

**CHANGED UTTERLY:
CONCEPTUAL STRETCHING AND THE
IMPACT OF THE TAX CASES ON EU STATE
AID LAW**

Volume II

Christopher McMahon

Trinity College Dublin

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4. DEVELOPMENTS EMERGING FROM CASES ON FISCAL MEASURES

4.1. Introduction

Cases dealing with fiscal measures have been among the most fertile sources of development and change in the EU State aid law since the mid-1990s. While fiscal measures can often have similar effects and pose similar problems to other forms of government intervention, they differ in their relationship to government spending, the availability of benchmarks and in some of their economic effects.¹ Fiscal measures therefore pose a distinctive challenge for the law as they are sufficiently similar to other forms of aid such that it is difficult to justify excluding them entirely from the State aid rules. They are also sufficiently different that the standards used to assess other interventions may lead to the prohibition applying either too broadly or too narrowly in dealing with fiscal measures. While similar problems can also be posed by certain market rules,² much of the case law exploring these difficulties has arisen from the treatment of national tax measures. These difficulties have driven changes in the standards used to identify aid in Article 107(1) TFEU as the law seeks to adapt to the distinctive features of this form of intervention.

This chapter explores and evaluates these changes in the law that have emerged in cases involving fiscal measures for two purposes. The first is to demonstrate the impact of fiscal measures on the law in this area and review the existing literature evaluating these developments. This will allow later chapters in this thesis to develop a novel contribution in exploring the impact of these developments on the treatment of non-fiscal measures. The second is to explore the relationship between these developments and the rationale for State

¹ It is worth recalling here that the term ‘fiscal measures’ refers in this thesis to rules, policies or practices delivered through the tax system. These can take any of a wide range of forms including tax exemptions, rebates and deferrals. ‘Non-fiscal measures’ refer to State intervention in the market by any other means, including direct subsidies, grants, loans, guarantees and market rules.

² It will be recalled that market rules are defined in this thesis as non-fiscal mandatory rules governing the behaviour of undertakings on the market.

aid law as a means of managing regulatory competition between Member States proposed in the previous chapter.

First, this chapter will examine the rule barring reliance on increased tax revenues to argue that a measure is not State aid. It will be argued that this rule can be best explained as an adaptation of State aid law to manage regulatory competition. Second, this chapter will consider the selectivity criterion in Article 107(1) TFEU and the development of the three-stage test to evaluate that criterion. Third, this chapter will then go on to review the changes in the application of that test after the decision in *Gibraltar*³ and its reorientation around the notion of discrimination (the ‘discrimination standard’). Fourth, the emergence of the arm’s length principle as part of the selectivity assessment in cases involving the tax treatment of multinational companies will also be considered. It will be argued that these developments represent responses to the challenges of applying the general rules on State aid to the specific features of fiscal measures. It will be argued that these developments have created space in the doctrine for an increasing role for the management of regulatory competition and the notion of solidarity between Member States discussed in the previous chapter.

4.2. Rule Barring Reliance on Increased Tax Revenues

4.2.1. Rule Barring Reliance on Increased Tax Revenues in Different Contexts

This section will consider a rule that has emerged in various strands of doctrine on fiscal measures that prevents Member States from arguing that a tax incentive or similar measure is not aid because the cost to the State is likely to be exceeded by increased revenues from the establishment or investment decisions of businesses benefitting from the incentive. This

³ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113.

will be explored through the case law on the applicability of the market economy operator test to fiscal measures, selectivity and State resources. It will contend that the arguments that have been articulated to defend this rule are inadequate and proposes an alternative based on the State aid rules' role in managing regulatory competition.

It will be recalled that one of the conditions for the application of Article 107(1) TFEU is that the impugned measure confers an economic advantage on an undertaking.⁴ This condition is not satisfied where the Member State participates in a commercial transaction in a manner comparable to a market economy operator and any apparent advantage could have been obtained on the open market.⁵ It had originally been held that it was only open to a Member State to argue that it had granted the aid as a market economy operator in circumstances where it was acting in some way comparable to that of a private entity rather than as a public authority.⁶ Indeed, it has been argued that there are two distinct lines of case law for identifying aid in different types of State intervention.⁷ The market economy operator principle is most often decisive in assessing commercial transactions, direct grants and subsidies, while selectivity is more often decisive for regulation in the narrow sense.⁸ This section will examine how recent case law has cast doubt on this

⁴ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 6.

⁵ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 207-208; Case 39/94 *SFEI* [1996] ECR I-3547, para 60. See Section 2.3.3.2.

⁶ Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* ECLI:EU:C:1994:325, [1994] ECR I-4103, para 22; C-334/99 *Germany v Commission* ECLI:EU:C:2003:55, [2003] ECR I-1139, paras 134, 140; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* ECLI:EU:T:2003:57, [2003] ECR II-435, para 317.

⁷ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 89.

⁸ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 89. On the controversy surrounding selectivity in such cases, see also Ulrich Soltész, 'EU state aid law and taxation – where do we stand today?' (2020) 41 *European Competition Law Review* 18; Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 138-139; Leigh Hancher, 'The General Framework' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 43-130, paras 3-198 – 3-199; Claire Micheau, 'Tax selectivity in European law of state aid: legal assessment and alternative approaches' (2015) 40 *European Law Review* 323. De Cecco's use of the term 'regulation' refers to 'a set of commands emanating from a public authority' which broadly corresponds to the definition of regulation in the narrow sense adopted by this thesis which includes 'the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with the rules'. See Robert Baldwin, Colin Scott

dichotomy and will outline the flaws in attempts to recast its rationale and exclude the availability of the market economy operator test for most fiscal measures. This section will go on to argue that the justification for this rule must be reconsidered and will propose an alternative rationale based on regulatory competition.

The first case causing confusion as to the boundaries of the market economy operator test emerged in *Ryanair v Commission*.⁹ In that case, the Commission rejected arguments that the Walloon regional government had acted as a market economy operator in agreeing to a reduction in landing charges to an airline in exchange for a commitment that a fixed number of flights would be directed through the government-owned airport. Fixing landing charges was a regulatory act rather than a market transaction, largely because such charges were outlined in government decrees and imposed on all relevant undertakings on the basis of objective criteria. The General Court annulled this decision and held that the airport management services offered by the government were an economic activity and the landing charges were fees for this activity.¹⁰ A private operator could have implemented the scheme even if elements of the scheme were put in place by law and therefore the market economy operator principle could be applied.¹¹

This reasoning was developed in *Commission v EDF* in which the CJEU confirmed the approach of the General Court in annulling a decision of the Commission that declared that elements of a restructuring of a state-owned energy company by France constituted State aid, including tax exemptions for that company.¹² The CJEU held that the Commission could not exclude the possibility that the market economy operator principle would apply simply

and Christopher Hood, 'Introduction' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press 1998) 1-55, 3-4.

⁹ Case T-196/04 *Ryanair v Commission* ECLI:EU:T:2008:585, [2008] ECR II-3643.

¹⁰ *ibid* para 91.

¹¹ *ibid* para 101.

¹² Case C-124/10 P *Commission v EDF* ECLI:EU:C:2012:318.

because the measures were implemented through regulation in the narrow sense.¹³ Subsequent decisions have followed *EDF*, and have held that the market economy operator test will apply where it is ‘meaningful to compare the behaviour of the State in that regard with that of a hypothetical private investor in a comparable position.’¹⁴ This approach has been welcomed as a departure from formalism by some commentators,¹⁵ although it has been suggested that this will have a relatively minor impact on fiscal measures.¹⁶ It seems therefore that the law will retain some scepticism of arguments by Member States that they have offered a tax benefit or other favourable regulation in the hope of obtaining some greater return for the State.

Other strands of the case law share this scepticism and prevent Member States from arguing that regulation in the narrow sense is merely a means of obtaining some relatively immediate economic benefit for the State. This has emerged in the law dealing with the requirement that aid be ‘granted by States or through State resources’ in Article 107(1) TFEU. While Panayi has argued that ‘it cannot conclusively be argued that tax incentives cause revenue loss’ because ‘tax incentives intended to influence inward investment may result to increased tax revenues as whole businesses relocate activities and income to the Member State in order to benefit from the measure’,¹⁷ the CJEU has precluded the possibility of reliance on such arguments to negate the State resources condition.¹⁸ For example, the

¹³ *ibid* paras 91-98.

¹⁴ Case C-224/12 P *Commission v Netherlands and ING Groep NV* ECLI:EU:C:2014:213, para 35. See also Case C-224/12 P *Commission v Netherlands and ING Groep NV* ECLI:EU:C:2014:213, Opinion of AG Sharpston, para 41.

¹⁵ Niels Baeten and Liliane Gam, ‘Tax Measures and the Private Investor Test: the Court of Justice Endorses a Level Playing Field’ (2013) 12 *European State Aid Law Quarterly* 547; Phedon Nicolaides, ‘Taxes, the Cost of Capital and the Private Investor Principle’ (2013) 12 *European State Aid Law Quarterly* 243, 245; Albert Sánchez Graells, ‘Bringing the “market economy agent” principle to full power’ (2012) 33 *European Competition Law Review* 470, 470.

¹⁶ Niels Baeten and Liliane Gam, ‘Tax Measures and the Private Investor Test: the Court of Justice Endorses a Level Playing Field’ (2013) 12 *European State Aid Law Quarterly* 547.

¹⁷ Christiana Panayi, ‘State Aid and Tax: a Third Way?’ (2004) 32 *Intertax* 283, 294.

¹⁸ Wolfgang Schön, ‘State Aid in the Area of Taxation’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, para 12-026.

fact that the relief at issue was related to a system that was not designed to generate revenue for the State is irrelevant to the question of whether the relief is granted through State resources.¹⁹ Further, the fact that a Member State received large amounts of tax revenue from an undertaking which established itself in that jurisdiction in response to certain exemptions did not prevent the exemptions being regarded as being granted through State resources in *Belgium Forum 187 v Commission*.²⁰

This issue has also arisen with respect to the selectivity criterion with the General Court pointing out in *Territorio Histórico de Guipúzcoa* and in *Territorio Histórico de Álava* that a Member State can seek to use tax reductions to stimulate investment and a subsequent increase in tax revenue provided that this is done through ‘general fiscal measures’ that are not selective.²¹ Where this argument is raised, judicial scepticism is evident towards the prospect of the tax reduction at issue stimulating an increase in tax revenue.²² The justification for the rejection of this argument is often based on the proposition that State aid is defined by reference to its effects and therefore its objectives are irrelevant.²³ While the arguments in these cases are directed at different conditions for the identification of aid, they share basic similarities in the way that they prohibit Member States from having recourse to

¹⁹ Case C-159/01 *Netherlands v Commission* ECLI:EU:C:2004:246, [2004] ECR I-4461, para 51.

²⁰ Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* ECLI:EU:C:2006:416, [2006] ECR I-5479, paras 307-309. See also Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Territorio Histórico de Álava* ECLI:EU:T:2009:315, [2009] ECR II-3029, para 130.

²¹ Joined Cases T-269/99, T-271/99 and T-272/99 *Territorio Histórico de Guipúzcoa* ECLI:EU:T:2002:258 [2002] ECR II-4271, paras 63-64; Joined Cases T-92/00 and T-103/00 *Territorio Histórico de Álava* ECLI:EU:T:2002:61, [2002] ECR II-1385, paras 61-62.

²² Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Territorio Histórico de Álava* ECLI:EU:T:2009:315, [2009] ECR II-3029, para 130; Joined Cases T-92/00 and T-103/00 *Territorio Histórico de Álava* ECLI:EU:T:2002:61, [2002] ECR II-1385, para 62; Joined Cases T-269/99, T-271/99 and T-272/99 *Territorio Histórico de Guipúzcoa* ECLI:EU:T:2002:258, [2002] ECR II-4271, para 64. The decision in Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Territorio Histórico de Álava* ECLI:EU:T:2009:315, [2009] ECR II-3029 appears to make similar findings to the other cases but it is less clear that it is directly referring to the selectivity criterion than the other judgments.

²³ Case C-159/01 *Netherlands v Commission* ECLI:EU:C:2004:246, [2004] ECR I-4461, para 51; Joined Cases T-269/99, T-271/99 and T-272/99 *Territorio Histórico de Guipúzcoa* ECLI:EU:T:2002:258, [2002] ECR II-4271, para 63; Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Territorio Histórico de Álava* ECLI:EU:T:2009:315, [2009] ECR II-3029, para 130.

the argument that regulation in the narrow sense is not aid simply because it seeks to secure some equivalent or greater return for the State.

4.2.2. Inadequacy of Reasons Defending Rule

The scepticism towards this type of argument being used to defend fiscal measures has not been adequately defended in the case law or the literature. It is worth considering two types of argument in support of this scepticism. The first relates to the quantification of the impact of fiscal measures and market rules. It has been suggested that tax measures cannot normally be subject to the market economy operator test because they are a form of regulation in the narrow sense.²⁴ The market economy operator test requires the assessment of some direct, individual cost and benefit to the Member State that is capable of quantification.²⁵ This assessment is thought to be much more difficult for regulation.²⁶ There is a risk that Member States may use a regulatory form to make aid less transparent in order to evade the prohibition in Article 107(1) TFEU.²⁷

Two important criticisms can be made about this reasoning. The first is that the relationship between fiscal measures and market rules is more complicated than De Cecco suggests. This is because fiscal aid will often avoid the problem of quantifiability to which de Cecco refers.²⁸ It is certainly true that for market rules, quantification will normally be

²⁴ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 88. De Cecco defines regulation as ‘a set of commands emanating from a public authority’. This broadly corresponds to the definition of regulation in the narrow sense adopted in this thesis. This encompasses ‘the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with the rules’, including fiscal measures and market rules. While market transactions can be considered to be regulation in the broad sense in that they represent ‘efforts of State agencies to steer the economy’, they can nevertheless be distinguished from regulation in the narrow sense. See Robert Baldwin, Colin Scott and Christopher Hood, ‘Introduction’ in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press 1998) 1-55, 3-4.

²⁵ *ibid* 95.

²⁶ *ibid*.

²⁷ *ibid*

²⁸ *Ibid*.

difficult and any benefit to the Member State will be generalised and diffuse. However, for tax measures this is less clear because they will often entail a clearly ascertainable cost to the Member State and the return may also be easier to quantify. Second, this reasoning contrasts with a large body of case law on State aid which affirms the irrelevance of regulatory technique to the assessment of aid and the basic equivalence between State aid in the form of direct grants and fiscal aid.²⁹

The second explanation for the refusal to accept this type of argument arises from the characterisation of tax measures as being general in character and being directed towards broad, macroeconomic objectives.³⁰ This contrasts with the narrower, microeconomic logic that characterises cases where the State acts as a shareholder trying to maximise a return on its investment. This explanation of the dichotomy has also been used to justify two exceptions to the general rule that the market economy operator test will not be applicable to fiscal aid.³¹ The first of these is where the aid takes the form of a parafiscal levy or charge that is hypothecated for some private, microeconomic purpose, even if its collection is facilitated by State coercion. The second is where tax has already been assessed and a debt is owed by an undertaking to the State and the State refrains from collecting the entirety of that debt.³²

²⁹ Case 173/73 *Commission v Italy* ECLI:EU:C:1974:71, [1974] ECR 709, para 13; Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, para 89; Case C-279/08 P *Commission v Netherlands (NOx)* ECLI:EU:C:2011:551, [2011] ECR I-7671, para 51; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, paras 87-88; Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paras 32-33.

³⁰ Niels Baeten and Liliane Gam, 'Tax Measures and the Private Investor Test: the Court of Justice Endorses a Level Playing Field' (2013) 12 *European State Aid Law Quarterly* 547, 550; Thomas Jaeger, 'Taking Tax Law Seriously: The Opinion of AG Mazak in EDF' (2012) 11 *European State Aid Law Quarterly* 1, 1.

³¹ Thomas Jaeger, 'Taking Tax Law Seriously: The Opinion of AG Mazak in EDF' (2012) 11 *European State Aid Law Quarterly* 1, 2.

³² Case C-342/96 *Spain v Commission* ECLI:EU:C:1999:210, [1999] ECR I-2459, paragraph 34; Case C-256/97 *DM Transport* ECLI:EU:C:1999:332, [1999] ECR I-3913, para 30; Case T-152/99 *HAMSA* ECLI:EU:T:2002:188, [2002] ECR II-3049; Case T-36/99 *Lenzing v Commission* ECLI:EU:T:2004:312, [2004] ECR II-3597; Case C-276/02 *Spain v Commission* ECLI:EU:C:2004:521, [2004] ECR I-8091; Case C-525/04 P *Spain v Commission and Lenzing* ECLI:EU:C:2007:698, [2007] ECR I-9947. See discussion in Leigh Hancher, 'The General Framework' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids*

Again, two criticisms of this account can be made. The first is that this dichotomy between macroeconomic and microeconomic logic and the generality of the measure resembles very closely the distinction that is drawn in the assessment of selectivity between selective measures and general macroeconomic policy measures.³³ Indeed some authors have described this distinction in precisely those terms.³⁴ There is a risk of conflation of selectivity with the economic advantage criterion that might lead to a measure being regarded as not selective for the same reason that the market economy operator test does not apply. If this distinction is to justify the inapplicability of the market economy operator test, further elaboration is required to distinguish it from the selectivity test which should be a separate stage of the inquiry.

The second criticism is that it does not consider the extent to which the tax policy decisions of the Member State may themselves be subject to competitive forces in a manner which has been well documented in the economic literature. This account seeks to explain why the behaviour of Member States in certain contexts cannot meaningfully be compared to that of a private operator within the meaning of the case law.³⁵ While private operators cannot set tax rates, Member States may still behave in a manner that is comparable to a private operator in setting those tax rates. This is described in the economic literature on tax competition and regulatory competition which posit models in which Member States are

(6th edn, Sweet & Maxwell 2021) 43-130, paras 3-226 – 3-240; Wolfgang Schön, ‘State Aid in the Area of Taxation’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490 paras 12-052 – 12-053.

³³ Joined Cases C-72/91 and C-73/91 *Sloman Neptun v Bodo Ziesemer* ECLI:EU:C:1992:130, [1993] ECR I-887, Opinion of AG Darmon, para 50; Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 90-91; Frans Vanistendael, ‘Fiscal Support Measures and Harmful Tax Competition’ (2000) 9 EC Tax Review 152, 159; Massimo Merola, ‘The Rebus of Selectivity in Fiscal Aid: A Nonconformist View on and beyond Case Law’ (2016) 39 World Competition 533.

³⁴ Massimo Merola, ‘The Rebus of Selectivity in Fiscal Aid: A Nonconformist View on and Beyond the Case Law’ (2016) 39 World Competition 533.

³⁵ Case C-224/12 P *Commission v Netherlands and ING Groep NV* EU:C:2014:213, para 35; Case C-224/12 P *Commission v Netherlands and ING Groep NV* EU:C:2014:213, Opinion of AG Sharpston, para 41.

described as offering infrastructure and other services to mobile businesses for a price in the form of taxation that is subject to competitive pressures.³⁶

There are two important implications of these models. The first is that Member States may offer a lower price, not simply to confer some benefit on an undertaking for political reasons, but in order to recoup that investment and a generous return from increased tax revenues from firms that are attracted to that jurisdiction by the favourable tax rules.³⁷ This is comparable to a private investor seeking to spend money in order to earn the best return. The second is that a Member State can be regarded as being subject to competitive pressures arising from the interaction between their tax policies and the policies of other Member States, combined with the high level of mobility for certain types of business within the internal market.³⁸ Therefore, there may be circumstances in which Member States act as though they are constrained by market mechanisms – which is all that is required of Member States in other contexts to comply with the market economy operator test.

The CJEU has rejected this framework for analysing tax competition in the EU and does not regard taxes as payment for services.³⁹ While Schön observes some brief discussion of taxation in these terms in the remarks of AG Léger in *Schumacker*,⁴⁰ this understanding of tax policy within the internal market has been absent from the case law on State aid.⁴¹

³⁶ Timothy Besley and Paul Seabright, 'The Effects and Policy Implications of State Aids to Industry: An Economic Analysis' (1999) 14 *Economic Policy* 15; Richard Baldwin and Paul Krugman, 'Agglomeration, integration and tax harmonisation' (2004) 48 *European Economic Review* 1; Gonzalo Fernández, 'A note on tax competition in the presence of agglomeration economies' (2005) 35 *Regional Journal of Economics* 837; Friedrich Heinemann, Michael Overesch and Johannes Rincke, 'Rate-Cutting Tax Reforms and Corporate Tax Competition in Europe' (2010) 22 *Economics and Politics* 498; Alexander Haupt and Tim Krieger, 'The role of relocation mobility in tax and subsidy competition' (2020) 116 *Journal of Urban Economics* 103196. See also Section 3.6.1.

³⁷ Christiana Panayi, 'State Aid and Tax: a Third Way?' (2004) 32 *Intertax* 283, 294.

³⁸ Jukka Snell and Jussi Jaakkola, 'Economic Mobility and Fiscal Federalism: Taxation and European Responses in a Changing Constitutional Context' (2016) 22 *European Law Journal* 772.

³⁹ Wolfgang Schön, 'Playing Different Games? Regulatory Competition in Tax and Company Law Compared' (2005) 42 *Common Market Law Review* 331, 341.

⁴⁰ Case C-279/93 *Schumacker* ECLI:EU:C:1994:391, [1995] ECR I-225, Opinion of AG Léger, paras 36, 56.

⁴¹ Wolfgang Schön, 'Playing Different Games? Regulatory Competition in Tax and Company Law Compared' (2005) 42 *Common Market Law Review* 331, 340-341.

This approach is not entirely without reason. The analogy between the selection of a jurisdiction for investment and a market transaction is imperfect, as some of the taxation is used for redistribution and cannot be regarded as payment for a service.⁴² However, in certain contexts where there is the possibility of regulatory competition, Member States and undertakings may behave in important ways as though the tax is the price that must be paid for establishment and operation in that jurisdiction. Even where the market economy operator principle is applied to non-fiscal measures, there is some acknowledgement that there are imperfections in the comparison of the actions of government to those of private operators.⁴³ There will always be an element of artificiality to this comparison even where fiscal measures are not in issue. The existing literature does not offer a sufficient explanation for the scepticism of this type of argument in respect of fiscal measures.

A more convincing reason why the law does not accept these justifications for fiscal measures can be derived from the understanding of State aid law as a mechanism for managing regulatory competition in order to secure solidarity between Member States.⁴⁴ Regulatory competition can occur as Member States use favourable tax measures to attract mobile capital and investment decisions. National governments offer certain tax incentives or other subsidies so that the resources they lose in offering a tax incentive will be offset and exceeded by the tax revenue arising from the establishment or investment decision of the undertaking to whom it is offered. It will be recalled that fiscal measures may be particularly useful to Member States for this purpose.⁴⁵ If Member States were able to avoid scrutiny

⁴² *ibid.*

⁴³ See Phedon Nicolaides, 'Taxes, the Cost of Capital and the Private Investor Principle' (2013) 12 *European State Aid Law Quarterly* 243, 245; Leigh Hancher, 'The General Framework' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 43-130, para 3-200 for the observation these imperfections in the comparison may arise from governments being able to secure finance at cheaper rates than private investors. Further, governments which own shares in undertakings who act to protect their investment may only have obtained that shareholding through the grant of State aid.

⁴⁴ See Section 3.6 for a more detailed explanation of this rationale for State aid control.

⁴⁵ See for example Phedon Nicolaides, 'Grants versus Fiscal Aid: In Search of Economic Rationality' (2015) 14 *European State Aid Law Quarterly* 410.

under the State aid rules simply by arguing that they were likely to recoup their investment in additional tax revenues in this way, it would prevent the rules from managing this process of regulatory competition. The existence of regulatory competition itself would allow the rules to be disapplied. This is the case irrespective of whether the argument is based on the market economy operator principle, selectivity or the burden on State resources. Notwithstanding the exceptions identified in *EDF* for cases that more closely resemble transactions, the consistency across these different strands of the doctrine suggests that managing regulatory competition is an important part of the rationale that these rules are designed to serve, even if this has not been expressly acknowledged in the case law.

4.3. The Three-Stage Test for Selectivity: Practical Uncertainty and Theoretical Ambiguity

4.3.1. Selectivity Criterion and the Three-Stage Test

It will be recalled that a measure cannot constitute State aid unless its impact on competition occurs ‘by favouring certain undertakings or the production of certain goods’ within the meaning of Article 107(1) TFEU. This phrase has been interpreted as providing a distinct condition for the application of Article 107(1) TFEU that the impugned measure be selective. This criterion is often described as distinguishing aid targeted towards specific undertakings or industries and general measures which are not aid.⁴⁶ As a result, measures can be presumed to be selective if they are granted to an individual undertaking.⁴⁷ Measures which

⁴⁶ Joined Cases C-72/91 and C-73/91 *Sloman Neptun v Bodo Ziesemer* ECLI:EU:C:1992:130, [1993] ECR I-887, Opinion of AG Darmon, paras 50-53; Case C-189/91 *Kirsammer-Hack v Sidal* ECLI:EU:C:1992:458, [1993] ECR I-6185, Opinion of AG Darmon, paras 58-69; Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 90-91; Michael Honoré, ‘Selectivity’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 119.

⁴⁷ Case C-15/14 P *MOL v Commission* ECLI:EU:C:2015:362, para 60; Case C-15/14 P *MOL v Commission* ECLI:EU:C:2015:362, Opinion of AG Wahl, paras 52-53; Case C-211/15 P *Orange v Commission* ECLI:EU:C:2016:78, Opinion of AG Wahl, para 67; Case T-135/12 *France v Commission* ECLI:EU:T:2015:116, paras 43-44; Commission Notice on the notion of State aid as referred to in Article

apply to all undertakings are not selective.⁴⁸ Beyond these relatively clear propositions, the law on selectivity is much less clear and the CJEU has developed a three-stage test to determine whether a measure can be classified as selective. This section will examine the three-stage test employed to identify selective measures and begin to consider the controversial application of these standards to fiscal measures.⁴⁹ In particular, this section will go on to examine the conflation of the selectivity criterion with the economic advantage criterion in respect of fiscal measures. This section will go on to suggest that the Commission and the CJEU have failed to elaborate a set of criteria that effectively distinguish between general and selective measures in the field of taxation.

The decision of the CJEU in *Adria-Wien*⁵⁰ can be considered to be the genesis of the three-stage test, with some refinement of this in the *Azores* case.⁵¹ The first stage of the test involves identifying the reference framework or normal regime in the context of which the alleged aid measure occurs.⁵² Second, it must be considered whether the impugned measure

107(1) of the Treaty on the Functioning of the European Union [2016] OJ C262/1, para 126. It also appears that this applies where a tax authority has a broad discretion to confer a particular tax benefit to individual undertakings, following Joined Cases C-649/20 P, C-658/20 P and C-662/20 P *Spain v Commission* ECLI:EU:C:2023:60, paras 38-49.

⁴⁸ Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365, paras 35-36; Case C-66/02 *Italy v Commission* ECLI:EU:C:2005:768, [2005] ECR I-10901, para 99; Case C-148/04 *Unicredito Italiano* ECLI:EU:C:2005:774, [2005] ECR I-11137, para 49; Case C-222/04 *Cassa di Risparmio di Firenze* ECLI:EU:C:2006:8, [2006] ECR I-289, para 135; Case T-399/11 *Banco Santander and Santusa v Commission* ECLI:EU:T:2014:938, para 69; Case T-219/10 *Autogrill España v Commission* ECLI:EU:T:2014:939, para 74; Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 120.

⁴⁹ On the importance and controversial nature of the selectivity criterion in the assessment of fiscal measures, see Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 88, 89; Ulrich Soltész, 'EU state aid law and taxation – where do we stand today?' (2020) 41 *European Competition Law Review* 18; Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 138-139; Leigh Hancher, 'The General Framework' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 43-130, paras 3-137 – 3-138; Claire Micheau, 'Tax selectivity in European law of state aid: legal assessment and alternative approaches' (2015) 40 *European Law Review* 323-348; Phedon Nicolaides and Ioana Eleonora Rusu, 'The Concept of Selectivity: An Ever Wider Scope' (2012) 11 *European State Aid Law Quarterly* 791.

⁵⁰ Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365.

⁵¹ Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115.

⁵² Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, paras 56-57. The relevant measure may constitute the derogation from the reference framework or the measure may create its own autonomous reference framework which may in turn result in selectivity by excluding undertakings comparable to those who are covered by it. See Case T-210/02 RENV *British Aggregates Association v Commission (British Aggregates III)* ECLI:EU:T:2012:110, paras 51, 63, 67, 71-75; Case T-219/10 RENV

differentiates between undertakings who are in a comparable legal and factual situation from the perspective of the measure's objectives.⁵³ If it does so, then the test must proceed to the third stage. If it does not, then the measure is not selective. Third, a measure that differentiates between comparable undertakings will not be selective if the differential treatment is justified by the nature or general scheme or structure of the system in question.⁵⁴ The test therefore allows States to treat comparable undertakings differently if this is consistent with the general purpose of the system, such as reduced environmental tax burdens on undertakings that cause a lesser degree of harm to the environment.⁵⁵ Some descriptions of this doctrine refer to a 'consistency test', which ensures that Member States are consistent in implementing policies which they choose themselves.⁵⁶

It is also important to note that this test for selectivity has both a material and a geographic dimension. The geographic dimension only arises in circumstances where the impugned measure has been adopted by a decentralised public authority such as a regional government.⁵⁷ Geographic or regional selectivity differs from material selectivity largely in the application of the first limb of the test and the determination of the reference framework. While EU State aid law originally regarded the fact that a regional government had adopted a measure derogating from the general tax system as a matter of form that did not prevent

World Duty Free Group v Commission ECLI:EU:T:2018:784, para 127; Joined Cases C-51/19 P and C-64/19 P *World Duty Free and Spain v Commission* ECLI:EU:C:2021:793, para 63.

⁵³ Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365, para 41; Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, para 54.

⁵⁴ Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365, para 42; Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, paras 52-53.

⁵⁵ Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365.

⁵⁶ See for example Joined Cases C-51/19 P and C-64/19 P *World Duty Free and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, para 18.

⁵⁷ Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 124.

the derogation being regarded as selective,⁵⁸ the CJEU has since adopted a position that allows regional differences in taxation and aid policy to escape the State aid rules.⁵⁹

In *Azores*, the CJEU determined that the relevant reference framework would not encompass the general tax system in the entire territory of the relevant Member State if the impugned measure was granted by a regional government with sufficient autonomy from the national government.⁶⁰ The reference framework would be limited to the territory governed by the regional institutions if those institutions have sufficient institutional, procedural and economic autonomy such that the regional institutions can take their own decisions without input from the central government and without compensation from the central government for any measures that would reduce their income.⁶¹ This has been affirmed in subsequent cases.⁶² Measures adopted by regional governments that comply with these criteria remain capable of being materially selective in the same way as measures adopted by Member State governments.⁶³ These criteria have brought considerable certainty to the law in this area and have not been associated with the same difficulties discussed below in relation to material selectivity.⁶⁴ This may simply be because material selectivity is much more complicated and must address a great diversity of different regulatory strategies.⁶⁵ However, it may also be

⁵⁸ Joined Cases C-400/97, C-401/97 and C-402/97 *Administración del Estado v Juntas Generales de Guipúzcoa* ECLI:EU:C:1999:340, [2000] ECR I-1073, Opinion of AG Saggio, paras 33-37.

⁵⁹ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 176.

⁶⁰ Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, paras 57-58.

⁶¹ Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, para 67.

⁶² Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de la Rioja v Juntas Generales del Territorio Histórico de Vizcaya* ECLI:EU:C:2008:488 [2008] ECR I-6747, para 60; Joined Cases T-211/04 and T-215/04 *Government of Gibraltar v Commission* ECLI:EU:T:2008:595, [2008] ECR II-3745, para 86.

⁶³ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 183-184. For example, Case C-169/08 *Presidente del Consiglio dei Ministri v Regione Sardegna* ECLI:EU:C:2009:709, [2009] ECR I-10821; Joined Cases C-471/09 and C-473/09 P *Territorio Histórico de Vizcaya – Diputación Foral de Vizcaya v Commission* ECLI:EU:C:2011:521, [2011] ECR I-111.

⁶⁴ Andreas Bartosch, 'Is There a Need for a Rule of Reason in European State Aid Law - Or How to Arrive at a Coherent Concept of Material Selectivity' (2010) 47 *Common Market Law Review* 729, 730; Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 126; 582-597; Begoña Pérez-Bernabeu, 'Refining the Derogation Test on Material Tax Selectivity: The Equality Test' (2017) 16 *European State Aid Law Quarterly* 582, 597.

⁶⁵ Miro Prek and Silvère Lefèvre, 'The Requirement of Selectivity in the Recent Case-Law of the Court of Justice' (2012) 11 *European State Aid Law Quarterly* 335, 345.

because the law in this area has made a more direct and transparent interpretive choice in favour of decentralised government that is absent in the law on material selectivity. These criteria are not a watertight means of preventing cross-subsidisation and circumvention of the State aid rules applying to Member States,⁶⁶ and therefore, clarity may have come at the cost of exempting certain targeted incentives from the State aid rules.

4.3.2. Conflation of Economic Advantage and Selectivity

The test for material selectivity and its application to fiscal measures has always been accompanied by considerable ambiguity and uncertainty as to what the test is supposed to measure. Even before the decision in *Gibraltar* and the subsequent case law stretched the test beyond recognition in the manner described in the next section, difficulties in the application of the test became apparent in the conflation of the selectivity test with the separate condition that the measure confer an economic advantage on an undertaking, which is a separate condition for the application of Article 107(1) TFEU.⁶⁷ With fiscal measures, the advantage does not arise from the disbursement of funds from the State to the undertaking. Instead, it is an omission to require an undertaking to pay. The advantage is identified by comparing the amount of tax required to be paid by the undertaking to the charges they would ordinarily have to pay.⁶⁸ The advantage arises from a deviation from the

⁶⁶ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 126-128, 134; Edoardo Traversa, 'The Selectivity Test: The Concept of Regional Aid' in Alexander Rust and Claire Micheau, (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 119-135, 127-128.

⁶⁷ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 6; Begoña Pérez-Bernabeu, 'Refining the Derogation Test on Material Tax Selectivity: The Equality Test' (2017) 16 *European State Aid Law Quarterly* 582, 592.

⁶⁸ Wolfgang Schön, 'State Aid in the Area of Taxation' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, paras 12-033 – 12-034; See for example Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, para 56; Joined Cases C-164/15 P and C-165/15 P *Commission v Aer Lingus and Ryanair* ECLI:EU:C:2016:990, para 40; Case 173/73 *Italy v Commission (Italian Textiles)* ECLI:EU:C:1974:71, [1974] ECR 709; Case C-387/92 *Banco Exterior de España* ECLI:EU:C:1994:100, [1994] ECR I-877, paras 13-14.

ordinary level of taxation, which might also appear to be captured in the first two stages of the test for selectivity.

Indeed, the CJEU has expressly acknowledged the similarity between these formally distinct stages of the analysis in *Azores*, where it held that ‘[t]he 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.”’⁶⁹ The CJEU has reiterated this point in numerous decisions.⁷⁰ In many cases, this is not simply a sleight of hand that occurs in the application of the law, but the CJEU often lists these distinct criteria as a single concept of ‘selective advantage’ when summarising the legal framework applicable to the dispute.⁷¹ In *Ireland and Apple v Commission*, the General Court expressly rejected a challenge to the Commission’s analysis based on the conflation of these concepts and appeared to accept as permissible some overlap in the analysis of these issues by the Commission.⁷² There has also been some affirmation of the link between the concepts of advantage and selectivity in cases involving non-fiscal aid as well.⁷³

This conflation has been heavily criticised in the literature. It has been suggested that the conflation between the concepts of economic advantage and selectivity makes

⁶⁹ Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, para 56. See also Case C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:971, para 55.

⁷⁰ Case T-210/02 RENV *British Aggregates Association v Commission (British Aggregates III)* ECLI:EU:T:2012:110, para 49; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 90; Joined Cases T-60/06 RENV II and T-62/06 RENV II *Italy and Euralumina SpA v Commission* ECLI:EU:T:2016:233, para 99; Case C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:97, para 55; Joined Cases C-105/18 to C-113/18 *UNESA* ECLI:EU:C:2019:935, para 62.

⁷¹ For examples in the case law, see Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, paras 70-71, 78, 86-87; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, paras 77-110; Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paras 32-33, paras 19, 21; Case C-233/16 *ANGED* ECLI:EU:C:2018:280, paras 37, 39, 56, 60. This practice has also been observed and criticised in the literature. See Juan Jorge Piernas López, ‘Revisiting Some Fundamentals of Fiscal Selectivity: The ANGED Case’ (2018) 17 *European State Aid Law Quarterly* 274, 277, 281; Wolfgang Schön, ‘State Aid in the Area of Taxation’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, paras 12-034 – 12-036.

⁷² Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338, paras 133-139.

⁷³ Case C-403/10 P *Mediaset* ECLI:EU:C:2011:533, [2011] ECR I-117, para 62.

enforcement of the State aid rules easier for the Commission because it reduces the number of distinct elements that it must prove and limits the potential arguments that are available to the Member State to refute the Commission's conclusions.⁷⁴ To the extent that it is more prevalent in the case law on fiscal measures, this may make it easier to enforce the State aid rules against fiscal measures when compared with non-fiscal measures. Even if one does not endorse the exceptionalism of Member State fiscal sovereignty in the EU legal order,⁷⁵ it nevertheless appears incongruous for the case law to facilitate more expansive enforcement against fiscal measures than against other measures for which the rules were originally designed.

4.4. Circumvention of Three-Stage Test for Selectivity and Emergence of Concept of a Privileged Category of Undertakings

4.4.1. The *Gibraltar* Decision

Despite these early difficulties in the application of the three-stage test, its ambiguity and inadequacy became most apparent after the circumvention of the test in the *Gibraltar* decision.⁷⁶ It will be argued that the *Gibraltar* decision cannot easily be reconciled with the test previously outlined by the CJEU and that the emergence of this new approach demonstrates the inadequacy of the existing criteria in their application to fiscal measures. This section will also criticise the failure of the Commission and the CJEU to adequately

⁷⁴ Wolfgang Schön, 'State Aid in the Area of Taxation' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, paras 12-033 – 12-039; Thomas Jaeger, 'From Santander to LuxLeaks - and Back' (2015) 14 *European State Aid Law Quarterly* 345, 350; Hugo López López, 'General Thought on Selectivity and Consequences of a Broad Concept of State Aid in Tax Matters' (2010) 9 *European State Aid Law Quarterly* 807, 819.

⁷⁵ For views in support of the exceptional position of taxation in the EU legal order, see Wolfgang Schön, 'State Aid in the Area of Taxation' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, paras 12-021, 12-035; Raymond Luja, 'Do State Aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty?' (2016) 25 *EC Tax Review* 312.

⁷⁶ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113.

theorise or explain the relationship between apparently diverging approaches to the selectivity criterion.

The decision of the CJEU in *Gibraltar* is a striking development in the evolution of the selectivity criterion in response to cases involving direct taxation that remains an influential part of the law in this area.⁷⁷ In this case, the Commission commenced an investigation into the corporate tax regime in Gibraltar before that regime was repealed and replaced in its entirety. The new regime was composed of a payroll tax, business property occupation tax and a registration tax with the liability for the first two of these capped at 15% of profits. This regime ensured that companies with no physical presence or very few employees in Gibraltar had to pay very little tax. It is noteworthy that this development had emerged in a case involving a fiscal measure that was clearly designed to attract cross-border establishment and investment in a manner that is likely to stimulate regulatory competition. These reforms were notified to the Commission and were declared to constitute State aid measures that were incompatible with the internal market. The General Court upheld an appeal from Gibraltar and the UK, finding that the Commission had misapplied the criteria of regional and material selectivity. It was held that the Commission had erred in suggesting that Gibraltar's tax reforms should be assessed as derogations from the general tax system of the UK. The relevant reference framework was limited to Gibraltar.⁷⁸ Further, the General Court found that the Commission had failed to demonstrate the existence of material selectivity because the Commission had not identified a derogation from the reference

⁷⁷ For example, Ruth Mason 'Ding-Dong! The EU Arm's Length Standard Is Dead' (2022) 108 Tax Notes International 1249, 1254-1255 observes that the *Gibraltar* was cited favourably by the CJEU in C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, para 70. She argues that it 'was wrongly decided and led to the current chaos'. For more detailed discussion of this more recent decision, see Section 4.6.3 below.

⁷⁸ Joined Cases T-211/04 and T-215/04 *Government of Gibraltar v Commission* ECLI:EU:T:2008:595, [2008] ECR II-3745, paras 115-116.

framework, as the newly established corporate tax regime was held to be the reference framework.⁷⁹

On appeal, the Commission argued that the General Court was mistaken in requiring an assessment of the reference framework and derogations from that framework under the analysis of selectivity and that this approach would allow Member States to circumvent the State aid rules by introducing aid measures as part of a broader tax system that is inherently discriminatory.⁸⁰ It was argued that allowing Member States to circumvent the State aid rules in this way would be contrary to the general principle that the character of a measure as State aid should be assessed according to its effects rather than its objectives.⁸¹ In particular, the Commission argued that the practical effect of the reforms was to confer a considerable advantage for offshore companies in Gibraltar.⁸²

The CJEU found that the General Court had erred in finding that there was no selective advantage afforded to offshore companies, and that the findings of the General Court would allow Member States to use differences in regulatory technique to grant a selective advantage to offshore companies.⁸³ Even though these advantages were conferred as part of an entirely new corporate tax system, the CJEU held that the measure ‘in practice discriminates between companies which are in a comparable situation with regard to the objective of the proposed tax reform, namely to introduce a general system of taxation for all companies established in Gibraltar’ because such companies will often lack property or employees in the jurisdiction that may be taxed.⁸⁴ It was held that the reforms were selective because they had created ‘a privileged category’ of offshore undertakings by specifically

⁷⁹ *ibid* paras 175-188.

⁸⁰ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 49.

⁸¹ *ibid* para 50.

⁸² *ibid* para 53.

⁸³ *ibid* paras 87-93.

⁸⁴ *ibid* para 101.

designing the tax system in a way that would preclude the possibility of them paying substantial amounts of tax.⁸⁵

4.4.2. Circumvention of the Three-Stage Test

This decision marks a considerable point of divergence with much of the case law on the selectivity test that preceded it. In particular, this decision appears to circumvent the three-stage test and carve out a new, alternative path for identifying selective measures. The first and most obvious feature of this divergence is the apparent irrelevance of the reference framework or any derogation from that framework to the finding that the measure is selective. In places, the judgment appears to uphold the importance of defining the reference framework and suggests that the new corporate tax regime in Gibraltar should be regarded as the reference framework.⁸⁶ The approach of the CJEU has been characterised as adopting a reference framework for comparison that is hypothetical in which offshore companies are subject to a similar level of taxation to other companies.⁸⁷ However, it is submitted that the identification of a privileged category of undertakings in the manner described by the CJEU is largely independent of any such reference framework. Indeed, subsequent cases have indicated that where this approach is taken, the Commission does not need to define the reference framework to assess the selectivity of a measure.⁸⁸ The decision appears to present an alternative mechanism for identifying selectivity where the reference system defined by

⁸⁵ *ibid* paras 106-107.

⁸⁶ *ibid* paras 90-91, 94-96.

⁸⁷ John Temple Lang, 'The Gibraltar State Aid and Taxation Judgment - A Methodical Revolution' (2012) 11 *European State Aid Law Quarterly* 805, 812

⁸⁸ Case T-140/13 *Netherlands Maritime Technology Association v Commission* ECLI:EU:T:2014:1029 paras 98-100. These conclusions were upheld by the CJEU in Case C-100/15 *Netherlands Maritime Technology Association v Commission* ECLI:EU:C:2016:254, para 76. See also Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981, paras 74-77; Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:624, Opinion of AG Wathelet, para 102; Case C-66/14 *Finanzamt Linz* ECLI:EU:C:2015:242, Opinion of AG Kokott, paras 85, 109, 112.

national policy choices has little relevance.⁸⁹ The novelty of this alternative mechanism is emphasised by the observation that the CJEU had reasserted the importance of the reference framework as a starting point in its judgment in *Paint Graphos*⁹⁰ delivered only a few weeks earlier.⁹¹ Subsequent case law has pointed out the importance of defining the reference framework, particularly in the contribution that it makes to securing predictability and effective review of decision-making.⁹²

Further, once the analysis disregards the reference framework and the identification of a derogation therefrom, the remainder of the test becomes difficult, if not impossible, to apply. The finding that impugned reforms create ‘a privileged category’ of undertakings and are therefore selective notwithstanding that this does not depart from Gibraltar’s general system of corporate taxation diminishes the importance of the third stage of the test. The CJEU dismissed the argument of Gibraltar and the UK on this point on the basis that it had not been raised in the investigation process before the Commission and therefore the Commission was under no obligation to address that argument.⁹³ In relation to this argument, the Commission and Spain submitted that the advantage conferred on offshore companies was not capable of justification by the nature and general scheme of the system because the system itself conferred the advantage.⁹⁴ While the CJEU did not have to address this directly, it is submitted that argument made by the Commission and Spain in this regard flows logically from the findings of the CJEU in respect of the privileged category of

⁸⁹ Michael Honoré, ‘Selectivity’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 145.

⁹⁰ Joined Cases C-78/08 and C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, [2011] ECR I-7611, para 49.

⁹¹ Miro Prek and Silvère Lefèvre, ‘The Requirement of Selectivity in the Recent Case-Law of the Court of Justice’ (2012) 11 *European State Aid Law Quarterly* 335, 339; Conor Quigley, ‘Direct Taxation and State Aid: Recent Developments concerning the Notion of Selectivity’ (2012) 40 *Intertax* 112, 117.

⁹² Case C-270/15 P *Belgium v Commission* ECLI:EU:C:2016:289, Opinion of AG Bobek, para 39; C-524/14 P *Commission v Hansestadt Lübeck* EU:C:2016:971, para 55; Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, para 88.

⁹³ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, paras 143-153.

⁹⁴ *ibid* para 141.

undertakings. If the system itself is regarded as selective, then the possibility of justification by the objectives of the system cannot be permitted. This is particularly significant in circumstances where the preceding case law has been described as being very quick to hold that a measure is *prima facie* selective and as relying heavily on the justification stage of the test to exclude measures from the scope of Article 107(1) TFEU.⁹⁵

The *Gibraltar* decision also features more ambiguous treatment of the second stage of the three-stage test, relating to whether the derogation from the system treats undertakings differently notwithstanding that they are in comparable legal and factual situations. The CJEU refers to this stage of the test and indicates that it is satisfied because the general criteria set out in the corporate tax regime discriminate between companies in comparable situations with regard to the objective of introducing a new corporate tax system for all companies established in Gibraltar.⁹⁶ It has been suggested that these dicta affirm that fiscal sovereignty of Member States in circumstances where the assessment of comparability is based on the objectives of the tax system as designed by national governments.⁹⁷ However, the finding of comparability based on the exceedingly general objective of creating a corporate tax system for all undertakings established in Gibraltar reveals an extremely low threshold for the satisfaction of this limb of the test, which could potentially find any difference in taxation between two companies in Gibraltar under this system to be *prima facie* selective.⁹⁸ The framing of the objective is somewhat confusing as it appears to cast

⁹⁵ Pierpaolo Rossi-Maccanico, 'Fiscal Aid Review and Tax Competition' in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 39-56. However Andreas Bartosch, 'Spanish Goodwill – A Textbook on Material Selectivity Awaiting a Second Edition' (2022) 21 *European State Aid Law Quarterly* 65, 70 argues that the third stage is quite rarely invoked successfully to exclude a measure from the prohibition in Article 107(1) TFEU.

⁹⁶ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 101.

⁹⁷ Frank Engelen and Anna Gunn, 'State Aid: Towards a Theoretical Assessment Framework' in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 137-151, 141.

⁹⁸ John Temple Lang, 'The Gibraltar State Aid and Taxation Judgment - A Methodical Revolution' (2012) 11 *European State Aid Law Quarterly* 805, 811.

the creation of a general system as an objective of the impugned reforms for the purposes of the selectivity test.

However, it is submitted that what is clear from this decision's treatment of selectivity is that the CJEU is very much willing to look behind the policy choices and stated objectives of the Member States in relation to tax law.⁹⁹ It is clear that following this decision, it is no longer enough for Member States to simply act consistently with broad outlines of policies selected by them or ensure a consistency of objectives.¹⁰⁰ Member States must ensure that the conferral of tax advantages and differential tax treatment is consistent with external objectives that may be identified by the Commission and the CJEU, although the precise content of these objectives has not been clarified.¹⁰¹ This places Member States in a relatively difficult position in which, on the one hand, the application of the conventional three-stage test applies pressure to them to ensure that any advantage they confer is consistent with general policy objectives. This may be achieved either by alterations to the advantage conferred and its conditions or by amendments to the general system of which it forms part. On the other hand, the finding in relation to the 'privileged category' of undertakings in *Gibraltar*¹⁰² opens the possibility that even if the benefit is consistent with the overall system, the system itself may be impugned by external criteria.

⁹⁹ Phedon Nicolaides and Ioana Eleonora Rusu, 'The Concept of Selectivity: An Ever Wider Scope' (2012) 11 European State Aid Law Quarterly 791, 801-802; John Temple Lang, 'The Gibraltar State Aid and Taxation Judgment - A Methodical Revolution' (2012) 11 European State Aid Law Quarterly 805, 812; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 104-105.

¹⁰⁰ John Temple Lang, 'The Gibraltar State Aid and Taxation Judgment - A Methodical Revolution' (2012) 11 European State Aid Law Quarterly 805, 812; Phedon Nicolaides and Ioana Eleonora Rusu, 'The Concept of Selectivity: An Ever Wider Scope' (2012) 11 European State Aid Law Quarterly 791, 801-802.

¹⁰¹ Roland Ismer and Sophia Piotrowski, 'The Selectivity of Tax Measures: A Tale of Two Consistencies' (2015) 43 Intertax 559, 568-569.

¹⁰² Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 104.

While some authors observe that the CJEU sought to apply the language of the three-stage test in *Gibraltar*,¹⁰³ the decision substantially departs from previous applications of that test. While one can find references to elements of the language of the three-stage test in this judgment, the analysis above indicates that the CJEU has not applied these criteria in the manner established by the previous case law on the matter. This view is also supported by the conclusions of AG Jääskinen in that case, which described the reasoning that was subsequently adopted by the CJEU as a ‘methodological revolution’.¹⁰⁴ Further, the suggestion that *Gibraltar* was decided on the basis of the three-stage test is inconsistent with a number of subsequent cases interpreting it.¹⁰⁵ It is also inconsistent with the Commission’s account of the import of that decision, which sees the notion of a privileged category of undertakings as an alternative to the three-stage test where the general system is designed in a ‘clearly arbitrary or biased way’.¹⁰⁶ This suggestion is also inconsistent with the views expressed by AG Saugmandsgaard Øe in *A-Brauerei* whereby he indicated his support for the approach in *Gibraltar* while simultaneously contrasting it with the three-stage test.¹⁰⁷ Even if one does not accept that *Gibraltar* supports the general availability test proposed by AG Saugmandsgaard Øe, it is noteworthy that a proponent of the approach in *Gibraltar* regards it as distinct from the three-stage test.

¹⁰³ Roland Ismer and Sophia Piotrowski, ‘The Selectivity of Tax Measures: A Tale of Two Consistencies’ (2015) 43 *Intertax* 559, 568; Conor Quigley, ‘Direct Taxation and State Aid: Recent Developments concerning the Notion of Selectivity’ (2012) 40 *Intertax* 112, 115-119.

¹⁰⁴ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:215, [2011] ECR I-11113, Opinion of AG Jääskinen, para 202.

¹⁰⁵ These cases suggest that in some cases it will not be necessary to define a reference framework. See Case T-140/13 *Netherlands Maritime Technology Association v Commission* ECLI:EU:T:2014:1029 paras 98-100. These conclusions were upheld by the CJEU in Case C-100/15 *Netherlands Maritime Technology Association v Commission* ECLI:EU:C:2016:254, para 76. See also Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981, paras 74-77; Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:624, Opinion of AG Wathelet, para 102; Case C-66/14 *Finanzamt Linz* ECLI:EU:C:2015:242, Opinion of AG Kokott, paras 85, 109, 112.

¹⁰⁶ 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 C262/1, paras 129-130.

¹⁰⁷ Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:741, Opinion of AG Saugmandsgaard Øe, paras 5-10.

Instead, many commentators describe *Gibraltar* as adopting a discrimination standard, whereby Member States must justify differential treatment of comparable undertakings by reference to certain acceptable objectives, which appear to be defined by EU law rather than by national governments.¹⁰⁸ However, other references to *Gibraltar* in the case law describe it as departing from a discrimination standard in favour of a general availability test,¹⁰⁹ such as that which is proposed by Nicolaidis.¹¹⁰ However, it is submitted that irrespective of the merits of the understanding of selectivity as a general availability test,¹¹¹ and irrespective of whether the outcome in *Gibraltar* is consistent with such an understanding, the CJEU does not provide any meaningful articulation of this approach in its judgment in that case. Even if it does adopt a discrimination standard that requires justification for differential treatment, it does not explain what reasons can justify such treatment except perhaps that the objective of reducing the tax burden for offshore companies will not suffice. Despite this ambiguity, the discrimination standard is a useful way of understanding *Gibraltar*, particularly in the light of subsequent decisions that make more consistent references to the notion of discrimination.

However, there exists one possible avenue through which the novel departure in *Gibraltar* can be understood as less of a disruption to the three-stage test. This lies in the suggestion that the approach in *Gibraltar* represents a kind of reasoning of last resort for

¹⁰⁸ Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 *European State Aid Law Quarterly* 357, 362; Roland Ismer and Sophia Piotrowski, 'The Selectivity of Tax Measures: A Tale of Two Consistencies' (2015) 43 *Intertax* 559; 568-569; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 104-105; John Temple Lang, 'The Gibraltar State Aid and Taxation Judgment - A Methodical Revolution' (2012) 11 *European State Aid Law Quarterly* 805, 812. See Andreas Bartosch, 'Is There a Need for a Rule of Reason in European State Aid Law - Or How to Arrive at a Coherent Concept of Material Selectivity' (2010) 47 *Common Market Law Review* 729 for a proposal that the test for selectivity operate along these lines.

¹⁰⁹ Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:741, Opinion of AG Saugmandsgaard Øe, paras 5-10; Joined Cases C-236/16 and C-237/16 *ANGED* ECLI:EU:C:2017:854, Opinion of AG Kokott, paras 84-85.

¹¹⁰ Phedon Nicolaidis, 'Excessive Widening of the Concept of Selectivity' (2017) 16 *European State Aid Law Quarterly* 62, 66.

¹¹¹ See the discussion on the relationship between approaches to selectivity based on discrimination and general availability at Section 4.5.3 below and in Section 8.2.1.

exceptional cases where the application of the three-stage test would allow Member States to effectively circumvent the State aid rules.¹¹² This characterisation is evident in the Commission's current interpretation of this decision.¹¹³ In particular, the CJEU regards its approach as avoiding a situation where the regulatory technique adopted by the Member State can have an impact on the characterisation of the measure at issue as State aid.¹¹⁴ This principle that regulatory technique should not matter is derived from existing case law,¹¹⁵ and from the related and frequently cited principle that State aid should be defined by reference to its effects and not its objectives, aims or causes.¹¹⁶ While avoiding circumvention of the State aid rules based on the formal structure of the impugned measure is a laudable objective, it is not clear that the approach in *Gibraltar* meaningfully serves that objective. In identifying the features of the impugned measures that bring it to create a privileged category of undertakings, the CJEU placed great weight on the fact that:

[T]he fact offshore companies are not taxed is 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.¹¹⁷

¹¹² Humbert Drabbe, 'The Test of Selectivity in State Aid Litigation: The Relevance of Drawing Internal and External Comparisons to Identify the Reference Framework' in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 87-105, 100.

¹¹³ 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 C262/1, paras 129-130.

¹¹⁴ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, paras 91-92. For further discussion of this idea, see Section 5.3.3.

¹¹⁵ Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, paras 85, 89; Case C-279/08 P *Commission v Netherlands (NOx)* ECLI:EU:C:2011:551, [2011] ECR I-7671, para 51.

¹¹⁶ Case 173/73 *Italy v Commission* ECLI:EU:C:1974:71, [1974] ECR 709, para 13. See also Case C-56/93 *Belgium v Commission* ECLI:EU:C:1996:64, [1996] ECR I-723, para 79; Case C-241/94 *France v Commission* ECLI:EU:C:1996:353, [1996] ECR I-4551, para 20; Case C-75/97 *Belgium v Commission* ECLI:EU:C:1999:311, [1999] ECR I-3671, para 25; Case C-409/00 *Spain v Commission* ECLI:EU:C:2003:92, [2003] ECR I-1487, para 46; Case C-5/01 *Belgium v Commission* ECLI:EU:C:2002:754, [2002] ECR I-11991, para 45; Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' v Commission* ECLI:EU:C:2011:368, [2011] ECR I-4727, para 94; Case T-52/12 *Greece v Commission* ECLI:EU:T:2014:677, para 67; Case C-126/01 *Ministre de l'économie, des finances et de l'industrie v GEMO SA* ECLI:EU:C:2003:622, [2003] ECR I-13769, para 34; Case C-522/13 *Ministerio de Defensa v Concello de Ferrol* EU:C:2014:2262, para 28. See also the discussion of this formula in Section 5.3.2.

¹¹⁷ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 106.

Therefore, while the CJEU claims to be avoiding a situation where regulatory technique or objectives will be decisive, it is submitted that the way in which the privileged category is defined above appears to be very much concerned with the objectives of the impugned measures. This is particularly the case in the distinction drawn here between a ‘random consequence’ and an ‘inevitable consequence’. Further, it is submitted that the effectiveness of this approach to prevent circumvention of the rules is undermined by the considerable uncertainty surrounding it. It has been observed that the criteria used to identify a privileged category of undertakings are not clear.¹¹⁸ This is compounded by the fact that there is no clear account of the relationship between this test and the three-stage test, and when the Commission should depart from the three-stage test. For example, the Commission has taken the view that ‘the three-step analysis cannot be applied in certain cases, taking into account the practical effects of the measures concerned’.¹¹⁹ The closest the Commission has come to defining where this approach should be departed from indicates that this should occur where the ‘boundaries of the system of reference have been designed in a consistent manner or, conversely, in a clearly arbitrary or biased way, so as to favour certain undertakings which are in a comparable situation with regard to the underlying logic of the system in question.’¹²⁰

In summary, it has been argued here that the decision in *Gibraltar* marks a departure from the previously decided case law and the three-stage test in articulating an alternative test for selectivity based on the identification of a privileged category of undertakings. This alternative approach is deficient in two important ways, as indicated above. The first is that the relationship between the three-stage test and the privileged category standard and the

¹¹⁸ Miro Prek and Silvère Lefèvre, ‘The Requirement of Selectivity in the Recent Case-Law of the Court of Justice’ (2012) 11 European State Aid Law Quarterly 335, 345; John Temple Lang, ‘The Gibraltar State Aid and Taxation Judgment - A Methodical Revolution’ (2012) 11 European State Aid Law Quarterly 805, 808

¹¹⁹ 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 C262/1, para 129.

¹²⁰ *ibid.*

circumstances in which these tests will be applied remain unclear. Second, this exposes Member States to contradictory pressures to ensure that differential taxation is coherent with a more general system and to ensure that the system itself does not create a privileged category of undertakings by reference to external standards. Third, it is submitted that the criteria for identifying a privileged category of undertakings have not been articulated in a particularly clear way by the CJEU. It can be concluded from these difficulties that the condition of selectivity for the application of Article 107(1) TFEU that fiscal measures pose a particular problem for the definition of the notion of aid. This is an example of how the standards for identifying aid in Article 107(1) TFEU have shifted in response to the challenges posed by fiscal measures, particularly those designed to attract and retain cross-border investment such as those at issue in *Gibraltar*.

4.5. Selectivity After *Gibraltar*: Emergence of Discrimination Standard

4.5.1. The ‘Privileged Category’ and Discrimination

The development of the case law in the wake of *Gibraltar* has reoriented the selectivity criterion towards a simpler test that examines discrimination or differential treatment and its justification. Even though the CJEU generally refrains from observing anything but purported continuity with its previous case law, this change is perceptible and significant. This section will examine the various elements that have contributed towards this shift in the law. This section will go on to argue that this approach, while distinct from that which was established in *Gibraltar*, also opens up considerable space for more explicit value and policy choices to be made by the CJEU and evaluates different sources which may inform such choices. This discrimination approach will also be contrasted with another competing account of the selectivity criterion that has been discussed in the case law and academic literature that defines it as a test of general availability.

One of the most striking elements of the case law following the *Gibraltar* decision is the incredibly sparse reference to what appears to be the most significant novel concept in that decision: the privileged category of undertakings. It will be recalled that *Gibraltar* can be interpreted as offering an alternative route to a finding of selectivity that largely bypasses the three-stage test developed in *Adria-Wien*, *Azores* and other cases, holding that a measure can be selective if it creates a ‘privileged category’ of undertakings who benefit from the measure, even if this is consistent with the general system.¹²¹ As indicated above, this is a novel development in the law with significant implications for the interpretation of the criterion of selectivity for the purpose of the application of Article 107(1) TFEU.

It is therefore somewhat striking that this element of the decision in *Gibraltar* has not been relied upon extensively by the European courts since it was decided. In *Netherlands Maritime Technology Association v Commission*, the General Court referred to the relevant passages of the *Gibraltar* judgment and held that the a different tax burden resulting from a general tax system could only be regarded as selective if it created a privileged category of undertakings.¹²² The General Court held that this was the test to be applied where the notified measure was a general system and that in such circumstances, the Commission did not have to define a reference framework.¹²³ This finding was upheld on appeal by the CJEU.¹²⁴ Another set of decisions of the General Court applied the concept of a privileged category to uphold an alternative line of reasoning deployed by the Commission to find that a tax exemption for ports was selective.¹²⁵ It seems clear from these decisions, and indeed other

¹²¹ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, paras 101-104.

¹²² Case T-140/13 *Netherlands Maritime Technology Association v Commission* ECLI:EU:T:2014:1029, para 99.

¹²³ Case T-140/13 *Netherlands Maritime Technology Association v Commission* ECLI:EU:T:2014:1029, paras 98-100.

¹²⁴ Case C-100/15 P *Netherlands Maritime Technology Association v Commission* ECLI:EU:C:2016:254, para 76.

¹²⁵ Case T-696/17 *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven NV v Commission* ECLI:EU:T:2019:652, paras 197-200; Case T-674/17 *Le Port de Bruxelles et Région de Bruxelles-Capitale v*

decided cases that do not refer to a privileged category of undertakings directly,¹²⁶ that *Gibraltar* does provide a means of identifying selectivity that is an alternative to the three-stage test. This also appears to be the Commission's understanding of the import of the decision.¹²⁷ However, it is worth noting that most of the very few cases that expressly refer to privileged categories of undertakings offer little clarity on how such a category might be identified. In two cases involving advertising taxes, the CJEU appeared to suggest that this might be identified where the reference system itself contained a 'manifestly discriminatory element'.¹²⁸ This suggests that it might be limited to more exceptional cases.¹²⁹ However, the reference to discrimination which has become prevalent in all analyses of selectivity suggests that the inquiry may not be radically different to that employed in more straightforward cases.

Commission ECLI:EU:T:2019:651, paras 194-197; Case T-673/17 *Port autonome du Centre et de l'Ouest v Commission* ECLI:EU:T:2019:643, paras 194-197.

¹²⁶ Case T-140/13 *Netherlands Maritime Technology Association v Commission* ECLI:EU:T:2014:1029 paras 98-100. These conclusions were upheld by the CJEU in Case C-100/15 *Netherlands Maritime Technology Association v Commission* ECLI:EU:C:2016:254, para 76. See also Case C-20/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981, paras 74-77; Case C-20/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:624, Opinion of AG Wathelet, para 102. See also Case C-66/14 *Finanzamt Linz* ECLI:EU:C:2015:242, Opinion of AG Kokott, paras 85, 109, 112; Joined Cases C-51/19 P and C-64/19 P *World Duty Free and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, para 18.

¹²⁷ 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 C262/1, paras 129-130.

¹²⁸ Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2021:202, paras 48-50; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2021:201, paras 42-44. However, these decisions do not refer directly to the notion of a 'privileged category' but the context suggests that they are referring to this alternative to the three-stage test for identifying selectivity. These passages rely on the conclusions of AG Kokott who uses the slightly different phrase 'manifestly inconsistent'. See Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2020:835, Opinion of AG Kokott, paras 47-52; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2020:834, Opinion of AG Kokott, paras 40-45.

¹²⁹ See also the analysis in *Swedish tax on credit institutions* (Case SA.56348 (2021/N) Commission Decision of 25 November 2021 [2021] OJ C511/2, recitals (48, 54, 58, 63, 65, 66)-(), in which the Commission found that a tax imposed on financial institutions trading in Sweden with liabilities above a certain threshold in order to compensate for the costs imposed on society by potential financial crises was not aid. As part of its analysis, it considered numerous elements of the tax that were 'inherent to the reference system and consistent with the tax's objective and do not reveal a manifestly discriminatory element in the design of the tax' before considering whether there was a derogation. See recital (63). This appears to support the suggestion that it is an alternative means of identifying selectivity even if there is no derogation from the reference system. This decision is currently under appeal before the General Court. See Action brought on 2 March 2022 — Svenska Bankföreningen and Länsförsäkringar Bank v Commission (Case T-112/22) [2022] OJ C191/31.

It is also worth noting a contrary interpretation of the concept of a privileged category that was rejected in a few of the handful of decisions that expressly refer to that concept. It was argued in *Commission v World Duty Free Group* that the decision in *Gibraltar* effectively required the Commission to identify the characteristics of a defined category of undertakings who would benefit from the impugned measure in order to classify it as selective.¹³⁰ While this argument led to the decisions of the Commission being set aside in by the General Court,¹³¹ this was overturned by the CJEU.¹³² The CJEU held that a measure could be held to be selective even if the Commission could not define common characteristics that the undertakings benefitting from the measure would share and therefore more favourable tax treatment for foreign shareholdings compared to domestic shareholdings was regarded as selective.¹³³ This approach was followed in *A-Brauerei*, where a similar argument was made.¹³⁴ While it is probably safe to conclude that the interpretation apparently rejected in *World Duty Free* and *A-Brauerei* is no longer good law, some further confusion is cast on this by the only other decision referring to a privileged category expressly. The conclusions of AG Kokott in *ANGED*, also appear to interpret *Gibraltar* as making it a condition of selectivity that ‘a tax system must characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged

¹³⁰ Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981, para 39.

¹³¹ Case T-219/10 *Autogrill España* ECLI:EU:T:2014:939, paras 57-58; T-399/11 *Banco Santander and Santusa v Commission* ECLI:EU:T:2014:938, paras 61-62.

¹³² Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981, paras 71-72, 78.

¹³³ *ibid.*

¹³⁴ Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paras 16, 27. It should be observed that while the English text of the judgment does not use the term ‘privileged category’, the CJEU uses a similar term at para 16 where it refers to a ‘favoured category’. However, it is submitted that this is likely to be an attempt to invoke the same language as was used *Gibraltar* in circumstances where the French version of the judgment refers to a ‘catégorie privilégiée’.

category.’¹³⁵ However, the greater part of the case law suggests that this is not a requirement that must be satisfied for selectivity in every case.¹³⁶

4.5.2. Selectivity as Discrimination

The decision in *World Duty Free* is the first in which the CJEU refers directly to the concept of a privileged category of undertakings and attempts to clarify how such a category might be identified. The criteria articulated in this decision resemble the second stage of the three-stage test, albeit with a particular emphasis on discrimination. In that case, the CJEU interpreted *Gibraltar* as making a finding of selectivity based on the identification of ‘*de facto* discrimination against undertakings that were in a comparable situation in the light of the objective pursued by that regime’.¹³⁷ It went on to hold that the central issue for determining selectivity was whether the measure placed recipient undertakings ‘in a position that is more favourable than that of other undertakings, although all those undertakings are in a comparable factual and legal situation in the light of the objective pursued by the tax system concerned.’¹³⁸ Before upholding the findings of the Commission in its original decision, the CJEU observed that the Commission ‘relied primarily on the ground that the consequence of that measure is discrimination’.¹³⁹ This decision marks the starting point for the reorientation of the selectivity test around the concept of discrimination.¹⁴⁰

¹³⁵ Cases C-236/16 and C-237/16 *ANGED* ECLI:EU:C:2017:854, Opinion of AG Kokott, para 84.

¹³⁶ See for example Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2020:835, Opinion of AG Kokott, paras 47-52; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2020:834, Opinion of AG Kokott, paras 40-45.

¹³⁷ Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981, para 74.

¹³⁸ *ibid* para 79. See also para 86.

¹³⁹ *ibid* para 75.

¹⁴⁰ However, Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 86-87 notes some continuity between the more recent case law making direct references to the concept of discrimination and the earlier observation in Case C-353/95 *Tiercé Ladbroke v Commission* ECLI:EU:C:1997:233, [1997] ECR I-7007, Opinion of AG Cosmas, para 30 that the selectivity criterion can be observed as an expression of the general principle of equal treatment.

Following the decision in *World Duty Free*, the characterisation of selectivity as a question of discrimination has become very prominent in the case law.¹⁴¹ Indeed, it has been suggested that this has become the ‘dominant approach’ in the case law.¹⁴² This language echoes the second stage of the three-stage test in *A-Brauerei*, which clearly adopts this phrasing both for situations that involve derogations from a reference framework and situations where the general system is selective.¹⁴³ In *Achema*, the CJEU described the selectivity test in general terms and indicated that the question of whether the measure favoured one group of undertakings over another group in a comparable legal and factual situation was a question of whether the undertakings were ‘subject to different treatment that can, in essence, be classified as “discriminatory”’.¹⁴⁴ Very similar language is used to describe the selectivity test in many other decisions.¹⁴⁵ In addition to describing individual stages of the three-stage test in this way, discrimination also appears to be an organising idea for the assessment of the selectivity criterion as a whole. For example, in *World Duty Free Group and Spain v Commission*, where the CJEU considered that ‘examination of whether such a measure is selective is thus, in essence, coextensive with the examination of whether it applies to a set of economic operators in a non-discriminatory manner’.¹⁴⁶ This

¹⁴¹ See Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 86-87.

¹⁴² Wolfgang Schön, ‘State Aid in the Area of Taxation’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, para 12-037.

¹⁴³ Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paras 32, 35.

¹⁴⁴ Case C-706/17 *Achema* ECLI:EU:C:2019:407, para 84.

¹⁴⁵ Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, para 83; Case C-219/16 P *Lowell Financial Services v Commission* ECLI:EU:C:2018:508, para 85; Case T-406/11 *Prosegur Compañía de Seguridad v Commission* ECLI:EU:T:2018:793, paras 47, 185; Case T-405/11 *Axa Mediterranean v Commission* ECLI:EU:T:2018:780, para 53; C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:971, para 53.

¹⁴⁶ Joined Cases C-51/19 P and C-64/19 P *World Duty Free and Spain v Commission* ECLI:EU:C:2021:793, para 33. See also Joined Cases C-51/19 P and C-64/19 P *World Duty Free and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, para 17; Case C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:971, para 53. The Commission also uses the language of discrimination in describing the selectivity criterion and the import of the decision in Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113. See 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 C262/1, para 130: ‘the Court of Justice found that the reference system as defined by the Member State concerned, although founded on criteria that were of a general nature, discriminated in practice between companies which were in a comparable situation with regard to the objective of the tax reform, resulting in a selective advantage being conferred on offshore companies.’

reorientation of the test around discrimination as an organising idea marks a significant shift in the way in which it is understood in the case law. This may represent an attempt to integrate the notion of a ‘privileged category’ developed in *Gibraltar*, which has also been described as requiring a ‘manifestly discriminatory element’, with the ordinary three-stage test.¹⁴⁷

The centrality of discrimination in the language used by the CJEU has undermined the boundaries between the different elements of the three-stage test. Many commentators have suggested that the test for selectivity can essentially be reduced down to a single question of whether the impugned measure discriminates between undertakings in a manner that is not justified by a legitimate objective (the ‘discrimination standard’).¹⁴⁸ One reason for this is that the identification of the reference framework is increasingly difficult to separate from a derogation from the reference framework that discriminates between undertakings in a comparable legal and factual situation. For example, Piernas López considers that in *ANGED*, AG Kokott held that the taxes applicable to small and large retail establishments constituted separate reference frameworks rather than construing the non-taxation of smaller establishments as a deviation from a more general reference framework

¹⁴⁷ Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2021:202, paras 48-50; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2021:201, paras 42-44.

¹⁴⁸ Michael Honoré, ‘Selectivity’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 164-165 Rita Szudoczky, ‘Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms’ (2016) 15 *European State Aid Law Quarterly* 357, 357-358; Phedon Nicolaides, ‘Excessive Widening of the Concept of Selectivity’ (2017) 16 *European State Aid Law Quarterly* 62, 70; Begoña Pérez-Bernabeu, ‘Refining the Derogation Test on Material Tax Selectivity: The Equality Test’ (2017) 16 *European State Aid Law Quarterly* 582, 596; Ruth Mason, ‘An American View of State Aid’ (2017) 157 *Tax Notes* 645, 646-647. For a critical view of this position, see Wolfgang Schön, ‘State Aid in the Area of Taxation’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, paras 12-037 – 12-039. See Frank Engelen and Anna Gunn, ‘State Aid: Towards a Theoretical Assessment Framework’ in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 137-151, 150 for a more structured elaboration of this type of test. This is broadly consistent with an earlier proposal from Andreas Bartosch, ‘Is There a Need for a Rule of Reason in European State Aid Law - Or How to Arrive at a Coherent Concept of Material Selectivity’ (2010) 47 *Common Market Law Review* 729, which proposed to reinterpret the selectivity criterion along those lines before the decision in *Gibraltar*.

applicable to all retail establishments.¹⁴⁹ However, the CJEU appears to have decided this point by concluding that smaller establishments are not in a comparable situation to the undertakings subject to the tax without determining the scope of the reference framework.¹⁵⁰ Further, it had been held by the General Court in a further judgment in the *World Duty Free* litigation that the same line of reasoning can result in the determination of both the first and second stages of the test.¹⁵¹

Despite this, Commission decisions continue to be annulled because of their failure to accurately define the reference framework.¹⁵² Moreover, the CJEU moved to correct the reasoning adopted by the General Court in *World Duty Free*.¹⁵³ AG Pitruzzella was particularly firm on this point, asserting that the identification of the relevant reference framework must be based on ‘content, structure, systematic arrangement and interrelationships between the rules in question, rather than the objectives pursued by the national legislature’ (which should be reserved for the second stage).¹⁵⁴ This account is unconvincing in the way in which it seeks to revert to the orthodox account of the three-

¹⁴⁹ Case C-233/16 *ANGED* ECLI:EU:C:2017:852, Opinion of AG Kokott, para 72; Juan Jorge Piernas López, ‘Revisiting Some Fundamentals of Fiscal Selectivity: The ANGED Case’ (2018) 17 *European State Aid Law Quarterly* 274, 277-278. See also Cases C-51/19 P and C-64/19 P *World Duty Free v Commission* ECLI:EU:C:2021:793, where the CJEU considered whether favourable tax treatment of shareholdings in foreign companies was a derogation from a reference framework relating to the tax treatment of shareholdings in domestic companies or whether the tax treatment of both such shareholdings constituted separate reference frameworks.

