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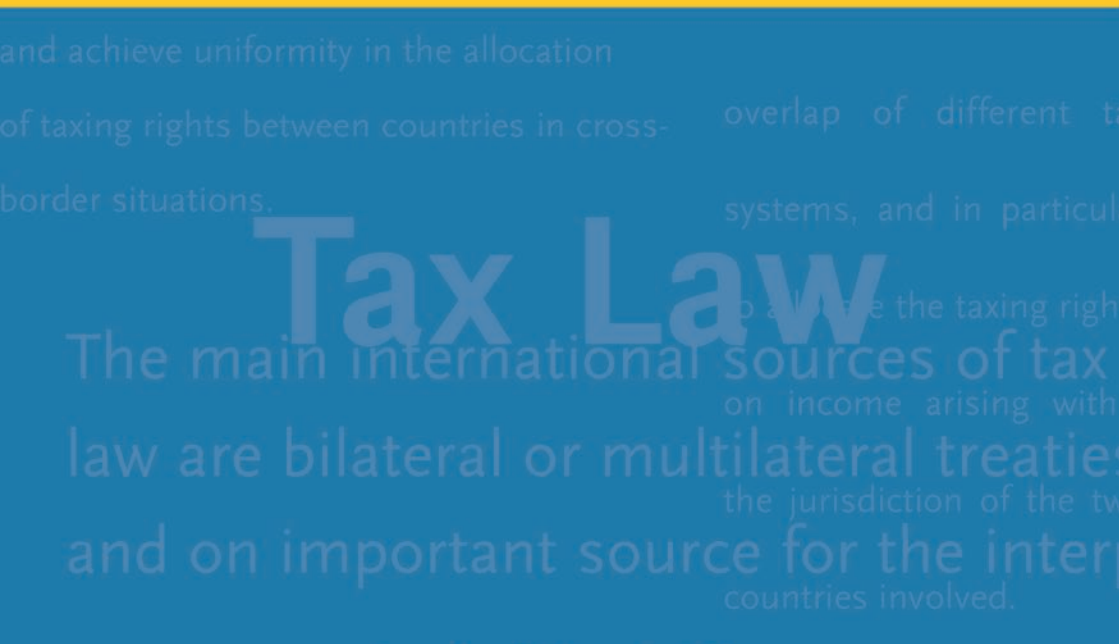
EU Income Tax Law: Issues for the Years Ahead



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IBFD

EU Income Tax Law: Issues for the Years Ahead

Why this book?
EU Income Tax Law: Issues for the Years Ahead, comprising papers from a conference held in Amsterdam, in April 2012, organized by the Amsterdam Centre for Tax Law in cooperation with the EU Tax Law Group, is a comprehensive examination of recent and future developments in the area of European tax law.

In this book, distinguished authors discuss the implications of the new developments in the abuse of law doctrine of the European Court of Justice, the European Parliament amendments of the CCCTB, the ongoing discussion relating to the Code of Conduct on harmful tax competition and double non-taxation, and the selectivity requirement in State aid cases, including the Paint Graphos and Gibraltar cases.

The problems of reverse discrimination are also considered as well as the possibility to neutralize restrictions of free movement, including an analysis of the issue of whether a taxpayer needs an ordinary credit or a full credit to neutralize such restrictions. The question as to under which conditions an exit taxation in the European Union is permissible is also thoroughly examined, followed by an analysis of the dividend withholding tax on EU pension funds and the investment funds saga, including an account of practical experience acquired in Spain and a discussion of the Santander case.

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Table of contents

Sample chapter

Some Fringe Areas of EU State Aid Law in Direct Tax Matters

by Peter J. Wattel*

7.1. Introduction[1]

In recent years, the awareness of State aid possibly contained in national direct tax measures has increased in the European Union. As a result, the Commission has undertaken more actions against fiscal State aid. This has revealed overlap and concurrence, and sometimes even contradiction between EU State aid law and other areas of EU (soft) law affecting direct taxation. This paper will discuss four types of interaction or overlap between EU State aid law and other fields of (EU) (soft) law as regards direct taxation:

– State aid and free movement rights;
– State aid and harmful tax competition;
– State aid and anti-abuse measures; and
– State aid in the form of taxation itself.

