



# EXPOSÉ

Working Title of the Doctoral Thesis

## „Merger of the Concepts of Selectivity and Non-Discrimination in Fiscal State Aid“

submitted by

Daniela Gschwindt, LL.B. LL.M.

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Supervisor:

Univ.-Prof. Mag. Dr. Thomas Jaeger, LL.M.

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## 1. Problem Overview and Research Subject

State aid comes in many different forms and disguises. The Member States of the European Union (MS) increasingly consider unobtrusive and indirect ways of attracting and funding businesses in the form of tax incentives and concessions, thereby boosting tax competition. In the light of today's trend of digitalisation and globalisation, this leads multinational enterprises (MNEs) to cross borders and explore commercial opportunities, ultimately leading to base erosion and profit shifting.<sup>1</sup> Already in the early days, Adam Smith's study has implied that in an ideal economy, State influence on the economic behaviour of market players is minimised.<sup>2</sup> However, this picture assumes a new form when it comes to direct taxation, a fundamental prerequisite for the functioning of any economy. It is therefore plausible that the European Commission no longer wants to accept excesses of State-subsidised distortions of competition. Hence, the stricter control of aid pursued by the European Union (EU) aims not only at national direct tax laws but also at individual measures. A central problem of the ever-widening State aid control of fiscal measures is that it cannot be predicted whether a measure will be deemed incompatible with the internal market creating legal uncertainty for national legislators and affected undertakings. At the same time, this uncertainty has the potential to severely undermine the fiscal autonomy of the MS. To resolve a conflict of jurisdiction and create more legal certainty, aid control needs to be more aligned with the actual purpose of the State aid provisions, namely the avoidance of cross-border trade distortions and the associated differences in treatment. Such restructuring would be in the interest of a uniform development of EU law. In recent years, the awareness has increased that national direct tax measures possibly contain State aid. The frequent use of fiscal support can be attributed to the fact that it is much more difficult to detect than cash subsidies.<sup>3</sup> Tax competition incidents, such as LuxLeaks or the *Fiat*<sup>4</sup> and *Starbucks*<sup>5</sup> decisions, have demonstrated that anti-competitive tax practices occur worldwide and may have contributed to the acceleration of the Commission's State aid inquiries and to a greater attention to the phenomenon of selective fiscal measures.

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<sup>1</sup> See also E Kemmeren, 'Should the Taxation of the Digital Economy Really be Different?' (2018) 2 EC Tax Review 72, 73; F Todhe, 'The Rise of an (Autonomous) Arm's Length Principle in EU State Aid Rules?' (2019) 18 EStAL 249, 256.

<sup>2</sup> A Smith, *The Wealth of Nations* (Strahan and Cadell 1776) Book I, Chapter VIII, 84, para 13 and Book II, Chapter III, 343-346, paras 31 and 36.

<sup>3</sup> See Case C-387/92 *Banco Exterior* [1994] ECR I-877, para 13, in which the ECJ clearly stated that the concept of fiscal aid is wider than that of subsidies.

<sup>4</sup> *Fiat* (SA.38375) Commission Decision 2016/2326 [2015] OJ L351.

<sup>5</sup> *Starbucks* (SA.38374) Commission Decision 2017/502 [2015] OJ L83.

The notions of discrimination and equal treatment lie at the heart of the research conducted. On the one hand, the EU fundamental freedoms, and especially the case law around them, incorporate a non-discrimination standard when direct tax measures are assessed. Hence, a static methodology can be discerned. On the other hand, the State aid analysis under Art. 107(1) TFEU does not explicitly refer to such a standard. However, over the last years, the Court of Justice of the European Union (CJEU) has increasingly transformed the selectivity analysis into an equal treatment test. This exercise is not very consistent, as no fixed yardsticks of comparison exist. In practice, the comparators and yardsticks chosen and applied by the European Courts and the Commission often differ from those adopted by national tax authorities. As a result, the Commission and CJEU regularly intervene and correct the national standard or method. A famous example constitutes the above-mentioned decisions and judgements concerning tax rulings and advance pricing agreements (APAs) granted to MNEs. Thus, the practical importance of a consistent and coherent EU methodology involving a non-discrimination test, modelled on that of the fundamental freedoms examination, for assessing fiscal State aids will be demonstrated.

