State Aid and Taxation: Recent Trends in the Case Law of the ECJ

*Michael Lang**

I. State aid prohibition under EU law

The prohibition of State aid under EU law is laid down in Article 107 paragraph 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 favouring 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."* According to the case-law of the ECJ, the classification of a measure as State aid requires that each of four criteria for prohibited State aid is cumulatively met: The measure has to be granted by the State or through State resources (first criterion); it has to favour an undertaking or the production of certain goods (second criterion); it has to be selective (third criterion); and it has to affect trade between Member States in such a way that it leads to a distortion of competition (fourth criterion).[1]

It has long been generally accepted that aid may include not only mere subsidies but also tax relief measures and tax exemptions.[2] There is no difference between a company being subject to the general tax burden first and then granted a subsidy or a company having to pay lower taxes from the outset.[3] Correspondingly, no distinction may be made between a situation where there is tax exemption or one where the taxable event is defined so narrowly that no exception is needed. This is merely a matter of legislative technique.[4] Accordingly, even the legal description of what is subject to tax may lead to the classification of a measure as a prohibited State aid.[5] Therefore, tax provisions – like any other measure – must also be examined to establish whether or not they constitute prohibited State aid, using the abovementioned criteria.

When assessing tax measures, making distinctions between the different criteria for prohibited State aid may lead to difficulties. It appears to be clear that, as far as tax measures are concerned, they are granted by "state resources". However, it has to be determined what constitutes a selective measure and what can be called "favouring an undertaking". Given that the fourth criterion – the impact on trade between Member States and the resulting distortion of competition – is not being given any great importance (not, at least, according to the case law of the ECJ), it is essential to assess the criterion of selectivity. In its case law, the ECJ tends to assume that this criterion is generally met without any detailed examination.

Three recent decisions of the ECJ, handling the question of whether and under which prerequisites tax provisions can be qualified as State aid under EU law, demonstrate the manner in which the ECJ assesses these criteria and their relationship to each

* *Univ.-Prof. Dr. Dr. h.c. Michael Lang* is the Head of the Institute of Austrian and International Tax Law at WU (Vienna University of Economics and Business), Academic Director of the LLM program in International Tax Law and Speaker of the interdisciplinary "Doctoral Programs in International Business Taxation" (DIBT) at WU. I would like to thank *Elke Aumayr* and *Martina Gruber* for their comments, helpful suggestions and support.

1 See *Lang*, Die Auswirkungen des gemeinschaftlichen Beihilferechts auf das Steuerrecht, 17. ÖJT, Gutachten, Band IV/1, 2009, p. 10 ff; *Jaeger*, Steuerliche Maßnahmen, in: Montag/Säcker (eds.), Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht (Kartellrecht), Band 3, Beihilfen- und Vergaberecht, 2011, MN 4 ff.

2 *Lang*, 17. ÖJT (fn. 1) p. 8 f; *Lang*, Die gesetzwidrige Begünstigung von Steuerpflichtigen als gemeinschaftsrechtswidrige Beihilfe?, in: Beiser (ed.), Ertragsteuern in Wissenschaft und Praxis - FS Doralt, 2007, p. 233 (p. 234); *Jaeger*, in: Montag/Säcker (fn. 1), MN 4 ff; see also *P. Jann*, Nationale Steuern und das EG-Beihilfenverbot – ein Überblick, in Monti ua (eds.), Wirtschaftsrecht und Justiz in Zeiten der Globalisierung, FS Baudenbacher, 2007, p. 419 (p. 423 ff); see Case 30/59, *De Gezamenlijke Steenkolenmijnen* [1961] ECR 48, paras. 3 and 43.

3 *Lang*, in: Beiser (fn. 2) p. 234.

4 *Ruppe*, Die Ausnahmebestimmungen des Einkommensteuergesetzes, 1971, p. 28 ff; *Stoll*, Das Steuerschuldverhältnis in seiner grundlegenden Bedeutung für die steuerliche Rechtsfindung, 1972, p. 104; *Lang*, Doppelbesteuerungsabkommen und Innerstaatliches Recht, 1992, p. 75 f.

5 *Lang*, Die Besteuerung von Körperschaften des öffentlichen Rechts aus dem Blickwinkel des gemeinschaftsrechtlichen Beihilfenrechts, in: König (ed.), Körperschaften im Steuerrecht - FS Wiesner, 2004, p. 237 (p. 240) with reference to Case C-295/97, *Piaggio* [1999] ECR I-3735.

other in the area of tax law. I shall therefore comment on these ECJ judgments in the cases: *Presidente del Consiglio dei Ministri v Regione Sardegna,*[6] *Paint Graphos Soc. coop. arl ua*[7] and *Commission and Spain v Government of Gibraltar and United Kingdom*[8] in the light of this, and describe the trends in ECJ case-law that can be derived from these judgments.