7.2. State aid and free movement rights: Convergence of assessment criteria

7.2.1. Differences and similarities: Comparing criteria

The EU Treaty rules on both State aid and free movement are so-called negative integration: they both *prohibit* certain national measures jeopardizing free competition in the EU internal market. They both serve the same overall purpose, i.e. an internal market with a level playing field for all EU economic operators. It therefore makes sense that the Commission is not at liberty to approve, under article 107(3) and 108 of the Treaty on the Functioning of the European Union (TFEU), of aid measures which would violate other

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1. This paper is an elaborated and extended version of the closing lecture of the 2012 GREIT Lisbon Summer Course on State Aid on 6 June 2012, organized by the Instituto de Dereito Económico Financeiro e Fiscal of the Faculdade de Dereito of the Universidade de Lisboa.

directly effective EU law, such as the free movement rights.[2] Both sets of EU rules express the basic rule "Thou shalt not discriminate": Thou shalt neither impede cross-border movement nor distort competition.[3]

The two sets of rules differ, however, in that State aid concerns *intra*-state distinctions between economic operators (within the same state) and free movement concerns *inter*state distinctions between economic operators (distinctions between residents and non-residents or between cross-border income and domestic income). Furthermore, the State aid rules are aimed at curbing *positive* discrimination (the *favouring* of certain undertakings or production of certain goods), whereas the free movement rights are aimed against negative discrimination (the *disadvantaging* of cross-border operations as compared to domestic operations).

A comparison of the criteria for establishing State aid and those for establishing impediments to free movement in direct tax matters produces the following:

(a) State aid criteria (article 107 of the TFEU): (i) there is an advantage; (ii) from State resources; (iii) which is (potentially) affecting competition and intra-Union trade; and (iv) which is selective (by favouring certain operators or activities); which is prohibited, unless (v) it is justified by the inner logic of the – in itself legitimate – tax policy of the Member State involved (the Commission[4] calls this "objectives inherent to the tax system itself" – such as a progressive rate, serving a general redistributive objective – as opposed to external objectives, such as social or regional objectives); and

(b) free movement criteria (articles 28, 29 and 45-66 of the TFEU, as interpreted by the Court of Justice of the EU (ECJ)):[5] (i) there is a discrimination against the cross-border position as compared to the comparable domestic position, which is prohibited unless (ii) it is justified by mandatory public interest requirements such as coherence of the tax system or a balanced allocation of taxing rights, and (iii) the measure taken is

2. *See* e.g. ECJ, 20 Mar. 1990, Case C-21/88, *Du Pont de Nemours Italiana SpA and Unità sanitaria locale No 2 di Carrara (Local Health Authority No 2, Carrara)*.
3. *See* e.g. ECJ, 7 May 1985, Case 18/84, *Commission v. France* (tax breaks for press printing).
4. Commission Notice on the application of State aid rules to measures relating to direct business taxation, 98/C384/03 (11 Nov. 1998).
5. For a summary of that case law by the ECJ itself, *see* e.g. IT: ECJ, 30 Nov. 1995, Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, para. 37, ECJ Case Law IBFD.

appropriate to protect that public interest and (iv) also proportional in that it does not go any further in limiting free movement than strictly necessary to attain protection of that public interest.

The case law of the ECJ shows that the State aid criteria "advantage" and "selective" are often taken together, or at least not very clearly distinguished, which is probably not surprising, as both criteria refer to (positive) discrimination. Moreover, *if* positive discrimination of certain undertakings or products is found to be present, then (potential) effects on competition and on interstate trade are more or less presumed.

Therefore, in both State aid cases and free movement cases the most relevant assessment criteria seem to be (i) a comparability/discrimination analysis and (ii) a justification inquiry.

