Part I
Fundamentals

Tax Legislation and the Notion of Fiscal Aid: A Review of 5 Years of European Jurisprudence

Wolfgang Schön

Contents

1 Legislation, Administration, Enforcement ... 4
2 Fiscal Aid and the Market Economy Actor ... 6
3 Advantage, Selectivity and Discrimination ... 7
3.1 A Conundrum ... 7
3.2 Benchmark Test Versus Discrimination Test ... 9
4 Negative State Aid ... 14
5 Advantage, Selectivity and General Measures ... 15
6 Dimensions of Selectivity ... 17
6.1 Availability to All Economic Operators? ... 17
6.2 Availability to "Certain Enterprises" and "Certain Branches of the Economy" ... 18
6.3 Justification Under the Relevant Tax System ... 20
6.4 "De-Facto-Selectivity" and "Indirect Selectivity" ... 21
7 Conclusions ... 23
References ... 24

Abstract State aid discipline under Art. 107, 108 TFEU has established itself as a major constraint to the tax sovereignty of national legislators. By analyzing a great number of CJEU judgments delivered during the last 5 years, this article lays out both the conceptual and the political issues which arise when tax benefits are subject to control under European competition law. This affects the concepts of "advantage", "selectivity" and "discrimination" as well as special cases like "negative state aid", "indirect selectivity" or "de-facto selectivity". The author proposes to apply Art. 107 par. 1 TFEU only if a tax provision deviates beneficially from a "normal" or "benchmark" treatment and rejects the trend to interpret Art. 107 par. 1 TFEU as a general ban on discrimination. Moreover, this article pleads for a limited reading of "selectivity" which is only given when a tax advantage confers a financial benefit on certain branches of the economy or certain individualized enterprises.

W. Schön (✉)
Max Planck Institute for Tax Law and Public Finance, Munich, Germany
e-mail: wolfgang.schoen@tax.mpg.de

© Springer-Verlag Berlin Heidelberg 2016

I. Richelle et al. (eds.), *State Aid Law and Business Taxation*, MPI Studies in Tax Law and Public Finance 6, DOI 10.1007/978-3-662-53055-9_1

1 Legislation, Administration, Enforcement

It is a well-known feature of state aid control that the constraints established by Art. 107 and Art. 108 TFEU for Member States who intend to provide financial benefits to economic actors also apply in the area of taxation.[1] The main difference between fiscal aid and (most) other means of subsidization stems from the fact, that any tax as such is just the opposite of a financial benefit. It is a financial burden established under the laws of a Member State and rigorously enforced by domestic tax authorities. Nevertheless, the CJEU has from the very beginning of its jurisprudence concerning state aid discipline pronounced the view that state aid can be provided under the law of taxation as well.[2] This wide approach requires us to turn the perspective upside down: You do not ask whether a Member State has transferred public resources to a private party, you rather ask whether a Member State has decided not to prescribe or enforce the transfer of private funds to the public coffer. State aid measures in the area of taxation look just like the negatives we used to have in photography before the digital age: You immediately recognize the contours of the picture but black and white have been switched. Taking account of this change of perspective is the major task in this province of state aid law.

Taking a closer look, state aid control in the fiscal field can set in at different institutional and procedural levels.

- A fairly straightforward case comes to the fore when a tax claim exists under the law of a given state, i.e. when the tax base has been ascertained, the tax rate has been applied and the tax bill has been sent to the taxpayer. The resulting tax receivable must be enforced by the authorities in accordance with the procedures provided for under domestic law[3]; state aid rules prevent the taxman from granting a more lenient treatment, e.g. deferral of payment or even a fully-fledged waiver of the existing tax claim.[4] In this situation the generosity of the tax authorities can be scrutinized under the "private creditor test", as the extension or the non-enforcement of a tax claim shows substantial similarity to the extension or non-enforcement of any private loan granted to the beneficiary.[5]

[1] For an overview see: Schön (2012), at § 10; Quigley (2015), at Part I.3; for indirect taxation see: Englisch (2013).

[2] Case 30/59 (Gezamenlijke Steenkolenmijnen), judgment of 23 February 1961, ECR 1961, p. 1 (19).

[3] Any favorable general rules under domestic procedural law, e.g. a short limitation period for tax debt, do not qualify as selective advantages (AG Kokott, Case C-105/14 (Taricco) opinion of 30th April 2015 para 61); for a general settlement of all tax claims pending for more than 10 years in the courts see: Case C-417/10 (3 M Italia) judgment of 29 March 2012; European Commission (2016), at para 165–169.

[4] Schön (2012), at para 10-036.

[5] Case C-73/11 P (Frucona Kosice), judgment of 24th January 2013, para 71–72; for a skeptical view of this judgment see Luja (2012), p. 120 at 122 et seq.