II. Presidente del Consiglio dei Ministri v Regione Sardegna

In *Presidente del Consiglio dei Ministri v Regione Sardegna*, Advocate General Kokott stated in her opinion: "The question is whether an advantage is conferred upon resident undertakings when the disputed regional tax is imposed only on non-residents when they stop over in Sardinia."[9] She initially states that "the concept of aid embraces not only positive benefits, such as subsidies, loans or the taking of shares in undertakings, but also action which, in various forms, mitigates 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. It follows that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers, constitutes State aid within the meaning of Article 87(1) EC. In that connection, it is immaterial what legal mechanism is used. The tax benefit may be based on the fact that the legislature has expressly exempted some undertakings from the tax in question, to which they would otherwise be subject. Likewise the tax benefit may arise from the fact that a tax law is asymmetrically formulated in relation to its factual elements or its scope, so that some undertakings are caught as taxpayers while others are not. The latter case applies here: the Sardinian legislation is worded in such a way that non-residents are subject to the tax on stopovers by private aircraft and recreational craft, but residents are not."

The examination of whether there has been any favouring of certain undertakings received very short treatment in the opinion: "As resident undertakings are not subject to the regional tax at issue, they enjoy a cost advantage compared to their competitors resident outside Sardinia. [...] However, an advantage of that kind is caught by Article 87(1) EC only where it '[favours] certain undertakings or the production of certain goods', that is to say aid which is selective [...]."[10] Advocate General Kokott did not differentiate between the criterion of favouring and selectivity, as can also be seen by the fact that she preceded this section of her conclusions with the headline "Conferment of an advantage, including selectivity".[11]

The Advocate General assigned higher importance to the question of selectivity. "With regard to determining whether a measure is selective, it is always necessary to ascertain in any particular case whether certain undertakings are favoured in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question. A differentiation between undertakings in the context of a system of taxation or charges can also be justified, not least by reference to the nature or overall structure of that system."[12] The tax provision in question had an environmental-politics objective according to the statement of the autonomous region of Sardinia. It was aimed at the protection and recovery of the environmental resources of Sardinia, which are put under strain by tourism, specifically in the coastal areas: "In relation to that specific aim, resident and non-resident operators of private aircraft and recreational craft find themselves in the same situation because the private aircraft and recreational craft stopping over in Sardinia pollute the environment irrespective of their provenance and the tax domicile of their operators. The differentiation made by the Sardinian regional legislature between resident and non-resident undertakings with regard to the tax liability on

6 Judgment 17.11.2009, Case C-169/08, *Presidente del Consiglio dei Ministri* [2009] ECR 2009 I-10821.

7 Judgment 8.9.2011, Case C-78/08, *Paint Graphos ao* [2008] ECR n.y.r.

8 Judgments 15.11.2011, joined Cases C-106/09 P und C-107/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] ECR n.y.r.

9 Opinion of AG Kokott 2.7.2009, Case C-169/08, *Presidente del Consiglio dei Ministri* [2009] ECR 2009 I-10821, paras. 125 ff.

10 Ibid., para. 129.

11 Ibid., para. 124.

12 Ibid., para. 133.

stopovers by private aircraft and recreational craft cannot therefore be justified on grounds of environment policy. Nor is it justified, as I have already mentioned, by the nature or the overall structure of the tax system. Consequently tax rules such as those adopted by Sardinia satisfy the condition of a – selective – advantage for the purposes of Article 87(1) EC."[13]

The ECJ itself focused on the question of "whether, having regard to the characteristics of the regional tax on stopovers, the undertakings having their tax domicile outside the territory of the region are, with reference to the legal framework in question, in a factual and legal situation comparable with that of undertakings which are established in that territory"[14] in the decision of the Grand Chamber. The ECJ added the following conclusions to this: "As is clear from paragraphs 36 and 37 of the present judgment, it must be held that, in the light of the nature and objectives of that tax, all the natural and legal persons who receive stopover services in Sardinia are [...] in an objectively comparable situation, irrespective of their place of residence or the place where they are established. It follows that the measure cannot be regarded as general, since it does not apply to all operators of aircraft or pleasure boats which make a stopover in Sardinia. [...] Accordingly, tax legislation such as that at issue in the main proceedings constitutes a State aid measure in favour of undertakings established in Sardinia."[15]

This judgment is also important for answering the question of whether the examination of the advantage has to be separated from that of selectivity. The ECJ examined the question of tax benefits in the context of the criterion of the use of State resources and stated that the waiver of tax revenues which could have normally been generated may constitute State aid. At first glance, it seems that the ECJ asks about the rule-exception relationship when assessing whether there is any advantage at all.[16] A more precise analysis of the judgment, however, shows that the ECJ considers "exemption of the operators of aircraft intended for private transportation of people and leisure boats with tax residence in the area of the region from the regional landing tax" to be sufficient already to assume a use of public resources. The ECJ apparently did not consider a more detailed examination to be necessary.[17] Nor did it make a detailed investigation of what tax income Sardinia "usually could have achieved", or look into the question of whether the majority of the aircraft and leisure boats arriving in Sardinia were operated by persons also resident there or by persons resident outside Sardinia. In any case, the submitting court did not have to answer this question. Therefore, the examination of the selectivity criterion was decisive: If there is a different treatment of comparable situations according to the selectivity examination, it must be assumed that there is a tax benefit. The ECJ therefore made it clear that no separate examination was necessary to determine whether or not there was an advantage.[18]