¹⁵⁰ Case C-233/16 *ANGED* ECLI:EU:C:2018:280, paras 45-56.

¹⁵¹ Case T-219/10 *RENV World Duty Free Group v Commission* ECLI:EU:T:2018:784, para 104. Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, para 91.

¹⁵² Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505; Case C-208/16 P *Germany v Commission* ECLI:EU:C:2018:506; C-209/16 P *Germany v Commission* ECLI:EU:C:2018:507; Case C-219/16 P *Lowell Financial Services v Commission* ECLI:EU:C:2018:508; Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2021:202; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2021:201. See Ulrich Soltész, ‘EU state aid law and taxation – where do we stand today?’ (2020) 41 *European Competition Law Review* 18, 20-21.

¹⁵³ Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, paras 65.

¹⁵⁴ Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, para 50. See also para 73. See also Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, para 73: ‘This includes, in particular, the determination of the basis of assessment and the taxable event’.

stage test and of the identification of the reference framework. This account seeks to avoid formalism and endorses the finding in *Andres v Commission* that it is not necessary to show that the impugned measure expressly takes the form of an exception to a more general rule, even if in such a situation there may often be selectivity through the differentiation of comparably situated undertakings.¹⁵⁵ Otherwise, the law might focus unduly on the regulatory form of the measure.¹⁵⁶ This impulse to avoid formalism is a laudable one which has led the CJEU to criticise the Commission and the General Court for acting on the basis of a ‘reference framework consisting of some provisions that have been artificially taken from a broader legislative framework.’¹⁵⁷

However, in the absence of such formalism, it is difficult to see how the CJEU can address the question of whether different tax rules covering two categories of undertakings constitute a reference system (and a potentially selective derogation) or two distinct reference systems that are not selective, without considering the purposes of those systems and comparing the undertakings they cover. Without undertaking a strictly formalistic assessment, it is impossible to consider only the ‘content, structure, systematic arrangement and interrelationships between the rules in question’ without inevitably assessing the

¹⁵⁵ Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, paras 92-93, 104. Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, paras 94-95; Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, para 76-78.

¹⁵⁶ Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, para 104; Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, para 89; Case C-279/08 P *Netherlands v Commission (NOx)* ECLI:EU:C:2011:551, [2011] ECR I-7671, para 51; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 87. See Section 5.3.3 for further discussion of this idea.

¹⁵⁷ Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, para 103. See also Case C-203/16 P *Andres v Commission* ECLI:EU:C:2017:1017, Opinion of AG Wahl, para 109. It has been suggested that this decision reveals the risk of relatively arbitrary definitions of the reference framework having a decisive impact on cases. See Ulrich Soltész, ‘EU state aid law and taxation – where do we stand today?’ (2020) 41 *European Competition Law Review* 18, 20. For the view that the assessment of the Commission and the General Court was to be preferred, see Phedon Nicolaidis, ‘The Definition of the Reference Tax System Is Still a Puzzle’ (2018) *European State Aid Law Quarterly* 419.

system's objectives.¹⁵⁸ The attempt by the CJEU to chart a path between formalism on the one hand and consideration of the system's objectives on the other is unconvincing and unsustainable. In those circumstances, it is difficult to avoid the conclusion that there will be significant overlap between the first and second stages of the test.

This is even clear from cases such as *Andres* in which the reference framework featured prominently in the reasoning. In such cases, the definition of the reference framework will often go some way towards determining the second stage as the broader the definition of the reference framework, the easier it will be to identify a derogation.¹⁵⁹ Where the definition of the reference framework is not subsumed into the second stage in the manner outlined here, the principles used to define it have been described as indeterminate and appear capable of justifying a wide range of possible frameworks.¹⁶⁰ In this respect too, it is not clear that it adds very much to the analysis. A finding that two measures represent different reference frameworks might be equated to a finding that there are particularly strong reasons to distinguish between the undertakings covered by each measure. At best it appears to be a device for concluding that two sets of undertakings are so distinct (like the very small and very large retailers in *ANGED*) that it can be concluded without more extensive analysis that differential treatment of them by the State is not problematic.¹⁶¹

¹⁵⁸ Quotation from Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, para 50.

¹⁵⁹ Bartłomiej Kurcz and Dimitri Vallindas, 'Can General Measures Be.. Selective - Some Thoughts on the Interpretation of a State Aid Definition' (2008) 45 *Common Market Law Review* 159, 179.

¹⁶⁰ Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 126-127. Honoré contrasts this position with the criteria used to identify the reference framework for the purposes of geographical selectivity articulated in Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115 which are comparatively clearer. See also Ulrich Soltész, 'EU state aid law and taxation – where do we stand today?' (2020) 41 *European Competition Law Review* 18, 20 for the concern that arbitrary definitions of the reference framework may have a decisive impact on any conclusion that a measure constitutes aid.

¹⁶¹ The General Court in Cases T-363/19 and T-456/19 *UK and ITV plc v Commission* ECLI:EU:T:2022:349 suggested that the a body of rules could be treated as a reference framework distinct from the broader corporate tax system of which it was a component if it could be regarded as 'severable' from that broader system. It is not clear that this novel formulation significantly alters the analysis.

Similarly, the boundaries between the second and third stages of the three-stage test have been eroded. It will be recalled that the second stage requires consideration of whether there is discriminatory or differential treatment of undertakings in a comparable legal and factual situation by reference to certain objectives.¹⁶² The third considers whether any such differential treatment is justified by the nature and general scheme of the system.¹⁶³ There had been some suggestion that the objectives that should be used to assess the differential treatment and its justification were different, with the former permitting recourse to the objectives of the measure itself in some cases.¹⁶⁴ The latter could only use general objectives of the system.¹⁶⁵ The Commission adopts a somewhat different interpretation, holding that only intrinsic objectives can be relied upon at both stages, but that certain objectives that would normally be external (such as environmental or public health goals) may be considered intrinsic when assessing certain special purpose levies.¹⁶⁶ After some erosion of this distinction even before the emergence of the discrimination standard,¹⁶⁷ the CJEU has

¹⁶² See Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365, para 40-42; Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, para 52-54.

¹⁶³ *ibid.*

¹⁶⁴ Humbert Drabbe, 'The Test of Selectivity in State Aid Litigation' in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 87-105, 101-102; Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 160, 163. See also Case C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:971, para 54; Case C-172/03 *Heiser* ECLI:EU:C:2005:130, [2005] ECR I-1627, para 40.

¹⁶⁵ Humbert Drabbe, 'The Test of Selectivity in State Aid Litigation' in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 87-105, 101-102; Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 160, 163. These include general features of tax systems such as progressivity, tax neutrality, administrative manageability, avoiding double taxation and combatting fraud and tax evasion. See 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 C262/1, para 139.

¹⁶⁶ 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 C262/1, paras 135-136. Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 162 contests this interpretation of the CJEU's case law. Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 *European State Aid Law Quarterly* 357, 373 argues that the CJEU's case law was not clear on this point.

¹⁶⁷ See for example Joined Cases C-78/08 and C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, [2011] ECR I-7611. The erosion of this distinction is discussed by José Luis Buendía Sierra, 'Finding Selectivity or the Art of Comparison' (2018) *European State Aid Law Quarterly* 85, 90-91; Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 163. These authors also refer to Case T-287/11 *Heitkamp v Commission* ECLI:EU:T:2016:60 which has since been overturned on appeal in Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505.

gone on to confirm that the second stage should consider only the objectives of the broader system.¹⁶⁸ As the CJEU does not appear to have attempted to disturb the previous case law accepting recourse to objectives such as environmental protection at the second stage in some cases,¹⁶⁹ it now appears likely that the Commission's interpretation is correct and that these can sometimes be regarded as intrinsic. This restatement from the CJEU nevertheless reinforces the similarity between these two stages by emphasising the similarity between the types of objectives that can be invoked at each stage. There is not much difference in asking whether undertakings have been treated differently based on the objectives of a given system and whether any differential treatment is justified based on the objectives of the same system. It has even been proposed that these two stages can be merged to ask whether the differential treatment is justified by reference to a legitimate objective.¹⁷⁰ This similarity is perhaps particularly incoherent where the burden of proof is said to rest on the Commission in the second stage and on the Member State in the third stage.¹⁷¹ Even though the CJEU continues to recite the formula of the three-stage test,¹⁷² the reorientation of the test around the discrimination standard makes it more difficult to sustain the boundaries between these different stages and between the three-stage test and the notion of a 'privileged category'.

¹⁶⁸ Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, para 117; Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, paras 19-20; Andreas Bartosch, 'Spanish Goodwill – A Textbook on Material Selectivity Awaiting a Second Edition' (2022) 21 *European State Aid Law Quarterly* 65, 68.

¹⁶⁹ See for example Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, paras 87-92; Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365, para 52.

¹⁷⁰ Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 165. See also Section 8.2.4 for a proposal for reformulating the test for selectivity that rejects this distinction.

¹⁷¹ José Luis Buendía Sierra, 'Finding Selectivity or the Art of Comparison' (2018) 17 *European State Aid Law Quarterly* 85, 90; Frank Engelen and Anna Gunn, 'State Aid: Towards a Theoretical Assessment Framework' in C Micheau and A Rust (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 137-151, 144; Leigh Hancher, 'The Role of Presumptions and the Burden of Proof in Recent State Aid Cases – Some Reflections' (2019) *European State Aid Law Quarterly* 470, 482-483.

¹⁷² See Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793; paras 35-36; Andreas Bartosch, 'Spanish Goodwill – A Textbook on Material Selectivity Awaiting a Second Edition' (2022) 21 *European State Aid Law Quarterly* 65, 68.

This reorientation of the selectivity criterion around the discrimination standard may allow the analysis to be simplified. If it opens the door to less technical complexity, however, the discrimination standard will nevertheless pose other important questions about the nature of this inquiry. As with *Gibraltar*, the case law's adoption of a discrimination standard also moves in the direction of more substantive review of national tax policies using the State aid rules. Even more so than the opaque concept of a 'privileged category' applied in *Gibraltar*, the discrimination standard presents a clear space for policy choices and value judgements to be made. The assessment of differential treatment and whether it is justified, whether the analysis is structured under the three-stage test or not, will require the law to identify a set of legitimate reasons that are capable of justifying this differential treatment.¹⁷³ It also seems clear that Member States will not be permitted to select any reason to justify their differential treatment of ostensibly similar undertakings.¹⁷⁴ Bartosch indicates that it is not desirable or feasible to allow any objective to justify differential treatment under such a test.¹⁷⁵ While the case law currently provides some examples of such principles or justifying reasons,¹⁷⁶ there does not appear to be any consistent theory behind this.

Attempts have been made in the literature to compare the current state of the law on selectivity to the case law interpreting the free movement provisions in the European

¹⁷³ Andreas Bartosch, 'Is There a Need for a Rule of Reason in European State Aid Law - Or How to Arrive at a Coherent Concept of Material Selectivity' (2010) 47 *Common Market Law Review* 729, 745. See also Section 8.2.2.

¹⁷⁴ Cristina Romariz, 'Revisiting Material Selectivity in EU State Aid Law - Or the Ghost of Yet-to-Come' (2014) 13 *European State Aid Law Quarterly* 39, 47.

¹⁷⁵ Andreas Bartosch, 'Is There a Need for a Rule of Reason in European State Aid Law - Or How to Arrive at a Coherent Concept of Material Selectivity' (2010) 47 *Common Market Law Review* 729, 745, 747.

¹⁷⁶ Examples can be seen in cases such as Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365 (environmental objectives); Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515 (environmental objectives, administrative difficulty); Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2021:202, paras 48-50; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2021:201 (progressivity); Case C-233/16 *ANGED* ECLI:EU:C:2018:280 (differentiation linked to the impact of an undertaking on the local environment and local infrastructure).

Treaties.¹⁷⁷ It has been suggested that in both areas of the law, differential treatment is identified which must then be justified by some legitimate objective. The means used to protect that objective must be suitable for that objective and must not go beyond which is necessary in conformity with the principle of proportionality.¹⁷⁸ This also would appear to be consistent with the thesis proposed by some authors that State aid performs a similar role to that of the free movement provisions in the Treaties and is largely concerned with securing the creation and functioning of the internal market.¹⁷⁹ It may be that similar kinds of legitimate objectives recognised in the Treaties and the case law on free movement could be used to justify differential treatment for the purposes of the State aid rules.¹⁸⁰

However, this analogy should be treated with caution. While State aid does indeed make a contribution to removing obstacles to cross-border trade and facilitates the creation and functioning of the internal market, it is submitted that it also has acquired a more nuanced objective of managing regulatory competition in the EU.¹⁸¹ Further, it is submitted that the objective of managing regulatory competition requires a broader margin of

¹⁷⁷ Begoña Pérez-Bernabeu, 'Refining the Derogation Test on Material Tax Selectivity: The Equality Test' (2017) 16 *European State Aid Law Quarterly* 582, 594-595; Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 *European State Aid Law Quarterly* 357, 378-380; Cristina Romariz, 'Revisiting Material Selectivity in EU State Aid Law - Or the Ghost of Yet-to-Come' (2014) 13 *European State Aid Law Quarterly* 39, 48-49; Claire Micheau, 'Tax selectivity in the European law of state aid: legal assessment and alternative approaches' (2015) 40 *European Law Review* 323, 343-344; Koen Lenaerts, 'State Aid and Direct Taxation' in Heikki Kanninen, Nina Korjus and Allan Rosas (eds), *EU Competition Law in Context: Essays in Honour of Virpi Tili* (Hart 2009) 291-306, 299, 302-306. See also Section 8.2.4.

¹⁷⁸ Frank Engelen and Anna Gunn, 'State Aid: Towards a Theoretical Assessment Framework' in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 137-151, 150; Begoña Pérez-Bernabeu, 'Refining the Derogation Test on Material Tax Selectivity: The Equality Test' (2017) 16 *European State Aid Law Quarterly* 582, 595; Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 *European State Aid Law Quarterly* 357, 377-378.

¹⁷⁹ Andrea Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' (2010) 12 *Cambridge Yearbook of Legal Studies* 35, 42; José Luis Buendía Sierra and Ben Smulders, 'The Limited Role of the "Refined Economic Approach" in Achieving the Objectives of State Aid Control: Time for Some Realism' in *EC State Aid Law: Liber Amicorum Francisco Santaolalla Gadea* (Wolters Kluwer 2008) 1-26. For a more nuanced view, see Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 38-43.

¹⁸⁰ Pierpaolo Rossi-Maccanico, 'Fiscal Aid Review and Cross-Border Tax Distortions' (2012) 40 *Intertax* 92, 99. See Section 8.2.4 for further discussion on this analogy.

¹⁸¹ See discussion in Sections 3.2, 3.4, 3.5.

discretion for Member States than a rationale based on the elimination of trade barriers and the establishment of the internal market as it does not seek to completely remove all differences in national policy in the same way. Indeed, it has been suggested that the discrimination approach and its association with the case law on free movement might be too restrictive as it might force Member States to justify all differential treatment in fiscal policy and aid policy in terms of goals recognised at EU level.¹⁸² It is submitted that this may be overcome by construing the range of objectives capable of justifying differential treatment relatively broadly. While these two areas cannot deal with the issues of discrimination identically, it is submitted that the case law is beginning to reveal more similarities between these areas than certain commentators are willing to accept.¹⁸³

4.5.3. An Alternative Approach: General Availability Test

It is important to note that the account of the test for selectivity under Article 107(1) TFEU outlined above is not without controversy. There is at least one other competing explanation of the current legal position that has been identified in the case law and the literature. This explanation understands selectivity as a test of general availability.¹⁸⁴ On this account, a measure is not selective simply because it treats different groups of goods or undertakings differently, provided that the favourable treatment is in principle open to all undertakings.¹⁸⁵

¹⁸² Claire Micheau, 'Tax selectivity in the European law of state aid: legal assessment and alternative approaches' (2015) 40 *European Law Review* 323, 343-344.

¹⁸³ For the contrary view, see Wolfgang Schön, 'State Aid in the Area of Taxation' in Leigh Hancher, Tom Ottvanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, paras 12-037 – 12-039.

¹⁸⁴ Section 8.2.4 argues that this approach should ultimately be adopted by the CJEU as part of reforms to the test for selectivity. See also Section 8.2.2.

¹⁸⁵ Phedon Nicolaidis, 'Excessive Widening of the Concept of Selectivity' (2017) 16 *European State Aid Law Quarterly* 62, 69-70; Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:741, Opinion of AG Saugmandsgaard Øe, paras 8-9, 87.

This account has been articulated as an alternative to the development towards a discrimination test for selectivity that has emerged since *World Duty Free*.¹⁸⁶ In proposing this explanation of the selectivity test, Nicolaides argues that this case was wrongly decided.¹⁸⁷ In *World Duty Free*, the CJEU held that a Spanish tax measure was selective and therefore impermissible aid. This measure provided more favourable tax treatment for acquisitions of shareholdings in foreign companies than for acquisitions of shareholdings in domestic Spanish companies. The CJEU overturned the findings of the General Court that the measure could not be selective because it did not favour a particular category of undertakings but rather a particular category of transactions.¹⁸⁸ The fact that any undertaking could avail of the favourable treatment by simply acquiring a shareholding in a foreign company did not alter its selective nature.¹⁸⁹

Nicolaides argues that the view taken by the CJEU is inappropriate in focusing on differential treatment *ex post*, after undertakings have made choices on how to react to specific rules and incentives.¹⁹⁰ Instead, he suggests that discrimination should be relevant for the purposes of selectivity where it takes place before undertakings have made such choices and excludes certain undertakings from favourable treatment *a priori*.¹⁹¹ It is suggested that differentiation based on the choices made by undertakings in response to rules set out in advance about what will be taxed and how it will be taxed is an inevitable part of any fiscal system.¹⁹² A similar point is made by other commentators who take a more textual

¹⁸⁶ Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981.

¹⁸⁷ Phedon Nicolaides, 'Excessive Widening of the Concept of Selectivity' (2017) 16 *European State Aid Law Quarterly* 62, 72.

¹⁸⁸ Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981, para 65.

¹⁸⁹ Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981, para 67.

¹⁹⁰ Phedon Nicolaides, 'Excessive Widening of the Concept of Selectivity' (2017) 16 *European State Aid Law Quarterly* 62, 69-71.

¹⁹¹ *ibid.*

¹⁹² *ibid.*

approach in arguing that where a measure only differentiates between undertakings based on some kind of behaviour or transaction rather than based on more intrinsic characteristics or the goods they produce, then it does not favour ‘certain undertakings or the production of certain goods’ and thus must fall outside of the prohibition in Article 107(1) TFEU.¹⁹³ A focus on this more textual approach to selectivity can also be observed in the conclusions of AG Kokott in *ANGED*.¹⁹⁴ However, this does not appear to have been accepted by the CJEU which has repeatedly confirmed that a measure can still be selective even if the differential treatment arises from the choices of Member States to engage in particular transactions or behaviour rather than relating to the characteristics of such undertakings.¹⁹⁵

However, a clearer statement in favour of this approach can be observed in the remarks of AG Saugmandsgaard Øe in *A-Brauerei*.¹⁹⁶ It is observed that the text of Article 107(1) TFEU does not refer to the term discrimination and thus the correct test must derive from the reference to ‘certain undertakings or the production of certain goods’ in that provision.¹⁹⁷ It is then suggested that a measure which applies across all economic sectors will generally not be selective because it will be generally available to all undertakings, even if not all undertakings actually do benefit from it.¹⁹⁸ However, if a measure is designed in a way that is superficially cross-sectoral in scope but in fact precludes the possibility of undertakings in certain economic sectors benefitting from it, it will still be selective.¹⁹⁹ He

¹⁹³ Wolfgang Schön, ‘Tax Competition in Europe - The Legal Perspective’ (2000) 9 EC Tax Review 90, 100; Wolfgang Schön, ‘State Aid in the Area of Taxation’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, para 12-077; Raymond Luja, ‘Do State Aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty’ (2016) 25 EC Tax Review 312, 315.

¹⁹⁴ Cases C-236/16 and C-237/16 *ANGED* ECLI:EU:C:2017:854, Opinion of AG Kokott, para 84.

¹⁹⁵ Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paras 25-26; Case C-128/16 P *Commission v Spain* ECLI:EU:C:2018:591 para 70; Case T-406/11 *Prosegur Compañía de Seguridad v Commission* ECLI:EU:T:2018:793, para 72; Case T-405/11 *Axa Mediterranean v Commission* ECLI:EU:T:2018:780, para 78;

¹⁹⁶ Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:741, Opinion of AG Saugmandsgaard Øe.

¹⁹⁷ *ibid* para 91.

¹⁹⁸ *ibid* paras 91-94.

¹⁹⁹ *ibid* 98.

argues that this correct test is one that reorients State aid law towards regulating State measures that are most damaging for competition in the internal market.²⁰⁰

However, the test proposed by AG Saugmandsgaard Øe was ultimately not accepted by the CJEU.²⁰¹ This is not to say that the general availability approach is entirely alien to the existing case law. There are some cases that would fit a general availability test even if the CJEU does not describe what it does in precisely those terms,²⁰² such as in *Netherlands Maritime Technology Association v Commission*²⁰³ and *Germany v Commission*.²⁰⁴ However, the remarks of AG Pitruzzella in *World Duty Free and Spain v Commission* make it clear that general availability does not form part of the prevailing account of the test for selectivity and some change in the CJEU's approach would be required to introduce it.²⁰⁵ It is also worth noting that the account of the existing law articulated by AG Saugmandsgaard Øe is not particularly convincing. While it is made clear that the general availability approach is presented as an alternative to the discrimination test,²⁰⁶ AG Saugmandsgaard Øe suggests that the general availability approach can be derived in part from the decision in *Gibraltar*.²⁰⁷ This is notwithstanding the heavy reliance on that decision in much of the case law that has developed the discrimination standard. Further, the foregoing analysis in this

²⁰⁰ *ibid* para 81.

²⁰¹ Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paras 25-26.

²⁰² Phedon Nicolaides, 'Excessive Widening of the Concept of Selectivity' (2017) 16 *European State Aid Law Quarterly* 62, 70-71.

²⁰³ Case C-100/15 P *Netherlands Maritime Technology Association v Commission* ECLI:EU:C:2016:254, paras 58, 72. This decision is cited in Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:741, Opinion of AG Saugmandsgaard Øe, para 97.

²⁰⁴ Case C-156/98 *Germany v Commission* ECLI:EU:C:2000:467, [2000] ECR I-6857, para 22. This decision is cited in Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:741, Opinion of AG Saugmandsgaard Øe, para 95.

²⁰⁵ Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, paras 24-27. The judgment itself appears to draw similar conclusions albeit less directly. See Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, para 99.

²⁰⁶ Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:741, Opinion of AG Saugmandsgaard Øe, paras 5-6.

²⁰⁷ *ibid* paras 5, 81, 99.

chapter indicates that the suggestion²⁰⁸ that the three-stage test and the discrimination approach only emerged in *Paint Graphos*²⁰⁹ rather than in *Adria-Wien*²¹⁰ is implausible.

However, it should be observed that the difference between the general availability test and the discrimination test is not quite as stark as the remarks of AG Saugmandsgaard Øe in *A-Brauerei* would suggest. The test can still be construed as identifying differential treatment between undertakings and examining whether that treatment is proportionate response to a justifiable objective, but it refrains from holding the characteristics of the different categories of undertakings constant. Where the characteristic that is the basis for the condition of the differential treatment is sufficiently capable of change in response to the condition, then there will be no discrimination or selectivity. For example, if the condition for availing of a tax benefit is the acquisition of shares in foreign companies, it might be that companies can respond to that condition relatively easily to acquire a shareholding in such a company and obtain the benefit. There is no discrimination because the favoured undertakings and the unfavoured undertaking differ only by a characteristic that is readily changeable. By contrast, it might be less realistic to suggest that all businesses might easily move their activities into heavy manufacturing industries to obtain a benefit made available to undertakings participating in such industries. Here the discrimination is more meaningful because the undertakings concerned cannot easily adapt to the condition for the benefit. This difference is a matter of degree that depends to some extent on the time horizon adopted, and this approach will require clarification of what kind of characteristics undertakings can reasonably be expected to change in response to incentives. While this might provide a less intrusive alternative to the discrimination standard, it is submitted that because it retains certain basic similarities to the discrimination standard, it is still faced with the questions of

²⁰⁸ Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:741, Opinion of AG Saugmandsgaard Øe, para 6.

²⁰⁹ Joined Cases C-78/08 and C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, [2011] ECR I-7611.

²¹⁰ Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365.

what range of legitimate objectives can be used to justify discriminatory treatment of undertakings that are truly comparable.

4.6. Tax Rulings and Use of Arm's Length Principle to Identify Selectivity and Advantage

4.6.1. Arm's Length Principle: Origins in *Forum 187*

One development that might be viewed as beginning to articulate these objectives is the treatment of tax rulings governing the taxation of multinational group companies. The tax treatment of group companies poses specific challenges for State aid law in that the decisions of one Member State in respect of such a company are even more likely to have an impact on the tax treatment of that company in another Member State or indeed a third country, even more so than in other areas of tax policy. As with other policies on direct taxation, there is little coordination between Member States in this regard.²¹¹ This area poses particular challenges for the State aid rules as it relates to direct taxation and the tax arrangements have considerable potential to affect the establishment decisions of multinational companies. This section will examine the increasing policy of enforcement against such tax rulings by the Commission and their treatment by the CJEU with a focus on the adoption of the arm's length principle as a standard by reference to which these rulings are reviewed. This section will examine the deficiencies in this approach in the erratic and unpredictable development of the law and the failure to articulate clear and practical standards in this area. It will be argued that these failings are evidence of the immense technical difficulties involved in applying the State aid rules to fiscal measures. However, it will also be argued that the

²¹¹ There is, however, a prominent counterexample in the form of the Code of Conduct for Business Taxation contained in Conclusions of the Ecofin Council Meeting on 1 December 1997 concerning taxation policy [1998] OJ C2/1. See William Bratton and Joseph McCahery, 'Tax coordination and tax competition in the European Union: evaluating the code of conduct on business taxation' (2001) 38 Common Market Law Review 677.

adoption of benchmarks for review in the form of the arm's length principle in this case law may assist in the application of a more effective and coherent discrimination test for selectivity.

The case law on the tax treatment of multinational groups begins in *Forum 187*, in which the CJEU upheld the finding of the Commission that a favourable tax regime implemented by Belgium for coordination centres of large multinational companies located in that jurisdiction was aid.²¹² The system calculated the coordination centre's income by adding a reasonable profit to certain costs, with exclusions for staff costs, financial charges and corporation taxes. The CJEU held that the calculation of the tax base for coordination centres had to be compared with an 'undertaking carrying on its activities in conditions of free competition' which is not part of a corporate group.²¹³ These exclusions were not comparable with the calculation of income for such a company and therefore conferred an advantage on coordination centres.²¹⁴ This regime was also selective in character because even if it sought to deal with the unique situation of international groups and the risk of double taxation, it was only available to certain groups that exceeded certain income thresholds and had operations in at least four countries.²¹⁵

The Commission has subsequently given this decision a very broad reading by using it to justify the importation of the arm's length principle into State aid law.²¹⁶ The

²¹² Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* ECLI:EU:C:2005:266, [2006] ECR I-5479.

²¹³ *ibid* para 95.

²¹⁴ *ibid* paras 94-96.

²¹⁵ *ibid* paras 119-126. Compare Case C-705/20 *Fossil (Gibraltar) Ltd v Commissioner of Income Tax* ECLI:EU:C:2022:680, paras 61-62, in which the application of general rules preventing double taxation was not inconsistent with the State aid rules and the obligation to recover aid.

²¹⁶ Tony Joris and Wout de Cock, 'Is *Belgium and Forum 187* a Suitable Source for an EU "At Arm's Length Principle"?' (2017) 16 *European State Aid Law Quarterly* 607, 612-614; Dimitrios Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016) 15 *European State Aid Law Quarterly* 428, 434-436; Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 *Journal of European Competition Law & Practice* 369, 381; Andrew Thomson and Emma Hardwick 'The European Commission's Application of the State Aid Rules to Tax: Where Are We Now?' (2017) 34 *Journal of Taxation and Investments* 29, 44.

Commission has relied on this decision in issuing various decisions holding transfer pricing arrangements in tax rulings issued by Member States to be State aid for a failure to comply with the arm's length principle.²¹⁷ In these decisions, the Commission asserts that where Member States give rulings on transfer pricing for the purposes of calculating the tax of group companies, they must adhere to the arm's length principle by ensuring that revenue and costs arising from intra-group transactions are valued in a manner that is similar to equivalent transactions between independent companies.²¹⁸ The Commission has also insisted in these decisions that the version of this principle which it applies is derived from 'a general principle of equal treatment in taxation falling within the application of Article 107(1) of the TFEU' rather than one deriving from the OECD Model Tax Convention to which the Commission frequently refers.²¹⁹ Further, the Commission has updated its

²¹⁷ *State aid granted by Luxembourg to Fiat* (Case SA.38375 (2014/C ex 2014/NN)) Commission Decision (EU) 2016/2326 [2016] OJ L351/1, recitals (222)-(223); *State aid implemented by Ireland to Apple* (Case SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP)) Commission Decision (EU) 2017/1283 [2016] OJ L187/1, recitals (249)-(250); *State aid implemented by Luxembourg to Amazon* (Case SA.38944 (2014/C) (ex 2014/NN)) Commission Decision (EU) 2018/859 [2018] OJ L153/1, recital (402); *State aid implemented by the Netherlands to Starbucks* (Case SA.38374 (2014/C ex 2014/NN)) Commission Decision (EU) 2017/502 [2017] OJ L83/38, recitals (258)-(262).

²¹⁸ *State aid granted by Luxembourg to Fiat* (Case SA.38375 (2014/C ex 2014/NN)) Commission Decision (EU) 2016/2326 [2016] OJ L351/1, recitals (224)-(227); *State aid implemented by Ireland to Apple* (Case SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP)) Commission Decision (EU) 2017/1283 [2016] OJ L187/1, recitals (258)-(263); *State aid implemented by Luxembourg to Amazon* (Case SA.38944 (2014/C) (ex 2014/NN)) Commission Decision (EU) 2018/859 [2018] OJ L153/1, recital (599); *State aid implemented by the Netherlands to Starbucks* (Case SA.38374 (2014/C ex 2014/NN)) Commission Decision (EU) 2017/502 [2017] OJ L83/38, recitals (267), (415)-(416).

²¹⁹ *State aid granted by Luxembourg to Fiat* (Case SA.38375 (2014/C ex 2014/NN)) Commission Decision (EU) 2016/2326 [2016] OJ L351/1, recital (228); *State aid implemented by the Netherlands to Starbucks* (Case SA.38374 (2014/C ex 2014/NN)) Commission Decision (EU) 2017/502 [2017] OJ L83/38, recital (264). This echoes some of the language in an earlier observation in Case C-353/95 *Tiercé Ladbroke v Commission* ECLI:EU:C:1997:233, [1997] ECR I-7007, Opinion of AG Cosmas, para 30 that the selectivity criterion can be observed as an expression of the general principle of equal treatment. See Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 86-87. Another precursor to this language can be seen in Koen Lenaerts, 'State Aid and Direct Taxation' in Heikki Kanninen, Nina Korjus and Allan Rosas (eds), *EU Competition Law in Context: Essays in Honour of Virpi Tili* (Hart 2009) 291-306, 306: 'Indeed, the Community law framing national rules on direct taxation cannot affect the sovereign choices of Member States, provided that these choices conform to the demands of the Union in terms of equality of treatment.' Lenaerts also notes at 299 in relation to free movement rules and State aid law that 'the Treaty generates an obligation of equality of tax treatment of objectively comparable situations.' These references to equal treatment can be regarded as echoing the discrimination standard.

guidance to refer directly to the arm's length principle in reliance on a broad interpretation of *Forum 187*.²²⁰

4.6.2. Arm's Length Principle: Criticisms of Commission's Approach

It has been suggested that this approach is illegitimate because it significantly mischaracterises the findings of the CJEU in *Forum 187*. For example, the CJEU did not refer to the arm's length principle at all in that decision.²²¹ Indeed it is not clear that it turns on favourable treatment for multinational group companies over others, as the relevant advantage was conferred not only on group companies but on a narrower category of corporate groups exceeding certain income thresholds and with operations in at least four countries. Selectivity arose from differential treatment between different categories of group company rather than between independent companies and group companies.²²² Further, even if it could be interpreted as adopting this principle, it is unlikely that it sought to propose an autonomous concept in State aid law of the variety described by the Commission but rather it was referring to the definition of this principle set out by the OECD.²²³ It has also been argued that the findings of the CJEU in *Forum 187* are even narrower and refer only to the cost-plus method of calculating income for group companies rather than the more general

²²⁰ 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 C262/1, paras 169-174; Dimitrios Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016) 15 European State Aid Law Quarterly 428, 430-431; Phedon Nicolaides, 'State Aid Rules and Tax Rulings' (2016) 15 European State Aid Law Quarterly 416, 419-420.

²²¹ Dimitrios Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016) 15 European State Aid Law Quarterly 428, 434-436; Tony Joris and Wout de Cock, 'Is *Belgium and Forum 187* a Suitable Source for an EU "At Arm's Length Principle"?' (2017) 16 European State Aid Law Quarterly 607, 614. See also Case C-898/19 P *Ireland v Commission* ECLI:EU:2021:1029, Opinion of AG Pikamäe, para 121.

²²² Tony Joris and Wout de Cock, 'Is *Belgium and Forum 187* a Suitable Source for an EU "At Arm's Length Principle"?' (2017) 16 European State Aid Law Quarterly 607, 615.

²²³ Dimitrios Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016) 15 European State Aid Law Quarterly 428, 434-436.

arm's length principle of the OECD.²²⁴ Further, it has been observed that the national legislation at issue in that case incorporated the cost-plus method and therefore the CJEU is better interpreted as referring to this method as part of the reference framework for that case specifically rather than as establishing a more general principle in this regard.²²⁵ It is difficult to refute the finding in the preponderance of the literature that the Commission's interpretation of *Forum 187* is strained and does not provide authority for the incorporation of the arm's length principle into the law, even if initial judicial treatment of this issue in the General Court appeared to endorse the Commission's approach.²²⁶

More substantive criticisms have also been raised in respect of the application of the arm's length principle by the Commission and the General Court. It has been suggested that the Commission has applied the principle in manner that is not easily predictable and that fails to acknowledge the uncertainty inherent in that principle.²²⁷ This is made worse by the insistence that the arm's length principle in EU law is independent from the version of that principle proffered by the OECD and indeed by national law, despite the frequent reference to the materials provided by the OECD on the methodologies needed to comply with that principle.²²⁸ Therefore the relationship between the arm's length principle as defined by the OECD and that elaborated by the Commission and the General Court is somewhat unclear.²²⁹

²²⁴ Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 *Journal of European Competition Law & Practice* 369, 381.

²²⁵ Tony Joris and Wout de Cock, 'Is *Belgium and Forum 187* a Suitable Source for an EU "At Arm's Length Principle"?' (2017) 16 *European State Aid Law Quarterly* 607, 614; Case C-898/19 P *Ireland v Commission* ECLI:EU:2021:1029, Opinion of AG Pikamäe, paras 120-127.

²²⁶ Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338, paras 170, 214-215; Cases T-760/15 and T-636/16 *Netherlands and Starbucks Corp v Commission* ECLI:EU:T:2019:669, paras 132, 162-163; Cases T-816/17 and T-318/18 *Luxembourg and Amazon v Commission* ECLI:EU:T:2021:252, paras 132-138, 296.

²²⁷ Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 *Journal of European Competition Law & Practice* 369, 370.

²²⁸ *State aid granted by Luxembourg to Fiat* (Case SA.38375 (2014/C ex 2014/NN)) Commission Decision (EU) 2016/2326 [2016] OJ L351/1, recital (228); Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670, paras 146-149.

²²⁹ Saturnina Moreno González, 'State Aid and Tax Competition: Comments on the European Commission's Decisions on Transfer Pricing Rulings' (2016) 15 *European State Aid Law Quarterly* 556, 560. Edoardo Traversa and Alessandra Flamini, 'Fighting Harmful Tax Competition through EU State Aid Law: Will the

While the OECD guidelines offer a range of methods to apply the arm's length principle that will depend on the information available and the relevant transaction,²³⁰ the Commission has sometimes moved beyond simply ensuring compliance with one of the many alternative methods approved by the OECD in its relevant guidelines. In some cases, the Commission has found that the use of one such method over another may give rise to State aid,²³¹ making the task of determining the legal consequences of a calculation methods unreasonably difficult for Member States and undertakings.²³² It has also been suggested that the application of the arm's length principle has conflated the theoretically separate concepts of advantage and selectivity.²³³ However, it should be noted that this trend had been observed before the development of this line of case law, particularly in cases involving fiscal

Hardening of Soft Law Suffice' (2015) 14 European State Aid Law Quarterly 323, 330 suggest that the Commission seeks to ensure compliance with OECD guidance on this issue. Nina Hrushko, 'Tax in the World of Antitrust Enforcement: European Commission's State Aid Investigations into EU Member States' Tax Rulings' (2017) 43 Brooklyn Journal of International Law 327, 349 analyses the Commission's suggestion that it is applying a principle of EU law independent from the OECD guidance.

²³⁰ James Kavanagh, Nicole Robins and Tridevi Chakma, 'State Aid Scrutiny of Corporate Tax Arrangements' (2015) 14 Competition Law Journal 199, 202-205. See Organisation for Economic Co-operation and Development, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022* (OECD Publishing 2022). Earlier versions of these guidelines are referred to by the Commission in its guidance. See 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 C262/1, para 173.

²³¹ Richard Lyal, 'Transfer Pricing Rules and State Aid' (2015) 38 Fordham International Law Journal 1017, 1041. For example, see *State aid implemented by Luxembourg to Amazon* (Case SA.38944 (2014/C) (ex 2014/NN)) Commission Decision (EU) 2018/859 [2018] OJ L153/1; *State aid implemented by the Netherlands to Starbucks* (Case SA.38374 (2014/C ex 2014/NN)) Commission Decision (EU) 2017/502 [2017] OJ L83/38. See also *State aid granted by Luxembourg to Fiat* (Case SA.38375 (2014/C ex 2014/NN)) Commission Decision (EU) 2016/2326 [2016] OJ L351/1 (subsequently annulled in Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859).

²³² Phedon Nicolaides, 'State Aid Rules and Tax Rulings' (2016) 15 European State Aid Law Quarterly 416, 419; Riccardo Fadiga, 'Of Apples, Cars, and Coffee - Against the Commission's Remedy to Unlawful Tax Rulings' (2018) 10 European Journal of Legal Studies 209, 229.

²³³ Tony Joris and Wout de Cock, 'Is *Belgium and Forum 187* a Suitable Source for an EU "At Arm's Length Principle"?' (2017) 16 European State Aid Law Quarterly 607, 614; Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 Journal of European Competition Law & Practice 369, 370; Kyle Richard, 'Are All Tax Rulings State Aid: Examining the European Commission's Recent State Aid Decisions' (2018) 18 Houston Business & Tax Law Journal 1, 7.

measures,²³⁴ even if the case law on tax rulings is often more direct in asserting that advantage and selectivity can be dealt with together.²³⁵

Another important criticism of the Commission's application of the arm's length principle is directed at the application of the State aid rules to such tax arrangements at a more fundamental level. It is not clear how State aid control will address the interdependence of the tax regimes of different Member States, and indeed the connections between their tax regimes and those of third countries. It is not always clear that the entirety of the alleged advantage conferred on an undertaking by one Member State would have been payable to that Member State if the impugned measure had not been adopted. The transfer pricing rules applied in one Member State have the potential to reduce the tax liability of an undertaking in other Member States.²³⁶ Therefore it is not clear that the usual requirement for the recovery of unlawful aid by the Member State granting the aid through the tax ruling is a satisfactory remedy in those circumstances. However, recovery by other Member States or third countries does not appear to be possible under the procedural rules governing the system of State aid control.²³⁷

²³⁴ See Section 4.3.2 above. See also Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, para 56; Case C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:971, para 55; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 90; Juan Jorge Piernas López, 'Revisiting Some Fundamentals of Fiscal Selectivity: The ANGED Case' (2018) 17 *European State Aid Law Quarterly* 274, 277, 281; Wolfgang Schön, 'State Aid in the Area of Taxation' in Leigh Hancker, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, paras 12-033 – 12-036.

²³⁵ In Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338, paras 133-139, the General Court rejected the argument that the Commission had erred in conflating economic advantage and selectivity and accepted that some overlap in the analysis did not constitute an error. See also Cases T-516/18 and T-525/18 *Luxembourg and Engie v Commission* ECLI:EU:T:2021:251, paras 239-241; Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670, paras 138-139; Cases T-760/15 and T-636/16 *Netherlands and Starbucks Corp v Commission* ECLI:EU:T:2019:669, paras 146-147; Cases T-816/17 and T-318/18 *Luxembourg and Amazon v Commission* ECLI:EU:T:2021:252, paras 115-116; Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, paras 67, 69.

²³⁶ Frans Vanistendael, 'Fiscal Support Measures and Harmful Tax Competition' (2000) 9 *EC Tax Review* 152, 156, 158.

²³⁷ Article 108(2)-(3) TFEU; Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, article 16. These provisions refer to the 'Member State concerned' and appear not to contemplate more complicated multilateral recovery as a potential remedy. In its press release on *State aid implemented by Ireland*

4.6.3. Judicial Clarification of the Arm's Length Principle

While the application of the arm's length principle by the Commission as an autonomous principle of EU law relied on a relatively dubious line of authority, this criticism was undermined in circumstances where the General Court delivered a number of judgments which endorsed the application of the arm's length principle in this way by the Commission.²³⁸ While some of these decisions resulted in the annulment of the Commission's initial decision,²³⁹ this was generally been due to more technical errors in the Commission's assessment, rather than a rejection of the broader principle.²⁴⁰ It had nevertheless been suggested that a detailed judgment from the CJEU dealing directly with this issue was required before the status of this principle in State aid law could be

to *Apple* (Case SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP)) Commission Decision (EU) 2017/1283 [2016] OJ L187/1, the Commission appeared to acknowledge its limitations here but indicated how the behaviour of other Member States and the US might impact on the amount of aid to be recovered by Ireland. See Commission, 'State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion' (Press Release, 30 August 2016) <https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923> accessed 19 May 2021, where the Commission observed that 'the tax treatment in Ireland enabled Apple to avoid taxation on almost all profits generated by sales of Apple products in the entire EU Single Market. This is due to Apple's decision to record all sales in Ireland rather than in the countries where the products were sold. This structure is however outside the remit of EU state aid control. If other countries were to require Apple to pay more tax on profits of the two companies over the same period under their national taxation rules, this would reduce the amount to be recovered by Ireland.' For discussion of the law on recovery more generally, see Section [2.5.2.2].

²³⁸ Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338, paras 214-225; Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670, paras 141-144. See also Case T-648/19 *Nike European Operations Netherlands v Commission* ECLI:EU:T:2021:428.

²³⁹ Cases T-816/17 and T-318/18 *Luxembourg and Amazon v Commission* ECLI:EU:T:2021:252; Cases T-760/15 and T-636/16 *Netherlands and Starbucks Corp v Commission* ECLI:EU:T:2019:669; Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338.

²⁴⁰ Andreas Bartosch, 'The Apple Ruling Or the Destruction of the Ring to Bind Them All' (2020) 19 *European State Aid Law Quarterly* 249, 249; Ulrich Soltész, 'EU state aid law and taxation – where do we stand today?' (2020) 41 *European Competition Law Review* 18, 23; Raquel Lapresta Bienz and Jokin Beltrán de Lubiano, 'El Tribunal General de la Unión Europea se pronuncia sobre los *tax rulings*: los casos *Fiat y Starbucks*' (2019) 53 *Actualidad Jurídica Uriá Menéndez* 124, 128; Sandra Marco Colino, 'The Long Arm of State Aid Law: Crushing Corporate Tax Avoidance' (2020) 44 *Fordham International Law Journal* 397, 456-457. See Cases T-816/17 and T-318/18 *Luxembourg and Amazon v Commission* ECLI:EU:T:2021:252, paras 132-138, 296; Cases T-760/15 and T-636/16 *Netherlands and Starbucks Corp v Commission* ECLI:EU:T:2019:669, paras 162-163; Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338, paras 214-215. See also Ruth Mason, 'State Aid Enforcement After *Amazon*' (2021) 102 *Tax Notes International* 1171, 1177-1178 for the view that the law was beginning to coalesce around a coherent standard in the judgments of the General Court before the clarification from the CJEU in Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859.

confirmed.²⁴¹ While it did not address this point directly, the CJEU in *Commission v Belgium and Magnetrol* came close to affirming the Commission's approach that has been repeatedly endorsed in the General Court.²⁴² While most of this judgment dealt with a procedural issue, the CJEU also rejected the argument that the Commission had exceeded its competence in reviewing matters relating to direct taxation and that Member States had exclusive jurisdiction over such matters, holding that Member States had to exercise their discretion on tax policies within the limits of the Treaties, including the State aid rules.²⁴³ Moreover, the Commission had competence to review measures irrespective of their form for compliance with the State aid rules, even if they dealt with double taxation and the limits of a Member State's jurisdiction to tax certain profits.²⁴⁴ Without directly endorsing the application of the arm's length principle or straying from frequently repeated formulae, this judgment appeared to offer support to the Commission's approach.²⁴⁵

However, this tentative support for the Commission's approach has been overtaken by the decision of the CJEU in *Fiat Chrysler Finance Europe and Ireland v Commission*.²⁴⁶

²⁴¹ Dimitrios Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016) 15 European State Aid Law Quarterly 428, 439.

²⁴² Case C-337/19 P *Commission v Belgium and Magnetrol* ECLI:EU:C:2021:741. For more complete discussion of this decision, see Christopher McMahon, 'Endorsement for Commission's approach to tax rulings from the Court of Justice: the decision in *Commission v Belgium and Magnetrol* (C-337/19 P) EU:C:2021:741' (2022) 43 European Competition Law Review 196.

²⁴³ Case C-337/19 P *Commission v Belgium and Magnetrol* ECLI:EU:C:2021:741, paras 161-167. This was also rejected by the General Court for similar reasons.

²⁴⁴ Case C-337/19 P *Commission v Belgium and Magnetrol* ECLI:EU:C:2021:741, paras 161-167.

²⁴⁵ Christopher McMahon, 'Endorsement for Commission's approach to tax rulings from the Court of Justice: the decision in *Commission v Belgium and Magnetrol* (C-337/19 P) EU:C:2021:741' (2022) 43 European Competition Law Review 196, 199.

²⁴⁶ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859. This judgment arose from an appeal against the decision of the General Court in in Cases T-755/15 and 759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670 which upheld a Commission decision finding that the Luxembourg had granted aid to Fiat Chrysler Finance Europe through a tax ruling on transfer pricing. It is noteworthy that while the impugned decision was addressed to Luxembourg and that Member State unsuccessfully sought its annulment in the General Court, together with the beneficiary undertaking, Luxembourg did not appeal the decision of the General Court. Appeals were brought by the beneficiary undertaking and Ireland, which had intervened in the proceedings before the General Court. Luxembourg did nevertheless intervene in the appeal before the CJEU. It is also noteworthy that the case was decided on the basis of the arguments raised by Ireland and the CJEU considered it unnecessary to determine the issues raised by Fiat Chrysler Finance Europe which were of a more technical nature. It is also worth noting that AG Pikamäe had recommended rejecting the grounds of appeal raised by the latter appellant. See Case C-885/19 P *Fiat Chrysler Finance Europe v Commission* ECLI:EU:C:2021:1028, Opinion of AG Pikamäe.

The CJEU annulled the judgment of the General Court and the Commission decision it upheld, finding that the Commission had erred in failing to take sufficient account of national law in applying the arm's length principle. It held that the reference framework must be defined exclusively by reference to national law and not external rules.²⁴⁷ While the Commission was entitled to consider and apply the arm's length principle to review a transfer pricing decision in circumstances where the relevant national law had incorporated that principle and did not seek to differentiate between group companies and other companies, it had erred in failing to consider properly the relevant national legislation incorporating and clarifying that principle.²⁴⁸ External standards are only relevant where the national tax system refers to them expressly.²⁴⁹ The CJEU also expressly rejected the argument that *Forum 187* could be taken as authority for the proposition that the arm's length principle could be applied wherever national law sought to tax integrated and stand-alone companies in the same way irrespective of the whether and how it has been incorporated into national law.²⁵⁰ While similar conclusions were previously articulated by AG Pikamäe in somewhat more strident language,²⁵¹ this decision remains striking given the direction of travel in the judgments before the General Court and the decision in *Magnetrol*. It seems likely that this will have an impact on a number of appeals currently pending before the CJEU.²⁵²

²⁴⁷ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, paras 68-75, 96.

²⁴⁸ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, paras 98-101.

²⁴⁹ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, para 96.

²⁵⁰ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, paras 102-104.

²⁵¹ Case C-898/19 P *Ireland v Commission* ECLI:EU:2021:1029, Opinion of AG Pikamäe, paras 67-146, 168-173.

²⁵² This includes Appeal brought on 25 September 2020 by European Commission against the judgment of the General Court (Seventh Chamber, Extended Composition) delivered on 15 July 2020 in Joined Cases T-778/16 and T-892/16, *Ireland and Others v Commission* (Case C-465/20 P) [2021] OJ C35/22; Appeal brought on 22 July 2021 by the European Commission against the judgment of the General Court (Seventh Chamber, Extended Composition) delivered on 12 May 2021 in Joined Cases T-816/17 and T-318/18, *Luxembourg and*

The decision in *Fiat Chrysler* resolves some of the criticisms of the Commission's approach identified in the literature.²⁵³ It will clearly prevent the continued application of the dubious interpretation of *Forum 187* to justify the application of the arm's length principle using standards and guidance external to the relevant national law. Although, the CJEU considered that *Forum 187* was authority for the proposition that the Commission could apply the arm's length principle where national law adopts a method for transfer pricing that is 'analogous to the OECD "cost-plus" method' as this incorporates the objective of taxing group companies in the same way as stand-alone companies.²⁵⁴ The judgment also addresses some of the concerns about the lack of clarity in this approach in that it gives Member States more control over defining the appropriate methods for transfer pricing and limits the ability of the Commission to be prescriptive about such methods. It also clarifies the nature of the arm's length principle in that it is not derived from EU law or the incorporation of OECD guidance, but instead a principle which may exist in different national tax systems.

Nevertheless, it is far from clear that this will put an end to the Commission's review of tax rulings on transfer pricing. First, there appeared to be some consensus before this judgment that at the very least, it is acceptable for the Commission to find that an intervention is selective and therefore aid where a Member State has misapplied a tax rule to the benefit of an undertaking or group of undertakings where others do not receive the same benefit.²⁵⁵ This may well occur through a tax ruling indicating in advance how

Amazon v Commission (Case C-457/21 P) [2021] OJ C452/10. Ruth Mason, 'Ding-Dong! The EU Arm's Length Standard Is Dead' (2022) 108 Tax Notes International 1249, 1254 argues that this decision will likely lead to the Commission losing these appeals.

²⁵³ See Christopher McMahon, 'Keeping an Autonomous Principle at Arm's Length: *Fiat Chrysler Finance Europe and Ireland v Commission*' (2023) 60 Common Market Law Review (forthcoming).

²⁵⁴ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, para 103.

²⁵⁵ Saturnina Moreno González, 'State Aid and Tax Competition: Comments on the European Commission's Decisions on Transfer Pricing Rulings' (2016) 15 European State Aid Law Quarterly 556, 573; Raymond Luja, 'Will the EU's State Aid Regime Survive BEPS?' [2015] British Tax Review 379, 390; Liza Lovdahl Gormsen,

national tax law will be applied to a specific undertaking. However, even this more limited form of review is not without difficulty, as it may undermine the certainty that tax rulings are intended to provide.²⁵⁶ It may also require the Commission and the CJEU to engage in extensive argument on the correct interpretation of national law,²⁵⁷ which they may not be well placed to do.²⁵⁸

However, it is also evident that this judgment does not limit the application of the State aid rules to transfer pricing decisions to a mere review of the legality of such decisions.²⁵⁹ Even if the CJEU has sought to emphasise the extent to which the assessment of such measures is a consistency test,²⁶⁰ it will remain considerably more invasive than merely verifying the legality of the measure. A Member State will have more freedom to shape the reference framework or set of principles and objectives against which any differentiation between undertakings will fall to be reviewed and the Commission will have

‘EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga’ (2016) 7 *Journal of European Competition Law & Practice* 369, 370.

²⁵⁶ Kyle Richard, ‘Are All Tax Rulings State Aid: Examining the European Commission’s Recent State Aid Decisions’ (2018) 18 *Houston Business & Tax Law Journal* 1, 55; Kaitlynn Michalski, ‘Equalising or Encroaching: Ireland’s Place in the European Commission’s Move Towards Tax Harmony’ (2018) 35 *Wisconsin International Law Journal* 704, 743-744.

²⁵⁷ See for example, Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338, paras 179-188 in which the General Court annulled the Commission’s decision on the basis that the Commission had made an error of assessment of the relevant provisions of Irish tax law. For discussion of the treatment of this point in the judgment, see Conor Quigley, *European State Aid Law and Policy* (4th edn, Hart 2022) 205-206; Veronika Korom, ‘Let Down by the Facts: The General Court Annuls the European Commission Decision on Irish Tax Arrangement for Apple’ (2021) 20 *European State Aid Law Quarterly* 277, 280-281.

²⁵⁸ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 139 refers to a decision of the Court of Appeal for England and Wales in *R v Attorney General, ex parte ICI* [1987] 1 CMLR 72 in which it was held that the inadvertent misapplication of national tax law could not give rise to State aid, as opposed to persistent or deliberate misapplication. It is suggested that this position does not sit well with the system of State aid control due to its focus on attributing some form of intention to the government granting the aid. See also Stephen Daly, ‘The Power to Get it Wrong’ (2021) 137 *Law Quarterly Review* 280, who proposes that in order to avoid the Commission and the CJEU reviewing the details of the application of national tax law through tax rulings, such rulings should only result in aid if they are made in breach of national administrative law standards. While such an approach might allow greater freedom to national tax authorities to interpret national tax law, it still leaves EU institutions to determine whether aid has been granted largely based on compliance with another body of national law.

²⁵⁹ It is also worth noting that not all enforcement against tax rules addressing the treatment of transactions between companies in multinational groups depends on the application of the arm’s length principle. See for example Cases T-363/19 and T-456/19 *UK and ITV plc v Commission* ECLI:EU:T:2022:349.

²⁶⁰ See for example Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, para 18.

to be receptive to the nuances of different national tax systems. Nevertheless, the CJEU still clearly envisages that the Commission will continue to abstract a more general set of principles from national law in order to review the measure.²⁶¹ For example, the CJEU considered that the adoption of a specific method outlined by the OECD was sufficient to allow the Commission to apply the more general arm's length principle in *Forum 187*.²⁶² The Commission can apply the principle where a national tax system can be considered as having the objective of taxing all resident companies in the same way.²⁶³

It might be tempting to consider that a Member State could in principle expressly reject the arm's length principle and expressly authorise more favourable tax treatment for multinational groups to avoid the Commission's scrutiny on this point. However, it is difficult to escape the conclusion that the Commission might consider that the objective of the tax system remains the taxation of all resident companies and that the attempt to favour group companies is therefore selective. Indeed, this is arguably how the Commission proceeded (successfully) in *Gibraltar* – concluding that the purpose of the tax system was to tax all resident companies and that differential treatment of certain companies was inconsistent with this, even if the tax system was expressly designed to achieve this outcome.²⁶⁴ The General Court decisions upholding the Commission's practice prior to *Fiat Chrysler* illustrate the fact that once the law rightly moves away from a purely formal

²⁶¹ Drawing out a general principle from the national legal system such as the arm's length principle may inevitably lead to some uncertainty in its application. See Richard Lyal, 'Transfer Pricing Rules and State Aid' (2015) 38 *Fordham International Law Journal* 1017, 1041-1042; Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 *Journal of European Competition Law & Practice* 369, 381.

²⁶² Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, paras 102-104.

²⁶³ *ibid* para 79.

²⁶⁴ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 101. For further discussion of this decision, see Section 4.4.1 above. As observed by Ruth Mason 'Ding-Dong! The EU Arm's Length Standard Is Dead' (2022) 108 *Tax Notes International* 1249, 1255, this decision was expressly endorsed by the CJEU at Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, para 70 and likely remains good law.

consistency test whereby Member States can easily immunise measures from scrutiny under the State aid rule, there will necessarily be substantive limits on what governments can do and a strong pressure on the Union courts to clarify them.²⁶⁵ The discrimination standard must have some substantive limits on the objectives which can be invoked to justify differential treatment. While *Fiat Chrysler* has restrained the process of clarifying these limitations in ruling out an entirely autonomous arm's length principle in EU law, it is not clear that it has eliminated them entirely nor that it has removed the logical need for such limitations to be defined.²⁶⁶

4.6.4. Comparability of Transactions within Corporate Groups and Between Independent Companies

It is also worth considering another, more fundamental argument made against the review of the transfer pricing decisions using the State aid rules. Some commentators suggest that transactions of this type between members of a corporate group and between independent companies cannot be meaningfully compared and therefore cannot be regarded as being in a comparable legal or factual situation for the purpose of the selectivity test.²⁶⁷ Companies that are part of the same corporate group transact with each other in a significantly different way to independent companies and engage in transactions that simply would not be carried out if the undertakings were independent, due to lower transaction risks and the free flow of

²⁶⁵ See Section 4.5.2 above.

²⁶⁶ Ruth Mason, 'Ding-Dong! The EU Arm's Length Standard Is Dead' (2022) 108 *Tax Notes International* 1249, 1255 suggests that new standards to assess revenue allocation rules must be developed by the Commission and the CJEU following the decision in Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859.

²⁶⁷ Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 *Journal of European Competition Law & Practice* 369, 377; Phedon Nicolaides, 'State Aid Rules and Tax Rulings' (2016) 15 *European State Aid Law Quarterly* 416, 423.

information between the parties.²⁶⁸ Indeed, the existence of corporate groups is to a large extent due to the differences in the way group companies can organise their affairs and the economic advantages that flow from this.²⁶⁹ The Commission has changed its position on this point quite quickly, as it appeared to consider that only group companies would be comparable with each other in respect of such arrangements in a number of decisions after *Forum 187* but before much of the more recent enforcement actions against transfer pricing.²⁷⁰

While there may often be differences between intra-group transactions and transactions between independent companies, it is submitted that Nicolaidis and Lovdahl Gormsen overstate the case in arguing that they are not comparable.²⁷¹ It may be more likely that certain objective factors that will affect the transaction's value such as a reduction in risk or the suitability of the products or services provided will apply where group companies are concerned.²⁷² However, these may not apply with the same force in every case involving such companies. These factors may not always be absent in cases where independent companies are involved. Indeed, the diversity in the structures of corporate groups mean that they are likely to be a relatively heterogeneous category for these purposes. Therefore, the

²⁶⁸ Phedon Nicolaidis, 'State Aid Rules and Tax Rulings' (2016) 15 *European State Aid Law Quarterly* 416, 423, 427. For a more detailed account of the factors pulling in favour of integrating functions into the same company or corporate group, see Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership structure' (1976) 3 *Journal of Financial Economics* 305; Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1991) 12.

²⁶⁹ *ibid.*

²⁷⁰ *Groepsrentebox scheme which the Netherlands is planning to implement* (Case C 4/07 (ex N 465/06)) Commission Decision 2009/809/EC [2009] OJ L288/26, recital (46); *Tax deductions for intra-group interest implemented by Hungary* (Case C 10/07 (ex NN 13/07)) Commission Decision 2010/95/EC [2010] OJ L42/3, recital (44). This has been criticised by Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 *Journal of European Competition Law & Practice* 369, 377; Kyle Richard, 'Are All Tax Rulings State Aid: Examining the European Commission's Recent State Aid Decisions' (2018) 18 *Houston Business & Tax Law Journal* 1, 23.

²⁷¹ Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 *Journal of European Competition Law & Practice* 369, 377; Phedon Nicolaidis, 'State Aid Rules and Tax Rulings' (2016) 15 *European State Aid Law Quarterly* 416, 423.

²⁷² Phedon Nicolaidis, 'State Aid Rules and Tax Rulings' (2016) 15 *European State Aid Law Quarterly* 416, 423.

methods for calculating transfer prices can consider these different factors in each case, rather than holding intra-group transactions to be incomparable with other transactions *a priori*. It is submitted that the actual market conditions that inform the estimate of the value's transaction are a much more legitimate characteristic on which to base differential treatment than the legal form of the undertaking as a group company.²⁷³ Further, whether such undertakings are comparable will also depend on the specificities of the national tax system which will inform the relevant reference framework and the objectives against which the differentiation in treatment will be assessed.²⁷⁴

4.7. Conclusion

This chapter has outlined important developments in the standards applied to identify aid within the meaning of Article 107(1) TFEU that have emerged from the case law dealing with fiscal measures. The CJEU has responded to the increasing importance of regulatory competition between Member States to attract mobile capital by preventing Member States from arguing that a measure is not aid simply because it would result in a net increase in tax revenue. The distinctive features of fiscal measures have also led the CJEU to develop a three-stage test for identifying selectivity that it has struggled to apply in a consistent and coherent manner. This chapter has also shown how this test for selectivity is increasingly reorienting itself around the discrimination standard and a much less structured approach to assessing this criterion. This chapter has also observed the emergence and application of the arm's length principle to determine whether aid is granted through tax rulings and transfer

²⁷³ However, in some cases, the difference in legal form might also involve more substantive differences that might render two undertakings with different legal forms largely incomparable. See Joined Cases C-78/08 and C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, [2011] ECR I-7611.

²⁷⁴ See Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, paras 98-101.

pricing systems. All of these developments act to expand the scope of the notion of aid in Article 107(1) TFEU and therefore the extent of the supervision of the Commission and the CJEU over national policies. However, they have not always done so according to clearly articulated or coherent standards.

This chapter makes an important contribution towards answering the primary research question which seeks to explore the effects of developments in the law dealing with fiscal measures on the law's treatment of non-fiscal measures. Understanding the nature of these developments and the existing literature that has described and evaluated them is an important part of any answer to this research question. Part of this analysis has involved an assessment of the causes of these developments. These changes have been explained as a result of two causes. The first is the application of the standards used to identify aid to the technically difficult problem of distinguishing potentially harmful fiscal aid from the general economic policies of Member States. The second is that some of these developments can be seen as a response to the increasing importance of regulatory competition in explaining the purpose of State aid law or as creating further opportunities for the law to develop along the lines of the purpose of the regime outlined in the previous chapter. While the rule barring reliance on increases in tax revenues can quite readily be explained as a move to better manage regulatory competition, the discrimination standard as it is currently applied leaves unanswered questions to which the management of regulatory competition and the notion of solidarity between Member States may be able to respond. The application of the arm's length principle should be viewed as having taken tentative steps towards the further development of the selectivity test consistent with these ideas.

Having considered the changes to the law precipitated by the case law on fiscal aid, it is necessary to consider to what extent these changes will impact on enforcement against other forms of aid. In order to consider that impact, it is first necessary to consider to what

extent the developments in the law described in this chapter will be capable of application in cases involving other forms of aid. This will require analysis of the attempts by the Commission and the CJEU to differentiate between the standards applicable to different types of aid and draw analogies and linkages between them. This analysis will be conducted in the next chapter.

5. DIFFERENTIATION BETWEEN FISCAL MEASURES AND NON-FISCAL MEASURES

5.1. Introduction

The previous chapter highlighted various developments in the case law that have emerged from the Commission's programme of enforcement against fiscal aid. These developments have significantly changed the approach taken to the selectivity criterion in the interpretation of Article 107(1) TFEU in a manner that is likely to increase the capacity of the Commission to enforce the State aid rules against fiscal measures. While these developments have emerged primarily from case law dealing with fiscal measures, they nevertheless invite questions about their potential impact on the State aid rules as a whole and the application of those rules to other types of aid, including loans, guarantees and direct grants and subsidies. This is important because the impact of these changes may extend beyond the fiscal measures in response to which they emerged and affect the treatment of a much broader range of State interventions in a manner that was not directly considered when the leading cases in this area were decided.

In order to evaluate that impact, this chapter will consider the extent to which the Commission and the CJEU have distinguished between the different forms in which aid can be granted. This issue is central to the primary research question because it will determine whether the developments in the case law on fiscal measures will be capable of substantially altering the approach taken to enforcement against other forms of aid. If the jurisprudence acknowledges some difference in how it should treat fiscal and non-fiscal measures, it may allow these developments in the law to be confined to cases involving fiscal measures or a subcategory of such interventions. Alternatively, if the law determines that all measures should be assessed according to the same principles, the developments emerging in the fiscal aid case law are likely to have a significant impact on the treatment of other types of measure.

This issue highlights a central problem in the application of the State aid rules. The Commission and the Union courts must on the one hand ensure that minor formal amendments to measures by Member States do not dramatically alter their position under the rules. On the other hand, they must also ensure that the technical criteria used to identify and evaluate aid can deal appropriately with a broad range of different forms of State intervention on the other hand. The interpretation of the State aid rules must chart a course between these two competing concerns.

In order to explore that question, this chapter will proceed as follows. This chapter will first consider the diverse ways in which Member States may intervene in the internal market. This chapter will then consider a number of apparent obstacles in the case law defining the notion of aid within the meaning of Article 107(1) TFEU to differentiation between various forms of State intervention in the form of formulae repeated by the Commission and the Union courts. This analysis will conclude that the existing jurisprudence provides little support for distinguishing fiscal aid of any sort from other measures which may engage the State aid rules. This chapter will go on to examine two areas which may offer more plausible means of differentiating between forms of State intervention. The first of these relates to the application of the market economy operator test and the distinction drawn in the law between market transactions and regulation in the narrow sense implemented by Member States. It will be argued that this only provides a limited scope for such differentiation and that it does so without singling out fiscal aid or any subcategory of fiscal aid. The second of these involves the assessment of aid measures for compatibility with the internal market under Article 107(2)-(3) TFEU which is likely to allow some limited degree of differentiation in the treatment of fiscal aid and non-fiscal aid by assessing the economic effects of the measure in greater detail.

5.2. The Challenge of Different Forms of Intervention

Government intervention in the market can take many forms.¹ While it seems clear that direct grants and subsidies were originally regarded as the central case of State aid at the advent of the European Coal and Steel Community and the Treaty of Rome, it has also been clear from very early on in the development of the law that notion of aid is broader than that of a subsidy and that it encompasses a much broader range of measures.² These include aid that is granted by States through their commercial transactions such as the sale of public assets³ and the supply and purchase of goods and services,⁴ injections of capital into publicly owned companies,⁵ State guarantees⁶ and publicly funded loans.⁷ It is also clear that aid can be granted through market rules such as those that grant access to public resources or infrastructure⁸ or those that implement permit and licensing regimes.⁹ It is also clear that fiscal measures can constitute aid insofar as they reduce the ordinary tax burden of certain

¹ These can all be construed as forms of regulation. It will be recalled that this thesis adopts definitions of regulation proffered by Robert Baldwin, Colin Scott and Christopher Hood, 'Introduction' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press 1998) 1-55, 3-4, who explain that regulation can generally be understood in the economic and legal literature as 'the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with the rules' ('regulation in the narrow sense' in this thesis). This will include fiscal measures, as well as non-fiscal mandatory rules governing the behaviour of undertakings on the market ('market rules' in this thesis). Baldwin, Scott and Hood also acknowledge another widely used definition of regulation that includes 'all the efforts of State agencies to steer the economy' and would therefore extend to most forms of aid, such as direct subsidies, grants, loans guarantees and market transactions ('regulation in the broad sense' in this thesis). These definitions include intentional acts on the part of the State. There are also broader definitions which extend to 'all mechanisms of social control' including social norms, unintentional acts and the independent behaviour of private actors, but such definitions are less instructive for the purpose of this thesis, which deals with rules governing State interventions. See also Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (2nd edn, Oxford University Press 2012) 3.

² Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1961:2, [1961] ECR 3, 19; Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 15-16.

³ Commission Communication on State aid elements in sales of land and buildings by public authorities [1997] OJ C209/3.

⁴ Case T-475/04 *Bouygues SA v Commission* ECLI:EU:T:2007:196, [2007] ECR II-2097; Case T-14/96 *BAI v Commission* ECLI:EU:T:1999:12, [1999] ECR II-139.

⁵ Case C-142/87 *Commission v Belgium (Tubemeuse)* ECLI:EU:C:1990:125, [1990] ECR I-959.

⁶ Cases C-399/10 P and C-401/10 P *Bouygues SA v Commission* ECLI:EU:C:2013:175.

⁷ Case C-342/96 *Spain v Commission* ECLI:EU:C:1999:210, [1999] ECR I-2459.

⁸ Case C-518/13 *Eventech* ECLI:EU:C:2015:9.

⁹ Phedon Nicolaides, 'Do Member States Grant Aid When They Act as Regulators?' (2018) 17 *European State Aid Law Quarterly* 2.

undertakings.¹⁰ Despite some basic similarities, fiscal measures themselves constitute a broad category that exhibits considerable internal diversity. It will be recalled that the most significant challenges for the case law on selectivity in particular has been posed by cases involving direct taxation such as *Gibraltar*¹¹ and *World Duty Free*¹² among many others.¹³ However, many indirect tax measures can be readily distinguished from matters of direct taxation. In particular, specific taxes, levies and exemptions that are designed to achieve a regulatory objective outside of the ordinary goals of the tax system, such as the environmental levy at issue in *British Aggregates*,¹⁴ can often be more easily compared to direct subsidies than measures of direct taxation.

Irrespective of precisely what is regarded as the primary objective of State aid,¹⁵ the multiplicity of different options available to Member States to intervene in the internal market poses a considerable challenge. It is difficult to apply precisely the same standards to identify potentially harmful interventions across these different forms. These difficulties can lead to both overenforcement and underenforcement for different types of regulation as it may be that the optimal standard is not identical for different forms of intervention and some variation may be desirable. However, this challenge is further complicated by the difficulty faced by the Commission and the CJEU in trying to avoid circumvention of the State aid rules. If there are different standards and criteria for different forms of intervention, this may bring about a situation where the rules for one type of intervention are more lenient than in another. This may offer incentives to Member States to select the form that will receive the most lenient treatment under the State aid rules. This is related to the widespread

¹⁰ Case 173/73 *Italy v Commission (Italian Textiles)* ECLI:EU:C:1974:71, [1974] ECR 709, paras 12-13.

¹¹ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113.

¹² Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981.

¹³ See chapter 4 for more detailed discussion.

¹⁴ Case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515.

¹⁵ See Chapter 3 for a more complete discussion of the objectives of EU State aid control and the relationship between them.

concern in the literature in many areas of State aid control that the rules will be enforced erratically due to formalism,¹⁶ a preoccupation which has driven many of the developments discussed in the previous chapter. The remainder of this chapter will explore the approach of the Commission and the Union courts to the challenge posed by diverse forms of State intervention and the extent to which the Commission and the Union courts can differentiate between measures based on their form.

5.3. Obstacles to Differentiation between Fiscal Measures and Non-Fiscal Measures

5.3.1. Managing Different Regulatory Forms

While there is a wide variety of different types of measure that have been regarded as capable of constituting State aid within the meaning of Article 107(1) TFEU, it does not necessarily follow that all such measures must be assessed according to identical standards to determine whether they are aid. Therefore, this section explores the response of the Commission and the Union courts to the diverse range of forms of State intervention and the extent to which this approach has differentiated between these different forms of aid. In particular, this section will examine whether there is any difference in the treatment of fiscal aid and non-fiscal aid and the extent to which this differential treatment is made explicit in the case law. In doing so, it will identify obstacles to such differential treatment arising from the interpretation of Article 107(1) TFEU. While some strands in the case law have

¹⁶ For examples of the concern about formalism in the application of State aid law, see Francesco de Cecco, 'The Many Meanings of "Competition" in EC State Aid Law' (2006-2007) 9 *Cambridge Yearbook of European Legal Studies* 111; Andrea Biondi, 'The Rationale for State Aid Control: A Return to Orthodoxy' (2010) 12 *Cambridge Yearbook of Legal Studies* 35, 49-50; Hans Friederiszick, Lars-Hendrik Röller and Vincent Verouden, 'European State Aid Control: An Economic Framework' in P Buccirossi (ed), *Advances in the Economics of Competition Law* (MIT Press 2006) 625-669, 630; Massimo Merola, 'The Rebus of Selectivity in Fiscal Aid: A Nonconformist View on and beyond Case Law' (2016) 39 *World Competition* 533, 554; Julio Baquero Cruz and Fernando Castillo De La Torre, 'A Note on PreussenElektra' (2001) 26 *European Law Review* 489, 492; Christian Koenig and Jürgen Kühling, 'EC Control of Aid Granted through State Resources' (2002) 1 *European State Aid Law Quarterly* 7, 18; Andrea Biondi, 'Some Reflections on the Notion of State Resources in European Community State Aid Law' (2007) 30 *Fordham International Law Journal* 1426, 1446-1447.

acknowledged the distinctive position of fiscal measures, these strands do not seek to justify any significant differentiation between the treatment of fiscal and non-fiscal measures in assessing whether they amount to aid. Indeed, the preponderance of the case law emphasises the need for Article 107(1) TFEU to be applied in a uniform manner across different types of measure.

5.3.2. Aid is Assessed by Reference to its Effects and Not its Causes or Aims

5.3.2.1. Origins of the Maxim

The first attempts at dealing with the issue of regulatory form and its relationship to State aid seek to emphasise the irrelevance of the form of the intervention to its classification as aid. In *Steenkolenmijnen*, the CJEU considered that a subsidy was ‘payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces’¹⁷ and then went on to contrast this with the concept of aid. The CJEU found that:

[t]he concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect.¹⁸

The fact that a measure does not take the form of a subsidy or direct payment to an undertaking does not therefore prevent it from constituting aid.¹⁹ An argument based on the

¹⁷ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1961:2, [1961] ECR 3, 19.

¹⁸ *ibid* 19.

¹⁹ This has also been affirmed in subsequent case law. See for example T-52/12 *Greece v Commission* ECLI:EU:T:2014:677, para 50; Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, [2011] ECR I-7611, para 45; Case C-355/00 *Freskot* ECLI:EU:C:2003:298, [2003] ECR I-5263, para 83; Case C-75/97 *Belgium v Commission* ECLI:EU:C:1999:311, [1999] ECR I-3671, para 23; Case C-200/97 *Ecotrade* ECLI:EU:C:1998:579, [1998] ECR I-7907, para 34.

form of intervention was also rejected in *Italian Textiles*.²⁰ In that case, it was argued that a reduction in the ordinary social security taxes and charges for employers in the textile sector was a matter of domestic taxation and therefore beyond the scope of the State aid rules.²¹ It was also suggested that the measure had a social aim that also rendered it immune from scrutiny under Article 107(1) TFEU. This was rejected by the CJEU which held that the ‘fiscal nature or social aim of the measure in issue cannot suffice to shield it from the application of Article [107].’²² The CJEU went on to hold that ‘Article [107] does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects.’²³ This ‘effects-based formula’ for aid has been particularly influential in subsequent case law and academic literature.²⁴

However, it is submitted that this crucial paragraph in *Italian Textiles* contains two distinct propositions that must be examined separately. The first is that the purpose, aim or objective of a measure does not affect its character as aid and that the effects of the measure should instead determine whether it is aid. The second is that the regulatory form of the intervention cannot affect its characterisation as aid. While both of these propositions continue to be central elements of the orthodox interpretation of the notion of aid within the meaning of Article 107(1) TFEU, it is submitted that the first has been misinterpreted and applied in a somewhat misleading way.