## **1.1. State Aid, the ‘Visible Hand’**

### ***1.1.1. Normative Framework***

One of the main objectives of the EU is market integration with the free movement of capital, labour, technology and undertakings between MS.<sup>6</sup> State aid rules, as part of EU competition law in the Treaty on the Functioning of the EU (TFEU), try to achieve exactly this goal. They attempt to strengthen the internal market by tackling market and competition distortions arising from State interference. As a result, State intervention, which aims at a selective economic and financial assistance granting beneficiary companies an advantage over competitors, is controlled.<sup>7</sup> Art. 107(1) TFEU prohibits any form of State aid, which (potentially) distorts competition and trade by favouring certain undertakings or goods. Hence, the qualification of State aid requires the fulfilment of five conditions: A measure must confer an economic advantage on the recipient (1), it must be selective (2), it must be granted using State resources or any other type of State intervention (3), and it must distort or threaten to distort competition (4) affecting intra-Union trade (5).<sup>8</sup> In matters of direct tax law,

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<sup>6</sup> A El-Agraa, *The European Union: Economics and Policies* (9th edn, CUP 2011) 1.

<sup>7</sup> A Jones, B Sufrin and N Dunne, *Jones & Sufrin’s EU Competition Law: Text, Cases, and Materials* (7th edn, OUP 2019) 1 and 27.

<sup>8</sup> Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, para 75; E-J Mestmäcker and H Schweitzer, ‘Art. 107 Abs. 1 AEUV’ in U Immenga and E-J Mestmäcker, *Wettbewerbsrecht Band 3* (5th edn, Beck 2016) para 4.

the questions of selectivity, advantage and anti-competitive effects are most crucial. The selectivity issue lies at the heart of the fiscal State aid analysis, since the other conditions laid down in Art. 107(1) TFEU are usually satisfied or presumed to be fulfilled and thus not subject to a deeper analysis.<sup>9</sup> Moreover, the Commission and CJEU do not examine aid measures with regard to their form, but according to their effects.<sup>10</sup> In this regard, the Commission, as the Guardian of the Treaties, has gradually introduced and adheres to a number of soft law instruments to further structure its approach under the State aid regime.

Not only the State aid rules, but also the Treaty rules on fundamental freedoms prohibit the jeopardy of free competition in the internal market. They serve the same purpose of preserving undistorted competition with a level playing field for all economic operators, thereby constituting a powerful tool for driving European tax integration.<sup>11</sup> The fundamental freedoms are all based on the underlying principle of non-discrimination enshrined in Art. 18 TFEU.<sup>12</sup> The fundamental freedoms are translated into free movement provisions in the TFEU. They include the right of EU citizens to move and reside freely within the EU (Art. 21(1) TFEU), the free movement of goods (Arts. 30, 34 and 35 TFEU, which are not further discussed), the free movement of persons and establishment (Art. 45 and 49 TFEU), the freedom to provide services (Art. 56 TFEU) and the free movement of capital and payments (Art. 63 TFEU). These provisions have direct effect, are recognised as general principles of EU law and enjoy fundamental rights protection under the EU Charter of Fundamental Rights.<sup>13</sup> Fundamental freedoms do not distinguish between general and specific tax measures but rather concentrate on the equal treatment of cross-border and domestic situations. In establishing an infringement, the CJEU carries out a four-step examination. First, it determines whether a measure falls within the scope of one of the freedoms. The existence of a cross-border element and the non-existence of a preceding specific secondary law are assessed at this stage.<sup>14</sup> The second step involves the analysis of whether a restriction or discrimination exists between objectively comparable cross-border and domestic situations. Next, it will be examined whether such a discriminating or restricting measure can be justified

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<sup>9</sup> See Commission, 'Report on the implementation of the Commission notice on the application of the state aid rules to measures relating to direct business taxation' C(2004) 434, para 22, <[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2004\)434&lang=fr](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2004)434&lang=fr)> accessed 31 May 2021.

<sup>10</sup> Commission Notice on the application of the State aid rules to measures relating to direct business taxation [1998] OJ C384/3, para 67.

<sup>11</sup> R Szudoczky, *The Sources of EU law and Their Relationships: Lessons for the Field of Taxation* (IBFD 2014) 469.

<sup>12</sup> T Jaeger, *Einführung in das Europarecht* (3rd edn, Facultas 2020) 179.

<sup>13</sup> *Ibid* 179-182.