III. Paint Graphos

The *Paint Graphos* case concerned the exemption of specific production and work cooperatives from the Italian corporation tax.[19] Advocate General Jääskinen describes both advantage and selectivity as "key terms",[20] but in the end is unable to differentiate clearly between these two criteria. "Above all, I should like to add that the existence of a justification based on the nature or general scheme of the tax system seems to me to be relevant for the purposes of the consideration of both the concept of advantage and that of selectivity. In both cases in question it is necessary to examine the separate treatment provided for within a tax system by comparing this to a hypothetical situation in which there is no such treatment, including an assessment of the significance of and reasons for such a choice by the national legislature."[21]

The Advocate General differentiates between advantage and selectivity using pragmatic criteria only. "For reasons of economy of presentation, I have decided to approach the question of the exis-

13 Ibid., paras. 137-139.

14 Judgment 17.11.2009, Case C-169/08, *Presidente del Consiglio dei Ministri* [2009] I-10821, para. 62.

15 Ibid., para. 63 f.

16 See *Lang*, Steuerrecht, Grundfreiheiten und Beihilfeverbot, IStR 2010, p. 570 (p. 577).

17 Ibid.

18 Ibid.

19 Judgment 8.9.2011, Case C-78/08, *Paint Graphos ao* [2008] ECR n.y.r.

20 Opinion of AG Jääskinen, 8.7.2012, Case C-78/08, *Paint Graphos ao* [2008] ECR n.y.r., para. 68.

21 Ibid., paras. 69 f.

tence of an advantage from a somewhat formal viewpoint and to discuss the aspects which, in themselves, might also call into question the existence of an advantage in the economic sense, in the context of selectivity."[22]

The Advocate General begins his examination of the selectivity criterion with the following statement: "In order to determine whether a measure is selective, it is necessary to examine whether, in the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation."[23]

In its judgment, the ECJ initially dealt with the question of whether or not this measure is being funded by State resources. The ECJ came to the conclusion that "consequently, a measure by which the public authorities grant certain undertakings a tax exemption which, although not involving the transfer of State resources, places the recipients of the exemption in a more favourable financial position than that of other taxpayers amounts to State aid within the meaning of Article 87(1) EC. Likewise, a measure allowing certain undertakings a tax reduction or to postpone payment of tax normally due can amount to State aid [...]. It must therefore be held that a national measure such as that at issue in the main proceedings involves State financing."[24]

However, the ECJ did not deal with the criterion of advantage at all. Instead, it started immediately with the prerequisite of selectivity: "In order to classify a domestic tax measure as 'selective', it is necessary to begin by identifying and examining the common or 'normal' regime applicable in the Member State concerned. It is in relation to this common or 'normal' tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation [...]".[25] The ECJ then assumed that "corporation tax must therefore be regarded as the legal regime of reference for the purpose of determining whether the measure at issue may be selective."[26] After developing the criteria for the comparability examination, the ECJ stated: "In the final analysis, it is for the referring court to determine, in the light of all the circumstances of the disputes on which it is required to rule whether, on the basis of the criteria set out at paragraphs 55 to 62 above, the producers' and workers' cooperative societies at issue in the main proceedings are in fact in a comparable situation to that of profit-making companies liable to corporation tax."[27] The ECJ then ordered the national court thus: "If the national court concludes that, in the disputes before it, the condition set out in the preceding paragraph is in fact met, it will still be necessary to determine, in accordance with the Court's case-law, whether tax exemptions such as those at issue in the main proceedings are justified by the nature or general scheme of the system of which they form part [...]."[28] This examination for justifiability examination is followed by one for proportionality: "In any event, in order for tax exemptions such as those at issue in the main proceedings to be justified by the nature or general scheme of the tax system of the Member State concerned, it is also necessary to ensure that those exemptions are consistent with the principle of proportionality and do not go beyond what is necessary, in that the legitimate objective being pursued could not be attained by less far-reaching measures."[29]

IV. Commission and Spain v Government of Gibraltar and United Kingdom

The discussion was recently stimulated by the judgment of the ECJ of 15 November 2011, C-106/09 P and C-107/09 P (Gibraltar).[30] In August 2002, the United Kingdom informed the European Commission about the Gibraltar government's intended reform of corporation tax.[31] This reform comprised