5.3.2.2. Objectives Cannot Preclude Application of Article 107(1) TFEU

²⁰ Case 173/73 *Italy v Commission (Italian Textiles)* ECLI:EU:C:1974:71, [1974] ECR 709.

²¹ *ibid* para 12.

²² *ibid* para 13.

²³ *ibid*.

²⁴ Juan Jorge Piernas López, ‘The Evolving Nature of the Notion of Aid under EU Law’ (2016) 15 *European State Aid Law Quarterly* 400, 414.

The first of these propositions, that the identification of State aid is primarily concerned with the effects of the measure rather than its objectives, causes or aims has been repeatedly affirmed by subsequent case law.²⁵ It is submitted that this proposition both accurately describes the case law and is normatively defensible when it is used to prevent Member States from invoking some laudable purpose or goal as a blanket defence to a finding that their proposed intervention is aid. Indeed, it is submitted that the social purpose of the preferential tax rate for the textile industry that was at issue in *Italian Textiles* was being used in precisely this way. For example, if a Member State were to offer a direct subsidy to a single manufacturer that had been found to produce vehicles to exceptionally high environmental and safety standards, it should not be open to the Member State to claim that this subsidy is not aid simply because it is designed to further environmental goals. This objective may of course be relevant in assessing whether the aid is compatible with the internal market, but the purpose is not in itself enough to alter its character as aid within the meaning of Article 107(1) TFEU.²⁶ The CJEU has stated this proposition as meaning that:

[T]he objective pursued by measures of State intervention is not sufficient to exclude those measures outright from classification as ‘aid’ for the purposes of Article 107 TFEU, since that provision does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects...²⁷

²⁵ Case C-56/93 *Belgium v Commission* ECLI:EU:C:1996:64, [1996] ECR I-723, para 79; Case C-241/94 *France v Commission* ECLI:EU:C:1996:353, [1996] ECR I-4551, para 20; Case C-75/97 *Belgium v Commission* ECLI:EU:C:1999:311, [1999] ECR I-3671, para 25; Case C-409/00 *Spain v Commission* ECLI:EU:C:2003:92, [2003] ECR I-1487, para 46; Case C-5/01 *Belgium v Commission* ECLI:EU:C:2002:754, [2002] ECR I-11991, para 45; Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato ‘Venezia vuole vivere’ v Commission* ECLI:EU:C:2011:368, [2011] ECR I-4727, para 94; T-52/12 *Greece v Commission* ECLI:EU:T:2014:677, para 67; Case C-126/01 *Ministre de l’économie, des finances et de l’industrie v GEMO SA* ECLI:EU:C:2003:622, [2003] ECR I-13769, para 34; Case C-522/13 *Ministerio de Defensa v Concello de Ferrol* EU:C:2014:2262, para 28.

²⁶ This was acknowledged by the CJEU in Case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, paras 90-92.

²⁷ Joined Cases C-51/19 and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, para 65. See also Case C-5/01 *Belgium v Commission* ECLI:EU:C:2002:754, [2002] ECR I-11991, para 46. See also Case C-241/94 *France v Commission* ECLI:EU:C:1996:353, [1996] ECR I-4551, para 21; Case C-75/97 *Belgium v Commission* ECLI:EU:C:1999:311, [1999] ECR I-3671, para 25; Case C-251/97 *France v Commission* ECLI:EU:C:1999:480, [1999] ECR I-6639, para 37; Joined Cases T-269/99, T-271/99 and T-272/99 *Territorio Histórico de Guipúzcoa* ECLI:EU:T:2002:258, [2002] ECR II-4271, paras

The case law is replete with examples of this proposition from *Italian Textiles* being applied in this way. For example, it has been held that the objective of compensating undertakings for the imposition of some other cost or charge cannot affect the character of a measure as aid.²⁸ Further, a claim that the provision of free specialised waste collection and disposal services for certain undertakings is not aid because such provision was made as ‘part of a health and safety policy’ was also rejected by the CJEU.²⁹ There are also examples of this application of the principle in cases involving fiscal aid. It has been held that the fact that a tax exemption is not intended to raise revenue but merely to incentivise some other socially or environmentally desirable activity will not prevent it being regarded as aid.³⁰ The invocation of national defence as an objective of a tax exemption for a public undertaking was also rejected by reference to this principle.³¹ In *Athletic Club*, the General Court emphasised the irrelevance of the objectives of the measure to reject the argument from the defending Member State that the measure at issue did not intend to grant aid.³² From these examples, it is clear that the pursuit of some social, cultural or economic aim cannot remove a State measure from the scope of Article 107(1) TFEU. Indeed, it has been acknowledged that State aid is often granted in order to further certain policy objectives.³³

63-64. Joined Cases T-92/00 and T-103/00 *Territorio Histórico de Álava* ECLI:EU:T:2002:61, [2002] ECR II-1385, paras 51.

²⁸ Case 173/73 *Italy v Commission (Italian Textiles)* ECLI:EU:C:1974:71, [1974] ECR 709, para 16; Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato ‘Venezia vuole vivere’ v Commission* ECLI:EU:C:2011:368, [2011] ECR I-4727, paras 93-100.

²⁹ Case C-126/01 *Ministre de l’économie, des finances et de l’industrie v GEMO SA* ECLI:EU:C:2003:622, [2003] ECR I-13769, para 34.

³⁰ Case C-159/01 *Netherlands v Commission* ECLI:EU:C:2004:246, [2004] ECR I-4461, para 49.

³¹ Case C-522/13 *Ministerio de Defensa v Concello de Ferrol* ECLI:EU:C:2014:2262, para 28.

³² Case T-679/16 *Athletic Club v Commission* ECLI:EU:T:2019:112, para 100. See also Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, para 65.

³³ Case 61/79 *Amministrazione delle Finanze dello Stato v Denkavit Italiana* ECLI:EU:C:1980:100, [1980] ECR 1205, para 31. It has also been suggested that the pursuit of such an objective might even make it more likely that it will be regarded as aid. See Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 35; Case 234/84 *Belgium v Commission* ECLI:EU:C:1986:151, [1986] ECR 2263, Opinion of AG Lenz, 2271.

While this formula is undoubtedly useful in understanding the correct interpretation of Article 107(1) TFEU, it is submitted that it has been stretched beyond its original meaning and has been applied in contexts in a manner that is misleading. It has been used as authority for the proposition that the objectives or aims of the measure are irrelevant to its classification as aid.³⁴ The assessment of whether a measure is selective is often said to be based only on the effects of the measure.³⁵ This insistence that only effects can matter for Article 107(1) TFEU does not accurately describe the case law. While it is true that the invocation of the objective of the measure cannot act as a blanket defence against the finding that it is aid, the objective of the measure remains relevant. In the previous chapter, it was argued that the assessment of the selectivity criterion as part of this inquiry has been reduced to what is, in essence, a discrimination test whereby a measure is selective if it treats different groups of undertakings in distinct ways without some justification as a proportionate response to a legitimate objective.³⁶ Even applying the orthodox formula of the three-stage test that is still repeated by the Commission and the Union courts, objectives are undoubtedly relevant. For example, in applying that test it must be considered whether the impugned measure favours certain undertakings ‘in comparison with other undertakings which are in

³⁴ Case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, paras 85-92; Case T-399/11 *Banco Santander and Santusa v Commission* ECLI:EU:T:2014:938, para 69; Case T-219/10 *Autogrill España v Commission* ECLI:EU:T:2014:939, para 65; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, paras 87-88; Case C-81/10 *France Télécom v Commission* ECLI:EU:C:2011:811, para 17; Case T-135/12 *France v Commission (Orange)* ECLI:EU:T:2015:116, para 45.

³⁵ Case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, paras 85; Case T-399/11 *Banco Santander and Santusa v Commission* ECLI:EU:T:2014:938, para 69; Case T-219/10 *Autogrill España v Commission* ECLI:EU:T:2014:939, para 65; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, paras 87-88; Case C-81/10 *France Télécom v Commission* ECLI:EU:C:2011:811, para 17; Case T-135/12 *France v Commission (Orange)* ECLI:EU:T:2015:116, para 35.

³⁶ See discussion in Sections 4.5.2, 8.2.3. See also Michael Honoré, ‘Selectivity’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 164-165; Rita Szudoczky, ‘Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms’ (2016) 15 *European State Aid Law Quarterly* 357, 357-358; Phedon Nicolaidis, ‘Excessive Widening of the Concept of Selectivity’ (2017) 16 *European State Aid Law Quarterly* 62, 70; Begoña Pérez-Bernabeu, ‘Refining the Derogation Test on Material Tax Selectivity: The Equality Test’ (2017) 16 *European State Aid Law Quarterly* 582, 596. See Frank Engelen and Anna Gunn, ‘State Aid: Towards a Theoretical Assessment Framework’ in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 137-151, 150 for a more structured elaboration of this type of test.

a legal and factual situation that is comparable in the light of the objective pursued by the measure in question'.³⁷ It is submitted that analysis of the measure's objectives will also be necessary to determine the reference framework, and to assess whether any derogation or differential treatment is justified by the nature or general scheme of the system which represent the other two stages of the test.³⁸

This application of the formula cannot be justified by the suggestion that it refers only to particular types of objective or particular stages of the three-stage test. It was thought that different types of objectives are relevant at the second and third stages of the inquiry, with an emphasis on the difference between objectives that are intrinsic and extrinsic to the system.³⁹ However, this distinction appears to have fallen out of favour in recent case law which purports to apply only objectives intrinsic to the general system at the second and third stages of the inquiry,⁴⁰ with some further suggestion that extrinsic objectives may still be relevant to the definition of the reference framework.⁴¹ While this author is sceptical of

³⁷ Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, para 54.

³⁸ This is particularly the case in circumstances where it has been observed that the boundaries between the different stages of this test are not always very well defined. See Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 157-166.

³⁹ Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 137; Phedon Nicolaidis, 'Multi-Rate Turnover Taxes and State Aid: A Prelude to Taxes on Company Size' (2019) 18 *European State Aid Law Quarterly* 226, 227; 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 C262/1, para 136. See also Case C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:971, para 54; Case C-172/03 *Heiser* ECLI:EU:C:2005:130, [2005] ECR I-1627, para 40. However, it has been suggested that objectives are not relevant to defining the reference framework in Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, paras 65; Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, para 50. See Section 4.5.2 for the argument that this is neither an accurate nor desirable account of the law.

⁴⁰ Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, para 117; Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, paras 19-20; Andreas Bartosch, 'Spanish Goodwill – A Textbook on Material Selectivity Awaiting a Second Edition' (2022) 21 *European State Aid Law Quarterly* 65, 68. See discussion in Chapters 4, 9.

⁴¹ Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, paras 18-20 suggests that extrinsic objectives may still be relevant to defining the reference framework as part of the first stage, even if they cannot be used at the second and third stages of the test. This author is sceptical about the merits of any such distinction. However, this author suggests that the distinctions between these elements of the test are relatively fluid and that it seems that the range of purposes which may be invoked to justify differential treatment is subject to substantive limitations

the practical importance of the distinctions between these different stages of the test, it seems difficult to argue that objectives are irrelevant in the manner suggested by this application of the formula, irrespective based on any of these views.

There is also another sense in which the interpretation of this principle from *Italian Textiles* is misleading in exaggerating the importance of the effects of a measure in classifying it as State aid. It is true that the effects of a measure have some relevance to the State aid inquiry. For example, in order to come within the prohibition in Article 107(1) TFEU, the measure must threaten to distort competition and affect trade between Member States.⁴² However, it will be recalled that these two requirements are often dealt with together,⁴³ the threshold for satisfying them appears to be very low⁴⁴ and they do not require any extensive economic analysis.⁴⁵ The effects of a measure therefore have only limited

from the case law of the CJEU. See for example Begoña Pérez-Bernabeu, ‘Refining the Derogation Test on Material Tax Selectivity: The Equality Test’ (2017) 16 *European State Aid Law Quarterly* 582, 596-597; Andreas Bartosch, ‘Is There a Need for a Rule of Reason in European State Aid Law - Or How to Arrive at a Coherent Concept of Material Selectivity’ (2010) 47 *Common Market Law Review* 729, 745.

⁴² Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 101. See for example Case C-15/14 P *Commission v MOL* ECLI:EU:C:2015:362, para 47; Case C-280/00 *Altmark* [2003] ECR I-7747, para 75.

⁴³ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 9-10, 109; Leigh Hancher, ‘The General Framework’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 43-130, paras 3-186, 3-188; e.g. Case 248/84 *Germany v Commission* [1987] ECR 4013, para 18; Case 57/86 *Greece v Commission* [1988] ECR 2855, paras 14-16; Case 310/85 *Deufil v Commission* [1987] ECR 901, paras 9-12; Case C-142/87 *Belgium v Commission (Tubemeuse)* [1990] ECR I-959, paras 35-41; Case C-303/88 *Italy v Commission* [1991] ECR I-1433, para 27.

⁴⁴ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 108-110. See for example Case C-303/88 *Italy v Commission* ECLI:EU:C:1991:136, [1991] ECR I-1433, para 27; Case 234/84 *Belgium v Commission* ECLI:EU:C:1986:302, [1986] ECR 2263, paras 20-23. Indeed, the suggestion that the distortion of competition must be appreciable to engage the prohibition on State aid has been expressly rejected in Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:160, [1980] ECR 2671, Opinion of AG Capotorti, 2699. See generally 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 C262/1, para 186, 196-197. However, it should be acknowledged that the Commission has begun to apply a higher threshold for the effect on inter-state trade criterion. See 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 C262/1, para 186, 196-197. See also discussion in Chapter 2, 9.

⁴⁵ See Sections 2.3.5, 8.3.1-8.3.2. Case C-385/18 *Arriva Italia Srl* ECLI:EU:C:2019:647, Opinion of AG Tanchev, para 120; Case C-494/06 P *Commission v Italy and Wam SpA* ECLI:EU:C:2009:272 [2009] ECR I-3639, para 58; Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:209, [1980] ECR 2671, paras 9-12; Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:160, [1980] ECR 2671, Opinion of AG Capotorti, 2700; Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International 2014) 207; 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 C262/1, para 194; Case T-211/05 *Italy v Commission* ECLI:EU:T:2009:304, [2009] ECR II-2777, paras 157-160; Joined Cases T-298/97, T-

relevance for its classification as aid and the assertion of the primacy of effects-based analysis as part of the inquiry under Article 107(1) TFEU is likely to be considerably overstated. While there is somewhat more detailed analysis of the economic effect of the measure where the market economy operator test is engaged in the assessment of whether a transaction confers an advantage on an undertaking,⁴⁶ many of the other effects are presumed to flow from the grant of a (selective) advantage to an undertaking by the State.⁴⁷ Assessment of effects is not predominant in this analysis and Article 107(1) TFEU patently does not cover every type of measure which may have an analogous effect.⁴⁸ Analysis of effects may allow differentiation on the basis of the differences in the economic effects of fiscal measures as compared with direct subsidies.⁴⁹ However, the very blunt analysis employed to assess the effects of aid under Article 107(1) TFEU is unlikely to be sensitive to these differences.

5.3.2.3. Regulatory Form is Irrelevant to Article 107(1) TFEU

The second proposition that can be drawn from the crucial passage from *Italian Textiles* is that the fiscal nature of a measure or indeed any regulatory form which it may take, cannot exclude the possibility that a measure will be regarded as aid. This proposition has also been

312/97 T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Commission* ECLI:EU:T:2000:151, [2000] ECR II-2319, para 95; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 35-36 ; Jacques Derenne and Vincent Verouden, 'Distortion of Competition and Effect on Trade' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 169-189, 188-189. For criticism of this lack of economic rigour, see Pietro Crocioni, 'Can State Aid Policy Become More Economic Friendly' (2006) 29 *World Competition* 89-108; Wolfgang Kerber, 'EU State Aid Policy, Economic Approach, Bailouts and Merger Policy: Two Comments' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 241-252; Jürgen Kühling, 'The Need for a More Economic Approach' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 211-224, 217; Cristina Romariz, 'Revisiting Material Selectivity in EU State Aid Law - Or the Ghost of Yet-to-Come' (2014) 13 *European State Aid Law Quarterly* 39, 49.

⁴⁶ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 59-87.

⁴⁷ Jacques Derenne and Vincent Verouden, 'Distortion of Competition and Effect on Trade' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 169-189, 188-189.

⁴⁸ Stephen Daly, 'The Power to Get it Wrong' (2021) 137 *Law Quarterly Review* 280.

⁴⁹ These are identified in the discussion in Section 3.5.5.

endorsed in subsequent cases. For example, it has been established that the fact that a measure involves no positive benefit granted to the undertaking but instead simply reduces the costs that they would ordinarily have to bear, including the cost of ordinary taxation, does not prevent it from being regarded as conferring an advantage and constituting aid.⁵⁰ This application of the principle is very important in facilitating the enforcement of the State aid rules against fiscal measures because it acknowledges that Member States can grant aid simply by foregoing revenue or deferring receipt of revenue without actively disbursing funds under the control of the State. Further, where a tax exemption is at issue, it is not necessary to demonstrate that a tax exemption or other reduction in the ordinary costs of the undertaking has an effect that is analogous to that of a positive subsidy or grant in order to establish that it is aid.⁵¹ However, it has also been accepted that advantages granted in other forms have a similar effect to that of direct grants or subsidies.⁵² While it might be thought that direct grants and subsidies are the central case of State aid or at least the most common variant thereof envisaged by the framers of the Treaties,⁵³ the case law rejects any hierarchy between different types of aid as one does not have to prove that fiscal aid has an equivalent effect to direct subsidies to engage the prohibition in Article 107(1) TFEU.⁵⁴

⁵⁰ Case C-387/92 *Banco Exterior de España* ECLI:EU:C:1994:100, [1994] ECR I-877, paras 13-14; Case C-200/97 *Ecotrade* ECLI:EU:C:1998:579, [1998] ECR I-7907, para 34; Case T-308/00 *Salzgitter AG v Commission* ECLI:EU:T:2004:199, [2004] ECR II-1933, paras 27, 84; Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2021:202, para 36; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2021:201, para 30.

⁵¹ Case T-308/00 *Salzgitter AG v Commission* ECLI:EU:T:2004:199, [2004] ECR II-1933, para 84.

⁵² Case C-387/92 *Banco Exterior de España* ECLI:EU:C:1994:100, [1994] ECR I-877, paras 13-14; Case C-200/97 *Ecotrade* ECLI:EU:C:1998:579, [1998] ECR I-7907, para 34; Case T-308/00 *Salzgitter AG v Commission* ECLI:EU:T:2004:199, [2004] ECR II-1933, paras 27, 84; Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2021:202, para 36; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2021:201, para 30.

⁵³ Wolfgang Schön, 'State Aid in the Area of Taxation' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, para 12-021; Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 15.

⁵⁴ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 15-16; Case T-308/00 *Salzgitter AG v Commission* ECLI:EU:T:2004:199, [2004] ECR II-1933, para 84.

While this case law makes it clear that fiscal measures are not excluded from the application of Article 107(1) TFEU, it is also possible to interpret this proposition as going further to ensure that fiscal measures cannot be treated any differently from other type of intervention. This takes the point too far, in circumstances where developments in the law on selectivity exhibit techniques and principles that seem specifically targeted at fiscal measures.⁵⁵ As discussed below, there is also some limited acknowledgement in the case law that some criteria or the relationships between those criteria will apply in a distinctive way in cases involving fiscal aid.⁵⁶ At least one author suggests that ‘it is accepted that the application of the state aid rules to the tax area requires some specific instruments and benchmarks’.⁵⁷ Moreover, the case law has not expressly ruled out the interpretation that there can be no substantial difference in principle in the approach taken to aid granted in any specific form.⁵⁸ Therefore, at least some of the case law advocating for an effects-based approach to the interpretation of Article 107(1) TFEU is open to a limited degree of differentiation in the approach taken to fiscal and non-fiscal measures.

In general, it appears that the frequently cited principle that the classification of a measure as State aid must focus on the effects of the impugned measure rather than its objectives, causes, aims, fiscal nature or other form generally militates against any bifurcation in the principles that should be applied to fiscal aid compared to other types of aid. This is despite the possibility that the prevailing interpretation of this principle may be

⁵⁵ This can be seen in the application of the arm’s length principle to the assessment of the selectivity of certain rulings and legislation on direct taxation in Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338, paras 214-215; Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670, paras 141-144; Cases T-516/18 and T-525/18 *Luxembourg and Engie v Commission* ECLI:EU:T:2021:251. See discussion in Section 4.6.

⁵⁶ See Section 5.4.2. Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, para 56; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 90.

⁵⁷ Wolfgang Schön, ‘State Aid in the Area of Taxation’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, para 12-022.

⁵⁸ See also Cristina Romariz, ‘Revisiting Material Selectivity in EU State Aid Law - Or the Ghost of Yet-to-Come’ (2014) 13 *European State Aid Law Quarterly* 39, 43.

consistent with a moderate degree of differentiation in the principles and methods used to determine whether fiscal measures are aid compared to those used for non-fiscal measures. However, in order to fully assess the extent to which the law allows such differentiation, it is necessary to consider another formula from the case law that appears to embody a similar principle. This is the assertion that regulatory technique must be irrelevant to classification as aid.

5.3.3. Regulatory Technique Must Be Irrelevant

Another variant of the formula asserting the primacy of effects in the definition of aid in Article 107(1) TFEU emerged in the decision in *British Aggregates*.⁵⁹ In that case, the CJEU considered that the General Court had erred in distinguishing cases dealing with the design of the scope of an environmental charge or levy and the design of an exemption from that charge or levy for the purposes of identifying aid and held that ‘[Article 107(1) TFEU] defines State interventions on the basis of their effects, and thus independently of the techniques used.’⁶⁰ This principle was reiterated by the CJEU in *NOx* in holding that neither the size of the class of recipient undertakings nor the distinction between individual aid and broader aid schemes can affect the selectivity of a measure.⁶¹ It was held that ‘[Article 107(1) TFEU] defines State interventions on the basis of their effects, and thus independently of the techniques used by the Member States to implement their interventions’.⁶² At first glance, this might appear to be a slight variation on the formula drawn from *Italian Textiles*. This formula appears to place greater emphasis on the second proposition discussed above that

⁵⁹ Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515.

⁶⁰ Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, para 89.

⁶¹ Case C-279/08 P *Netherlands v Commission (NOx)* ECLI:EU:C:2011:551, [2011] ECR I-7671, para 51.

⁶² *ibid.*

can be derived from that case, namely, the principle that neither the fiscal nature of a measure nor its regulatory form can alter its classification as aid. However, more recent endorsements of the formula in *British Aggregates* and *NOx* have referred to it together with the first proposition derived from *Italian Textiles* and discussed above, namely the primacy of effects over the causes, aims and objectives of the measure. The CJEU therefore held in *Gibraltar* that ‘[Article 107(1) TFEU] does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects, and thus independently of the techniques used’.⁶³ This variation has been endorsed repeatedly in the case law,⁶⁴ although the earlier formula also continues to be cited.⁶⁵ Insofar as this formula seeks to assert that the broad category of intervention into which the measure falls cannot in itself be used to assert that it is not aid, it is an uncontroversial restatement of the principle in *Italian Textiles*.

However, the formula has been interpreted more broadly than this and has been used for a wide range of different purposes in the case law. These different applications of the formula are not all consistent with one another. The formula has been deployed frequently in judicial treatment of the selectivity criterion. For example, this formula played a central role in justifying the conclusion in *Gibraltar*, where the CJEU held that the three-stage test for identifying selectivity could be circumvented where the general system of which the

⁶³ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 87.

⁶⁴ Joined Cases T-226/09 and T-230/09 *British Telecommunications and BT Pension Scheme Trustees v Commission* ECLI:EU:T:2013:466, para 42; Case T-251/11 *Austria v Commission* ECLI:EU:T:2014:1060, para 98; Cases T-516/18 and T-525/18 *Luxembourg and Engie v Commission* ECLI:EU:T:2021:251, para 351.

⁶⁵ Case C-15/14 P *Commission v MOL* ECLI:EU:C:2015:362, para 86. Indeed, it has been suggested that this approach is consistent with the wording of Article 107(1) TFEU which describes as aid a measure ‘in any form whatsoever’ which complies with the conditions contained in that provision in Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:741, Opinion of AG Saugmandsgaard Øe, para 128. There are also other variations such as Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, para 94: ‘Consequently, the regulatory technique used cannot be decisive for the purposes of determining the reference framework’. See also Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, para 92; Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, para 70.

measure formed part was designed in a clearly arbitrary and discriminatory manner.⁶⁶ Indeed, the decision in *Gibraltar* highlights the inconsistency between this formula and the three-stage test for selectivity first developed in *Adria-Wien* and *Azores*.⁶⁷ Inevitably, this test will pay at least some attention to the question of regulatory technique as it seeks to identify a reference framework and a derogation from that framework. As the decision in *Gibraltar* has not completely supplanted the use of the formula of the three-stage test in the decisional practice and the jurisprudence of the CJEU,⁶⁸ it is unclear how one might reconcile these two approaches with this principle simultaneously. The CJEU has attempted to rationalise this inconsistency in *A-Brauerei* in stating that the identification of a derogation from a reference framework does have regard to regulatory technique and that this can be relevant, but that the decision in *Gibraltar* makes it clear that this need not always be decisive and that the absence of such a derogation does not preclude a finding of aid.⁶⁹ However, this

⁶⁶ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 87. The Commission considers that this means that ‘the three-step analysis cannot be applied in certain cases, taking into account the practical effects of the measures concerned.’ See 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 C262/1, para 129. This view of *Gibraltar* as allowing the CJEU to circumvent the three-stage test is also articulated by Humbert Drabbe, ‘The Test of Selectivity in State Aid Litigation: The Relevance of Drawing Internal and External Comparisons to Identify the Reference Framework’ in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 87-105, 100; John Temple Lang, ‘The Gibraltar State Aid and Taxation Judgment - A Methodical Revolution’ (2012) 11 *European State Aid Law Quarterly* 805, 812; Phedon Nicolaides and Ioana Eleonora Rusu, ‘The Concept of Selectivity: An Ever Wider Scope’ (2012) 11 *European State Aid Law Quarterly* 791, 801-802. Other authors have emphasised that the CJEU conscientiously used the language of the three-stage test to justify its conclusions. See Roland Ismer and Sophia Piotrowski, ‘The Selectivity of Tax Measures: A Tale of Two Consistencies’ (2015) 43 *Intertax* 559, 568; Conor Quigley, ‘Direct Taxation and State Aid: Recent Developments concerning the Notion of Selectivity’ (2012) 40 *Intertax* 112, 115-119.

⁶⁷ Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365; Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115.

⁶⁸ For example, see Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, paras 35-36; Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, paras 17-20; Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2021:202, paras 37-38; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2021:201, paras 31-32.

⁶⁹ Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paras 32-33. See also Joined Cases C-51/19 and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, paras 93-95. Here the CJEU held that ‘regulatory technique is relevant for those purposes where it follows that two categories of operators are distinguished and a priori treated differently, namely those covered by the derogation and those which are covered by the ordinary taxation regime, even though those two categories are in a comparable situation with regard to the objective pursued by that system’. See also Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, para 93; Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, para 70.

implies that regulatory technique may be decisive in some cases where the three-stage test is held to apply.

However, the development of the case law reveals that this formula does not merely stand for such a specific proposition but instead appears to have been interpreted as a much broader principle that can be used for a variety of different purposes. For example, the CJEU has invoked this principle to inform the identification of the reference framework. In *Andres v Commission*, the CJEU held that ‘the regulatory technique used cannot be decisive for the purposes of determining the reference framework’.⁷⁰ Similarly, this principle was referred to in *Commission v Aer Lingus and Ryanair* in order to refute an argument that the simultaneous introduction of two rates of a tax was relevant to the question of which rate was to be regarded as constituting the ordinary rate or reference framework.⁷¹ The principle has also been applied to determine whether multiple, separate interventions by the State can be regarded as a single aid measure.⁷² Indeed, in *Luxembourg and Engie v Commission*, the General Court invoked this principle in rejecting an argument that where State aid was alleged to have occurred through the operation of multiple distinct rules on transfer pricing, it could only be regarded as selective if each of those rules could individually be regarded as selective.⁷³

The principle has been applied in another case dealing with the taxation of multinational companies. In *Luxembourg and Fiat Chrysler v Commission*, the General Court applied this principle to refute the argument that there should be no recovery of the

⁷⁰ Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, paras 92. See also Case C-203/16 P *Andres v Commission* ECLI:EU:C:2017:1017, Opinion of AG Wahl, para 108. This was recently endorsed by the CJEU in Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, para 70.

⁷¹ Joined Cases C-164/15 P and C-165/15 P *Commission v Aer Lingus and Ryanair* ECLI:EU:C:2016:990, para 58; Joined Cases C-164/15 P and C-165/15 P *Commission v Aer Lingus and Ryanair* ECLI:EU:C:2016:515, Opinion of AG Mengozzi, para 33.

⁷² Case C-15/14 P *Commission v MOL* ECLI:EU:C:2015:362, paras 86, 88-99.

⁷³ Cases T-516/18 and T-525/18 *Luxembourg and Engie v Commission* ECLI:EU:T:2021:251, para 351.

aid at issue in that case, which was granted through a tax ruling.⁷⁴ The precise formula used by the General Court in this decision is also significant in that it asserts that ‘the concept of State aid is defined on the basis of the effects of the measure on the competitive position of its beneficiary’.⁷⁵ This echoes the remarks of the AG Mengozzi in the decision that first gave rise to the regulatory technique formula in *British Aggregates*.⁷⁶ While this variation tries to specify more concretely exactly what type of effect is at issue, it remains vulnerable to the criticism raised above in relation to the *Italian Textiles* formula in that it exaggerates the extent to which the law in this area makes any meaningful inquiry into the competitive effects of the measure.⁷⁷

Because of the wide range of different propositions that it has been used to support, it is somewhat difficult to discern the impact of this principle that effects must be the focus of the definition of aid rather than regulatory technique. Where it is applied to interpret the selectivity criterion, it promotes an understanding of that criterion that is inconsistent with the three-stage test and its focus on the identification of a reference framework and derogations therefrom. This can be seen in the way that it was used to justify the decision in *Gibraltar*⁷⁸ and in the way it has been applied in decisions that describe selectivity in terms of discrimination such as *A-Brauerei* and *Andres v Commission*.⁷⁹ This principle therefore seems to present a significant obstacle to any difference in treatment of government intervention based on its fiscal nature or regulatory technique. This is both because it

⁷⁴ Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670, paras 404-408. Note that this decision has been annulled by the CJEU on grounds that are not relevant to the point about recovery in Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, para 70.

⁷⁵ Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670, para 407.

⁷⁶ Case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:419, [2008] ECR I-10515, Opinion of AG Mengozzi, para 100.

⁷⁷ See Section 5.3.2.2 above.

⁷⁸ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, paras 87-88.

⁷⁹ Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paras 32-33; Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, paras 92

prevents the regulatory form of the measure being used as a defence in itself and because it has had a significant impact in driving the interpretation of the selectivity criterion towards a discrimination standard which can be applied more uniformly across different regulatory techniques than the three-stage test. It has considerably narrowed the doctrinal space for differentiation, particularly direct and explicit differentiation between different types of intervention that was left open by the earlier iteration of this principle that emerged in *Italian Textiles*.

However, it is submitted that the discrimination approach to selectivity does leave some residual relevance for the regulatory technique or form of the measure. This is because the discrimination approach effectively provides that the selectivity criterion is satisfied wherever State intervention treats comparable undertakings differently without any justification based on some recognised legitimate objective. While Member States have some freedom to identify the objectives against which the differential treatment should be tested, the Commission and the Union courts are willing to limit the range of objectives that can be invoked.⁸⁰ Indeed, the principle about the irrelevance of regulatory technique has been invoked to suggest that the assessment of the selectivity criterion must have regard not only to the objectives expressly referred to in the national legislation but also objectives that can be inferred from it.⁸¹ The form of the measure will inevitably inform the relevant objectives against which differential treatment will be assessed.⁸² A direct taxation measure

⁸⁰ This seems clear from Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113; Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338, paras 214-215; Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670, paras 141-144; Cases T-516/18 and T-525/18 *Luxembourg and Engie v Commission* ECLI:EU:T:2021:251. See discussion in Sections 4.5.2, 8.2.1.

⁸¹ Case C-596/19 P *Commission v Hungary* ECLI:EU:C:2020:835, Opinion of AG Kokott, para 115.

⁸² While the CJEU does not describe the case law in this way, this feature of the selectivity criterion may be reflected in accounts that describe the reference framework as being appropriately defined from the ‘content, structure, systematic arrangement and interrelationships between the rules in question’. See Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, para 50. See also Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, para 73 which indicates that the definition of the reference framework may include ‘the determination of the basis of assessment and the taxable event’.

is more likely to be regarded as serving a relatively narrow set of objectives such as the raising of revenue, progressivity and an appropriate distribution of the tax burden, whereas indirect taxes such as levies are more likely to be regarded as serving more specific objectives towards incentivising or discouraging certain types of transaction or behaviour.⁸³ Regulatory form may therefore still have some influence on the relevant objectives identified by the Commission and the CJEU and have some influence on the question of whether the intervention is selective.

5.4. Apparent Mechanisms for Differentiation Fall Short

5.4.1. Tax Sovereignty of Member States

While it has been observed above that there exist considerable obstacles in certain strands of case law to differentiation based on the form of the measure, this section will examine two lines of doctrine that appear to allow for some differentiation. However, it will be argued that these lines of doctrine are less significant than they might appear in this regard and only allow for relatively modest differentiation if at all between types of fiscal measure and between fiscal and non-fiscal measures.

The first of these bears on the question of whether there can be any difference in treatment between fiscal measures and non-fiscal measures and relates to what is described

⁸³ 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 C262/1, para 136; Michael Honoré, ‘Selectivity’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 164; Phedon Nicolaides, ‘Multi-Rate Turnover Taxes and State Aid: A Prelude to Taxes on Company Size’ (2019) 18 *European State Aid Law Quarterly* 226, 227. Wolfgang Schön, ‘State Aid in the Area of Taxation’ in Leigh Hancker, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, paras 12-073 – 12-075 refers to a similar distinction between ‘regulatory taxation’ and a ‘fiscally oriented tax’. However this must be qualified in the light of the decisions Case C-596/19 P *Commission v Hungary* ECLI:EU:C:2020:835, Opinion of AG Kokott, para 88; Cases C-236/16 and C-237/16 *ANGED* ECLI:EU:C:2018:291, paras 40-45 which appear to take a broader view of the range of objectives that are capable of justifying differential treatment through fiscal measures.

as the sovereignty of Member States in matters of taxation.⁸⁴ This refers to the presumption that matters relating to taxation remain the competence of Member States outside of limited exceptions prescribed by the Treaties. In this section, it will be argued that while arguments about the infringement of national sovereignty in matters of taxation are at the core of the criticism that is frequently levelled against the approach of the Commission and the CJEU to State aid enforcement, these have not featured prominently in the reasoning of the Union courts. Concerns about Member State sovereignty in taxation have not served to substantially narrow the definition of aid within the meaning of the Treaties. Indeed, the limits of the Union's competences in the field of taxation may have instead increased the incentives for the Commission to seek to expand the definition of aid.

Despite some joint borrowing by EU Member States to support the economic recovery after the Covid-19 pandemic and the existence of certain fiscal rules for Member States sharing the euro as their common currency, the EU is not a fiscal union. The EU can only act within the scope of competences that have been expressly attributed to it by the Treaties.⁸⁵ Beyond these competences, Member States are free to act without central direction.⁸⁶ Taxation in general is a matter for Member States, but Union competences overlap with this policy area in places. Much of the explicit areas of overlap take the form of restrictions on the ability of Member States to use tax measures as barriers to trade. For example, Member States are prohibited from implementing taxes that are designed to

⁸⁴ Edoardo Traversa and Alessandra Flamini, 'Fighting Harmful Tax Competition through EU State Aid Law: Will the Hardening of Soft Law Suffice' (2015) 14 *European State Aid Law Quarterly* 323, 331; Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 *Journal of European Competition Law and Practice* 369, 379; Raymond Luja, 'Will the EU's State Aid Regime Survive BEPS?' [2015] *British Tax Review* 379, 390; Kaitlynn Michalski 'Equalizing or Encroaching? Ireland's Place in the European Commission's Move Towards Tax Harmony' (2018) 35 *Wisconsin International Law Journal* 704, 735-736; Nina Hrushko, 'Tax in the World of Antitrust Enforcement: European Commission's State Aid Investigations into Member States' Tax Rulings' (2017) 43 *Brooklyn Journal of International Law* 327, 330.

⁸⁵ Articles 2-4 TFEU. These competences can be exclusive (such as those described in Article 3 TFEU) or shared with Member States (which are described in Article 4 TFEU). Even where the Union shares competence with Member States, the subsidiarity principle in Article 5(3) TEU operates to ensure that the Union must not act unless it can demonstrate that action at a lower level of government would be inadequate.

⁸⁶ Article 5(3) TEU.

discriminate against products coming from other Member States.⁸⁷ Further, remissions and repayments of taxes for goods that are exported to other Member States are also generally prohibited outside of certain exceptions.⁸⁸

The EU also has some competence to enact secondary legislation in respect of taxation.⁸⁹ Article 113 TFEU provides that the Council may enact measures for the ‘harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation’. However, such measures are only permitted insofar as they are ‘necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.’⁹⁰ This competence is also subject to the substantial procedural limitation that it can only be applied with unanimous agreement in the Council.⁹¹ This competence has led to a limited degree of harmonisation in some areas of taxation.⁹² It may also be possible to legislate in this area using Article 115 TFEU which also allows for the adoption of measures by unanimity in the Council that ‘directly affect the establishment or functioning of the internal market’. This could facilitate the adoption of measures to harmonise elements of direct taxation. There have also been various soft law instruments such as the Code of Conduct for Business Taxation which have introduced a somewhat more significant role for the EU in this area. However, these have been criticised for being incapable of achieving meaningful change in this area.⁹³

⁸⁷ Article 110 TFEU. For a summary of the relevant case law, see Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (7th edn, Oxford University Press 2020) 706-716. Member States also cannot make repayments of taxes on exported goods in excess of the value of the taxes which would otherwise be paid following Article 111 TFEU.

⁸⁸ Article 112 TFEU.

⁸⁹ For discussion of the EU’s competence regarding taxation, see Section 7.2.2.

⁹⁰ Article 113 TFEU.

⁹¹ Article 113 TFEU.

⁹² Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 126; Wolfgang Schön, ‘State Aid in the Area of Taxation’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, para 12-008.

⁹³ Frans Vanistendael, ‘Fiscal Support Measures and Harmful Tax Competition’ (2000) 9 EC Tax Review 152, 161.

Another power exists in the Treaties that allows the EU to act on matters relating to taxation. Article 116 sets out a process for addressing national rules that distort competition on the internal market. The Commission may make a finding that certain national rules, including tax provisions, cause such a distortion and that the distortion should be eliminated. It must then consult the relevant Member State with a view to agreeing to eliminate the distortion. If this is unsuccessful, the Commission can propose secondary legislation to address the distortion which can be adopted by a qualified majority in the Council. This provides a route to harmonisation that is procedurally much more straightforward even if it could theoretically have more significant substantive limits compared to Article 113 TFEU.⁹⁴ Article 117 TFEU goes further to require Member States to warn the Commission of a possible distortion of competition that may arise from legislation that they propose to introduce. The fact that these fairly extensive powers have not been used despite significant concerns over the tax policies of certain Member States has been described as evidence of the serious political obstacles to harmonisation in this area rather than any legal impediment.⁹⁵ However, any conclusion on the legal effect of these provisions of the Treaties must be qualified with the acknowledgement that there has been very little substantive discussion of Articles 116 and 117 TFEU in the case law of the CJEU and therefore whether

⁹⁴ However, the CJEU has not policed the limits of EU competence in a particularly rigorous way. See Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* ECLI:EU:C:2000:544, [2000] ECR I-8419; Case C-491/01 *R v Secretary of State ex parte BAT and Imperial Tobacco* ECLI:EU:C:2002:741, [2002] ECR I-11543; Case C-210/03 *Swedish Match* ECLI:EU:C:2004:802, [2004] ECR I-11893; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health* ECLI:EU:C:2005:449, [2005] ECR I-6451; Case C-380/03 *Germany v Parliament and Council (Tobacco Advertising II)* ECLI:EU:C:2006:772, [2006] ECR I-11573; Case C-58/08 *Vodafone, O2 et al v Secretary of State* ECLI:EU:C:2010:321, [2010] ECR I-4999; Case C-358/14 *Poland v Parliament and Council* ECLI:EU:C:2016:323; Case C-477/14 *Pillbox* ECLI:EU:C:2016:324; Case C-547/14 *Philip Morris* ECLI:EU:C:2016:325. For the view that the approach of the CJEU is too lenient in reviewing competence, see Stephen Weatherill, “The limits of legislative harmonisation ten years after Tobacco Advertising: how the Court’s case law has become a “drafting guide” (2011) 12 *German Law Journal* 827. For a view endorsing the legitimacy of relatively broad interpretations of the competence of the EU, see Paul Craig, ‘Competence: clarity, conferral, containment and consideration: The nature of the “competence problem” (2004) 29 *European Law Review* 323, 324-325.

⁹⁵ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 198-199; Jukka Snell and Jussi Jaakkola, ‘Economic Mobility and Fiscal Federalism: Taxation and European Responses in a Changing Constitutional Context’ (2016) 22 *European Law Journal* 772; Frans Vanistendael, ‘Fiscal Support Measures and Harmful Tax Competition’ (2000) 9 *EC Tax Review* 152, 161.

they would permit tax harmonisation on the scale suggested by some authors remains somewhat unclear.⁹⁶

In the same way, the approach of the CJEU to the relationship between fiscal sovereignty and State aid is not suggestive of any particularly strong legal impediment to EU intervention in taxation. The reference to this concept is relatively sparse in the early case law in circumstances where tax competition did not have the same centrality to the Commission's enforcement policy as it would acquire in later years. In *Italian Textiles*, it was argued in defence of the contested measure that the determination that it was aid encroached on the area of internal taxation which was 'a field reserved by the Treaty to the sovereignty of Member States'.⁹⁷ This argument was rejected by the CJEU.⁹⁸ There is also some acknowledgement of the general primacy of Member State intervention in fiscal matters in *Compagnie Commerciale de l'Ouest*, in which AG Tesauro recognised that the scheme of the Treaties has laid out special rules for tax measures in Article 110 TFEU to that end.⁹⁹

There is also acknowledgement of the autonomy of Member States in the sphere of taxation, particularly direct taxation, in *Gibraltar*, in which AG Jääskinen affirmed that 'in the sphere of direct taxation the Member States enjoy a high degree of legislative, regulatory

⁹⁶ The only references to Articles 116 and 117 TFEU in the case law do not provide much discussion of the substantive limits of the competence provided to the Union by those provisions. See Case T-151/11 *Telefónica de España v Commission* ECLI:EU:T:2014:631, para 98; Case T-533/10 *DTS Distribuidora de Televisión Digital v Commission* ECLI:EU:T:2014:629, para 48. Further Martijn Nouwen, 'The Market Distortion Provisions of Articles 116-117 TFEU: An Alternative Route to Qualified Majority Voting in Tax Matters?' (2021) 49 *Intertax* 14, 27-28 argues that these legal bases are not designed to be used for sweeping measures of harmonisation. Brady Gordon, 'Tax Competition and Harmonisation under EU Law: Economic Realities and Legal Rules' (2014) 39 *European Law Review* 790 goes further and argues that any attempt to suppress tax competition would be in breach of the requirements of proportionality and subsidiarity in the Treaties. See Article 5 TEU. See further discussion in Section 7.2.2.

⁹⁷ Case 173/73 *Italy v Commission (Italian Textiles)* ECLI:EU:C:1974:71, [1974] ECR 709, para 12.

⁹⁸ Case 173/73 *Italy v Commission (Italian Textiles)* ECLI:EU:C:1974:71, [1974] ECR 709, para 13.

⁹⁹ Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest* ECLI:EU:C:1991:313, [1992] ECR I-1847, Opinion of AG Tesauro, 1865-1866.

and administrative sovereignty.¹⁰⁰ He went on to hold that the ‘power of taxation remains a domestic right of governments, which may choose the tax systems most suited to their preferences, provided they comply with European Union law.’¹⁰¹ However, AG Jääskinen also emphasised that the competence of Member States in this area remains circumscribed by Union law, observing that ‘it is undisputed that in the exercise of their powers the Member States must comply with the Treaty’.¹⁰² It was also suggested that the interpretation of Article 107(1) TFEU must distinguish between State aid and tax measures ‘which may give rise to differential treatment necessary for the pursuit of general public-interest objectives set by the State in the exercise of its sovereign rights’.¹⁰³ While the parties in that case referred extensively to the concept of fiscal sovereignty in their submissions, the CJEU does not use this terminology in its findings, instead acknowledging that ‘in the absence of European Union rules governing the matter, it falls within the competence of the Member States [...] to designate bases of assessment and to spread the tax burden across the different factors of production and economic sectors’.¹⁰⁴

In more recent case law, the concept of tax sovereignty has been referred to in support of conflicting interpretations of the concept of selectivity with varying degrees of success. AG Kokott in *ANGED* framed the nature of the dispute before the CJEU in that case as one relating to ‘the area of tension that exists between the Member States’ fiscal sovereignty, on the one hand, and the fundamental freedoms and the rules on State aid, on the other.’¹⁰⁵ In *Finanzamt Linz*, the same Advocate General argued in favour of a cautious interpretation of selectivity, fearing that an unduly broad reading of that criterion would reorder the allocation

¹⁰⁰ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:215, [2011] ECR I-11113, Opinion of AG Jääskinen, para 139.

¹⁰¹ *ibid.*

¹⁰² *ibid* para 137.

¹⁰³ *ibid* para 145.

¹⁰⁴ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 97.

¹⁰⁵ Case C-233/16 *ANGED* ECLI:EU:C:2017:852, Opinion of AG Kokott, para 2.

of competences between the EU institutions and the Member States, although she stopped short of using the language of sovereignty.¹⁰⁶ In *A-Brauerei*, AG Saugmandsgaard Øe invoked fiscal sovereignty and fiscal autonomy in support of his proposal to reframe the test for selectivity in terms of general availability rather than discrimination and to narrow the scope of Article 107(1) TFEU, although this was not accepted by the CJEU.¹⁰⁷

In *Commission v Hungary and Poland* and *Commission v Poland and Hungary*, AG Kokott referred to the concept of fiscal sovereignty in explaining that the intervention of State aid law into general tax matters does not prescribe any particular tax base, rate or form unless the general measure is manifestly inconsistent or arbitrary in the manner identified in *Gibraltar*.¹⁰⁸ The CJEU ultimately accepted this argument in holding that the relevant taxes were not aid simply by using turnover as the taxable base and applying a progressive rate, again asserting that the default position is that Member States are able to define their own tax systems.¹⁰⁹ Further, it has been invoked in *Fiat Chrysler Finance Europe and Ireland v Commission*, in support of the proposition that Member States must have some control over the characteristics of the reference framework and the principles that will inform the Commission's assessment.¹¹⁰ However, while these decisions might appear to mark a victory for the concept of fiscal autonomy, they ultimately engage the CJEU in an assessment as to whether the criteria used to differentiate between undertakings and their tax burdens are legitimate.¹¹¹ Further, this defence of fiscal autonomy or sovereignty is expressed to be

¹⁰⁶ Case C-66/14 *Finanzamt Linz* ECLI:EU:C:2015:242, Opinion of AG Kokott, paras 113-115.

¹⁰⁷ Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:741, para 74.

¹⁰⁸ Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2020:834, Opinion of AG Kokott, paras 40-48; Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2020:835, Opinion of AG Kokott, paras 41-55.

¹⁰⁹ Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2021:201, paras 30-46; Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2021:202, paras 43-52.

¹¹⁰ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, para 73; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2021:201, paras 38-39; Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2021:202, paras 44-45.

¹¹¹ Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670, paras 126, 156; Case C-337/19 P *Commission v Belgium and Magnetrol* ECLI:EU:C:2021:741, paras 161-167. For more complete discussion of this decision, see Christopher McMahon, 'Endorsement for Commission's

subject to ‘the absence of any such approximation measure’ suggesting that it is the absence of harmonisation rather than any substantive legal principle that operates to prevent the Commission from applying standards drawn directly from outside national law.¹¹² While the concept is sometimes invoked more forcefully in the opinions of Advocates General, its role is less prominent in the decisions of the CJEU itself.¹¹³

However, while the concept of fiscal sovereignty or fiscal autonomy may be employed to clarify nuances in the interpretation of the criterion of selectivity, it is submitted that the case law does not disclose any reason to believe that this concept has any significant effect on the scope of the State aid rules. In a significant number of cases, parties to disputes before the CJEU have sought to rely on this concept to declare the area of taxation at issue to be immune from review under the State aid rules. This suggestion has consistently been rebutted by the Union courts who have repeatedly affirmed that notwithstanding the default position that Member States can set fiscal policy, they must still exercise their competences consistently with the limits prescribed by EU law and the State aid rules in particular.¹¹⁴ Indeed it appears that this adequately describes the relationship between the tax sovereignty of Member States and other provisions of the Treaties.¹¹⁵

approach to tax rulings from the Court of Justice: the decision in *Commission v Belgium and Magnetrol* (C-337/19 P) EU:C:2021:741’ (2022) 43 European Competition Law Review 196.

¹¹² Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, para 94.

¹¹³ For example, compare C-898/19 P *Ireland v Commission* ECLI:EU:C:2021:1029, Opinion of AG Pikamäe, paras 106, 110 and Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, para 73.

¹¹⁴ Joined Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338, paras 103-124; Joined Cases T-760/15 and T-636/16 *Netherlands and Starbucks v Commission* ECLI:EU:T:2019:669, paras 142-143; Case C-362/19 P *Commission v Fútbol Club Barcelona and Spain* ECLI:EU:C:2021:169, para 105; Joined Cases T-131/16 and T-263/16 *Belgium and Magnetrol International v Commission* ECLI:EU:T:2019:91, paras 64-68; Case C-337/19 P *Commission v Belgium and Magnetrol* ECLI:EU:C:2021:741, paras 161-167; Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, para 73.

¹¹⁵ Compare the treatment of the freedom of establishment under Articles 49 and 54 TFEU in Case C-75/18 *Vodafone Magyarország* ECLI:EU:C:2019:492, Opinion of AG Kokott, paras 38-41.

The fact that a matter falls within the field of taxation does not radically alter how it interacts with the State aid rules. Sovereignty and issues of institutional competence do not operate to insulate tax measures from review under the State aid rules.¹¹⁶ One commentator has described the position as being one where ‘a national tax measure only falls within the sacred area of national tax sovereignty as long as it has not been found to constitute State aid by the [CJEU].’¹¹⁷ Further, appeals to the importance of Member State sovereignty in such matters have not restrained the CJEU from developing the notion of aid and the selectivity criterion such that the law engages in some substantive review of Member State justifications for their tax policies. This is particularly apparent in the discrimination standard and the introduction of the arm’s length principle as a means of evaluating the choices of Member States regarding their treatment of transfer pricing. Contrary to the assertion that ‘Member States have explicit sovereignty in relation to direct taxation’,¹¹⁸ national autonomy in this area is largely a result of the lack of harmonising secondary legislation in this field rather than any direct protection for fiscal competences contained in the Treaties.¹¹⁹

Despite the apparent absence of limitations in the Treaty, the literature uses the concept of tax sovereignty as an important criterion for evaluating the case law of the CJEU and the decisional practice of the Commission on State aid. For example, one commentator has referred to the third stage of the three-stage test for selectivity and the opportunity it presents to Member States to justify apparently selective measures by reference to their own objectives as providing ‘the key to resolve the conflict between state aid review and tax

¹¹⁶ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 127-128.

¹¹⁷ Dimitrios Kyriazis, ‘From Soft Law to Soft Law through Hard Law: The Commission’s Approach to the State Aid Assessment of Tax Rulings’ (2016) 15 *European State Aid Law Quarterly* 428, 436.

¹¹⁸ Liza Lovdahl Gormsen, ‘EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga’ (2016) 7 *Journal of European Competition Law and Practice* 369, 375.

¹¹⁹ See Section 7.2.2 on the reasons for the limited extent of tax harmonisation in the EU.

sovereignty'.¹²⁰ The literature often evaluates the law by discussing the nature of the balance that is struck between the protection of the internal market and national tax sovereignty.¹²¹ Further, it had been suggested that the application of the arm's length principle as part of the assessment of transfer pricing decisions and the reliance on soft law derived from international instruments in this regard undermines the tax sovereignty of Member States in pre-empting a decision by a national government to endorse such standards.¹²² Other commentators go further in arguing that the application of the State aid rules to address harmful tax competition undermines the tax sovereignty of Member States.¹²³ On the other hand, it has been suggested that the EU has always been a new legal order in which Member States have ceded their sovereignty in certain areas to achieve common goals and that it would make little sense to carve out an area relevant to those goals which should be excluded from the decisions of the shared institutions.¹²⁴

However, the references to sovereignty in a significant proportion of the literature appear to misconstrue the role of that concept. More critical references to sovereignty in this context emphasise that the concept offers no clear limits to the notion of aid.¹²⁵ Further, an

¹²⁰ Pierpaolo Rossi-Maccanico, 'Fiscal Aid Review and Cross-Border Tax Distortions' (2012) 40 *Intertax* 92, 98. See also Thomas Jaeger, 'From Santander to LuxLeaks - and Back' (2015) 14 *European State Aid Law Quarterly* 345, 356.

¹²¹ Fausta Todhe, 'The Rise of an (Autonomous) Arm's Length Principle in EU State Aid Rules' (2019) 18 *European State Aid Law Quarterly* 249, 256; Thomas Jaeger, 'From Santander to LuxLeaks - and Back' (2015) 14 *European State Aid Law Quarterly* 345, 356.

¹²² Edoardo Traversa and Alessandra Flamini, 'Fighting Harmful Tax Competition through EU State Aid Law: Will the Hardening of Soft Law Suffice' (2015) 14 *European State Aid Law Quarterly* 323, 331; Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 *Journal of European Competition Law and Practice* 369, 379; Raymond Luja, 'Will the EU's State Aid Regime Survive BEPS?' [2015] *British Tax Review* 379, 390; Kaitlynn Michalski 'Equalizing or Encroaching? Ireland's Place in the European Commission's Move Towards Tax Harmony' (2018) 35 *Wisconsin International Law Journal* 704, 735-736. The application of this principle has been qualified by the decision in *Joined Cases C-885/19 P and C-898/19 P Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859. See Section 4.6.3.

¹²³ Nina Hrushko, 'Tax in the World of Antitrust Enforcement: European Commission's State Aid Investigations into Member States' Tax Rulings' (2017) 43 *Brooklyn Journal of International Law* 327, 330.

¹²⁴ Sandra Marco Colino, 'The Long Arm of State Aid Law: Crushing Corporate Tax Avoidance' (2020) 44 *Fordham International Law Journal* 397, 458.

¹²⁵ Dimitrios Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016) 15 *European State Aid Law Quarterly* 428, 436.

argument from the allocation of competences between the Union and the Member States clarifies very little when the Commission is trying to police the limits of the State aid rules which are clearly within its competence.¹²⁶ Some accounts simply state that national fiscal sovereignty is limited only to the determination of broad, general measures of tax policy with a macroeconomic focus.¹²⁷ It might therefore be argued that the concept of fiscal sovereignty in EU law does not have any independent, free-standing identity as a legal principle. Instead, it can be understood in one of two ways. The first is that it may be regarded as a useful descriptor of the general autonomy that Member States have on matters of taxation. This autonomy is merely the product of the interaction of various provisions in the Treaties combined with the political obstacles to more secondary legislation in this area. The second can be seen where it is used in the literature to normatively evaluate the decisions of the Commission and the Union courts. In this context, it serves as an open-ended political ideal with no particular legal identity which can be used as a criterion for judging the merits of these decisions.

To conclude, it is necessary to consider what impact this might have on the support in the existing law for the differentiation of fiscal aid from non-fiscal aid. At the outset, one might have supposed that the references to fiscal sovereignty and fiscal autonomy would have allowed for some distinctive treatment for fiscal aid. If this concept was to have any impact in this area, it would have to pull in favour of less rigorous enforcement of State aid against tax measures compared to non-fiscal aid. However, as this concept can only be understood as either a description of the general legal position under the Treaties or an open-

¹²⁶ Fausta Todhe, 'The Rise of an (Autonomous) Arm's Length Principle in EU State Aid Rules' (2019) 18 *European State Aid Law Quarterly* 249, 261.

¹²⁷ Massimo Merola, 'The Rebus of Selectivity in Fiscal Aid: A Nonconformist View on and beyond Case Law' (2016) 39 *World Competition* 533, 545.

ended political ideal, there is little support for any such differentiation based on national fiscal sovereignty.

5.4.2. Link between Advantage and Selectivity for Fiscal Measures

Another formula deployed in the case law sheds light on the relationship between the treatment of fiscal measures and the treatment of non-fiscal measures under the State aid rules. This formula comes in the form of an acknowledgement by the Commission and the CJEU that the concepts of advantage and selectivity are very closely linked in the case of fiscal measures.¹²⁸ This is significant because it represents the clearest acknowledgement of the difference between fiscal and non-fiscal measures in the case law and has the potential to allow the law to develop distinct approaches for different types of measure. This section will explore the development of this formula in the case law and discuss its implications. This section will go on to conclude despite this formula's express reference to fiscal aid as a distinct category, it does not produce any meaningful differentiation in the approach taken to fiscal aid compared to non-fiscal aid.

This formula first emerged while the three-stage test for selectivity was in the early stages of its development and relates to the relationship between two different criteria in the State aid inquiry under Article 107(1) TFEU. It will be recalled that in order for a measure to be regarded as State aid within the meaning of Article 107(1) TFEU, the measure must be imputable to the State and place a burden on State resources, confer an advantage on an undertaking, be selective and threaten to distort competition and affect trade between Member States.¹²⁹ These are cumulative conditions, all of which must be satisfied before a

¹²⁸ See Section 4.3.2.

¹²⁹ Case C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:97, para 40; Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981, paragraph 53.

measure can be classified as aid.¹³⁰ It will also be recalled that the advantage criterion merely requires that the measure reduce the ordinary costs that an undertaking would usually have to bear.¹³¹ The selectivity criterion is generally considered to require that the measure satisfy the three-stage test developed in *Adria-Wien* and *Azores*,¹³² although this thesis has argued that more recent treatment of this issue simply assesses whether the measure involves differential treatment of undertakings without being justified by a legitimate, generalisable policy objective.¹³³

The decision in *Azores* acknowledges that the advantage and selectivity criteria may be less distinct in cases involving fiscal aid. In that case, the CJEU observed 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. The ‘normal’ tax rate is the rate in force in the geographical area constituting the reference framework.¹³⁴

This passage suggests that the existence of an advantage will be established where there is a reduction from normal taxation while equating the concept of normal taxation with the reference framework which is used to assess the selectivity criterion. This means that a deviation from normal taxation is likely to lead to a finding that an advantage has been conferred and that there has been a deviation from the reference framework which is likely to result in a finding of selectivity. This observation of the link between these concepts has been affirmed repeatedly by the CJEU in subsequent case law.¹³⁵ Indeed, a pattern has also

¹³⁰ Philipp Werner and Vincent Verouden, ‘Introduction – The Law and Economics of EU State Aid Control’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-62, 16-17.

¹³¹ Case C-387/92 *Banco Exterior de España* ECLI:EU:C:1994:100, [1994] ECR I-877, paras 13-14.

¹³² Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365; Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115.

¹³³ See Sections 4.5.2, 8.2.1.

¹³⁴ Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, para 56.

¹³⁵ Case T-210/02 *RENV British Aggregates Association v Commission (British Aggregates III)* ECLI:EU:T:2012:110, para 49; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 90; Joined Cases T-60/06 *RENV II* and T-62/06 *RENV II Italy and Euralumina SpA v Commission* ECLI:EU:T:2016:233, para 99; Case

emerged in the case law whereby the CJEU refers to the theoretically distinct criteria for advantage and selectivity as a single concept of ‘selective advantage’.¹³⁶

This development has been the subject of criticism in the literature. It has been argued that this development brings the law to conflate the distinct concepts of advantage and selectivity in a manner that is undesirable.¹³⁷ It might be thought that the concepts of advantage and selectivity are both derived from reasonable interpretations of the text of Article 107(1) TFEU and therefore the elision of the boundary between them departs from the notion of aid that is envisaged by the Treaties. On a more practical level, it has been suggested that the conflation of these two concepts reduces the burden on the Commission to establish the existence of aid and reduces the range of potential arguments open to Member States and other litigants to refute any finding of aid.¹³⁸ This could make it easier for the Commission to enforce these rules against fiscal measures in a manner which might conflict with the sensitivities regarding the fiscal sovereignty of Member States described above.

However, while this formula appears on its face to mark a distinctive approach for fiscal measures, there are strands in the case law that suggest that this is not the case. The

C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:97, para 55; Joined Cases C-105/18 to C-113/18 *UNESA* ECLI:EU:C:2019:935, para 62; Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, para 88.

¹³⁶ Juan Jorge Piernas López, ‘Revisiting Some Fundamentals of Fiscal Selectivity: The ANGED Case’ (2018) 17 *European State Aid Law Quarterly* 274, 277, 281; Wolfgang Schön, ‘State Aid in the Area of Taxation’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, paras 12-033 – 12-036. For examples in the case law, see Case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, paras 70-71, 78, 86-87; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, paras 77-110; Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paras 32-33, paras 19, 21; Case C-233/16 *ANGED* ECLI:EU:C:2018:280, paras 37, 39, 56, 60.

¹³⁷ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 5-6.

¹³⁸ Wolfgang Schön, ‘State Aid in the Area of Taxation’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, paras 12-033 – 12-039; Thomas Jaeger, ‘From Santander to LuxLeaks - and Back’ (2015) 14 *European State Aid Law Quarterly* 345, 350; Hugo López López, ‘General Thought on Selectivity and Consequences of a Broad Concept of State Aid in Tax Matters’ (2010) 9 *European State Aid Law Quarterly* 807, 819.

most notable of these can be found in the remarks of AG Wahl in *Hansestadt Lübeck* which observed that:

That prior determination of the reference framework, recognised as being essential in tax matters, is, in my view, just as essential in an examination of non-fiscal measures, and in particular of charging schemes designed inter alia to finance infrastructure, like the 2006 schedule at issue in the present case. Just as it could be held 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’, it must be held that, before assessing the selectivity of a measure fixing charging rates, it is necessary to determine the ‘normally applicable’ regime from which the measure purports to derogate.¹³⁹

The CJEU went on to hold that the three-stage test could be applied in the assessment of non-fiscal measures in the form of airport charges, although it repeated the acknowledgement in *Azores* that ‘the determination of the reference framework is of particular importance in the case of tax measures since the very existence of an advantage may be established only when compared with “normal” taxation’.¹⁴⁰ From this case, it seems that the same issue of conflation would arise in respect of airport charges whose reduction could be attributed to the State. Much like in the case of a tax exemption, the advantage could only be identified by comparison with a reference framework consisting of the charges ordinarily levied on similar undertakings. A deviation from this reference framework would be regarded both as the conferral of an advantage and prima facie selectivity. The same issue might be said to arise in respect of market rules.¹⁴¹ For market rules, the advantage conferred can only be assessed by comparison with the position of other undertakings, an assessment that inevitably overlaps with selectivity. For example, in *Eventech*, the CJEU held that regulations granting access to taxi cabs to bus lanes but not to minicabs did not grant a

¹³⁹ Case C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:693, Opinion of AG Wahl, para 77 (internal citations omitted).

¹⁴⁰ Case C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:971, para 55.

¹⁴¹ It will be recalled that in this thesis, market rules are defined as non-fiscal mandatory rules governing the behaviour of undertakings on the market.

‘selective economic advantage’ and appears to address both economic advantage and selectivity by comparing the treatment between the different types of undertakings and the justification for such differentiation.¹⁴²

In referring to the decision of the CJEU in *Hansestadt Lübeck* on this point, it is necessary to address what appears to be a very significant finding made by the General Court in the judgment that was under appeal in that case. In criticising the decision of the Commission to find that the contested measures were selective by comparing the recipient airlines with airlines that used other airports, the General Court considered that the case law on the selectivity of fiscal measures was not relevant in that case because the contested measure was not fiscal in character.¹⁴³ This is certainly the clearest language suggesting that the law on selectivity might not be the same for non-fiscal measures as it is for fiscal measures in any decision of the Union courts.¹⁴⁴ These remarks might appear particularly significant in circumstances where the judgment of the General Court was upheld by the CJEU and there was no finding of any error in that judgment on appeal.¹⁴⁵ However, it does not appear that the remarks of the General Court in *Hansestadt Lübeck* have produced any revolution in principle. This is because of the failure of the CJEU to expressly endorse or reiterate those remarks together with the fact that the judgment of the CJEU and the Opinion of AG Wahl reassert the continuity between the application of the selectivity criterion to

¹⁴² Case C-518/13 *Eventech* ECLI:EU:C:2015:9, paras 53-63.

¹⁴³ Case T-461/12 *Hansestadt Lübeck v Commission* ECLI:EU:T:2014:758, para 57: ‘Quant à la jurisprudence relative au caractère sélectif de mesures fiscales, elle n’est pas pertinente en l’espèce, eu égard à la nature de la mesure en cause’.

¹⁴⁴ Michael Honoré, ‘Selectivity’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 139, 166 goes further to suggest that this is the only decided case featuring judicial comment to the effect that the law on selectivity might not be the same for non-fiscal measures as it is for fiscal measures. However, some of the case law cited above on the conflation of economic advantage and selectivity in cases involving fiscal measures also implies some difference in treatment, albeit in a less direct manner.

¹⁴⁵ Case C-524/14 P *Commission Hansestadt Lübeck* ECLI:EU:C:2016:971, paras 71-75. See Hans Arno Petzold, ‘Airport Selection - New Tools or Loopholes Opened’ (2017) 16 *European State Aid Law Quarterly* 285 for a favourable view of this outcome. For a more critical view, see Juan Jorge Piernas López, ‘Selectivity Revisited’ (2016) 15 *European State Aid Law Quarterly* 115.

fiscal measures and its application to other types of measure.¹⁴⁶ Moreover, there has been no further reference to the relevant passage from the General Court decision in the case law.

Therefore, despite the express reference to fiscal measures in this formula first mentioned in *Azores*, it does not produce any meaningful differentiation in the treatment of fiscal aid when compared with non-fiscal aid. The problem of the conflation of the criteria of advantage and selectivity is not only confined to fiscal measures, but also arises in respect of other measures such as market rules. The emergence of the discrimination standard as part of the selectivity inquiry as described in this thesis does not alter this position significantly because the conflation between the tests for selectivity and advantage can still persist even while the boundaries between the different stages of the three-stage test for selectivity also become blurred.

5.5. Plausible Methods of Differentiation Supported by Case Law

5.5.1. Differentiation between Market Operations and Regulatory Acts

In interpreting the limits of Article 107(1) TFEU, the Commission and the CJEU have shown themselves to be generally sceptical of differentiation based on the form of the measure or its regulatory technique. As is apparent from the discussion above, there are numerous obstacles in the doctrine on the notion of aid that impede differentiation between fiscal measures and non-fiscal measures. In this section, these obstacles will be contrasted with elements of the jurisprudence which have been more willing to acknowledge the differences between regulatory forms and their effects. In particular, this section will discuss the

¹⁴⁶ Case C-524/14 P *Commission v. Hansestadt Lübeck* ECLI:EU:C:2016:971. Indeed, at paras 53-55, the CJEU went on to reject the contention of the Commission that the General Court had applied contradictory reasoning in holding that the case law on fiscal aid was inapplicable while substantially applying that case law elsewhere in the judgment and endorsed the finding of the General Court that users of other airports were not in a comparable factual or legal situation to that of the users of Lübeck airport.

relatively clear boundaries that have been drawn in the case law between market operations and regulation in the narrow sense.¹⁴⁷ This section will also discuss differentiation based on effects as part of the assessment of aid for its compatibility with the internal market and its implications for the differentiation of fiscal and non-fiscal measures.

Among the clearest examples of differentiation based on regulatory form that can be identified in the case law on fiscal aid can be found in the distinction between market operations and other regulatory activities of Member States in identifying aid under Article 107(1) TFEU. It will be recalled that a Member State can argue that a measure is not aid due to the absence of the conferral of an economic advantage on an undertaking where the Member State acted consistently with the behaviour of an equivalent market economy operator.¹⁴⁸ This market economy operator principle is only available where the Member State is acting in a capacity that renders it comparable to a market operator.¹⁴⁹ Therefore, it has been held that it is not generally available in circumstances where the Member State intervenes by way of regulation in the narrow sense.¹⁵⁰

¹⁴⁷ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 88-89 who discusses this distinction in the case law defines regulation as ‘a set of commands emanating from a public authority’. This broadly corresponds to the definition of regulation in the narrow sense adopted in this thesis. This encompasses ‘the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with the rules’, including fiscal measures and market rules. While market transactions can be considered to be regulation in the broad sense in that they represent ‘efforts of State agencies to steer the economy’, they can nevertheless be distinguished from regulation in the narrow sense. See Robert Baldwin, Colin Scott and Christopher Hood, ‘Introduction’ in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press 1998) 1-55, 3-4.

¹⁴⁸ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 207-208; Case 39/94 *SFEI* [1996] ECR I-3547, para 60. See further discussion in Section 2.3.3.2.

¹⁴⁹ Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, para 22; C-334/99 *Germany v Commission* [2003] ECR I-1139, paras 134, 140; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-435, para 317.

¹⁵⁰ Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, para 22; C-334/99 *Germany v Commission* [2003] ECR I-1139, paras 134, 140; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-435, para 317. See Martin Köhler, ‘New Trends Concerning the Application of the Private Investor Test’ (2011) 10 *European State Aid Law Quarterly* 21, 24-25.

It will also be recalled that the boundary between these two categories of case has become less clear following the decisions in *Ryanair v Commission*¹⁵¹ and *Commission v EDF*,¹⁵² both of which leave open the possibility that the market economy operator principle can be invoked in circumstances where the contested measure involves government regulation or exemptions from taxes or other compulsory charges.¹⁵³ While there was some suggestion in the literature that these authorities might justify the application of the market economy operator principle to all types of State intervention,¹⁵⁴ subsequent decisions following *EDF* suggest that any change in this regard is much more modest and only extends to applying the market economy operator principle in circumstances where the intervention can meaningfully be compared to that of a private entity.¹⁵⁵ In particular, it appears unlikely that it would alter the position whereby Member States are not permitted to defend decisions to introduce tax exemptions on the basis that they will increase their overall tax revenue following a logic akin to that of a private investor.¹⁵⁶

Despite the moderation of this distinction following *EDF*, it remains the clearest example of differential treatment based on regulatory form that can be observed in the case law interpreting the limits of Article 107(1) TFEU. In cases involving measures that can be compared to market transactions, the market economy operator test will generally be decisive.¹⁵⁷ By contrast, in cases involving regulation in the narrow sense, including taxation, this test will generally be inapplicable and instead the selectivity criterion will

¹⁵¹ Case T-196/04 *Ryanair v Commission* ECLI:EU:T:2008:585, [2008] ECR II-3643.

¹⁵² Case C-124/10 P *Commission v EDF* ECLI:EU:C:2012:318. See further discussion in Section 4.2.

¹⁵³ See discussion in Section 4.2.1.

¹⁵⁴ Albert Sánchez Graells, 'Bringing the "market economy agent" principle to full power' (2012) 33 *European Competition Law Review* 470, 472.

¹⁵⁵ Case C-224/12 P *Commission v Netherlands and ING Groep NV* ECLI:EU:C:2014:213, para 35. See also Case C-224/12 P *Commission v Netherlands and ING Groep NV* ECLI:EU:C:2014:213, Opinion of AG Sharpston, para 41.

¹⁵⁶ Joined Cases C-182/03 *Belgium and Forum 187 v Commission* ECLI:EU:C:2006:416, [2006] ECR I-5479, paras 127-129. See also Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Territorio Histórico de Álava* ECLI:EU:T:2009:315, [2009] ECR II-3029, para 130.

¹⁵⁷ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 88-89. This might include measures such as loans, capital injections and the purchase and sale of assets.

normally determine the outcome.¹⁵⁸ It is submitted that this distinction might provide some form of doctrinal insulation which might prevent the developments described in this thesis from having a significant impact on non-fiscal measures. However, while fiscal measures represent the most common form of aid granted by regulation in the narrow sense,¹⁵⁹ this distinction between market operations and regulation in the narrow sense does not precisely follow the distinction between fiscal aid and non-fiscal aid and therefore market rules are likely to be examined in the same way as fiscal measures.¹⁶⁰

Moreover, while this distinction is the result of the determination by the CJEU that the market economy operator principle is inapplicable to regulation in the narrow sense, nothing prevents the application of the selectivity criterion to market transactions by Member States in principle.¹⁶¹ However, the practical reality is that market transactions are more likely to have a relatively narrow range of beneficiaries such that they clearly satisfy this criterion. Nevertheless, it is possible to envisage circumstances where both the market economy operator principle and the selectivity criterion might be controversial. Consider for example a government scheme that offers loans or repayable advances to almost all undertakings operating within a Member State. Such a scheme could be defended on the basis that such aid is offered on terms that could be obtained on the open market, but also on the basis that the category of beneficiaries is so wide that it is not selective.

It might be thought that this distinction in the case law would establish a precedent, which might be used to undermine the formulas discussed above that assert that the notion

¹⁵⁸ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 88-89.

¹⁵⁹ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 95-96.

¹⁶⁰ While it has been observed by Phedon Nicolaides, 'Do Member States Grant Aid When They Act as Regulators?' (2018) 17 *European State Aid Law Quarterly* 2, 3 that non-fiscal regulation is less likely to constitute aid in itself because it will often not entail any burden on State resources, there are circumstances in which they can amount to aid.

¹⁶¹ Indeed, the argument that 'a measure laying down the conditions on which a public undertaking offers its own goods or services always constitutes a selective measure' advanced by the Commission in Case C-524/14 P *Commission v Hansesstadt Lübeck* ECLI:EU:C:2016:971, paras 34, 50 was expressly rejected.

of aid is indifferent to regulatory form. There are two reasons why this distinction is unlikely to offer such a precedent. The first is that, as indicated above, any bright line between the treatment of these two types of aid has been dulled somewhat by the decision in *EDF*. The second is that while this distinction may have limited the application of the market economy operator test, it has not substantially altered the application of the selectivity test as it applies to different types of measure. Differentiation in the application of the selectivity criterion to different regulatory forms remains difficult to justify on the basis of the existing case law.

