

# Entrepreneurship Threats: An Overview of EU Case Law on State Aid Concerning Fiscal Measures

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# Introducing myself – Network purposes

- Education background:
  - Brazil: J.D., Law, PUC-PR (2009), specialization in General Theories of Law and Constitutional Law, UniBrasil(2010), lawyer registered at the OAB-PR (Brazilian BAR Assoc., 2010–2022).
  - Sweden: Post-doctor research funded by SkatteNytt (2024), LL.D. in Tax Law, Gothenburg University (2024), LL.M. in International Tax Law, Uppsala University (2015), LL.M. in International Environmental Law, Stockholm University (2014).
- Areas:
  - EU constitutional law, EU tax law, EU State aid law, and EU environmental law.
  - Some Swedish tax law and environmental law (teaching duties & interests).
  - Domestic violence against immigrants in Sweden (voluntary work – practice).
  - Feminist theories in tax law (additional future interests).

- E-thesis link:  
<https://gupea.ub.gu.se/handle/2077/78834>
- GU's profile:  
<https://www.gu.se/en/about/find-staff/joanacristinapedroso>
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# What are fiscal measures from a State aid perspective?

Taxes (direct or indirect), fees, and charges with fiscal and/or parafiscal objectives.

- De jure: Tax Law (formal aspects)
  - **Principle of legality**
  - **Tax jurisdiction and competence**
  
- Interpretation of the tax law:
  - Tax rulings
  - Tax administration guidelines
  - Preparatory work
  - Domestic case law
  - ...

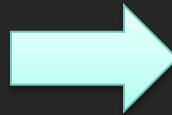
# State aid main rule – article 107(1) TFEU

‘Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in ***any form whatsoever*** which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.’

Unchanged since the Treaty of Rome

Case law developed

First, it must be recalled that, according to the Court's settled case law, the classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (Joined cases C-20/15 and C-21/15 P, *Commission v World Duty-Free Group SA and others*, para. 53).



## Fiscal measures

### Cumulative conditions:

- 1<sup>st</sup> Granted by a Member State or through State resources.
- 2<sup>nd</sup> Affects trade between Member States.
- 3<sup>rd</sup> Favoring certain undertakings or the production of certain.
- 4<sup>th</sup> Distorts or threatens to distort competition.

# Concept of *aid*

“The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, 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.”

Ref. C-30/59 *De Gezamenlijke in Limbur v. High Authority of the European Coal and Steel Community*, p. 19

***‘In any form whatsoever’***

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# Granted by a MS or through State resources

- **Usually not critical (as for subsidies) because of the principle of legality in tax law = granted by a MS**
  - **Legislator, tax authority, court (at all levels: communal, district, regional, national, over seas, etc.).**
- **Fiscal measures harmonized at the EU level (e.g., VAT): Can they be State aid? Yes, but...**
  - **Obligations under EU law?**
    - Implementation of an EU law without any discretion, not *granted by a Member State* (C-460/07 Sandra Puffer), **Union aid**.
    - With discretion, such measure may **granted by a Member State** and thus may fulfill this condition.

# ***Favoring certain undertaking or the production of certain goods – a.k.a. Selective advantage condition***

54. So far as concerns the condition relating to the selectivity of the advantage, which is a constituent factor in the concept of State aid within the meaning of Article 107(1) TFEU, it is clear from equally settled case-law of the Court that the assessment of that condition requires a determination whether, under a particular legal regime, a national measure is such as to favour certain undertakings or the production of certain goods over other undertakings which, **in the light of the objective pursued by that regime, are in a comparable factual and legal situation and who accordingly suffer different treatment that can, in essence, be classified as discriminatory** (á).X

C-20/15 and C-21/15 P, *Commission v World Duty Free Group SA and others*, para. 54.

“56. As regards, in particular, national measures that confer a tax advantage, it must be recalled that a measure of that nature which, although not involving the transfer of State resources, **places the recipients in a more favourable position than other taxpayers** is capable of procuring a selective advantage for the recipients and, consequently, of constituting State aid, within the meaning of Article 107(1) TFEU. On the other hand, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute such aid (...).”

”57. In that context, in order to classify a national tax measure as ‘selective’, the Commission must begin by **identifying the ordinary or ‘normal’ tax system applicable in the Member State concerned, and thereafter demonstrate that the tax measure at issue is a derogation from that ordinary system, in so far as it differentiates between operators who, in the light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation (...).**”

C-20/15 and C-21/15 P.

# ADVANTAGE → 'favouring' (far-reaching concept)

- The tax measure must confer a relief from the normal charges normally internalized by the undertakings, in a way to favor the taxpayer. This benefit or advantage could be granted through **special deductions, accelerated depreciation, special tax-free reserves, reduction of the rate or the subjection to tax, or through deferment, cancelation, or rescheduling tax debts, etc.** (Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation [1998] OJ 98/C384/03, para 9)
- Relates to an economic benefit not obtained without the measure (C-143/99, *Adria Wien-Pipeline*, also C-173/73, *Italy v Commission*)
- Difficult burden of proof on tax rulings' cases (corporate income tax). However, closer than ever.