22 Ibid., para. 70.

23 Ibid., para. 79.

24 Judgment 8.9.2011, Case C-78/08, *Paint Graphos ao* [2008] ECR n.y.r., paras. 46 f.

25 Ibid., para. 49.

26 Ibid., para. 79.

27 Ibid., para. 63.

28 Ibid., para. 64.

29 Ibid., para. 75.

30 Judgments 15.11.2011, joined Cases C-106/09 P und C-107/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] n.y.r.

31 Ibid., paras. 9 ff.

a complete revocation of the old corporate tax system and the introduction of three taxes that would be applied to all companies in Gibraltar: a registration fee for companies, a payroll tax and a business property occupation tax (BPOT). The payroll tax and business property occupation tax were intended to be capped at 15% of profits. The Commission decided in 2004 that this reform of the corporation tax system in Gibraltar constituted a State aid that was not compatible with the Common Market. The reform therefore could not be carried out.[32]

On 7 April 2011, the opinion of Advocate General Jääskinen was published.[33] He initially assumed that the term of State aid in the sense of Article 107 TFEU was broader than the definition of a subsidy, since it comprises not only positive measures like subsidies but also measures that reduce the burden that a company in a comparable situation usually has to bear in various ways. "In order to determine whether such an advantage constitutes aid for the purposes of Article 87 EC, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions."[34] According to the Advocate General, the key term of this case was the "advantage". He believed that "a measure liable to constitute State aid which is awarded in an indirect form, such as a tax measure, cannot be defined without a reference framework. The opposite approach would lead to confusion between the concept of selectivity and that of advantage."[35] Advocate General Jääskinen was of the opinion that "the selectivity of a measure involves an unequal distribution of the advantages as between undertakings which are in a comparable situation." In his view, the "examination of the criterion of selectivity is distinct from examination of the criterion of advantage."[36]

The Advocate General stated that, if the non-taxation of offshore companies was to be considered a State aid measure, "a question would remain outstanding: how to quantify the amount of the supposed aid without having first identified the common legal regime, or indeed the general reference framework."[37] Advocate General Jääskinen noted that "in particular, the ceilings of 15% and 35% do not disclose the amount of aid, since the Gibraltar tax system lacks any reference provisions that make it possible to understand how offshore companies should have been taxed. A measure liable to be regarded as fiscal aid must correspond to a fiscal cost. The Commission must be in a position to identify the value of the tax actually or potentially 'lost' which represents the amount of the supposed aid. The only means available to the Commission of estimating the 'lost' value is to refer to a general regime applicable in the reference framework being examined."[38]

Therefore, the knowledge of the "usually applicable system" was a decisive factor: "The starting point of an analysis of tax measures must therefore be a factual comparison, seeking to ascertain what the situation would be if the measure liable to constitute State aid were not adopted."[39] The Advocate General considered that the following procedure was needed. "It is therefore necessary to start by asking whether a person should have been taxed and, if so, whether the absence of taxation constitutes an advantage. The next issue is whether the other undertakings in a comparable situation enjoy the same advantage. If that is not the case, there is probably a selective advantage."[40] Therefore – according to the opinion of Advocate General Jääskinen – the examination of selectivity is subordinated to the assessment of whether an advantage is present.

Regarding selectivity, the Advocate General noted that "given the diversity of tax measures, it is becoming more and more complex to trace a dividing line between general measures and selective measures. Consequently, determination of the reference framework, difficult though it may be, is fundamental in ascertaining whether the regime in question is 'abnormal' and therefore 'selective'."[41]

32 Judgments 15.11.2011, joined Cases C-106/09 P und C-107/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] n.y.r., para 21; see Cases T-211/04 and T-215/04, *Government of Gibraltar v Commission* [2008] II-3745, para. 30; European Commission, 30.3.2004, C(2004) 929, "on the aid scheme which the United Kingdom is planning to implement as regards the Government of Gibraltar Corporation Tax Reform", paras. 134-141.

33 Opinion of AG Jääskinen, 7.4.2011, joined Cases C-106/09 P and C-107/09, *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] n.y.r.

34 Ibid., para. 156.

35 Ibid., para. 158.

36 Ibid., para. 158.

37 Ibid., paras. 155 ff.

38 Ibid., para. 160.

39 Ibid., para. 163.

40 Ibid., para. 165.

41 Ibid., para. 178.

According to Advocate General Jääskinen, the assessment of the selectivity of the advantage granted by the measures in question must be performed in two steps: "In connection with examination of the selectivity condition in tax matters, the criterion adopted since Advocate General Darmon delivered his Opinion in *Sloman Neptun* has been that of 'derogation' from the general taxation system. (108) According to Advocate General Darmon, 'the only fundamental precondition for the application of Article 92(1) is that the measure should constitute a derogation, by virtue of its actual nature, from the scheme of the general system in which it is set'."[42]