5.5.2. Regulatory Technique and the Compatibility Assessment

While the obstacles to and potential mechanisms for the differentiation of fiscal aid from non-fiscal aid described above primarily relate to Article 107(1) TFEU and its definition of the notion of aid, it is necessary to consider the compatibility assessment under Article 107(2)-(3) TFEU and its potential to distinguish between different forms of aid. This section will discuss the capacity of the compatibility assessment of aid to consider in greater detail the effects of different forms of aid and how this compares to the treatment of effects in the interpretation of Article 107(1) TFEU. This section will go on to explain how this might facilitate some difference in treatment between fiscal and non-fiscal measures.

This chapter has examined the CJEU's repeated assertion that State aid is defined by reference to its effect and not its objects, causes or aims and that regulatory technique cannot alter the classification of a measure of State intervention as aid.¹⁶² One might therefore expect that an analysis of the effects of measures might allow some differentiation between fiscal and non-fiscal measures in broad terms. This is because there is a body of evidence

¹⁶² For the original articulation of these formulae, see Case 173/73 *Italy v Commission (Italian Textiles)* ECLI:EU:C:1974:71, [1974] ECR 709, para 13; Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, para 89. See discussion above at Section 5.3.

that suggests that the form through which aid is granted may have some impact on its economic effects.¹⁶³ The precise nature of these differences is likely to vary depending on the design of any specific subsidy or tax exemption. Despite these differences, it is clear that the assessment of a measure under Article 107(1) TFEU does not consider these effects in any rigorous or systematic way. As has been discussed above, there is little focus on the economic effect of a measure in determining whether it amounts to aid.¹⁶⁴

However, it is widely acknowledged that much of the economic analysis of the effects of a measure in the application of the State aid rules occurs as part of the compatibility assessment under Article 107(2)-(3) TFEU.¹⁶⁵ The Commission's assessments on this point analyse the economic effects of the aid in much greater detail at this stage. In assessing whether aid is compatible with the internal market, the Commission's stated policy since 2005 has been that it conducts a balancing test, ensuring that the negative effects of the aid do not outweigh its benefits.¹⁶⁶ The Commission also considers a range of different sets of detailed guidelines that it has published for different categories of aid. Since the State Aid Modernisation Programme which began in 2012, the Commission has also introduced a set of common principles which will govern the assessment of the compatibility of all types of

¹⁶³ See discussion in Chapter 3. See for example Phedon Nicolaidis, 'Grants versus Fiscal Aid: In Search of Economic Rationality' (2015) 14 *European State Aid Law Quarterly* 410, 415-416; Ken Woodside, 'Tax Incentives vs. Subsidies: Political Considerations in Governmental Choice' (1979) 5 *Canadian Public Policy* 248; Isabel Busom, Beatriz Corchuelo and Ester Martínez-Ros, 'Tax incentives... or subsidies for business R&D?' (2014) 43 *Small Business Economics* 571; Hua Cheng et al., 'Different policy instruments and the threshold effects on collaboration efficiency in China' (2020) 47 *Science and Public Policy* 348; Alexander Haupt and Tim Krieger, 'The role of relocation mobility in tax and subsidy competition' (2020) 116 *Journal of Urban Economics* 103196.

¹⁶⁴ See Section 5.3.2.3 above.

¹⁶⁵ Jürgen Kühling, 'The Need for a More Economic Approach' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 211-224; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 154. For an outline of this assessment, see discussion in Section 2.4.

¹⁶⁶ Phedon Nicolaidis, "What should state aid control protect? A proposal for the next generation of state aid rules" (2019) 40 *European Competition Law Review* 276, 277.

aid with the internal market.¹⁶⁷ These include the requirements that the aid be a contribution to a well-defined objective of common interest that cannot be delivered by the market alone.¹⁶⁸ The aid must be appropriate for and proportionate to its stated objective and it must avoid negative effects on competition and trade.¹⁶⁹ The aid should also have a strong incentive effect and be implemented in a transparent manner.¹⁷⁰ While this test has been described as essential to the system of State aid control,¹⁷¹ it has been suggested that this account of the test is misleading and unachievable in practice. It has been argued that a full cost-benefit analysis of every aid measure notified to the Commission would be unduly burdensome on the resources of the Commission and those of national governments.¹⁷² Some commentators argue that the Commission's assessment is limited to verifying that the measure is appropriate for a common interest objective and that it keeps its negative effects to the minimum possible given its objectives.¹⁷³

However, it remains clear that there is a much more detailed analysis of the economic effects of a measure as part of the compatibility assessment than is involved in the identification of aid. Among the features of the aid that are scrutinised are the strength of the incentive effect of the measure and its transparency. There is a suggestion in the economic literature that aid measures may vary along these dimensions depending on whether they are

¹⁶⁷ Leigh Hancher and Phedon Nicolaides, 'Compatibility of Aid – General Introduction' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 193-220, 202-203.

¹⁶⁸ Leigh Hancher and Phedon Nicolaides, 'Compatibility of Aid – General Introduction' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 193-220, 203.

¹⁶⁹ Leigh Hancher and Phedon Nicolaides, 'Compatibility of Aid – General Introduction' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 193-220, 203.

¹⁷⁰ Leigh Hancher and Phedon Nicolaides, 'Compatibility of Aid – General Introduction' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 193-220, 203.

¹⁷¹ Andrea Biondi, 'The Rationale for State Aid Control: A Return to Orthodoxy' (2010) 12 *Cambridge Yearbook of Legal Studies* 35, 38.

¹⁷² Phedon Nicolaides, "What should state aid control protect? A proposal for the next generation of state aid rules" (2019) 40 *European Competition Law Review* 276, 280.

¹⁷³ Phedon Nicolaides, "What should state aid control protect? A proposal for the next generation of state aid rules" (2019) 40 *European Competition Law Review* 276, 281; Phedon Nicolaides and Ioana Eleanora Rusu, 'The "Binary" Nature of Economics of State Aid' (2010) 37 *Legal Issues of Economic Integration* 25.

granted as a tax exemption or as a direct grant or subsidy.¹⁷⁴ While this assessment will always depend on many different factors, one might legitimately expect a differentiation in treatment between fiscal and non-fiscal measures in light of these differences in their economic effects, all else being equal. It may be that the increased transparency and enhanced incentive effects of subsidies in some circumstances may make them more likely to be compatible with the internal market. It is submitted that the compatibility assessment therefore provides more fertile ground for differentiation between fiscal aid and non-fiscal aid than Article 107(1) TFEU. However, it is also unclear that the magnitude of any such difference in economic effects would lead to radically different enforcement outcomes.

5.6. Conclusion

This chapter has examined the approach of EU State aid law to the challenge of diversity in the form of government intervention. This challenge arises from the relatively broad interpretation of the notion of aid that has been adopted by the CJEU that makes it capable of encompassing everything from State guarantees to direct subsidies, from recapitalisation of public undertakings to corporate tax rules and from the sale of public assets to environmental levies. The developments in the case law on fiscal measures explored in the previous chapter require consideration of the extent to which the law differentiates between these different forms of intervention. This is necessary to understand the impact of these

¹⁷⁴ Hua Cheng et al., 'Different policy instruments and the threshold effects on collaboration efficiency in China' (2020) 47 *Science and Public Policy* 348; Phedon Nicolaides, 'Grants versus Fiscal Aid: In Search of Economic Rationality' (2015) 14 *European State Aid Law Quarterly* 410, 415-416; Isabel Busom, Beatriz Corchuelo and Ester Martínez-Ros, 'Tax incentives... or subsidies for business R&D?' (2014) 43 *Small Business Economics* 571; Ken Woodside, 'Tax Incentives vs. Subsidies: Political Considerations in Governmental Choice' (1979) 5 *Canadian Public Policy* 248. See discussion in Section 3.5.5.

developments on State aid enforcement against non-fiscal measures which is the focus of the primary research question.

This chapter has identified formulae repeated in the jurisprudence of the CJEU interpreting Article 107(1) TFEU that pose apparent obstacles to differentiation between forms of intervention by Member States. The assertions of the irrelevance of the objects, causes, aims and regulatory techniques to classification of a measure as State aid pose significant obstacles to any meaningful differentiation. While there is a considerable volume of academic commentary highlighting the importance of the fiscal sovereignty and autonomy of Member States, the impact of such a concept on the interpretation of Article 107(1) TFEU has been minimal and has not provided substantial support for differentiation. Further, the apparent acknowledgement of the heightened importance of the reference framework in fiscal aid cases has had a much more modest impact than might be anticipated.

The position of the CJEU on the applicability of the market economy operator principle does reveal some difference in the approach taken to market transactions and regulatory measures. While this might insulate some market transactions from the repercussions of the developments in fiscal aid to a degree, there is no such obstacle to the cross-pollination of approaches between fiscal measures other forms of regulation in the narrow sense. While the scope for differentiation between different forms of intervention remains relatively limited in the application of Article 107(1) TFEU, this is to a considerable extent due to the inability of the doctrine to consider the effects of impugned measures in any meaningful way. By contrast, the assessment of aid measures for compatibility with the internal market considers economic effects in a much more detailed manner and in this way offers a greater, but still moderate, potential to differentiate between the range of forms fiscal and non-fiscal aid may take because of the different effects that these measures are likely to have on the market.

These findings lead to the conclusion that the obstacles to the cross-pollination of the case law between different types of fiscal aid and between fiscal and non-fiscal aid are not substantial and therefore the potential for the developments in the law arising from cases dealing with direct taxation to affect the treatment of other types of measure is significant. This may produce unforeseen effects as it is not clear that such developments were consciously implemented to alter enforcement patterns across the wide range of forms of intervention available to Member States. This will require consideration of the full extent of this impact and its consequences in the next chapter.

6. CROSS-POLLINATION: EFFECT OF FISCAL MEASURES CASE LAW ON ENFORCEMENT AGAINST NON-FISCAL MEASURES

6.1. Introduction

Much of the literature reviewed in the preceding chapters has identified fiscal measures as a significant area of controversy and contestation in State aid control, at least insofar as the definition of the notion of aid is concerned. This literature has often reviewed the case law on fiscal measures and the novel developments that have emerged from it with an underlying assumption that the law dealing with non-fiscal aid is well settled and uncontroversial. Problems in the identification of fiscal measures as aid are often presented as problems of appropriately analogising the measures at issue with similar non-fiscal measures. Similarly, the merits of the application of the State aid rules in a particular way to fiscal aid measures are often reviewed by reference to its impact on the fiscal sovereignty of Member States and their ability to levy taxes as they wish.

Against this backdrop, there has been little consideration of the place of non-fiscal aid in the review of the developments that emerge from the fiscal aid case law. As outlined in the previous chapter, the CJEU has interpreted Article 107(1) TFEU in a manner that does not meaningfully differentiate between fiscal measures and non-fiscal measures in determining whether they constitute aid. Indeed, the CJEU has insisted on using broadly the same criteria to identify aid in both types of State intervention. Therefore, one might expect the developments emerging in response to fiscal aid to have an impact on other types of measure as well. Previous contributions to the literature on fiscal aid have not considered this impact in any great depth. This may have been sensible when the Commission began enforcing the State aid rules against fiscal measures with greater fervour from the mid-1990s onwards. Then, the direction of travel in terms of doctrinal development was largely from the substantial body of case law on non-fiscal aid towards the relatively novel enforcement

priority of fiscal aid. However, it is submitted that this approach is less illuminating after more than 20 years in which many of the most significant developments in the interpretation of the limits of Article 107(1) TFEU have emerged from disputes involving fiscal aid. The potential for cross-pollination between these two areas is substantial.

It is submitted that any such impact is particularly significant for two reasons. The first is that of its legitimacy. The legitimacy of significant changes in the interpretation of the Treaties by the CJEU, in the form of a more expansive approach to selectivity and the application of the arms-length principle, and the impact of these changes on fiscal measures is open to criticism.¹ However, they could be said to have one redeeming feature in that the CJEU was directly considering and addressing fiscal measures when it brought about those changes. The possibility that there might also be significant changes in the application of the State aid rules to non-fiscal measures arising from cases where such measures were neither in issue nor directly considered is somewhat more troubling.²

The second reason is that such an impact is likely to persist long after the relevance of the doctrine as it applies to fiscal measures. There appears to be a considerable likelihood of some international agreement coordinating taxation on corporations which is likely to calm the intensity of tax competition between Member States.³ This may make the State aid rules less important as a tool for the Commission to control this process of tax competition. However, the impact of the developments arising from cases involving fiscal measures may still persist in cases involving non-fiscal measures which are likely to be outside the scope of any tax cooperation regime. This is because these developments relate to the interpretation

¹ See in particular Sections 4.4, 4.6.2

² Indeed, the framing of the academic discussion on the issue almost exclusively around the impact on fiscal sovereignty and the freedom of Member States to levy taxes at will may have made a failure to consider the impact on non-fiscal measures more likely.

³ See Section 7.2.1.

of Article 107(1) TFEU, over which the Commission has no discretion.⁴ Further, even if the Commission's enforcement priorities change, national courts are capable of identifying aid for the purpose of enforcing the prohibition on implementing aid before it is notified to and approved by the Commission.⁵ This thesis argues that the more expansive definition of aid that has been developed by the CJEU in the context of fiscal measures will persist in its application to non-fiscal measures, even if the Commission relaxes its enforcement priorities in that regard.

Against that backdrop, this chapter will argue that the broader definition of State aid with more easily satisfied criteria that have emerged in the case law on fiscal measures is capable of having a significant impact on the enforcement of the State aid rules against non-fiscal measures. Two principal developments will be explored. First, this chapter will consider the impact of a more easily satisfied selectivity criterion on aid schemes and direct subsidies and how this development leads to greater potential for enforcement against such measures and significantly increases the burden on Member States in defending such measures. This chapter will then go on to examine the interaction between developments from the case law on fiscal measures, such as the discrimination standard and conflation of the criteria of

⁴ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 4; Case T-308/00 *Salzgitter AG v Commission* ECLI:EU:T:2004:199, [2004] ECR II-1933, para 74; Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' v Commission* ECLI:EU:C:2011:368, [2011] ECR I-4727, para 132. Further, the Union courts will engage in a full review of the Commission's application of Article 107(1) TFEU except where complex economic assessments are required. See Case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515; Case T-487/11 *Banco Privado Português and Massa Insolvente do Banco Privado Português* ECLI:EU:T:2014:1077, para 46; Case C-486/15 P *Commission v France and Orange* ECLI:EU:C:2016:912, paras 88-89. See Section 2.4.1.

⁵ Case 120/73 *Lorenz GmbH v Germany* ECLI:EU:C:1973:152, [1973] ECR 1471; Case 121/73 *Markmann AG v Germany* ECLI:EU:C:1973:153, [1973] ECR 1495; Case 122/73 *Nordsee GmbH v Germany* ECLI:EU:C:1973:154, [1973] ECR 1511. For an evaluation of the extent of the powers of private actors and national court to intervene, see Fernando Pastor-Marchante, 'The Protection of Competitors under State Aid Law' (2016) 15 *European State Aid Law Quarterly* 527, 534; Patricia Ypma and others, *Study on the enforcement rules and decisions of State aid by national courts* (European Commission 2019) 88-90. See also discussion in Section 2.4.1. See Chapter 7.3.2.

economic advantage and selectivity on the case law on market rules in the form of access to infrastructure or public resources and the grant of special or exclusive rights.⁶

6.2. Selectivity of General Aid Schemes and Increased Potential for Enforcement

6.2.1. General Aid Schemes and Selectivity

The most important change that has emerged from the case law on fiscal aid is the increasingly broad approach to the selectivity criterion. This approach makes it easier to find that a given measure is selective and therefore that it constitutes State aid. As has been explained in previous chapters, the selectivity criterion is that which seeks to distinguish between specific aid measures which are prohibited and general measures which are outside of the scope of the State aid rules.⁷ However, the precise nature of this distinction has not been adequately explained in the case law. While this criterion will almost inevitably be satisfied for *ad hoc* grants of aid to specific companies or individual aid,⁸ it is more likely to be contested for more general schemes of aid that can apply to multiple undertakings.

⁶ In this thesis, market rules are defined as non-fiscal mandatory rules governing the behaviour of undertakings on the market. They are included in the definition of regulation in the narrow sense, meaning as ‘the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with the rules’. See Robert Baldwin, Colin Scott and Christopher Hood, ‘Introduction’ in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press 1998) 1-55, 3-4.

⁷ Joined Cases C-72/91 and C-73/91 *Sloman Neptun v Bodo Ziesemer* ECLI:EU:C:1992:130, [1993] ECR I-887, Opinion of AG Darmon, paras 50-53; Case C-189/91 *Kirsammer-Hack v Sidal* ECLI:EU:C:1992:458, [1993] ECR I-6185, Opinion of AG Darmon, paras 58-69; Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, para 20; Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 90-91; Michael Honoré, ‘Selectivity’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 119. See Section 2.3.4, 4.3.

⁸ Case C-15/14 P *Commission v MOL* ECLI:EU:C:2015:362, para 60; Case C-211/15 P *Orange v Commission* ECLI:EU:C:2016:798, paras 53-54; Case C-270/15 P *Belgium v Commission* ECLI:EU:C:2016:489, para 49. It is also clear that as measure is not selective if it applies without distinction to all undertakings. See Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365, paras 35-36; Case C-66/02 *Italy v Commission* ECLI:EU:C:2005:768, [2005] ECR I-10901, para 99; Case C-148/04 *Unicredito Italiano* ECLI:EU:C:2005:774, [2005] ECR I-11137, para 49; Case C-222/04 *Cassa di Risparmio di Firenze* ECLI:EU:C:2006:8, [2006] ECR I-289, para 135; Case T-399/11 *Banco Santander and Santusa v Commission* ECLI:EU:T:2014:938, para 69; Case T-219/10 *Autogrill España v Commission* ECLI:EU:T:2014:939, para 74.

The application of the law to general aid schemes, often in the form of taxation, originally gave rise to the three-stage test for selectivity which first seeks to identify a reference framework and a deviation from that reference framework.⁹ The next stage seeks to establish whether the deviation from that framework treats undertakings differently notwithstanding that they are in a comparable legal and factual situation. The third stage then considers whether the aid is justified, notwithstanding such differential treatment, by reference to the nature and general scheme of the system. As explained in previous chapters, the boundaries between these stages have been blurred considerably and the limits of the test were effectively circumvented by the *Gibraltar* decision.¹⁰ The combination of these developments has tended to collapse this structured approach into a much broader set of questions. These are essentially whether the intervention at issue treats different undertakings or groups of undertakings differently and whether this differentiation is a necessary and proportionate response to a legitimate objective. Such differentiation is increasingly described as ‘discriminatory’ by the Commission and the CJEU.¹¹ The *Gibraltar* decision and the cases applying the arm’s length principle suggest that EU law fixes some substantive limits to the objectives that can be invoked to justify differential treatment, even if Member States can choose from a very diverse range of objectives.¹²

⁹ Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365, para 40-42; Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, para 52-54.

¹⁰ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113. See Section 4.4.

¹¹ Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981, para 75; Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paras 32, 35; Case C-706/17 *Achema* ECLI:EU:C:2019:407, para 84; Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, para 83; Case C-219/16 P *Lowell Financial Services v Commission* ECLI:EU:C:2018:508, para 85; Case T-406/11 *Prosegur Compañía de Seguridad v Commission* ECLI:EU:T:2018:793, paras 47, 185; Case T-405/11 *Axa Mediterranean v Commission* ECLI:EU:T:2018:780, para 53. See also Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, para 17: ‘it has become increasingly clear in the case-law of the Court, since the judgment of 15 November 2011 in *Commission v Government of Gibraltar and the United Kingdom* (‘*Gibraltar*’), that the concept of selectivity is closely linked to that of discrimination. A national measure is considered selective where the advantage it provides is applied in a discriminatory manner.’ (internal citations removed). See Section 4.5.2.

¹² See discussion in Sections 4.5.2, 8.2.1. See Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113; Joined Cases C-

6.2.2. Discrimination Standard and General Aid Schemes

This approach not only extends the notion of State aid to capture a broader range of fiscal measures, but it is also likely to make it easier to find that any general aid scheme is selective, irrespective of its fiscal character or otherwise. This occurs in two ways. The first is that the minimum threshold that requires justification under the discrimination standard is considerably lower than under the requirement for a derogation from a reference framework or system under the three-stage test. A reference system or framework can be sufficiently complex such that two undertakings can be treated differently without derogating from the system. By contrast, the discrimination approach requires no such derogation, and it seems clear following *Gibraltar* that any form of differentiation between two undertakings can in principle require justification to avoid the prohibition in Article 107(1) TFEU.¹³ Therefore, it is submitted that the discrimination standard is much more sensitive than the three-stage test. The adoption of a somewhat modified version of this in the general availability approach would make the test moderately less sensitive, in ignoring certain types of differential treatment where the undertakings concerned could reasonably be expected to be capable of modifying their behaviour to benefit from any incentive.¹⁴ However, this would still be a

182/03 and C-217/03 *Belgium and Forum 187 v Commission* ECLI:EU:C:2005:266, [2006] ECR I-5479; Cases T-516/18 and T-525/18 *Luxembourg and Engie v Commission* ECLI:EU:T:2021:251; Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670; Joined Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338; Cases T-760/15 and T-636/16 *Netherlands and Starbucks Corp v Commission* ECLI:EU:T:2019:669; Cases T-816/17 and T-318/18 *Luxembourg and Amazon v Commission* ECLI:EU:T:2021:252. As argued in Section 4.6.3, this remains the case even after the decision in Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859.

¹³ See Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113. See also Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paras 32-33. See also Joined Cases C-51/19 and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, paras 93-95; Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, para 93; Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, para 70.

¹⁴ This general availability approach is articulated in Phedon Nicolaidis, 'Excessive Widening of the Concept of Selectivity' (2017) 16 *European State Aid Law Quarterly* 62, 69-70; Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:741, Opinion of AG Saugmandsgaard Øe, paras 8-9, 87. See discussion in Section 4.5.3.

more sensitive standard than the threshold based on the derogation from a reference framework.

The second difference is that the discrimination approach limits the ability of Member States to justify this differential treatment. Many articulations of the three-stage test view it as a consistency test that simply holds Member States to their own stated objectives.¹⁵ It simply examines whether the derogation is consistent with an objective identified by the Member State, or whether there is a ‘legitimate justification for such unequal treatment and that the measure introducing it is proportionate.’¹⁶ While this review of the proportionality of the measure to a legitimate objective is also part of the discrimination approach, the latter goes further and allows the CJEU to police and circumscribe the range of objectives selected by Member States to justify differential treatment of undertakings. There appear to be certain objectives, such as attracting offshore companies to set up in a particular Member State,¹⁷ that cannot be invoked by Member States to justify differential treatment even if this has not been expressly accepted by the case law.¹⁸

This additional breadth in the concept of selectivity across these two dimensions has important consequences for Member States seeking to implement aid schemes, even if these are not fiscal in nature. Consider the example of a scheme of interest-free public loans for the purchase by businesses of new motor vehicles that covers a certain proportion of the cost of a new vehicle, with that proportion varying according to the type of vehicle.¹⁹ Suppose

¹⁵ See for example Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, para 19; Cases C-236/16 and C-237/16 *ANGED* ECLI:EU:C:2017:854, AG Kokott, para 82.

¹⁶ Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, para 15.

¹⁷ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113.

¹⁸ Indeed, this thesis contends that this limitation of the range of legitimate objectives is necessary if a test approximating the discrimination standard is adopted. See Section 8.2.3.

¹⁹ This is a slightly more complicated version of a loan scheme sought to be implemented by Spain that was regarded as aid in Case T-55/99 *CETM v Commission* ECLI:EU:T:2000:223, [2000] ECR II-3207.

that a greater proportion of the cost of the new vehicle can be borrowed for electric or hybrid vehicles compared to petrol or diesel cars. Suppose also that the scheme is only available to undertakings who already owned motor vehicles of a certain age by a certain date and who remove the older vehicles from use, with a view to preventing undertakings from purchasing older vehicles simply to avail of the scheme.

It is clear from the existing case law on a similar but not identical scheme that the exclusion of larger undertakings from this scheme is likely to constitute a derogation from the reference system and differentiation between undertakings in a comparable situation that will require justification if it is to avoid the prohibition in Article 107(1) TFEU.²⁰ However, it is submitted that under the discrimination approach, the potential lines of attack on this scheme are far more numerous. Each condition for the application of the subsidy can be construed as differential treatment that must be capable of justification by the Member State. It might be argued that the differentiation between undertakings who own motor vehicles that are sufficiently old by the relevant date and other undertakings would have to be justified, presumably on the basis that the scheme seeks to remove older, less environmentally friendly vehicles from circulation. The offer of different amounts of aid for the purchase of different types of vehicle could be regarded as discriminatory, unless the general availability approach is adopted and this is regarded as a differentiation arising from the subsequent choice of the undertaking.

While many of these differences could surely be justified as being necessary and proportionate to some legitimate aim, such as that of environmental protection, it remains the case that a Member State seeking to implement such a scheme is vulnerable to many more lines of criticism under the discrimination standard. Even if this does not actually

²⁰ Case T-55/99 *CETM v Commission* ECLI:EU:T:2000:223, [2000] ECR II-3207, paras 39-42.

narrow the range of substantive policy choices available to the Member State in any particular case, the Member State still faces an additional burden in ensuring that each individual condition of the application of the measure is proportionate in the light of a legitimate objective. This considerably increases the burden of compliance on Member States.

Second, the possibility that EU law will prevent reliance on particular objectives to justify differential treatment places real, substantive limits on the policies that can be pursued by Member States in addition to those which existed under the three-stage test. The clearest example of this can be found in *Gibraltar*, from which it seems clear that a Member State cannot successfully justify an advantage in the form of a lower tax burden on offshore companies on the grounds that the system seeks to give favourable tax treatment to offshore companies or incentivise offshore companies to establish themselves in a particular jurisdiction.²¹ Similarly, it appears that Member States will not be able to justify differential tax treatment of multinational companies and smaller undertakings for certain transactions.²² While the issue of justification was not addressed in great detail in *World Duty Free*, it might be supposed based on that case that seeking to incentivise investment in companies based in specific Member States or groups of Member States is an unlikely candidate for an acceptable justification.²³ As has been suggested in previous chapters, such a delimitation of the range of objectives which can be used to justify differentiation is vital to the coherence

²¹ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113.

²² Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* ECLI:EU:C:2005:266, [2006] ECR I-5479; Cases T-516/18 and T-525/18 *Luxembourg and Engie v Commission* ECLI:EU:T:2021:251; Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670; Joined Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338; Cases T-760/15 and T-636/16 *Netherlands and Starbucks Corp v Commission* ECLI:EU:T:2019:669; Cases T-816/17 and T-318/18 *Luxembourg and Amazon v Commission* ECLI:EU:T:2021:252. However, this limitation has been qualified somewhat by the Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793 and Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859. See Section 4.6.3.

²³ Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981.

and effectiveness of the discrimination standard.²⁴ This is because without such limits, Member States would be able to justify virtually any measure and would thereby be able to evade the prohibition in Article 107(1) TFEU.²⁵ These limits imposed by the CJEU on the range of acceptable justifications limits the freedom of Member States not only in respect of tax measures, but also regarding non-fiscal interventions. For example, if a Member State granted a universal subsidy scheme that covered all undertakings but that varied the amounts according to certain criteria that increased the amount granted to offshore companies or to companies who invested in shareholdings in other Member States, this too would undoubtedly be regarded as selective on the authority of *Gibraltar* and *World Duty Free*.²⁶ The freedom of Member States to implement general schemes of direct subsidies or guarantees or loans is similarly constrained by the same principles that have been used to broaden the selectivity criterion in cases involving fiscal measures.

Third, there remains considerable uncertainty about precisely where these substantive limits on the range of legitimate objectives lie. The case law cited above has only provided limited insights into the objectives which cannot justify discriminatory treatment and the process through which these limits are established is opaque and unsystematic. This can be seen in the attempts to define the limits on the choices of Member States in the case law on transfer pricing.²⁷ Notwithstanding the qualification of this principle in *Fiat Chrysler*

²⁴ See Section 4.5.2.

²⁵ Andreas Bartosch, 'Is There a Need for a Rule of Reason in European State Aid Law - Or How to Arrive at a Coherent Concept of Material Selectivity' (2010) 47 Common Market Law Review 729, 745.

²⁶ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113; Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981.

²⁷ See Joined Cases C-182/3 and C-217/03 *Belgium and Forum 187 v Commission* ECLI:EU:C:2005:266; Cases T-516/18 and T-525/18 *Luxembourg and Engie v Commission* ECLI:EU:T:2021:251; Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670; Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338; Cases T-760/15 and T-636/16 *Netherlands and Starbucks Corp v Commission* ECLI:EU:T:2019:669; Cases T-816/17 and T-318/18 *Luxembourg and Amazon v Commission* ECLI:EU:T:2021:252.

Finance Europe and Ireland v Commission,²⁸ it seems clear that there are limits on the ability of Member States to grant tax incentives that favour large multinational companies over smaller undertakings, irrespective of what the relevant national law seeks to achieve.²⁹ Again, it should be stressed that limits such as these on the choices of Member States should be capable of applying also to other types of intervention. It would also be impermissible, therefore, to enact general schemes of direct grants, subsidies, guarantees or loans that favoured multinational companies in this way, as the law does not differentiate between measures based on regulatory form or their fiscal nature.³⁰

The case law seeking to clarify this apparent limit on the range of objectives that can justify differential treatment has been piecemeal and uncertain. The case law of the General Court applying the arm's length principle has been criticised for misconstruction of the authorities on which it relies and the opacity of the standards it sets out.³¹ While it had been suggested that this was an autonomous principle that could be derived from Article 107(1)

²⁸ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859. See Section 4.6.3 for the argument that this judgment has not removed these limits.

²⁹ See Joined Cases C-182/3 and C-217/03 *Belgium and Forum 187 v Commission* ECLI:EU:C:2005:266; Cases T-516/18 and T-525/18 *Luxembourg and Engie v Commission* ECLI:EU:T:2021:251; Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670; Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338; Cases T-760/15 and T-636/16 *Netherlands and Starbucks Corp v Commission* ECLI:EU:T:2019:669; Cases T-816/17 and T-318/18 *Luxembourg and Amazon v Commission* ECLI:EU:T:2021:252.

³⁰ Case 173/73 *Italy v Commission (Italian Textiles)* ECLI:EU:C:1974:71, [1974] ECR 709, para 13; Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, para 89; Case C-279/08 P *Netherlands v Commission (NOx)* ECLI:EU:C:2011:551, [2011] ECR I-7671, para 51; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 87; Joined Cases T-226/09 and T-230/09 *British Telecommunications and BT Pension Scheme Trustees v Commission* ECLI:EU:T:2013:466, para 42; Case T-251/11 *Austria v Commission* ECLI:EU:T:2014:1060, para 98; Cases T-516/18 and T-525/18 *Luxembourg and Engie v Commission* ECLI:EU:T:2021:251, para 351; Case C-15/14 P *Commission v MOL* ECLI:EU:C:2015:362, para 86. See discussion in Section 5.3.3.

³¹ Tony Joris and Wout de Cock, 'Is *Belgium and Forum 187* a Suitable Source for an EU "At Arm's Length Principle"?' (2017) 16 *European State Aid Law Quarterly* 607; Dimitrios Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016) 15 *European State Aid Law Quarterly* 428; Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 *Journal of European Competition Law & Practice* 369; Kyle Richard, 'Are All Tax Rulings State Aid: Examining the European Commission's Recent State Aid Decisions' (2018) 18 *Houston Business & Tax Law Journal* 1. See also Case C-898/19 P *Ireland v Commission* ECLI:EU:2021:1029, Opinion of AG Pikamäe, paras 67-146, 168-173. See Section 4.6.2 for a more exhaustive account of these criticisms.

TFEU with some borrowings from OECD guidance,³² it is now clear that it is only to be applied where it can be inferred from the relevant national tax system.³³ However, it does not appear that this precludes review based on the arm's length principle beyond merely verifying compliance with national rules, and some uncertainty persists on this point.³⁴ This case law illustrates that attempts to articulate these limits on the freedom of Member States will continue to develop in an unsystematic and piecemeal fashion. In the absence of some form of legislative development or Treaty reform, Member States will have to manage this uncertainty in designing not only fiscal policies but also non-fiscal interventions that might potentially engage Article 107(1) TFEU. While the arm's length principle applied by the CJEU in these decisions at the very least marked a step towards articulating limits on the range of objectives which can be used to justify differential treatment, it only ever represented a very small contribution to this project that has been constrained somewhat by the decision in *Fiat Chrysler*.³⁵ This thesis will therefore go on to provide a more systematic account of how the CJEU might define these objectives and clarify the application of the discrimination standard.³⁶

6.2.3. More Expansive Enforcement Against Non-Fiscal Aid Schemes

It seems clear that the developments in the law on fiscal aid, specifically relating to the selectivity criterion are capable of having a profound impact not only on fiscal measures, but also on other types of intervention on the internal market by Member States. The

³² Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338, paras 214-215; Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670, paras 141-144; Cases T-516/18 and T-525/18 *Luxembourg and Engie v Commission* ECLI:EU:T:2021:251.

³³ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, paras 96-101.

³⁴ For this argument, see Section 4.6.3.

³⁵ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859.

³⁶ See Section 8.2.4.

combination of a broader, more easily satisfied selectivity criterion emerging in the fiscal aid cases and a refusal on the part of the Commission and the Union courts to allow for any distinction between fiscal measures and non-fiscal measures would allow for much more expansive enforcement against general schemes of direct grants, subsidies, loans and guarantees. While there has only been a limited case law considering the issue of selectivity in respect of general aid schemes that are not fiscal in character, there is evidence of the use of the discrimination standard in such cases and reference to the fiscal aid case law.

For example, the decision in *Eventech* links the issue of selectivity to whether access to public infrastructure is non-discriminatory even though it was decided before *World Duty Free* and the bulk of the case law on fiscal measures referring to discrimination in this context.³⁷ Beyond this somewhat prescient reference to discrimination, this language from the fiscal aid cases has emerged in more recent case law. In *Achema*, the CJEU assessed the discriminatory character of public interest compensation for certain energy undertakings by reference to discrimination.³⁸ The language of discrimination was also mentioned in the discussion of the selectivity of grants of green energy certificates by AG Campos Sánchez-Bordona in *Axpo Trading Ag*.³⁹ Similar discussion can be seen in AG Hogan's treatment of the selectivity criterion in assessing the mandatory conversion of cooperative banks into a company limited by shares in *Adusbef*.⁴⁰ While the case law evidencing this impact on a diverse range of State interventions is currently limited, it is submitted that a change in

³⁷ Case C-518/13 *Eventech* ECLI:EU:C:2015:9, paras 53-54.

³⁸ Case C-706/17 *Achema* ECLI:EU:C:2019:407, paras 83-88.

³⁹ Case C-705/19 *Axpo Trading Ag* ECLI:EU:C:2020:989, Opinion of AG Campos Sánchez-Bordona, paras 163-177. This request for a preliminary reference was subsequently withdrawn while judgment was still pending. See Case C-705/19 *Axpo Trading Ag* ECLI:EU:C:2021:755.

⁴⁰ Case C-686/18 *Adusbef* ECLI:EU:C:2020:90, Opinion of AG Hogan, paras 117-118. However, it should be noted that the CJEU held that the question referred in relation to State aid was inadmissible due to the incomplete nature of the information provided by the referring court. See Case C-686/18 *Adusbef* ECLI:EU:C:2020:567, paras 58-61.

emphasis is perceptible and that it paves the way for more expansive enforcement against various categories of non-fiscal aid in the near future.

6.3. Conflation of Criteria and Emerging Primacy of Discrimination Standard for Market Rules

6.3.1. Aid through Market Rules – Permits, Licences, Special Rights and Concessions

A second important area of potential impact of the developments in the case law on fiscal measures on the treatment of other forms of State intervention can be seen in the effect on certain types of market rule.⁴¹ This effect is observed in the case law on market rules that grant access to public resources or infrastructure to undertakings or that confer permits, licences or special or exclusive rights. The law here has developed an idiosyncratic and relatively unclear set of standards to determine whether or not such rules grant State aid. It will be argued that these standards bear certain resemblances to the law on fiscal measures. Some of these resemblances can be attributed to the common problems faced by the Commission and the CJEU in seeking to determine how the State aid rules should apply to such measures. More than any other categories of intervention, both involve complicated and often general systems that are nevertheless capable of conferring specific entitlements of economic value to undertakings at the expense of the State's opportunity to collect revenue.⁴² Other resemblances involve direct borrowing, with the significant body of case

⁴¹ In this thesis, market rules are defined as non-fiscal mandatory rules governing the behaviour of undertakings on the market. They are included in the definition of regulation in the narrow sense, meaning as 'the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with the rules'. See Robert Baldwin, Colin Scott and Christopher Hood, 'Introduction' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press 1998) 1-55, 3-4.

⁴² It is acknowledged that certain types of fiscal measures such as special purpose levies designed to change the behaviour of undertakings such as those at issue in Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515 have a particularly close affinity with market rules.

law on selectivity in the jurisprudence on fiscal measures driving change in the law on this type of regulation. This section will first discuss how the grant of special access or rights fits into the general scheme of EU State aid law. It will then go on to consider the line of doctrine emerging in *Eventech*⁴³ and subsequent cases that appear to conflate the criteria of State resources, economic advantage and selectivity. This section will then go on to explain the relationship between these developments and the trends emerging from the Commission's campaign of enforcement of the State aid rules against fiscal measures. It will be argued that the case law on fiscal measures has had a clear impact on this area and that there is considerable potential for this to move the law in a more unpredictable direction.

It is first necessary to consider the treatment of grants of permits, licences, concessions or access to public resources or infrastructure by a Member State under the State aid regime. It is clear that Member States can offer these rights on market terms in order to commercially exploit certain scarce resources, infrastructure or assets and raise revenue.⁴⁴ Where Member States do offer such rights on a commercial basis, the decisive criterion for determining whether the prohibition on State aid in Article 107(1) TFEU applies is that of economic advantage, as implemented through the market economy operator principle and the associated tests.⁴⁵ In order to avoid a finding that an economic advantage has been conferred, Member States will generally seek to show that their intervention is consistent with the

⁴³ Case C-518/13 *Eventech* ECLI:EU:C:2015:9.

⁴⁴ 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 C262/1, para 53; Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C8/4, para 33; Case C-462/99 *Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission, and Mobilkom Austria AG* ECLI:EU:C:2003:297, [2003] ECR I-05197, paras 92-93; Case T-475/04 *Bouygues and Bouygues Télécom SA v Commission* ECLI:EU:T:2007:196, [2007] ECR II-2097, paras 101, 104, 105, 111; Grith Skovgaard Olykke, 'Exclusive Rights and State Aid' (2017) 16 European State Aid Law Quarterly 164, 175.

⁴⁵ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 89. See Section 2.3.3.2 for more detail on the application of this principle.

behaviour of a market economy operator and that the recipient could have obtained the benefit under normal market conditions.⁴⁶

As with the sale of any other good or asset carried out by Member States,⁴⁷ there are a range of different methods of demonstrating that the grant of the right in question is consistent with the market economy operator principle. The transaction may be one in which the State undertakes contracts on the same terms and conditions as private operators in a comparable situation (a ‘*pari passu*’ transaction).⁴⁸ If there are no comparable private operators for comparison, the grant of the right according to a competitive, transparent, non-discriminatory and unconditional tendering process consistent with the public procurement principles in the Treaty will also be presumed to be consistent with the market economy operator principle.⁴⁹ Failing that, the transaction can be shown to be compliant with the market economy operator principle by benchmarking or by using various generally accepted assessment methodologies.⁵⁰ In certain circumstances, a Member State may also claim that any deviation from the behaviour of a market economy operator was effected in order to

⁴⁶ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 208-209; Case C-39/94 *SFEI* ECLI:EU:C:1996:285, [1996] ECR I-3547, para 60; 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 C262/1, para 74.

⁴⁷ The Commission refers to ‘the lease of certain goods or the grant of concessions for the commercial exploitation of natural resources’ as being subject to the same standards and tests as the sale of any other asset. See 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 C262/1, para 89, fn 145.

⁴⁸ Case T-296/97 *Alitalia v Commission* ECLI:EU:T:2000:289, para 81; 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 C262/1, paras 86-88.

⁴⁹ 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 C262/1, paras 89-96.

⁵⁰ 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 C262/1, paras 97-105. It is also clear from Case C-131/15 *Club Hotel Loutraki AE v Commission* ECLI:EU:C:2016:989 that it is possible for the market value of distinct rights to be assessed together in order to determine whether an advantage was granted. See discussion of the General Court judgment in Case T-58/13 *Club Hotel Loutraki AE v Commission* ECLI:EU:T:2015:1 that is the subject of this appeal in Paul Adriaanse, ‘The Influence of EU State Aid Law on the Allocation of Limited Rights by National Authorities’ in Paul Adriaanse, Frank van Ommeren, Willemien den Ouden and Johan Wolswinkel (eds), *Scarcity and the State I: The Allocation of Limited Rights by the Administration* (Intersentia 2016) 219-238, 227-229, 233.

compensate the beneficiary of the measure for the performance of services of general economic interest.⁵¹ In order to do so, the criteria in *Altmark* must be complied with.⁵²

As an example, a Member State could offer an undertaking or group of undertakings the right to operate ferry services across an inland waterway or lake. There is unlikely to be a private undertaking offering similar rights to operate such services so there will not be a *pari passu* transaction. The Member State will therefore have to demonstrate compliance by awarding the rights based on a competitive, transparent, non-discriminatory and unconditional tendering process or by applying benchmarking or some other appropriate assessment methodology. It is also open to the Member State to offer this right at a price that deviates from the market economy operator principle, if it requires the right holder to operate some ferry service on an unprofitable route, provided that the public service obligations, the relevant deduction and its basis for calculation are clearly defined and do not exceed certain limits.⁵³

It has been argued in cases where the market economy operator principle and the *Altmark* criteria are at issue, both of which relate to the economic advantage criterion under Article 107(1) TFEU, the selectivity criterion is unlikely to be decisive or even particularly relevant.⁵⁴ This has been contrasted with the approach taken to aid granted through regulation in the narrow sense, in which the selectivity criterion is the decisive criterion and the State is generally thought to be incapable of being held to the standard of a private

⁵¹ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C8/4; 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 C262/1, para 70.

⁵² Case C-280/00 *Altmark* ECLI:EU:C:2003:415, [2003] ECR I-7747, paras 89-93. This means that there must be clearly defined public service obligations, a clear basis for the calculation of compensation set out in advance, no compensation in excess of the costs of performing those obligations and no compensation in excess of the costs of a reasonably well run and adequately equipped undertaking unless the beneficiary is selected through a public procurement procedure. See discussion in Section 2.3.3.3.

⁵³ Case C-280/00 *Altmark* ECLI:EU:C:2003:415, [2003] ECR I-7747, paras 89-93.

⁵⁴ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 89.

operator.⁵⁵ It will be recalled that the CJEU has blurred the boundary between these types of cases in preventing the Commission precluding the possibility that regulations in the narrow sense do not confer an advantage based on the market economy operator principle.⁵⁶ However, there also exists another line of case law and decisional practice from the CJEU and the Commission that casts further doubt on this typology and appears to interact with some of the developments from the case law on fiscal measures to conflate the criteria of economic advantage and selectivity, and in places that of State resources also.

6.3.2. State Does Not Have to Act According to Market Logic

This line of doctrine deals with cases involving the grant of a right such as a permit, licence, concession or right of access to public resources or infrastructure,⁵⁷ but in circumstances where the State controls access to them by market rules rather than by something more akin to a market transaction. This may involve granting the relevant right to certain groups of undertakings for free or for an application fee that does not necessarily reflect the economic value of the right being conferred, provided that those undertakings meet certain conditions. For example, in *Commission v Netherlands*, it was held that the grant of permits free of charge entitling certain companies to emit pollutants without penalty amounted to aid.⁵⁸ This method of allocating resources is not uncommon, and Member States frequently allocate

⁵⁵ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 88-89; Leigh Hancher, 'The General Framework' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 43-130, para 3-199. For cases limiting the application of the market economy operator principle to circumstances in which the State is acting in a manner comparable with a private entity, see Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* ECLI:EU:C:1994:325, [1994] ECR I-4103, para 22; C-334/99 *Germany v Commission* ECLI:EU:C:2003:55, [2003] ECR I-1139, paras 134, 140; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* ECLI:EU:T:2003:57, [2003] ECR II-435, para 317.

⁵⁶ Case C-124/10 P *Commission v EDF* ECLI:EU:C:2012:318, paras 92-93; Case C-224/12 P *Commission v Netherlands and ING Groep NV* ECLI:EU:C:2014:213, para 35. See also Case C-224/12 P *Commission v Netherlands and ING Groep NV* ECLI:EU:C:2014:213, Opinion of AG Sharpston, para 41. See discussion in Section 4.2.1.

⁵⁷ Such as the example of the right to operate ferry services discussed above.

⁵⁸ Case C-279/08 *Commission v Netherlands (NOx)* ECLI:EU:C:2011:551, [2011] ECR I-07671.

such rights by market rules rather than auctioning off such rights to the highest bidder or bidders.

The first significant decision on this point is *Bouygues v Commission* in which the applicant claimed that aid had been granted in the award of permits to operate mobile telephony services in the wireless spectrum.⁵⁹ The applicant claimed that two of its competitors, who had submitted similar applications in an earlier call for applications, were awarded permits that came into effect at an earlier date than the permit awarded to the applicant. The applicant also criticised a reduction in the fees payable by its competitors after the first call for applications. The General Court acknowledged that the permits had an economic value that could result in the conferral of an advantage from State resources even if there was no comparable private operator capable of conferring such permits.⁶⁰ The General Court confirmed that even where the State conferred permits of economic value for a fixed fee or for free, the prohibition on State aid can still be avoided where the State offers the permits on the same terms to all operators.⁶¹ This finding was confirmed on appeal to the CJEU.⁶² While the judgments of the General Court and the CJEU as well as the Opinion of AG Trstenjak are not very clear in distinguishing the criteria of economic advantage and selectivity,⁶³ the outcome of this case can be explained as an application of the selectivity criterion, as it was found that any advantage conferred by State resources was inherent in the scheme of Union legislation which governed the award of telecommunications licences of

⁵⁹ Case T-475/04 *Bouygues SA v Commission* ECLI:EU:T:2007:196, [2007] ECR II-2097, upheld on appeal in Case C-431/07 *Bouygues SA v Commission* ECLI:EU:C:2009:223, [2009] ECR I-2665.

⁶⁰ Case T-475/04 *Bouygues SA v Commission* ECLI:EU:T:2007:196, [2007] ECR II-2097, paras 104-105.

⁶¹ *ibid* para 110

⁶² Case C-431/07 *Bouygues SA v Commission* ECLI:EU:C:2009:223, [2009] ECR I-2665, para 118.

⁶³ See for example Case T-475/04 *Bouygues SA v Commission* ECLI:EU:T:2007:196, [2007] ECR II-2097, paras 108-114; Case C-431/07 *Bouygues SA v Commission* ECLI:EU:C:2009:223, [2009] ECR I-2665, paras 88-105; Case C-431/07 *Bouygues SA v Commission* ECLI:EU:C:2008:545, [2009] ECR I-2665, Opinion of AG Trstenjak, paras 131, 142.

this type.⁶⁴ Irrespective of what the rules are for allocating permits or rights with economic value, the suggestion that no State aid exists where these rules are applied equally to all operators appears to be an argument that has more to do with selectivity than economic advantage.⁶⁵

However, the decision in *Eventech* complicates this finding notwithstanding that it sees the CJEU identify economic advantage and selectivity as separate criteria. In that case the CJEU dealt with a preliminary reference from the High Court of England and Wales that dealt with the right of black cabs in London to use bus lanes while other private hire vehicles were prohibited from doing so. It was suggested by one of the parties that the relevant public authority had to charge undertakings that were granted preferential access to this infrastructure to avoid the conferral of an economic advantage equal to the economic value of such a right of access.⁶⁶ The CJEU rejected this argument, holding that no such economic advantage would necessarily be conferred where the State, ‘in order to pursue the realisation of an objective laid down by that State’s legislation, grants a right of privileged access to public infrastructure which is not operated commercially by the public authorities to users of that infrastructure’.⁶⁷ When the State acts in a ‘genuinely regulatory capacity’, it does not have to maximise revenue from the conferral of rights, permits or preferential access.⁶⁸ It

⁶⁴ Case T-475/04 *Bouygues SA v Commission* ECLI:EU:T:2007:196, [2007] ECR II-2097, paras 106, 111; Case C-431/07 *Bouygues SA v Commission* ECLI:EU:C:2009:223, [2009] ECR I-2665, para 103; Case C-431/07 *Bouygues SA v Commission* ECLI:EU:C:2008:545, [2009] ECR I-2665, Opinion of AG Trstenjak, paras 117, 165.

⁶⁵ This is reinforced by the conclusions of the CJEU in Case C-279/08 *Commission v Netherlands (NOx)* ECLI:EU:C:2011:551, [2011] ECR I-07671, paras 62-64 in which the CJEU held that the awarding emissions permits free of charge to some undertakings which were subject to the rules on the limitation of pollutant emissions but not others was selective and therefore amounted to State aid. This decision separates the issues of economic advantage and selectivity more clearly. See also *Alleged illegal State Aid to IMUNA PHARM* (Case SA.37624 (2014/NN)) Commission Decision of 20 November 2014 [2015] OJ C44/1.

⁶⁶ Case C-518/13 *Eventech* ECLI:EU:C:2015:9, para 46.

⁶⁷ *ibid* para 48.

⁶⁸ Case C-518/13 *Eventech* ECLI:EU:C:2014:2239, Opinion of AG Wahl, para 32. This appears to correspond to the definition of regulation in the narrow sense adopted by this thesis, which includes ‘the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with the rules’ following Robert Baldwin, Colin Scott and Christopher Hood,

was held that it was a matter for the public authorities to determine whether it was necessary to forgo revenue to achieve the relevant regulatory objective and what conditions control access to the infrastructure.⁶⁹ The conditions must be determined in advance in a transparent and non-discriminatory manner.⁷⁰ The CJEU then went on to find that it is common case that these criteria are satisfied, including that ‘all the providers of such services are treated equally’.⁷¹ While this might appear to cover the issue of discrimination, the CJEU went on to find that the issue of discrimination still had to be considered and that this was subsumed into the issue of selectivity.⁷² It was held that the measure was also not selective because of the differences in the obligations of black taxi cabs and other private hire vehicles.⁷³

While it may be possible to read *Eventech* as simply being decided on the issue of selectivity, it is submitted that the language referring directly to economic advantage makes it difficult to avoid the conclusion that the case also seeks to articulate standards for this criterion as well. Indeed, some commentators have sought to explain this decision as indicating that certain types of benefits that are inherent in the pursuit of a non-economic objective by regulation might be regarded as ‘inherent’ in that regulation and that such benefits do not amount to an economic advantage.⁷⁴ Unfortunately, these standards include the need for non-discriminatory conditions for the granting of the right. This makes this issue difficult to separate from the selectivity criterion because discrimination informs the assessment of this criterion also.⁷⁵ This confusion is exacerbated by the somewhat different view articulated by AG Wahl in this case. AG Wahl offers an alternative line of reasoning,

‘Introduction’ in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press 1998) 1-55, 3-4.

⁶⁹ Case C-518/13 *Eventech* ECLI:EU:C:2015:9, para 49.

⁷⁰ *ibid* para 49.

⁷¹ *ibid* para 50.

⁷² *ibid* para 53.

⁷³ *ibid* paras 54-63.

⁷⁴ Laura Parret and Greetje van Heezik, ‘*Eventech*, the Selectivity of a Bus Lines Policy’ (2018) 17 *European State Aid Law Quarterly* 93, 98-99.

⁷⁵ As is expressly acknowledged by the CJEU in Case C-518/13 *Eventech* ECLI:EU:C:2015:9, para 53.

which again builds up a distinctive test for assessing advantage, but links this to the State resources criterion rather than selectivity.⁷⁶ For example, AG Wahl considered that preferential access of this type ‘does not involve a transfer of ‘State resources’, provided that all comparable undertakings are granted access on equal terms, which falls to be verified by the referring court.’⁷⁷ It was further acknowledged that the approach adopted would mean that ‘whether State resources have been transferred is dependent on whether equal treatment has been ensured’, and that equal treatment was also highly relevant for the assessment of selectivity.⁷⁸

The confusion on the application of the State aid rules to such cases continues in the case law and decisional practice that builds on *Eventech*. The Commission’s own guidance on the notion of State aid refers to *Eventech* and *Bouygues*, in support of the proposition that a Member State does not confer an advantage or forego State resources when it grants access to public resources or special rights without maximising revenue, where it acts as a regulator and grants the access or right according to qualitative criteria that are set out in advance in a transparent and non-discriminatory manner and linked to the relevant regulatory objective.⁷⁹ It is notable that the Commission does not draw any link between this line of doctrine and

⁷⁶ Francesco de Cecco, ‘Of vexed questions and vexatious litigation: a comment on *Eventech*’ (2016) 41 *European Law Review* 741; Grith Skovgaard Olykke, ‘Exclusive Rights and State Aid’ (2017) 16 *European State Aid Law Quarterly* 164, 177.

⁷⁷ Case C-518/13 *Eventech* ECLI:EU:C:2014:2239, Opinion of AG Wahl, para 46. This also resembles the reasoning in the earlier Commission decision in *Alleged illegal State Aid to IMUNA PHARM* (Case SA.37624 (2014/NN)), Commission Decision of 20 November 2014 [2015] OJ C44/1, recitals (11)-(17), in which the Commission concluded that the grant of an exclusive export licence for blood plasma without charge in circumstances where the relevant regulations never provided for a charge to be imposed for the grant of such licences and where the licences were not tradable on any market did not amount to aid, in part because this did not entail any burden on State resources. No mention of selectivity is made in this case. The presence of State aid was also ruled out in *Alleged aid to Jadrolinija (Croatia)* (Case SA.37265 (2014/NN)) Commission Decision of 15 October 2014 [2015] OJ C44/1 on the basis that there was no burden on State resources arising from the prescription of maximum fees which could be charged by an undertaking granted the right to operate a port as any advantage to companies using the port was drawn from the private resources of the port operator.

⁷⁸ Case C-518/13 *Eventech* ECLI:EU:C:2014:2239, Opinion of AG Wahl, para 35. Compare the use of the notion of ‘discrimination’ in the case law cited in Section 4.5.2.

⁷⁹ 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 C262/1, paras 53-55. This is also consistent with the conclusions in *Alleged illegal State Aid to IMUNA PHARM* (Case SA.37624 (2014/NN)), Commission Decision of 20 November 2014 [2015] OJ C44/1.

the selectivity criterion, notwithstanding its use of discrimination as a standard. While its precise relationship to the different elements constituting the notion of aid is not entirely clear,⁸⁰ there does appear to be some flexibility in the rules to permit Member States to evade the prohibition on aid where they grant access to public resources or special or exclusive rights on a non-commercial basis.⁸¹

It is worth considering the application of this doctrine in two Commission decisions. In *Yliopiston*, the Commission considered the licensing regime for pharmacies in Finland.⁸² Under that regime, each pharmacist must pay €2,500 for the grant of a licence for a pharmacy branch.⁸³ Each pharmacist was permitted to operate a maximum of three branches, except for the University of Helsinki (UHP) which was permitted to operate up to 16 branches. This difference in the maximum number of pharmacies that could be licensed by ordinary pharmacies and UHP was the subject of a complaint to the Commission. It could be argued that the State had foregone resources in the form of the application fee in a manner that gave UHP greater market access than its competitors.⁸⁴ The Commission relied on *Eventech* in finding that there had been no grant of an advantage through State resources in circumstances where the Finnish Medicines Agency was acting in a regulatory capacity and that the criteria

⁸⁰ In any event, the criteria articulated in the case law appear to be very fact-sensitive. See Paul Adriaanse, 'The Influence of EU State Aid Law on the Allocation of Limited Rights by National Authorities' in Paul Adriaanse, Frank van Ommeren, Willemien den Ouden and Johan Wolswinkel (eds), *Scarcity and the State I: The Allocation of Limited Rights by the Administration* (Intersentia 2016) 219-238, 232. This may make it difficult for Member States to rule out the possibility of aid when adopting certain forms of market rules and increase notifications to the Commission for this type of scheme.

⁸¹ Paul Adriaanse, 'The Influence of EU State Aid Law on the Allocation of Limited Rights by National Authorities' in Paul Adriaanse, Frank van Ommeren, Willemien den Ouden and Johan Wolswinkel (eds), *Scarcity and the State I: The Allocation of Limited Rights by the Administration* (Intersentia 2016) 219-238, 233 suggests that some caution is required pending further decisions of the Union courts following this line of case law.

⁸² *Alleged illegal State aid awarded to Yliopiston Apteekki Oy (UHP)* (Case SA.42028) Commission Decision of 20 November 2017 [2017] OJ C422/1.

⁸³ For a description of the licensing regime, see *ibid* recitals (10)-(13).

⁸⁴ Phedon Nicolaides, 'Do Member States Grant Aid When They Act as Regulators' (2018) 17 *European State Aid Law Quarterly* 2, 10.

were set out in advance in legislation in a transparent manner.⁸⁵ The Commission went on to find that the criteria were not discriminatory because of the additional obligations of UHP in training new pharmacists and engaging in research and the development of new medicines.⁸⁶ It has been suggested that this advantage does not seem to be necessary and proportionate to these objectives.⁸⁷ While this conclusion was reached in referring to State resources and economic advantage, the analysis also draws heavily on language more closely associated with selectivity, with the Commission observing that ‘UHP can thus not be said to be in a comparable legal and factual situation with private pharmacies in Finland, which are not subject to such obligations’.⁸⁸

In *KGHM Polska Miedź*, the Commission considered a decision of the Polish Ministry of the Environment to grant a concession to one of four applicants to engage in exploration for a particular mineral.⁸⁹ Again, the Commission interpreted the *Bouygues* and *Eventech* line of case law to hold that there was no advantage where the State had chosen to grant access to public resources on a non-commercial basis in acting as a regulator and controlling access on the basis of conditions set out in advance in a transparent and non-discriminatory manner, and that the contested decision complied with those criteria.⁹⁰ In order to determine the existence of an advantage, the Commission considered that the process had complied with EU law principles on public procurement in that it was competitive, transparent, non-discriminatory and unconditional. The decision went on to consider the issue of selectivity,

⁸⁵ *Alleged illegal State aid awarded to Yliopiston Apteekki Oy (UHP)* (Case SA.42028) Commission Decision of 20 November 2017 [2017] OJ C422/1, recitals (32), (34).

⁸⁶ *ibid* recitals (38)-(39).

⁸⁷ Phedon Nicolaidis, ‘Do Member States Grant Aid When They Act as Regulators’ (2018) 17 *European State Aid Law Quarterly* 2, 10.

⁸⁸ *Alleged illegal State aid awarded to Yliopiston Apteekki Oy (UHP)* (Case SA.42028) Commission Decision of 20 November 2017 [2017] OJ C422/1, recital (40).

⁸⁹ *Alleged aid to KGHM Polska Miedź SA* (Case SA.41116) Commission Decision of 7 November 2017 [2017] OJ C400/1.

⁹⁰ *Alleged aid to KGHM Polska Miedź SA* (Case SA.41116) Commission Decision of 7 November 2017 [2017] OJ C400/1, recital (53).

finding that even if the preceding four criteria were not satisfied, ‘it undoubtedly was non-discriminatory’ and therefore it was not selective.⁹¹ It is also striking that in this decision, the Commission found that any advantage would be drawn from State resources in circumstances where the mineral resources that were the subject of the concession were under the control of the State.⁹² It is submitted that the interpretation of *Eventech* provided in these cases suggests that, contrary to the suggestion of Skovgaard Ølykke,⁹³ State aid law does provide standards that govern this type of measure.⁹⁴ However, the Commission and the CJEU have articulated these in an ambiguous and tautologous manner.

Further, it should be noted that the case law on access to public resources and the granting of special rights and concessions has not developed an entirely consistent approach. *Commission v MOL* offers an alternative way of dealing with concessions and access to public resources. This decision dealt with a finding by the Commission that Hungary granted aid to a mining company in granting an extension to a mining concession for a fixed fee for a number of years based on the criteria set out in the legislation in force at the time before amending the legislation to increase the rate of the fees three years later for extensions granted after the amendment. In this case, a much clearer distinction is drawn between economic advantage and selectivity.⁹⁵ The CJEU based its conclusion that no aid was granted on the absence of selectivity, and appeared to accept that some advantage was conferred on the undertaking that was put in a more advantageous position by the initial

⁹¹ *ibid* recital (89).

⁹² *ibid* recital (50).

⁹³ Grith Skovgaard Ølykke, ‘Exclusive Rights and State Aid’ (2017) 16 *European State Aid Law Quarterly* 164, 180.

⁹⁴ Although it might reasonably be said that ‘State aid law is still waiting for a hallmark judgment on the allocation of limited rights’ following Paul Adriaanse, Frank van Ommeren, Willemien den Ouden and Johan Wolswinkel, ‘The Allocation of Limited Rights by the Administration: A Quest for a General Legal Theory’ in Paul Adriaanse, Frank van Ommeren, Willemien den Ouden and Johan Wolswinkel (eds), *Scarcity and the State I: The Allocation of Limited Rights by the Administration* (Intersentia 2016) 3-25, 21.

⁹⁵ Case C-15/14 *Commission v MOL* ECLI:EU:C:2015:362, paras 59-60; Case C-15/14 *Commission v MOL* ECLI:EU:C:2015:32, Opinion of AG Wahl, paras 48; Nina Niejahr, ‘The ECJ Confirms Limits to the Commission’s Expansive Application of the Selectivity Criterion in State Aid Cases’ (2015) 14 *European State Aid Law Quarterly* 443, 444.

long-term agreement on fees.⁹⁶ The CJEU found that the measure was not selective because the Hungarian authorities did not discriminate between undertakings in a comparable situation, as the conditions of the market changed between the contested agreement and the amendment to the fees regime.⁹⁷ Compared with *Eventech* and the recent Commission decisions, this represents a broader, simpler approach to the economic advantage criterion which leaves the selectivity criterion to determine the outcome.

6.3.3. Relationship with Case Law on Fiscal Measures

These decisions appear to continue a trend that is evident in the case law dealing with fiscal measures whereby it is difficult to distinguish between the apparently separate criteria of advantage and selectivity. Given the importance of cases involving fiscal measures in driving doctrinal change and development regarding selectivity⁹⁸ and the failure to differentiate between fiscal measures and other types of measure,⁹⁹ one might suppose that this trend is the result of the Commission and the CJEU simply applying developments from the case law on fiscal measures to market rules. However, it is submitted that the conflation of these concepts is in reality more likely to be the result of the same basic challenges presenting themselves to the Commission and the CJEU when faced with fiscal measures and market rules. In both types of case, the existing standards struggle to police a principled distinction between matters of general economic policy and discriminatory aid. When dealing with regulation in the narrow sense, be it fiscal or otherwise, it is difficult to identify an economic

⁹⁶ Case C-15/14 *Commission v MOL* ECLI:EU:C:2015:362, paras 64-65; Case C-15/14 *Commission v MOL* ECLI:EU:C:2015:32, Opinion of AG Wahl, paras 48, 53.

⁹⁷ Case C-15/14 *Commission v MOL* ECLI:EU:C:2015:362, paras 64-65; Case C-15/14 *Commission v MOL* ECLI:EU:C:2015:32, Opinion of AG Wahl, paras 115-116.

⁹⁸ See Chapter 4.

⁹⁹ See Chapter 5.

advantage without engaging in some form of comparison between undertakings, which begins to broach matters that form part of the inquiry into selectivity.¹⁰⁰

Indeed, there are reasons to suppose that certain types of market rule may make this inquiry even more difficult than in the case of interventions through the tax system. While it may be that fiscal measures sometimes occur in the context of a more complex and intricate system than market rules, the latter are likely to pose their own challenges. For example, while an exemption from an environmental levy on energy consumption for the manufacturing sector, such as that at issue in *Adria-Wien* might relatively easily be compared to an equivalent subsidy for the same sector,¹⁰¹ it might be more difficult to understand how the conferral of a special right to use pre-existing public infrastructure can be compared to an equivalent direct grant or payment.¹⁰² This may explain why some of the decisions on market rules appear to go further than merely conflating economic advantage and selectivity. For example, it is possible to follow the Commission in interpreting cases such as *Eventech*¹⁰³ and *Yliopiston*¹⁰⁴ as conflating these criteria with that of State resources.¹⁰⁵ By contrast, a burden on State resources is perhaps more obvious in fiscal cases because of a comparatively direct impact on State revenues¹⁰⁶ and because the CJEU has ruled out the

¹⁰⁰ Wolfgang Schön, 'State Aid in the Area of Taxation' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, paras 12-035 – 12-036 makes a similar observation in respect of fiscal measures but it is submitted that a similar problem presents itself in dealing with aid granted through other complicated systems of market rules.

¹⁰¹ Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365.

¹⁰² See Case C-518/13 *Eventech* ECLI:EU:C:2015:9.

¹⁰³ *ibid.*

¹⁰⁴ *Alleged illegal State aid awarded to Yliopiston Apteekki Oy (UHP)* (Case SA.42028) Commission Decision of 20 November 2017 [2017] OJ C422/1.

¹⁰⁵ 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 C262/1, paras 53-55.

¹⁰⁶ Maiju Mähönen, 'The Standing of Environmental Objectives in the Assessment of Fiscal State Aid Under Article 107(1) TFEU' (Master's Thesis, University of Helsinki 2020) 48.

possibility that tax exemptions that attract inward investment and lead indirectly to more revenue than they forgo might not satisfy the State resources criterion.¹⁰⁷

It is also worth observing that while the preponderance of the case law on fiscal measures does not regard the State resources criterion as particularly controversial, there is some early case law that hints at a deeper ambiguity in the relationship between the criteria of State resources and selectivity. The decision in *Sloman Neptun* dealt with German legislation which disapplied German employment law and employers' obligations in respect of social security contributions for foreign employees on ships flying the German flag.¹⁰⁸ While AG Darmon sought to argue that the case should be decided on the basis of selectivity and the distinction between general aids and general measures of economic policy,¹⁰⁹ the CJEU appeared to decide the case on the basis of the State resources criterion.¹¹⁰ It was held that '[t]he system at issue does not seek, through its object and general structure, to create an advantage which would constitute an additional burden for the State' and that any loss in State revenue arising from a reduction in the amount of social security payments falling due from affected undertakings was 'inherent in the system and...not a means of granting a particular advantage to the undertakings concerned.'¹¹¹ Some commentators have observed here that the language used by the CJEU remains very reminiscent of that used for the selectivity criterion.¹¹² It may be that in some cases, both can be construed as seeking to

¹⁰⁷ Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* ECLI:EU:C:2006:416, [2006] ECR I-5479, paras 127-129. See also Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Territorio Histórico de Álava* ECLI:EU:T:2009:315, [2009] ECR II-3029, para 130. See Section 4.2.1 for further discussion of this rule.

¹⁰⁸ Joined Cases C-72/91 and C-73/91 *Sloman Neptun v Bodo Ziesemer* ECLI:EU:C:1993:97, [1993] ECR I-887. This was followed in subsequent cases dealing with non-fiscal measures in Joined Cases C-189/91 *Kirsammer-Hack v Sidal* ECLI:EU:C:1993:907, [1993] ECR I-6185; Joined Cases C-52/97, C-53/97 and C-54/97 *Viscido v Ente Poste Italiane* ECLI:EU:C:1998:209, [1998] ECR I-2629.

¹⁰⁹ Joined Cases C-72/91 and C-73/91 *Sloman Neptun v Bodo Ziesemer* ECLI:EU:C:1992:130, [1993] ECR I-887, Opinion of AG Darmon, paras 47, 74-98.

¹¹⁰ Joined Cases C-72/91 and C-73/91 *Sloman Neptun v Bodo Ziesemer* ECLI:EU:C:1993:97, [1993] ECR I-887, para 21.

¹¹¹ *ibid* para 21.

¹¹² Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 114; Julie Bousin and Jorge Piernas, 'Developments in the Notion of Selectivity' (2008) 7 *European State Aid Law Quarterly* 634,

ensure some general sense of regulatory neutrality, whereby asymmetries in burdens and benefits arising from State measures can be regarded as inherent in some general scheme. While there is little evidence to suggest deliberate application across these different strands of case law, the common patterns that can be observed may share their origins in this underlying ambiguity.

Another reason why this parallel development in the treatment of fiscal measures and market rules is more likely to be the result of shared problems rather than overt borrowing or cross-pollination in this case law can be discerned from the language used in the different types of case. In cases on fiscal measures, the Commission and the CJEU have often been relatively candid in indicating that the concepts of economic advantage and selectivity are intrinsically linked and must often be addressed together.¹¹³ By contrast, even though decisions such as *Eventech*, *Yliopiston* and *KGHM Polska Miedź* articulate standards for economic advantage and selectivity that overlap to a considerable degree, the language of these decisions is striking in the way that it seeks to conscientiously refer to these criteria separately. Even though these decisions fail to effectively separate out these criteria, it remains the case that evidence of cross-pollination from the cases on fiscal measures on this specific issue is less than clear.

Evidence of a significant impact arising from developments in the fiscal aid cases is comparatively clearer in the application of the discrimination standard for selectivity and other criteria. In cases involving fiscal measures, particularly those related to direct taxation,

635-636. See also the critique of Luca Rubini, 'The Elusive Frontier: Regulation under EC State Aid Law' (2009) 9 *European State Aid Law Quarterly* 277, 298, arguing that the State resources criterion is often used as a technical argument to justify a broader policy choice based on the objectives of the measure.

¹¹³ Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, para 56; Case T-210/02 RENV *British Aggregates Association v Commission (British Aggregates III)* ECLI:EU:T:2012:110, para 49; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 90; Joined Cases T-60/06 RENV II and T-62/06 RENV II *Italy and Euralumina SpA v Commission* ECLI:EU:T:2016:233, para 99; Case C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:97, para 55; Joined Cases C-105/18 to C-113/18 *UNESA* ECLI:EU:C:2019:935, para 62.

it has become increasingly apparent that the three-stage test for selectivity is collapsing into one central question.¹¹⁴ This question centres around whether the contested measure is discriminatory in character. This appears to operate to prevent Member States from treating categories of undertakings differently unless they are justified by reference to some legitimate objective. It has been argued elsewhere in this thesis that it is increasingly apparent that the range of acceptable objectives is not infinite nor is it entirely at the discretion of the Member State.¹¹⁵ While the range of potential objectives has not been elaborated in great detail by the Commission or the CJEU, EU law effectively places limits on what objectives Member States can legitimately invoke to differentiate between undertakings without engaging the prohibition in Article 107(1) TFEU even if the Commission must frame its conclusions to some extent based on national law rather than external sources.¹¹⁶

The case law on market rules clearly draws on this approach to selectivity. In *Eventech*, *Yliopiston* and *KGHM Polska Miedź*, there is little attempt by the CJEU and the Commission to apply the three-stage test, preferring instead to focus on the issue of discrimination. In *KGHM Polska Miedź*, this trend is particularly apparent where the Commission indicates that no economic advantage is conferred provided that the relevant concessions are granted according to a process that is competitive, transparent, non-discriminatory and unconditional.¹¹⁷ While the Commission finds that these criteria are satisfied,¹¹⁸ its alternative line of reasoning is particularly revelatory on the nature of the selectivity criterion. The Commission goes on to suggest that even if the process through which the

¹¹⁴ See discussion in Section 4.5.2. See also Section 6.2.2 above.

¹¹⁵ See Sections 4.5.2, 4.6.3.

¹¹⁶ As argued in Section 4.6.3, this remains the case even after the decision in Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859.

¹¹⁷ *Alleged aid to KGHM Polska Miedź SA* (Case SA.41116) Commission Decision of 7 November 2017 [2017] OJ C400/1, recital (53).

¹¹⁸ *ibid* recitals (84)-(87).

concession was granted was found to be lacking in terms of its competitiveness, transparency and unconditional nature, the Commission held that because the process was non-discriminatory, it could not be selective.¹¹⁹ Therefore the question of the discrimination can be determinative of the issue of selectivity. This trend is not confined to cases on aid granted through market rules applying a more complicated test for economic advantage. In *Commission v MOL*, one similarly observes the absence of the three-stage test and a focus on the central question of comparability and discrimination.¹²⁰ This decision uses somewhat different language, with crucial passages from the judgment and the opinion of AG Wahl justifying their conclusions on selectivity by reference to ‘the principle of equal treatment’.¹²¹ It is submitted that this embodies much the same concept as that of discrimination and that it applies language that is similar to the justification of the CJEU for the existence of the arm’s length principle as part of EU law in the transfer pricing case law.¹²²

The adoption of the discrimination standard as the core of the selectivity criterion may also interact with the conflation of the different elements that constitute the definition of State aid within the meaning of Article 107(1) TFEU. As in the case law on fiscal measures, the conflation of selectivity and economic advantage is likely to increase the prominence of

¹¹⁹ *ibid* recitals (88)-(90).

¹²⁰ Case C-15/14 *Commission v MOL* ECLI:EU:C:2015:362. This decision upholds the decision of the General Court to annul the Commission’s finding of aid in Case T-499/10 *MOL v Commission* ECLI:EU:T:2013:592. It is noteworthy that the General Court judgment is cited in support of the Commission’s conclusions on justification in *Alleged aid to KGHM Polska Miedź SA* (Case SA.41116) Commission Decision of 7 November 2017 [2017] OJ C400/1, para 89.

¹²¹ Case C-15/14 *Commission v MOL* ECLI:EU:C:2015:362, paras 64-65; Case C-15/14 *Commission v MOL* ECLI:EU:C:2015:32, Opinion of AG Wahl, paras 85-86.

¹²² See for example the discussion in *Aid granted by Luxembourg to Fiat* (Case SA.38375 (2014/C ex 2014/NN)) Commission Decision (EU) 2016/2326 [2016] OJ L351/1 recital (228); *Aid implemented by the Netherlands to Starbucks* (Case SA.38374 (2014/C ex 2014/NN)) Commission Decision (EU) 2017/502 [2017] OJ L83/38, recital (264); Joined Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670, para 150. See also the references to ‘unequal treatment’ as part of the assessment of selectivity in Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, paras 14-18. It should be observed that there is at least one earlier attempt to describe selectivity in terms of equal treatment in Case C-353/95 P *Tiercé Ladbroke v Commission* ECLI:EU:C:1997:233, [1997] ECR I-7007, Opinion of AG Cosmas, para 30.

the discrimination standard in determining whether a measure constitutes aid. This can be observed in the centrality of the discrimination standard in the case law on market rules discussed above, such as *Eventech* and *KGHM Polska Miedź*. However, this case law also has the potential to intensify this trend. This is because elements of these decisions draw another link between selectivity and the State resources criterion. This can be seen in AG Wahl's opinion in *Eventech*, the Commission decision in *Yliopiston* and indeed the Commission's interpretation of the effect of *Eventech* and *Bouygues*.¹²³ In places, this conflation allows the discrimination standard to effectively determine the question of whether there is a burden on State resources.¹²⁴ This builds on the developments in the fiscal aid case law to take a much more reductive approach to the definition of State aid and to give the discrimination standard a much more important role. In circumstances where the advantage criterion may often be less significant in cases involving regulation in the narrow sense,¹²⁵ particularly where it is distinguished from selectivity as in *Commission v MOL*,¹²⁶ the application of the discrimination standard to the State resources criterion could arguably have a greater impact on the law in this area than the conflation of economic advantage and selectivity.