<sup>14</sup> *Ibid* 181.

by a legitimate objective and imperative reasons in the public interest. Lastly, it is verified whether the measure is exercised in a proportionate manner, i.e. it must be suitable to achieve the aim pursued and does not go beyond what is necessary.<sup>15</sup> Since its landmark judgement of 1986,<sup>16</sup> direct tax cases have become an important component of CJEU case law on fundamental freedoms.

Unlike the field of indirect taxation,<sup>17</sup> direct taxation has not experienced a great level of positive integration. In principle, direct taxation falls within the competence of the MS (Art. 3 TFEU). Tax sovereignty is an essential element of the enforcement of State powers and can be defined as the autonomous power to introduce and enforce a tax system. Although direct tax law is not a harmonised area within EU law, the MS sovereignty is not absolute: The CJEU has ruled in many instances that tax sovereignty does not justify national tax rules, which result in the discrimination or unjustified restriction of activities covered by the fundamental freedoms.<sup>18</sup> This is especially true when national tax law discriminates and distinguishes between domestic and foreign persons, goods, services or capital. Consequently, MS' tax sovereignty and EU State aid rules face each other: On the one side, MS are free to design their tax system and exercise their tax powers; on the other side, State aid rules necessarily affect those national tax systems. As a result, the focus will predominantly lie on the case law of the CJEU, which distinguishes between general tax measures (covered by fiscal sovereignty) and selective tax incentives (giving rise to infringement proceedings).<sup>19</sup> It will, however, be demonstrated that the notions of generality and selectivity do not necessarily exclude each other.<sup>20</sup> In such cases, a concrete case-by-case analysis is needed to determine whether or not a measure is indeed available to all or only a limited number of undertakings. To sum up, the most serious constraints imposed on the tax sovereignty of MS

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<sup>15</sup> See also B Terra and P Wattel, *European Tax Law, Fiscale Handboeken* (2nd edn, Kluwer Law International 2012) 59-64.

<sup>16</sup> Case 270/83 *Commission v France (Avoir Fiscal)* [1986] ECR 273.

<sup>17</sup> Indirect taxes, including Value Added Tax and excise duties, may create an immediate obstacle to the free movement of goods and services and are harmonised on the basis of Art. 113 TFEU.

<sup>18</sup> See e.g. Case 270/83 *Commission v France (Avoir Fiscal)* [1986] ECR 273; Case C-330/91 *Commerzbank* [1993] ECR I-4017; Case C-484/93 *Svensson & Gustavsson* [1995] ECR I-3955; and many more have followed.

<sup>19</sup> See e.g. Joined Cases T-211/04 and T-215/04 *Government of Gibraltar v Commission* [2008] ECR II-3745; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] ECR I-11113; Case T-219/10 *Autogrill España v Commission* [2014] ECLI-939; Case T-399/11 *Banco Santander and Santusa v Commission* [2014] ECLI-938; Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* [2016] ECLI-981.

<sup>20</sup> See Case C-279/08 *Commission v Netherlands* [2011] ECR I-7671, para 50, where the ECJ has held that a tax measure can be considered selective, even though it applies to a large number of undertakings.

are, on the one side, the fundamental freedoms enshrined in the free movement provisions of the TFEU and, on the other, the State aid rules laid down in Art. 107 and 108 TFEU.<sup>21</sup>

### ***1.1.2. Selectivity***

The most critical condition of the State aid analysis under Art. 107(1) TFEU is the selectivity criterion. The notion of selectivity consists of a geographic and a material element. Whilst territorial/geographic selectivity has been largely resolved by the CJEU, the concept of material selectivity still suffers from a lack of clarity. The most common form of material selectivity is de facto selectivity<sup>22</sup> (as opposed to de jure selectivity occurring from the legal criteria itself), which finds tax regimes framed in general and objective terms but in fact advantaging only certain undertakings or groups.<sup>23</sup> Here, the Court applies its effects-doctrine, which consists in looking at the effects, rather than the causes or objectives of a measure. However, the mere existence of a benefit does not necessarily imply selectivity. The concept of material factual selectivity is even more complex than that and inevitably leads to discrepancies.

In order to establish the existence of selectivity, the Commission adopts a three-step (derogation) approach, which evolved over the years through CJEU case law. The approach was first laid down in the 1998 Commission Notice<sup>24</sup> and re-adopted in its updated version, the 2016 Commission Notice.<sup>25</sup> Essentially, the analysis requires the identification of a reference system (1), against which any derogations are measured (2). Once a derogation from the reference system has been established, it must be assessed whether it can be justified (3). Along with this formal and normative approach, the CJEU developed what is called the comparability approach to selectivity. Thereby, it places a greater emphasis on the second step by introducing a supplementary aspect to it: The examination of a differential treatment of taxpayers who, in light of the objective of the tax system, are in a comparable legal and

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<sup>21</sup> P Pistone, 'Smart Tax Competition and the Geographical Boundaries of Taxing Jurisdictions: Countering Selective Advantages Amidst Disparities' (2012) 40 *Intertax* 85, 85-89.