Advocate General Jääskinen agreed, declaring: "That derogation-based approach has been criticised in the legal literature since neither the Commission nor the Court of Justice has succeeded in determining precisely what is covered by the term 'derogation from the norm' or what constitutes the 'norm' or 'a general system'. Writers have also emphasised the difficulty in determining a 'normal' tax rate in order to establish the rate which may be regarded as departing from the norm."[43] Later on, the Advocate General discussed possible alternatives to the derogation-based approach.[44] The analysis of the jurisprudence showed that "it is apparent from an analysis of the case-law that several solutions have been proposed by Advocates General. Apart from a derogation-based approach, the idea has been put forward that a measure should be regarded as general when it derives from the internal logic of the tax regime or where it is intended to achieve equality between economic operators. Among the approaches proposed by academic writers, it has been suggested in particular that a measure is general as long as any undertaking, in any sector, is eligible to benefit from it. Under this approach it is necessary to carry out a two-stage test, the first stage comprising identification of the targets of the measure ('revealed potential targets'), and the second being intended to identify the scope of the measure ('revealed potential scope'). It would be at the second stage that it would be possible to identify the reasons underlying the measure proposed by the Member State. According to another suggestion, an analysis in three successive stages would involve, first, seeking to ascertain whether the measure is capable of applying to all undertakings that are in a comparable factual and legal situation, second, verifying whether certain undertakings enjoy more favourable treatment (discrimination) and, finally, ascertaining that the measure can be justified by the nature or structure of the tax regime."[45]

In the end, Advocate General Jääskinen was still of the opinion that the question to be asked concerned the generally applicable tax system and the deviation from it: "Notwithstanding the criticisms mentioned above, the derogation-based approach seems to me to be the one most consonant with the allocation of powers between the Member States and the Commission. Whilst accepting that Member States retain competence to organise their tax regimes, it seems to me to be justified to take the view that the authority which the Commission derives from Article 87(1) EC must be circumscribed so as to apply only to measures that amount to a derogation from the generally applicable system."[46] He also argued as follows: "Furthermore, I am of the opinion that the justification for the approach of seeking to identify, initially, a general regime and, subsequently, derogation from that regime stems from the logic underlying the concept of State aid, which requires the existence of an advantage to be established."[47] In the end, the Advocate General based his opinion on selectivity in his earlier statement on the advantage situation, even though he demanded that the two criteria of the term State aid be kept apart and reviewed separately. It seems that both the determination of the generally applicable tax system and the deviation from it – based on the of the Advocate General's assumption – are required in order to verify whether there is any advantage at all and to assess whether or not this advantage is selective.

In the judgment of the Grand Chamber from 15 November 2011, C-106/09 P and C-107/09 P (Gibraltar), the ECJ chose an entirely different approach: "As regards appraisal of the condition of selectivity, it is clear from settled case-law that Article 87(1) EC requires assessment of whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others

42 Ibid., para. 182.

43 Ibid., para. 184.

44 Ibid., para. 184 ff.

45 Ibid., paras. 185-187.

46 Ibid., para. 189.

47 Ibid., para. 190.

which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation."[48] The ECJ based this on its consistent case law.

On "normal taxation", the ECJ stated the following: "The Court admittedly held in paragraph 56 of *Portugal v Commission* that the determination of the reference framework has a particular importance in the case of tax measures, since the very existence of an advantage may be established only when compared with 'normal' taxation. However, contrary to the General Court's reasoning and the proposition put forward by the Government of Gibraltar and the United Kingdom, that case-law does not make the classification of a tax system as 'selective' conditional upon that system being designed in such a way that undertakings which might enjoy a selective advantage are, in general, liable to the same tax burden as other undertakings but benefit from derogating provisions, so that the selective advantage may be identified as being the difference between the normal tax burden and that borne by those former undertakings. Such an interpretation of the selectivity criterion would require, contrary to the case-law cited in paragraph 87 above, that in order for a tax system to be classifiable as 'selective', it must be designed in accordance with a 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."[49]

The ECJ noted that "[t]hose considerations apply particularly with regard to a tax system which, as in the present case, instead of laying down general rules applying to all undertakings from which a derogation is made for certain undertakings, achieves the same result by adjusting and combining the tax rules in such a way that their very application results in a different tax burden for different undertakings."[50] The Court applies this approach "mainly" to constellations, where the tax legislator differentiates the taxation situation so that no exceptions are needed to release certain companies from the tax. This also means that the ECJ does not limit its consideration to such cases. Therefore, the same enquiry should be made in other fiscal State aid cases. "Thus, the criteria forming the basis of assessment which are adopted by a tax system must also, in order to be capable of being recognised as conferring selective advantages, be such as to characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category, thus permitting such a regime to be described as favouring 'certain' undertakings or the production of 'certain' goods within the meaning of Article 87(1) EC."[51] It is essential for assessment of selectivity that the criteria specified as taxation basis in a tax system be suitable "such as to characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category, thus permitting such a regime to be described as favouring 'certain' undertakings or the production of 'certain' goods within the meaning of Article 87(1) EC."[52]

This was the decisive factor leading the ECJ to the conclusion that there was indeed a selective advantage. The circumstance that "offshore companies" were not subject to taxation was, as it stated, "not a random consequence of the regime at issue", but "the inevitable consequence of the fact that the bases of assessment are specifically designed so that offshore companies, which by their nature have no employees and do not occupy business premises, have no tax base under the bases of assessment adopted in the proposed tax reform."[53] Offshore companies form a group of companies that "precisely on account of the specific features characteristic of that group gives reason to conclude that those companies enjoy selective advantages"[54] regarding the taxation basis contained in the tax reformation plans. Therefore the ECJ was able to determine that these companies are being given selective advantages. The "frame of reference" was the provisions applicable to companies comparable in actual and legal respect that lead to their taxation.

