction for an automatic exchange of information between Member States on their tax rulings in my opinion.

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[302] C-172/03 *Heiser*, EU:C:2005:130, paras 33 & 35; Furthermore, see the Opinion of AG Tizzano in the same judgement, EU:C:2004:678, para 58.
[303] Commission notice *on the notion of State aid as referred to Article 107 (1) TFEU*, (C/2016/2946), para 156.
[304] Ibid.
[305] State Aid Action Plan: *Less and better targeted State aid: a roadmap for State aid reform*, Brussels 2005-2009.
[306] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the committee of the Regions, *EU State Aid Modernisation (SAM)*, COM/2012/0209.
[307] European Commission Press Release, *Combating corporate tax avoidance: Commission presents Tax Transparency Package*, (2015).

State aid is, as described, one of many tools to assure that the internal market competition functions properly, enhancing economic efficiency.[308]

The four cumulative criteria that must be upheld for a measure to be considered as State aid;[309] As we have seen, fits most fiscal measure with the criteria, albeit, there is a legal debate of when conferring an advantage is seen as selective, this especially perhaps, is due to the fact that even though substantive amounts of case-law emanating from the Courts, there is still a lack of coherence between the Court and the Commission, for instance, when it comes to the derogation method. A method often used by the Commission but by the Courts not a definite safe harbor.[310]

The underlying fundamental principle for State aid regulation relying on the belief that free competition based on equal and non-discriminatory treatment of every undertaking will ensure optimal economic efficiency. Hence, an uneven treatment towards certain undertakings in the form of, *inter alia*, tax exempts and other fiscal measures creating preferential economic treatment between comparable undertakings will likely distort competition and possibly have an effect on trade between the Member States.[311]

However, tax rulings are one of the instruments towards a more reciprocal relationship between the tax authorities and the taxpayers, with an aim from the applicant to compliance and legal certainty. However, a tax ruling including APAs must factually correspond and correlate with an economic reality.[312]

The argument of legal uncertainty in tax rulings when the Commission intervenes has to be backed up with both factual and legal evidence corresponding to an economic reality according to my personal opinion.

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[308] Hofmann, H & Micheau, C. p. 3.
[309] Cf. Article 107 (1) TFEU.
[310] See section 3.1.2.1.4.
[311] Luengo, G. p. 3-4.
[312] Commission Decision of 21 October 2015, *State aid SA.38374 implemented by the Netherlands to Starbucks*, 2017/502/EC, Official Journal L 83, paras 263-267 & 415-416*;* and Commission Decision of 21 October 2015, *State aid SA.38375 which Luxembourg granted Fiat*, 2016/2326/EC, Official Journal L 351, para 227.

Moreover, when addressing the legal part, it is up to the CJEU to provide a clear and consistent case-law.

The most recent cases *World Duty Free Group and Banco Santander* cases does awake certain concern. The General Court stated that where a measure is *a priori* available to all relevant undertakings meeting relevant criteria, the measure will not be considered as selective. Although, one has to bear in mind that this judgment was met with criticism from both the Commission and the Advocate General and was later on overruled by the CJEU.[313] Still, the seemingly differentiated application of conferring selectivity towards tax rulings between the CJEU and the GC does emphasize the existence of a remaining blur in the field of State aid applied to fiscal measures.

My personal view regarding the case, goes in line with the commissions view, perhaps best illustrated, with the AG Opinion.[314] Since, when undertakings benefit from a tax measure, that would not be entitled to them under the normal fiscal regime, and result in a tax advantage that cannot be claimed by other undertakings performing similar operations and as such, in virtue, are in a comparable situation. Such a measure constitutes, de facto, a selective measure in nature; because, contrary to what the General Court claims, it does not actually apply to all economic operators.