The potential impact of this increasingly reductive discrimination standard is amplified by the impact of the decisions on access to public resources and the granting of special rights and concessions. This is due to its interaction with the typology of State interventions proposed by de Cecco and the standards employed to determine whether they are aid.¹²⁷ It has been proposed that State interventions can be divided broadly between market

¹²³ Case C-518/13 *Eventech* ECLI:EU:C:2014:2239, Opinion of AG Wahl, para 35; *Alleged illegal State aid awarded to Yliopiston Apteekki Oy (UHP)* (Case SA.42028) Commission Decision of 20 November 2017 [2017] OJ C422/1, recitals (31)-(45); 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 C262/1, paras 53-55.

¹²⁴ See for example Case C-518/13 *Eventech* ECLI:EU:C:2014:2239, Opinion of AG Wahl, para 35.

¹²⁵ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 89.

¹²⁶ Case C-15/14 *Commission v MOL* ECLI:EU:C:2015:362.

¹²⁷ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 89.

transactions which are reviewed by reference to the market economy operator principle and regulatory interventions, including fiscal measures, for which the market economy operator principle is not available and for which selectivity is the decisive criterion.¹²⁸ It will be recalled that the decision in *Commission v EDF* undermined this distinction to a limited extent in permitting Member States to have recourse to the market economy operator principle to defend regulatory interventions from classification as State aid.¹²⁹ This might be characterised as extending the reach of the market economy operator principle to apply to interventions that would normally have been considered regulatory in character. It is submitted that the effect of the case law on access to public resources and the granting of special rights and concessions can be understood as the mirror image of *EDF*. This is because it allows the distribution of public resources or rights with economic value to undertakings to avoid scrutiny under the market economy operator test and instead be assessed as regulatory interventions. This further increases the fluidity of the boundaries between the categories of intervention posited by de Cecco.¹³⁰ However, it is likely to have the added effect of expanding the reach of the selectivity criterion and therefore the discrimination standard in the law of State aid.

It is worth considering for a moment the practical impact of these developments in the law on access to public resources and the conferral of special rights and concessions and the way in which they draw on or move in parallel with similar trends in the case law on fiscal measures. At first glance, the availability of the review under the discrimination standard

¹²⁸ *ibid* 88-89. De Cecco's use of the term 'regulation' refers to 'a set of commands emanating from a public authority' which broadly corresponds to the definition of regulation in the narrow sense adopted by this thesis which includes 'the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with the rules'. See Robert Baldwin, Colin Scott and Christopher Hood, 'Introduction' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press 1998) 1-55, 3-4.

¹²⁹ Case C-124/10 P *Commission v EDF* ECLI:EU:C:2012:318, paras 92-93. See Section 4.2.1. These will include

¹³⁰ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 89.

has led to a finding that there was no aid in many of the cases discussed above, such as *Eventech*, *Yliopiston*, *KGHM Polska Miedź* and *Commission v MOL*. Such cases appear to offer an alternative line of defence for such measures beyond the market economy operator principle. Indeed, Nicolaidis offers an instructive critique of the relatively lenient approach of the Commission in *Yliopiston* and *KGHM Polska Miedź* and its failure to probe more closely the connection between the measures at issue and the regulatory objectives they proposed to serve.¹³¹ However, it is submitted that it is premature to conclude that the effect of this confluence of developments will always be to reduce enforcement and narrow the scope of the prohibition in Article 107(1) TFEU. The confluence of the various developments discussed above have the net effect of increasing the influence and importance of the discrimination standard in the identification of State aid, both as part of the selectivity analysis and beyond. As has been observed above, the discrimination standard is relatively flexible and less structured than the three-stage test, which may give the Commission greater freedom to make a finding of aid. Further, it will be recalled that the current formulation of that test is incomplete in that it effectively circumscribes the range of objectives which Member States may use to justify differential treatment of undertakings without attempting to define or develop a methodology for defining the range of objectives which may be invoked in this way.¹³² The flexible and inchoate nature of this standard means that its adoption has the potential to facilitate more expansive and unpredictable enforcement, particularly against regulation in the narrow sense.

6.4. Conclusion

¹³¹ Phedon Nicolaidis, 'Do Member States Grant Aid When They Act as Regulators' (2018) 17 *European State Aid Law Quarterly* 2, 10, 18.

¹³² See Sections 4.5.2, 8.2.1. See also 6.2.2 above.

This chapter has sought to identify and evaluate trends in the case law and decisional practice of the CJEU and the Commission that draw on the developments that emerged in the treatment of fiscal measures and apply them to other forms of State intervention. Two broad areas of interest have emerged from this analysis. The first of these has a very wide field of potential application and relates to the reorientation of the selectivity test around the discrimination standard. It has been submitted that this standard is likely to make it easier for the Commission to make a finding that a measure is selective and to successfully defend that finding before the CJEU. While this may increase the capacity of the Commission to enforce the State aid rules against tax measures, the law does not place much of an emphasis on the distinction between tax measures and other forms of State intervention and it is therefore likely to have a similar impact on a much wider range of measures. It has been argued that virtually any general aid measure, that is, an aid measure that is granted to multiple undertakings in a relatively systematic manner according to a general scheme of rules or objective criteria set out in advance, will be affected by these developments. Such aid can be granted in such diverse forms as direct grants, market rules, guarantees, loans and the provision of services. In these cases, the Commission's task of establishing selectivity is likely to be made easier by the adoption of a more reductive and flexible discrimination standard.

The second area of interest is narrower in scope but nevertheless significant. This relates to certain types of aid granted by market rules, particularly the grant of access to public infrastructure or resources, concessions, special or exclusive rights, permits or licences. In this case law, the CJEU and the Commission have moved the doctrine in a similar direction to the trends emerging in the fiscal aid jurisprudence. They have interpreted the selectivity criterion as equivalent to a discrimination standard and they have conflated economic advantage and selectivity criteria in a manner reminiscent of the case law on fiscal

measures. However, the law in this area has built on the developments in the fiscal aid case law and has begun to conflate the selectivity criterion with the State resources criterion as well. While this case law has in places also sought to develop more complex standards for the advantage criterion, these feature discrimination as an important element and have not been adequately defined or consistently applied. This means that, in this very broad area of market rules, the standards employed to identify State aid within the meaning of Article 107(1) TFEU place considerable weight on the issue of discrimination. As indicated above, this standard is flexible and is likely to be more easily found to be satisfied than those which apply to these criteria in other types of case, such as the three-stage test for selectivity and the market economy operator test. It is submitted that the overlap arising from the centrality of discrimination to the three most decisive of the four criteria for the identification of State aid is likely to further reduce the number of hurdles facing the Commission as it seeks to establish the existence of aid.

While increased enforcement against general aid schemes and particular forms of market rules is not necessarily a negative development, this chapter has highlighted two specific concerns with this possibility. The first relates to the legitimacy of the development of the law in this area by the Commission and the CJEU. There might be a legitimate general concern about the CJEU and the Commission seeking to interpret the provisions of the Treaties in a way that seeks to give greater powers to the EU to regulate a significant area of domestic policymaking by national governments, but the argument made here is more specific. That general concern might be intensified where the increased enforcement of one type of measure largely arises from developments in the law emerging from enforcement against another type of intervention, namely fiscal measures. The legitimacy of this increased enforcement might be further undermined in circumstances where it may be regarded as a by-product of developments elsewhere. The Commission may be regarded as

being capable of affording some political legitimacy to enforcement patterns, particularly in the sphere of State aid where it has broad control over this.¹³³ However, this legitimacy is likely to be undermined where it results from the policy priorities of the Commission regarding fiscal measures and not direct or deliberate consideration of the appropriate response to general aid schemes or market rules. This conclusion must be qualified by the acknowledgement that at least some of the similarity between the case law on fiscal measures and market rules merely reflects the reality that these measures are similar in character in some respects and that they sometimes pose the same basic problems for State aid regulation.

The second concern relates specifically to the discrimination standard and the important role it plays in facilitating the Commission in finding the existence of aid. It has been argued that the discrimination standard creates the potential for increased enforcement but also that it does so in a relatively unpredictable and unprincipled way. This is because the standard as articulated by the Commission and the CJEU has not been adequately explained. Discrimination in the sense of differential treatment of undertakings is an inevitable part of any system of economic regulation. The challenge for State aid law is to determine when such differential treatment is impermissible. In essence, this amounts to identifying whether the reasons justifying the differential treatment are acceptable or not. As has been argued above, the current State of the law effectively circumscribes the range of acceptable justifications but it does not do so according to any well-established pattern, system or test. Neither has the law done much to indicate what types of justification will or

¹³³ It is acknowledged, however, that the Commission's priorities here are not supposed to be capable of changing the definition of aid within the meaning of Article 107(1) TFEU in circumstances where this is to be assessed objectively by the CJEU. See Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 4; Case T-308/00 *Salzgitter AG v Commission* [2004] ECR II-1933, para 30. However, the Commission can exercise discretion in the priority of the cases it investigates and its allocation of resources, even if it must investigate any compliant it receives by way of preliminary examination. See Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, article 12(2); Case C-521/06 *P Athinaiki Techniki v Commission* EU:C:2008:422, para 38.

will not be capable of avoiding classification of an intervention as discriminatory. This makes the application of Article 107(1) TFEU more difficult to predict and more susceptible to the interpretive choices of the Commission. The fact that the Commission has thus far been relatively lenient in its application of the discrimination standard to market rules for granting licences and concessions does not preclude the possibility of more expansive enforcement should the priorities of the Commission change.

The role of the case law dealing with fiscal measures in contributing towards parallel developments in the treatment of other types of State intervention has largely been facilitated by the relative reluctance to distinguish between different forms of State intervention in the interpretation of Article 107(1) TFEU.¹³⁴ However, moves towards harmonisation of international taxation may lessen the priority of enforcement against fiscal measures for the Commission. It is therefore necessary to consider whether the doctrinal developments that emerged from that case law remain relevant in the light of greater tax cooperation, both in their application to fiscal measures and to other forms of State intervention.

¹³⁴ See Section 5.6.

7. CONTINUING RELEVANCE OF FISCAL MEASURES CASE LAW AFTER TAX HARMONISATION

7.1. Introduction

The preceding chapters have explored the response of State aid law to the challenge of fiscal measures and direct taxation. These chapters also examined the impact of this response beyond fiscal measures to shape enforcement patterns against other types of aid. It was argued that this response allows for much more expansive enforcement of the State aid rules against not only fiscal aid but also against a wide range of measures including direct grant and loan schemes and market rules. The purpose of this chapter is to explore the possibility of harmonisation and direct taxation and its impact on the relevance of the developments described in this thesis.

Significant proposals have been put forward both by the Organisation for Economic Cooperation and Development (the ‘OECD’) and the EU for the harmonisation of the direct taxation of large multinational companies including minimum effective corporate tax rates and common corporate tax bases. Because there is at least some extent to which the State aid rules have been used to respond to corporate tax competition between Member States, these proposals raise the possibility that the impact of the developments described in the preceding chapters may be diminished. This may be because these proposals will remove or at least mitigate the problem to which the developments in the fiscal aid case law were responding. Such rules might also be thought to impact the application of the State aid rules or to change the enforcement priorities of the Commission and move them away from fiscal measures.

This chapter offers a defence of the importance of the developments described in the preceding chapters and their continuing relevance to the enforcement of the State aid rules

against both fiscal aid and non-fiscal aid. First, the nature of the tax harmonisation proposals put forward by the OECD and the EU will be considered. It will be argued that while these appear likely to significantly moderate elements of tax competition in the EU, they do not completely remove this feature from the interactions between Member States nor do they directly amend or alter the application of the State aid rules. Second, it will be argued that the Commission has indicated its commitment to the enforcement of the rules in much the same way even if these proposals are ultimately approved. Third, this chapter will identify the constraints on the power of the Commission to radically shift its enforcement priorities away from direct taxation, including the oversight of the CJEU and the availability of private enforcement mechanisms through the CJEU and national courts. Fourth, it will be argued that the impact of the developments described in this thesis affect the treatment of non-fiscal measures as well and the treatment of this type of measure is inevitably beyond the reach of any tax harmonisation proposals.

In addition, this chapter will outline two areas where the impact of the developments described in this thesis in respect of both fiscal and non-fiscal measures is likely to increase. The first of these can be seen in secondary legislation regulating foreign subsidies. The second relates to new arrangements that have been agreed between the EU and the UK in respect of State aid and subsidy control in the aftermath of the UK's departure from the EU. In both of these areas, the State aid rules and the developments described in this thesis take on an important role in influencing the trading and diplomatic relationship between the EU and third countries.

7.2. Nature of Tax Harmonisation

7.2.1. Proposals for Tax Harmonisation

In order to assess the impact of tax harmonisation and the extent to which it conditions the influence of the developments in the fiscal aid case law described in this thesis, it is first necessary to consider the nature of the tax harmonisation that is likely to occur. This section will consider the existing proposals for harmonisation of direct taxation in the EU in the context of previous measures that have been adopted. This section will suggest that there are both political and legal impediments to further tax harmonisation in the EU. This section will then examine the potential impact of proposed tax harmonisation on the trends in the fiscal aid case law that have been identified in this thesis. While any such harmonisation is likely to reduce the pressure to apply the State aid rules against tax measures, such harmonisation is likely to be incomplete and would not preclude the application of those rules.

The most prominent proposal for the harmonisation of international taxation is the ‘Two Pillar Solution’ which has been agreed as part of the OECD/G20 Base Erosion and Profit Shifting Project.¹ As of the time of writing, this proposal has been agreed by 136 countries throughout the world, including all members of the G20 and the OECD, as well as all Member States of the EU.² The Two Pillar Solution marks a very significant step towards global tax harmonisation both in terms of the breadth of the range of jurisdictions it covers and the depth of the integration and harmonisation it envisages. The first element of the Two Pillar Solution involves some harmonisation of the rules for the allocation of a portion of the profits of multinational enterprises across different jurisdictions, with a view to increasing the extent to which the profits of such enterprises will be taxed in the jurisdiction of the market in which the relevant goods or services are used or consumed.³ The second element

¹ Organisation for Economic Co-operation and Development, ‘Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy’ (OECD, 8 October 2021).

² *ibid* 1-2.

³ *ibid* 1-2.

involves the fixing of a global minimum corporate tax rate of 15% combined with rules that allow States to impose additional taxes on amounts that are subject to a tax rate lower than this minimum in other jurisdictions.⁴

The impact of the Two Pillar Solution is likely to be significant within the EU. The formulation of common rules on attributing income to different jurisdictions and the fixing of a minimum tax rate for large multinational enterprises will inevitably limit the ability of Member States to engage in tax competition in the areas covered by the agreement. This will inevitably reduce the extent to which the State aid rules need to be used to mitigate competition between Member States in this area. Further, it may be that the dulling of competition between Member States on corporate taxation will also lead to a shift in the policy and enforcement priorities of the Commission in applying the State aid rules. The Commission may be less inclined to devote resources to applying the State aid rules in this way when Member States are complying with these new common rules on taxation. Further, the proposal for specific EU legislation to implement the Two Pillar Solution may give the Commission more effective tools to deal with tax harmonisation than the State aid rules.⁵

While it seems clear that the Two Pillar Solution will have a significant impact on the global tax landscape, it is submitted that it will not radically alter the significance of the developments in the State aid case law. This is because it does not remove the possibility for significant tax competition between Member States above the 15% minimum rate. Further, it is important to note that the proposals only affect corporate taxation for the largest multinational enterprises, with the tax arrangements of most companies remaining unaffected.⁶ The continued existence of tax competition beyond the scope of the Two Pillar

⁴ *ibid* 3-5. This is a minimum effective tax rate that will limit the extent to which the proposed harmonisation can be circumvented through other tax exemptions and other measures.

⁵ Commission, 'Communication from the Commission to the European Parliament and the Council – Business Taxation for the 21st Century' COM(2021) 251 final, 8.

⁶ *ibid* 1, 4.

Solution leaves open the possibility that the Commission and other actors may seek to use the State aid rules to lessen that competition.

Another significant proposal for harmonisation to be considered emerges from the EU institutions themselves. In May 2021, the Commission released updated proposals for tax harmonisation within the EU, intending to implement the Two Pillar Solution within the EU through the enactment of two directives.⁷ However, the proposals go further than the Two Pillar Solution and seek to neutralise the misuse of shell companies by multinational enterprises and to require certain multinational enterprises to publish details of their effective corporate tax rate within the EU.⁸ The Commission also intends to adopt a recommendation to Member States on the treatment of losses to facilitate post-pandemic recovery by small and medium-sized enterprises ('SMEs') and legislation to incentivise equity financing to mitigate what it perceives as a bias in favour of debt financing in tax systems across the EU.⁹

Among the most significant of these proposals, the Commission plans to adopt a 'single corporate tax rulebook for the EU' called 'Business in Europe: Framework for Income Taxation' ('BEFIT') which seeks to prescribe a common tax base and then allocate profits between Member States based on a formula.¹⁰ The Commission has also proposed a digital sales levy which will be administered by the EU itself. However, this appears to be inconsistent with the Two Pillar Solution and it is unclear if the Commission intends to proceed with this.¹¹ These proposals have finally replaced an earlier long-standing proposal for a Common Consolidated Corporate Tax Base (the 'CCCTB') which was first proposed

⁷ Commission, 'Communication from the Commission to the European Parliament and the Council – Business Taxation for the 21st Century' COM(2021) 251 final, 8.

⁸ *ibid* 9-10.

⁹ *ibid* 10-11.

¹⁰ *ibid* 11-12.

¹¹ Dáire Lawler, 'Fit for Purpose or Overly Taxing? The EU's Business Taxation Agenda for the 21st Century' (Institute of International and European Affairs, 28 October 2021) 6-7.

in 2011 and relaunched as part of a package of corporate tax reforms in 2016.¹² The significance of these proposals must be understood in the context of the relatively limited nature of EU harmonisation of direct taxation and the resistance of Member States to such harmonisation.

7.2.2. Member State Reluctance and Existing Common Rules

Taken together, these proposals go considerably further than any previous attempt to harmonise rules on direct taxation of corporations in the EU. Previous attempts to coordinate the tax rules of Member States were much more limited, beginning with the Code of Conduct on Business Taxation adopted in 1997. This Code of Conduct was agreed by the Council and provides criteria for the identification of measures that are likely to cause harmful tax competition such as rules offering preferential treatment for non-residents or companies without a substantial economic presence in a given State.¹³ Such measures are likely to influence the locational decisions of businesses within the EU. The Code of Conduct also provides that new measures of this type should not be introduced and that existing measures should be phased out.¹⁴ Member States must share information on potentially harmful tax measures and allow these to be assessed by the Code of Conduct Group which will report to the Council.¹⁵ However, the enforcement mechanisms are largely political in character, reflecting a longstanding reluctance to allow the EU to harmonise direct taxation.¹⁶

¹² Commission, 'Communication from the Commission to the European Parliament and the Council – Business Taxation for the 21st Century' COM(2021) 251 final, 12.

¹³ Conclusions of the ECOFIN Council Meeting on 1 December 1997 concerning taxation policy [1998] OJ C2/1.

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 198-199; William Bratton and Joseph McCahery, 'Tax Coordination and Tax Competition in the European Union: Evaluating the Code of Conduct on Business Taxation' (2001) 38 *Common Market Law Review* 677, 687.

The existing proposals also go beyond the measures contained in Anti-Tax Avoidance Directive adopted in 2016.¹⁷ This instrument requires Member States to implement five measures to disincentivise or restrict certain forms of aggressive tax planning. These include a general anti-abuse rule, rules on exit taxation, rules preventing undertakings from taking advantage of mismatches in different tax rules, rules preventing companies from shifting debt to jurisdictions with more favourable rules and rules preventing companies from shifting profits to low-tax jurisdictions. While the Anti-Tax Avoidance Directive contains legally binding enforcement mechanisms, it again falls short of harmonisation on a significant scale. Indeed, it has been observed that the Anti-Tax Avoidance Directive seems somewhat out of place in the context of the degree of harmonisation on direct taxation within the EU.¹⁸

The limited nature of harmonisation on direct taxation before the Two Pillar Solution and BEFIT proposals suggests that the adoption of such measures will face considerable challenges. It might be thought that the limited scope of the existing common rules are simply a result of the limits of the competences granted to the Union by the Treaties. While the EU does have competence to adopt measures relating to taxation, many of the legal bases available to the Commission to harmonise fiscal rules require unanimity in the Council. Article 113 TFEU, for example, permits the EU to harmonise indirect taxes but requires unanimity in the Council. While Article 114 TFEU allows for harmonisation measures for the completion and functioning of the internal market to be adopted based on qualified majority voting, this provision expressly excludes the possibility of it being used to enact fiscal provisions. Article 115 TFEU allows the Union to adopt measures to be adopted for

¹⁷ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L193/1.

¹⁸ Christiana Panayi, 'The Peripatetic Nature of EU Corporate Tax Law' (2019) 24 Deakin Law Review 1, 24-25. For example, it has been suggested that it is somewhat incoherent for the EU to fail to prescribe a minimum tax rate but at the same to penalise the shifting of profits to low-tax jurisdictions.

the same purpose and appears to be broad enough to include measures of direct taxation, but this legal basis also requires unanimity in the Council. It would appear then that anything other than unanimous agreement between Member States would be sufficient to obstruct any such harmonisation. The very broad consensus required to adopt a proposal under the most obvious legal bases in the Treaties undoubtedly plays some role in obstructing the harmonisation of tax rules. This is particularly the case where it is quite likely that tax harmonisation will result in differing costs and benefits for different Member States.¹⁹

However, it is important not to overstate the role of the architecture of the Treaties in limiting fiscal integration by Member States. The general reluctance of Member States to accept substantial harmonisation of direct taxation remains a significant obstacle to the existing proposals. Quigley has argued that there is a legal basis in the Treaties that would allow for further tax harmonisation in pursuit of internal market objectives with more permissive voting rules.²⁰ Article 116 TFEU allows the Commission to identify differences in national rules that distort conditions of competition on the internal market that should be eliminated. The Commission must then consult the relevant Member States and if no agreement can be reached to eliminate the distortion, the Council may adopt secondary legislation to eliminate the distortion by qualified majority.²¹ Similarly, Article 117 TFEU

¹⁹ See Reuven Avi-Yonah and Kimberly Clausing, 'More Open Issues Regarding the Consolidated Corporate Tax Base in the European Union' (2008) 62 *Tax Law Review* 119, 120 on earlier tax harmonisation proposals. Compare Jack Mintz and Joann M Weiner, 'Some Open Negotiation Issues Involving a Common Consolidated Corporate Tax Base in the European Union' (2008) 62 *Tax Law Review* 81 who argue that in the long-run such proposals could represent a Pareto-efficient outcome benefitting all Member States if they are interpreted as including compensating side-payments to Member States who stand to lose from the core proposals. See also Nicolas Chatelais and Mathilde Peyrat, 'Are Small Countries the Leaders of the European Tax Competition?' (2008) CES Working Paper 2008.58, 25 <<https://halshs.archives-ouvertes.fr/halshs-00332479/document>> accessed 21 November 2022; Michel Devereux and Simon Loretz, 'What Do We Know About Corporate Tax Competition?' (2013) 66 *National Tax Journal* 745, 765; Achim Kemmerling and Eric Seils, 'The Regulation of Redistribution: Managing Conflict in Corporate Tax Competition' (2009) 32 *West European Politics* 756, 770. Compare Yutao Han and Xi Wan, 'Who Benefits from Partial Tax Coordination' (2018) 42 *The World Economy* 1620.

²⁰ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 197-198.

²¹ Article 116 TFEU.

requires Member States to consult the Commission before implementing any national rule which may cause a distortion of competition on the internal market.²² If a Member State does not comply with any recommendation from the Commission on this, other Member States cannot be required to amend their laws to remove the distortion under Article 116.²³ Quigley argues that these provisions of the Treaties would allow the Union to bring about more extensive harmonisation of direct taxation if there was political will to do so.²⁴

However, this account is not universally accepted. It has been argued that while the provisions of Article 116-117 TFEU would be an effective tool for removing non-selective measures that are found to be harmful under the Code of Conduct on Business Taxation that were adopted by a few Member States, its use to adopt the wide-ranging tax measures that are currently being proposed would be disproportionate and inappropriate.²⁵ This view sees Articles 116-117 TFEU as a subsidiary safety valve to address distortions too specific to justify total harmonisation under Articles 113-115 TFEU but too generic to be captured by the prohibition in Article 107(1) TFEU. A somewhat more radical argument has been proposed that moves to eliminate tax competition are likely to breach the requirements that all acts be consistent with the principles of proportionality and subsidiarity.²⁶ These

²² Article 117(1) TFEU.

²³ Article 117(2) TFEU.

²⁴ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 197-198.

²⁵ Martijn Nouwen, 'The Market Distortion Provisions of Articles 116-117 TFEU: An Alternative Route to Qualified Majority Voting in Tax Matters?' (2021) 49 *Intertax* 14, 27-28.

²⁶ Brady Gordon, 'Tax Competition and Harmonisation under EU Law: Economic Realities and Legal Rules' (2014) 39 *European Law Review* 790. See Article 5 TEU. This argument may be somewhat overstated in circumstances where judicial review of competence under Article 5 TEU has historically been quite permissive and deferential to the Union legislator. See Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* ECLI:EU:C:2000:544, [2000] ECR I-8419; Case C-491/01 *R v Secretary of State ex parte BAT and Imperial Tobacco* ECLI:EU:C:2002:741, [2002] ECR I-11543; Case C-210/03 *Swedish Match* ECLI:EU:C:2004:802, [2004] ECR I-11893; Cases C-154/04 and C-155/04 *Alliance for Natural Health* ECLI:EU:C:2005:449, [2005] ECR I-6451; Case C-380/03 *Germany v Parliament and Council (Tobacco Advertising II)* ECLI:EU:C:2006:772, [2006] ECR I-11573; Case C-58/08 *Vodafone, O2 et al v Secretary of State* ECLI:EU:C:2010:321, [2010] ECR I-4999; Case C-358/14 *Poland v Parliament and Council* ECLI:EU:C:2016:323; Case C-477/14 *Pillbox* ECLI:EU:C:2016:324; Case C-547/14 *Philip Morris* ECLI:EU:C:2016:325. For the view that the approach of the CJEU is too lenient in reviewing competence, see Stephen Weatherill, 'The limits of legislative harmonisation ten years after Tobacco Advertising: how the Court's case law has become a "drafting guide"' (2011) 12 *German Law Journal* 827. For a view endorsing

interpretations suggest that the unanimity voting rules cannot entirely be circumvented and that they may still represent a significant obstacle to harmonisation of direct taxation across the EU.²⁷ There is therefore no guarantee that the Commission's existing proposals will succeed in overcoming the disagreement and inertia among Member States on this issue. If any harmonisation does occur within the EU, there is similarly no guarantee that it will be as extensive as outlined in these proposals. This suggests that any potential dilution of the significance of the developments in the application of the State aid rules to fiscal measures might not be as substantial as might otherwise be expected.

7.2.3. Impact of Harmonisation on Developments from Case Law on Fiscal Measures

Even in circumstances where such proposals are adopted in their current form and significant harmonisation of direct taxation is implemented across the EU combined with the OECD Two Pillar Solution, it is submitted that this does not radically alter the importance of the developments in the application of the State aid rules to fiscal measures outlined in this thesis. Such developments would continue to be relevant because the proposals would not alter the application of the State aid rules or prevent them from applying to policies governed by the harmonisation proposals. Further, while the proposals for harmonisation are substantial, they will not completely eliminate tax competition between Member States. This leaves it open to the Commission and private parties to continue to invoke the State aid rules

the legitimacy of relatively broad interpretations of the competence of the EU, see Paul Craig, 'Competence: clarity, conferral, containment and consideration: The nature of the "competence problem"' (2004) 29 *European Law Review* 323, 324-325.

²⁷ They operate in this way combined with the substantial political disagreement among Member States about the benefits of more extensive tax harmonisation. See Christiana Panayi, 'The Peripatetic Nature of EU Corporate Tax Law' (2019) 24 *Deakin Law Review* 1, 20.

and rely on the developments arising from the fiscal aid case law to manage this phenomenon.

The first limitation on any attempt to harmonise taxation across the Member States through EU legislation or the OECD Two Pillar Solution is that these measures do not purport to alter the application of the State aid rules in any way. The State aid rules are codified in the primary legislation of the EU. While the Commission has considerable discretion on compatibility decisions under Article 107(3) TFEU, the application of the prohibition on aid in Article 107(1) TFEU, the exemptions in Article 107(2) TFEU and the standstill obligation in Article 108(3) TFEU are capable of objective review by the Union courts.²⁸ The interpretation of these latter three provisions cannot be amended by any secondary legislation harmonising tax regimes across the EU or the adoption by Member States of the Two Pillar Solution. Further, the identification of State aid does not depend on the comparison between an impugned measure and corresponding measures taken by other Member States.²⁹ Therefore, convergence of Member State tax rules under the harmonisation proposals will not determine whether those rules are caught by the prohibition on State aid.

The second limitation on the impact of the proposals for tax harmonisation is that they do not seek to achieve a complete fiscal union between Member States or harmonise all aspects of taxation. This means that the potential for tax competition between Member States and the challenges this poses will remain a feature of the internal market and the State aid rules may continue to be invoked as a means of addressing these challenges. For example, the proposals are targeted towards the taxation of very large multinational companies. While such companies are likely to be the primary beneficiaries of tax competition between Member States, it remains the case that some quite large, reasonably mobile companies

²⁸ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 4-5.

²⁹ Case 173/73 *Italy v Commission (Italian Textiles)* ECLI:EU:C:1974:71, [1974] ECR 709, para 17.

falling below the relevant turnover thresholds will remain unaffected by the reforms as currently formulated.³⁰ Further, while the proposals seek to establish a CCCTB, they only specify a minimum corporate tax rate. While this would pose a significant constraint on corporate tax competition within the EU,³¹ as argued above there remains significant space for competition above this rate and will not eliminate this phenomenon entirely. Even in areas that are subject to harmonised rules, the Commission may use the failure to correctly implement or apply these rules as alternative avenue for arguing that aid has been granted.³² This leaves open the possibility that the Commission will continue to apply the State aid rules and the developments arising from the fiscal aid case law after any harmonisation measures are adopted. Further, the Commission has committed itself ‘to use all tools at its disposal to ensure companies pay their fair share of tax, including the enforcement of State aid rules’ after the adoption of such proposals.³³

7.3. Limitations on Fiscal Aid as Self-Enforcing

7.3.1. Commission’s Ability to Weaken Enforcement Against Fiscal Measures

³⁰ The thresholds currently proposed in the Two Pillar Solution are a global turnover above €20 billion euros and profitability above 10% calculated using an averaging mechanism (with the turnover threshold to be reduced to €10 billion euros at a later stage) at for Pillar One and a global turnover of €750 million for Pillar Two. See Organisation for Economic Co-operation and Development, ‘Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy’ (8 October 2021).

³¹ This is particularly the case in circumstances where the proposed minimum rate of 15% is higher than the rate prevailing in various Member States. See Organisation for Economic Co-operation and Development, ‘Corporate Tax Statistics: Third Edition’ (OECD, 29 July 2021) 10. These Member States include Ireland, Hungary and Bulgaria.

³² Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 206. The General Court upheld the Commission’s reliance on the failure to correctly apply rules contained in the Anti-Tax Avoidance Directive into national law in support of its contention that aid had been granted in Cases T-516/18 and T-525/18 *Luxembourg and Engie v Commission* ECLI:EU:T:2021:251, paras 384-463. This conclusion is not disturbed by the decision in Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859 paras 93-94, which leaves open the possibility that the relevant reference framework could be derived from EU law in circumstances where the relevant rules are the subject of harmonisation.

³³ Commission, ‘Communication from the Commission to the European Parliament and the Council – Business Taxation for the 21st Century’ COM(2021) 251 final, 10.

While the foregoing section confirms that the Commission remains willing and able to use the State aid rules against tax measures irrespective of the proposed tax harmonisation measures, there remains a possible objection to the argument canvassed here that the developments arising from the case law on fiscal measures will remain relevant. While the Commission can continue to enforce the State aid rules in the same way as before, it may be that changes in the Commission's enforcement priorities and policy direction in response to such reforms might still diminish the relevance of the State aid rules and their application to tax measures. In this section, it will be argued that, despite the discretion that the Commission has in conducting State aid investigations and determining whether aid is compatible with the internal market, the intervention of private parties, national courts and the CJEU is likely to ensure that the State aid rules exert a continuing influence on the tax measures irrespective of harmonisation.

Only a brief overview of the enforcement regime for State aid is necessary here. The notion of aid is one that is defined in Article 107(1) TFEU and the interpretation of the CJEU of that provision. The Commission does not have discretion in determining whether a given measure constitutes aid,³⁴ although the CJEU will defer somewhat to any technical economic analysis which the Commission must undertake in assessing certain criteria used to identify aid measures.³⁵ Any new measure that constitutes aid within the meaning of Article 107(1) TFEU is presumptively prohibited and cannot be implemented unless the Commission has been notified of the proposed measure and has determined that it is either not aid or is aid

³⁴ Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) para 19.56; Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 901-902; T-366/00 *Scott SA v Commission* ECLI:EU:T:2007:99, [2007] ECR II-797, para 96; Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, para 111.

³⁵ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 901-903; Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) para 19.57; Joined Cases C-341/06 P and C-342/06 P *Chronopost v Ufex* ECLI:EU:C:2008:375, [2008] ECR I-4777, para 143; Case T-266/02 *Deutsche Post v Commission* ECLI:EU:T:2008:235, [2008] ECR II-1233, para 90.

that is compatible with the internal market.³⁶ In determining whether an aid measure is compatible with the internal market, the Commission may rely on any of a number of grounds.³⁷ The grounds listed in Article 107(2) TFEU declare that certain categories of aid are compatible with the internal market and their application is capable of full judicial review by the CJEU.³⁸ By contrast, the grounds listed in Article 107(3) TFEU grant discretion to the Commission to determine whether aid described in such grounds is compatible with the internal market.³⁹ The CJEU is more deferential to the Commission's decisions on these grounds.⁴⁰ The Commission's priorities will therefore have some influence over enforcement patterns. Further, the Commission's priorities may also influence enforcement patterns in the manner in which it allocates investigative resources.

This regime gives some power to the Commission to influence enforcement outcomes in a manner that accords with its own policy decisions. For example, the Commission's discretion in respect of whether aid is compatible with the internal market allows it to determine whether a given aid measure can be granted or not. It can also exercise

³⁶ Article 108(3) TFEU; Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, article 3. There are certain de minimis exceptions and block exemptions from this general obligation to notify. See for example Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1; Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1. The application of these regulations have been extended to the end of 2023 by Commission Regulation (EU) 2020/972 of 2 July 2020 amending Regulation (EU) No 1407/2013 as regards its prolongation and amending Regulation (EU) No 651/2014 as regards its prolongation and relevant adjustments [2020] OJ L215/3. For further discussion, see Section 2.5.2.2.

³⁷ For a more general discussion of the compatibility assessment, see Section 2.4.

³⁸ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 255; Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen v Commission* ECLI:EU:C:1999:326, [1999] ECR II-3663, para 169; Case T-268/06 *Olympiaki Aeroporia Ypiresies AE v Commission* ECLI:EU:T:2008:222, [2008] ECR II-1091, paras 51-53; Case C-301/96 *Germany v Commission* ECLI:EU:C:2003:509, [2003] ECR I-9919, para 80.

³⁹ Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:209, [1980] ECR 2671, paras 17, 24; Case C-93/15 P *Banco Privado Português and Massa Insolvente do Banco Privado Português* ECLI:EU:C:2015:703, para 60; Case C-574/14 *PGE Górnictwo i Energetyka Konwencjonalna* ECLI:EU:C:2016:686, para 32; Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 251.

⁴⁰ Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) para 19.57. See for example Case C-310/99 *Italy v Commission* ECLI:EU:C:2002:143, [2002] ECR I-2289, para 46.

this discretion to produce general guidance to reflect its shifting priorities, such as the more permissive approach it outlined in its Temporary Framework for aid granted in response to the Covid-19 pandemic.⁴¹ Further, the Commission is the entity charged with investigating breaches of the State aid rules and it can therefore shape enforcement outcomes by redirecting resources towards its own priorities. It might therefore be thought that if the priorities of the Commission moved on from enforcement against fiscal measures after the harmonisation of certain rules on direct taxation, then the Commission might use its discretion to curtail enforcement of the State aid rules against these measures. This might diminish the relevance of the developments in the case law on fiscal aid.

7.3.2. Constraints on the Commission’s Power and Private Enforcement

However, it is submitted that the ability of the Commission to use its enforcement powers to appreciably curtail the enforcement of the State aid rules against measures of direct taxation remains relatively constrained. This is because the competitors of undertakings who receive

⁴¹ Communication from the Commission – Temporary Framework to support the economy in the context of the coronavirus outbreak [2020] OJ C911/1, as amended by Communication from the Commission - Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C112/1; Communication from the Commission – Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C164/3; Communication from the Commission – Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C218/3; Communication from the Commission – 4th Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance [2020] OJ C340/1; Communication from the Commission – Fifth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance [2021] OJ C34/6; Communication from the Commission – Sixth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance [2021] OJ C473/1.. See also Paula Riedel, Thomas Wilson and Shane Cranley, ‘Learnings from the Commission’s Initial State Aid Response to the COVID-19 Outbreak’ (2020) *European State Aid Law Quarterly* 115, 117; Carole Maczkovics, ‘How Flexible Should State Aid Control Be in Times of Crisis?’ (2020) *European State Aid Law Quarterly* 271, 279.

aid have some powers to intervene in the process. Despite certain limitations on their rights, competitors can require the Commission to take a formal position on a complaint. They can seek judicial review and annulment of decisions refusing to open the formal investigation procedure and indeed final decisions clearing aid. They can also impede the grant of aid through national courts. It is submitted that these powers, together with the role of the CJEU in interpreting the notion of aid, make it more difficult for the Commission to radically change its enforcement priorities and refrain from enforcing the State aid rules against fiscal measures or measures of direct taxation.

While the Commission has some power over the allocation of its investigative resources and can avoid or delay taking a position on a particular aid measure, its ability to do this is quite limited.⁴² The notification and standstill obligation in Article 108(3) TFEU means that the Commission must adjudicate on measures notified by Member States reasonably quickly, with time limits being set out in secondary legislation.⁴³ Even if the Commission may be able to avoid ruling on potential aid measures granted through direct taxation that are not notified, a portion of such measures will likely be referred to the Commission by complaints submitted by the competitors of beneficiaries.⁴⁴ Many commentators have highlighted weaknesses in the procedural rights of complainants under the State aid rules.⁴⁵ However, it remains the case that a complainant can compel the

⁴² See Section 2.5 for an overview of enforcement procedures in State aid law.

⁴³ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, articles 4(5), 9(6).

⁴⁴ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, articles 12, 24.

⁴⁵ These include the absence of any procedural rights at the preliminary examination stage, any rights to access to the file in investigations and any rights to respond to the comments of other parties. See for example Adinda Sinnaeve and Piet Jan Slot, 'The New Regulation on State Aid Procedures' (1999) 36 *Common Market Law Review* 1153, 1184; Andreas Bartosch, 'The Procedural Regulation in State Aid Matters' (2007) 6 *European State Aid Law Quarterly* 474, 479; Preslava Dilkova, 'The new procedural regulation in state aid: whether "modernisation" is in the right direction?' (2014) 35(2) 88-91, 91; Edoardo Gambaro and Francesco Mazzocchi, 'Private Parties and State Aid Procedures: A Critical Analysis of the Changes Brought by Regulation 734/2013' (2016) 53 *Common Market Law Review* 385, 396. On the absence of any right to access the investigation file, see Case T-613/97 *Union Française de L'Express (Ufex) v Commission* ECLI:EU:T:2006:150, [2006] ECR II-4055, para 90; Case C-139/07 P *Commission v TGI*

Commission to reach a formal decision rejecting its complaint alleging unlawful aid and refusing to undertake further investigations due to the absence of serious doubts as to the existence of aid or its compatibility with the internal market.⁴⁶ The Commission can only refuse to open the formal investigation procedure if it has no serious difficulties in confirming that it is compatible with the internal market and the concept of ‘serious difficulties’ is an objective one capable of full review by the CJEU.⁴⁷ While it remains possible for the Commission to delay in ruling on some cases that it does not consider to be a priority, there appear to be greater limits to this discretion than in competition law cases.⁴⁸

It is also important to note that the Commission’s ability to remove priority from enforcement against direct taxation measures is limited by the mechanisms available to private parties to enforce the rules. As indicated above, it is difficult for the Commission to avoid making a formal decision on a measure that is notified by a Member State or is the subject of a complaint from a private party. Once a formal decision is made, this can be the

ECLI:EU:C:2010:376, [2010] ECR I-5885, paras 50-64; Case T-198/01 *TGI v Commission* ECLI:EU:T:2004:222, [2004] ECR II-2717, para 197; Cases T-494/08 to 500/08 and T-509/08 *Ryanair v Commission* ECLI:EU:T:2010:511, [2010] ECR II-5723, para 70. On the rights of affected undertakings more generally, see Section 2.5.2.3.

⁴⁶ Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) para 18.98; Fernando Pastor-Merchante, ‘The Protection of Competitors under State Aid Law’ (2016) 15 *European State Aid Law Quarterly* 527, 536; Case C-521/06 P *Athinaiki Techniki I* ECLI:EU:C:2008:422, [2008] ECR I-5829, para 40; Case C-322/09 P *NDSHT v Commission* ECLI:EU:C:2010:701, [2010] ECR I-11911, para 50; Case T-182/10 *Aiscat v Commission* ECLI:EU:T:2013:9, para 28; Case C-615/11 P *Commission v Ryanair* ECLI:EU:2013:310, para 35.

⁴⁷ Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) para 18.50; Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 905. See for example Case C-431/07 P *Bouygues SA v Commission* ECLI:EU:C:2009:223, [2009] ECR I-2665, para 63; Case T-57/11 *Castelnou Energia v Commission* ECLI:EU:T:2014:1021, para 81. However, some cases have noted that there may be some room for the Commission’s own assessment of the circumstances of the case. See Case T-95/03 *Asociación de Estaciones de Servicio v Commission* ECLI:EU:T:2006:385, [2006] ECR II-4739, para 139; Case T-30/03 *RENV 3F v Commission* ECLI:EU:T:2011:534, [2011] ECR II-6651, para 55. However, it should be noted that this full review is available only in respect of a decision not to open the formal investigation procedure and the Union courts will be more deferential where the Commission has decided to open the formal investigation procedure. See Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 905-906; Joined Cases T-195/01 R and T-207/01 R *Government of Gibraltar v Commission* ECLI:EU:T:2001:291, [2001] ECR II-3915, para 79.

⁴⁸ Case C-119/97 P *Ufex v Commission* ECLI:EU:C:1999:116, [1999] ECR I-1341, para 88; Case T-475/04 *Bouygues v Commission* ECLI:EU:T:2007:196, [2007] ECR II-2097, para 158; Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 670-671. Compare Case T-24/90 *Automec v Commission* ECLI:EU:T:1992:97, [1992] ECR II-2223.

subject of judicial review before the Union courts under Article 263 TFEU. While the Member State alone will be the addressee of the decision, the CJEU has given a relatively liberal interpretation to the standing rules derived from *Plaumann*⁴⁹ for competitors of the beneficiaries of aid measures.⁵⁰ The requirement of direct concern will be satisfied where a competitor seeks to annul a decision approving aid that has already been granted or has already been approved by national authorities.⁵¹ The CJEU has also taken a relatively permissive approach to the interpretation of the requirement for individual concern compared with other areas.⁵² A competitor of a beneficiary must show some substantial economic impact to them as a result of the grant of the aid to establish individual concern where they seek to challenge a final decision or to challenge a preliminary decision exclusively on the merits.⁵³ While it has been suggested that this requirement has become increasingly demanding in terms of the probability and magnitude of the harm,⁵⁴ it still facilitates some competitors in challenging the Commission's decisions.

However, it is easier for an aggrieved competitor to challenge a preliminary decision not to open the formal investigation procedure and obstruct the approval of aid.⁵⁵ Provided that one of the arguments raised by the applicant relates to the failure by the Commission to initiate the formal investigation procedure, the applicant need only show that they are an

⁴⁹ Case 25/62 *Plaumann v Commission* ECLI:EU:C:1963:17, [1963] ECR 199.

⁵⁰ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (7th edn, Oxford University Press 2020) 574-575;

⁵¹ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 857; See for example Case T-375/04 *Scheucher-Fleisch v Commission* ECLI:EU:T:2009:445, [2009] ECR II-4155, paras 36-39.

⁵² Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (7th edn, Oxford University Press 2020) 574-575; Fernando Pastor-Merchante, 'The Protection of Competitors under State Aid Law' (2016) 15 *European State Aid Law Quarterly* 527, 536.

⁵³ Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) paras 19.34-19.37.

⁵⁴ Fernando Pastor-Merchante, 'The Protection of Competitors under State Aid Law' (2016) 15 *European State Aid Law Quarterly* 527, 535. For a detailed review of the approach of the CJEU in this area, see Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 858-885.

⁵⁵ Leo Flynn and Hans Gilliams, 'Judicial Protection' in L Hnacher, T Ottervanger and P Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2022) 1117-1197, para 27-049.

‘interested party’ within the meaning of the procedural rules.⁵⁶ This has been defined very broadly, requiring only that the applicant’s ‘interests might be affected by the granting of aid’.⁵⁷ This allows a very broad category of applicant to rely on substantive errors in the decision to require the Commission to open the formal investigation procedure and obtain a ruling from the CJEU on the matter.⁵⁸ While the rights available as part of the formal investigation procedure are limited by the absence of any entitlement for undertakings to view the Commission’s file or to respond to the comments of others,⁵⁹ this type of challenge will at least obstruct the Commission to some extent.⁶⁰ It may also lead the Union courts to make findings on the substance of the case which may subsequently affect the Commission’s reassessment of the measures, limiting the Commission’s ability to radically change its enforcement against fiscal measures.

Moreover, private parties may cause disruption and provoke formal decisions on measures by challenging them before the national courts.⁶¹ National courts are empowered

⁵⁶ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, article 1(h). This appears to be equivalent to the ‘parties concerned’ mentioned in Article 108(2) TFEU. See Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, recital (33).

⁵⁷ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, article 1(h). Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) para 18.64 explains that this codifies the position in Case 323/82 *Intermills v Commission* ECLI:EU:C:1984:345, [1984] ECR 3809, para 16.

⁵⁸ See for example Case T-578/17 *a&o hostel and hotel Berlin GmbH v Commission (Jugendherberge Berlin)* ECLI:EU:T:2019:437, paras 45-48. See also Christopher McMahon, ‘The Relationship between Economic Advantage and the Compatibility Assessment in Decisions Not to Raise Objections’ (2021) 20 *European State Aid Law Quarterly* 427.

⁵⁹ Case C-367/95 P *Commission v Sytraval* ECLI:EU:C:1998:154, [1998] ECR I-171; Case C-139/07 P *Commission v TGI* ECLI:EU:C:2010:376, [2010] ECR I-5885, paras 50-64; Case T-198/01 *TGI v Commission* ECLI:EU:T:2004:222, [2004] ECR II-2717, para 197; Cases T-494/08 to T-500/08 and T-509/08 *Ryanair v Commission* ECLI:EU:T:2010:511, [2010] ECR II-5723, para 70; Fernando Pastor-Merchante, ‘The Protection of Competitors under State Aid Law’ (2016) 15 *European State Aid Law Quarterly* 527, 536; Preslava Dilkova, ‘The new procedural regulation in state aid: whether “modernisation” is in the right direction?’ (2014) 35(*European Competition Law Review* 88, 91; Edoardo Gambaro and Francesco Mazzocchi, ‘Private Parties and State Aid Procedures: A Critical Analysis of the Changes Brought by Regulation 734/2013’ (2016) 53 *Common Market Law Review* 385, 396; Adinda Sinnaeve and Piet Jan Slot, ‘The New Regulation on State Aid Procedures’ (1999) 36 *Common Market Law Review* 1153, 1184; Andreas Bartosch, ‘The Procedural Regulation in State Aid Matters’ (2007) 6 *European State Aid Law Quarterly* 474, 479.

⁶⁰ Fernando Pastor-Merchante, ‘The Protection of Competitors under State Aid Law’ (2016) 15 *European State Aid Law Quarterly* 527, 538.

⁶¹ See also Section 2.5.2.2 on the powers of national courts in this sphere.

to enforce the standstill obligation in Article 108(3) TFEU and they may interpret the notion of aid in Article 107(1) TFEU for that purpose.⁶² They may also refer questions on these issues under Article 267 TFEU to the CJEU, which will always have the final word on the interpretation of the notion of aid.⁶³ The Commission can make submissions to a national court where State aid is at issue, but its recommendations do not bind the national court.⁶⁴ Even though national courts cannot adjudicate on the compatibility of a measure with the internal market, they can take steps to suspend the measure until the Commission decides on the matter.⁶⁵ While there are limitations to the powers of national courts in this sphere, this enforcement mechanism assists competitor undertakings seeking to force the Commission to investigate the matter further. This is because the national court will only be required to refrain from taking decisions inconsistent with those of the Commission after the Commission has decided to open the formal investigation procedure.⁶⁶

7.3.3. Compatibility Assessment and Fiscal Measures

The potential of the compatibility assessment to allow the Commission to reduce enforcement against fiscal aid is also relatively limited.⁶⁷ The issue of compatibility is reserved to the Commission and that institution has a broader discretion to determine

⁶² Case 120/73 *Lorenz GmbH v Germany* ECLI:EU:C:1973:152, [1973] ECR 1471; Case 121/73 *Markmann AG v Germany* ECLI:EU:C:1973:153, [1973] ECR 1495; Case 122/73 *Nordsee GmbH v Germany* ECLI:EU:C:1973:154, [1973] ECR 1511.

⁶³ Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) para 19.56; Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 756-758; T-366/00 *Scott SA v Commission* [2007] ECR II-797, para 96; Case C-487/06 P *British Aggregates Association v Commission* [2008] ECR I-10515, para 111.

⁶⁴ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, article 29(2); Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 760; Communication from the Commission – Commission Notice on the enforcement of State aid rules by national courts [2021] OJ C305/1, paras 104-130.

⁶⁵ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 774.

⁶⁶ Case C-284/12 *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH* ECLI:EU:2013:755, para 33; Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 767-768.

⁶⁷ See Section [2.4] for further discussion of the compatibility assessment. See also Section [5.5.2].

whether an aid measure is compatible with the internal market under Article 107(3) TFEU subject to more limited judicial review from the CJEU.⁶⁸ However, the grounds for compatibility set out in that provision do not lend themselves particularly well to giving much more favourable treatment to measures based exclusively on their form. For example, the mere fact that a measure is granted in the form of an exemption from direct taxation does not speak to its ability to promote the economic development of relatively disadvantaged regions⁶⁹ or its propensity to ‘promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State’.⁷⁰

However, the compatibility assessment assesses the economic impact of the measure in question in much greater detail than in Article 107(1) TFEU. As has been observed elsewhere in this thesis, there may be ways in which tax incentives and other types of aid differ in their economic effects.⁷¹ To the extent that they do so, the compatibility assessment may be able to take account of these factors and it may be possible for the Commission to take a more favourable view of direct tax measures after tax harmonisation occurs. This is because the compatibility assessment involves a much more detailed assessment of the economic effects of aid measures than the inquiry under Article 107(1) TFEU.⁷² However, such a difference in economic effect may well be small and highly contingent on the precise

⁶⁸ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 4; Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) para 19.57. See for example Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:209, [1980] ECR 2671, paras 17, 24; Case C-310/99 *Italy v Commission* ECLI:EU:C:2002:143, [2002] ECR I-2289, para 46.

⁶⁹ Article 107(3)(a) TFEU.

⁷⁰ Article 107(3)(b) TFEU.

⁷¹ See Section 3.5.5. Isabel Busom, Beatriz Corchuelo and Ester Martínez-Ros, ‘Tax incentives... or subsidies for business R&D?’ (2014) 43 *Small Business Economics* 571; Hua Cheng et al., ‘Different policy instruments and the threshold effects on collaboration efficiency in China’ (2020) 47 *Science and Public Policy* 348; Ken Woodside, ‘Tax Incentives vs. Subsidies: Political Considerations in Governmental Choice’ (1979) 5 *Canadian Public Policy* 248; Alexander Haupt and Tim Krieger, ‘The role of relocation mobility in tax and subsidy competition’ (2020) 116 *Journal of Urban Economics* 103196; Phedon Nicolaidis, ‘Grants versus Fiscal Aid: In Search of Economic Rationality’ (2015) 14 *European State Aid Law Quarterly* 410.

⁷² See Leigh Hancher and Phedon Nicolaidis, ‘Compatibility of Aid – General Introduction’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 193-220, 203.

form of the aid scheme at issue. This may limit the ability of the Commission to justify a direct preference for tax measures.

Ultimately, the adoption of proposed measures to harmonise direct taxation for corporations across the EU will not insulate direct taxation from the impact of significant developments in the interpretation of the notion of aid. This is in part because these changes do not alter the application of the State aid rules to taxation and the Commission is committed to continuing to enforce these rules against tax measures. However, the continuing relevance of the developments described in this thesis is also secured by the ability of private enforcement mechanisms to moderate any attempt by the Commission to dramatically change its enforcement priorities in this regard. While there are clear limits to the reach of private enforcement, they can obstruct the Commission in approving aid and obtain judicial rulings on the substance of the matter that may force the Commission's hand in the investigation.

7.4. Wider Reach of Developments on Fiscal Measures

The foregoing sections have argued that the adoption of proposed harmonisation measures for the direct taxation of corporations across the EU will not insulate direct taxation from the impact of the State aid rules and the developments arising from the case law on fiscal aid. In this section, it will be argued that the State aid rules and the developments arising from the fiscal aid case law described in this thesis will continue to be an important and influential part of the regulation of the internal market beyond the area of taxation. It will be argued that irrespective of the tax harmonisation proposals described above, the developments in the case law that have emerged from fiscal aid cases have an increasing influence on cases that do not involve direct taxation or indeed any form of taxation. The

increasing relevance of these developments to the identification of aid granted through market rules means that their importance cannot be diminished by the adoption of measures that harmonise taxation rules across the EU.

The previous chapter has examined the impact of the developments in the fiscal aid case law on the application of the State aid rules to other forms of aid.⁷³ These developments can be found in the interpretation of the notion of aid in Article 107(1) TFEU. The most significant of these is the movement of the selectivity criterion away from a structured three-stage test towards a more reductive test that seeks to identify discrimination. The primary feature of this test is that it requires Member States to justify differential treatment of different categories of undertakings by reference to some norm or objective that is regarded as acceptable under EU law.⁷⁴ While Member States enjoy a broad discretion as to the objectives that they wish to invoke to justify differential treatment of undertakings, it is clear from the case law that this discretion is not unlimited and that certain objectives cannot be used in this way. This can be seen in the refusal to allow a Member State to justify a tax measure that favoured offshore companies even though this could readily be interpreted as the primary objective of the system of which it formed part in *Gibraltar*.⁷⁵ This means that the test imposes substantive restrictions on what objectives Member States can pursue using measures subject to the prohibition on aid in Article 107(1) TFEU. Further, it has been

⁷³ See generally Chapter 6.

⁷⁴ See Sections 4.5.2, 8.2.1.

⁷⁵ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113. See also a range of decisions requiring that national tax rules on transfer pricing and tax rulings respect the arm's length principle. See for example Joined Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338, paras 214-225; Joined Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670, paras 141-144. See also Case C-337/19 P *Commission v Belgium and Magnetrol* ECLI:EU:C:2021:741. For more complete discussion of this decision, see Christopher McMahon, 'Endorsement for Commission's approach to tax rulings from the Court of Justice: the decision in *Commission v Belgium and Magnetrol* (C-337/19 P) EU:C:2021:741' (2022) 43 *European Competition Law Review* 196. See also qualification of this in C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859 and discussion in Section 4.6.3.

argued in this thesis that this test makes it easier for the Commission to establish that a measure is selective and therefore constitutes State aid.

While cases dealing with fiscal measures played a decisive role in producing this important doctrinal development, its impact extends beyond taxation. As observed earlier in this thesis, the CJEU has done little to insulate the principles applicable to tax measures from the general rules applicable to all State aid measures.⁷⁶ Therefore, the discrimination standard, which has come to occupy a central role in the interpretation of the selectivity criterion, is likely to facilitate enforcement against non-fiscal measures as well as those delivered through the tax system. This is likely to facilitate the Commission in establishing that general aid schemes involving direct grants or subsidies that apply to broad categories of undertakings constitute aid.⁷⁷ Further, the discrimination standard occupies a more central role in decisions of the CJEU and the Commission relating to aid granted by market rules, particularly the grant of permits, licences, concessions or similar rights.⁷⁸ In such cases, the discrimination standard is increasingly becoming the fulcrum around which State aid enforcement turns.

The emerging importance of the discrimination standard in the interpretation of the selectivity criterion in cases that do not deal with tax measures cannot be meaningfully affected by the moves towards the harmonisation of direct taxation in the EU. Non-fiscal measures will simply not be covered by any harmonisation measures. Moreover, tax harmonisation cannot affect the interpretation of the prohibition on aid in Article 107(1) TFEU and the application of the discrimination standard. Any change in the Commission's

⁷⁶ See Section 5.6.

⁷⁷ See Section 6.2.3.

⁷⁸ See Section 6.3. See for example Case C-518/13 *Eventech* ECLI:EU:C:2015:9; *Alleged illegal State aid awarded to Yliopiston Apteekki Oy (UHP)* (Case SA.42028) Commission Decision of 20 November 2017 [2017] OJ C422/1; *Alleged aid to KGHM Polska Miedź SA* (Case SA.41116) Commission Decision of 7 November 2017 [2017] OJ C400/1.

policy priorities in the wake of the harmonisation measures that might affect enforcement patterns is likely to be limited to fiscal measures rather than other measures such as permits, licences, concessions or similar rights. While it may indeed be desirable to regulate the direct taxation policies of Member States directly rather than using the somewhat ill-suited instrument of State aid control, the impact of the response of the Commission and the Union courts to fiscal measures has already developed in a manner that prevents it from being easily contained or reversed. The impact of the developments emerging from the fiscal aid cases is therefore likely to persist in the aftermath of any harmonisation on direct taxation.

7.5. Implications for Interpretation of Foreign Subsidies Regulation

Another area that is likely to ensure the continuing relevance of the developments in State aid doctrine stimulated by the fiscal aid litigation can be found in Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (the ‘FSR’).⁷⁹ The FSR has considerable potential to perpetuate and amplify the impact of developments from the tax cases by bringing a whole new category of State intervention (and by extension the relationships between the EU and third countries) within their influence. This section will give an overview of the structure and content of the FSR and before outlining the areas of potential interaction between it and the jurisprudence defining the notion of aid.

The design of the FSR is motivated by a concern that the relatively tight controls on aid measures granted by Member States contained in Articles 107-109 TFEU will be undermined by interventions from the governments of third countries that seek to give an

⁷⁹ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/1.

advantage to undertakings that operate on the internal market.⁸⁰ Undertakings that benefit from support measures from third country governments may enjoy an unfair advantage over undertakings that have been granted aid by Member States or indeed undertakings that do not benefit from such support measures.⁸¹ This is because subsidies granted by third country governments are not subject to the State aid rules at all.⁸² There appears to have been a particular concern about China's interventionist industrial policies and its willingness to grant subsidies to undertakings that would be prohibited under the State aid rules.⁸³ The FSR is therefore designed to support and complement the existing rules on State aid.⁸⁴ The FSR can also be seen as a response to the challenges posed by the UK's departure from the EU and the Covid-19 pandemic which have highlighted the EU's dependency on foreign supply chains and have given fresh political impetus to a strong programme of industrial policy at EU-level.⁸⁵ Further, there is a concern that the impact of the pandemic on EU companies

⁸⁰ Commission, 'Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market' COM(2021) 223 final of 5 May 2021, part 1; Commission 'White paper on levelling the playing field as regards foreign subsidies' COM(2020) 253 final, section 2.1.

⁸¹ *ibid.*

⁸² While there are some existing regulations that allow the EU to react to foreign subsidies under World Trade Organisation rules, such as Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016] OJ L176/21; Regulation (EU) 2016/1037 of the European Parliament and of the Council on protection against subsidised imports from countries not members of the European Union [2016] OJ L176/55, these are much more limited in scope than the EU's more comprehensive system of State aid control. See Commission, 'Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market' COM(2021) 223 final of 5 May 2021, part 3.2. For some comparisons of the subsidy control rules of the World Trade Organisation with EU State aid law on issues relevant to this thesis, see Claire Micheau, *State Aid, Subsidies and Tax Incentives under EU and WTO Law* (Wolters Kluwer 2014); Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009).

⁸³ European Court of Auditors, 'The EU's response to China's state-driven investment strategy', Review 03 (2020) 15-16; Thorsten Käseberg and Sophie Gappa, 'Systems competition – China's challenge to the competition order' (2020) 16 *Competition Law International* 175, 175-176.

⁸⁴ Commission, 'Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market' COM(2021) 223 final of 5 May 2021, part 1. There is some concern however, that these rules will deter genuine foreign direct investment into the EU, particularly in light of the failure to exempt subsidies from third countries which have equivalent systems of subsidy control. See Andreas Haak and Barbara Thiemann, 'Fostering Tech Sovereignty with a Level Playing Field on State Aid and Foreign Subsidies' (2022) 21 *European State Aid Law Quarterly* 20, 27, 30.

⁸⁵ Sophie Meunier and Justinas Mickus, 'Sizing up the competition: explaining reform of European Union competition policy in the Covid-19 era' (2020) 42 *Journal of European Integration* 1077, 1087-1090.

may leave them vulnerable to takeover by undertakings subsidised by third country governments.⁸⁶

The impact of the FSR depends heavily on the definition of the notion of a foreign subsidy. A foreign subsidy is defined as a ‘financial contribution which confers a benefit to an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries’, which is provided by a third country.⁸⁷ Financial contributions can include direct transfers of funds, loans, guarantees, forgiveness of debts, the provision of goods and services and the foregoing of revenue.⁸⁸ Subsidies from public or private entities whose actions can be attributed to the government of a third country come within the definition also.⁸⁹ It has been acknowledged that this definition bears considerable similarities with the definition of State aid.⁹⁰ It has therefore been suggested that interpretation of this concept may draw to a significant extent on the existing case law defining the notion of aid and indeed that the FSR may benefit from some form of express adoption of this case law.⁹¹ In particular, the above-cited provisions appear to correspond to the criteria of imputability to the State, the conferral of an economic advantage and selectivity and it may be that their interpretation would draw on existing case law interpreting Article 107(1) TFEU.

⁸⁶ Sophie Meunier and Justinas Mickus, ‘Sizing up the competition: explaining reform of European Union competition policy in the Covid-19 era’ (2020) 42 *Journal of European Integration* 1077, 1079; Thorsten Käseberg and Sophie Gappa, ‘Systems competition – China’s challenge to the competition order’ (2020) 16 *Competition Law International* 175, 177-178.

⁸⁷ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/1, article 3(1).

⁸⁸ *ibid* article 3(2).

⁸⁹ *ibid* article 3(2).

⁹⁰ Raymond Luja, ‘The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union’ (2021) *European State Aid Law Quarterly* 187, 188.

⁹¹ *ibid* 188, 199. In places however, the extent to which the interpretation of the FSR will draw on EU State aid law and WTO rules is still not entirely clear and may have to be clarified by further guidance from the Commission. See Morris Schonberg, ‘The EU Foreign Subsidies Regulation: Substantive Assessment Issues and Open Questions’ (2022) 21 *European State Aid Law Quarterly* 143, 144-146.

However, there remain important differences between the FSR and the State aid control regime. First, the Commission has separated the criterion of the distortion of the internal market⁹² from the definition of a foreign subsidy.⁹³ It sets out the criteria for the identification of a distortion of the internal market, including the nature of the subsidy and its amount and conditions, the position of the recipient undertaking and the affected markets,⁹⁴ together with a non-exhaustive list of circumstances in which the subsidy is likely to cause a distortion.⁹⁵ There is no general prohibition on foreign subsidies and the Commission is only empowered to take action in the form of commitments or redressive measures to remedy a distortion of the internal market caused by a foreign subsidy,⁹⁶ after balancing the positive and negative effects of the subsidy.⁹⁷ The FSR therefore appears to deal with the minimum threshold for competitive distortion together with something like the compatibility assessment under Article 107(2)-(3) TFEU in one stage of the analysis.⁹⁸ Another significant departure from the State aid control regime is the stipulation that subsidies granted to an undertaking in amounts less than €4 million over three years is unlikely to cause a distortion, rather than providing a clear *de minimis* exemption.⁹⁹

⁹² This criterion is an impact standard that appears broadly equivalent to the criteria relating to the distortion of competition and the effect on intra-EU trade in Article 107(1) TFEU.

⁹³ Raymond Luja, 'The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union' (2021) *European State Aid Law Quarterly* 187, 189.

⁹⁴ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/1, article 4(1).

⁹⁵ *ibid* article 5.

⁹⁶ *ibid* article 7(1).

⁹⁷ *ibid* article 6.

⁹⁸ Raymond Luja, 'The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union' (2021) *European State Aid Law Quarterly* 187, 190.

⁹⁹ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/1, article 4(2). Compare the *De Minimis* Regulations discussed in Section 2.6.2.

The enforcement mechanisms envisaged also differ from the State aid rules.¹⁰⁰ While there is a similar two-stage investigation process,¹⁰¹ the decisions are by necessity addressed to the recipient undertaking rather than the third country.¹⁰² It is also envisaged that private enforcement will play a less important role without any formal procedure for filing complaints to the Commission.¹⁰³ An important point of divergence can be seen in the notification requirements. Reflecting the political reality of the lack of control that the Commission has over the activities of third country governments,¹⁰⁴ the FSR does not oblige such a government to notify the Commission of subsidies in advance. However, undertakings are obliged to notify foreign subsidies to the Commission received in the three years preceding a concentration where the participants have an aggregate EU turnover above

¹⁰⁰ Wolfgang Weiß, 'Ex Officio Third Country Subsidies' Review: Similarities with and Differences to State Aid Procedure' (2022) 21 European State Aid Law Quarterly 132,140-142 has commented that stronger investigation powers available to the Commission under the FSR compared to those available under the EU State aid control regime are required in circumstances where the relevant facts under investigation are more likely to have taken place outside of the jurisdiction of a Member State.

¹⁰¹ Compare Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9.

¹⁰² Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/1, article 41. Some decisions clearing or prohibiting the subsidy under article 29(4) and article 31(2) can be addressed to a contracting authority under article 41(3). EU law cannot obligate a third country to cooperate in the same way as a Member State in a State aid investigation. However, the regime leaves open the possibility of cooperation with third country governments. See for example articles 13(6), 37, 40(1). Nevertheless, the Commission may proceed to a decision without any such cooperation under article 16. Instead, it is the undertaking concerned that can be fined for a failure to cooperate under article 17. Wolfgang Weiß, 'Ex Officio Third Country Subsidies' Review: Similarities with and Differences to State Aid Procedure' (2022) 21 European State Aid Law Quarterly 132, 141-142 comments that undertakings will have stronger procedural rights under the FSR than under the EU State aid control regime as a result.

¹⁰³ Raymond Luja, 'The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union' (2021) European State Aid Law Quarterly 187, 194.

¹⁰⁴ *ibid* 192.

certain thresholds.¹⁰⁵ Undertakings submitting a tender for a public procurement contract with a value in excess of €250 million must also notify any foreign financial contribution.¹⁰⁶

The FSR has the potential to extend and amplify the effect of the doctrinal developments emerging from the case law on fiscal aid. As indicated above, it is likely that the definition of a foreign subsidy will draw on the case law interpreting the definition of aid in Article 107(1) TFEU.¹⁰⁷ The relatively expansive interpretation of the notion of aid in Article 107(1) TFEU and of the selectivity criterion in particular may therefore produce a similarly broad scope for the FSR, potentially covering a wide range of measures implemented by third countries that are thought to discriminate between different categories of undertakings without justification.¹⁰⁸ While measures to harmonise global corporate taxation may limit the importance of the FSR to regulate third country fiscal measures, any such measures are likely to leave considerable room for divergence. Further, the broad interpretation given to the selectivity criterion is not limited to fiscal aid and may still allow the Commission to review the industrial policies and market rules of third countries.

¹⁰⁵ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/1, articles 20-21. Raymond Luja, ‘The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union’ (2021) *European State Aid Law Quarterly* 187, 192 observes that the subsidy does not have to have any relationship to the concentration itself. See article 20 for the definition of concentration which largely reproduces the definition in Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1, article 3.

¹⁰⁶ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/1, articles 28-29. Raymond Luja, ‘The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union’ (2021) *European State Aid Law Quarterly* 187, 193 suggests that the reference to foreign financial contributions (without the requirement of selectivity) in Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/1, articles 27-28 (which has been retained in the final text of the FSR) rather than subsidies may be excessively broad.

¹⁰⁷ Raymond Luja, ‘The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union’ (2021) *European State Aid Law Quarterly* 187, 188, 199; Jakub Kociubinski, ‘The Proposed Regulation on Foreign Subsidies Distorting the Internal Market: The Way Forward or Dead End?’ (2022) 6 *European Competition and Regulatory Law Review* 56, 57-58.

¹⁰⁸ This is subject to the practical ability of the Commission to credibly assess the conditions for the identification of a subsidy granted by a third country quite possibly without the cooperation of that third country’s authorities which is in doubt. Jakub Kociubinski, ‘The Proposed Regulation on Foreign Subsidies Distorting the Internal Market: The Way Forward or Dead End?’ (2022) 6 *European Competition and Regulatory Law Review* 56, 59-65. For discussion of the discrimination standard, see Sections 4.5.2, 8.2.1. For discussion of the impact of this standard on non-fiscal measures, see Sections 6.2-6.3.

In addition to expanding the category of measures that may be subject to the influence of the doctrinal developments described in this thesis, it is likely that the FSR will increase the political and diplomatic impact of these developments. The State aid control regime, and by extension, the developments described in this thesis, currently play an important role in determining the balance of power between the Member States and the Union in exercising their shared competence in the field of internal market regulation.¹⁰⁹ The FSR has the potential to give these developments an additional, important impact on the Union's relationships with third countries.¹¹⁰

7.6. Implications for Interpretation of EU-UK Trade and Cooperation Agreement

7.6.1. Brexit and State Aid

The departure of the UK from the EU has profound implications across many areas of regulation, including the State aid control regime. In this section, it will be argued that the departure of the UK from the EU and the consequent arrangements for subsidy control will make a significant contribution towards the continuing relevance of the developments described in this thesis. It will be argued that these new arrangements, like the FSR, give a new significance to the interpretation of the notion of aid by intertwining the State aid control regime with the EU's external relations and trading relationships. This section will outline

¹⁰⁹ This shared competence is enumerated in Article 4(2) TFEU. For discussion of the role of State aid control in managing regulatory competition between Member States, see Section 3.6.

¹¹⁰ There is some resemblance between this process and the Brussels Effect described by Anu Bradford, *The Brussels Effect* (Oxford University Press 2020), under which third countries and businesses voluntarily conform to generally more stringent EU rules in order to maintain access to the EU's internal market. However, because the FSR explicitly targets subsidies granted by third country governments (even if it is designed to regulate them in a way that is at least comparable to subsidies granted by Member State governments), it might be regarded as a somewhat more direct attempt by the EU to bring third countries into compliance with its standards than the Brussels Effect. Other commentators have highlighted the extent to which this may provoke retaliation by third countries in respect of European firms trading in third countries. See Jakub Kociubinski, 'The Proposed Regulation on Foreign Subsidies Distorting the Internal Market: The Way Forward or Dead End?' (2022) 6 *European Competition and Regulatory Law Review* 56, 67-68.

the new subsidy control rules envisaged by the Trade and Cooperation Agreement ('TCA')¹¹¹ and the new regime implemented by the UK in fulfilment of these rules. The special arrangements in place for measures that may affect trade between the EU and Northern Ireland which maintain the EU State aid rules in force will then be considered.

7.6.2. Trade and Cooperation Agreement

The EU and the UK concluded the TCA in December 2020 which subsequently came into effect at the end of 2020 following the conclusion of the transition period.¹¹² During the transition period, Articles 107-109 TFEU continued to apply in respect of aid granted by the UK.¹¹³ Rather than continuing the application of these rules, the TCA established a new system of subsidy control as between the EU and the UK.¹¹⁴ Under this system, both the EU and the UK must put in place internal rules controlling the grant of subsidies overseen by an independent authority.¹¹⁵ These regimes must prevent the grant of certain expressly prohibited subsidies and must ensure that subsidies that may have a material impact on trade or investment between the EU and the UK comply with certain principles.¹¹⁶ The subsidy control regime must also ensure that subsidies are only used for the purposes for which they

¹¹¹ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L149/10.

¹¹² This transition period established in the earlier Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C1384/1 (the 'Withdrawal Agreement') had been in effect since the departure of the UK from the EU on 31 January 2020.

¹¹³ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C1384/1, Articles 126-127.

¹¹⁴ Part Two, Heading One, Title XI, Chapter 3 TCA. The EU State aid rules were formally disapplied in the UK (other than to the extent retained by the Protocol on Ireland/Northern Ireland to the Withdrawal Agreement) by the State Aid (Revocations and Amendments) (EU Exit) Regulations 2020, SI 2020/1470. The rules in the TCA could be applied with direct effect from its coming into force through the European Union (Future Relationship) Act 2020, s 29 pending the implementation of a domestic UK regime.

¹¹⁵ Although it has been observed that the UK could adopt a regime with a greater reliance on judicial decision-making in ordering recovery than the EU regime in which the Commission has fairly extensive powers at first instance. See Ben Holles de Peyer and Marija Momic, 'State Aid Law Post-Brexit: Subsidy Control under the EU-UK Trade and Cooperation Agreement' (2021) 42 European Competition Law Review 365, 368.

¹¹⁶ Articles 366-367 TCA.

are granted and allow for the recovery of the aid if the relevant rules are breached.¹¹⁷ There are also requirements to make details of any subsidies granted publicly available.¹¹⁸ However, there is no compulsory notification requirement analogous to Article 108(3) TFEU.¹¹⁹ The decisions of the authorities granting subsidies or overseeing the subsidy control regime must be subject to judicial review.¹²⁰ If either party to the TCA is concerned that the other is in breach of their obligations on subsidy control, this will be resolved by consultations culminating in a decision by an arbitral tribunal.¹²¹ There is also some provision for unilateral action by a party where a subsidy breaches these rules and causes significant negative effects on trade or investment between the parties.¹²²

While the TCA clearly envisages a less centralised enforcement regime than EU State aid control, there are nevertheless considerable points of continuity with the previous system, particularly in the definition of a subsidy. While the CJEU has long held that the notion of aid in Article 107(1) TFEU is considerably broader than that of a subsidy,¹²³ the definition of subsidy in Article 363 TCA does not appear to diverge radically from the notion of aid. Much like State aid, the definition covers a wide range of government interventions that arise from government resources and expressly refers to direct grants, loans, guarantees, the purchase or sale of goods or services and the ‘forgoing of revenue that is otherwise due’, which will include tax measures.¹²⁴

¹¹⁷ Articles 368, 373 TCA.