The judgment of the ECJ differed from the final petitions of the Advocate General not only because the ECJ had not enquired into normal taxation and the deviation from it, but had instead performed a

48 Judgment of 15.11.2011, joined Cases C-106/09 P and C-107/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] n.y.r., para. 75.

49 Ibid., paras. 90-92.

50 Ibid., para. 93.

51 Ibid., para 104.

52 Ibid., para. 104.

53 Ibid., para. 106.

54 Ibid., para. 107.

comparability examination and had dispensed with independent examination of an advantage. Apparently, the ECJ assumed that the assessment of whether or not an advantage existed had been included in the selectivity examination. This was also reflected in the ECJ's speaking of the criteria that must be present to accept "selective advantages".

V. Conclusions from the recent jurisprudence

The opinions of the Advocates General and the ECJ judgments analysed here clearly show that, when assessing whether or not a tax measure constitutes a prohibited State aid, the two criteria for establishing the financing though State resources – advantage and selectivity – are not only closely connected but even merge with each other and may eventually be arbitrarily exchanged.

In the case *Presidente del Consiglio dei Ministri v Regione Sardegna*, Advocate General Kokott did not at all examine whether the measure was granted by State resources as she considered the unequal treatment of different tax payers to constitute an advantage without any further examination. She focused primarily on examining whether the selectivity criterion had been fulfilled. Advocate General Jääskinen showed in his conclusions for the two other cases that he does not actually see any conceptual difference between the prerequisite of an advantage and that of selectivity. In his opinion in *Paint Graphos*, he decided "to streamline" his arguments by merely examining some formal aspects of establishing the existence of an advantage, and then looking at the actual materially relevant aspects in the scope of selectivity. In his opinion in the *Gibraltar* case, Advocate General Jääskinen preferred to examine separately whether an advantage had been conferred and whether the selectivity criterion had been met, but in the end the same arguments were put forward on both levels.

The ECJ limited itself to a cursory examination of whether there was an advantage in its judgment *Presidente del Consiglio dei Ministri v Regione Sardegna*. On the other hand, the selectivity examination proved to be decisive: If selectivity applies, an advantage is present in any case. In *Paint Graphos*, the ECJ also focused on the examination of the selectivity criterion while the question of whether there is an advantage was not answered at all. After a similar general examination in *Presidente del Consiglio dei Ministri v Regione Sardegna*, on which basis an advantage was found to be present, the Court determined that the measure was granted by State resources due to the fact that individual entities subject to taxation enjoyed financial benefits. In the *Gibraltar* judgment, the question of the existence of an advantage was not answered at all. Instead, only the existence of a selective advantage was examined. All of this shows that the independent examination of the criteria allowing to establishing involvement of State resources – the existence of an advantage and the selectivity of the measure – cannot in any case be applied consistently in tax-law situations. The first criteria merges with selectivity, which is of higher importance when examining if there is a prohibited State aid.

The present judgments clearly show that the ECJ considers the selectivity examination as an examination of comparability.[55] The conclusions of Advocate General Kokott clearly point in this direction. In the *Gibraltar* case, Advocate General Jääskinen shows awareness that an approach based on the identification of derogation to a generally applicable taxation system was open to severe criticism, but decided to pursue this approach anyway. The judgment of the Grand Chamber of the ECJ clearly assumes that the comparability examination is vital and considers the question of identifying the general taxation regime of reference and derogations to it to be irrelevant. The Grand Chamber thus shows the same trend in the *Gibraltar* judgment as previously in *Presidente del Consiglio dei Ministri v Regione Sardegna*. Only in the judgment passed in between these two, *Paint Graphos* (in which, however, the decision was made by the First Chamber), does the ECJ appear to hesitate between on the one hand determining the generally applicable tax system and the derogations to it and on the other hand examining the actual and legal comparability. That said, the comparability examination turns out to be decisive in this judgment as well.

The approach of using "normal taxation" and derogations to it as a basis – which is not preferred

55 See *Lang*, Das Gibraltar-Urteil des EuGH: Neue beihilferechtliche Vorgaben für das Steuerrecht?, Österreichische Steuer-Zeitung 2011, p. 593 (pp. 596 et seq.); *Rossi-Maccanico*, Fiscal Aid Review and Cross-Border Tax Distortions, Intertax 2012, p. 92 (p. 98).