What is interesting is the approach from the CJEU that to certain extent departs from the normal three step analysis, better known as the derogation method, and have incorporated a new criterion in the form of potential effects. I therefore consider that, *de lege feranda*, the three-step-analysis ought to be expanded for legal clarity into the following method:

> In order to classify a national tax measure as selective the following criteria should be considered when deciding upon if a tax measure confers selectivity;

[313] Joined Cases C-20/15 P & C-21/15 P *Commission v World Duty Free Group SA, (formerly Autogrill España SA), Banco Santander SA & Santusa Holding SL,* EU:C:2016:981.
[314] Opinion of the AG Wathelet to the judgment C-20/15 P & C-21/15 P *Commission v Banco Santander and Santusa,* EU:C:2015:676.

a. *Firstly, by identifying the ordinary or 'normal' tax system applicable*, and thereafter demonstrate that;

b. the tax measure *is a 'derogation' from that ordinary reference system or general scheme* in the sense that it *differentiates from other operators that are in a comparable factual and legal situation* ***or deviates from the arm's length principle or methodology applied to ensure a reliable approximation of what would under normal circumstances be classified as a market-based outcome****;*

c. that the measure is not *justified by 'the nature or general scheme of the system' or* ***by the very logic of the system per se and in other words not by the measure in relation to the extent of effects of the measure taken.***

The *World Duty Free Group and Banco Santander* cases proved that there was and still is a seemingly apparent legal hotspur within the area of European State aid; it is not clarified and settled in how the selectivity criterion ought to be interpreted in fiscal State measures. Additionally, I do support the belief given by the US Treasury Dept. that; in this ambiguous area, the interpretation of the European State aid rules has developed a new and different mentality, that is much more aggressive towards multinational corporations.[315]

Nevertheless, I do not agree with the US Treasury Dept. that the commission has adopted an entirely new and different case law. Both the *Belgium & Forum 187 v Commission* & *Commission v Gibraltar* support the Commissions decisions. Nevertheless, the Commission seems to be taking a new step in joining the advantage and selectivity criterion which is more evidently shown in the Fiat and Starbucks decisions. Where the commission stated that: "*tax measure results in an unjustified reduction of the tax liability of a beneficiary who would otherwise be subject to a higher level of*

[315] Cf. United States Department of the Treasury White Paper, *The European Commission's recent State aid investigations of transfer pricing rulings*, 24 august, 2016.

tax under the reference system, that reduction constitutes both the advantage granted by the tax measure and the derogation from the system of reference.".[316] This is understandable as the criteria are somewhat intersected in their application to Article 107 (1) TFEU.

But seeing as State aid control is an everchanging area the past two decades the legal framework of State aid in the Union has gone through a review and produced a large amount of texts with the aim of making the legal framework simpler and more understandable/transparent in relation to State aid review, a so called 'codification' manifested in the Commissions Practice and the Courts case law. [317] Whether the abovementioned has provided more guidance or not I leave to the reader to decide upon; one thing is, however, sure - and that is that it continues to fuel a debate between NCAs, National tax authorities, the Commission, the CJEU and operators on the market.

Lastly, as the thesis have shown European State aid rules have a rather great effect and impact on the seemingly reserved right to fiscal autonomy of the Member States. What the Court's verdict will be in the Apple-case remains to be unveiled.

When I first found out about the Apple case a year ago, I told my associate professor and senior lecturer Jörgen Hettne at the Lund University Department of Business Law that my personal belief was that the CJEU would change the General Court's judgment in the the *World Duty Free Group and Banco Santander* cases and that the cases would in turn provide further guidance in how selectivity should be interpreted once and for all in fiscal State measures.

Additionally, a new Commission Notice on fiscal State measures and European State aid would not be unexpected as well as the areas have grown and developed both in its broad range and complexity. The remarkable part

[316] see *State aid implemented by the Netherlands to Starbucks*, Commission Decision COMP/SA.38374, Oct. 21, [2015] & *State aid which Luxembourg granted to Fiat*, Commission Decision COMP/SA.38375, Oct. 21, [2015].
[317] See section 2.1.4.

is that in so far, my preliminary remarks of the case a year ago, have all succeeded. And, along those lines it would not be farfetched for me to give my assumption of the potential judgment in the Apple case at hand for the CJEU.

My take on the Apple case is that the CJEU will have the same approach as the Commission and furthermore expand the case-law within the area by looking at the potential harmful effects to undertakings that would have reasonably been considered to be in the same *factual and legal* comparable situation. Thus, in light of the foregoing I believe the CJEU will find that the tax rulings provided by Irish Revenue in favour of Apple Sales International (ASI) and Apple Operations Europe (AOE) confer a selective advantage.