¹¹⁸ Article 369 TCA.

¹¹⁹ Ben Holles de Peyer and Marija Momic, ‘State Aid Law Post-Brexit: Subsidy Control under the EU-UK Trade and Cooperation Agreement’ (2021) 42 *European Competition Law Review* 365, 368.

¹²⁰ Article 372 TCA.

¹²¹ Articles 370, 374-375 TCA.

¹²² Article 374 TCA.

¹²³ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1961:2, [1961] ECR 3, 19.

¹²⁴ Article 363(1)(b)(i) TCA.

Of particular importance to the argument canvassed here is the requirement that a subsidy be specific.¹²⁵ The TCA appears to echo the CJEU's selectivity criterion in providing that a subsidy must be 'specific insofar as it benefits, as a matter of law or fact, certain economic actors over others in relation to the production of certain goods or services'.¹²⁶ It then goes on to provide for more detailed rules to determine whether a tax measure can be regarded as specific. A tax measure cannot be regarded as specific unless it reduces the tax liability of undertakings compared with the application of the normal tax regime and treats those undertakings more favourable than other undertakings in a comparable position.¹²⁷ A tax measure will also avoid being classified as specific if it is justified by the principles inherent in the design of the tax system or by some non-economic public policy objective that is non-discriminatory.¹²⁸ While it has been suggested that these provisions of the TCA deliberately use language that is distinct from that of the State aid rules in order to ensure that there is a discontinuity with the previous regime and that the UK will not be bound by the case law of the CJEU interpreting the notion of aid,¹²⁹ the differences are often confined only to descriptive labels for concepts rather than to the explanations of how these concepts will work. Further, much of the description of the specificity criterion appears to mirror the case law of the CJEU interpreting the selectivity criterion.¹³⁰ This is particularly true of the additional requirements applying to tax measures,¹³¹ and casts some doubt on Robertson's claim that the language of Article 363 reveals a clear intention to avoid reliance on existing

¹²⁵ Article 363(1)(b)(iii) TCA.

¹²⁶ Article 363(1)(b)(iii) TCA.

¹²⁷ Article 363(2)(a) TCA.

¹²⁸ Article 363(2)(b)-(c) TCA.

¹²⁹ Aidan Robertson, 'The New UK Subsidy Control Regime' (2021) 42 *European Competition Law Review* 230, 231-232; Ben Holles de Peyer and Marija Momic, 'State Aid Law Post-Brexit: Subsidy Control under the EU-UK Trade and Cooperation Agreement' (2021) 42 *European Competition Law Review* 365, 368.

¹³⁰ Philip Baker, 'Fiscal Subsidy Control in the Post-Brexit Era' [2021] *British Tax Review* 14, 19.

¹³¹ *ibid.*

concepts.¹³² These features combined suggest that there may be more continuity in the application of these rules than some commentators maintain.

A more plausible case for divergence might be made for the requirement that a subsidy have an effect on trade or investment between Member States.¹³³ This differs from the language of Article 107(1) TFEU which determines that an aid measure is one that ‘distorts or threatens to distort competition’ and affects ‘trade between Member States’. Indeed, the prohibition in the TCA only applies where there is at least the prospect of a material effect on trade or investment between the EU and the UK.¹³⁴ While the requirement in EU law is very easy to satisfy,¹³⁵ there is some suggestion that the criterion in the TCA may be narrower in scope, given the inevitably looser nature of the trading relationship envisaged under this agreement.¹³⁶ However, it may be that these factors would only give rise to a narrower definition of a ‘material effect’ rather than a mere ‘effect’ on trade or investment. Given that the prohibition only applies where there is a material effect¹³⁷ and there is no requirement for an onerous notification obligation where a measure is classified as a subsidy,¹³⁸ the threshold requirement for an effect on trade or investment in the subsidy definition, as opposed to a material effect, may be interpreted to allow it to be easily satisfied. It has been suggested that the future interpretation of the various references to ‘effect’,

¹³² Aidan Robertson, ‘The New UK Subsidy Control Regime’ (2021) 42 *European Competition Law Review* 230, 231-232.

¹³³ Article 363(1)(b)(iv) TCA.

¹³⁴ Articles 366-367 TCA.

¹³⁵ Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:209, [1980] ECR 2671, para 11-12; Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:160, [1980] ECR 2671, Opinion of AG Capotorti, 2699; Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 10. See Sections 2.3.5, 8.3.1-8.3.2.

¹³⁶ Aidan Robertson, ‘The New UK Subsidy Control Regime’ (2021) 42 *European Competition Law Review* 230, 232; Philip Baker, ‘Fiscal Subsidy Control in the Post-Brexit Era’ [2021] *British Tax Review* 14, 19.

¹³⁷ Articles 366-367 TCA.

¹³⁸ Ben Holles de Peyer and Marija Momic, ‘State Aid Law Post-Brexit: Subsidy Control under the EU-UK Trade and Cooperation Agreement’ (2021) 42 *European Competition Law Review* 365, 368.

‘material effect’ and ‘significant negative effect’ will be very influential in shaping the impact of the new regime.¹³⁹

7.6.3. Subsidy Control Act 2022

The UK implemented the regime required by the TCA in the Subsidy Control Act 2022.¹⁴⁰

Under this system, a public authority must only grant subsidies that are consistent with principles listed in Schedule 1, which largely restate those contained in Article 366 TCA.¹⁴¹

The Act also repeats the prohibitions and conditions for certain types of aid contained in Article 367 TCA.¹⁴² There is no compulsory notification requirement and public authorities will generally assess the compliance of proposed subsidies with the Act themselves. Some subsidies will be classified as ‘subsidies of interest’ and will require more extensive assessment by the public authority.¹⁴³ For these subsidies, the public authority will be able to request non-binding advice from a specialised Subsidy Advice Unit (‘SAU’) within the Competition and Markets Authority (‘CMA’).¹⁴⁴ For ‘subsidies of particular interest’, more

¹³⁹ Ben Holles de Peyer and Marija Momic, ‘State Aid Law Post-Brexit: Subsidy Control under the EU-UK Trade and Cooperation Agreement’ (2021) 42 *European Competition Law Review* 365, 369. While uncertainty remains as to how these would be interpreted, it is worth noting that the Subsidy Control Act 2022, s 2 that establishes the new regime does not qualify the impact standards in this way and defines a subsidy as something that has or is capable of having an effect on competition or investment within the UK or trade or investment between the UK and another country. This may make it less likely that certain subsidies will not be identified and adequately policed by the UK regime.

¹⁴⁰ The Subsidy Control Act 2022 was formally enacted on 28 April 2022. While some of its provisions came into force upon its enactment pursuant to s 91, the new regime was properly brought into effect on 4 January 2023. See the Subsidy Control Act 2022 (Commencement) Regulations 2022, SI 2022/1359, reg 2. Before that date, the subsidy control provisions could be applied with direct effect to restrain the grant of a subsidy pursuant to European Union (Future Relationship) Act 2020, s 29

¹⁴¹ Subsidy Control Act 2022, s 12. Schedule 1 supplements the principles contained in Article 366 TCA with the requirement that ‘[s]ubsidies should be designed to achieve their specific policy objective while minimising any negative effects on competition or investment within the United Kingdom.’ There are also further principles with which subsidies granted for energy or environmental objectives must comply. See Subsidy Control Act 2022, s 13, Schedule 2.

¹⁴² Subsidy Control Act 2022. Part 2, Chapter 2.

¹⁴³ ‘Subsidies of interest’ are defined in the Subsidy Control (Subsidies and Schemes of Interest or Particular Interest) Regulations 2022, SI 2022/1246, reg 4 and generally includes subsidies over £5 million per enterprise for each period comprising the elapsed part of the financial year in which the subsidy was granted and the two financial years immediately preceding it.

¹⁴⁴ Subsidy Control Act 2022, s 56.

extensive analysis and advice from the Subsidy Advice Unit will be required.¹⁴⁵ A public authority must not award a subsidy until five working days have elapsed since the advice was provided.¹⁴⁶ The legislation also established de minimis thresholds¹⁴⁷ and rules for services of public economic interest.¹⁴⁸ The rules can be enforced by seeking judicial review of the decision of the public authority within one month of the compulsory publication¹⁴⁹ of the details of the subsidy on a public database.¹⁵⁰ Orders can be made to recover any subsidy that is granted unlawfully.¹⁵¹

However, some uncertainty remains over the impact of the Subsidy Control Act 2022. Concerns persist over the capacity of the CMA to effectively police the UK government's policies in this regard.¹⁵² Further, some commentators have pointed to an apparently substantial exemption from the recovery requirement for measures which are implemented through an Act of Parliament or an act adopted by the Council of the European Union either independently or together with the European Parliament.¹⁵³ While this appears

¹⁴⁵ *ibid* s 52. 'Subsidies of particular interest' are defined in the Subsidy Control (Subsidies and Schemes of Interest or Particular Interest) Regulations 2022, SI 2022/1246, reg 3 using a range of thresholds that vary depending on whether the recipient enterprise operates in one of a list of sensitive sectors defined in the schedule to the Regulations.

¹⁴⁶ *ibid* s 54. The Secretary of State can require certain subsidies to be referred for advice from the SAU. See ss 55, 60.

¹⁴⁷ *ibid* s 36 fixes this threshold at £315,000 per enterprise per period of three years.

¹⁴⁸ *ibid* Part 3 Chapter 2. These are the equivalent of services of general economic interest in the EU.

¹⁴⁹ This is provided for in Subsidy Control Act 2022, ss 33-34.

¹⁵⁰ This application will be heard by the specialised Competition Appeal Tribunal. Section 75 also provides for an appeal on a point of law to the Court of Appeal.

¹⁵¹ Subsidy Control Act 2022, s 74.

¹⁵² Barry Rodger and Andreas Stephan, 'The Impact of Brexit on the Competition and Markets Authority' (2021) 42 *European Competition Law Review* 393, 398-399. The absence of a central regulator with enforcement powers may also lead to regional divergence in the application of the regime and in subsidy policy when compared with the highly centralised EU system. See Kieron Beal, "'More flexible and less bureaucratic' or carte blanche? The enforcement of subsidy control post-Brexit' (2022) 43 *European Competition Law Review* 533. Vincent Verouden and Pablo Ibáñez Colomo, 'State Aid Control' in Fabian Zuleeg and Larissa Brunner (eds), *Ensuring a post-Brexit level playing field* (European Policy Centre 2019) 67-94, 84 further suggest that oversight by a national rather than a supranational regulator marks a 'fundamental difference' with the EU State aid control regime.

¹⁵³ Article 373(5) TCA. This is reflected in Subsidy Control Act 2022, Schedule 3 which makes it clear that courts cannot order the recovery of subsidies made by an Act of Parliament. The prohibitions on different types of aid and the requirement to abide by certain principles also do not apply to such subsidies. However, such subsidies must still be published, and they can be referred to the SAU voluntarily. See Kieron Beal, "'More flexible and less bureaucratic' or carte blanche? The enforcement of subsidy control post-Brexit' (2022) 43 *European Competition Law Review* 533.

to be an attempt to mirror the freedom of the EU institutions within the State aid control regime to grant subsidies without scrutiny and grant the central UK government a similar freedom, it has been suggested that this may allow the UK to evade the rules by simply ensuring that subsidies are enacted by primary legislation.¹⁵⁴

Most importantly, the definition of a subsidy appears to largely reflect the provisions of the TCA and does not radically diverge from the interpretation of the notion of aid in Article 107(1) TFEU.¹⁵⁵ The definition provided by the Act is somewhat more detailed than the TCA. In particular, the Act attempts to codify the specificity criterion in much greater detail, including by identifying examples of ‘principles inherent to the design of the arrangements of which that financial assistance is part’¹⁵⁶ and establishing specific rules for special purpose levies.¹⁵⁷ Much like the TCA however, there does appear to be some divergence in the labels used to describe certain important concepts and an attempt at more exhaustive codification of the concept than in Article 107(1) TFEU. While there remains some uncertainty as to how this will be interpreted by the UK courts and to what extent they may consider CJEU case law as persuasive precedent, there is no particularly striking point of divergence apparent on the face of the legislation. It is therefore possible for the developments described in this thesis, such as the emergence of an expansive interpretation

¹⁵⁴ Ben Holles de Peyer and Marija Momic, ‘State Aid Law Post-Brexit: Subsidy Control under the EU-UK Trade and Cooperation Agreement’ (2021) 42 *European Competition Law Review* 365, 368-369. This may be a particular concern for the enforcement of the rules against fiscal measures which may be more likely to be contained in primary legislation emanating from the UK Parliament. Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 972 suggests that ‘tax legislation is generally controlled by the central UK government and applied throughout the UK.’

¹⁵⁵ See Subsidy Control Act 2022, ss 2-4. The Act is also designed to control subsidies for domestic purposes and so the definition also covers financial assistance that affects competition or investment within the UK. See Subsidy Control Act 2022, s 2(1)(d)(i). This is an example of the EU seeking to agree to uphold similar standards rather than leaving the Brussels Effect to bring third countries to comply with the EU’s own standard. See Anu Bradford, *The Brussels Effect* (Oxford University Press 2020) 86-91 for discussion of the reasons for treaty-driven cooperation and multilateralism as partial alternative to the Brussels Effect.

¹⁵⁶ Subsidy Control Act 2022, s 4(2).

¹⁵⁷ Subsidy Control Act 2022, s 4(6).

of the selectivity criterion oriented around a discrimination standard, to provoke similar developments in the application of the new subsidy control regime.

7.6.4. Northern Ireland Protocol

Irrespective of how this uncertainty is resolved, there remains one important area which guarantees a significant impact of the existing jurisprudence on State aid in the trading relationship between the UK and the EU. This can be found in the Protocol on Ireland/Northern Ireland (the ‘Protocol’) which forms part of the Withdrawal Agreement. The Protocol aims to guarantee freedom of movement and free trade across the land border between Ireland and Northern Ireland notwithstanding the departure of the UK from the EU.¹⁵⁸ In order to achieve this, significant elements of EU market regulation will continue to apply in relation to Northern Ireland, including the State aid rules.¹⁵⁹ Article 10 of the Protocol provides that Articles 107-109 TFEU and the associated secondary legislation will continue to apply in the UK ‘in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol.’¹⁶⁰ The enforcement structures will also remain the same. The Commission will continue to have the authority to investigate and respond to breaches of the rules and the CJEU will continue to exercise its power of judicial

¹⁵⁸ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C1384/1, Protocol on Ireland/Northern Ireland, preamble.

¹⁵⁹ These are limited to the single electricity market and trade in goods. See Commission, ‘Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of State Aid’ (18 January 2021) 3-4 <https://ec.europa.eu/info/sites/default/files/notice-stakeholders-brexit-state-aid_en.pdf> accessed 10 December 2021.

¹⁶⁰ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C1384/1, Protocol on Ireland/Northern Ireland, Article 10(1). There is an exemption for certain agricultural subsidies contained in Article 10(2).

review and provide authoritative interpretations on the provisions of Union law that remain in force in relation to Northern Ireland.¹⁶¹

These rules represent a significant constraint on the UK. The UK must notify aid measures and seek approval from the Commission before implementing them. While this may limit its ability to offer aid directly to businesses in Northern Ireland, it may also have wider implications. While the EU indicated in a unilateral declaration on the Protocol that Article 107(1) TFEU would not apply to a UK government measure where any effect on trade between Northern Ireland and the EU was ‘hypothetical, presumed, or without a genuine and direct link to Northern Ireland’,¹⁶² a subsequent notice from the Commission indicated that it did not consider that this altered the application of the existing case law of the CJEU on the effect on inter-state trade criterion in Article 107(1) TFEU.¹⁶³ Therefore, aid granted to an undertaking based in the UK that also trades in Northern Ireland or manufactures goods available for sale in Northern Ireland may also be covered.¹⁶⁴ It has been suggested that aid to transport and banking firms may be more likely to raise this concern.¹⁶⁵

¹⁶¹ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C1384/1, Protocol on Ireland/Northern Ireland, Article 12(4).

¹⁶² ‘Unilateral Declarations by the European Union and the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on Article 10(1) of the Protocol’ (17 December 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946286/Unilateral_declarations_by_the_European_Union_and_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_in_the_Withdrawal_Agreement_Joint_Committee_on_Article_10_1_of_the_Protocol.pdf> accessed 3 January 2023. As observed in Section 2.3.5, subject to some recent developments on measures with a local impact, this case law established a relatively low threshold for the satisfaction of this criterion.

¹⁶³ Article 107(1) TFEU. See Commission, ‘Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of State Aid’ (18 January 2021) 4-5 <https://ec.europa.eu/info/sites/default/files/notice-stakeholders-brexite-state-aid_en.pdf> accessed 10 December 2021.

¹⁶⁴ See Commission, ‘Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of State Aid’ (18 January 2021) 6-7 <https://ec.europa.eu/info/sites/default/files/notice-stakeholders-brexite-state-aid_en.pdf> accessed 10 December 2021.

¹⁶⁵ Barry Rodger and Andreas Stephan, ‘The Impact of Brexit on the Competition and Markets Authority’ (2021) 42 *European Competition Law Review* 393, 398. See also Commission, ‘Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of State Aid’ (18 January 2021) para 1.2 <https://ec.europa.eu/info/sites/default/files/notice-stakeholders-brexite-state-aid_en.pdf> accessed 10 December 2021. Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 972 also considers that this will pose particular difficulties in relation to fiscal measures as most tax legislation is dealt with by the central UK government.

The UK government instead considers that only in very rare circumstances could supports to undertakings based outside of Northern Ireland permit a finding of an effect on trade between Northern Ireland and the EU.¹⁶⁶ There is clearly a divergence in the interpretations of this criterion between the UK government and the Commission. While the Commission's view may be of more practical importance as it retains its enforcement powers in respect of Northern Ireland, subject to review by the Union courts,¹⁶⁷ this remains an important question that has not been fully resolved and an early English authority on this point clearly diverges from the Commission's view.¹⁶⁸

The application of the Protocol remains the subject of continuing controversy and negotiation between the EU and the UK, particularly the oversight of the CJEU.¹⁶⁹ There has also been some suggestion that an effective British subsidy control regime implementing the requirements of the TCA may remove the need for continued application of the EU State aid rules in the UK.¹⁷⁰ However, so long as it continues to apply, the developments in the interpretation of the notion of aid described in this thesis apply similarly to Northern Ireland insofar as it affects the single electricity market and trade in goods as they do in respect of any Member State of the EU. The Protocol sees the State aid rules and the broad

¹⁶⁶ Department for Business, Energy and Industrial Strategy, *Guidance on the UK's international subsidy control commitments* (24 June 2021) section 6 <<https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/technical-guidance-on-the-uks-international-subsidy-control-commitments#section-6>> accessed 3 January 2023. Indeed, the UK government goes so far as to say that 'there should be a very strong assumption that aid to services cannot be relevant to Article 10'.

¹⁶⁷ George Peretz, 'State Aid' in Christopher McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge University Press 2022) 232-244, 242. Peretz also suggests that the better view is that this is a matter of EU law that will fall to be ultimately resolved by the CJEU rather than by arbitration.

¹⁶⁸ *R (British Sugar plc) v Secretary of State for International Trade* [2022] EWHC 393 (Admin) [120]-[133].

¹⁶⁹ Peter Foster, 'What are the UK's 5 proposals to rewrite the Brexit deal for Northern Ireland?' *Financial Times* (London, 21 July 2021) <<https://www.ft.com/content/b0389ef8-aada-49df-8ecc-81d432e9199a>> accessed 10 December 2021.

¹⁷⁰ This position has also been adopted by the UK Government in Northern Ireland Office, *Northern Ireland Protocol: The Way Forward* (CP 502, 2021) para 64. See also Thomas Pope and Alex Stojanovic, 'Beyond State Aid: The Future of Subsidy Control in the UK' (Institute for Government 2020) 54-55; George Peretz, 'State Aid' in Christopher McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge University Press 2022) 232-244, 244.

interpretation of aid by the CJEU forced to play an important part in defining the EU's trading relationship with the UK.

7.7. Conclusion

This chapter has examined proposals for the harmonisation of direct taxation at EU level and internationally and assessed their impact on the developments arising from the case law on fiscal measures that have been outlined in this thesis. While such proposals would undoubtedly have a far-reaching impact, the argument canvassed here is that their impact on enforcement patterns in State aid will be relatively limited. There are four main reasons for this.

The first is that the proposals as currently formulated do not seek to achieve total harmonisation of direct taxation either at an international level or within the EU, nor do they propose to amend the application of the State aid rules to tax measures. Even without considering the political uncertainty surrounding this project, this leaves open the possibility of tax competition and the continued application of the State aid rules to constrain such competition. The second is that the Commission remains committed to enforcing the State aid rules in much the same way as before.

The third reason is that, even if the Commission's policy and enforcement priorities did change after the implementation of any tax harmonisation proposals and if these sought to reduce enforcement against fiscal measures, the Commission's freedom to do so is limited. The legal tools available do not readily allow any significant distinction to be drawn between fiscal measures and non-fiscal measures. Further, the availability of review by the Union courts, the procedural rules which allow aggrieved undertakings to either force the Commission to reach a formal decision and the possibility of private recourse to national

courts somewhat constrains the Commission's ability to alter the practical effect of the State aid rules.

The fourth is that the developments described in this thesis, such as the reorientation of the selectivity criterion around the discrimination standard, have had a profound impact on the interpretation of the notion of aid as it applied to non-fiscal measures. Even if there is a change in how the State aid rules apply to fiscal measures or in the Commission's enforcement priorities, these would not affect the greater enforcement potential of the State aid rules against direct grant schemes and market rules. The continuing application of the developments described in this thesis to both fiscal and non-fiscal aid means that their relevance will remain undiminished by any tax harmonisation.

In addition to these reasons, this chapter has drawn attention to two developments that are likely to increase the relevance of the trends in the case law identified in this thesis. The first of these is the Proposal which may well draw heavily on the existing jurisprudence on State aid. The second is the subsidy control regime in the TCA and the Subsidy Control Act 2022 and the application of the State aid rules in Northern Ireland under the Protocol. Rather than limiting the importance of the State aid rules and their response to the challenge of fiscal measures, these developments give them an important role in shaping the EU's external relations and its relationship with its trading partners.

8. SOLUTIONS FOR CONTAINING THE NOTION OF AID AFTER THE FISCAL MEASURES CASE LAW

8.1. Introduction

The preceding chapters have charted the way in which the application of the State aid rules to tax measures and regulatory competition has provoked changes in the standards applied to identify aid within the meaning of Article 107(1) TFEU.¹ Tests have been stretched and strained to adapt to the unique challenges posed by regulating taxation. These changes have been most apparent in the interpretation of the selectivity criterion as it has been reoriented around the discrimination standard.² It has also been shown that the impact of these changes cannot be confined to the assessment of fiscal measures in circumstances where the CJEU insists that the regulatory form of an intervention cannot affect its classification as aid.³ Instead, these changes are likely to facilitate the Commission in enforcing the State aid rules not only against tax measures, but will also allow a wider category of grant schemes, loans, guarantees and even general market regulation to come within the definition of aid.⁴ This considerably broadens the notion of aid. In the last chapter, it was shown that these developments are likely to persist even in the face of proposals for tax harmonisation in the EU and potential change in priorities on the part of the Commission.⁵ Indeed, this broader notion of aid may play an even greater role in conditioning the EU's external relationships as it may inform the interpretation of the proposed Foreign Subsidies Regulation⁶ and the Trade and Cooperation Agreement between the EU and the UK.⁷

¹ See in particular the developments discussed in Sections 4.2-4.6.

² See Section 4.5.2.

³ See Section 5.3.3. See also Section 5.3.2.3.

⁴ See in particular Sections 6.2.3, 6.3.2.

⁵ See Sections 7.2-7.4.

⁶ Commission, 'Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market' COM(2021) 223 final of 5 May 2021.

⁷ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L149/10. See also Sections 7.5-7.6.

One important concern about the changes described in the preceding chapters is that they will lead to an unduly broad notion of aid in Article 107(1) TFEU. The concern is that such an interpretation will mean that an excessively broad range of Member State policies will have to be notified in advance to the Commission. Member States will have to wait for the Commission's approval before implementing these policies. This may unduly limit the autonomy and flexibility of national governments and it may also place excessive burdens on the administrative resources of the Commission. However, it is not just the breadth of the notion of aid that is open to criticism, but the fact that the standards articulated by the Union courts to identify aid, particularly those used to determine whether aid is selective, are incoherent and unclear. The discrimination standard's limits have not been clarified, nor has its relationship to the three-stage test nor the elusive notion of a 'privileged category' of undertakings.⁸

This chapter proposes two solutions to contain and clarify the notion of aid. The first is a proposal to clarify and systematise the law on selectivity. It will be argued that the discrimination standard that has come to dominate the selectivity assessment offers the best possible means of understanding this criterion. However, the discrimination standard requires refinement. It will be argued that a coherent application of this standard will inevitably require important questions about values to be determined by the Union courts in identifying legitimate reasons that Member States can invoke to justify differential treatment of categories of undertakings. While the current law has sought to obscure these value

⁸ This concept emerged 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, paras 87-93. See also the subsequent treatment and marginalisation in Case T-140/13 *Netherlands Maritime Technology Association v Commission* ECLI:EU:T:2014:1029, paras 98-100; Case T-696/17 *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven NV v Commission* ECLI:EU:T:2019:652, paras 197-200; Case T-674/17 *Le Port de Bruxelles et Région de Bruxelles-Capitale v Commission* ECLI:EU:T:2019:651, paras 194-197; Case T-673/17 *Port autonome du Centre et de l'Ouest v Commission* ECLI:EU:T:2019:643, paras 194-197; Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free* ECLI:EU:C:2016:981, 71-72, 78; Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paras 16, 27; Cases C-236/16 and C-237/16 *ANGED* ECLI:EU:C:2017:854, Opinion of AG Kokott, paras-84-85. See Section 4.4.2 for further discussion.

judgments, it will be argued these interpretive choices must be explicit and transparent. This chapter will offer a more coherent and systematic framework for assessing selectivity, combining the discrimination standard with a framework for identifying the legitimate objectives which can justify differential treatment of undertakings. While this proposal will clarify the test and the framework within which the Union courts must make important value judgements, it cannot entirely predetermine them. Therefore, while this proposal has the potential to narrow the scope of the notion of aid, its application by the Union courts may prevent it from confining the boundaries of this notion.

The second proposal seeks to compensate for the expansion of the notion of aid that is inherent in the discrimination standard which is not reversed by the reform proposed above. It will be argued that two elements of the definition of aid in Article 107(1) TFEU have been overlooked. The requirements that aid distort competition on the internal market and affect trade between Member States have been interpreted such that they are almost always satisfied, even where the measure does not have consequential impacts on competition or trade in the internal market.⁹ The thresholds for these impact standards are low and the burden on the Commission to reason its conclusions in respect of them is light. This chapter will propose a more rigorous interpretation of these standards, arguing for higher thresholds and more extensive obligations on the Commission to present tangible economic evidence in support of its conclusions. It will be argued that not only does this represent a means of limiting the scope of the prohibition on aid in a principled manner that serves the objectives of State aid control, but also that it can compensate for the expansion caused by the adoption of the discrimination standard.

⁹ See also Section 2.3.5.

These proposed reforms require changes in the interpretation of Article 107(1) TFEU. To differing extents, they require the Union courts to adapt their existing jurisprudence to address changes in how the notion of aid is applied. Where possible however, they draw on arguments developed from the existing jurisprudence and the logic and objectives of the State aid control regime. They represent important but modest changes that can allow the law to adapt to the challenges presented by their application to fiscal measures and indeed a wide range of other government interventions.

8.2. Coming to Terms with Selectivity as Discrimination

8.2.1. Selectivity as Discrimination

This thesis has already charted the development of the selectivity criterion in a manner that has largely been driven by the case law on fiscal measures.¹⁰ It will be recalled that these developments have resulted in a much more expansive understanding of this criterion that means that it will be much more easily satisfied and will more readily facilitate the Commission in finding that aid has been granted. While it may be that the assessment of fiscal measures has played a significant role in these trends, there will likely be a tangible impact on any form of aid scheme as well as on market rules.¹¹ It is also clear from the previous chapter that these developments will be resilient in the face of closer tax harmonisation and are likely to persist.¹² Indeed, they may become important in new ways in shaping the EU's trading relationship with the UK and in the development of the FSR.¹³

At the core of these changes in the interpretation of the selectivity criterion is the emergence of the discrimination standard. The argument advanced in this thesis is that this

¹⁰ See in particular Sections 4.2-4.6.

¹¹ See Sections 6.2-6.3.

¹² See Sections 7.3-7.4.

¹³ See Sections 7.5-7.6.

has largely come to replace the three-stage test articulated in *Adria-Wien*¹⁴ and *Azores*.¹⁵ The issue of selectivity focuses on whether the impugned measure treats two sets of undertakings differently where this differential treatment is not justified as a proportionate response to some legitimate objective.¹⁶ It is also clear that the CJEU is not only capable of reviewing whether the differential treatment is appropriate and proportionate to the objective, but EU law places some limit on the range of acceptable objectives.¹⁷ It has been argued in previous chapters of this thesis that the discrimination standard greatly simplifies the analysis under the selectivity criterion and that it will more readily facilitate the Commission in establishing the selectivity of a measure, both in relation to fiscal measures and other forms of government intervention.¹⁸ This may have an impact on Member State autonomy in relation to a wide range of policies, requiring a broader range of State interventions to be notified to and approved by the Commission before being implemented.

The remainder of this section will defend the discrimination standard, arguing that it represents the best available option to anchor the selectivity criterion in the definition of aid in Article 107(1) TFEU. This will entail an analysis of the alternative tests for selectivity that have been proposed in the case law and the literature and will offer an amendment to the discrimination standard as it is currently applied based on elements of these alternative tests. It will go on to identify the most important criticism of the discrimination standard, which is that it is incomplete and inadequately theorised in failing to identify the objectives

¹⁴ Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365.

¹⁵ Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115.

¹⁶ See Section 4.5.2.

¹⁷ See Section 4.5.2. This development became apparent in Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113. It was also evident in the application of the arm's length principle to tax rulings on transfer pricing irrespective of the content of the national law. See Section 4.6.1. Joined Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338, paras 214-215; Joined Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670, paras 141-144; Case C-337/19 P *Commission v Belgium and Magnetrof* ECLI:EU:C:2021:741, paras 161-167. While this development has been qualified in Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859. See Section 4.6.3 for an explanation of the impact of this decision on the case law.

¹⁸ See Section 6.2.3.

which Member States may rely on in justifying differential treatment of undertakings or a test or mechanism through which these can be identified. This section will propose a new scheme for the selectivity criterion that builds on the discrimination standard through marginal but important modifications that draw on the existing jurisprudence.

8.2.2. Discrimination as Best Answer to a Difficult Question

Before proposing a solution to this deficiency in the case law on the discrimination standard however, it is necessary to consider the alternatives to the discrimination standard in the assessment of the selectivity criterion. This is for two reasons. The first is that this section will argue that the discrimination standard is the best available solution to the difficult and persistent challenges posed by the selectivity criterion. Such an argument can only be made by considering the alternative tests available. The second is that the alternative tests that have been proposed in the literature and the case law shed light on some of the weaknesses in the current interpretation of the standard that can be remedied alongside the significant gap in the existing doctrine that has been identified above.

The first of these alternatives that must be considered is the three-stage test articulated by the CJEU in *Adria-Wien* and *Azores* for measures that benefit more than one undertaking.¹⁹ As indicated above, this test finds selectivity if the following conditions are satisfied. First, a relevant reference framework and a derogation from that reference framework must be identified.²⁰ Second, there must be differential treatment between undertakings in a comparable legal and factual situation by reference to the objectives of the

¹⁹ Case C-143/99 *Adria-Wien* [2001] ECR I-8365, paras 41-42; Case C-88/03 *Portugal v Commission (Azores)* [2006] ECR I-7115, paras 52-54.

²⁰ Case C-88/03 *Portugal v Commission (Azores)* [2006] ECR I-7115, paras 56-57.

measure.²¹ Third, this differential treatment must not be justifiable by reference to the nature and general scheme of the system.²² Even though the echoes of this test still reverberate across the judgments of the CJEU,²³ it no longer offers a credible solution to the problem of selectivity. As has already been discussed elsewhere in this thesis, there are considerable difficulties with the application of this test. Some of these are technical difficulties with the doctrine. The outcome of the test can often depend on the breadth of the reference framework notwithstanding that there is little guidance on precisely how to define the limits of the reference framework.²⁴ The test has also been applied in a way that blurs the lines between selectivity and the distinct criterion of economic advantage in Article 107(1) TFEU.²⁵ The

²¹ Case C-143/99 *Adria-Wien* [2001] ECR I-8365, para 41; Case C-88/03 *Portugal v Commission (Azores)* [2006] ECR I-7115, para 54.

²² Case C-143/99 *Adria-Wien* [2001] ECR I-8365, para 42; Case C-88/03 *Portugal v Commission (Azores)* [2006] ECR I-7115, paras 52-53.

²³ See for example Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, paras 86-87; Case C-208/16 P *Germany v Commission* ECLI:EU:C:2018:506, paras 83-83; Case C-209/16 P *Germany v Commission* ECLI:EU:C:2018:507, paras 81-82; Case C-219/16 P *Lowell Financial Services v Commission* ECLI:EU:C:2018:508, paras 88-89; Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2021:202, paras 37-38; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2021:201, paras 31-32; Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, para 68; Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, paras 35-36.

²⁴ Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505; Case C-208/16 P *Germany v Commission* ECLI:EU:C:2018:506; C-209/16 P *Germany v Commission* ECLI:EU:C:2018:507; Case C-219/16 P *Lowell Financial Services v Commission* ECLI:EU:C:2018:508; Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2021:202; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2021:201; Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793; Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859. See Ulrich Soltész, 'EU state aid law and taxation – where do we stand today?' (2020) 41 *European Competition Law Review* 18, 20-21. See Sections 4.5.2, 4.6.3 for discussion of the incoherent articulation of these standards by the CJEU.

²⁵ See the discussion in Sections 4.3.2, 5.4.2. See express acknowledgement of the links between these conditions in cases involving fiscal measures such as Case C-88/03 *Portugal v Commission (Azores)* [2006] ECR I-7115, para 56; Case T-210/02 *RENV British Aggregates Association v Commission (British Aggregates III)* ECLI:EU:T:2012:110, [2012] ECR II-2789, para 49; 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 90; Joined Cases T-60/06 *RENV II* and T-62/06 *RENV II Italy and Euralumina SpA v Commission* ECLI:EU:T:2016:233, para 99; Case C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:97, para 55; Joined Cases C-105/18 to C-113/18 *UNESA* ECLI:EU:C:2019:935, para 62. Other cases use the term 'selective advantage' to refer to both conditions together such as Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, paras 70-71, 78, 86-87; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732 [2011] ECR I-11113, paras 77-110; Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paras 32-33, paras 19, 21; Case C-233/16 *ANGED* ECLI:EU:C:2018:280, paras 37, 39, 56, 60. The remarks of the CJEU in Case C-403/10 *Mediaset* [2011] ECR I-117, para 62 demonstrate that this development is not limited to cases involving fiscal measures.

boundaries between the different stages of the analysis are also fluid and increasingly collapse into a single question which relies heavily on the language of discrimination.²⁶

However, these are not simply minor defects in the analysis that can be easily remedied, but symptoms of more fundamental problems with the test. Rather than offer a credible alternative to the discrimination standard, it increasingly appears as a formula that simply adds layers of complexity that obscure the reality of the operation of the discrimination standard. In particular, these may obscure the more difficult value judgments about what objectives are acceptable grounds for the justification of differential treatment that must be made in applying the discrimination standard. At crucial stages of its development, the CJEU has insisted that the test is concerned with effects, not the objectives, causes or aims of a measure²⁷ when in reality objectives are essential to defining the reference framework, determining the comparability of undertakings and whether any differential treatment of undertakings is justified by the system.²⁸ That these additional layers

²⁶ See Section 4.5.2. Joined Cases C-78/08 and C-80/08 *Paint Graphos* [2011] ECR I-7611; José Luis Buendía Sierra, 'Finding Selectivity or the Art of Comparison' (2018) *European State Aid Law Quarterly* 85, 90-91; Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 163. The trend towards the discrimination test can be observed in Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free* ECLI:EU:C:2016:981, paras 74, 75; Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paras 32, 35; Case C-706/17 *Achema* ECLI:EU:C:2019:407, para 84; Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, para 83; Case C-219/16 P *Lowell Financial Services v Commission* ECLI:EU:C:2018:508, para 85; Case T-406/11 *Prosegur Compañía de Seguridad v Commission* ECLI:EU:T:2018:793, paras 47, 185; Case T-405/11 *Axa Mediterranean v Commission* ECLI:EU:T:2018:780, para 53; Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2021:202, paras 48-50; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2021:201, paras 42-44; Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, para 33.

²⁷ See Section 5.3.2. See also Case 173/73 *Italy v Commission (Italian Textiles)* [1974] ECR 709, para 13; Case C-56/93 *Belgium v Commission* [1996] ECR I-723, para 79; Case C-241/94 *France v Commission* [1996] ECR I-4551, para 20; Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, para 25; Case C-409/00 *Spain v Commission* [2003] ECR I-1487, para 46; Case C-5/01 *Belgium v Commission* [2002] ECR I-11991, para 45; Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' v Commission* [2011] ECR I-4727, para 94; T-52/12 *Greece v Commission* ECLI:EU:T:2014:677, para 67; Case C-126/01 *Ministre de l'économie, des finances et de l'industrie v GEMO SA* [2003] ECR I-13769, para 34; Case C-522/13 *Ministerio de Defensa v Concello de Ferrol* EU:C:2014:2262, para 28; Case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, para 85; Case C-279/08 *Commission v Netherlands (NOx)* ECLI:EU:C:2011:551, [2011] ECR I-7671, para 75; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 87.

²⁸ See also Section 4.5.2 on this point.

of complexity can apparently be bypassed by the CJEU in cases such as *Gibraltar*, is particularly telling and makes the three-stage test particularly unconvincing as an alternative to the discrimination standard.²⁹ While the move to a more simplified version of the discrimination standard is not without consequence,³⁰ it is not clear that the structure of the three-stage test contributes anything useful to the analysis that the discrimination standard that is inherent in it cannot already provide.

A considerable part of the difficulty with the three-stage test is that it seeks to adopt the structure of relatively mechanical rules while simultaneously using open-ended concepts such as the discrimination standard. While the solution canvassed here proposes to embrace the discrimination standard and the value judgments that it entails, there are another range of possible solutions that prefer more mechanistic rules. One such possibility that has some support in the case law relates to the breadth of the measure. It has long been established that a measure will be presumed to be selective without more, if it is granted to an individual undertaking.³¹ Similarly, the CJEU often defines selective measures in opposition to measures of general application.³² It is clear that measures that apply to all undertakings are not selective.³³ There is some sense in which a measure is selective simply because it is not

²⁹ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 104. See also Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2021:202, paras 48-50; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2021:201 paras 42-44 which appear to preserve the availability of the ‘privileged category’ approach.

³⁰ The suggestion is that this approach simplifies the tests for selectivity and therefore makes it easier for the Commission to prove that a measure is selective and that it therefore constitutes aid. See Section 6.2.3 for further discussion.

³¹ Case C-15/14 P *MOL v Commission* ECLI:EU:C:2015:362, para 60; Case C-15/14 P *MOL v Commission* ECLI:EU:C:2015:362, Opinion of AG Wahl, paras 52-53; Case C-211/15 P *Orange v Commission* ECLI:EU:C:2016:78, Opinion of AG Wahl, para 67; Case T-135/12 *France v Commission* ECLI:EU:T:2015:116, paras 43-44; 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 C262/1, para 126.

³² Joined Cases C-72/91 and C73/91 *Sloman Neptun* [1993] ECR I-887, Opinion of AG Darmon, para 58; Case C-241/94 *France v Commission* [1996] ECR I-4551, Opinion of AG Jacobs, para 30.

³³ Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365, paras 35-36; Case C-66/02 *Italy v Commission* ECLI:EU:C:2005:768, [2005] ECR I-10901, para 99; Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, para 49; Case C-222/04 *Cassa di Risparmio di Firenze* ECLI:EU:C:2006:8, [2006] ECR I-289, para 135; Case T-399/11 *Banco Santander and Santusa v Commission* ECLI:EU:T:2014:938, para 69; Case T-219/10 *Autogrill España v Commission* ECLI:EU:T:2014:939, para 74; Michael Honoré, ‘Selectivity’ in

sufficiently broad. De Cecco proposes a rationale for this, whereby broader measures are less likely to be targeted payments in support of narrow interest groups and are more likely to enjoy significant political support in order to sustain much greater investment.³⁴ In order to pursue certain types of active industrial and subsidy policy without scrutiny from the Commission, a Member State must therefore adopt as general a measure as possible.

However, there are important reasons for scepticism towards using the breadth of the category of undertakings covered by the measure as the core of the selectivity test. While it avoids some of the complexity of the three-stage test and discrimination standard and also avoids engaging the law in more nuanced value judgments, it is a very crude measure. A minimum number of undertakings or proportion of economic actors that must be covered in order to avoid classification of a measure as selective would be very inflexible and formalistic. Further, the theoretical justification for the preference for broad measures is not a normatively attractive one, as it adopts a relatively paternalistic view of Member State governments that is not appropriate in the governance of the internal market.³⁵ Moreover, the position whereby individual measures are presumptively selective and measures applicable to all undertakings are not, is also capable of being explained by the discrimination standard. Where all undertakings are covered by a measure, there is simply no differential treatment that requires justification and therefore no selectivity. When an advantage is conferred on a single undertaking to the exclusion of all others, there is differential treatment. A plausible interpretation of the discrimination standard is that it is

Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 120.

³⁴ Francesco De Cecco, 'The Many Meanings of Competition in EC State Aid Law' (2006-2007) 9 *Cambridge Yearbook of European Legal Studies* 111, 127.

³⁵ Compare the justification for State aid control explored in Section 3.4 relating to national government failure and regulatory capture. David Spector, 'State Aids: Economic Analysis and Practice in the EU' in X Vives (ed), *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (Oxford University Press 2009) 176-202, 177-178 characterises this style of argument as forming part of a set of 'paternalistic justifications' for EU State aid control that are less than convincing.

very difficult for a legitimate objective to justify limiting the aid to a single undertaking as a proportionate attempt to pursue that objective.

Another relatively crude rule that seeks to circumvent the value judgements inherent in the discrimination standard or the three-stage test is the ‘but for’ test. Under this approach, a State intervention is selective if it puts an undertaking in a more favourable situation than that which would have prevailed but for the intervention.³⁶ This test has been used in the context of WTO law in interpreting whether revenue foregone by the State is ‘otherwise due’ which does not correspond perfectly with the selectivity criterion in Article 107(1) TFEU and is therefore designed to apply to tax exemptions.³⁷ It is unclear if the standard for comparison should be the situation immediately before the implementation or a hypothetical scenario where the impugned exemption does not apply. This standard has been criticised for being excessively formalistic. If the comparator is the situation prevailing immediately prior to the introduction of the measure, it will capture all measures that reduce tax burdens irrespective of the range of undertakings covered. It would simply impede change in the allocation of the tax burden. If the alternative comparator is used, much turns on the form of the measure. Micheau correctly observes that it would be possible to circumvent the test by refraining from designing measures as exemptions from general rules.³⁸ This would sit uneasily with the CJEU’s constant refrain that regulatory technique should not matter to the

³⁶ Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International 2014) 284.

³⁷ *ibid.*

³⁸ Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International 2014) 285.

classification of a measure as aid.³⁹ It is therefore to be welcomed that the CJEU has not adopted this approach.⁴⁰

Another set of alternatives seek to reorient the selectivity criterion around competition economics. These alternatives draw on the view that State aid law is primarily about securing effective competition on the internal market. This view has some support in the academic literature even if it remains contested.⁴¹ There is also some rhetorical commitment to the centrality of competition economics and policy in the case law.⁴² The text of Article 107(1) TFEU, which is also located among the competition rules in the Treaties, also makes important references to competition on the internal market. However, the selectivity criterion does not draw on economic methods to any appreciable extent and does not examine the competitive relationship between recipient undertakings and to whom

³⁹ Case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, para 89; Case C-279/08 *Commission v Netherlands (NOx)* ECLI:EU:C:2011:551, [2011] ECR I-7671, para 51; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 87; Joined Cases T-226/09 and T-230/09 *British Telecommunications and BT Pension Scheme Trustees v Commission* ECLI:EU:T:2013:466, para 42; Case T-251/11 *Austria v Commission* ECLI:EU:T:2014:1060, para 98; Joined Cases T-516/18 and T-525/18 *Luxembourg and Engie v Commission* ECLI:EU:T:2021:251, para 351; Case C-15/14 P *Commission v MOL* ECLI:EU:C:2015:362, para 86.

⁴⁰ Case C-143/99 *Adria-Wien* [2001] ECR I-8365, para 41; Case 57/86 *Greece v Commission* ECLI:EU:C:1988:284, [1988] ECR 2855, para 10. Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International 2014) 284 also cites Case T-335/08 *BNP Paribas and BNL v Commission* ECLI:EU:T:2010:271, [2010] ECR II-3323, para 169 in support of the proposition that this approach has been expressly rejected. However this passage could also be understood as simply ruling out the possibility of the General Court considering the differences in behaviour that the previous tax system would provoke rather than preventing comparison with any previous tax system rather than explicitly rejecting it. The decisions in *Adria-Wien* and *Greece v Commission* come closer to a more explicit rejection of the ‘but for’ test.

⁴¹ Commentators who discuss State aid control in these terms include Alexander Collins, ‘Is the Regulation of State-Aid a Necessary Component of an Effective Competition Law Framework’ (2005) 16 *European Business Law Review* 379; Timothy Besley and Paul Seabright, ‘The Effects and Policy Implications of State Aids to Industry: An Economic Analysis’ (1999) 14 *Economic Policy* 15; Pietro Crocioni, ‘Can State Aid Policy Become More Economic Friendly’ (2006) 29 *World Competition* 89; Vincent Verouden and Philipp Werner, ‘Introduction – The Law and Economics of State Aid Control’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-64. For a contrary view see Andrea Biondi, ‘The Rationale of State Aid Control: A Return to Orthodoxy’ (2010) 12 *Cambridge Yearbook of Legal Studies* 35, 42; José Luis Buendía Sierra and Ben Smulders, ‘The Limited Role of the “Refined Economic Approach” in Achieving the Objectives of State Aid Control: Time for Some Realism’ in *EC State Aid Law: Liber Amicorum Francisco Santaolalla Gadea* (Wolters Kluwer 2008) 1-26, 9; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 38.

⁴² Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1961:2, [1961] ECR 3, 23-25; Case 73/79 *Commission v Italy* ECLI:EU:C:1980:129, [1980] ECR 1533, para 8.

an advantage is not conferred either within the same national market or across the internal market as a whole.⁴³ Market definition analysis consistent with the approach taken under the competition rules that apply to undertakings is not relevant to the assessment of selectivity.⁴⁴

One possible reform along these lines would limit selectivity to those circumstances where an advantage is conferred on one class of undertakings but not on a class of undertakings that are competing with them.⁴⁵ This need not be the entirety of the analysis. It could simply be a method of determining whether two groups of undertakings are in a comparable legal and factual situation within the meaning of the second stage of the three-stage test. Indeed, the literature identifies the decision in *British Aggregates III* as offering support for this view, in which the General Court appeared to consider the extent to which the tax measure would divert demand from one product to another in relation to the question of selectivity, which appears to involve some analysis of substitutability between products.⁴⁶ However, the approach in the judgment is not very well developed⁴⁷ and it appears to be a relatively isolated line of reasoning. Further, it is not clear that substitutability is useful in the sense in which it is used in competition law in cases where the differentiation may not exist between the producers of discernible products, but instead distinguishes between

⁴³ Francesco de Cecco, *State Aid and European Economic Constitution* (Hart 2013) 100.

⁴⁴ Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International 2014) 295.

⁴⁵ Antonis Metaxas, 'Selectivity of Asymmetrical Tax Measures and Distortion of Competition in the Telecoms Sector' (2010) *European State Aid Law Quarterly* 771; Case C-53/00 *Ferring* [2001] ECR I-9067, Opinion of AG Tizzano, para 39.

⁴⁶ Case T-210/02 *RENV British Aggregates Association v Commission (British Aggregates III)* ECLI:EU:T:2012:110, [2012] ECR II-2789, para 78; Phedon Nicolaidis and Ioana Eleonora Rusu 'The Concept of Selectivity: An Ever Wider Scope' (2012) 11 *European State Aid Law Quarterly* 791, 796-797; Gianni Lo Schiavo, 'The General Court Reassesses the British Aggregates Levy: Selective Advantages "Permeated" by an Exercise on the Actual Effects of Competition' (2013) 12 *European State Aid Law Quarterly* 384, 388.

⁴⁷ Gianni Lo Schiavo, 'The General Court Reassesses the British Aggregates Levy: Selective Advantages "Permeated" by an Exercise on the Actual Effects of Competition' (2013) 12 *European State Aid Law Quarterly* 384, 388-389.

different business structures or forms.⁴⁸ It may also be more difficult to use the conventional tests considered in the market definition analysis in competition law when considering taxes that are very small or very large.⁴⁹ Moreover, it is not clear that differentiation between the producers of substitutable products is all that the selectivity seeks to capture – an exemption for a tax to minimise noise pollution that applied to ventilation systems but allowed taxation of concerts could be selective even though these things are clearly not substitutable.⁵⁰

There are further problems associated with this approach. Selectivity is normally concerned only with those differences in the treatment of undertakings that occur within a Member State rather than by comparison with undertakings in other Member States.⁵¹ If the competitive relationship between recipient undertakings and other undertakings determines whether differential treatment is selective, limiting the analysis to undertakings operating in a national market would preclude selectivity where the competitors of the recipient undertakings are outside the territory of the Member State granting the aid. This would preclude consideration of important economic and competitive effects and would undermine one of the primary rationales for adopting this type of analysis.⁵² It appears that this would also allow Member States to confer an advantage on an entire sector of their domestic economy without engaging the prohibition in Article 107(1) TFEU. This would considerably diminish the breadth of the prohibition on aid in a manner that undermines many of the purported rationales for State aid control.⁵³ The alternative is to consider whether the

⁴⁸ Gianni Lo Schiavo, 'The General Court Reassesses the British Aggregates Levy: Selective Advantages "Permeated" by an Exercise on the Actual Effects of Competition' (2013) 12 *European State Aid Law Quarterly* 384, 388-389.

⁴⁹ Phedon Nicolaides and Ioana Eleonora Rusu 'The Concept of Selectivity: An Ever Wider Scope' (2012) 11 *European State Aid Law Quarterly* 791, 796-797.

⁵⁰ Phedon Nicolaides and Ioana Eleonora Rusu 'The Concept of Selectivity: An Ever Wider Scope' (2012) 11 *European State Aid Law Quarterly* 791, 796-797.

⁵¹ Francesco de Cecco, *State Aid and European Economic Constitution* (Hart 2013) 100; Case 173/73 *Italy v Commission (Italian Textiles)* [1974] ECR 709, para 17.

⁵² Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International 2014) 295.

⁵³ For a discussion of these rationales, see Chapter 3.

recipient undertakings have competitors on the internal market as a whole. While this avoids the problem described above, this approach sits uneasily with regulatory diversity across the EU.⁵⁴ If the analysis is broadened in this way, it is not clear why a Member State conferring an advantage on all undertakings within its jurisdiction would avoid the prohibition, as competitors in other Member States would not benefit in a similar manner. Provided that competing undertakings are distributed across multiple Member States, the mere fact of regulatory diversity across those Member States could be regarded as selective. This alternative would therefore lead to an excessively broad interpretation of selectivity.

Micheau also suggests that an approach to selectivity that draws heavily on competition law methods might simply duplicate the analysis under the criterion of the distortion of competition and the effect on inter-state trade.⁵⁵ The current approach to the interpretation of those criteria, which does not require the Commission to conduct a market definition analysis or demonstrate anything other than a relatively remote possibility of an impact on competition or inter-state trade,⁵⁶ means that the risk of unnecessary duplication here would be relatively minimal. However, there might be more force to this criticism if the more rigorous approach to the application of the competitive distortion and effect on inter-state trade criteria outlined below is adopted. While competition and market analysis does not provide a convincing answer to the challenges posed by the selectivity criterion, that is not to say that this type of analysis should have no role to play in the interpretation of the notion of aid in Article 107(1) TFEU. The obvious place for this analysis to come to the

⁵⁴ Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International 2014) 295.

⁵⁵ Claire Micheau, 'Tax selectivity in European law of state aid: legal assessment and alternative approaches' (2015) 40 *European Law Review* 323, 347. See also Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 5-6 on the risk of conflating the notions of selective advantage and competitive advantage.

⁵⁶ See for example Case C-385/18 *Arriva Italia Srl* ECLI:EU:C:2019:647, Opinion of AG Tanchev, para 120; Case C-494/06 P *Commission v Italy and Wam SpA* [2009] ECR I-3639, para 58; Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paras 9-12; Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, Opinion of AG Capotorti, 2700.

fore is in interpreting the conditions relating to the distortion of competition and the effect on inter-state trade, rather than incorporating it as part of the selectivity criterion. It may well be that differentiation between suppliers of competing products may be more likely to be selective under the application of the discrimination standard as outlined in this chapter,⁵⁷ but this does not have to be reflected in the doctrine on selectivity. This chapter will go on to propose a more important role for competition and market analysis in the identification of aid that is distinct from the role to be played by the selectivity criterion.⁵⁸

Another alternative that seeks to avoid reliance on objectives is proposed by Mason.⁵⁹ The system proposed by Mason features an internal consistency test whereby the selectivity of tax measures is determined by asking whether any advantage would persist if the impugned measure was adopted by all other States.⁶⁰ If the advantage would be removed by its universal adoption, then the problem can be said to arise simply from the fact that tax rules are not harmonised at EU level and there are differences between Member States in this respect. As an example of this, she cites *Gibraltar*, arguing that if the taxation of companies was in all countries based their occupation of property, registration and number of employees according to the tax system impugned in that case, no company would benefit from an advantage because companies would be taxed wherever their employees and property were located.⁶¹ If the advantage would persist even if the measure was universally adopted, then it is selective. As an example, she suggests that transfer pricing rules that are ‘one-sided’ and fail to allocate the residual for multinational companies but not domestic

⁵⁷ John Temple Lang, ‘*Autogrill Espana and Banco Santander: the concept of "general" tax measures clarified for state aid*’ (2015) 40 *European Law Review* 763, 767.

⁵⁸ See Section 8.3.4 below.

⁵⁹ Ruth Mason, ‘Identifying Illegal Subsidies’ (2019) 69 *American University Law Review* 479.

⁶⁰ *ibid* 535-545.

⁶¹ *ibid*, 547-548.

companies will lead to lesser taxation of multinational companies even in the event of their universal adoption and therefore such rules are selective.⁶²

However, this test cannot entirely replace the discrimination standard. Indeed, Mason endorses the general characterisation of selectivity as a test of discrimination.⁶³ Mason suggests that this test offers greater predictability and legal certainty and that it allows the identification of selectivity without relying on standards that are external to the national law of the Member State in question, therefore removing value judgements about the tax system from the State aid rules.⁶⁴ However, it is not clear that this approach does in fact remove the need for value judgements. The test is useful for differentiating between measures that favour cross-border commerce over purely internal trade. However, this inevitably relies on the inability of a Member State to justify differential treatment on the basis that it is trying to favour cross-border trade over domestic commerce.⁶⁵ While it may be useful for this specific purpose, it can only do this in addition to and not in place of the discrimination standard and the identification of legitimate objectives which can justify differential treatment as proposed in this chapter.

An important contribution to understanding the selectivity criterion can nevertheless be drawn from Mason's work. She argues that a review of the case law of the CJEU and the Commission's decisional practice reveal a variable level of scrutiny of differential treatment of undertakings based on the basis for the differentiation.⁶⁶ Differentiation based on what she describes as 'suspect classifications' such as sector, region, nationality, size or cross-border trade will be subject to a greater level of scrutiny and will be more difficult for the

⁶² *ibid* 549-550.

⁶³ Ruth Mason, 'An American View of State Aid' (2017) 157 *Tax Notes* 645, 646-647.

⁶⁴ Ruth Mason, 'Identifying Illegal Subsidies' (2019) 69 *American University Law Review* 479, 556-557.

⁶⁵ See for example Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981.

⁶⁶ Ruth Mason, 'An American View of State Aid' (2017) 157 *Tax Notes* 645, 647.

Member State to justify.⁶⁷ These types of differentiation may be particularly likely to cause the impediments to trade, distortions of competition and heightened regulatory competition that the State aid rules seek to avoid and therefore subjecting them to more severe scrutiny may well be desirable.⁶⁸

One of the most convincing proposals on the modification of the selectivity criterion comes in the form of the general availability test.⁶⁹ Under this approach, a measure is not selective simply because it treats undertakings differently provided that the advantage is in principle open to all undertakings. An example of this approach can be seen in Nicolaides' criticism of the outcome of the decision in *World Duty Free*.⁷⁰ In *World Duty Free*, the CJEU held that favourable tax treatment for undertakings with shareholdings in foreign companies as compared with shareholdings in domestic Spanish companies was selective, drawing heavily on the language of discrimination.⁷¹ Nicolaides argues that this application of the selectivity criterion is overinclusive.⁷² He observes that while the impugned measure did clearly differentiate between undertakings, the criterion for differentiation was a choice made by the undertakings concerned to purchase shares in certain companies.⁷³ This differentiation of undertakings *ex post*, after they have had the opportunity to respond to a regulatory incentive, can be distinguished from differentiation based on their characteristics *ex ante*. He argues that the former is legitimate and inevitable and should not lead to the classification of the measure as selective while the latter should require differentiation. This understanding of the selectivity criterion has also been endorsed by AG Saugmandsgaard Øe in *A-Brauerei*, who characterised the correct test as being one of general availability rather

⁶⁷ Ruth Mason, 'An American View of State Aid' (2017) 157 Tax Notes 645, 647.

⁶⁸ Ruth Mason, 'An American View of State Aid' (2017) 157 Tax Notes 645, 655-656.

⁶⁹ See Section 4.5.3.

⁷⁰ Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free* ECLI:EU:C:2016:981.

⁷¹ *ibid* paras 53-95.

⁷² Phedon Nicolaides, 'Excessive Widening of the Concept of Selectivity' (2017) 16 European State Aid Law Quarterly 62.

⁷³ *ibid* 71.

than discrimination.⁷⁴ On this view, it is not differential treatment in itself that is problematic, provided that the advantage is generally available to all undertakings in the sense that undertakings can choose to engage in the behaviour that will result in the advantage being granted.⁷⁵ While there is a limited body of case law that appears consistent with this test,⁷⁶ more recent discussion suggests that this is not part of the prevailing test for selectivity⁷⁷ and would require a change in the approach of the CJEU.

This interpretation of the selectivity criterion makes a significant contribution to the law that moderates the breadth of the definition of aid. However, the differences between this and the emerging discrimination standard currently being applied by the CJEU should not be overstated. The general availability test is in substance very similar to the discrimination standard in the sense that it appears that it would still require justification based on some legitimate objective for most forms of differential treatment between undertakings.⁷⁸ However, instead of regarding the characteristics on which the differentiation is based as fixed, it acknowledges the reality that undertakings can respond to regulatory incentives and make choices and changes to avail of those incentives. Such an approach could be taken in a direction that would prevent the selectivity criterion ever being satisfied. It could be thought that an undertaking could change everything about itself in order to avail of the advantage. However, this would deprive the general availability

⁷⁴ Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:741, Opinion of AG Saugmandsgaard Øe; Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024. See Chapter 4.5.2.

⁷⁵ Phedon Nicolaides, 'Excessive Widening of the Concept of Selectivity' (2017) 16 *European State Aid Law Quarterly* 62, 71-72.

⁷⁶ Case C-100/15 P *Netherlands Maritime Technology Association v Commission* ECLI:EU:C:2016:254, paras 58, 72; Case C-156/98 *Germany v Commission* [2000] ECR I-6857, para 22; Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:741, Opinion of AG Saugmandsgaard Øe; Phedon Nicolaides, 'Excessive Widening of the Concept of Selectivity' (2017) 16 *European State Aid Law Quarterly* 62, 70-71.

⁷⁷ Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, paras 24-27; Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793. Indeed it is noteworthy that the CJEU in Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024 did not endorse or apply the interpretation of the selectivity criterion provided by AG Saugmandsgaard Øe. See also Section 4.5.3.

⁷⁸ Compare discussion in Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:741, Opinion of AG Saugmandsgaard Øe, paras 61-88 on the differences between the discrimination approach and the general availability approach.

approach of its utility. Instead, the question is whether changing the characteristic that is used to differentiate between undertakings is a reasonably available option for the undertakings who are not entitled to the benefit. While it might be relatively easy for the undertakings with shareholdings in domestic companies in *World Duty Free*⁷⁹ to have instead purchased equivalent shareholdings in foreign companies to avail of the benefit, it would probably not be reasonably open to an undertaking to shift to manufacturing in order to avail of the tax rebate on offer in *Adria-Wien*.⁸⁰

The limitation described above is necessary to make the general availability test work effectively. With this limitation, the general availability approach is best interpreted as making a slight but important modification to the discrimination standard as it is currently applied. It will be recalled that a central feature of the impact of the discrimination standard is that it is very sensitive to differential treatment between undertakings. Nearly any form of differentiation can lead to selectivity if not appropriately justified, which can lead to considerable uncertainty. The general availability approach described above would moderate this feature of the discrimination standard by finding that there is no real differential treatment where the undertakings that do not benefit are reasonably capable of adapting their conduct such that they can avail of the favourable treatment as well. Therefore, the general availability approach does not replace the discrimination standard but represents a moderate and desirable amendment to that standard that would help to establish appropriate and principled limits on the notion of aid. It would allow some differentiation that is inherent in almost every State intervention in the market to avoid classification as selective. Further, it is arguable that this is more consistent with the discrimination standard in the sense that

⁷⁹ Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free* ECLI:EU:C:2016:981.

⁸⁰ Case C-143/99 *Adria-Wien* [2001] ECR I-8365.

discrimination is ordinarily interpreted in other fields of EU law as relating to characteristics that are immutable or difficult to change.⁸¹

Ultimately, the discrimination standard offers the best framework within which the selectivity criterion can be constructed. The alternatives to this approach have considerable shortcomings. Some of these alternatives, such as those that consider the number or proportion of undertakings that can benefit from the measure or consider the circumstances that would have prevailed but for the measure are excessively crude. Much like the approach centred on competition economics, these approaches can very easily be interpreted to apply selectivity very broadly or very narrowly. It is difficult to apply these standards to cast moderate and principled limits around the selectivity criterion. Considering the purpose of the impugned measure is the best way to overcome this difficulty. While the three-stage test does ultimately examine the purposes of the measure as it is applied, it obscures this behind a more mechanical structure. The separation of the assessment into distinct stages does not

⁸¹ The most obvious example of such a characteristic in the context of EU law is nationality. For both individuals and undertakings, this characteristic is not impossible to change but may often be quite difficult to change. Article 18 TFEU prohibits discrimination on the grounds of nationality. Other internal market rules seek to prevent Member States from differentiating between persons, undertakings, goods and capital flows based on their origin or the cross-border nature of their activities such as Articles 34, 45, 49, 56, 63 TFEU. See Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (4th edn, Cambridge University Press 2019) chapters 14-19 for further discussion and analysis of the case law. The Charter of Fundamental Rights of the European Union [2012] OJ C326/391, Article 21 also prohibits discrimination on the basis of a wider range of grounds including 'sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation'. Some of these grounds are also the subject of more specific prohibitions in secondary legislation including Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23. While not all of these protected grounds are applicable to undertakings, they illustrate the point that in a discrimination analysis, the law might be more concerned with differential treatment on the basis of characteristics that are more difficult to change. For further discussion of the case law see Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (4th edn, Cambridge University Press 2019) chapter 13. See Roland Ismer and Sophia Piotrowski, 'Selectivity in Corporate Tax Matters after World Duty Free: A Tale of Two Consistencies Revisited' (2018) 46 *Intertax* 156, 165; Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 *European State Aid Law Quarterly* 357 for the view that State aid law appears to be acting in pursuit of equal treatment.

add any additional analytical value. The discrimination standard is the basic question underlying the three-stage test and this should be applied directly.⁸² The general availability test is best interpreted not a meaningful alternative to this analysis, but merely a modest, yet welcome amendment to the discrimination standard.

Despite the inadequacy of its alternatives, the discrimination standard as currently interpreted is not without shortcomings. However, this section has proposed a change that would considerably improve the application of this standard and help to mitigate the difficulties posed by the expansive interpretation of the notion of aid. By acknowledging that undertakings may sometimes be able to adapt their behaviour to avail of a subsidy, the general availability approach can introduce another principled limit on the notion of aid. With this change, the discrimination standard is the best available answer to the difficult question of whether a measure is selective. Attention must now turn to the primary flaw in the discrimination standard – its failure to make explicit the value judgements that it necessarily entails – and how this can be remedied.

8.2.3. Incomplete Nature of the Discrimination Standard

The most important criticism of the discrimination standard is that, as currently applied, it is incomplete and inadequately theorised. It will be recalled that the application of the discrimination standard has led to the selectivity criterion being satisfied where it can be shown that a measure discriminates between two comparable undertakings in a manner that is not justified by reference to the objectives of the measure.⁸³ While the CJEU continues to

⁸² See for example Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, para 33: ‘The examination of whether such a measure is selective is thus, in essence, coextensive with the examination of whether it applies to a set of economic operators in a non-discriminatory manner.’

⁸³ Michael Honoré, ‘Selectivity’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 164-165; Rita Szudoczky, ‘Convergence of the Analysis of

refer to the three-stage test for selectivity,⁸⁴ this obscures rather than clarifies the analysis undertaken by the CJEU in circumstances where the three stages of the test do not ask distinct questions. The case law increasingly equates various stages of the test, as well as the selectivity criterion in general, with the question of whether the impugned measure is discriminatory.⁸⁵ Selectivity has effectively been reduced to a single question of whether a measure discriminates between comparable undertakings.⁸⁶

National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 European State Aid Law Quarterly 357, 357-358; Phedon Nicolaides, 'Excessive Widening of the Concept of Selectivity' (2017) 16 European State Aid Law Quarterly 62, 70; Begoña Pérez-Bernabeu, 'Refining the Derogation Test on Material Tax Selectivity: The Equality Test' (2017) 16 European State Aid Law Quarterly 582, 596; Ruth Mason, 'An American View of State Aid' (2017) 157 Tax Notes 645, 646-647. See Frank Engelen and Anna Gunn, 'State Aid: Towards a Theoretical Assessment Framework' in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 137-151, 150 for a more structured elaboration of this type of test. See also Koen Lenaerts, 'State Aid and Direct Taxation' in Heikki Kanninen, Nina Korjus and Allan Rosas (eds), *EU Competition Law in Context: Essays in Honour of Virpi Tili* (Hart 2009) 291-306, 299, 302-306. See discussion in Section 4.5.2.

⁸⁴ Case C-417/10 *3M Italia* ECLI:EU:C:2012:184, para 40; Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free* ECLI:EU:C:2016:981, paras 57-58; Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paras 36, 44; Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, paras 86-87; Case C-208/16 P *Germany v Commission* ECLI:EU:C:2018:506, paras 83-84; C-209/16 P *Germany v Commission* ECLI:EU:C:2018:507, paras 81-82; Case C-219/16 P *Lowell Financial Services v Commission* ECLI:EU:C:2018:508, paras 88-89; Case T-406/11 *Prosegur Compañía de Seguridad v Commission* ECLI:EU:T:2018:793, paras 50-51; Case T-405/11 *Axa Mediterranean v Commission* ECLI:EU:T:2018:780, paras 56-57; Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2021:202, paras 37-38; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2021:201, paras 31-32; Joined Cases C-51/19 P and C-64/19 P *World Duty Free and Spain v Commission* ECLI:EU:C:2021:793, paras 35-36.

⁸⁵ Case C-518/13 *Eventech* ECLI:EU:C:2015:9, para 53; Case C-66/14 *Finanzamt Linz* ECLI:EU:C:2015:242, Opinion of AG Kokott, paras 81-82; Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free* ECLI:EU:C:2016:981, paras 54, 71-75; Joined Cases C-20/15 and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:624, Opinion of AG Wathelet, paras 7, 80, 83, 96; Case C-270/15 P *Belgium v Commission* ECLI:EU:C:2016:289, Opinion of AG Bobek, para 29; Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paras 22, 35-36; Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, paras 83; Case C-208/16 P *Germany v Commission* ECLI:EU:C:2018:506, para 81; C-209/16 P *Germany v Commission* ECLI:EU:C:2018:507, para 79; Case C-219/16 P *Lowell Financial Services v Commission* ECLI:EU:C:2018:508, para 85; Case T-406/11 *Prosegur Compañía de Seguridad v Commission* ECLI:EU:T:2018:793, paras 47, 185; Case T-405/11 *Axa Mediterranean v Commission* ECLI:EU:T:2018:780, para 53; Case C-706/17 *Achema* ECLI:EU:C:2019:407, para 84; Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2021:202, para 34; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2021:201, para 28; Joined Cases C-51/19 P and C-64/19 P *World Duty Free and Spain v Commission* ECLI:EU:C:2021:793, paras 33.

⁸⁶ Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 164-165; Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 European State Aid Law Quarterly 357, 357-358; Phedon Nicolaides, 'Excessive Widening of the Concept of Selectivity' (2017) 16 European State Aid Law Quarterly 62, 70; Begoña Pérez-Bernabeu, 'Refining the Derogation Test on Material Tax Selectivity: The Equality Test' (2017) 16 European State Aid Law Quarterly 582, 596. See Frank Engelen and Anna Gunn, 'State Aid: Towards a Theoretical Assessment Framework' in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 137-151, 150 for a more structured elaboration of this type of test.

However, the CJEU has not provided a complete or satisfactory account of how this test operates and how it can distinguish aid from generally applicable measures that fall outside of Article 107(1) TFEU. It is clear that virtually every form of State intervention in the market will favour some undertakings more than others. In this very broad sense, all such interventions could be regarded as discriminatory and therefore selective. Such an interpretation would obviously be too broad. It is not differential treatment in itself that is discriminatory or selective, but differential treatment that is not supported by some acceptable reason for differentiation. Therefore, a Member State may exempt aggregates made from recycled materials from the requirement to pay an environmental levy that is imposed on other aggregates made directly from minerals freshly extracted from the earth.⁸⁷ This is because the differential treatment is linked to the environmental harm caused by the activity, which is a legitimate reason for distinguishing between the two situations. However, if the extraction of a type of minerals causes similar levels of harm to the extraction of minerals covered by the levy, the Member State cannot exempt such minerals as it cannot be justified by that objective.⁸⁸ Similarly, Member States may rely on the general objectives of taxation such as progressivity to impose smaller tax burdens on undertakings with a lesser ability to pay than larger undertakings.⁸⁹ In implementing a tax designed to address the environmental and infrastructural burden of retail establishments, Member States may treat smaller establishments that make a lesser contribution to such a burden more favourably than larger retail establishments.⁹⁰ However, this logic does not allow a Member State to justify

⁸⁷ Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515. See also Case T-210/02 RENV *British Aggregates Association v Commission (British Aggregates III)* ECLI:EU:T:2012:110, [2012] ECR II-2789. This feature of the levy was not contested by the applicant in these cases.

⁸⁸ Case T-210/02 RENV *British Aggregates Association v Commission (British Aggregates III)* ECLI:EU:T:2012:110, [2012] ECR II-2789, paras 71-93.

⁸⁹ Case C-596/19 P *Commission v Hungary and Poland* ECLI:EU:C:2021:202, paras 46-47; Case C-562/19 P *Commission v Poland and Hungary* ECLI:EU:C:2021:201, paras 40-41.

⁹⁰ Case C-233/16 *ANGED* ECLI:EU:C:2018:280, para 67.

an exemption from such a tax for particularly large establishments.⁹¹ Once Member States can rely on an acceptable reason for doing so, they may differentiate between undertakings without engaging the prohibition on aid.

At first glance, the discrimination standard might appear to be merely a rationality or ‘internal consistency’ check for certain interventions by Member States.⁹² This is not radically different from the understanding of the selectivity criterion before the emergence of the case law discussing the discrimination standard. It was understood that the selectivity analysis merely verified that the measure only differentiated between undertakings to the extent justified by the objectives of the measure.⁹³ While Member States were thought to have the freedom to choose the relevant objectives for the measure that might justify any differential treatment, the CJEU would assess the purpose of the measure objectively and would not necessarily accept the Member State’s view of the matter.⁹⁴

However, the case law goes further than this. The clearest example of this is *Gibraltar*, in which an entirely new corporate tax system was put in place that favoured offshore companies.⁹⁵ Indeed, it seems clear that this was the intended purpose of the adoption of the new system. The CJEU suggested that the purpose of the system was in reality to provide a tax system for all companies rather than just offshore companies and

⁹¹ *ibid* para 68.

⁹² Of the type described by Roland Ismer and Sophia Piotrowski, ‘The Selectivity of Tax Measures: A Tale of Two Consistencies’ (2015) 43 *Intertax* 559, 568-569; Joined Cases C-51/19 P and C-64/19 P *World Duty Free and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, para 18.

⁹³ Hugo López López, ‘General Thought on Selectivity and Consequences of a Broad Concept of State Aid in Tax Matters’ (2010) 9 *European State Aid Law Quarterly* 807, 815 argues that the analysis should go no further than this. Juan Jorge Piernas López, ‘Revisiting Some Fundamentals of Fiscal Selectivity: The ANGED Case’ (2018) 17 *European State Aid Law Quarterly* 274, 279 also explains how the test is largely about ensuring consistency, although he acknowledges that there may be some limits on reliance on extrinsic objectives as opposed to objectives intrinsic to or inherent in the general system.

⁹⁴ Roberto Cisotta, ‘Criterion of Selectivity’ in Herwig Hofmann and Claire Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016) 128-150, 149. Andrea Biondi, ‘State aid is falling down, falling down: An analysis of the case law on the notion of aid’ (2013) 50 *Common Market Law Review* 1719, 1735-1737.

⁹⁵ See Section 4.4.

therefore there was an inconsistency with this more general objective.⁹⁶ However, it is difficult to see an inconsistency with this more general statement of the objective of the system unless one finds that virtually every difference in the tax burden between two companies is suspect. A more plausible interpretation of this decision is that while the impugned tax system was clearly designed to favour offshore companies, this was not an acceptable objective to differentiate between offshore companies and other companies and the range of such objectives is circumscribed by EU law.⁹⁷

Similarly, the General Court had repeatedly held that in order for tax rulings and transfer pricing rules to avoid discriminating against multinational group companies and being regarded as selective as a result, they must apply the arm's length principle to certain transactions.⁹⁸ Indeed, the General Court insisted that the arm's length principle is part of the law on selectivity and does not need to be incorporated into national legislation to permit review on the basis of that principle.⁹⁹ Perhaps more explicitly than in *Gibraltar*, these cases see the CJEU going beyond a mere rationality or 'internal consistency' test in their application of the selectivity criterion.¹⁰⁰ These cases saw the CJEU precluding Member States from relying on certain objectives. On this understanding, it is never possible to justify

⁹⁶ Joined Cases C-106/09 and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 101.