In free movement cases, the comparability analysis concentrates on the question of whether cross-border positions receive (no worse than) national treatment; it looks for *dis*advantages: for anything that makes investing, working or trading across the internal EU borders *harder* than investing, working or trading at home. In State aid cases, by contrast, the comparability analysis concentrates on the question of whether competition is distorted; it looks for unjustified *benefits*: for anything that makes competing *easier* for certain operators or operations.

Both analyses look at legal and factual comparability of the assessment object and its comparator in the light of *object* and *purpose* of the tax measure concerned (what is its policy objective?).[6] Therefore, it is not surprising that certain national tax measures may be caught by both prohibitions.[7]

6. For this comparability analysis in fiscal free movement matters, *see* e.g. NL: ECJ, 18 Sept. 2003, Case C-168/01**,** *Bosal Holding BV*, ECJ Case Law IBFD and NL: ECJ, 25 Feb. 2010, Case C-337/08, *X. Holding BV*, ECJ Case Law IBFD, and in fiscal State aid matters, *see* e.g. ECJ, 8 Nov. 2001, Case C-143/99, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH I Finanzlandesdirektion für Kärnten*, ECJ Case Law IBFD.

7. *See* M. O'Brien, *Company Taxation, State aid and Fundamental Freedoms: Is the next step enhanced cooperation?*, 30 European Law Review 218, pp. 231-233 (2005).

7.2.2. Examples of concurrence of the State aid prohibition and the free movement rules

Four ECJ cases are summarized here to illustrate that, as both sets of rules express, at a more abstract level, the same norm (a level playing field within the European internal market), the State aid prohibition and the free movement rights overlap and in tax matters may easily apply simultaneously.

The most recent case is *Regione Sardegna* (Case C-169/08),[8] which concerned a regional tax on touristic stopovers in Sardinia by boats and aircraft. Local rental and tour undertakings were exempt because they were subject to a local environmental tax. The Italian Constitutional Court (*Corte costituzionale*) was confronted with the question of whether this regional tax was constitutional (was within the autonomous taxing power of the region) and compatible with EU law (as it also disadvantaged touristic operators from other Member States, such as France). The *Corte costituzionale* for the first time ever asked preliminary questions to the ECJ: Does this tax and its exemption of locals offend either the EU State aid prohibition or the EU freedom to provide and acquire services? The ECJ's answer was affirmative on both counts: the impugned tax measure was caught by both discrimination tests as it was both benefiting certain undertakings as compared to other (domestic) undertakings *and* discriminating against foreign undertakings. It was for the national court to take requisite measures on the basis of this finding of a double EU law violation.

This preliminary answer raises the question for the national court of which legal remedy it should apply, as the State aid provisions and the free movement rights point in opposite directions. The State aid rules would require the Italian Republic to recover the benefit granted (with interest) from the favoured undertakings (that would mean the imposition of additional tax assessments on the previously exempted Sardinian undertakings); whereas the free movement rights would require Italy to extend the tax exemption also to the non-Sardinian undertakings (refund the non-Sardinian undertakings). In practice, however, that question probably did not arise: from a national constitutional law perspective, the Sardinian tax measure was simply unconstitutional (also because it offended EU law, irrespective of *which* EU law it offended) and therefore invalid, meaning that the tax levied on the basis of it should be refunded as far as – reasonable – time limits for refund claims have not expired yet.

8. IT: ECJ, 17 Nov. 2009, Case C-169/08, *Presidente del Consiglio dei Ministri v. Regione Sardegna*, ECJ Case Law IBFD.

A rather old case, *Commission v. France* (Case 18/84),[9] involved a tax deferral for press undertakings that had their printing done in France. The ECJ found that this tax break had the same effect as a quantitative import restriction on printed paper and amounted therefore to a violation of the free movement of goods, but it might also have decided that the tax deferral constituted State aid to the national printing business, or to the press undertakings receiving the tax break, or to both.