Furthermore, I have confidence in that the Court will address the issue at hand with regards to the *effects* of the measure as well as the logic of the system *per se* and conclude that when staying under the umbrella of the arm's length principle the methodology applied to ensure a reliable approximation of what would under normal circumstances be classified as a market-based outcome is in the case not justified by the nature of the legal system. After all, when looking to the objectives of the system, it's hard to imagine that the tax base for Apple is in line with the objectives set forth. But it is yet for the CJEU to decide.

The most recent cases *World Duty Free Group and Banco Santander* cases does awake certain concern. Still, the seemingly differentiated application of conferring selectivity towards tax rulings between the CJEU and the GC does emphasize that there is a remaining blur in the field of EU State aid law applied to fiscal measures.

5 Conclusions

To conclude this thesis, the modern European economies rely heavily on markets and undertakings to decide what markets to expand into, what goods to sell and what R&D to undertake etc. The underlying fundamental principle to ensure that the clockwork keeps on ticking is free competition based on equal and non-discriminatory treatment of every undertaking will ensure optimal economic efficiency.

The evolution of European State aids began with the Treaty of Paris in 1951, which gave rise to the ECSC. The objective at that time was to maintain post-war peace and reconcile two political powers, Germany and France. Today, however, the past two decades have marked the legal framework of State aid in the Union by key aspects such as: Transparency, Modernization and a more economic point of view.

The legal framework has gone through a review and produced a large amount of texts with the aim of making the legal framework simpler and more understandable/transparent in relation to State aid review, a so called 'codification' manifested in the Commissions Practice and the Courts case-law. However, this has also contributed to the complexity of the area that now withholds a large amount of Commission Policy Framework.

The famous wording of Article 107(1) TFEU prohibits any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, insofar as it affects trade between Member States.

The selectivity criterion '*favouring certain undertakings or the production of certain goods*' is, one of the most defining criteria for State aid. The criterion additionally raises complex questions in tax measures since there is no community-level harmonisation of the tax provisions of the Member States. The Commission very clearly States in their notice that Member

States freely can decide upon the most appropriate economic policy and tax burden they see fit and fall within their competence due to natural fiscal autonomy. However, when exercising such policies, they must follow Union Law.

The selective advantage may derive from an exception to the tax provisions of a legislative, regulatory or administrative nature or from a discretionary practice on the part of the tax authorities. However, the selective nature of a measure may be justified by 'the nature or general scheme of the system'. The methodology to the abovementioned derogation has also been coined through the case-law as the derogation method. Sometimes this justification has also been referred by the Court as the 'nature or structure' or 'logic' of the system, and applies almost exclusively to tax measures.

Due to the complexity and judicial uncertainty with regards to certain areas of tax measures in relation to EU State aid law. One solution to the encumbrances within the judicial area has been incentives for tax transparency. Furthermore, have tax rulings, APAs and other tax perceiving measures has been developed globally as a consequence of a change in mentality from tax authorities, an ambition for a higher degree of tax compliance and securer economic investments from multinational corporations and tax filers. However, this has also give rise to, as evidently shown in the recent cases brought up by the thesis, a legal hotspur. Where the Commission has been the pot stirrer in the interrelationship between national fiscal autonomy, larger multinational companies and the EU's State aid rules.

Some of the most recent and influential decisions on fiscal selectivity are the decisions of the General Court in the World Duty Free Group and Banco Santander cases. The CJEU overruled the GC in the case stating that a national measure has to be regarded as selective where the measure benefits exclusively undertakings that export goods or services, even though that might not have been the case with respect to the particular tax measures at issue.

Based on the application of the selectivity criterion in tax measures and in specific relation to the derogation method, I have found that, *de lege feranda*, application of the three-step-analysis ought to be expanded with the elements of a deviation from the arm's length principle or the methodology applied to ensure a reliable approximation of what would under normal circumstances be classified as a market-based outcome. In addition to the developments of the Court that the where a measure is not justified by 'the nature or general scheme of the system' or by the very logic of the system per se or not by the measure in relation to the extent of effects of the measure taken may confer selectivity in relation to Article 107 (1) TFEU.

However, bearing in mind of the historical aspects of European State aid law, what is proven is that the area is truly an ever-changing legal spine, unlike other competition law areas, where the Commissions policy framework brings flesh to the Court's bones. Therefore, little can be speculated how we look at State aid in the next 60 years. One thing is ensured however, and that is that it will continue to fuel a wide debate amongst the Member States,

In other words – It's a great time to be a competition lawyer!

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