by the ECJ – makes the effort of determining the rule and identifying the exception to it.[56] This approach, rightly discarded by the ECJ's Grand Chamber, does not lead to satisfactory results. Distinguishing "normal taxation" from derogations where different tax provisions are applied will in practice differentiate between at least two provisions that have a different area of application and imply different legal consequences.[57] What criteria should be used to determine which one of these provisions is the rule and which one the exception? Coincidences of legislative techniques must not be decisive.[58] Searching for the legislator's intention also cannot lead to any result.[59] Notwithstanding the terminology used by legislators, in the end the legislator only wishes to apply one legal consequence under certain conditions and another one under different conditions.[60] Enquiring into which provision has the larger or the smaller area of application in order to distinguish the rule from the exception that must be justified based on this assessment will only raise the problem that general provisions abstractly circumscribe their addressees and the number of concretely affected tax payers cannot be foreseen.[61] Even if the corresponding forecasts exist, there is no reason to perform the selectivity examination only under the presumption that the minority has a privilege compared to the majority. The ECJ was therefore right not to allow this to stop it from classifying the tax-exemption of offshore companies as selective in the *Gibraltar* judgment, even though the conclusions of the Advocate General noted that the tax provisions lead to a situation where "less than 1% of companies are actually taxed".[62] The question of identifying the generally applicable tax burden therefore is not relevant, since the definition of the rule and of exceptions to it is, in the end, arbitrary.[63] Once a specific provision is considered the rule, however, a derogation to it creating an advantage is automatically "suspected of being State aid".[64] If the examination scale depends upon defining beforehand which provision constitutes the rule and which constitutes the exception, there is no increase of rationality. Rather, a concealed valuation is usually performed when specifying the rule and is disguised in the semblance of rationality.[65] The ECJ therefore did well in not applying the principle of rule and exception for its selectivity examination.[66]

In its *Gibraltar* judgment, the ECJ noted that its older case-law on State aid law is not entirely directed at "normal taxation".[67] The previously raised argument of Advocate General Jääskinen against the Commission's decision, according to which an approach not directed at defining the derogation from "the generally applicable tax regime" for applying the prohibition of State aid "would be tantamount to triggering a methodological revolution"[68] and therefore is not justified. Advocate General Mengozzi had already correctly summarised the existing case-law in his conclusions in *British Aggregates v Commission*: "With particular reference to State measures of a fiscal nature, the case-law shows, however, that even measures which are selective, in that they differentiate between undertakings, may escape being classified as aid, if that differentiation is justified by the nature or structure of the tax regime of which they form part. It follows, according to the Court, that, in order to determine whether or not a measure is selective for the purposes of applying Article 87(1) EC, 'it is appropriate to examine whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings by

56 See e.g. *Pistone,* Smart Tax Competition and the Geographical Boundaries of Taxing Jurisdictions: Countering Selective Advantages Amidst Disparities, Intertax 2012, . 85 (p. 87); critical in respect of this approach *Lang,* 17. ÖJT (fn. 1) p. 25 f; also *Lang* (fn. 16) p. 574 ff.

57 See *Lang,* 17. ÖJT (fn. 1) p. 25 f.

58 Also *Sutter,* Beihilfen im materiellen Steuerrecht – Steuergesetze und Verwaltungshandeln der Steuerbehörden im Spannungsfeld zum EG-Beihilfenverbot, in Studiengesellschaft WiR (eds.), Beihilfenrecht, 2004, p. 37 (p. 43).

59 See *Lang* (fn. 16) p. 574 ff.

60 Ibid., p. 26.

61 Ibid., p. 25.

62 Opinion of AG Jääskinen, 7.4.2011, joined Cases C-106/09 P and C-107/09, *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] n.y.r., para. 239.

63 For another interpretation, see *Schön,* Diskussionsbeitrag, 17. ÖJT, Band IV/2, 2010, p. 28 ff.

64 *Lang* (fn. 16) p. 577.

65 See *Lang,* 17. ÖJT (fn. 1) p. 25; *Lang* (fn. 16) p. 577; similarly *Pöschl,* Gleichheit vor dem Gesetz, 2008, p. 189, in their accurate criticisms of the jurisprudence of the German Constitutional Court, which is confronted with similar issues in its practice of applying the principle of equality.

66 See *Lang,* 17. ÖJT (fn. 1) p. 29.

67 Ibid., p. 28.

68 Opinion of AG Jääskinen, 7.4.2011, joined Cases C-106/09 P and C-107/09, *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] n.y.r., para. 202.

comparison with others which are in a comparable legal and factual situation'."[69]

A selectivity examination comprises two parts:[70] On the one hand, it must be examined whether a selective measure is present. On the other hand, it must be examined whether the selective measure is justified and proportional. The need for a proportionality examination was emphasised by the ECJ particularly in *Paint Graphos*. In the first step mentioned, it must be investigated whether specific companies are being treated differently – in other words, better – through tax provisions than other companies. Therefore, two provisions must be compared: the beneficial and the less beneficial one, or the tax provisions and the relief from or lack of a provision. The advantage granted to specific companies or entire industrial sectors only meets the selectivity criterion if the companies treated differently under tax provisions are actually "in a comparable factual and legal situation".[71]