A third example of a case featuring concurrence of prohibited State aid and a violation of free movement rights is *Germany v. Commission* (Case C-156/98).[10] After the *Wiedervereinigung* of East and West Germany, the German federal government introduced tax incentives for the acquisition of small and medium-sized enterprises in the new *Länder* in East Germany. According to both the Commission and the ECJ, these tax breaks simultaneously violated both the right of establishment and the State aid rules. In this case as well, the question would arise, from a theoretical point of view, of which remedy would be appropriate: granting the same tax break for similar acquisitions in the other *Länder* and abroad or recovering the tax forgone from the aided acquiring companies? However, in practice, and unlike in the *Sardegna* case, here the answer was probably that the tax advantage had to be made undone by still levying the tax forgone from the aided undertakings.

Finally, *Calafiori* (Case C-451/03)[11] is mentioned, as in that case, the ECJ condemned an Italian measure providing for payments to tax consultants assisting undertakings in filing their returns as violating both the State aid rules and the free movement of services and establishment.

7.2.3. Some examples of the ECJ's comparability/discrimination analysis in fiscal State aid cases

To illustrate that the ECJ's selectivity/advantage analysis in fiscal State aid matters looks much like its discrimination analysis in fiscal free movement rights cases, some State aid cases in tax matters are summarized below in which the selectivity analysis is in fact a discrimination analysis and in which *comparability* (of the economic operators involved) and *justifiability* (of the national measure distinguishing between economic operators) are

9. *Commission v. France* (C-18/84).
10. ECJ, 19 Sept. 2000, Case C-156/98, *Commission v. Germany*.
11. ECJ, 30 Mar. 2006, Case C-451/03, *Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori (Pubblico Ministero)*, ECJ Case Law IBFD.

separated, just as they are in the Court's analysis in free movement cases. In one case, *Gibraltar* (Joined Cases C-106/09 P and C-107/09 P)[12] (*see* section 7.3.4.), the ECJ considered the Gibraltar tax system to be selective and therefore to amount to State aid, verbally because that tax system "in practice *discriminates*" (emphasis added). Also, it will be illustrated that the Court's selectivity criterion may shift depending on the desired result of its analysis.

Commission v. Netherlands (Case C-279/08 P)[13] concerned the Netherlands environmental measures as regards NOx emissions by industrial facilities. All undertakings were subject to emission ceilings (individual emission standards). Exceeding the ceiling would trigger a very substantial levy. Only the 250 largest undertakings (i.e. the highest emissions undertakings) had the opportunity to sell unused emission allowance and to buy extra allowance. Thus, unlike other undertakings, only these large undertakings had the possibility of monetizing the economic value of their emission reduction. That amounted to State aid, as the state had created – for free – for these large undertakings a market in emission allowance. That was an advantage not enjoyed by other undertakings which were comparable under the relevant comparison criterion, i.e. their obligation to reduce their NOx emission.

From *GIL Insurance* (Case C-308/01)[14] it appears that, as in free movement cases, also in State aid cases anti-tax avoidance measures which seem to be selective (seem to discriminate) may be justified if they are inherent to a consistent general system of taxation. The case concerned the increase of the UK insurance premium tax (IPT) on certain contracts (domestic appliance insurances), which was raised to the level of the VAT in order to compensate for the fact that these contracts were not subject to VAT, which had created a difference in tax burden. The increase was not considered by the ECJ to favour a specific (other) sector, but rather to restore a level playing field. Although the measure derogated from the normal IPT regime, there was no derogation from VAT-subjected transactions. As far as the measure could be considered to be selective, it was justified by "the nature and general scheme of the tax system" (which resembles the "coherence of the tax system" featuring in fiscal free movement cases of discrimination).

12. ECJ, 15 Nov. 2011, Joined Cases C-106/09 P, *Commission v. Government of Gibraltar* and C-107/09 P, *Kingdom of Spain v. Government of Gibraltar,* and *United Kingdom of Great Britain and Northern Ireland Commission v. Government of Gibraltar*, ECJ Case Law IBFD.
13. ECJ, 8 Sept. 2011, Case C-279/08 P, *Commission v. Netherlands*.
14. UK: ECJ, 29 Apr. 2009, Case C-308/01, *GIL Insurance Ltd and Others v. Commissioners of Customs & Excise*, ECJ Case Law IBFD.