<sup>22</sup> The dimension of factual selectivity was brought about in particular by Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] ECR I-11113, paras 101 et seq.; Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* [2016] ECLI-981, paras 71 et seq., which explicitly recognised the existence of de facto selectivity.

<sup>23</sup> A Nykiel-Mateo and J Wiemann, 'Selectivity' in L Flynn and others (eds), *EU Competition Law Volume IV: State Aid* (2nd edn, Claeys & Casteels 2016) 268 et seq.

<sup>24</sup> Commission Notice on the application of the State aid rules to measures relating to direct business taxation [1998] OJ C384/3.

<sup>25</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C262.

factual situation (de facto discrimination analysis).<sup>26</sup> On the basis of the current standard, both the derogation and comparability approach are concurrently part of the fiscal State aid assessment: It is necessary that the tax measure derogates from the previously defined reference system leading to a differential treatment of objectively comparable undertakings. Once a tax measure derogates from this normal system and benefits only certain undertakings, the measure is per se discriminatory or selective (*prima facie*), unless it can be justified by the nature or general scheme of the system. Thus, it seems that the core test to appraise selectivity is the comparison evaluation, which can be associated with the concept of non-discrimination and equal treatment.<sup>27</sup>

CJEU case law and Commission practice differ and deviate from each other in the methodological analysis of fiscal State aids. The same problem can be observed within the CJEU itself, where the General Court (GC) and the Court of Justice (ECJ) often disagree on the qualification and classification of a tax measure.<sup>28</sup> Particularly, the distinction between general and selective tax measures remains a precarious issue. Over the last years, the Court has endorsed an increasingly extensive interpretation of selectivity, making it easier for the Commission to demonstrate its fulfilment. Although a comparative approach has been deployed consistently, no fixed standards or comparators can be discerned. As was rightly pointed out by former Advocate General Wathelet, the selectivity criterion has been and is still one of the most controversial issues in the area of State aid law.<sup>29</sup> It seems that the Court has missed its chance repeatedly, especially on appeal, to finally define the scope of selectivity. Rather, the Commission appears to be progressively using the control tool of Arts. 107 and 108 TFEU to address grave cases of harmful tax competition and to take more actions to fight fiscal State aid.<sup>30</sup>

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<sup>26</sup> Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, para 41; Joined Cases C-78/08 to C-80/08 *Paint Graphos* [2011] ECR I-7611, para 49.

<sup>27</sup> J L Buendía Sierra, 'Finding Selectivity or the Art of Comparison' (2018) 17 *EStAL* 85, 88.

<sup>28</sup> See e.g. Case C-487/06 *British Aggregates v Commission* [2008] ECR I-10515; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] ECR I-11113.

<sup>29</sup> Opinion of AG Wathelet in Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* [2016] ECLI-624, para 5.

<sup>30</sup> This is especially visible in the latest Commission decisions dealing with various tax rulings provided to MNEs (e.g. Amazon, Ikea, Starbucks, Apple) by national tax authorities throughout the EU; L Panci, 'Latest Developments on the Interpretation of the Concept of Selectivity in the Field of Corporate Taxation' (2018) 17 *EStAL* 353, 353.



## 1.2. Fundamental Freedoms and Direct Taxation

The CJEU has evolved a more or less consistent approach in applying the fundamental freedoms to direct tax rules. They are aimed at discriminatory tax laws and measures stemming from a national tax system. Although this area remains a particularly challenging one for the Court, the case law has reached a level of maturity and strikes a balance between EU and national interests. Nevertheless, the Court remained cautious and dogmatic in certain aspects, such as for example regarding the absence of an obligation for MS to address the problem of double taxation by granting immunity to bilateral tax treaty provisions which would otherwise be unlawful.<sup>31</sup> In other words, the scope of the fundamental freedoms does not extend to disparities arising from different tax systems or other two-country problems. Only those tax measures treating cross-border situations less favourably than comparable domestic situations are caught by the TFEU provisions, such as regulatory double burdens.