⁹⁷ See John Temple Lang, 'The Gibraltar State Aid and Taxation Judgment - A Methodical Revolution' (2012) *European State Aid Law Quarterly* 805, 812; Phedon Nicolaides and Ioana Eleonora Rusu, 'The Concept of Selectivity: An Ever Wider Scope' (2012) 11 *European State Aid Law Quarterly* 791, 801-802; Roland Ismer and Sophia Piotrowski, 'The Selectivity of Tax Measures: A Tale of Two Consistencies' (2015) 43 *Intertax* 559, 568-569.

⁹⁸ See Section 4.6.1. Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338, paras 214-225; Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670, paras 141-144; Cases T-760/15 and T-636/16 *Netherlands and Starbucks Corp v Commission* ECLI:EU:T:2019:669, paras 131-172.

⁹⁹ Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338, paras 214-225; Cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler v Commission* ECLI:EU:T:2019:670, paras 141-144; Cases T-760/15 and T-636/16 *Netherlands and Starbucks Corp v Commission* ECLI:EU:T:2019:669, paras 131-172.

¹⁰⁰ Roland Ismer and Sophia Piotrowski, 'The Selectivity of Tax Measures: A Tale of Two Consistencies' (2015) 43 *Intertax* 559, 568-569; Roland Ismer and Sophia Piotrowski, 'Selectivity in Corporate Tax Matters after World Duty Free: A Tale of Two Consistencies Revisited' (2018) 46 *Intertax* 156, 165.

favourable treatment of some undertakings by reference to objectives of attracting offshore companies or large multinational companies to set up in a particular Member State. While it is now clear that the arm's length principle must actually be incorporated into national law to allow for review of this type (which must remain receptive to the specific way in which it has been incorporated),¹⁰¹ the preceding line of General Court decisions demonstrated the pressure that this type of test creates for the Union courts to clarify the limits of the objectives on which Member States may rely.¹⁰²

There are legitimate criticisms of the opacity of the reasoning of the Commission and the CJEU and its misleading emphasis on continuity with previous jurisprudence.¹⁰³ However, there is a more fundamental criticism that must be addressed here that observes that these developments unduly limit the freedom of Member States to implement policies and define their objectives.¹⁰⁴ This criticism overlooks the reality that these limits are a necessary part of the type of test for selectivity that is currently employed.¹⁰⁵ Indeed, the three stage test attempted to limit the range of acceptable objectives albeit in a very technical

¹⁰¹ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, paras 96-101.

¹⁰² See Section 4.6.3.

¹⁰³ On the decision in Joined Cases C-106/09 and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, see John Temple Lang, 'The Gibraltar State Aid and Taxation Judgment - A Methodical Revolution' (2012) *European State Aid Law Quarterly* 805 See Section 4.4. On the use of the arm's length principle before the judgment in Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* ECLI:EU:C:2022:859, see Tony Joris and Wout de Cock, 'Is *Belgium and Forum 187* a Suitable Source for an EU "At Arm's Length Principle"?' (2017) 16 *European State Aid Law Quarterly* 607; Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 *Journal of European Competition Law & Practice* 369; Dimitrios Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016) 15 *European State Aid Law Quarterly* 428. On the opacity of the Commission's application of external standards in assessing selectivity, see Ruth Mason, 'Identifying Illegal Subsidies' (2019) 69 *American University Law Review* 479530-531, which has been cited favourably in Case C-898/19 P *Ireland v Commission* ECLI:EU:C:2021:1029, Opinion of AG Pikamäe, para 111. For more detailed discussion of these criticisms, see Section 4.6.2.

¹⁰⁴ John Temple Lang, 'The Gibraltar State Aid and Taxation Judgment - A Methodical Revolution' (2012) *European State Aid Law Quarterly* 805, 811-812; Phedon Nicolaidis and Ioana Eleonora Rusu, 'The Concept of Selectivity: An Ever Wider Scope' (2012) 11 *European State Aid Law Quarterly* 791, 803; Case C-898/19 P *Ireland v Commission* ECLI:EU:C:2021:1029, Opinion of AG Pikamäe, paras 67-146, 168-173.

¹⁰⁵ Andreas Bartosch, 'Is There a Need for a Rule of Reason in European State Aid Law - Or How to Arrive at a Coherent Concept of Material Selectivity' (2010) 47 *Common Market Law Review* 729, 741, 745.

and unsatisfactory manner by categorising them as intrinsic or external to the system of which the measure forms part.¹⁰⁶ Under a test where a measure is selective if it differentiates between undertakings without being justified by the pursuit of an acceptable objective or purpose, a refusal to limit the range of permissible objectives which can be invoked would lead to two possible consequences.¹⁰⁷ The first would see the selectivity test become excessively difficult to satisfy, as it would always be possible for a Member State to frame an objective such that the measure will be justified,¹⁰⁸ except perhaps for individual aid. The second would see the CJEU try to guard against this narrowing of the notion of aid by being more open to rejecting accounts of the objectives served by the impugned measure and engaging in a stricter proportionality-style analysis.¹⁰⁹ While there is a role for such scepticism of Member State accounts, cases such as *Gibraltar* illustrate problems in excessive reliance on this approach as it sees the CJEU cast the objectives of the measure in very broad terms that are both implausible and do not very well explain how these very general objectives do not justify the differential treatment. Bartosch acknowledged the need for limiting the range of permissible objectives before the final judgment in *Gibraltar* was delivered under an understanding of the three-stage test that was focused on objectives.¹¹⁰

¹⁰⁶ See discussion below at Section 8.2.4. See also discussion at Section 4.5.2.

¹⁰⁷ Andreas Bartosch, 'Is There a Need for a Rule of Reason in European State Aid Law - Or How to Arrive at a Coherent Concept of Material Selectivity' (2010) 47 *Common Market Law Review* 729, 741. More orthodox suggestions for how the range of acceptable justifying purposes can be limited are described by Joachim Englisch, 'State Aid and Indirect Taxation' in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 69-85, 73.

¹⁰⁸ Andreas Bartosch, 'Is There a Need for a Rule of Reason in European State Aid Law - Or How to Arrive at a Coherent Concept of Material Selectivity' (2010) 47 *Common Market Law Review* 729, 745 avers to this possibility.

¹⁰⁹ Roland Ismer and Sophia Piotrowski, 'The Selectivity of Tax Measures: A Tale of Two Consistencies' (2015) 43 *Intertax* 559, 568-569 refer to this as the 'internal consistency' element of the test to be contrasted with the 'external consistency' element that involves holding Member State policies to external standards (or merely limiting the ability of Member States to rely on certain objectives as justification). These 'internal consistency' elements of the test will remain important to some extent irrespective of whether the CJEU also limits the range of legitimate objectives which can be invoked.

¹¹⁰ Andreas Bartosch, 'Is There a Need for a Rule of Reason in European State Aid Law - Or How to Arrive at a Coherent Concept of Material Selectivity' (2010) 47 *Common Market Law Review* 729, 741, 745. See also Begoña Pérez-Bernabeu, 'Refining the Derogation Test on Material Tax Selectivity: The Equality Test' (2017) 16 *European State Aid Law Quarterly* 582, 589-590, 596.

The developments since then that have reoriented the test around the discrimination standard have given a more central role to these legitimate objectives and strengthened the case for the law to define and limit the range of permissible objectives.

This sheds light on the most important deficiency in the case law on selectivity to date. This is the failure on the part of the CJEU to systematically define the objectives that Member States can or cannot rely on.¹¹¹ The closest the law comes to defining the range of objectives which may justify differential treatment in a systematic manner is the extremely technical distinction it draws as part of the three-stage test between objectives which are intrinsic and external to the system of which the impugned measure forms part.¹¹² Objectives extrinsic to the system such as environmental goals may be considered when assessing if a measure treats undertakings differently when they are comparable by reference to those objectives under the second stage.¹¹³ Intrinsic objectives, which include certain general features of tax systems such as progressivity, tax neutrality, administrative manageability and avoiding double taxation, fraud or tax evasion,¹¹⁴ can be relied upon to justify any differentiation as part of the third stage.¹¹⁵ The Commission puts this differently, claiming that only intrinsic objectives can be relied upon at both stages, but that certain objectives that would normally be external (such as environmental or public health goals) may be

¹¹¹ Roland Ismer and Sophia Piotrowski, 'The Selectivity of Tax Measures: A Tale of Two Consistencies' (2015) 43 *Intertax* 559, 5569-570 described the need for further clarification of the external standards with which Member States would have to comply to avoid the prohibition on aid in the wake of Joined Cases C-106/09 and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113. This is essentially the same issue as the range of legitimate objectives based on which Member States can justify differential treatment.

¹¹² See also Section 4.5.2.

¹¹³ Humbert Drabbe, 'The Test of Selectivity in State Aid Litigation' in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 87-105, 101-102; Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 160, 163.

¹¹⁴ 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 C262/1, para 139.

¹¹⁵ Humbert Drabbe, 'The Test of Selectivity in State Aid Litigation' in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 87-105, 101-102; Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 160, 163.

considered intrinsic when assessing certain special purpose levies.¹¹⁶ After some erosion of this distinction even before the emergence of the discrimination standard,¹¹⁷ the CJEU has gone on to confirm that the second stage should only consider the objectives of the broader system.¹¹⁸

This does not provide a satisfactory answer to the question of what objectives are capable of being invoked as justification for four reasons. First, the former interpretation of this distinction does not preclude reliance on particular objectives but merely determines at what stage of the analysis they will be considered. In those circumstances, it is not clear why the different stages or the different types of purpose should be distinguished in this way.¹¹⁹ Second, the Commission's more restrictive view does preclude reliance on certain objectives in most cases but it does so excessively, limiting the range of potential justifications to general features of the tax system only.¹²⁰ Third, the boundaries between the second and third stages of the test and the different types of objective that may be invoked are increasingly difficult to maintain, particularly for direct tax measures.¹²¹ Fourth, the

¹¹⁶ 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 C262/1, paras 135-136. Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 162 contests this interpretation of the CJEU's case law. Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 *European State Aid Law Quarterly* 357, 373 argues that the CJEU's case law is not clear on this point.

¹¹⁷ See for example Joined Cases C-78/08 and C-80/08 *Paint Graphos* [2011] ECR I-7611. The erosion of this distinction is discussed by José Luis Buendía Sierra, 'Finding Selectivity or the Art of Comparison' (2018) *European State Aid Law Quarterly* 85, 90-91; Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 163. These authors also refer to Case T-287/11 *Heitkamp v Commission* ECLI:EU:T:2016:60 which has since been overturned on appeal in Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505.

¹¹⁸ Joined Cases C-51/19 P and C-64/19 P *World Duty Free and Spain v Commission* ECLI:EU:C:2021:793, para ; Andreas Bartosch, 'Spanish Goodwill – A Textbook on Material Selectivity Awaiting a Second Edition' (2022) 21 *European State Aid Law Quarterly* 65, 68.

¹¹⁹ See Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 165 who argues that these different stages and types of objective can be treated together.

Andreas Bartosch, 'Is There a Need for a Rule of Reason in European State Aid Law - Or How to Arrive at a Coherent Concept of Material Selectivity' (2010) 47 *Common Market Law Review* 729, 747. Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 137 points out that the range of intrinsic objectives appears largely limited to general fiscal objectives.

¹²¹ José Luis Buendía Sierra, 'Finding Selectivity or the Art of Comparison' (2018) *European State Aid Law Quarterly* 85, 90-91; Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State*

distinction between intrinsic and external objectives is somewhat misleading in that it suggests that certain objectives could be invoked if a Member State could ensure that they were sufficiently ‘baked in’ to the general system. It is difficult to see how that would be the case for cases like *Gibraltar*¹²² and *Ireland and Apple v Commission*.¹²³

Another apparent attempt to limit the objectives that may be invoked to justify differential treatment falls short of what is needed to develop a coherent approach to selectivity. The case law on the three-stage test is ambiguous as to whether the relevant objectives that are used to assess whether the measure differentiates between undertakings in a comparable position in the second stage and those used to assess justification in the third stage should be drawn from the impugned measure itself or the broader reference system of which it forms part. This ambiguity is particularly pronounced in the second stage of the analysis for which some cases say the objective of the impugned measure should be used¹²⁴ whereas others indicate that it should be an objective of the broader reference system.¹²⁵ In some cases involving large-scale tax reforms such as those at issue in *Gibraltar*, this is likely to be moot simply because the objectives of the impugned measure and the general system will be identical.¹²⁶ In many cases, the CJEU does not specify from where it derives the

Aid Control: Law and Economics (Wolters Kluwer 2017) 119-168, 163, 165; Rita Szudoczky, ‘Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms’ (2016) 15 *European State Aid Law Quarterly* 357, 373.

¹²² Joined Cases C-106/09 and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113.

¹²³ Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338, paras 214-225.

¹²⁴ Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365, para 41; Case C-409/00 *Spain v Commission* ECLI:EU:C:2003:92, [2003] ECR I-1487, para 47; Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, para 54; Case C-279/08 P *Commission v Netherlands (NOx)* ECLI:EU:C:2011:551, [2011] ECR I-7671, para 62.

¹²⁵ Case C-308/01 *GIL Insurance* ECLI:EU:C:2004:252, [2004] ECR I-4777, para 68; Case C-172/03 *Heiser* ECLI:EU:C:2005:130, [2005] ECR I-1627, para 40; Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, [2011] ECR I-7611, para 49; Case T-210/02 RENV *British Aggregates Association v Commission (British Aggregates III)* ECLI:EU:T:2012:110, [2012] ECR II-2789, para 49.

¹²⁶ Rita Szudoczky, ‘Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms’ (2016) 15 *European State Aid Law Quarterly* 357, 366-367; Hugo López López, ‘General Thought on Selectivity and Consequences of a Broad Concept of State Aid in Tax Matters’ (2010) 9 *European State Aid Law Quarterly* 807, 814. This might be said to have occurred in Joined Cases C-106/09 and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113.

relevant objective¹²⁷ and it has also been suggested that the terms may in fact be used interchangeably.¹²⁸ However, the recent decision in *World Duty Free Group and Spain v Commission* appears to confirm that the objective of the system is to be applied at this stage.¹²⁹ It has been argued that the objective of the system should be preferred for this stage over the objective of the measure itself.¹³⁰ This is because it is suggested that taking the objective of the measure itself, which is often derived from the conditions for the eligibility of the measure, will lead to a circular analysis and that it will prevent the CJEU from properly assessing the proportionality of the impugned measure to the relevant objective.¹³¹ One advocate of this view does suggest that the objective of the measure itself may be relevant,¹³² but is not particularly clear about precisely how this might work. Others argue that the objective of the measure itself should be used at this stage and that to do otherwise risks unduly expanding the notion of aid.¹³³ For the third stage, some commentators suggest that

¹²⁷ Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 *European State Aid Law Quarterly* 357, 366; Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, para 82; Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de la Rioja v Juntas Generales del Territorio Histórico de Vizcaya* ECLI:EU:C:2008:488, [2008] ECR I-6747, para 46; Case C-417/10 *3M Italia* ECLI:EU:C:2012:184, para 40.

¹²⁸ Bartłomiej Kurcz and Dimitri Vallindas, 'Can General Measures Be.. Selective - Some Thoughts on the Interpretation of a State Aid Definition' (2008) 45 *Common Market Law Review* 159, 172.

¹²⁹ Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, para 125.

¹³⁰ Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 *European State Aid Law Quarterly* 357, 367-368. See also Roland Ismer and Sophia Piotrowski, 'Selectivity in Corporate Tax Matters after World Duty Free: A Tale of Two Consistencies Revisited' (2018) 46 *Intertax* 156, 165; Joachim Englisch, 'State Aid and Indirect Taxation' in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 69-85, 73.

¹³¹ Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 *European State Aid Law Quarterly* 357, 367-368. See also Roland Ismer & Sophia Piotrowski, 'Selectivity in Corporate Tax Matters after World Duty Free: A Tale of Two Consistencies Revisited' (2018) 46 *Intertax* 156, 165.

¹³² Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 *European State Aid Law Quarterly* 357, 368.

¹³³ Begoña Pérez-Bernabeu, 'Refining the Derogation Test on Material Tax Selectivity: The Equality Test' (2017) 16 *European State Aid Law Quarterly* 582, 590; Hugo López López, 'General Thought on Selectivity and Consequences of a Broad Concept of State Aid in Tax Matters' (2010) 9 *European State Aid Law Quarterly* 807, 815. This consequence is also acknowledged by Roland Ismer and Sophia Piotrowski, 'Selectivity in Corporate Tax Matters after World Duty Free: A Tale of Two Consistencies Revisited' (2018) 46 *Intertax* 156, 160.

the objective should be derived from the system,¹³⁴ but others state that it should be that of the objective.¹³⁵ While the language used is somewhat different, this ambiguity is closely related to the distinction between intrinsic and external objectives which has been criticised above.

This thesis argues that this distinction is not a useful way to identify objectives that are capable of justifying differential treatment under the nascent discrimination standard. As before, if both types of objectives can be used but at different stages of the analysis, it is not clear that this distinction, or indeed the distinction between the stages matters very much at all.¹³⁶ If only the objectives of the general system can be used, this appears to limit the relevant objectives to fiscal objectives which is excessively strict and would widen the notion of aid unduly.¹³⁷ Moreover, as the law has moved from an approach whereby a derogation from a broader reference system is required as part of the first stage of the analysis to one where differential treatment in itself is capable of being selective,¹³⁸ the distinction between the objectives of the general system and those of the specific measure seems more artificial.¹³⁹ Finally, concerns about excessively narrowing the notion of aid by allowing the use of objectives derived from the measures at issue might be mitigated by the limitations

¹³⁴ Roland Ismer and Sophia Piotrowski, 'Selectivity in Corporate Tax Matters after World Duty Free: A Tale of Two Consistencies Revisited' (2018) 46 *Intertax* 156, 165.

¹³⁵ Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 *European State Aid Law Quarterly* 357, 371.

¹³⁶ Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 165.

¹³⁷ Andreas Bartosch 'Is There a Need for a Rule of Reason in European State Aid Law - Or How to Arrive at a Coherent Concept of Material Selectivity' (2010) 47 *Common Market Law Review* 729, 747. Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 137 points out that objectives intrinsic to the system appear to be largely limited to general fiscal objectives. Begoña Pérez-Bernabeu, 'Refining the Derogation Test on Material Tax Selectivity: The Equality Test' (2017) 16 *European State Aid Law Quarterly* 582, 591 argues that only very rarely has the CJEU found that a measure was justified by a general fiscal objective.

¹³⁸ Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 *European State Aid Law Quarterly* 357, 361-363; Case C-203/16 P *Andres v Commission* ECLI:EU:C:2018:505, paras 92-93, 104. Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:793, paras 94-95; Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission* ECLI:EU:C:2021:51, Opinion of AG Pitruzzella, para 76-78.

¹³⁹ See discussion of the reference framework in Section 4.5.2.

on the range of permissible objectives advocated by some commentators and in this chapter.¹⁴⁰

Therefore, the law does not offer a satisfactory response to the imperative to limit the range of objectives that can be invoked to justify differential treatment. It remains clear that certain objectives cannot be invoked by Member States for this purpose, but the law does not give much detail on how far this category extends. Moreover, there is no coherent framework or methodology that has been articulated for identifying which objectives can or cannot be relied upon in this way. This represents a considerable omission in the existing jurisprudence that contributes to the uncertainty in the application of the selectivity criterion. This chapter will go on to propose a method of resolving this deficiency.

8.2.4. Developing a More Transparent and Moderate Standard

As has been observed above, the discrimination standard as articulated by the CJEU is incomplete. It has been argued that the test identifies measures as selective where they involve differential treatment of undertakings that is not capable of being justified as necessary and proportionate to the achievement of a legitimate objective. However, a more troubling omission in the case law is the failure to specify or delimit the category of legitimate objectives that can be invoked to justify differential treatment. It is clear that Member States are not entirely free in their choice of objectives which can be used to justify differential treatment and this is a necessary and desirable feature of this type of test. However, there is little clarity on what objectives can be relied upon in this way and which

¹⁴⁰ Andreas Bartosch ‘Is There a Need for a Rule of Reason in European State Aid Law - Or How to Arrive at a Coherent Concept of Material Selectivity’ (2010) 47 *Common Market Law Review* 729, 747; Begoña Pérez-Bernabeu, ‘Refining the Derogation Test on Material Tax Selectivity: The Equality Test’ (2017) 16 *European State Aid Law Quarterly* 582, 589-590.

cannot. This section considers how this deficiency in the case law could be remedied in a manner that supports the objectives of the State aid control regime and more broadly, those of the EU.

The first significant element of the scheme proposed here is that it must take a relatively broad view of the range of permissible objectives. That is to say that most general, relevant public policy objectives should be capable of being invoked to justify differential treatment such that it is not selective.¹⁴¹ In circumstances where relatively modest differential treatment of categories of undertakings may require justification, Member State governments will need to be able to invoke a wide range of justifying objectives in order to avoid excessive restrictions on their ability to regulate their domestic economies. There are many legitimate reasons why Member States may choose to differentiate between different categories of undertakings for the purpose of taxation and general regulation and therefore the justifying objectives must be similarly numerous.

In this respect, the interpretation of the selectivity criterion should be informed by the approach taken by the CJEU in the case law on free movement.¹⁴² While there is a body of academic literature that argues that the State aid rules have much in common with the free movement provisions in the Treaties,¹⁴³ the comparison may become more appropriate as

¹⁴¹ Andreas Bartosch 'Is There a Need for a Rule of Reason in European State Aid Law - Or How to Arrive at a Coherent Concept of Material Selectivity' (2010) 47 *Common Market Law Review* 729, 747.

¹⁴² See generally Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 *European State Aid Law Quarterly* 357; Roberto Cisotta, 'Criterion of Selectivity' in Herwig Hofmann and Claire Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016) 128-150, 148; Frank Engelen and Anna Gunn, 'State aid: Towards a theoretical assessment framework' in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 137-151, 146-149; Koen Lenaerts, 'State Aid and Direct Taxation' in Heikki Kanninen, Nina Korjus and Allan Rosas (eds), *EU Competition Law in Context: Essays in Honour of Virpi Tili* (Hart 2009) 291-306, 299, 302-306.

¹⁴³ Andrea Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' (2010) 12 *Cambridge Yearbook of Legal Studies* 35, 42; José Luis Buendía Sierra and Ben Smulders, 'The Limited Role of the "Refined Economic Approach" in Achieving the Objectives of State Aid Control: Time for Some Realism' in *EC State Aid Law: Liber Amicorum Francisco Santaolalla Gadea* (Wolters Kluwer 2008) 1-26, 9; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 38. This proposition is contested however, with other commentators such as Alexander Collins, 'Is the Regulation of State-Aid a Necessary Component of an Effective Competition Law Framework' (2005) 16 *European Business Law Review* 379;

the selectivity test reorients itself around the discrimination standard. This is because the case law on free movement is to a large extent concerned with identifying a specific form of discrimination, namely less favourable treatment of goods, services, capital or persons moving across borders compared with purely domestic situations.¹⁴⁴ As with State aid law, the jurisprudence on free movement does not prohibit any relevant differential treatment outright, but must also examine whether it is justified as a measure that is necessary for and proportionate to the achievement of a legitimate objective.¹⁴⁵ Defining the range of objectives that can be relied upon to justify the differential treatment is therefore very important. Some of these are expressly identified in the Treaties,¹⁴⁶ while others have been elaborated by the jurisprudence of the CJEU.¹⁴⁷ This range of permissible objectives does not include purely economic or protectionist justifications.¹⁴⁸ However, beyond these limits, the range of permissible justifications is very broad,¹⁴⁹ including environmental

Pietro Crocioni, 'Can State Aid Policy Become More Economic Friendly' (2006) 29 *World Competition* 89 suggesting that the State aid rules have a greater affinity with the competitions rules in the Treaties. See Chapter 3 for an outline of this debate.

¹⁴⁴ Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 *European State Aid Law Quarterly* 357, 378-379.

¹⁴⁵ Rita Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms' (2016) 15 *European State Aid Law Quarterly* 357, 379. See also Gjermund Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47 *Common Market Law Review* 1021 for discussion of the requirements of consistency and coherence in justification of restrictions on free movement that could also be very effectively transposed to the analysis of selectivity.

¹⁴⁶ See for example Articles 36, 45(3)-(4), 51, 52(1) and 62 TFEU.

¹⁴⁷ Such as the mandatory requirements that have been interpreted as limiting the prohibition on measures equivalent to quantitative restrictions on imports since Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* ECLI:EU:C:1979:42, [1979] ECR 649, para 8. For discussion of the case law see Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (4th edn, Cambridge University Press 2019) 719-724. There is also some controversy over the more limited availability of these justifications such that they are only available for measures that are indistinctly applicable. See Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (4th edn, Cambridge University Press 2019) 719-720; Case 788/79 *Gilli and Andres* ECLI:EU:1980:171, [1980] ECR 2071. Compare the discussion of the different types of permissible objectives as part of the selectivity analysis in Compare Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 129.

¹⁴⁸ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (4th edn, Cambridge University Press 2019) 825-826; Jukka Snell, 'Economic aims as justification for restrictions on free movement' in A Schrauwen (ed), *Rule of Reason: Re-thinking Another Classic of EC Legal Doctrine* (Europa Law Publishing 2005) 35-56, 37. Although it has been suggested that the division between economic and non-economic justifications is not quite so clearly defined in the case law. See Sue Arrowsmith, 'Rethinking the Approach to Economic Justifications under the EU's Free Movement Rules' (2015) 68 *Current Legal Problems* 307.

¹⁴⁹ Stephen Weatherill, 'The Several Internal Markets' (2017) 36 *Yearbook of European Law* 125, 143.

protection,¹⁵⁰ consumer protection,¹⁵¹ the promotion of culture¹⁵² and the protection of the nature of sport.¹⁵³ It is also significant that the CJEU has expanded the range of permissible justifications beyond the text of the treaties in the context of free movement law, as this echoes developments in the application of the selectivity criterion and provides a useful comparison for the scheme proposed here.¹⁵⁴ The comparison with free movement may also justify an even broader range of objectives being available in the selectivity analysis in circumstances where discrimination in free movement law is limited to nationality or the national provenance of goods, services or capital.¹⁵⁵ This contrasts with State aid law in which virtually any form of differential treatment of undertakings will require justification.¹⁵⁶

While important lessons can be drawn with similarities to the free movement case law on this, there are specific features of the State aid control regime which must be accounted for in identifying the range of legitimate objectives. Bartosch offers a useful starting point for refining this list, arguing that because State aid law is designed to prevent subsidy races between Member States and distortions of competition between undertakings, ‘considerations related to improving the competitiveness of certain undertakings, industries, sectors or regions are from the very outset impermissible and consequently give rise to selectivity.’¹⁵⁷ These limitations are drawn from the two primary rationales for State aid

¹⁵⁰ Case C-309/02 *Radlberger Getränkegesellschaft v Land Baden-Württemberg* ECLI:EU:C:2004:799, [2004] ECR I-11763; Case C-112/00 *Schmidberger v Austria* ECLI:EU:C:2003:333, [2003] ECR I-5659.

¹⁵¹ Case 178/84 *Commission v Germany* ECLI:EU:C:1987:126, [1987] ECR 1227.

¹⁵² Case C-250/06 *United Pan-Europe Communications Belgium* ECLI:EU:C:2007:783 [2007] ECR I-11135.

¹⁵³ Case C-415/93 *Bosman* ECLI:EU:C:1995:463, [1995] ECR I-4921.

¹⁵⁴ Rita Szudoczky, ‘Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms’ (2016) 15 *European State Aid Law Quarterly* 357, 379.

¹⁵⁵ Rita Szudoczky, ‘Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms’ (2016) 15 *European State Aid Law Quarterly* 357, 380; Roberto Cisotta, ‘Criterion of Selectivity’ in Herwig Hofmann and Claire Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016) 128-150, 148.

¹⁵⁶ Rita Szudoczky, ‘Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms’ (2016) 15 *European State Aid Law Quarterly* 357, 380.

¹⁵⁷ Andreas Bartosch ‘Is There a Need for a Rule of Reason in European State Aid Law - Or How to Arrive at a Coherent Concept of Material Selectivity’ (2010) 47 *Common Market Law Review* 729, 747.

control identified in the literature: one based on the imperative of market integration and the removal of trade barriers and the other based on preventing distortions of competition. However, this thesis has argued that the management of regulatory competition between Member States in their responses to cross-border mobility other than simply restraining such mobility is emerging as a prominent objective of State aid control.¹⁵⁸ State aid control increasingly plays a role in governing Member State competition for investment through tax, subsidies and certain market rules. As a result, it seems clear that Member States should also be unable to rely on the objective of increasing overall tax revenue for that Member State by increasing foreign investment to prevent a measure being regarded as selective.¹⁵⁹ Merola's distinction between non-selective general measures based on macroeconomic rationales and selective measures relying on microeconomic justifications at the level of the sector or undertaking may also explain why some of these objectives listed above may not be invoked by Member States.¹⁶⁰

Further limitations on the range of legitimate objectives can be inferred from the exemptions provided in Article 107(2)-(3) TFEU.¹⁶¹ It has been observed that the exemptions in these provisions are relatively broad, especially when they are compared with the relatively narrow derogation contained in Article 101(3) TFEU.¹⁶² This has been used as an argument in favour of an expansive interpretation of the general prohibition on aid in Article 107(1) TFEU. It has been suggested that the broad derogations available require a

¹⁵⁸ See Section 3.6.

¹⁵⁹ There is some acknowledgement of this in the case law already. See Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Territorio Histórico de Álava* [2009] ECR II-3029, para 130; Joined Cases T-92/00 and T-103/00 *Territorio Histórico de Álava* [2002] ECR II-1385, para 62; Joined Cases T-269/99, T-271/99 and T-272/99 *Territorio Histórico de Guipúzcoa* [2002] ECR II-4271, para 64 and discussion in Section 4.2.2.

¹⁶⁰ Massimo Merola, 'The Rebus of Selectivity in Fiscal Aid: A Nonconformist View on and Beyond the Case Law' (2016) 39 *World Competition* 533, 538.

¹⁶¹ For discussion of these provisions and the compatibility assessment, see Sections 2.4, 5.5.2, 7.3.3.

¹⁶² Case 234/84 *Commission v Belgium* [1986] ECR 2263, Opinion of AG Lenz, 2274; Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021) 165-166.

similarly broad interpretation of the prohibition to avoid the State aid rules being circumvented.¹⁶³ This argument should be approached with scepticism. The breadth of the notion of aid may seem somewhat secondary in importance to the exemptions for compatibility with the internal market which seem to determine the substantive limits on what Member States can and cannot do. However, a broad definition of the notion of aid may place a heavy burden on Member States to notify and delay the implementation of measures as required by Article 108(3) TFEU. While it may seem that interpreting both the prohibition and the derogations broadly may be a useful way of trading off and balancing the severity or leniency of the regime, this trade-off is imperfect.

Better insights from the exemptions in Article 107(2)-(3) TFEU can be drawn from the specific objectives to which they point. These provisions identify categories of aid that are permitted¹⁶⁴ and that may be permitted by the Commission.¹⁶⁵ They do so primarily by identifying the objectives that such aid serves. For example, aid will be compatible if it is designed ‘to make good the damage caused by natural disasters or exceptional occurrences’.¹⁶⁶ Aid may also be compatible if it serves ‘an important project of common European interest’, if it seeks ‘to remedy a serious disturbance on the economy of a Member State’.¹⁶⁷ If the Treaties identify these objectives as being grounds for the compatibility of aid, it is inappropriate to use these objectives to identify aid in the first place.¹⁶⁸ This is because these objectives were selected as being relevant to the analysis when a measure is already classified as aid. If they could be used as part of the analysis in Article 107(1) TFEU, it would be likely that measures would only be classified as aid if they were also

¹⁶³ Case 234/84 *Commission v Belgium* [1986] ECR 2263, Opinion of AG Lenz, 2274.

¹⁶⁴ Article 107(2) TFEU.

¹⁶⁵ Article 107(3) TFEU.

¹⁶⁶ Article 107(2)(b) TFEU.

¹⁶⁷ Article 107(3)(b) TFEU.

¹⁶⁸ Even if both sets of objectives are in some general sense legitimate, as suggested by Michael Honoré, ‘Selectivity’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 129.

incompatible with the internal market. This is inconsistent with the system of State aid control envisaged by the Treaties.

However, the position of the exemption for ‘aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned’ in Article 107(2)(a) TFEU is more ambiguous. This is more prescriptive as to the features of the measure rather than the very general ‘social’ objective to which it refers. It may therefore be unnecessary to preclude reliance on objectives that may be broadly described as ‘social’ in the selectivity analysis. It is also noteworthy that some of the objectives proposed above for exclusion from justification based on rationale for State aid control also feature in the exemptions. For example, Article 107(3)(c) TFEU allows the Commission to exempt aid ‘to facilitate the development of certain economic activities or of certain economic areas’. This would also appear to militate against allowing Member States to justify differential treatment on the basis of this type of objective as part of the selectivity analysis.

Identifying limits on the objectives that may be invoked using the criteria outlined in Articles 107(2)-(3) TFEU also helps to address another potential objection to the approach canvassed here. It may be argued that an approach to selectivity whereby the CJEU polices the consistency of differential treatment with any one of a set of legitimate objectives defined by the CJEU itself would unnecessarily duplicate the compatibility assessment undertaken by the Commission, especially under Article 107(3) TFEU.¹⁶⁹ The common principles used by the Commission in considering whether aid is compatible with the internal market refer to the appropriateness of the measure to achieve a legitimate objective and whether they are

¹⁶⁹ See for example Juan Jorge Piernas López, ‘Revisiting Some Fundamentals of Fiscal Selectivity: The ANGED Case’ (2018) 17 *European State Aid Law Quarterly* 274, 280 who argues that the pursuit of national objectives is to be assessed as part of the compatibility assessment under Article 107(2)-(3) TFEU and not under the selectivity assessment in Article 107(1) TFEU.

proportionate to that objective.¹⁷⁰ While there is some similarity in the analysis here, it is also relatively minor and superficial in character. The first reason for this is that it has been argued here that the objectives in Article 107(3) TFEU should not generally be considered as legitimate objectives precisely because it is envisaged that they will be considered as part of the compatibility analysis instead, limiting the possibility of overlap. Second, there is considerably more detailed and broader analysis conducted as part of the compatibility assessment that will not overlap with the selectivity analysis proposed here. For example, the selectivity analysis will not consider the need for State intervention, the incentive effect, the avoidance of undue negative effects on competition or the transparency of the aid, which also feature as part of the common principles for the assessment of the compatibility of aid.¹⁷¹ Compliance with more detailed, sector-specific guidelines is also necessary for aid to be compatible with the internal market, which will not feature in the selectivity assessment. Third, even if there is some limited overlap with the factors considered as part of the compatibility assessment, this is not fatal to the account of the selectivity criterion canvassed in this section. Some limited overlap in the assessment under Article 107(1) and Article 107(3) TFEU is not problematic. For example, it is well established that in order for a measure to be classified as aid, it must distort or threaten to distort competition on the internal market and affect trade between Member States. Assessment of the scale of competitive distortion and the effect on trade is also among the common principles for the assessment of aid¹⁷² and this limited overlap does not pose any particular difficulty.

This refinement to the selectivity test retains some flexibility and provides space for further development and elaboration. It may do this by allowing for the CJEU to continue to

¹⁷⁰ Leigh Hancher and Francesco Maria Salerno, 'Article 107(2) and Article 107(3)' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 131-182, para 4-057.

¹⁷¹ *ibid.*

¹⁷² *ibid.*

elaborate on the list of prohibited objectives. This thesis has argued that the changing dynamics of the internal market have altered the balance between the different roles played by the State aid control regime.¹⁷³ Rather than simply prohibiting trade barriers or protecting competition between undertakings, the State aid rules are managing regulatory competition between Member States as national governments respond to mobility across borders. Not only has the role of State aid control evolved, but the task of managing regulatory competition that it has increasingly come to serve is one that is potentially broader in scope, more complex and more prone to change in its demands. There may therefore be an increasing need for flexibility and possibilities for development of the notion of aid. The CJEU may therefore go on to find further objectives incapable of justifying differential treatment. How the CJEU should approach this task of further incremental development poses a difficult question for the State aid law. It may not be possible or appropriate to elaborate an exhaustive test for the identification of permissible and impermissible objectives.

However, it may be possible for the CJEU to identify the broad principles which it uses to determine the permissibility of an objective. Indeed, given the sparse wording of Article 107(1) TFEU and the heavy reliance on the interpretation of the CJEU to define the notion of aid, identifying broad principles that will inform the assessment of whether an objective is permissible may be the best that can be hoped for. The concept of inter-state solidarity may be useful in this regard.¹⁷⁴ This is a concept that is to some extent built into

¹⁷³ See Section 3.6.3.

¹⁷⁴ See Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 *Oxford Journal of Legal Studies* 213. Under Sangiovanni's framework, one can distinguish three types of solidarity relevant for the EU: 1) national solidarity between citizens within a Member State; 2) transnational solidarity between all European citizens and 3) Member State solidarity which deals with the relationships between Member States. While all of these types of solidarity are somewhat engaged by the various references to solidarity in the case law and primary legislation, only Member State solidarity is of immediate relevance to the argument canvassed here. The terms 'Member State solidarity', 'inter-state solidarity' and 'solidarity between Member States' will be used interchangeably to refer to this concept. For a discussion of solidarity along similar lines, see Section 3.6.5.

the Treaties.¹⁷⁵ There are numerous references to solidarity in the TEU. While some of these refer to solidarity between citizens or people within the EU,¹⁷⁶ Article 3(3) TEU identifies ‘solidarity among Member States’ as an objective of the Union.¹⁷⁷ Other references insist that solidarity between Member State shall be an important part of the Union’s common foreign policy and defence.¹⁷⁸ There are also numerous references to solidarity in the TFEU including a general affirmation in the Preamble¹⁷⁹ and more specific references in respect of the immigration and border control,¹⁸⁰ energy policy,¹⁸¹ financial and energy solidarity for disasters and exceptional events.¹⁸² Article 222 TFEU also contains a specific ‘solidarity clause’ requiring the Union and its Member States to act ‘in a spirit of solidarity’ to assist a Member State which is the victim of a terrorist attack or natural or man-made disaster.¹⁸³ Solidarity in a more general sense forms part of the Charter of Fundamental Rights of the European Union,¹⁸⁴ with the title on solidarity including a recognition of the ability of Member States to provide services of general economic interest, which is subject to more

¹⁷⁵ It is also an integral part of the political project and ideals underpinning European integration. One important statement of the objectives of the European project, European Union, ‘Déclaration Schuman – mai 1950’ <https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_fr> accessed 7 June 2022, indicates the importance of solidarity: ‘L’Europe ne se fera d’un coup, ni dans une construction d’ensemble: elle se fera par des réalisations concrètes créant d’abord une solidarité de fait’ (‘Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity’).

¹⁷⁶ Articles 2, 3(5) TEU.

¹⁷⁷ Article 3(3) TEU.

¹⁷⁸ Articles 21(1), 24, 31(1), 32, 41, 42 TEU.

¹⁷⁹ Preamble to the TFEU refers to the heads of State of the Member States ‘intending to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations’.

¹⁸⁰ Articles 67, 80 TFEU.

¹⁸¹ Article 194 TFEU.

¹⁸² Article 122 TFEU.

¹⁸³ Article 222 TFEU.

¹⁸⁴ Charter of Fundamental Rights of the European Union [2014] OJ C326/391, Title IV. Much of the material in the Charter appears to relate more closely to solidarity between European citizens rather than between States in the recognition of employment and family rights (Articles 27-33), rights to social security and social assistance (Article 34) and rights of access to healthcare (Article 35) and rights to consumer protection (Article 38). However, elements of these may also engage relationships and interaction between Member States. This is particularly apparent in the recognition of services of general economic interest (Article 36) and the need to integrate environmental protection into the policies of the Union (Article 37).

detailed regulation by the State aid rules.¹⁸⁵ It has been observed that while Article 125 TFEU might seem to offer a limit on the extent to which the EU and Member States can act in solidarity, it has also been suggested that this legal limit has not prevented practical cooperation and joint action in response to various crises.¹⁸⁶

Inter-state solidarity also carries some uncertainty and ambiguity as to its meaning and status.¹⁸⁷ While its status is not entirely self-evident from the Treaties, there appears to be consensus that it should not be considered to be a general principle of EU law.¹⁸⁸ However, some commentators regard it as a principle that can in some circumstances be legally enforceable in conjunction with other provisions in some contexts.¹⁸⁹ Joppe considers that it is better regarded as a value rather than legally binding principle in the context of internal market law.¹⁹⁰ Considerable differences in meaning can be observed across the

¹⁸⁵ Charter of Fundamental Rights of the European Union [2014] OJ C326/391, Article 36. This could arguably relate more to national solidarity and allowing this to qualify internal market rules. However, there may also be an element relating to Member State solidarity in that Member States may agree on common rules that permit them to derogate from the stricter rules. See more generally Case C-280/00 *Altmark* ECLI:EU:C:2003:415, [2003] ECR I-7747; Thomas Jaeger, 'Services of General Economic Interest' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 255-306.

¹⁸⁶ WT Eijsbouts and David Nederlof, 'Rethinking Solidarity in the EU, from Fact to Social Contract' (2011) 7 *European Constitutional Law Review* 169, 171-172.

¹⁸⁷ See for example Graham Butler and Holly Snaith, 'Negative Solidarity: The European Union in the Financial Crisis' in Helle Krunke, Hanne Petersen and Ian Manners, *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020) 128-164, 164.

¹⁸⁸ Graham Butler, 'Solidarity and Its Limits for Economic Integration in the European Union's Internal Market' (2018) 25 *Maastricht Journal of European and Comparative Law* 310, 317-318; Malcolm Ross, 'Promoting solidarity: from public services to a European model of competition?' (2007) 44 *Common Market Law Review* 1057, 1069; Anne Joppe, 'EU Solidarity, Illustrated by the Covid-19 Crisis: What Does EU Solidarity Mean in the Context of Free Movement of Goods and Persons and How Is This Illustrated by the Response to the Covid-19 Pandemic?' (2021) 17 *Utrecht Law Review* 130, 133-134; For a contrary view see Federico Casolari, 'EU loyalty and the protection of Member States' national interests: A mapping of the law' in Marton Varju (ed), *Between compliance and particularism: Member State Interests and European Union Law* (Springer 2019) 49-78, 66; Case C-370/12 *Pringle* ECLI:EU:C:2012:675, Opinion of AG Kokott, paras 142-143.

¹⁸⁹ An example might be in its interaction and overlap with the principle of sincere co-operation in Article 4(3) TEU. See Anne Joppe, 'EU Solidarity, Illustrated by the Covid-19 Crisis: What Does EU Solidarity Mean in the Context of Free Movement of Goods and Persons and How Is This Illustrated by the Response to the Covid-19 Pandemic?' (2021) 17 *Utrecht Law Review* 130, 132-133; Esin Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance' (2016) 23 *Maastricht Journal of European and Comparative Law* 965, 974.

¹⁹⁰ Anne Joppe, 'EU Solidarity, Illustrated by the Covid-19 Crisis: What Does EU Solidarity Mean in the Context of Free Movement of Goods and Persons and How Is This Illustrated by the Response to the Covid-19 Pandemic?' (2021) 17 *Utrecht Law Review* 130, 134. See also Graham Butler, 'Solidarity and Its Limits for Economic Integration in the European Union's Internal Market' (2018) 25 *Maastricht Journal of European and Comparative Law* 310.

different contexts in primary legislation where reference is made to it.¹⁹¹ Indeed, this ambiguity has led to criticisms that the concept is unduly vague and adds little value to the interpretation of EU law.¹⁹² It is also thought that its political character has made the CJEU reluctant to rely on the concept explicitly in the past few decades.¹⁹³ Resolving these ambiguities entirely is beyond the scope of this thesis but it is worth noting that there are commentators who consider that the concept has great potential to shape the development of EU law.¹⁹⁴

Nevertheless, it may be instructive to consider Sangiovanni's account of inter-state solidarity which regards it as an integral part of the European project which he claims is 'a way for member states to enhance their problem-solving capacities in an era of globalization, while indemnifying each other against the risks and losses implicit in integration.'¹⁹⁵ He argues that while the Union as a whole may benefit from trade integration and the protection of market competition, different Member States may have to deal with a disproportionate share of the benefits or costs of these processes which may arise from regulatory

¹⁹¹ Anne Joppe, 'EU Solidarity, Illustrated by the Covid-19 Crisis: What Does EU Solidarity Mean in the Context of Free Movement of Goods and Persons and How Is This Illustrated by the Response to the Covid-19 Pandemic?' (2021) 17 *Utrecht Law Review* 130, 134; Graham Butler, 'Solidarity and Its Limits for Economic Integration in the European Union's Internal Market' (2018) 25 *Maastricht Journal of European and Comparative Law* 310, 312.

¹⁹² Graham Butler, 'Solidarity and Its Limits for Economic Integration in the European Union's Internal Market' (2018) 25 *Maastricht Journal of European and Comparative Law* 310, 329; Anne Joppe, 'EU Solidarity, Illustrated by the Covid-19 Crisis: What Does EU Solidarity Mean in the Context of Free Movement of Goods and Persons and How Is This Illustrated by the Response to the Covid-19 Pandemic?' (2021) 17 *Utrecht Law Review* 130, 133.

¹⁹³ Esin Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance' (2016) 23 *Maastricht Journal of European and Comparative Law* 965, 983.; Anne Joppe, 'EU Solidarity, Illustrated by the Covid-19 Crisis: What Does EU Solidarity Mean in the Context of Free Movement of Goods and Persons and How Is This Illustrated by the Response to the Covid-19 Pandemic?' (2021) 17 *Utrecht Law Review* 130, 135. Compare Case C-370/12 *Pringle* ECLI:EU:C:2012:756, para 28; Case C-370/12 *Pringle* ECLI:EU:C:2012:675, Opinion of AG Kokott, paras 142-143.

¹⁹⁴ See Malcolm Ross, 'Solidarity – A New Constitutional Paradigm for the EU?' in Malcolm Ross, and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford, OUP 2010) 23-45, 41; Dagmar Schiek, 'Solidarity in the Case Law of the European Court of Justice: Opportunities Missed?' in Helle Krunke, Hanne Petersen and Ian Manners, *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020) 252-300.

¹⁹⁵ Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 *Oxford Journal of Legal Studies* 213, 241.

competition.¹⁹⁶ Inter-state solidarity recognises that measures may sometimes be required to compensate Member States who bear a disproportionate burden in this context¹⁹⁷ and that this may come in the form of allowing Member States to take action themselves through more active industrial policy. It has been suggested that solidarity in this context is largely concerned with Member States making sacrifices in pursuit of their own longer-term self-interest,¹⁹⁸ which does not appear inconsistent with Sangiovanni's account which involves burden sharing in pursuit of long-term mutual benefit.¹⁹⁹

This has a clear relevance to EU State aid law. One of the first judicial references to this concept occurred in *Commission v France*, in which the CJEU was called upon to interpret the State aid rules and held that solidarity was the basis of the obligations relating to the State aid rules and the basis of the EU as a whole.²⁰⁰ This view was repeated by the CJEU in *Commission v Italy* in which it was held that Member States had to implement EU agricultural market regulations even though they were contrary to their national interests.²⁰¹ While these remarks may appear to describe an integrative force in the form of an obligation for Member States to obey EU rules against their own interests,²⁰² the broader interpretation

¹⁹⁶ Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 *Oxford Journal of Legal Studies* 213, 241. Dagmar Schiek, 'Solidarity in the Case Law of the European Court of Justice: Opportunities Missed?' in Helle Krunke, Hanne Petersen and Ian Manners, *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020) 252-300, 292 argues that solidarity may also support the resilience of the Union against risks inherent in a market economy, rather than those arising from economic integration.

¹⁹⁷ Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 *Oxford Journal of Legal Studies* 213, 241.

¹⁹⁸ Esin Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance' (2016) 23 *Maastricht Journal of European and Comparative Law* 965, 973.

¹⁹⁹ Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 *Oxford Journal of Legal Studies* 213, 231-232.

²⁰⁰ Joined Cases 6/69 and 11/69 *Commission v France* ECLI:EU:C:1969:68, [1969] ECR 523, para 16.

²⁰¹ Case 39/72 *Commission v Italy* ECLI:EU:C:1973:13, [1973] ECR I-101, para 25.

²⁰² Esin Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance' (2016) 23 *Maastricht Journal of European and Comparative Law* 965, 977-978; Dagmar Schiek, 'Solidarity in the Case Law of the European Court of Justice: Opportunities Missed?' in Helle Krunke, Hanne Petersen and Ian Manners, *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020) 252-300, 293.

canvassed by Sangiovanni²⁰³ and Schiek²⁰⁴ implies that it might also be used to allow Member States to take compensatory action through market intervention in other contexts. It has been argued that solidarity of this type could help inform the justifications available to Member States when they restrict the exercise of free movement rights.²⁰⁵ This understanding of solidarity could also be used to inform the kinds of objectives that might render aid compatible with the internal market under Article 107(2)-(3) TFEU and might inform the development of Commission policy.²⁰⁶ While the purpose of the analysis under Article 107(1) TFEU is somewhat different, inter-state solidarity may be useful to the CJEU as it identifies objectives that can justify differential treatment between undertakings such that it is not selective. It would assist not as a binding legal duty or concept, but as a general value or *telos* that the system of State aid control seeks to achieve.

The approach outlined in this chapter does not erase the ambiguities inherent in the selectivity criterion. Nor does it fully determine the value judgements that the CJEU will have to address as part of that criterion. However, it may assist in ensuring that those choices are made in a more explicit and direct manner, removing the façade of the more mechanical tests that have been applied by the CJEU. This is an important first step towards containing

²⁰³ Andrea Sangiovanni, ‘Solidarity in the European Union’ (2013) 33 *Oxford Journal of Legal Studies* 213.

²⁰⁴ Dagmar Schiek, ‘Solidarity in the Case Law of the European Court of Justice: Opportunities Missed?’ in Helle Krunke, Hanne Petersen and Ian Manners, *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020) 252-300, 292.

²⁰⁵ Anne Joppe, ‘EU Solidarity, Illustrated by the Covid-19 Crisis: What Does EU Solidarity Mean in the Context of Free Movement of Goods and Persons and How Is This Illustrated by the Response to the Covid-19 Pandemic?’ (2021) 17 *Utrecht Law Review* 130, 137-138. This section has already outlined an analogy between this area of law and the State aid rules. See above.

²⁰⁶ Anne Joppe, ‘EU Solidarity, Illustrated by the Covid-19 Crisis: What Does EU Solidarity Mean in the Context of Free Movement of Goods and Persons and How Is This Illustrated by the Response to the Covid-19 Pandemic?’ (2021) 17 *Utrecht Law Review* 130 refers to the importance of the value of solidarity in informing the EU’s approach to certain internal market rules during the Covid-19 pandemic. While the term ‘solidarity’ is not used in the temporary frameworks allowing for a wider range of aid measures to be compatible with the internal market as part of the response to the pandemic and the costs arising from the Russian invasion of Ukraine, it is clear that solidarity can be seen as important value underpinning this relaxation of strict market rules in times of crisis. See Communication from the Commission - Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia [2022] OJ C1131/1; Communication from the Commission – Temporary Framework to support the economy in the context of the coronavirus outbreak [2020] OJ C911/1.

the notion of aid within more transparent boundaries, even if the breadth of those boundaries will depend on the specific manner in which it is applied by the CJEU. This clarity is necessary for Member States to understand the limits of the prohibition on aid and may even encourage them to act more decisively to address the economic challenges facing the EU, which may in places demand greater State intervention.²⁰⁷ This approach is also grounded in an understanding of what State aid control and indeed, State intervention is for, as it permits Member States to differentiate between undertakings in line with recognised objectives, which are consistent with inter-state solidarity and the purpose of European integration.

8.3. A More Rigorous Approach to the Distortion of Competition and the Effect on Trade between Member States

8.3.1. Very Low Threshold – Distortion of Competition

This section will propose another solution to the overly expansive notion of aid that has emerged in the response of the CJEU and the Commission to the challenges posed by fiscal measures. While the solution proposed in the preceding section greatly improves the coherence and consistency of the selectivity criterion and contains it within reasonable limits, it remains the case that the move to the discrimination standard has made that criterion somewhat easier to satisfy. It is therefore necessary to re-evaluate the approach of the CJEU and the Commission to other conditions for the identification of aid, namely the requirements for a distortion of competition on the internal market and an effect on trade between Member States. These conditions can be regarded as ‘impact standards’ that consider the effects of

²⁰⁷ For an overview of some of the long-term challenges that may require more State intervention in the EU, see Section 1.1.

the measure to determine whether it amounts to aid.²⁰⁸ This section will argue that these conditions have generally been conflated in the case law and have been interpreted such that they are satisfied in almost any case where the other conditions for aid are fulfilled. It will be argued that this position leads to an unduly expansive interpretation of the notion of aid that is inconsistent with the requirements of the Treaties. This section will go on to propose a more rigorous application of these conditions with a higher threshold that must be satisfied before a measure is classified as aid.

It is first necessary to assess the interpretation of these criteria in the case law of the CJEU and the decisional practice of the Commission. The law on the requirement for the distortion of competition is well settled.²⁰⁹ Wherever a measure is liable to improve the competitive position of its beneficiary relative to other undertakings with which it competes, there will be a distortion of competition.²¹⁰ The Commission does not have to prove the existence of any actual distortion of competition, but only that the measure is liable to distort competition.²¹¹ The substantive threshold for a distortion of competition is very low, with even a very minor distortion of competition being capable of satisfying this condition.²¹² The case law has repeatedly contrasted the ‘extremely broad definition’²¹³ of distortion of competition under Article 107(1) TFEU with the interpretation of similar wording in Article 101 TFEU and other areas of competition law which normally requires that the distortion of

²⁰⁸ Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 381.

²⁰⁹ For further discussion, see Section 2.3.5.

²¹⁰ Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paras 11-12; Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600-607/97, T-1/98, T-3/98, T-6/98 and T-23/98 *Alzetta v Commission* [2000] ECR II-2319, para 81; 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 C262/1, para 187.

²¹¹ Case C-659/17 *Azienda Napoletana Mobilità* ECLI:EU:C:2019:633, para 29; Case C-494/06 P *Commission v Italy and Wam SpA* [2009] ECR I-3639, para 50; Case C-222/04 *Cassa di Risparmio di Firenze* [2006] ECR I-289, para 140; Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600-607/97, T-1/98, T-3/98, T-6/98 and T-23/98 *Alzetta v Commission* [2000] ECR II-2319, paras 76-80.

²¹² Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, Opinion of AG Capotorti, 2699; 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 C262/1, para 189.

²¹³ Case C-385/18 *Arriva Italia Srl* ECLI:EU:C:2019:647, Opinion of AG Tanchev, para 120.

competition be appreciable in character.²¹⁴ In particular, it is clear that the small size of any grant of aid cannot exclude the possibility of a distortion of competition.²¹⁵ Similarly, the relatively small size of the recipient undertaking and its market share cannot guarantee that this condition will not be fulfilled.²¹⁶ Despite this very low threshold, the Commission has found that a distortion of competition can be excluded where aid is granted to a provider of a service in a sector that is not liberalised.²¹⁷ This is subject to the conditions that the aid is granted to an undertaking providing a service subject to a legal monopoly that is compliant with EU law, that there is no possibility of competition on the market or to become the exclusive provider of the services and that there is no competition with the provision of other services.²¹⁸ If the recipient operates on another market that is open to competition, the possibility of cross-subsidisation arising from the aid must also be excluded.²¹⁹ However, it remains the case that the threshold is sufficiently low that it will be established in respect of virtually every measure under investigation.²²⁰

²¹⁴ Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, Opinion of AG Capotorti, 2699; Case C-385/18 *Arriva Italia Srl* ECLI:EU:C:2019:647, Opinion of AG Tanchev, para 120. Compare the position in the interpretation of Article 101 TFEU in Case 5/69 *Völk v Vervaecke* [1969] ECR 295, para 7; Case C-226/11 *Expedia Inc v Autorité de la concurrence* ECLI:EU:C:2012:795, para 16. See also a summary of the position in Communication from the Commission — Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union [2014] OJ C291/1; Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021) 145-148.

²¹⁵ Case C-280/00 *Altmark Trans* [2003] ECR I-7747, para 81; 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 C262/1, para 189.

²¹⁶ C-280/00 *Altmark Trans* [2003] ECR I-7747, para 81; Case T-55/99 *CETM v Commission* [2000] ECR II-3207, para 89; 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 C262/1, para 189.

²¹⁷ 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 C262/1 paras 187-188.

²¹⁸ Case C-385/18 *Arriva Italia Srl* ECLI:EU:C:2019:1121, paras 57-59; Case C-659/17 *Azienda Napoletana Mobilità* ECLI:EU:C:2019:633, paras 34-43; Case T-295/12 *Germany v Commission* ECLI:EU:T:2014:675, para 158; *Network Rail* (Case Aid No N 356/02) Commission Decision of 7 July 2002 [2002] OJ C232/2, recitals (75)-(77); 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 C262/1, para 188.

²¹⁹ Case C-659/17 *Azienda Napoletana Mobilità* ECLI:EU:C:2019:633, paras 34-43; Case C-659/17 *Azienda Napoletana Mobilità* ECLI:EU:C:2019:475, Opinion of AG Hogan, paras 36-42; 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 C262/1, para 188.

²²⁰ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 9-10, 110; Jacques Derenne and Vincent Verouden, 'Distortion of Competition and Effect on Trade' in Philipp

As a result of this very low threshold, much of the litigation that has challenged the Commission's application of this condition focuses on the sufficiency of the Commission's reasoning.²²¹ The Commission considers that this criterion will generally be satisfied when a Member State grants a financial advantage to an undertaking in a sector that could be exposed to competition.²²² This financial advantage will generally be present where the aid contributes the ordinary costs of the business.²²³ In determining whether there is a distortion of competition, the Commission is not required to conduct any market definition analysis or detailed economic assessment.²²⁴ This approach has been described as relying heavily on presumptions rather than detailed economic analysis.²²⁵ While the burden on the Commission to motivate its finding on this point is not particularly onerous, the Commission must still explain the circumstances that give rise to the distortion even if it claims that it is apparent from the circumstances themselves that there is a competitive distortion.²²⁶ However, many of the cases where the CJEU has made a finding that there was insufficient

Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Kluwer Law International 2017) 169-189, 188-189; Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International 2014) 216; Pietro Crocioni, 'Can State Aid Policy Become More Economic Friendly' (2006) 29 *World Competition* 89, 90; Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 394.

²²¹ Such an argument relies in part on the general duty imposed on all institutions of the EU to motivate their decisions with sufficient reasons in Article 296 TFEU.

²²² Case C-385/18 *Arriva Italia Srl* ECLI:EU:C:2019:1121, para 52; 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 C262/1, para 187.

²²³ 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 C262/1, para 189.

²²⁴ Case C-385/18 *Arriva Italia Srl* ECLI:EU:C:2019:647, Opinion of AG Tanchev, para 120; Case C-494/06 *P Commission v Italy and Wam SpA* [2009] ECR I-3639, para 58; Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paras 9-12; Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, Opinion of AG Capotorti, 2700.

²²⁵ Pietro Crocioni, 'Can State Aid Policy Become More Economic Friendly' (2006) 29 *World Competition* 89, 90; Jacques Derenne and Vincent Verouden, 'Distortion of Competition and Effect on Trade' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Kluwer Law International 2017) 169-189, 188-189.

²²⁶ Jacques Derenne and Vincent Verouden, 'Distortion of Competition and Effect on Trade' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Kluwer Law International 2017) 169-189, 184.

reasoning on this point involve decisions that provide no material that is relevant to the distortion of competition.²²⁷

There are also some cases in which the CJEU expresses scepticism towards the Commission's reasoning where it relies too heavily on presumptions to justify its conclusions on the distortion of competition. In *Wam*, the CJEU found that in circumstances where the aid was granted to an undertaking to fund increased capacity to export to third countries, the distortion of competition was less obvious and required more detailed reasoning.²²⁸ AG Sharpston emphasised the distinction between economic advantage and competitive advantage and considered that the Commission had to do more to explain how the aid would affect the recipient's competitive position.²²⁹ She suggested that the finding that a distortion of competition cannot be excluded is not sufficient to explain why such a distortion exists.²³⁰ A similar approach can be seen in AG Fennelly's conclusions in *Italy and Sardegna Lines*, in which he considered that the Commission could not use the selective nature of the measure as evidence of a distortion of competition.²³¹ Rubini praises the more stringent approach taken by AG Sharpston in *Wam* but acknowledges that this is not typical of the jurisprudence, which relies more heavily on a presumption of competitive distortion if other conditions are satisfied.²³² Indeed, AG Tanchev's remarks in *Arriva Italia Srl* appear to equate an inability to exclude the possibility of competitive distortion with the presence

²²⁷ Case T-34/02 *Le Levant v Commission* ECLI:EU:T:2006:59, [2006] ECR II-267, para 123; Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines v Commission* ECLI:EU:C:2000:570, [2000] ECR I-8855, paras 64-69; Joined Cases C-329/93, C-62/95 and C-63/95 *Germany, Hanseatische Industrie-Beteiligungen GmbH and Bremer Vulkan Verbund AG v Commission* ECLI:EU:C:1996:394, [1996] ECR I-05151, paras 52-55; Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek BV v Commission* ECLI:EU:C:1985:113, [1985] ECR 809, para 24.

²²⁸ Case C-494/06 P *Commission v Italy and Wam SpA* [2009] ECR I-3639, paras 62-65.

²²⁹ Case C-494/06 P *Commission v Italy and Wam SpA* [2009] ECR I-3639, Opinion of AG Sharpston, paras 55-51.

²³⁰ Case C-494/06 P *Commission v Italy and Wam SpA* [2009] ECR I-3639, Opinion of AG Sharpston, paras 44-51.

²³¹ Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines v Commission* [2000] ECR I-8855, Opinion of AG Fennelly, para 51.

²³² Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 394-395.

of such a distortion.²³³ Elements of this are also evident in the language of the CJEU in *Azienda Napoletana Mobilità*.²³⁴

8.3.2. Changing Standard – Effect on Trade Between Member States

A measure will only be considered to be State aid if it affects trade between Member States within the meaning of Article 107(1) TFEU.²³⁵ While the language of Article 107(1) TFEU suggests that these are distinct and cumulative criteria,²³⁶ the effect on trade between Member States has often been conflated with the distortion of competition. Since the decision in *Philip Morris*,²³⁷ the criteria have often been dealt with together.²³⁸ However, there are some exceptions which analyse them separately.²³⁹ The interpretation of the inter-state trade criterion therefore shares important characteristics with the distortion of competition in that no detailed economic assessment or market definition analysis is required in order to justify the Commission's conclusions.²⁴⁰ Further, there is no requirement to prove a real effect on trade, only that the measure is liable to affect trade between Member States.²⁴¹

²³³ Case C-385/18 *Arriva Italia Srl* ECLI:EU:C:2019:647, Opinion of AG Tanchev, paras 57-78.

²³⁴ Case C-659/17 *Azienda Napoletana Mobilità* ECLI:EU:C:2019:633, paras 39, 42.

²³⁵ See also Section 2.3.5.

²³⁶ This appears to be accepted in principle by the Commission. See 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 C262/1, para 186.

²³⁷ Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:209, [1980] ECR 2671.

²³⁸ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 9-10, 109; Leigh Hancher, 'The General Framework' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 43-130, paras 3-186, 3-188; e.g. Case 248/84 *Germany v Commission* [1987] ECR 4013, para 18; Case 57/86 *Greece v Commission* [1988] ECR 2855, paras 14-16; Case 310/85 *Deufil v Commission* [1987] ECR 901, paras 9-12; Case C-142/87 *Belgium v Commission (Tubemeuse)* [1990] ECR I-959, paras 35-41; Case C-303/88 *Italy v Commission* [1991] ECR I-1433, para 27.

²³⁹ Joined Cases 67/85, 68/75 and 70/85 *Van der Kooy v Commission* [1988] ECR 219, paras 58-59; Case 62/87 *Exécutif régional wallon v Commission* [1988] ECR 1573, paras 11-19.

²⁴⁰ Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International 2014) 207; 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 C262/1, para 194; Case T-211/05 *Italy v Commission* ECLI:EU:T:2009:304, [2009] ECR II-2777, paras 157-160; Joined Cases T-298/97, T-312/97 T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Commission* ECLI:EU:T:2000:151, [2000] ECR II-2319, para 95.

²⁴¹ Case C-385/18 *Arriva Italia Srl* ECLI:EU:C:2019:647, Opinion of AG Tanchev, para 45.

As with the distortion of competition, an effect on inter-state trade may arise even where the subsidy is very small.²⁴² Similarly, the fact that the recipients of the aid trade primarily or exclusively with third countries is not necessarily inconsistent with the finding that there is an effect on trade between Member States.²⁴³ As with the distortion of competition, the condition relating to the effect on inter-state trade is likely to be fulfilled in most cases where the other conditions for identifying aid are satisfied. The approach of the CJEU has been criticised for failing to articulate positive guidance on what circumstances will give rise to an effect on inter-state trade, focusing instead on situations in which the effect cannot be excluded.²⁴⁴ It has also been suggested that this approach creates the risk of conflating the inability to preclude the possibility that the criterion is satisfied with a positive finding that there is such an effect.²⁴⁵ This can also be contrasted with the CJEU's approach to similar wording in Article 101 TFEU which treats these conditions separately and gives them a narrower reading than that which prevails in the interpretation of Article 107(1) TFEU.²⁴⁶

²⁴² Case C-518/13 *Eventech* ECLI:EU:C:2015:9, para 68; 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 C262/1, para 192.

²⁴³ Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International 2014) 207; Case C-142/87 *Commission v Belgium* ECLI:EU:C:1990:125, [1990] ECR I-959, para 35; Case C-494/06 P *Commission v Italy and Wam SpA* ECLI:EU:C:2009:272 [2009] ECR I-3639, para 62.

²⁴⁴ Claus-Dieter Elhermann and Anne Vallery, 'Giving Meaning to the Condition of Effect on Trade: The Court's Judgment in *Xunta de Galicia*, A Missed Opportunity?' (2005) 4 *European State Aid Law Quarterly* 709, 711. See Case C-172/03 *Heiser* [2005] ECR I-1627, para 35. Some limited guidance is available in Case C-126/01 *Ministre de l'économie, des finances et de l'industrie v GEMO SA* ECLI:EU:C:2003:273, [2003] ECR I-13769, Opinion of AG Jacobs, para 145 wherein it is suggested that this condition may not be satisfied in cases involving 'sectors with little competition in intra-Community trade such as car repairs, taxi services, or sectors with prohibitive transport costs, aid of a relatively small amount granted to small undertakings operating on essentially local markets'

²⁴⁵ Claus-Dieter Elhermann and Anne Vallery, 'Giving Meaning to the Condition of Effect on Trade: The Court's Judgment in *Xunta de Galicia*, A Missed Opportunity?' (2005) 4 *European State Aid Law Quarterly* 709, 712; Sebastiaan Cnossen and Georges Dictus, 'Big on Big, Small on Small: A Never Ending Promise?: A Critical Assessment of the Commission Decision Practice with Regard to the Effect on Trade Criterion' (2021) 20 *European State Aid Law Quarterly* 30, 33-34. See Case C-172/03 *Heiser* ECLI:EU:C:2005:130 [2005] ECR I-1627, para 35.

²⁴⁶ Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021) 145-153; Case C-226/11 *Expedia Inc v Autorité de la concurrence* ECLI:EU:C:2012:795, para 16; Case 5/69 *Völk v Vervaecke* ECLI:EU:C:1969:35, [1969] ECR 295, para 7. For example, compare Case C-180/98 *Pavlov* ECLI:EU:C:2000:428, [2000] ECR I-645 which is decided on the basis that the distortion of competition is not appreciable and Case C-393/08 *Emanuela Sbarigia v Azienda USL* ECLI:EU:C:2010:388, [2010] ECR I-6337 which is decided on the basis that there is no effect on trade between Member States. One can also compare the Commission's guidelines on these two distinct criteria: Compare Commission Notice — Guidelines on the

However, the Commission has taken some steps to apply the effect on trade criterion in a way that makes it more difficult to satisfy. A range of decisions determining that impugned measures did not affect trade between Member States indicate an intention to give this condition a much more decisive role in identifying aid and clearing measures with minimal effects.²⁴⁷ These decisions relate to government support for local healthcare facilities, sports and leisure facilities, ports and local languages and media. The Commission's guidance on the notion of aid appears to draw a number of criteria from these cases, finding that there will be no effect on inter-state trade if the recipient supplies goods or services only to a limited area within a Member State, if the recipient is unlikely to attract customers from other Member States and if the measure would not have any foreseeable, more than marginal effect on conditions of cross-border investment or establishment.²⁴⁸ It has been suggested that these criteria are moving towards a *de minimis* threshold in a manner that is absent in the analysis on the distortion of competition and indeed the case law of the CJEU on this point.²⁴⁹ It is suggested that these criteria are intended to exclude from the

effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81; Communication from the Commission – Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C291/1.

²⁴⁷ *Alleged State aid to medical center in Durmersheim* (Case SA.37904) Commission Decision of 26 May 2015 [2015] OJ C188/1; *Alleged aid to a specialised rehabilitation clinic for orthopaedic medicine and trauma surgery* (Case SA.38035) Commission Decision of 21 May 2015 [2015] OJ C188/1; *Funding to public hospitals in the Hradec Králové Region* (Case SA.37432) Commission Decision of 22 May 2015 [2015] OJ C203/1; *Alleged State aid to UK member-owned golf clubs* (Case SA.38208) Commission Decision of 8 June 2015 [2015] OJ C277/1; *Alleged State aid to Glenmore Lodge* (Case SA.37963) Commission Decision of 6 June 2015 [2015] OJ C277/1; *BLSV-Sportcamp Nordbayern* (Case SA.43983) Commission Decision of 25 October 2016 [2016] OJ C406/1; *Aid to local media published in the Basque language* (Case SA.44942) Commission Decision of 26 September 2016 [2016] OJ C369/1; *Aid to support the Valencian language in the press* (Case SA.45512) Commission Decision of 21 September 2016 [2016] OJ C369/1; *Investment in the port of Lauwersoog* (Case SA.39403) Commission Decision of 10 July 2015 [2015] OJ C259/1; *Investment for the Port of Wyk on Föhr* (Case SA.44692) Commission Decision of 1 August 2016 [2016] OJ C302/1; *Alleged unlawful State aid for the Städtische Projekt "Wirtschaftsbüro Gaarden" – Kiel* (Case SA.33149) Commission Decision of 26 May 2015 [2015] OJ C188/1. See Bernadette Zelger, 'The Effect on Trade Criterion in European Union State Aid Law: A Critical Approach' (2018) 17 *European State Aid Law Quarterly* 28 for a summary of these decisions.

²⁴⁸ 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 C262/1, paras 196-197.

²⁴⁹ Edwin Schotanus, 'Port of Izola: An Appreciable Twist in State Aid Law' (2019) 18 *European State Aid Law Quarterly* 359, 365. Sebastiaan Cnossen and Georges Dictus, 'Big on Big, Small on Small: A Never Ending Promise?: A Critical Assessment of the Commission Decision Practice with Regard to the Effect on

definition of aid measures that have a ‘minor, marginal or insignificant’ effect on inter-state trade.²⁵⁰ The decision in *Marinvest* appears to develop the second of these criteria, finding that the aid must have a significant incentive effect that would attract customers from other Member States.²⁵¹ The application of these criteria for the effect on inter-state trade also appears to differentiate this analysis from the assessment of competitive distortion where the threshold is much more easily satisfied. For example, in *Marinvest*, the General Court applied these criteria and considered that even if a distortion of competition at a local level could not be excluded, an effect on inter-state trade may still be absent.²⁵²

There remains some uncertainty about how these criteria will be applied. Some commentators have given these new criteria a cautious welcome.²⁵³ Indeed, it has been suggested that many of the decisions finding that there is no effect on trade between Member States have had a ‘social character’ including local provision of cultural events, leisure facilities and healthcare.²⁵⁴ However, the Commission continues to be criticised for the inchoate and piecemeal development of the law in this area.²⁵⁵ Apart from the cluster of decisions from which these new criteria have been derived, the Commission often refrains

Trade Criterion’ (2021) 20 European State Aid Law Quarterly 30 argue that these developments are consistent with the existing case law.

²⁵⁰ Bernadette Zelger, ‘The Effect on Trade Criterion in European Union State Aid Law: A Critical Approach’ (2018) 17 European State Aid Law Quarterly 28, 40-41; Sebastiaan Cnossen and Georges Dictus, ‘Big on Big, Small on Small: A Never Ending Promise?: A Critical Assessment of the Commission Decision Practice with Regard to the Effect on Trade Criterion’ (2021) 20 European State Aid Law Quarterly 30, 32.

²⁵¹ Case T-728/17 *Marinvest and Porting v Commission* ECLI:EU:T:2019:325, para 101 (‘un effet incitatif important’ – At the time of writing, the judgment is only available in French); Sebastiaan Cnossen and Georges Dictus, ‘Big on Big, Small on Small: A Never Ending Promise?: A Critical Assessment of the Commission Decision Practice with Regard to the Effect on Trade Criterion’ (2021) 20 European State Aid Law Quarterly 30, 35.

²⁵² Case T-728/17 *Marinvest and Porting v Commission* ECLI:EU:T:2019:325, paras 99, 106.

²⁵³ Bernadette Zelger, ‘The Effect on Trade Criterion in European Union State Aid Law: A Critical Approach’ (2018) 17 European State Aid Law Quarterly 28, 40-41; Sebastiaan Cnossen and Georges Dictus, ‘Big on Big, Small on Small: A Never Ending Promise?: A Critical Assessment of the Commission Decision Practice with Regard to the Effect on Trade Criterion’ (2021) 20 European State Aid Law Quarterly 30, 39.

²⁵⁴ Delia Ferri and Juan Jorge Piernas López, ‘The Social Dimension of EU State Aid Law and Policy’ (2019) 21 Cambridge Yearbook of European Legal Studies 75, 88.

²⁵⁵ Bernadette Zelger, ‘The Effect on Trade Criterion in European Union State Aid Law: A Critical Approach’ (2018) 17 European State Aid Law Quarterly 28, 40-41; Sebastiaan Cnossen and Georges Dictus, ‘Big on Big, Small on Small: A Never Ending Promise?: A Critical Assessment of the Commission Decision Practice with Regard to the Effect on Trade Criterion’ (2021) 20 European State Aid Law Quarterly 30, 39-40.

from deciding on the effect on inter-state trade when it reaches a decision not to raise objections to alleged aid.²⁵⁶ This can be understood as squandering opportunities to expand and develop the rules on this point.²⁵⁷ Indeed, it has been suggested that the Commission has sometimes undermined its own decisions with contradictory reasoning by concluding that there are no serious doubts as to the compatibility of the aid with the internal market while claiming it cannot take a position on whether there is an advantage and whether it affects trade between Member States.²⁵⁸ In order for the application of this condition to be useful in guiding the behaviour of Member States, the Commission must do more to elaborate on its guidance and apply it in a detailed, systematic manner. Cnossen and Dictus suggest that the more detailed and conclusive reasoning on the matter in the Commission's decision in *Ingolstadt* provides an instructive and positive example for future practice.²⁵⁹ Further elaboration on these criteria and detailed examples of their practical application are required.