Adria-Wien Pipeline (Case C-143/99)[15] concerned an Austrian tax on the consumption of energy (gas and electricity) by undertakings. There was a rebate, however, for companies producing goods. That rebate was State aid, as in the light of the ecological goal of the tax it should catch *all* companies consuming energy, as their consumption was equally damaging to the environment, and should not distinguish between energy-consuming companies on ecologically irrelevant criteria such as the type of product (goods or services).

In *Paint Graphos* (Joined Cases C-78/08 to C-80/08),[16] the ECJ held that Italian cooperative societies, which were exempt from the Italian corporation tax, were nevertheless not necessarily aided, as they were not comparable to ordinary companies under the Italian corporate tax system, inasmuch as they were fiscally sufficiently transparent (their profits being taxed in the hands of the members) and the preferential regime was restricted to the profits made on transactions between the members of the cooperative society and did not include outside trading profits. Therefore, no State aid would be present if these societies were indeed sufficiently *uncomparable*, which was a matter for the national court to ascertain.

In *British Aggregates* (Case C-487/06 P),[17] a British environmental levy on aggregates was under scrutiny that targeted only *virgin* (mined) aggregates. It did not tax producers of by-product or waste aggregates. The General Court did not see any selective advantage for the latter, as from an ecological point of view, it considered them not to be (sufficiently) comparable to miners of aggregates (or at least considered that to be a matter of national environmental policy discretion). On appeal, however, the ECJ held that, given the environmental goal of the levy, all producers of aggregates were in principle *comparable* and should, therefore, in principle all be caught by the scope of the levy. An exemption or a reduction for producers of non-virgin aggregates might, however, be *justified* by the nature or general scheme of the levy system, or compatible with the internal market on environmental grounds.

A striking feature of the Court's comparability analysis in fiscal State aid cases is that its comparison criterion may shift according to the need to reach a specific result: in *Paint Graphos*, the Court held that for a finding

15. *Adria-Wien Pipeline* (C-143/99).
16. IT: ECJ, 8 Sept. 2011, Joined Cases C-78/08 to C-80/08, *Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v. Paint Graphos Soc. coop. arl and Others*, ECJ Case Law IBFD.
17. ECJ, 22 Dec. 2008, Case C-487/06 P, *British Aggregates Association* v. *Commission*, ECJ Case Law IBFD.

of selectiveness of a tax regime, it is necessary to identify the "normal" tax regime and to establish that a *derogation* from that *normal* regime is afoot, favouring certain taxpayers. In *Gibraltar* (*see* section 7.3.4.), which was decided only two months later, that criterion would have prevented the Court from finding that the Gibraltar tax system was selective, as there was no derogation form the general Gibraltar corporation tax: Gibraltar had carefully made sure that all companies, including the offshore industry, were subject to the same corporate tax system. However, in contrast with *Paint Graphos*, the absence of any "derogation" from the "normal" tax system did not prevent the Court from considering the Gibraltar corporate tax system to be State aid. Derogating from *Paint Graphos*, the ECJ considered that to be selective, it is not necessary that a generally applicable tax contains a derogation benefiting certain undertakings, as the general tax system may effectively be too narrowly defined from the outset; that is a matter of regulatory technique. Therefore: not the design of the tax system is decisive, but its material effect. A main rule/exception analysis is not (always) decisive, as state may *exclude* certain undertakings from a tax by *including* them in such a crafty way that they are *effectively* still *excluded* and therefore favoured.

For a finding of selectivity it is not relevant either that the large majority of addressees of the tax system is not effectively taxed (in *Gibraltar*, 99% of the domiciled – but offshore – companies were effectively not paying corporation tax) and that also in that respect one cannot speak of a derogation or an exception (in *Gibraltar*, actually *paying* tax was the exception/derogation). This too shows that selectivity (certain economic operators are *favoured*) and discrimination (certain economic operators are *disadvantaged*) are conceptually identical.

7.2.4. Convergence of criteria: Rewriting the State aid criteria in direct tax matters in the light of case law: More ECJ scrutiny and less fiscal sovereignty?