Upon a closer look at the four-step assessment approach of a fundamental freedom infringement referred to above, it becomes clear that the most relevant assessment criteria seem to be the second and third step, namely the comparability/discrimination analysis and the justification inquiry. Contrary to State aid law, the fundamental freedoms and free movement provisions explicitly require the execution of a discrimination test by which a domestic and a cross-border situation are compared (both inbound and outbound scenarios). For this comparison, three standard comparators come into play: The factual circumstances (1) and the legal tax treatment (2) of a situation are taken into consideration when assessing a measure in light of its objective (3).<sup>32</sup> Hence, the existent and ever-growing CJEU case law on direct tax law affecting the fundamental freedoms is well established and mostly consistent. As a result, these Court decisions and the practical application of the equal treatment requirement can and should serve as the main source of inspiration in overcoming the discrepancies in the assessment of State aids under Art. 107(1) TFEU.

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<sup>31</sup> P Farmer, 'Direct Taxation and the Fundamental Freedoms' in D Chalmers and A Arnall (eds), *The Oxford Handbook of European Union Law* (OUP 2015), 809 et seq.; for concrete examples see Case C-279/93 *Finanzamt Köln-Altstadt v Schumacker* [1995] ECR I-225; Case C-250/95 *Futura Participations and Singer v Administration des contributions* [1997] ECR I-2471; Case C-403/03 *Schempp* [2005] ECR I-6421; Case C-513/04 *Kerckhaert and Morres* [2006] ECR I-10967; Case C-67/08 *Block* [2009] ECR I-883; Case C-128/08 *Damseaux* [2009] ECR I-6823; Case C-540/11 *Levy and Sebbag* [2012] ECLI:EU:C:2012:581.

<sup>32</sup> See also R Szudoczky, *The Sources of EU law and Their Relationships: Lessons for the Field of Taxation* (IBFD 2014), 538-539.

### 1.3. Comparing Comparability – Trend of Convergence

The regimes of State aid law and fundamental freedoms are both part of EU primary law and represent the legal fundamentals of the internal market. From a dynamic perspective, a tendency of convergence of the method of analysis by which tax measures are reviewed can be discerned: The most relevant assessment criteria of both State aid law and the fundamental freedoms seem to be the comparability/discrimination analysis and the justification analysis. The actual convergence between both examinations occurs at this point. The comparability analyses compare the legal and factual situation in light of the object and purpose of the relevant tax measure. In free movement cases, the analysis targets disadvantages making investments, work or trade harder across borders than in a domestic situation. It must be assessed whether cross-border cases receive national treatment or not. In State aid cases, the analysis looks for unjustified benefits facilitating competition for certain operators and/or operations. The main question is whether competition is distorted through a favourable treatment of selected taxpayers.<sup>33</sup> State aid rules have a broader scope than the free movement provisions, since foreign businesses are not always concerned by the relevant tax and thus no border crossing is triggered. As an example, therefore, the tax burden shifting among domestic groups of taxpayers may fall within the ambit of State aid, but does not necessarily entail a discrimination or restriction of the corporate activities in another MS. In order to apply a comprehensible comparability approach, a fixed criterion as yardstick needs to be determined for a multi-level comparison (comparability/derogation level and justification level). Apart from this, further parallels exist in the second assessment stage involving possible justifications for discriminatory or restrictive fiscal measures. Under the fundamental freedoms, the rule of reason counterbalances an extensive interpretation of the TFEU provisions. Concerning fiscal State aids, the effect-based doctrine manifested by the ‘nature and general scheme of the system’ reflects an appropriate balance between undistorted competition and national tax sovereignty.<sup>34</sup> The justification grounds resemble each other, as they are all reasons internal to the tax system. Moreover, the requirements of proportionality and consistency always need to be fulfilled.<sup>35</sup> Again, the overlap between the two goes only as far as transnational situations are concerned.<sup>36</sup> Hence, both the State aid rules and the

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<sup>33</sup> P Wattel, ‘Forum: Interaction of State Aid, Free Movement, Policy Competition and Abuse Control in Direct Tax Matters’ (2013) 5 *World Tax Journal* 128, 129-130.

<sup>34</sup> B Pérez-Bernabeu, ‘Refining the Derogation Test on Material Tax Selectivity: The Equality Test’ (2017) 16 *EStAL* 582, 586.

<sup>35</sup> J L Buendía Sierra, ‘Finding Selectivity or the Art of Comparison’ (2018) 17 *EStAL* 85, 91.