**SELECTIVITY → COMPARABILITY ASSESSMENT or CIRCLE OF COMPARABLE UNDERTAKINGS ‘Certain undertakings or the production of certain goods (selectivity)’**

- **breach of the equality principle among taxpayers in a comparable situation the light of the objectives intrinsic in the reference regime (material or geographic reference system, *de jure or de facto*) + proportionality**
  - **Undertakings?** ‘Every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity’ (C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, para 21). **Regardless of their legal status and how they are financed (C-49/07, MOTOE)**
  - **Not necessarily competitors!!! (C-143/99, *Adria-Wien Pipelines GmbH*).**
  - If the benefit is available to everyone but one taxpayer, it can still be considered *selective* (T-219/10 *Auto Grill España SA v. Commission*, paras 44-45)
  - The Commission is not obliged to identify specific group of privileged undertakings – it is sufficient that a derogation is identified (joined cases C-20/15 and C-21/15 *Commission v. World Duty Free Group* – Grand Chamber, para 67.

**Is the selective advantage condition (effect) only about discriminatory tax treatment?**

**What is discrimination from an EU law point of view?**

**\* Similar logic of Free Movement Provisions concerning discrimination and restrictions?  
See case C-143/99, *Adria-Wien Pipelines GmbH* – discrimination and/or restriction?**



**COMPARABLE  
Principles equal pay &  
proportionality**

# OBJECTIVE OF THE TAX REGIME

= LOGIC OF THE TAX REGIME

1) Why did the tax legislators plan, design, and impose the tax law?

To achieve certain aims/objectives/purposes with the imposition

2) What are the tax's aims/objectives/purposes?

Fiscal? Social? Environmental? Administrative? ...

3) In which order did the tax legislators frame these aims/objectives/purposes?

4) How was the tax law or the fiscal measure itself logical to that tax's aim even in terms of proportion?

The analysis of these questions regards the EFFECTS of the measure.

**RULE OF REASON**

**V**

**EFFECTS-BASED APPROACH**



# Relevant case law: Direct Taxes

C-88/03, *Portugal v Commission (Azores)* ⇒ material and geographic selectivity

C-106/09 and C-107/09, *Commission and Spain v. Government of Gibraltar and United Kingdom* ⇒ de facto selective (direct tax, discriminatory, de facto)

C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission*,

C-451/21 P and C-454/21 P, *Luxembourg v Commission (Engie group)*

# Relevant case law: Indirect Taxes

- C-143/99, *Adria-Wien Pipelines GmbH* (three-step method/approach, principles of equal pay, prop. & PPP)
- C-486/07 P, *British Aggregates Assoc.* (plaintiff rights, Commission error)
- C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück*
- C-233/16, *ANGED*.
- C-562/19 P, *Commission v Poland and Hungary* (limits of Commission leeway)

# SELECTIVITY IN INDIRECT TAXATION – ???



**Indirect taxes are transferred to the final consumer**

**So who benefits?**

See joined case C-164/15 and C-165/15 P, *Aer Lingus Ltd, Ryanair Ltd, Ireland v Commission*

\*If harmonized by the EU, a discussion of whether it is EU aid or State aid (granted by a MS slide 9).

**★KEY★**

Advantage

**Ask: What is the tax treatment – tax burden in question?**

**★KEY★**

Selectivity

**Ask: To whom the tax advantage is available and not available?**

**Based on the logic of the tax regime, are they in a legal or factual comparable circumstance?**

## 3rd Step: Justification

“58. (...) where the Member State concerned is able to demonstrate that that differentiation is justified since it flows from the nature or general structure of the system of which the measures form part (...).” C-20/15 and C-21/15 P.

E. x.: the need to fight fraud or tax evasion, specific accounting requirements, progressive nature of the system, need to avoid double taxation...

Not connected to the objective/aim/purpose of the tax!!!!

# Affects trade between MS & distort or threatens to distort competition are not so critical

- A discussion about what the market in consideration of the tax in question.
- Could become critical when new markets are established and competition does not exist. We have seen digitalization, crypto currencies, multiverse, A.I. etc, but are they competing with existing sectors?
- How to define the market becomes key.
  - E.g., in my thesis, environmental protection perspective.

# Conclusion

## Entrepreneurship Threats: An Overview of EU Case Law on State Aid Concerning Fiscal Measures

- The State aid threat lasts 10 years > Reg. 2015/1589, Art. 17(1) + aid recovery – Art. 13(2) + interests payment – Art. 16(2).
  - Reduces legal certainty, predictability, and legitimate expectation.
- Overview perception (a new era in the EU case law) before heavy focus on what constitutes S.A., now limits the EU S.A. intervention on MS tax discretion.
  - Direct taxation: MAIN ISSUES with the Commission's decision framing tax rulings concerns *how* it defined the reference tax regime
  - Indirect taxation: mostly an issue concerning *how* the legislator considered the principles of equal pay & proportionality concerning the tax objective within the selective advantage condition analysis.
    - Future possibilities: aid granted by the EU through positive harmonization of certain issues.



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**THANK YOU!**

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