On the basis of the case law of the ECJ, one may thus rewrite the Treaty criteria for State aid as follows:

(i) Which undertakings are in a legally and factually comparable position in the light of the tax system (its policy objective) at issue?

(ii) Is there a derogation or exclusion from that tax system to the benefit of an identifiable specific group of undertakings, or a cunning choice of a seemingly indiscriminate tax base which nevertheless produces a selective effect?

(iii) Is the derogation/selective effect justified by the nature or general scheme of that system? Is there an "inner logic" to that derogation, or, framed inversely: is there an "alien selective element" in the system, which cannot be explained by the (in itself unobjectionable) fiscal goal of the tax measure? (e.g. a progressive rate, anti-abuse measures or tax base distinctions based on environmental facts).

Framed in this manner, the State aid criteria seem rather close to the well-known *rule of reason* test in (fiscal) free movement cases, albeit that the last two steps of the rule of reason test (Is the measure appropriate? Is it proportional?) do not yet seem to have been developed much in State aid cases. As in free movement cases, first a selectivity/discrimination analysis (a comparability analysis) is applied, followed by a justification analysis. Apparently, especially after *Gibraltar* (*see* section 7.3.4.), the main issue in both fields of EU law seems to be whether a distinguishing effect is justified by the logic of the fiscal policy objective pursued. *Other* than fiscal (revenue or generally redistributive) objectives are at the outset suspect and need justification. The most interesting question is whether there is room for a proportionality test in State aid tax matters as there is in free movement tax cases.

ECJ Judge Lenaerts[18] has drawn attention to this parallel between State aid law and free movement law in direct taxation, especially to the parallel between the "inner logic" justification in State Aid cases ("the nature or general scheme" of the tax system) and the "coherence of the tax system" justification in free movement cases. He observed that the ECJ has hitherto never accepted the "inner logic" excuse in State aid cases on direct taxes, and it is true that the *GIL Insurance* case summarized above concerned *in*direct taxation.

After the recent *Gibraltar* case (*see* section 7.3.4.), however, the "inner logic" justification may be accepted in direct tax cases as well. If the Court more easily finds comparability and therefore selectivity/discrimination to

18. K. Lenaerts, *State Aid and Direct Taxation*, in *EU Competition Law in Context*: *Essays in Honour of Virpi Tiili* pp. 291-306 (H. Kanninen, N. Korjus & A. Rosas eds., Oxford, Hart Publishing 2009).

be present, as it seems to do in *Gibraltar*, in which no derogation from the general tax system was present, then the need for justifications of (effective) tax differentiations within a national tax system will increase.

On the one hand, this guarantees ECJ supervision over Member States' tax systems, as they will need to be able to explain and justify effective differentiations in their tax systems, but on the other hand creates more risk of political assessment, as it further limits Member State fiscal sovereignty and increases legal uncertainty for both taxpayers and the national tax legislature. Few had expected *Gibraltar* to turn out as it did. The Commission may (or must) now examine national tax measures for inner logic (is the tax system "coherent" in respect of international neutrality, but is it also horizontally – domestically – neutral? Does the distinction between *domestic* taxpayers flow from "the nature and general scheme" of the tax system?).

7.3. State aid and harmful tax competition

7.3.1. Delineation and overlap of fiscal State aid and harmful tax competition: The Code of Conduct for Business Taxation

The EU Member States do not wish to give up any tax sovereignty, but they do not wish to lose any policy race to the bottom from their fellow Member States either, so they sat together to agree on a non-binding code of conduct to curb what they see as harmful tax competition by their fellow Members. That Code of Conduct for Business Taxation,[19] a political rather than a legal instrument, was agreed on in December 1997. It distinguishes "good" (fair) and "bad" (unfair) fiscal policy competition and is aimed at preventing a policy race to the bottom, the "bottom" being a situation in which too little tax revenue is raised to keep up decent public service, infrastructure and social security, to the unjustified benefit of internationally mobile capital. The Commission (Commissioner Monti) called this effect of excessive harmful tax competition "fiscal degradation". The Code in principle targets non-selective incentives for especially mobile foreign investors not reflecting the true balance of taxes and public service. A Code was needed as the State aid rules would not be of much help to outlaw horizontal (non-selective) tax legislation which would, moreover, not *reduce* but on the contrary *increase* state resources. The legally most likely way to tackle unfair tax competi-