<sup>36</sup> S Buriak and I Lazarov, ‘Between State Aid and the Fundamental Freedoms: The Arm’s Length Principle and EU Law’ (2019) 56 *CMLR* 905, 907.

fundamental freedoms intend to tackle problems arising from the legislation and measures of a MS.

Resulting from the above, the same question and issue arises in State aid and fundamental freedoms cases: They are always concerned with a comparable situation. The comparative approach by the CJEU to selectivity is similar to its discrimination test for the establishment of a free movement infringement, which is needed to ascertain *prima facie* selectivity of tax measures: A derogation from the reference system is selective if the application of such a measure leads to a differential treatment of objectively comparable situations. This formulation is generally associated with the principle of equal treatment or non-discrimination, which is recognised as a general principle of EU law, also outside the State aid reach.<sup>37</sup> Since the notion of selectivity brings about conceptual difficulties, it must be assessed whether certain elements of the assessment of fundamental freedoms can be transferred thereto and serve as role model. With regard to the fundamental freedoms, the comparison approach always works with the same comparators: a cross-border and a domestic situation. Under the State aid analysis, the comparison is less defined and has no standard or fixed yardstick. Accordingly, the methodology depends on the structural features of a given measure, i.e. the question of whether the measure is part of a broader scheme or constitutes the system itself. As a result, a yardstick of comparison (*tertium comparationis*) and the level of its application must yet be determined to establish the parallelism of situations.<sup>38</sup> The legal and factual comparability of different situations cannot be determined without a fixed yardstick, by means of which these similarities and differences are ascertained. It can be discerned that the assessment of direct tax measures under the fundamental freedoms is based on a more consolidated methodology with a more conceptual and doctrinal substantiation than the State aid rules. This can partially be explained by the fact that the CJEU and the Commission continuously adjust and modify the State aid framework without providing a clear and consistent line of reasoning.<sup>39</sup> What is more, the Commission started scrutinising fiscal State aid only as of the 1990's onwards.

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<sup>37</sup> K Lenaerts, 'State Aid and Direct Taxation' in H Kanninen, N Korjus and A Rosas (eds), *EU Competition Law in Context: Essays in Honour of Virpi Tiili* (Hart Publishing 2009) 299; M Lang, 'State Aid and Taxation: Recent Trends in the Case Law of the ECJ' (2012) 11 EStAL 411, 420; M Prek and S Lefèvre, 'The Requirement of Selectivity in the Recent Case-Law of the Court of Justice' (2012) 11 EStAL 335, 336.

<sup>38</sup> C Micheau 'Tax selectivity in State aid review: a debatable case practice' (2008) 17 EC Tax Review 276, 281.

<sup>39</sup> See also Opinion of AG Jääskinen in Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] ECR I-11113, para 176.

## 2. Aim and Relevance of the Research

The current understanding of fiscal aid selectivity is characterised by vagueness, complexity and uncertainty.<sup>40</sup> This leads to potential conflicts in the MS' practice when considering adopting tax incentives. It is, therefore, necessary to improve the methodology of identifying selectivity in order to achieve the ultimate aim of regulating the harmful effects caused by fiscal State aid. The thesis aims at the interaction between two essential regimes of the internal market: State aid rules and fundamental freedoms. The concept of selectivity is interpreted by the Commission and the CJEU similarly to the concept of discrimination. Accordingly, the main objective is to illustrate this convergence of analysis: The methods applied to fiscal measures for safeguarding an equal treatment within the fundamental freedoms and State aid are conceptually similar. Both sets of rules express the general principle of equality in their specific field of application pursuing similar objectives: Both State aid law and the fundamental freedoms amount to the prohibition of discrimination as a fundamental principle ensuring free und undistorted competition.<sup>41</sup> After all, fiscal State aid control is a mechanism enabling tax policy convergence between the MS, just like the fundamental freedoms. Thus, the focus lies on developing and deducing common theoretical and methodological aspects. The methods of analysis and the relevant criteria will be compared and their convergence evaluated. Such a convergence does not mean or imply a complete analogy. Rather, it enables to draw lessons from one method to the other, which can help solve conceptual problems arising from the application of State aid rules to direct tax measures. The trend of convergence has become most visible in the case law of the CJEU, which has progressively interpreted Art. 107(1) TFEU into a non-discrimination standard. Hence, an in-depth analysis of the case law is required in order to develop a more systematic approach to the application of State aid rules. The thesis will demonstrate that the previous inconsistent approach leads to confusion and unsatisfactory results. A comprehensive framework for direct tax measures under State aid scrutiny is advocated, amplifying the idea of a common methodology. This will ultimately lead to greater legal certainty for the MS, the taxpayers, and the Commission in charge of enforcement.