A more important concern about this shift in the Commission's decisional practice is that it involves a change in the interpretation of Article 107(1) TFEU that is not supported by the jurisprudence of the CJEU and is therefore beyond the competence of the Commission to introduce.²⁶⁰ However, some commentators argue that while previous case law on this

²⁵⁶ Sebastiaan Cnossen and Georges Dictus, 'Big on Big, Small on Small: A Never Ending Promise?: A Critical Assessment of the Commission Decision Practice with Regard to the Effect on Trade Criterion' (2021) 20 *European State Aid Law Quarterly* 30, 39-40.

²⁵⁷ *ibid.*

²⁵⁸ Sebastiaan Cnossen and Georges Dictus, 'Big on Big, Small on Small: A Never Ending Promise?: A Critical Assessment of the Commission Decision Practice with Regard to the Effect on Trade Criterion' (2021) 20 *European State Aid Law Quarterly* 30, 38 referring to *Alleged non-tax aid measures to Youth Hostel Berlin Ostkreuz gmbH* (Case SA.43145 (2016/FC)) Commission Decision of 29 May 2017 [2017] OJ C193/1 which was annulled in Case T-578/17 *a&o hostel and hotel Berlin v Commission (Jugendherberge Berlin)* ECLI:EU:T:2019:437. See Christopher McMahon, 'The Relationship between Economic Advantage and the Compatibility Assessment in Decisions Not to Raise Objections: Case T-578/17 *a&o hostel and hotel Berlin GmbH v Commission (Jugendherberge Berlin)*' (2021) 20 *European State Aid Law Quarterly* 427.

²⁵⁹ Sebastiaan Cnossen and Georges Dictus, 'Big on Big, Small on Small: A Never Ending Promise?: A Critical Assessment of the Commission Decision Practice with Regard to the Effect on Trade Criterion' (2021) 20 *European State Aid Law Quarterly* 30, 39. See *Ingolstadt Congress Centre* (Case SA.48582 (2017/FC)) Commission Decision of 28 April 2020 [2021] OJ C240/1 which was subsequently affirmed by the General Court in Case T-582/20 *Ighoga Region 10 v Commission* ECLI:EU:T:2022:648.

²⁶⁰ Edwin Schotanus, 'Port of Izola: An Appreciable Twist in State Aid Law' (2019) 18 *European State Aid Law Quarterly* 359, 365; Cees Dekker, 'The Effect on Trade between the Member States' Criterion: Is It the Right Criterion by Which the Commission's Workload Can Be Managed?' (2017) 16 *European State Aid Law*

issue does outline circumstances in which an effect on inter-state trade cannot be excluded, these do not go on to find that such an effect is always present in such circumstances.²⁶¹ The decision of the General Court in *Marinvest* which upheld the Commission's analysis of these criteria to conclude that there was no effect on inter-state trade where the recipient undertaking provided spaces in a port for mooring recreational boats mostly for local residents rather than to tourists from other Member States.²⁶² Schotanus argues that this does not resolve the matter and that a decision of the CJEU is required to resolve the inconsistency he sees between *Marinvest* and the preponderance of the previous jurisprudence.²⁶³ In particular, he points to cases decided by the CJEU after *Marinvest*, including *Achema*,²⁶⁴ *Azienda Napoletana Mobilità*²⁶⁵ and *Arriva Italia Srl*²⁶⁶ which do not refer to the new criteria articulated by the Commission or indeed to *Marinvest* when addressing the effect on trade between Member States.²⁶⁷ While these were decided in the context of preliminary references in the absence of a Commission decision directly referring to these criteria, they do not provide any support for the Commission's new approach. The subsequent decision of the General Court in *Ighoga Region 10 v Commission* to uphold a finding that there was no aid makes more direct reference to these criteria forming part of the Commission's 'decisional practice' and offers further support for the legal validity of the Commission's

Quarterly 154, 162-163. See Joined Cases C-75/05 P and C-80/05 P *Germany v Kronofrance* ECLI:EU:C:2008:482, [2008] ECR I-6619, para 65; Case C-288/11 P *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission* ECLI:EU:C:2012:821, para 38. See also discussion in Section 2.4.3.

²⁶¹ Sebastiaan Cnossen and Georges Dictus, 'Big on Big, Small on Small: A Never Ending Promise?: A Critical Assessment of the Commission Decision Practice with Regard to the Effect on Trade Criterion' (2021) 20 European State Aid Law Quarterly 30, 32-34; Bernadette Zelger, 'The Effect on Trade Criterion in European Union State Aid Law: A Critical Approach' (2018) 17 European State Aid Law Quarterly 28, 41.

²⁶² Case T-728/17 *Marinvest and Porting v Commission* ECLI:EU:T:2019:325, paras 95-106.

²⁶³ Edwin Schotanus, 'Port of Izola: An Appreciable Twist in State Aid Law' (2019) 18 European State Aid Law Quarterly 359, 362, 365.

²⁶⁴ Case C-706/17 *Achema* ECLI:EU:C:2019:407.

²⁶⁵ Case C-659/17 *Azienda Napoletana Mobilità* ECLI:EU:C:2019:633.

²⁶⁶ Case C-385/18 *Arriva Italia srl* ECLI:EU:C:2019:1121.

²⁶⁷ Edwin Schotanus, 'Port of Izola: An Appreciable Twist in State Aid Law' (2019) 18 European State Aid Law Quarterly 359, 363-365.

approach, even if a decision of the CJEU is required to finally settle this issue.²⁶⁸ It nevertheless represents a welcome improvement to the law in this area. This approach is an important first step towards higher thresholds and distinct application of the impact standards in Article 107(1) TFEU. As will be argued below, this is a necessary improvement to the interpretation of these conditions.

8.3.3. Deficiencies in the Prevailing Approach

The interpretation of the two impact standards in Article 107(1) TFEU that define aid in relation to its effects has begun to diverge. While the law is very quick to find that a State intervention has distorted competition even if its impact is very small, the interpretation of the inter-state trade criterion is taking important, albeit uncertain steps towards providing a meaningful limit on the notion of aid. It is important to consider the deficiencies in the prevailing interpretation and outline the changes necessary for these conditions to perform their important, but distinct roles in defining the notion of aid.

First, these conditions reflect concepts that are important to the objectives of the State aid control regime and therefore have great potential to identify aid that is likely to cause the type of harm to competition and the internal market that the regime seeks to prevent. Indeed, this is likely to be the reason why they are referred to expressly in Article 107(1) TFEU. However, the reality is that a broad interpretation of these conditions such that they are very easy to satisfy leads them to contribute very little to the analysis under the remaining conditions for identifying aid. This means that any positive contribution that they are capable

²⁶⁸ Case T-582/20 *Ighoga Region 10 v Commission* ECLI:EU:T:2022:648, para 143: ‘sa pratique décisionnelle antérieure’. The Commission had correctly concluded that the contracts offered to a company for the construction and operation of a conference centre did not affect trade between Member States because of the size and capacity of the conference centre, the local nature of the events organised there, the low portion of the national market share of the relevant undertaking and that the respondents to the call for tenders were based in Germany, and most of them in the local area. See more generally paras 138-222.

of making to defining aid is relatively limited. While there have been some tentative steps in the Commission's practice on the effect on trade between Member States, the distortion of competition has a particularly marginal role in distinguishing between aid and other permissible interventions on the market.²⁶⁹ It fails to distinguish between the conferral of an economic advantage and the conferral of a competitive advantage, which should in theory remain distinct concepts.²⁷⁰ Indeed, it has been suggested that the market economy operator principle effectively acts a proxy for the condition on the distortion of competition, with the latter making no real contribution to the analysis.²⁷¹ This is particularly problematic in circumstances where this principle cannot be invoked in respect of all forms State intervention to argue that they are not aid.²⁷² Given the strong textual justification for the conditions relating to the distortion of competition and the effect on inter-state trade, their relatively peripheral roles in the identification of aid is arguably inconsistent with Article 107(1) TFEU and its objectives.

Secondly, there is an extent to which this interpretation unduly extends the limits of the notion of aid. Even though the scope of the prohibition on aid in Article 107(1) TFEU does not determine whether the aid is compatible with the internal market and therefore permissible, an unduly broad prohibition has significant consequences. This may lead to Member States having to notify an excessively broad range of measures to the Commission and refrain from implementing them until they have been approved.²⁷³ Further, it may also

²⁶⁹ Sebastiaan Cnossen and Georges Dictus, 'Big on Big, Small on Small: A Never Ending Promise?: A Critical Assessment of the Commission Decision Practice with Regard to the Effect on Trade Criterion' (2021) 20 *European State Aid Law Quarterly* 30, 39-40.

²⁷⁰ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 5-6.

²⁷¹ Francesco de Cecco, 'The Many Meanings of "Competition" in EC State Aid Law' (2006-2007) 9 *Cambridge Yearbook of European Legal Studies* 111, 122.

²⁷² However, the range of measures in respect of which the market economy operator principle can be invoked has expanded somewhat following Case T-196/04 *Ryanair v Commission* ECLI:EU:T:2008:585, [2008] ECR II-3643; Case C-124/10 P *Commission v EDF* ECLI:EU:C:2012:318.

²⁷³ As is required by Article 108(3) TFEU; Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, articles 2-3.

place further strain on the administrative resources of the Commission as it struggles to review an unduly large number of notifications. A stricter interpretation of these impact standards might allow the Commission to more effectively streamline its enforcement and prioritise the notification and review of measures that are most likely to be harmful due to their impact on competition and inter-state trade.²⁷⁴ This would be consistent with previous initiatives of the Commission to modernise and reorient State aid enforcement against measures that are most likely to cause harm.²⁷⁵ This would also conform to consistent policy prescriptions in the literature on competition economics seeking safe harbours for measures unlikely to be harmful and prioritising resources for more ambiguous cases.²⁷⁶

Third, the decisional practice of the Commission and the case law of the CJEU too often conflates the distortion of competition and the effect on inter-state trade. It has long been established that these are distinct, cumulative conditions.²⁷⁷ Indeed, this understanding of the relationship between the two conditions is the most plausible reading of the text of Article 107(1) TFEU. However, there remains a significant body of case law and Commission decisions that treat both of these conditions together with relatively terse reasoning.²⁷⁸ This approach ignores the distinct contributions that each condition has to make

²⁷⁴ Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 399-400.

²⁷⁵ Commission, 'State Aid Action Plan – Less and better targeted state aid: a roadmap for state aid reform 2005-2009' (2005) COM 107 final, para 18; Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU State Aid Modernisation (SAM)' COM (2012) 209 final, para 8.

²⁷⁶ Ulrich Schwalbe, 'European State Aid Control – The State Aid Action Plan' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 161-192; Organisation for Economic Co-operation and Development, 'Safe Harbours and Legal Presumptions in Competition Law' (Organisation for Economic Co-operation and Development, 9 November 2017) <[https://one.oecd.org/document/DAF/COMP\(2017\)9/en/pdf](https://one.oecd.org/document/DAF/COMP(2017)9/en/pdf)> accessed 3 June 2022.

²⁷⁷ 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 C262/1, paras 185-186; Case C-659/17 *Azienda Napoletana Mobilità* ECLI:EU:C:2019:633, para 20; Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600-607/97, T-1/98, T-3/98, T-6/98 and T-23/98 *Alzetta v Commission* [2000] ECR II-2319, para 81; Erika Szyszczak, 'Distortion of Competition and Effect on Trade Between EU Member States' in Herwig Hoffmann and Claire Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016) 151-160, 151.

²⁷⁸ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 9-10, 109; Leigh Hancher, 'The General Framework' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 43-130, paras 3-186, 3-188; e.g. Case 248/84 *Germany v*

as part of this analysis. It is also inconsistent with the finding that these are distinct, cumulative conditions to fail to assess both separately. While there is a consensus in the literature that the close links between these conditions cannot be severed completely, it is not impossible to address them as separate criteria that will not always be satisfied together. The treatment of criteria derived from similar wording in Article 101 TFEU provides a useful example of how it is possible to address these related criteria separately.²⁷⁹ As observed above, there have been positive developments in this regard with the Commission's new approach to effects on inter-state trade that draws distinctions between this condition and the distortion of competition. The General Court's reasoning in *Marinvest* also appears to separate these criteria.²⁸⁰ Therefore, this attempt to restate the tests for the distortion of competition and the effect on trade between Member States starts from the premise that these conditions are not coextensive and that they require separate analysis to determine whether they are fulfilled.

8.3.4. The Need for Two Distinct, Higher Thresholds

These deficiencies with the prevailing practice can inform a restatement of the tests for these criteria. This restatement has three main features. The first is that the distortion of competition and the effect on inter-state trade should be addressed separately as distinct,

Commission [1987] ECR 4013, para 18; Case 57/86 *Greece v Commission* [1988] ECR 2855, paras 14-16; Case 310/85 *Deufil v Commission* [1987] ECR 901, paras 9-12; Case C-142/87 *Belgium v Commission (Tubemeuse)* [1990] ECR I-959, paras 35-41; Case C-303/88 *Italy v Commission* [1991] ECR I-1433, para 27.

²⁷⁹ Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021) 145-153; Case C-226/11 *Expedia Inc v Autorité de la concurrence* ECLI:EU:C:2012:795, para 16; Case 5/69 *Völk v Vervaecke* ECLI:EU:C:1969:35, [1969] ECR 295. For example, compare Joined Cases C-180/98 to C-184/98 *Pavlov and Others* ECLI:EU:C:2000:428, [2000] ECR I-6451, which is decided on the basis that the distortion of competition is not appreciable and Case C-393/08 *Emanuela Sbarigia v Azienda USL* ECLI:EU:C:2010:388, [2010] ECR I-6337 which is decided on the basis that there is no effect on trade between Member States. Compare Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81 and Communication from the Commission – Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C291/1.

²⁸⁰ Case T-728/17 *Marinvest and Porting v Commission* ECLI:EU:T:2019:325, paras 95-106.

albeit related issues. The second is that the substantive thresholds for these conditions must be raised above the very sensitive thresholds that are currently applied. The third is that the CJEU should be more exigent in requiring the Commission to provide evidence to substantiate the assertion that a measure distorts competition and affects trade between Member States. In particular, the distortion of competition should involve the use of more detailed economic evidence than is currently required for the Commission to satisfy this condition. This will require a decreased reliance on presumptions that these conditions merely because the remaining criteria for identifying aid are fulfilled. It is necessary to outline specific prescriptions for the distortion of competition and the effect on inter-state trade in turn.

The test for the distortion of competition must be interpreted more rigorously than the prevailing standard. In order to play a meaningful role in the identification of aid, three important changes are required. The first is that the law must cease its reliance on crude presumptions of competitive distortion wherever there is an economic advantage or wherever another criterion for the identification of aid is satisfied.²⁸¹ Related to this point is that the CJEU must be clear that the mere fact that competitive distortion cannot be excluded should not be equated to a finding that such a distortion exists. Some strands in the case law offer limited support for this more exigent approach.²⁸²

The second is that the substantive threshold must be higher. It may well be the case that anytime the State confers an economic advantage on a selective category of undertakings using State resources, there is also likely to be at least some minimal distortion of competition. If this condition is to make any meaningful, independent contribution to the

²⁸¹ Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 392-393.

²⁸² Case C-494/06 P *Commission v Italy and Wam* ECLI:EU:C:2008:639, [2009] ECR I-3639, Opinion of AG Sharpston, paras 52-57.

analysis, it cannot be fulfilled by this minimal distortion alone and should instead require that the distortion be appreciable. While this would follow the interpretation of Article 101 TFEU, this is not to say that the precise level of the threshold should be identical for both Article 101 and Article 107(1) TFEU. Indeed, there may well be good reasons why this threshold should be lower for the latter. The law may be more concerned about distortions of competition caused by State aid than those caused by undertakings and about the risk of error in clearing measures that should be subject to further scrutiny in this context.²⁸³ Further, the availability of broader derogations for aid under Article 107(2)-(3) TFEU may also allow for a lower threshold under Article 107(1) TFEU than would be applied to an agreement between undertakings.²⁸⁴ While these reasons might justify differences in the precise level of the threshold, it is much more difficult to argue that they require the absence of any appreciability threshold in circumstances where this deprives the condition of any meaningful effect in any liberalised market.

The third is that the CJEU must be more demanding in requiring the Commission to reason its conclusions that an intervention has sufficiently distorted competition. Indeed, this prescription follows closely from the previous two. In order to establish something more than some minimal level of distortion without relying on very simple presumptions relating to other criteria for identifying aid, more detailed economic analysis should be required. There is a consensus in the literature about the types of competitive distortion that aid may cause. Aid can inhibit the ordinary functioning of the market such that it can allow less efficient undertakings to survive when they otherwise would not, which in turn may dull incentives to compete.²⁸⁵ Aid can also distort the dynamic incentives which may result in

²⁸³ Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, Opinion of AG Capotorti, 2699.

²⁸⁴ Case 234/84 *Commission v Belgium* [1986] ECR 2263, Opinion of AG Lenz, 2274.

²⁸⁵ Hans Friederiszick, Lars-Hendrik Röller and Vincent Verouden, 'European State Aid Control : An Economic Framework' in Paolo Bucirossi (ed), *Handbook of Antitrust Economics* (MIT Press 2008) 625-699, 625; Jacques Derenne and Vincent Verouden, 'Distortion of Competition and Effect on Trade' in Philipp

potential competitors refraining from entering the market.²⁸⁶ This may also encourage competitors in the market to reduce sales and limit plans for investment.²⁸⁷ The aid may also consolidate any market power held by the beneficiaries.²⁸⁸ The aid may also have effects on markets other than those on which the beneficiaries compete, including markets for their inputs and other markets that use similar inputs.²⁸⁹ It is also clear that the intensity of these effects will vary according to a wide range of factors including market concentration, barriers to entry and product differentiation.²⁹⁰ The scale of any competitive distortion therefore depends not only on the form of the intervention but also its context.²⁹¹ Identifying these effects and making some meaningful assessment of their gravity is difficult without engaging with economic evidence and analysis that is considerably more detailed than that which is currently accepted as justification for a finding that a measure distorts competition

Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Kluwer Law International 2017) 169-189, 176.

²⁸⁶ Vincent Verouden and Philipp Werner, 'Introduction' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-64, 42-45; Commission 'Common principles for an economic assessment of the compatibility of State aid under Article 87.3' (2009) para 46 <https://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf> accessed 24 November 2022; Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 387.

²⁸⁷ Commission 'Common principles for an economic assessment of the compatibility of State aid under Article 87.3' (2009) para 47 <https://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf> accessed 24 November 2022.

²⁸⁸ Vincent Verouden and Philipp Werner, 'Introduction' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-64, 45-46; Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 387. Jacques Derenne and Vincent Verouden, 'Distortion of Competition and Effect on Trade' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Kluwer Law International 2017) 169-189, 176 suggest that this is not a frequent concern in State aid cases.

²⁸⁹ Vincent Verouden and Philipp Werner, 'Introduction' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-64, 46-47; Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 387-392; Commission, 'Common principles for an economic assessment of the compatibility of State aid under Article 87.3' (2009) para 48 <https://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf> accessed 24 November 2022.

²⁹⁰ Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 387.

²⁹¹ Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 386.

within the meaning of Article 107(1) TFEU. Such an analysis will generally require the Commission to consider the relevant market and its product and geographic dimensions.²⁹²

One potential difficulty with this arises with respect to distortions of competition arising from locational competition, whereby Member States use incentives to encourage mobile undertakings to make investments and establish themselves in one Member State over another. Many commentators have suggested that State aid control is not only designed to address competition between undertakings, but also competition between Member States.²⁹³ Indeed, the State aid rules have often been applied against measures that seem to directly encourage establishment or investment in a specific Member State and the CJEU has frequently rejected attempts to justify State intervention as a means to attract investment.²⁹⁴ Managing this type of regulatory competition between Member States is an important and distinctive part of the State aid control regime.²⁹⁵ However, it has been suggested that this type of inter-state competition involves analysis that is quite different to the microeconomic analysis that would be undertaken following the prescriptions set out above.²⁹⁶ This creates a difficulty because if it is covered by the distortion of competition criterion, it may complicate the analysis as it may not be possible to assess the effects on

²⁹² Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 386.

²⁹³ See for example Andrea Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' (2010) 12 *Cambridge Yearbook of Legal Studies* 35, 42; José Luis Buendía Sierra and Ben Smulders, 'The Limited Role of the "Refined Economic Approach" in Achieving the Objectives of State Aid Control: Time for Some Realism' in *EC State Aid Law: Liber Amicorum Francisco Santaolalla Gadea* (Wolters Kluwer 2008) 1-26; Ulrich Schwalbe, 'European State Aid Control – The State Aid Action Plan' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 161-192, 163; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 40-43. See also the discussion in Sections 3.2.2, 3.3.2, 3.6.3.

²⁹⁴ See for example Joined Cases C-106/09 and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113; Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Territorio Histórico de Álava* [2009] ECR II-3029, para 130; Joined Cases T-92/00 and T-103/00 *Territorio Histórico de Álava* [2002] ECR II-1385, para 62; Joined Cases T-269/99, T-271/99 and T-272/99 *Territorio Histórico de Guipúzcoa* [2002] ECR II-4271, para 64.

²⁹⁵ See Section 3.6. for further discussion on this objective of State aid control.

²⁹⁶ Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 387-392.

these different types of competition in a commensurable manner to determine whether the relevant threshold has been met. It may also make it difficult to separate targeted incentives from broader macroeconomic policy.²⁹⁷ If it is excluded, some measures may evade scrutiny notwithstanding their impact on matters relevant to the rationale for State aid control.

The resolution proposed by this thesis is that this type of regulatory competition between Member States and the impact on locational competition should be included in the assessment of a distortion of competition. However, excluding this element from the analysis would not pose a significant obstacle to State aid control. A tax break or direct grant for a company seeking to procure the establishment of an office in a specific Member State would have to be set at a level that would provide a positive incentive to move, which would likely affect the competitive relationship between the company and its competitors in any event.²⁹⁸ Such measures are likely to be captured in the analysis outlined above even without specifically accounting for the impact on regulatory competition between Member States. While it may be that some subsidies could be designed in a manner such that they would only compensate for the costs of moving and therefore have a minimal impact on competition between undertakings, this is unlikely in practice.²⁹⁹ Further, the location of an investment can effectively be understood as an input. Aid can distort competition on the market for this input just as it can for any other, specifically by exerting a negative impact on regions from which investment is withdrawn.³⁰⁰ This may also occur by encouraging an

²⁹⁷ Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 389-392.

²⁹⁸ Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 388-389. Andrew Evans, *European Community Law of State Aid* (Clarendon Press 1997) 83 indicates that in practice incentives of this type are usually set at so high a level that they will cause a positive inducement to move to a particular location. See also Vincent Verouden, 'EU State Aid Control: The Quest for Effectiveness' (2015) 14 *European State Aid Law Quarterly* 459, 462.

²⁹⁹ Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 388-389.

³⁰⁰ Commission 'Common principles for an economic assessment of the compatibility of State aid under Article 87.3' (2009) para 49 <https://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf> accessed 24 November 2022.

inefficient allocation of resources by leading undertakings to establish facilities in places that are not best suited to those facilities.³⁰¹

However, it is more appropriate that this type of competition is included in the assessment of the distortion. This is because it flows from an important rationale for State aid control. The rules are designed to restrain regulatory competition and so the distortion of competition criterion should assess distortions to this type of competition. Indeed, the breadth of the notion of competitive distortion as it is currently interpreted may well include this type of competition already.³⁰² The difficulties of integrating assessment of this type of distortion into the analysis are not insurmountable. As indicated above, the Commission already considers the impact on locational competition as a potential distortion to an input market. However, it is also clear that the Commission also considers the competition between Member States to include competition to attract investment directly as well.³⁰³ The compatibility assessment therefore considers both types of competition and integrates them into a final assessment of the appropriateness of the aid. It therefore seems possible that this could also be done under Article 107(1) TFEU. Further, the difficulty in distinguishing between legitimate macroeconomic policy and aid is often more pressing in cases involving locational competition. However, this distinction is one that should be policed by the selectivity criterion and the interpretation of that criterion proposed in this chapter.

Similar amendments should be made to the interpretation of effects on trade between Member States. In order to clarify the meaning of this condition, it is important to understand its relationship to the distortion of competition. There appears to be consensus that these

³⁰¹ *ibid.*

³⁰² Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 392.

³⁰³ Commission 'Common principles for an economic assessment of the compatibility of State aid under Article 87.3' (2009) paras 49-51 <https://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf> accessed 24 November 2022.

conditions are inextricably linked.³⁰⁴ However, this does not mean that both conditions will always be satisfied wherever one of them is satisfied. While the distortion of competition should be interpreted broadly to encompass the different types of harm that aid can inflict on the internal market, the effect on trade between Member States is more specific. The latter condition should be focused on identifying an appreciable international impact of the harms caused by the impugned measure. This understanding of the relationship between the two criteria suggests that while some distortion of competition will be necessary for there to be an effect on trade between Member States, an effect on inter-state trade is not necessary for there to be a distortion of competition. It is possible for government interventions to distort competition within the boundaries of a single Member State to an appreciable extent without necessarily causing any significant effects on international trade within the internal market.³⁰⁵ This may be the case where the distortion of competition occurs over a very narrow geographical area within a single Member State in the circumstances highlighted in the Commission's guidance.³⁰⁶

The assessment of the effects on inter-state trade therefore encompasses the elements of the competitive distortion that involve a cross-border effect within the internal market. Some guidance may be drawn from the analysis of the inter-state effects of competitive distortions as part of the assessment of the compatibility of the aid with the internal

³⁰⁴ Jacques Derenne and Vincent Verouden, 'Distortion of Competition and Effect on Trade' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Kluwer Law International 2017) 169-189, 169; Erika Szyszczak, 'Distortion of Competition and Effect on Trade Between EU Member States' in Herwig Hoffmann and Claire Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016) 151-160, 151; Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 399. Beyond the academic literature, this is also the position of the Commission: 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 C262/1, para 186. This also has some support in the case law. See Case T-288/97 *Regione autonoma Friuli-Venezia Giulia* ECLI:EU:T:2001:115, [2001] ECR II-169, para 41; Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600-607/97, T-1/98, T-3/98, T-6/98 and T-23/98 *Alzetta v Commission* [2000] ECR II-2319, para 81.

³⁰⁵ See for example Case T-728/17 *Marinvest and Porting v Commission* ECLI:EU:T:2019:325.

³⁰⁶ 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 C262/1, para 196.

market.³⁰⁷ This condition may be satisfied where there are distortions in markets that span multiple Member States. Effects on inter-state trade may also exist where the beneficiaries trade across multiple jurisdictions. Locational competition and the extent to which the aid causes the displacement of economic activity and incentivises the redirection of investment should play a particularly prominent role under the analysis for this criterion.³⁰⁸ The criteria in the Commission’s guidance are also useful starting points for analysis, suggesting that there will not be a sufficient effect on inter-state trade where the recipient trades in a small geographical area, the recipient is unlikely to draw customers from other Member States and there is no more than a marginal effect on conditions of cross-border investment and establishment.³⁰⁹ However, the Commission should be cautious about concluding that there is an effect on inter-state trade simply because tourists from other Member States are potential customers as this risks setting a very low threshold.³¹⁰ The CJEU should hold the

³⁰⁷ Commission ‘Common principles for an economic assessment of the compatibility of State aid under Article 87.3’ (2009) paras 44-56 <https://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf> accessed 24 November 2022. This was a document prepared for consultation in 2009. It was suggested that the General Court had validated important elements of this approach in a number of decisions shortly after its publication in Dounia Ababou, ‘The General Court Confirms The Commission’s Economic Approach Of State Aids’ (2011) 10 European State Aid Law Quarterly 149. See Case T-8/06 *FAB Fernsehen aus Berlin GmbH v. Commission* ECLI:EU:T:2009:386, [2009] ECR II-196; Case T-21/06 *Germany v Commission* ECLI:EU:T:2009:387, [2009] ECR II-197; Case T-24/06 *MABB v Commission* ECLI:EU:T:2009:388, [2009] ECR II-198. There is also a more recent reference to this document in the case law before the CJEU to inform the correct interpretation of the compatibility test in Case C-594/18 P *Austria v Commission (Hinkley Point C)* ECLI:EU:C:2020:742, paras 23-26. Moreover, Leigh Hancher and Phedon Nicolaides, ‘Compatibility of Aid – General Introduction’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 193-220, 202-203 suggest that it formed the basis for the common principles that were subsequently adopted in different sectoral guidelines as part of the State Aid Modernisation initiative.

³⁰⁸ Commission ‘Common principles for an economic assessment of the compatibility of State aid under Article 87.3’ (2009) paras 49-51 <https://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf> accessed 24 November 2022.

³⁰⁹ 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 C262/1, para 196.

³¹⁰ Sebastiaan Cnossen and Georges Dictus, ‘Big on Big, Small on Small: A Never Ending Promise?: A Critical Assessment of the Commission Decision Practice with Regard to the Effect on Trade Criterion’ (2021) 20 European State Aid Law Quarterly 30, 38. See *Alleged non-tax aid measures to Youth Hostel Berlin Ostkreuz GmbH* (Case SA.43145 (2016/FC)) Commission Decision of 29 May 2017 concerning alleged non-tax aid measures to youth hostel Berlin Ostkreuz [2017] OJ C193/1 which was annulled in Case T-578/17 *a&o hostel and hotel Berlin v Commission (Jugendherberge Berlin)* ECLI:EU:T:2019:437. See Christopher McMahon, ‘The Relationship between Economic Advantage and the Compatibility Assessment in Decisions Not to Raise Objections: Case T-578/17 *a&o hostel and hotel Berlin GmbH v Commission (Jugendherberge Berlin)*’ (2021) 20 European State Aid Law Quarterly 427.

Commission to similar higher evidential standards on this point as should be applied to the distortion of competition. This approach does not require strict separation of the matters considered under each condition, but simply that the Commission and the CJEU offer a more transparent analysis, in which the factors relevant to each condition are highlighted and explained in turn.

Just as the distortion of competition must be appreciable in order to classify a measure as aid, so too must the threshold for an effect on inter-state be raised. The effect must be appreciable to justify the application of the prohibition of Article 107(1) TFEU. There is some suggestion that the case law is moving towards a higher substantive threshold for this criterion in the Commission's decisional practice,³¹¹ even if the support for this position before the CJEU is less clear.³¹² However, the statements of this test still suggest that it will take relatively unusual circumstances for the effect to fall below this threshold. The test delimits the circumstances in which there will be no effect, rather than situations where there will be an effect. Subject to more direct approval from the CJEU, this could represent an important improvement but it is unclear that it would create an appreciability threshold that would be necessary to appropriately circumscribe the notion of aid. This would also be consistent with the approach taken to the interpretation of similar language in Articles 101-102 TFEU,³¹³ even if the jurisdictional role played by this criterion under the competition rules is not relevant in circumstances where many Member States do not have

³¹¹ Bernadette Zelger, 'The Effect on Trade Criterion in European Union State Aid Law: A Critical Approach' (2018) 17 *European State Aid Law Quarterly* 28, 33 Sebastiaan Cnossen and Georges Dictus, 'Big on Big, Small on Small: A Never Ending Promise?: A Critical Assessment of the Commission Decision Practice with Regard to the Effect on Trade Criterion' (2021) 20 *European State Aid Law Quarterly* 30, 36.

³¹² Edwin Schotanus, 'Port of Izola: An Appreciable Twist in State Aid Law' (2019) 18 *European State Aid Law Quarterly* 359, 365; Cees Dekker, 'The Effect on Trade between the Member States' Criterion: Is It the Right Criterion by Which the Commission's Workload Can Be Managed' (2017) 16 *European State Aid Law Quarterly* 154, 162-163.

³¹³ See Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81.

a domestic system of State aid control.³¹⁴ Nevertheless, limiting the application of Article 107(1) TFEU to circumstances where the effect on trade is appreciable would narrow the notion of aid in a principled and proportionate manner that is connected to its central objectives of managing competition between Member States and preventing the imposition of trade barriers between them.

The tests proposed above would represent a significant change to the type of assessment undertaken under Article 107(1) TFEU. Higher thresholds and more rigorous explanation would enhance the marginal importance of these impact standards and would make them important criteria for the identification of aid. This would serve to narrow the notion of aid and would help to compensate for the more expansive interpretation of this notion that is a consequence of the adoption of the discrimination standard as a test for selectivity. This would reduce the administrative burden on the Commission and, more importantly, expand the freedom of Member State governments to act decisively in pursuit of their own interests, and those of the EU more generally. Further, it would do so in a way that does minimal violence to the text of Article 107(1) TFEU and the objectives of the State aid control regime. It would give more meaningful effect to two conditions with a strong textual justification in the Treaties. It would apply standards that are directed towards precisely the type of harms that State aid control seeks to avoid including obstacles to trade, distortions of competition between undertakings and excessive regulatory competition between Member States.

The CJEU has often insisted that in identifying aid, it is only effects that are important, and not the objectives, aims or causes of a measure.³¹⁵ While the proposals

³¹⁴ See Caroline Buts, Tony Joris & Marc Jegers, 'State Aid Policy in the EU Member States: It's a Different Game They Play' (2013) 212 *European State Aid Law Quarterly* 330 for an overview of domestic regimes and formal advisory mechanisms in some Member States.

³¹⁵ See Section 5.3.2. See also Case 173/73 *Italy v Commission (Italian Textiles)* [1974] ECR 709, para 13; Case C-56/93 *Belgium v Commission* [1996] ECR I-723, para 79; Case C-241/94 *France v Commission* [1996]

outlined in this chapter on the selectivity criterion make it clear that objectives cannot be removed from the analysis, the approach to the impact standards in Article 107(1) TFEU canvassed here would ensure that the notion of aid is defined to a greater extent in relation to its effects. This may allow for differential treatment of interventions according to their form, but only to the extent that the difference in regulatory form has a meaningful impact upon the effects of the measure. This could provide a more principled way of acknowledging any differences that may exist between different types of measure but only to the extent that it is justified by the economic evidence.³¹⁶

8.3.5. Objections to More Rigorous Approach

While the advantages of a more rigorous approach to the impact standards in Article 107(1) TFEU are clear, it is necessary to defend this more rigorous interpretation of the distortion of competition and the effect on inter-state trade from potential objections. Three principal arguments against this approach will be considered.³¹⁷ The first is that the more detailed

ECR I-4551, para 20; Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, para 25; Case C-409/00 *Spain v Commission* [2003] ECR I-1487, para 46; Case C-5/01 *Belgium v Commission* [2002] ECR I-11991, para 45; Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' v Commission* [2011] ECR I-4727, para 94; T-52/12 *Greece v Commission* ECLI:EU:T:2014:677, para 67; Case C-126/01 *Ministre de l'économie, des finances et de l'industrie v GEMO SA* [2003] ECR I-13769, para 34; Case C-522/13 *Ministerio de Defensa v Concello de Ferrol* EU:C:2014:2262, para 28; Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10515, para 85; Case C-279/08 *Commission v Netherlands (NOx)* [2011] ECR I-7671, para 75; 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 87.

³¹⁶ Some reasons for the differences between fiscal aid and other forms of aid are considered by Phedon Nicolaides, 'Grants versus Fiscal Aid: In Search of Economic Rationality' (2015) 14 *European State Aid Law Quarterly* 410; Isabel Busom, Beatriz Corchuelo and Ester Martínez-Ros, 'Tax incentives... or subsidies for business R&D?' (2014) 43 *Small Business Economics* 571; Hua Cheng et al., 'Different policy instruments and the threshold effects on collaboration efficiency in China' (2020) 47 *Science and Public Policy* 348; Alexander Haupt and Tim Krieger, 'The role of relocation mobility in tax and subsidy competition' (2020) 116 *Journal of Urban Economics* 103196. See further discussion in Section 3.5.5.

³¹⁷ There are also some less significant objections discussed by Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:160 [1980] ECR 2671, Opinion of AG Capotorti, 2699 that appear to assume that essentially any form of State intervention will inevitably cause a distortion of competition and that an assumption that there will be an appreciable distortion of competition is justified because of the greater scale of State intervention and the propensity of national governments to circumvent the rules ('tendenza dei governi ad eludere il divieto degli aiuti'). These objections make excessive generalisations about the range of interventions that the State aid rules seek to regulate. State intervention can occur on a large scale but can also be far less

analysis required of the Commission to classify a measure of aid will only exacerbate the administrative burden on the Commission's resources rather than easing it. Second, it is arguable that the approach canvassed above, which bears resemblances to the interpretation of these impact standards as they are applied in Articles 101-102 TFEU, ignores important differences between State aid control and competition rules that require a different approach. Third, it may be argued that this change is superfluous as it can do little more than replicate the analysis under the compatibility assessment and the exemptions in the General Block Exemption Regulation³¹⁸ (the 'GBER') and the De Minimis Regulation.³¹⁹

The first objection relates to the administrative burden on the Commission. One of the justifications for narrowing the notion of aid in the manner described above is that it will ease the administrative burden faced by the Commission. The broader the notion of aid is, the wider the category of measures that must be notified to and cleared by the Commission before they are implemented. The Commission has limited administrative resources and high volumes of notifications may prevent it from performing its role effectively.³²⁰ This may increase delays which may in turn frustrate the policy objectives of national governments. Further, this may increase the risk of error in decisions which may require further delays as the appeals process is exhausted. While there are time limits set out in secondary legislation for the Commission to reach a decision,³²¹ these can be circumvented relatively easily by issuing a request for further information from the Member State which extends the period

disruptive for markets and any distortion is not inevitably an appreciable one. It is also not clear that the assumptions about national governments' behaviour distinguishes the State aid rules from those governing the conduct of undertakings or that these assumptions can justify almost assuming away part of the analysis on whether a measure is aid. The possibility that the law should be more concerned with State action than private action in this context has been discussed above.

³¹⁸ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1.

³¹⁹ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1.

³²⁰ Pietro Crocioni, 'Can State Aid Policy Become More Economic Friendly' (2006) 29 *World Competition* 89, 90.

³²¹ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, articles 4(5), 9(6).

within which a decision must be made.³²² Narrowing the notion of aid will reduce the volume of notifications and may therefore alleviate these difficulties. However, it may be argued that decreased reliance on presumptions and requirements for detailed economic evidence to substantiate the effects of the measure on competition and inter-state trade will place further strain on the Commission's resources.³²³ This may outweigh any alleviation of the administrative burden caused by narrowing the notion of aid.

While there is a need for caution in making additional demands on the Commission's resources, this concern is overstated. This is because the Commission will generally have to carry out a very similar analysis irrespective of whether it must do so as part of the identification of aid under Article 107(1) TFEU. This is because the Commission's assessment for the compatibility of aid with the internal market will generally include more detailed assessment of the distortion of competition on the internal market and its effect on inter-state trade.³²⁴ This analysis goes beyond the relatively superficial assessment currently undertaken under Article 107(1) TFEU in respect of these criteria and resembles the type of analysis proposed in this chapter. Even when the Commission relies on the prevailing simplistic approach towards these impact standards to find that a measure is aid, it will still have to conduct a more detailed assessment of the measure's impact on competition and

³²² *ibid* article 5.

³²³ Pietro Crocioni, 'Can State Aid Policy Become More Economic Friendly' (2006) 29 *World Competition* 89, 90 explains that one of the reasons the Commission does not conduct more detailed economic assessments as part of Article 107(1) TFEU is that it does not have sufficient resources to do so for the large number of measures notified to it.

³²⁴ For further discussion of the compatibility assessment, see Sections 2.4, 5.5.2, 7.3.3. Leigh Hancher and Phedon Nicolaides, 'Compatibility of Aid – General Introduction' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 193-220, 203. This assessment must consider the matters such as the incentive effect of the aid, its proportionality and the extent to which it avoids negative effects on competition and trade between Member States. Although there are criticisms of the difference between what the Commission's analysis claims to do and what it actually does. See Phedon Nicolaides, "What should state aid control protect? A proposal for the next generation of state aid rules" (2019) 40 *European Competition Law Review* 276, 281; Phedon Nicolaides and Ioana Eleanora Rusu, 'The "Binary" Nature of Economics of State Aid' (2010) 37 *Legal Issues of Economic Integration* 25. It has also been suggested that a complete cost-benefit analysis of every measure would not be realistic given the constraints on the resources of the Commission. See Phedon Nicolaides, "What should state aid control protect? A proposal for the next generation of state aid rules" (2019) 40 *European Competition Law Review* 276, 280.

inter-state trade as part of the compatibility assessment. Where a measure would have been classified as aid under the current approach, the more rigorous interpretation of the impact standards proposed here should not add to the Commission's workload. It will give additional grounds to an interested party, and indeed the Commission, to argue that a measure does not constitute aid but this does not substantially change the type of analysis that must be conducted. It may be argued that in cases where the Commission finds that there is no aid and decides not to conduct an assessment of the measure's compatibility as a ground for clearing the aid, there may be an additional workload for the Commission in carrying out a more detailed economic analysis under Article 107(1) TFEU than would be required under the current position. However, this impact is likely to be marginal for two reasons. The first is that any increased workload here will likely be compensated for by the much greater potential to find that the measures are not aid and therefore do not have to be notified at all under the approach canvassed here. The second is that under the current law, the Commission will often consider compatibility as an alternative ground for clearing a measure even if it considers that the measure does not constitute aid.³²⁵

The second criticism is that State aid control is sufficiently different from the competition rules that similar interpretations of the criteria relating to competitive distortion and inter-state trade should not be applied in both contexts. In particular, it is suggested that unlike Article 101 TFEU, which contains only very narrow exemptions,³²⁶ Article 107 TFEU

³²⁵ Sebastiaan Cnossen and Georges Dictus, 'Big on Big, Small on Small: A Never Ending Promise?: A Critical Assessment of the Commission Decision Practice with Regard to the Effect on Trade Criterion' (2021) 20 *European State Aid Law Quarterly* 30, 39-40 are critical of this trend in *Alleged non-tax aid measures to Youth Hostel Berlin Ostkreuz gGmbH* (Case SA.43145 (2016/FC)) Commission Decision of 29 May 2017 [2017] OJ C193/1 which was annulled in Case T-578/17 *a&o hostel and hotel Berlin v Commission (Jugendherberge Berlin)* ECLI:EU:T:2019:437. See Christopher McMahon, 'The Relationship between Economic Advantage and the Compatibility Assessment in Decisions Not to Raise Objections: Case T-578/17 *a&o hostel and hotel Berlin GmbH v Commission (Jugendherberge Berlin)*' (2021) 20 *European State Aid Law Quarterly* 427.

³²⁶ Article 101(3) TFEU. That these exemptions are very narrowly interpreted is illustrated by the paucity of cases in which the Commission has found an infringement of Article 101(1) TFEU to be covered by the exemption in Article 101(3) TFEU. See Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021) 165-166; David Bailey, 'Reinvigorating the Role of Article 101(3) under Regulation 1/2003' (2016) 81 *Antitrust Law Journal* 111, 111-112. See also the Commission's guidance on the

contains very broad derogations from the general prohibition on aid.³²⁷ It can be argued that the broad character of these derogations for aid that is compatible with the internal market requires the notion of aid to be interpreted broadly.³²⁸ Indeed, the presence of very broad derogations moderates some of the negative effects arising from a wide interpretation of the notion of aid. Therefore, the State aid rules should adopt considerably lower thresholds for competitive distortion and effects on inter-state trade and should not require detailed economic analysis on this point in the same way as the competition rules. Commentators who regard the State aid rules as largely serving market integration objectives might also object to how these proposals seek to bring the interpretation of Article 107(1) TFEU in line with the competition rules.³²⁹

There are two responses that can be made to this criticism. The first is that while the proposals outlined in this chapter undoubtedly bring the interpretation of these impact standards closer to that which is employed for Articles 101-102 TFEU, they do not require the analysis to be precisely the same.³³⁰ These proposals are not inconsistent with a somewhat lower threshold being used in Article 107(1) TFEU than in Articles 101-102 TFEU. Parts of the analysis will inevitably differ to account for differences between public and private intervention in the internal market. While similar interpretations of similar wording in these provisions of the Treaties might be desirable, this is not the primary goal

interpretation of this provision: Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97.

³²⁷ Case 234/84 *Commission v Belgium* [1986] ECR 2263, Opinion of AG Lenz, 2274.

³²⁸ *ibid.*

³²⁹ These might include Andrea Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' (2010) 12 *Cambridge Yearbook of Legal Studies* 35; José Luis Buendía Sierra and Ben Smulders, 'The Limited Role of the "Refined Economic Approach" in Achieving the Objectives of State Aid Control: Time for Some Realism' in *EC State Aid Law: Liber Amicorum Francisco Santaolalla Gadea* (Wolters Kluwer 2008) 1-26; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013). For further discussion of this debate, see Section 3.3.2.

³³⁰ Ulrich Schwalbe, 'European State Aid Control – The State Aid Action Plan' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 161-192; Pietro Crocioni, 'Can State Aid Policy Become More Economic Friendly' (2006) 29 *World Competition* 89, 101-105; Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 397.

of this reform. Similarly, these proposals do not seek to assert the primacy of competition rationales in the State aid control regime.³³¹ This thesis has defended a pluralist understanding of the objectives of State aid law that emphasises the role it plays in managing regulatory competition as well as facilitating market integration and maintaining competition between undertakings. More rigorous interpretation of the impact standards, particularly the effects on inter-state trade, can allow State aid law to more effectively identify measures that will cause the most harm to market integration objectives as well.

Second, there is a need for caution in arguing for a broad interpretation of the notion of aid simply because the derogations in Article 107(2)-(3) TFEU are also quite broad. While broad derogations do limit the costs of a broader notion of aid, they can only do so imperfectly. Even if a given intervention is regarded as aid that is compatible with the internal market, its classification as aid still has important consequences. A Member State must notify the Commission, justify the intervention and wait for the Commission's approval.³³² This is a significant limitation on national government's autonomy and flexibility even if the Commission finds the intervention to be compatible. Extending the notion of aid excessively has the potential to unduly restrict policymaking by national governments and to place unmanageable burdens on the Commission's resources. The breadth of the derogations does not mitigate these costs and therefore relying on this to justify extension of the notion of aid through lax impact standards is inappropriate. This is particularly the case in circumstances where it is clear that the precise scope of the derogations is subject to change. It is clearly established that the Commission has discretion

³³¹ For further discussions of the market competition rationales for State aid control, see Section 3.3.1

³³² Article 108(3) TFEU; Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, articles 2-3. See also the discussion of the procedural rules in Section 2.5.

in defining the precise scope of the derogations in Article 107(3) TFEU.³³³ The Commission does this by issuing detailed guidelines on the types of measures that will be permitted. These can evolve and change according to the political priorities of the Commission and can become more or less permissive as a result. When the CJEU defines the notion of aid in Article 107(1) TFEU and determines how the impact standards should be applied, it should therefore be hesitant to rely on the breadth of derogations that are subject to the Commission's discretion to justify its approach.

The third criticism that may be made against the proposals outlined in this chapter is that they are superfluous and that they will have little practical impact. It may be argued that the exemptions from the notification obligation in the GBER and the De Minimis Regulation more effectively serve the objectives pursued by these proposals. They may simply be unnecessary. It will be recalled that the De Minimis Regulation sets out minimum thresholds for most types of aid below which the measure does not have to be notified on the basis that it does not distort competition or affect trade between Member States within the meaning of Article 107(1) TFEU.³³⁴ This threshold is currently fixed at €200,000 per undertaking per three year period for most types of aid.³³⁵ It will be recalled that the GBER sets out categories and amounts of aid that are deemed to be compatible with the internal market and are also exempt from the general obligation contained in Article 108(3) TFEU to notify aid and refrain from implementing it until it is approved.³³⁶ Both instruments create safe harbours

³³³ Although the same is not true of the derogations in Article 107(2) TFEU. See Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:209, [1980] ECR 2671, para 17.

³³⁴ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1. See Section [2.6.2].

³³⁵ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1, article 3(1)-(2).

³³⁶ See Section [2.6.3]; Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1.

within which Member States can grant aid or measures similar to aid without the uncertainty and delay of the notification process. While these measures undoubtedly make some contribution towards limiting the volume of notifications and easing the burden on the Commission as well as facilitating greater autonomy for Member States, they are imperfect substitutes for a more rigorous application of the impact standards.

This is in part because of the nature of the exemptions contained in these instruments. The GBER does not find that measures that satisfy its conditions are not aid. Instead, it finds only that they are compatible with the internal market. While it may alleviate the practical burdens of notification that would ordinarily be associated with aid, it does not narrow the range of measures that are ultimately subject to the Commission's oversight. Rather than exercise this oversight through the notification procedure, it is instead conducted by compliance with conditions stipulated in advance by the Commission in the GBER. Further, there are often conditions relating to the review of the aid and publication of their details that would not be present if the measures were not regarded as aid at all due to the application of the impact standards in Article 107(1) TFEU.³³⁷ By contrast, the De Minimis Regulation does declare certain measures to fall outside the definition of aid.³³⁸ However, it does this on the basis of largely quantitative thresholds that are relatively low.³³⁹ While these thresholds undoubtedly go some way towards filtering out measures that are unlikely to distort competition, the reliance on quantitative criteria might be regarded as a relatively crude metric, particularly when compared to the analysis proposed above.³⁴⁰ Further, it will be recalled that there remains some doubt over the legitimacy of the De Minimis Regulation

³³⁷ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1, articles 9, 11.

³³⁸ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1, recital (1).

³³⁹ *ibid* article 3(2); The main thresholds are €200,000 per undertaking in any three-year period, or €100,000 per undertaking in a three year period for undertakings performing road freight transport for hire.

³⁴⁰ Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 397-398.

in circumstances where they see the Commission purport to define the notion of aid under Article 107(1) TFEU, which is thought to be a function reserved to the CJEU.³⁴¹ These instruments cannot appropriately delimit the notion of aid and the scrutiny of the Commission without more rigorous interpretation of the impact standards in Article 107(1) TFEU by the CJEU itself.

Similarly, it might be argued that the proposals canvassed here are superfluous because they would conflate the analysis under Article 107(1) TFEU with the compatibility assessment under Article 107(2)-(3) TFEU.³⁴² As has been argued above, the more rigorous approach to the impact standards in Article 107(1) TFEU canvassed here would require more detailed economic analysis similar to that which is conducted as part of the compatibility assessment. However, that is not to say that this leads to unnecessary duplication or conflation. While the analysis may be similar, the thresholds involved should be distinct. The threshold for competitive distortion that should lead to a measure being classified as aid will inevitably be lower than that which is used to find the measure to be incompatible with the internal market. Further, it is clear from the Commission's guidance on the compatibility assessment that the analysis is considerably broader than that which would be undertaken under Article 107(1) TFEU, considering the importance of the objective of the measure, its proportionality, its necessity and other matters that go beyond the competitive distortion itself.

³⁴¹ See Section 2.6.2.2; Michael Berghofer, 'The New De Minimis Regulation: Enlarging the Sword of Damocles?' (2007) *European State Aid Law Quarterly* 11, 14. Although it has been argued that the CJEU appears to have accepted that the design of the De Minimis Regulation is permissible under the Treaties. See Koen Van de Castele, 'De Minimis Aid' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot, (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 235-244, paras 6-040 – 6-044. See also Case C-351/98 *Spain v Commission (Renove)* [2002] ECR I-8031, paras 51-52. Compare the position under the GBER in Section 2.6.3.2.

³⁴² For further discussion of the compatibility assessment, see Sections 2.4, 5.5.2, 7.3.3.

8.4. Conclusion

The proposals canvassed in this chapter adapt the State aid rules to the exigencies of their enforcement against a diverse range of government interventions on the internal market. The first proposal carries the logic of the discrimination standard to its conclusion and develops a coherent test based on identifying differential treatment of categories of undertakings and requiring its justification as a proportionate response to a legitimate objective. Where previous interpretations of the discrimination standard and the selectivity criterion more generally have sought to obscure the important choices on what constitutes a legitimate objective, the approach canvassed here makes those choices explicit and transparent and makes suggestions about the sources from which these objectives can be derived. While this proposal does not necessarily restrict the scope of the prohibition in Article 107(1) TFEU, it makes amendments that bring clarity and coherence to the application of the standard and creates a framework that would allow the CJEU to limit the notion of aid in a principled and transparent manner.

The second proposal argues in favour of more rigorous application of the impact standards in Article 107(1) TFEU. In order to be classified as aid, it has been argued that a measure must distort competition and affect trade between Member States to an appreciable extent and that the Commission must do more to reason its findings that this threshold is reached. This proposal narrows the notion of aid by excluding measures that have inconsequential effects on the dynamics of competition and trade on the internal market. This represents a more principled mechanism for narrowing the notion of aid that accords with the primary objectives of State aid control. In this way, it would be more effective than some of the more mechanistic alternatives to the discrimination standard that have been considered and applied in the case law.

Both changes require the CJEU to re-evaluate its existing jurisprudence and make targeted but significant changes to its approach in defining aid of all types. It is well established that while the Commission will most often reach a first instance decision on whether aid is present, the CJEU has the exclusive power to give authoritative interpretations of the Treaties and therefore to define the limits of the notion of aid.³⁴³ However, this is not to say that the Commission does not also have an important role in shaping the standards for the identification of the notion of aid. Particularly in respect of the more detailed economic assessment that should be required in assessing the impact standards, the Commission must do more to systematise its decisional practice and provide guidance on the types of measures that are likely to fall below the relevant thresholds.³⁴⁴

This also points to an important limitation of this thesis. While this chapter has sought to advance two important proposals for the reform on the law defining the notion of aid, it has done so primarily through the articulation of general frameworks and tests for assessing measures to determine whether they constitute aid. Even though this is an important step towards clarifying the law and placing appropriate limits on the notion of aid, there remains some inevitable ambiguity in the standards articulated in this chapter. The precise shape of the prohibition on aid that could emerge from these proposals will depend to a large extent on the application of these rules by the institutions of the EU – particularly the CJEU but also the Commission. It is up to these institutions to develop a body of case law and decisional practice that can give practical examples and analogies that will help Member

³⁴³ See Section 2.4.1. See also Case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515; Case T-487/11 *Banco Privado Português and Massa Insolvente do Banco Privado Português* ECLI:EU:T:2014:1077, para 46; Case C-486/15 P *Commission v France and Orange* ECLI:EU:C:2016:912, paras 88-89.

³⁴⁴ See Sebastiaan Cnossen and Georges Dictus, ‘Big on Big, Small on Small: A Never Ending Promise?: A Critical Assessment of the Commission Decision Practice with Regard to the Effect on Trade Criterion’ (2021) 20 *European State Aid Law Quarterly* 30, 39-40.

States, beneficiaries and their competitors to determine whether a given intervention constitutes aid.

9. CONCLUSION

9.1. Primary Research Question

It will be recalled that this thesis is directed towards answering one primary research question. This question asks how the developments in the interpretation of Article 107(1) TFEU arising from cases dealing with fiscal measures may affect the application of EU State aid law to non-fiscal measures, including market regulation such as systems for the grant of licences, permits and special rights as well as schemes of direct grants, loans and guarantees. The purpose of this concluding chapter is to review the findings made in the previous chapters and explain how they have answered the various components of the research question.

9.2. The Challenge of Fiscal Measures and its Impact

The substantive elements of the thesis began with a general assessment of the legal framework governing State aid in the EU in Chapter 2. This assessment highlighted important features of this framework.¹ First, the Treaty provisions on State aid are relatively sparsely worded and ambiguous, notwithstanding the breadth of the area they regulate and the complexity of the measures that are subject to them. Many of the legislative measures and policy guidance from the Commission that fill these gaps relate more directly to issues of compatibility or procedure rather than the notion of aid. Therefore, the Union courts have a very important role in interpreting the Treaty provisions on State aid and resolving these ambiguities, particularly in relation to the notion of aid in Article 107(1) TFEU, a provision which might be described as ‘striking

¹ See in particular Section 2.7.

for its brevity'.² Second, State aid control has a distinctive enforcement regime in which the Commission has considerable influence. The Union courts have a gatekeeping role in determining what measures are classified as aid and a supervisory function over other aspects of the inquiry. However, the Commission's powers of enforcement, the obligation to notify most aid to the Commission in advance, the discretion as to whether aid is compatible and powers to issue broad policy guidance and secondary legislation ensure that it has considerable latitude to shape what aid measures are implemented. Third, the regime leaves open possibilities for private enforcement that can disrupt the implementation of measures that have not been notified to the Commission.

Chapter 3 went on to consider the rationale for State aid control, acknowledging that the regime has been regarded as serving a diverse range of objectives. These include the integration and protection of the internal market,³ the protection of competition between undertakings⁴ and guarding against national government failure and regulatory capture.⁵ The precise balance between these objectives has been changed by the increasing application of the State aid rules against fiscal measures and market rules, which pose challenges that direct grants or subsidies do not.⁶ In particular, it is more difficult to distinguish between measures of this type that are analogous to direct grants or subsidies and those that are more akin to general economic policy. This has also been shaped by the changing dynamics of competition between Member States. It was argued that these changes have reoriented the balance of the different rationales that justify State aid control in favour of the management of regulatory competition, a rationale that has

² Stephen Weatherill and Paul Beaumont, *EU Law: The Essential Guide to the Legal Workings of the European Union* (3rd edn, Penguin 1999) 501 describe what has now become Article 34 TFEU in the same terms.

³ See Section 3.2.

⁴ See Section 3.3.

⁵ See Section 3.4.

⁶ See Section 3.5.

been neglected in the literature.⁷ The State aid rules have increasingly become a mechanism for managing how Member States compete to attract mobile capital and investment. While the EU has some reason to constrain this type of competition, some of it is desirable in a polity with multiple levels of economic governance. This thesis expands on existing accounts of State aid law along these lines by advocating for the use of solidarity between Member States as an organising principle or objective of the process of managing regulatory competition.⁸

The more concrete doctrinal implications of this reorientation of the objectives of State aid law and the application of these rules against fiscal aid then fell to be explored in Chapter 4. Some of the consequences of this reorientation are firmly established in the doctrine while others remain contested. One well established rule emerging from the doctrine is that Member States cannot rely on the possibility or probability that a measure will increase inward investment into the State such that it will increase overall tax revenues to avoid classification of the measure as aid.⁹ This means that it is not possible for Member States to claim that a tax exemption falls outside the definition of aid simply because it will cause a net increase in revenues rather than a decline in those revenues. This appears to conflict with an emerging line of jurisprudence that allows Member States to rely on the market economy operator principle to exclude the presence of aid when they offer exemptions from taxes. However, the need to prevent Member States from using the simple fact that they are engaging in regulatory competition as a defence simply reflects the reality that the State aid rules are increasingly targeted at controlling regulatory competition. This chapter also identified the difficulties faced by the CJEU in

⁷ See Section 3.6.

⁸ See Section 3.6.5.

⁹ See Section 4.2.

applying the three-stage test for selectivity to fiscal measures.¹⁰ The test has been strained and contorted, with new standards being developed to determine whether an intervention is selective. These include the ‘privileged category’ approach applied in *Gibraltar*,¹¹ the discrimination standard which emerged in the wake of that decision and the arm’s length principle applied in cases involving transfer pricing.¹²

Chapter 4 explored both the causes and the consequences of these developments. This thesis has claimed that these developments can largely be attributed to two causes. The first is that the Commission and the CJEU have sought to use the State aid rules to provide a substantial constraint on the ability of Member States to engage in regulatory competition through tax and subsidy policy to attract investment and mobile capital. Second, while many fiscal measures can operate similarly to the central case of aid in the form of grants or subsidies, these are more difficult to distinguish from general fiscal measures that are part of general economic policy than other forms of aid. The three-stage test articulated by the CJEU is inadequate to draw this distinction in a convincing way. The primary consequence is that the notion of aid in Article 107(1) TFEU is capable of encompassing a much broader range of tax measures than it otherwise would, but without a principled or coherent account of how the law works or why it should work in this way. It should be observed that this area of the law, particularly the application of the State aid rules to transfer pricing, is the subject of ongoing controversy and appeals in high profile cases that will require new research to build on the argument in this thesis.¹³

¹⁰ See Section 4.3.

¹¹ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113. See Section 4.4.

¹² See Section 4.6.

¹³ See Section 4.6.

9.3. Impact of the Case Law on Fiscal Measures on Other Forms of Intervention

After identifying the developments in the case law arising from the application of Article 107(1) TFEU to fiscal measures, their roots in the doctrine of the Union courts and the shifting rationales for State aid control, it was necessary to consider the impact on other forms of aid. Chapter 5 began this examination by considering whether any such impact would be possible. It examined the extent to which the law treats fiscal measures differently to other forms of intervention. If the case law did provide the CJEU and the Commission with options to confine legal developments to fiscal measures, then the impact on other forms of aid would likely be minimal. However, this author's conclusions indicate that the scope for differentiating between different measures based on their form is very limited indeed.¹⁴ The case law of the CJEU features frequently repeated formulae that preclude the consideration of regulatory technique in determining whether a measure constitutes aid and commit the law to examining the effects rather than its causes, objectives, purposes or aims.¹⁵ While reference to the notion of 'selective advantage' in cases involving fiscal aid and the invocation of Member State tax sovereignty may appear to provide some scope for the differentiation between fiscal aid and other forms of intervention, these appear to have had a relatively modest impact on the application of the law.¹⁶

However, there are some limited avenues for differentiation between these forms of intervention. The economic literature suggests that in some circumstances, fiscal incentives will have different economic effects to equivalent aid in the form of direct grants or subsidies.¹⁷ As the consideration of the economic effects of the measure under

¹⁴ See Section 5.6.

¹⁵ See Sections 5.2.3, 5.3.3.

¹⁶ See Sections 5.4.1, 5.4.2.

¹⁷ See Section 3.5.5.

Article 107(1) TFEU is relatively superficial, the existing case law provides limited space for examining these different effects.¹⁸ However, the proposal canvassed in Chapter 8 of this thesis to interpret the criteria relating to the distortion of competition and the effect on trade between Member States in a more rigorous manner would make differentiation along these lines possible.¹⁹ It may also be that the different economic effects associated with different regulatory forms can be accounted for in the Commission's assessment of the compatibility of aid with the internal market under Article 107(3) TFEU.²⁰ However, any such differentiation in the treatment of fiscal measures from other regulatory forms is indirect and will only emerge to the extent that there are differences in the economic effects of these measures. To the extent that this differentiation emerges under the compatibility assessment, this will not affect whether a measure is classified as aid under Article 107(1) TFEU.

This makes it clear that the developments that have emerged in the case law on fiscal aid are capable of having and indeed are likely to have an impact on the treatment of other forms of State intervention. Chapter 6 addresses the core of the research question by considering the form that this impact may have on other forms of aid. This is a crucial element of the original contribution made by this thesis. Whereas the existing literature has examined the changes in the law emerging from the case law on fiscal measures, the impact of these developments on forms of intervention that are not fiscal in character has not been comprehensively examined. There are two main impacts on enforcement against non-fiscal measures that have been identified in this thesis. The first is that the reorientation of the selectivity test around the discrimination standard will likely make it easier for the Commission to determine that a measure is selective and have such a finding

¹⁸ See Sections 2.3.5, 8.3.1, 8.3.2.

¹⁹ See Section 8.3.4.

²⁰ See Section 5.5.2.

upheld by the CJEU. This will allow a wider range of measures to be regarded as aid, whether or not they relate to taxation. The selectivity test is applied to general aid measures that are granted to multiple undertakings in a relatively systematic manner according to general rules or criteria specified in advance. This means that a wide range of different measures, including general schemes of grants, guarantees and loans as well as market rules and the provision of services will be more easily classified as aid.²¹

The second consequence is limited to aid granted through market rules, particularly where this involves the grant of access rights to public infrastructure or resources, concessions, permits, licences or special or exclusive rights.²² The treatment of these measures exhibits similar trends to fiscal aid cases in that the discrimination standard is increasingly used to identify selectivity and this criterion is often conflated with economic advantage. However, the case law dealing with these measures has gone further and often conflates the selectivity criterion with the State resources criterion as well. This further enhances the importance of the discrimination standard in the identification of State aid as in these cases it appears to be an important part of three of the criteria for identifying aid. This is likely to facilitate the Commission in making a finding that a given measure is aid more readily and defending this finding before the Union courts.

There are two reasons for caution arising from this potential for increased enforcement of the State aid rules against a wide range of government interventions.²³ The first is that this is a significant change in the law on many types of aid that is driven by developments in the case law in response to fiscal measures. While there may be

²¹ See Section 6.2.3

²² See Section 6.3.

²³ See Section 6.4.

general concerns and to some extent, tolerance about these changes being introduced by the Commission's policy priorities on taxation and changes in the case law, the fact that their impact extends beyond the field of taxation for which they are developed raises a more specific concern about the legitimacy of these developments. The second is that the discrimination standard has been poorly articulated and theorised by the Commission and the Union courts. While it seeks to identify differential treatment that is not justified as a proportionate response to an important objective there is no clarity in the case law about what kind of objectives can be invoked as justifications in this way. The CJEU appears to have ruled out some objectives under the existing case law, but a much more systematic approach is required in order to make the application of the discrimination standard reasonably consistent and predictable.

It is also worth qualifying the impact of these changes. Even if a wider range of measures is classified as aid, this does not necessarily mean that all such measures will be prohibited. The Commission may still approve it as compatible with the internal market under Article 107(2)-(3) TFEU. However, this is not sufficient to erase the concerns raised in this thesis. Irrespective of the leniency of the Commission's policies on compatibility, a broad definition of aid in Article 107(1) TFEU remains a consequential encroachment on the freedom Member States enjoy in pursuing economic policy. All aid must be notified in advance to the Commission and cannot be implemented lawfully without the Commission's approval. Further, Member States may well choose to notify an even broader range of measures, particularly where the standard applied is so unpredictable, in order to avoid the risk of granting unlawful aid. Exemptions in secondary legislation from the notification obligation are imperfect substitutes for the

freedom of Member States where Article 107(1) TFEU is held not to apply.²⁴ A broader definition of aid therefore comes with costs that require not only caution, but also a systematic and principled approach to identifying aid. This is lacking in the case law interpreting the selectivity criterion.

9.4. Persistence of the Effects on Non-Fiscal Measures

These effects on the application of Article 107(1) TFEU described in Chapter 6 are a central part of this thesis's answer to the primary research question posed. However, the robustness of these effects was tested in Chapter 7. This Chapter considered whether these effects would be displaced or made irrelevant by proposals for tax harmonisation and co-ordination at a global level and within the EU. This is an important test of the conclusions of this thesis in the light of likely developments in EU market integration and tax cooperation in the coming years. Chapter 7 explores this possibility and concludes that the problems identified in this thesis remain pressing despite these proposals for four main reasons.

The first of these is that the existing proposals are not intended to achieve total harmonisation of direct taxation, let alone other forms of taxation and regulation.²⁵ Nor do they seek to amend the application of the State aid regime to tax measures. Tax competition will continue in the EU and the Commission may continue to invoke the

²⁴ See for example Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1 (the 'De Minimis Regulation'); Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1. The application of these regulations have been extended to the end of 2023 by Commission Regulation (EU) 2020/972 of 2 July 2020 amending Regulation (EU) No 1407/2013 as regards its prolongation and amending Regulation (EU) No 651/2014 as regards its prolongation and relevant adjustments [2020] OJ L215/3. See Sections 2.6.2, 2.6.3.

²⁵ See Section 7.2.3.

State aid rules to manage this process. The second, related reason, is that the Commission has publicly committed itself to the continued application of the State aid rules to taxation in the same way as before even after the implementation of any of the proposals on tax harmonisation. One should also consider the political obstacles to the adoption of these measures both at an international level and within the EU and the real possibility that they will not be implemented or that they will be substantially diluted.

The third reason addresses the possibility that the Commission's enforcement priorities would shy away from enforcement of the State aid rules against tax measures if there were other rules in place harmonising taxation within the EU.²⁶ The Commission's ability to refrain from enforcing the rules against tax measures is constrained by a range of factors, including the inability of the Commission to distinguish between fiscal and non-fiscal measures under the existing guidance and case law. The supervisory jurisdiction of the Union courts, procedural rules allowing affected undertakings to force the Commission to make a formal decision on a measure and the availability of recourse to national courts by private actors make it more difficult for the Commission to roll back its enforcement against fiscal measures after the case law has developed to include many such measures within the notion of aid.

The fourth reason relates to the wide-ranging impact of the developments described in this thesis outside the sphere of direct taxation and indeed fiscal measures more generally.²⁷ An important implication of the findings in Chapter 6 which highlight the possibility of increased enforcement against schemes of direct grants and market rules is that the developments in the case law on fiscal aid have an impact on other types of government intervention. The possibility of increased enforcement here would

²⁶ See Section 7.3.2.

²⁷ See Section 7.4.

presumably be unaffected by a change in the Commission's policy priorities. Even if the Commission did seek to roll back enforcement in reliance on these developments, the factors indicated in the preceding paragraph would limit its ability to do so.

Not only do the effects described in Chapter 6 survive scrutiny in the face of the potential obstacles identified in Chapter 7, but this examination also highlighted two issues which are likely to heighten the impact of these effects. The first is the FSR.²⁸ While the details of the proposal may change and it cannot be predicted with certainty how it will be interpreted, it is plausible that it will draw to some extent on the existing jurisprudence on State aid. The second can be seen in systems that replace the State aid rules in the UK. The interpretation of the new subsidy control regime contained in the TCA may be shaped to some extent by the existing jurisprudence on State aid,²⁹ including the difficulties with the breadth of the notion of aid and the incoherence of the selectivity criterion. This may also be reflected to a greater or lesser extent in the UK's Subsidy Control Act 2022 which implements this regime. Further, the State aid rules will apply to a segment of the territory of a third country in Northern Ireland.³⁰ These developments are likely to increase the salience and impact of the developments described in this thesis as they will play an important role in conditioning the EU's trading relationships with third countries. The scale and shape of the impact of these developments cannot be predicted with precision at the time of writing, and further research would be welcome as the tax harmonisation proposals, the FSR and the EU's relationship with the UK

²⁸ See Section 7.5. See also Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/1.

²⁹ See Section 7.6. Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L149/10, Articles 363-375.

³⁰ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C1384/1, Protocol on Ireland/Northern Ireland, Article 10.

develop. However, a preliminary examination of the likely direction of these developments suggests that the findings of this this thesis are reasonably robust.

9.5. Proposals for Reform

Chapter 6 has identified significant effects on the application of the State aid rules to non-fiscal measures and made a largely negative assessment of the implications of these effects for the coherence of the law and the breadth of the prohibition on aid in Article 107(1) TFEU. Chapter 7 has confirmed that the impact of these developments is both significant and persistent which in turn strengthens the case for reform in this area in a manner that might constrain the notion of aid within more principled, coherent and transparent limits. The last component of this thesis' response to the primary research question is to consider how these effects on non-fiscal aid can be mitigated and contained. Chapter 8 therefore proposes two potential avenues for reform of the interpretation of Article 107(1) TFEU that might serve these objectives. These reforms relate to the standards used to identify aid, whether the measure at issue is fiscal or non-fiscal in character. This is because the doctrine and the enforcement regime provide few tools to distinguish between measures based on their fiscal character.³¹

The first reform relates to the selectivity criterion which has proved to be the most controversial and difficult part of the analysis to determine whether a fiscal measure or market rule constitutes aid. Chapter 4 has outlined the way in which the test for selectivity has begun to reorient itself around the discrimination standard, even if it continues to use the language of the three-stage test from the previous case law in places. The discrimination standard holds a measure to be selective, and therefore aid, if it

³¹ See Section 5.6.

differentiates between undertakings without being justifiable as a proportionate response to a legitimate objective. While the case law has limited the range of objectives it considers to be legitimate, it has failed to acknowledge this explicitly or define the range of objectives which can be invoked by Member States.

This thesis proposes a modest but important development to the law whereby the discrimination standard would be adopted as the test for selectivity expressly, with a number of key amendments to improve its effectiveness and coherence.³² These include making it possible for Member States to justify differential treatment based on a range of objectives that is very broad but nevertheless circumscribed by EU law. Under this test, Member States would be able to rely on most legitimate, general public policy objectives to justify differential treatment along lines that are similar to the approach taken in free movement law, with important exclusions derived from the nature of State aid law. National governments will therefore be able to pursue active State intervention freely where they differentiate between undertakings consistently with these objectives. This thesis has also suggested that the notion of solidarity between Member States might be a useful interpretive aid to the CJEU in identifying these objectives in a manner consistent with the objectives of the State aid control regime.³³ This proposal would not predetermine exactly how expansive the notion of aid should be, but it would allow the CJEU to develop a more coherent and transparent framework for identifying selectivity. It provides clear mechanisms to narrow the notion of aid by limiting the range of measures which can be invoked and by interpreting the proportionality requirement more rigorously.

³² See Section 8.2.4.

³³ See Sections 3.6.5, 8.2.4.

The second proposal would do more to directly contract the scope of the notion of aid and advocates for a more rigorous application of the impact standards in Article 107(1) TFEU. These impact standards are the requirements that a measure must distort competition and affect trade between Member States. At present, these criteria are often conflated by the Commission and the CJEU, with very low substantive thresholds for both and a minimal burden of proof on the Commission.³⁴ While there have been some more reassuring developments in the Commission's guidance on the condition relating to the effect on inter-state trade, this thesis argues that the law would be improved by going further to separate these distinct standards and impose much higher thresholds for a measure to be classified as aid.³⁵ This would also be helped by the imposition of a more substantial burden on the Commission to motivate its finding that a measure does reach these thresholds. Should they be adopted by the CJEU, these proposals would narrow the notion of aid and would give more freedom to Member States to pursue certain policies without recourse to the Commission. It was suggested that this reform offers a method of doing so that is both workable and consistent with the objectives of State aid control, even if it would require a shift in the doctrine of the CJEU. There is also scope for further research here in circumstances where the Commission's new approach to the effect on inter-state trade remains to be fully tested by the CJEU. This may be supplemented by the Commission's evaluation of the of the De Minimis Regulation that is currently underway, and which may result in amendments that will narrow the range of measures which must be notified by Member States.³⁶

³⁴ See Sections 2.3.5, 8.3.1, 8.3.2.

³⁵ See Section 8.3.4.

³⁶ Commission, 'Call for Evidence for an Initiative (without an impact assessment): State aid – Exemptions for small amounts of aid (de minimis aid) (update)' (2022) Ref Ares(2022)4676878.

Both of these proposed reforms would entail significant changes to the interpretation of Article 107(1) TFEU that would require the CJEU to revise its jurisprudence on these points. While these changes are substantial, this thesis has sought to demonstrate that they are consistent with the objectives of the State aid control regime and could be achieved through incremental development of the case law. The impact of any such reforms would also depend to a large extent on the Commission which would also have an important role to play in applying any new test developed by the CJEU at first instance. In respect of the impact standards, the reform proposed here would also be assisted by more systematic accounts of the Commission's decisional practice to allow Member States, undertakings and their legal advisors to more accurately predict the types of measures that will fall below the relevant thresholds. If they were to be adopted, the effectiveness of these reforms will likely depend on the detail of their application by the Union courts and the Commission. It is hoped that these proposals will nevertheless provide a practicable solution to containing the notion of aid within principled, transparent and coherent limits.