19. Resolution, annexed to the Ecofin Council conclusions of 1 December 1997, OJ C2, p. 1 (6 Jan. 1998).

tion would be to engage articles (now) 116 and 117 of the TFEU, as unfair tax competition which needs to be eliminated amounts to a serious market distortion caused by disparities in national tax legislation to which articles 116 and 117 apply. These provisions, moreover, have the advantage that their application does not require unanimity, but a mere qualified majority. It would seem, however, that the Commission estimated that individual Member States tackled under these provisions would consider that to be the nuclear option and unfair, and might threaten to block progress in all other areas. A political peer pressure instrument was therefore needed. The opponents of elimination of tax competition (mobile capital) call the Code of Conduct "a taxer's cartel".

If tax competitive measures are selective, they may be eliminated by Commission action under the State aid rules. Therefore, the Commission published a – rather general – Notice on the application of State aid rules to measures relating to direct business taxation[20] in order to distinguish between fiscal State aid (its turf) and non-selective but all the same harmful tax competition (the gentlemen's agreement area).

The Code of Conduct Group, consisting of high representatives of the Member States' governments, initially blacklisted harmful national tax measures, requiring their *roll-back*. Nowadays, the Group has become part of the permanent political furniture of the EU and is mostly involved in consolidating what has been achieved and preventing new distortions from arising, i.e. in monitoring roll-back and assessing any proposed new measures potentially harmful (*standstill*).

7.3.2. Comparing criteria

Let us again compare criteria, this time the State aid criteria against the Code's harmful tax competition criteria:

– the State aid criteria are: (i) advantage; (ii) from State resources; (iii) (potentially) affecting competition and intra-Union trade; (iv) selective ("favouring certain undertakings or the production of certain goods"), and (v) not justified by any "inner logic" of the tax system; and
– the Code's criteria for harmful tax competition are: (i) a significant influence on business location ((re)location test), (ii) by providing for a significantly lower effective tax level than the general level (derogation test).

20. Commission Notice 98/C384/03 (11 Nov. 1998).

These sets of criteria are not identical – especially, the selectivity criterion seems to be missing in the Code – but they do overlap, especially if one looks at the more detailed assessment criteria contained in the Code. It specifies that the following characteristics make a national tax measure (very) suspect: (a) aiming at offshore companies; (b) ring-fencing (protecting one's existing tax base against one's own competitive measures); (c) application of the competitive measure notwithstanding a lack of economic substance of the economic operator in that Member State; (d) a lack of arm's length profit determination (e.g. notional profit calculation); and (e) non-transparency of administrative practice, especially of individual revenue rulings.

In 1999, the Code of Conduct Group on the basis of these criteria blacklisted 66 national measures: 40 in Member States, 23 in their overseas countries and territories, and 3 in Gibraltar. In 2000, the Ecofin Council reached an "interim agreement" on that list, meaning that the national tax measures still on the list had to be rolled-back within a certain time frame.

The Commission studied the original blacklist as well and, in 2001, launched a State aid initiative against 15 national tax measures of which 13 were also on the Code of Conduct Group blacklist. It follows that 53 out of the 66 measures on the blacklist (5/6th) were not considered susceptible to control under the State aid rules, which underpins the need for an instrument such as the Code, but which also illustrates that 1/6th of the measures under scrutiny were caught by both sets of rules. Even more interesting was that two measures considered to be State aid by the Commission were not on the Code of Conduct Group blacklist at all. Such discrepancies occurred more often in subsequent years: the Luxembourg 1929/millonnaire companies were not considered to be harmful tax competition, but they were still found to be State aid, and the Maltese corporation tax refund to shareholders was not considered to be State aid, as it was applied indiscriminately to both domestic and non-resident shareholders, but it has still been considered harmful tax competition by the Code of Conduct Group, to be rolled back.

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