Equal treatment is a fundamental principle and affects all areas of EU law, State aid included. Introducing a discrimination test, as conducted under the fundamental freedoms, into the State

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<sup>40</sup> For a similar view see M Merola, 'The Rebus of Selectivity in Fiscal Aid: A Nonconformist View on and Beyond Case Law' (2016) 39 *World Competition* 533, 536-539.

<sup>41</sup> B Pérez-Bernabeu, 'Refining the Derogation Test on Material Tax Selectivity: The Equality Test' (2017) 16 *EStAL* 582, 594.

aid assessment has practical relevance. At the EU level, the latest Commission State Aid Scoreboard of 2019 demonstrates that MS spent 120.9 billion Euro, representing 0.76% of the Gross Domestic Product, on State aid.<sup>42</sup> In addition, tax competition does not end at the borders of the EU, i.e. erasing all sorts of tax incentives might deter investors to other attractive countries, e.g. Switzerland, the United States or the well-known tax havens. Hence, it is essential to find the right balance between national fiscal sovereignty and the compliance with EU standards within the State aid regime. This would ensure a clearer and uniform approach to direct tax law in the EU, instead of the introduction of new Commission standards through the back door (especially having regard to the current debate around the autonomous EU arm's length principle).

### **3. Research Questions**

The research is designed to evaluate the hypothesis that the selectivity criterion laid down in Art. 107 TFEU entails a non-discrimination standard for fiscal State aid, such as can be found under the fundamental freedoms. It will be analysed where and whether such a standard is uniform. As a result, the following research questions can be derived:

Does the selectivity criterion in Art. 107 TFEU imply a non-discrimination standard for fiscal State aid?

- a. Can such a non-discrimination standard be derived or assumed from the one applied in the fundamental freedom assessment?
- b. Can or must the non-discrimination standard as applied under the free movement provisions serve as a model?
- c. What is the interplay and relationship between the State aid rules and the free movement provisions?
- d. Is it necessary to restructure the selectivity analysis under Art. 107(1) TFEU?

Thus, this thesis deals in particular with EU primary law (State aid rules and fundamental freedoms) as well as national direct tax law, referring to the various case law. It will concentrate on the material aspect of the selectivity criterion. The fiscal State aid is examined independently from other forms of aid and independently of indirect tax measures, which will not be further addressed. The thesis focuses on aid and tax measures in the area of direct taxation only and does not comprehensively deal with transfer pricing issues, except for the

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<sup>42</sup> European Commission, 'State aid Scoreboard 2019' (DG Competition, State aid Policy and Strategy) <[https://ec.europa.eu/competition/state\\_aid/scoreboard/state\\_aid\\_scoreboard\\_2019.pdf](https://ec.europa.eu/competition/state_aid/scoreboard/state_aid_scoreboard_2019.pdf)> accessed 31 May 2021.

last chapter. In this last chapter, the thesis aims to further exemplify recent developments and current problematics in the fiscal State aid assessment by means of reference to heavily debated Commission decisions and Court judgements on European tax rulings and the transfer pricing mechanisms contained therein.

#### **4. Overview of the State of Research**

Fiscal State aid is at the interface between national tax sovereignty and the safeguarding of an effective and undistorted internal market. The case law presented throughout the thesis will show that the application and notion of the selectivity concept is wide and ambiguous. The broadening of selectivity by the Commission and the CJEU has been sharply criticised, in particular after the GC took stance for the Commission's argumentation in the *Fiat*<sup>43</sup> and *Starbucks*<sup>44</sup> cases. Accordingly, these cases, amongst others, indicate an indirect harmonisation of direct tax law. Many scholars devote their research to the phenomenon of (aggressive) tax competition, also comprising the base erosion and profit shifting undertaken by MNEs. This involves having recourse to not only European law, but also international tax standards and guidelines, such as the Base Erosion and Profit Shifting Project introduced by the Organisation for Economic Co-operation and Development (OECD). In turn, the thesis tries to focus on EU primary law concerns: State aid law, fundamental freedoms and, most importantly, CJEU case law defining the relevant principles and illustrating their practical application and interplay.