The selectivity examination therefore turns out to be a variant of the assessment of equal treatment:[72] For the purposes of the State aid provisions, it is essential to know whether the companies treated differently under tax provisions "are in a comparable factual and legal situation".[73] Whether or not a situation is legally or factually comparable cannot be assessed in isolation, but requires a scale for comparison. Any assessment of equal treatment is not arbitrary but rather looks at essential joint features and differences within their respective contexts. The basis for determining these essential features, i.e. the *tertium comparationis* according to which the comparison must be made, is important.[74] The prohibition of State aid under EU law is not a general requirement of equal treatment, but forbids unequal treatment that may cause distortions of competition in the meaning of Article 107 et seq. TFEU. The circumstance cited in Article 107 TFEU of "production branches" in addition to "certain undertakings" does not limit the examination of selectivity. According to the opinion of the ECJ, all companies of a specific region, for example – independently from their assignment to a "production branch" – may also be described as "certain undertakings".[75] In the light of this, all companies that are in considerable competitive relationships in the meaning of Article 107 et seq. TFEU may be considered comparable.

However, this does not render the comparability examination under State aid law automatically applicable:[76] Whether or not a competitive relationship between companies is essential for the purposes of the provisions of Article 107 et seq. TFEU must be interpreted according to the intensity of the competitive relationship. In the end, this must be determined by a decision handed down by a judge.[77] The direction of the comparability examination, however, is covered by this, meaning that not every case of differentiation is forbidden. Companies that are not even in a potential competition with each other may be treated differently. The intensity of the competition must be examined in the scope of proportionality. If there are consequences from different tax legislations, it does not matter whether the more beneficial provision refers to the larger or the smaller number of companies in a comparable situation.[78]

The establishment of unequal treatment between companies in a comparable situation, however, does not necessarily constitute State aid: "However, according to settled case-law, the concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, *prima facie* selective where that differen-

69 Opinion of AG Mengozzi, 17.7.2008, Case C-487/06, *British Aggregates v Commission* [2008] I-10515 with reference to Case C-88/03, *Portugal v Kommission* [2006] I-7115, para. 56; see also Case C-143/99, *Adria Wien Pipeline* [2001] I-8365, para 41.

70 See *Lang*, 17. ÖJT (fn. 1) p. 25 ff.

71 Judgment 17.6.1999, Case C-75/97, *Belgium v Commission* (Maribel) [1999] I-3671, para. 28; Judgment 8.11.2001, Case C-143/99, *Adria Wien Pipeline* [2001] I-8365, para. 41.

72 See *Schön*, in: Koenig/Roth/Schön (eds.), Aktuelle Fragen des EG-Beihilfenrechts, Beihefter ZHR 2001, p. 111; also *Kube*, Die Gleichheitsdogmatik des europäischen Wettbewerbsrechts – zur Beihilfenkontrolle staatlicher Ausgleichszahlungen, EuR 2004, p. 230 (p. 244); for details *Lang*, 17. ÖJT (fn. 1) p. 25 ff; *Lang* (fn. 16) p. 577 ff; gleichheitsrechtliche Ansätze auch bei *Jaeger*, in: Montag/Säcker (fn. 1) MN 70.

73 Judgment 17.6.1999, Case C-75/97, *Belgium v Commission* (Maribel) [1999] I-3671, paras. 28-31; Judgment 8.11.2011, Case C-143/99, *Adria Wien Pipeline* [2001] I-8365, para 41; Judgment of 15.11.2011, joined Cases C-106/09 P and C-107/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] n.y.r., para. 75 with further reference.

74 See *Pöschl*, (fn. 62) p. 155.

75 See *Arhold*, Steuerhoheit auf regionaler oder lokaler Ebene und der europäische Beihilfebegriff – wie weit reicht das Konzept von der regionalen Selektivität, EuZW 2006, p. 717 (p. 720).

76 *Lang*, 17. ÖJT (fn. 1) p. 27.

77 See *Lang*, 17. ÖJT (fn. 1) p. 27; other opinion *Schön*, 17. ÖJT (fn. 60) p. 80 f.

78 *Lang*, 17. ÖJT (fn. 1) p. 26 and p. 28 f.

tiation arises from the nature or the overall structure of the system of charges of which they are part [...]".[79] A measure may, according to the ECJ, be justified by the nature and the inner structure of the tax system "if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system. In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives".[80]

79 Judgment 6.9.2006, Case C-88/03, *Portugal v Commission* [2006] I-7115, para. 52; see Case 173/73, *Commission v Italy* [1974] p. 709, para. 33; Case C148/04, *Unicredito* [2005] I11137, para. 51.

80 Case C-88/03, *Portugal v Commission* [2006] I-7115, paras. 52, 81; Fur further details, see *Mamut,* Aktuelle Fragen im Bereich der Steuerbeihilfen – Mitgliedstaaten zwischen Steuerwettbewerb und Systemimmanenz steuerlicher Beihilfen, in: Jaeger (ed.), Jahrbuch Beihilferecht, 2008, p. 177 ff.