Scholars and practitioners are aware that the criterion of selectivity needs to be improved or even rebuilt for further legal certainty and uniformity in fiscal State aid law. Despite the amount of literature dedicated to the progressive policy and approach of the EU towards fiscal State aid, only few legal scholars have endeavoured to thoroughly explore the interplay between the State aid rules in Arts. 107 and 108 TFEU and the fundamental freedoms enshrined in the free movement provisions. Their argumentations and views are based on different reasons and developed in varying intensities. Especially, the use of complementary or replacing aspects such as the discrimination standard has been left behind. No tangible benefit was yet derived, which would however be possible by explicitly integrating such a standard into the State aid assessment. So far, no consistent research has been conducted to evaluate the shift that has taken place by introducing comparability requirements into Art. 107(1) TFEU and the operation of a resulting equality concept within the ambit of the

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<sup>43</sup> Joined Cases T-755/15 and T-759/15 *Luxembourg v Commission* [2019] ECLI-670.

<sup>44</sup> Joined Cases T-760/15 and T-636/16 *Netherlands v Commission* [2019] ECLI-669.

State aid rules. Hence, the thesis is timely and considerable in significance by adding value and developing new ideas and impulses to the present state of knowledge and research.

## **5. Method and Approach**

The demand for holistic conceptualisation is the key stimulus of the thesis. A consistent framework is sought by referring to, analysing and classifying commonly relevant principles and standards developed by the Court and deduce the main methodological features. Despite the evolution and enhancement of the competences of EU institutions (especially in competition law), the influence and significance of EU law in the area of direct taxation is still quite low. In addition, an inconsistent reasoning of the CJEU in direct fiscal aid cases and diverging national interpretations and applications complement this shortcoming. Resulting therefrom, the methodology chosen for the research is that of a combination of different complementary methods. Several parts of the thesis are descriptive reporting the existing state of affairs regarding the fiscal State aid framework and the Commission's policy. Due to the actuality of the topic, which is continuing to be in flux, the focus of analysis will remain on the case law of the CJEU dealing with both sets of rules, namely State aid and fundamental freedoms, throughout the chapters. In application of the methods of legal doctrine and comparative law, the work will be conducted by researching, describing and comparing applicable legal provisions and case law. The filtering out of the most important aspects in the rulings of the Court necessarily implies the examination and critical appraisal of the MS' national tax legislation and aid measures. However, it is not the objective of the thesis to assess the laws of the MS, but rather to use these situations as examples of fiscal aid measures triggering the application of EU law (State aid rules and fundamental freedoms alike). This approach should not present a strictly black-letter approach, but rather follows a reform-oriented research, which evaluates the adequacy of existing normative EU rules and which recommends changes, respectively a solution to a legal problem. The existence of the problem will be clearly illustrated in the thesis, ultimately leading to the desire and need for improvement in legal practice. The comparative legal analysis of the State aid rules and fundamental freedoms aims at discerning commonalities and erasing substantial differences. Such a common-core method serves the ultimate aim of a more harmonised approach on a European level.

The research will be conducted in three main steps. In a first step, primary sources as well as associated CJEU decisions will be examined. This includes not only discerning the Court's

reasoning, but already the Commission's practice (leading to the Court's involvement). As a second step, supporting material (e.g. Commission papers and notices) will be covered before continuing with the integration of academic literature, theories and opinions into the work (third step). This approach is also consistent with the preliminary table of contents. As a starting point, the normative framework of fiscal State aid and the developments in this area are displayed. This allows grasping the meaning and functioning of the selectivity and non-discrimination concepts, as provided for respectively under State aid law and the fundamental freedoms, which are further examined in a next part. The core of the thesis will subsequently be the chapter on the actual convergence of the two sets of rules, with special regard to the requirement of equal treatment. The assessment of the comparability concept requires an investigation into adequate yardsticks and the appropriate level of comparison. It will become obvious that the trend of convergence is real and continues to proceed, making the inclusion of a non-discrimination standard into State aid control more and more feasible and desirable.



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## 8. Schedule

	SS 20	WS 20	SS 21	WS 21	SS 22	WS 22	SS 23	WS 23
Subject and literature research								
VO legal methodology								
Exposé writing								
Dissertation writing								
SE presentation and discussion of dissertation project								
SE dissertation subject								
SE dissertation subject								
Additional SE								
Finalisation and submission								
Public defensio								