- A bit less straightforward but still more in line with general rules on state aid is the examination of the tax authorities' behaviour at the level of the tax assessment. As a rule, tax authorities do not enjoy any leeway when they calculate the tax bill. And the mere application of binding laws as such does not amount to self-standing fiscal aid. Nevertheless there are two situations where state aid examinations may set in with regard to the handling of a tax case by the domestic authorities: the first case concerns the "misapplication" of the law by the tax authorities—here we have to decide whether any "misapplication" favouring the taxpayer can be wiped out by the European Commission under Art. 107/108 TFEU or whether only qualified cases like "intentional" misapplications or "indefensible" deviations from the correct construction of the law or the facts can be attacked.[6] The second case refers to the law granting certain discretionary powers to the tax authorities. While it is evident that some limited leeway will always exist when tax assessments are performed (e.g. to reach settlements on the factual and on the legal side in complex cases[7]) the Court is wary about such discretionary features of fiscal law which allow tax authorities to dole out benefits for reasons outside the practical necessities of the tax system.[8] The current debate on the admissibility of "rulings" for multinational enterprises circles around this fine balance between providing legal certainty and granting illegal benefits to taxpayers.[9]

But the most problematic level to apply state aid rules to is tax legislation. This is due to the well-known fact that (outside harmonized areas like VAT and some excises) there exists no general rule as to which economic events arising within a jurisdiction must be taxed. To the contrary, following democratic principles and the rule of law, unless the competent legislative bodies have decided to levy a tax on a certain economic event, there is no tax.[10] This is a generally accepted emanation of the tax sovereignty granted to all Member States under the European Treaties and this foundational principle cannot be called into question under the flag of state aid control. Non-taxation of economic behavior as such is not an issue under European law. We need additional factors to identify state aid in the area of tax legislation.

---

[6] Quigley (2015), pp. 10, 106–107; Schön (2012), at 10-014; it is evident that mere reimbursement of illegally assessed taxes does not amount to state aid (Case 61/79 (Amministrazione delle finanze dello Stato) judgment of 27th March 1980 para 29–32).

[7] European Commission (2016), at para 172–173; Quigley (2015), pp. 104–105.

[8] Case C-6/12 (P Oy) judgment of 18th July 2013, para 24–30.

[9] European Commission (2016), at para 169–174; European Commission (2015); De la Blétière (2015), pp. 51 et seq.; Leclercq and du Pasquier (2015a), pp. 60 et seq.; Rossi-Maccanico (2015), pp. 73 et seq.; Luja (2015), p. 379 at 383 et seq.; Lang (2015), p. 391 at 394 et seq.; Gunn and Luts (2015), p. 119; Lyal (2015).

[10] In "Eventech" the Court held that no state is obliged to levy fees for the use of public roads (Case C-518/13 (Eventech) judgment of 14th January 2014, para 43–44; see also AG Wahl, opinion of 24th September 2014 para 29.

2 Fiscal Aid and the Market Economy Actor

The specific character of taxation being an expression of the fundamental sovereignty of each Member State makes it impossible to simply submit tax advantages to the "market economy operator test" as applied in other cases. No private person is able to levy taxes and no private person is able to grant tax relief. But there are hybrid situations. In "Electricité de France", the French Republic had provided for a tax exemption regarding capital gains realized by a large utility company in the context of a restructuring of the commercial and tax accounts. This utility company was wholly-owned by the French state. In his opinion, Advocate General *Mazak* had drawn a clear line between the state as a shareholder and the state as a public authority.[11] In his view, the legislative tax exemption could not be re-characterized as a mere waiver of a tax claim equivalent to a capital injection by a private investor. Both the General Court[12] and the Court of Justice[13] took a different stance.[14] For them, it does not make a material difference whether an existing tax claim is waived (just like any other debt claim) or whether tax legislation prevents the tax claim to come into being in the first place. Against this background the French Republic was heard with the argument that a private investor would have contributed a similar financial benefit to the utility company.

From a legal perspective, this is a slippery line of argument as it requires a material comparison between the fiscal state and a private actor who would never be able to confer to the business a congruent advantage. This can only work by analogy and brings along intricate measurement issues—e.g. when the "cost of capital" principle has to be applied to a tax waiver[15] or when the state is obliged to "prove" having acted in its capacity as a shareholder.[16] The formal view taken by Advocate General *Mazak* seems to be more in line with the necessity to apply strict discipline against subsidies and to provide legal certainty in the area of fiscal aid.[17] In any case the "private investor test" should remain restricted to the narrow field of tax measures initiated by the State in its rare double role as shareholder and legislator.

[11]AG Mazák, Case C-124/10 P (Electricité de France), opinion of 20th October 2011, para 76 et seq.; sympathetic Jaeger (2012), pp. 1 et seq.

[12]Case T-156/04 (Electricité de France), judgment of 15th December 2009, para 221–237.

[13]Case C-124/10 P (Electricité de France), judgment of 5th June 2012, para 79, 92; Debroux (2012), pp. 6–7; Baeten and Gam (2013); Leclercq and du Pasquier (2015b), pp. 9 et seq.

[14]Cornella (2015), p. 553 at 557 et seq.

[15]Nicolaides (2013), p. 243.

[16]Soltesz (2012), p. 134 at 135.

[17]Piernas López (2015), pp. 93 et seq.

3 Advantage, Selectivity and Discrimination

3.1 A Conundrum

It is common ground that state aid in the area of fiscal legislation consists of a specific financial benefit which can be ascertained by way of comparison amongst a sample of economic operators who are potential or actual taxpayers. The functioning of the Internal Market shall not be distorted by "Member States favouring some actors to the detriment of others".[18] But this is where the consensus stops and where both terminological ambiguities and substantive differences begin. This debate circles around three overlapping concepts: the notion of "advantage", the notion of "selectivity" and the notion of "discrimination".

The historical starting point is the concept of "advantage".[19] According to the wording of Art. 107 par. 1 TFEU, state aid law is about "favours".[20] Against this background, from its early judgments, the Court of Justice has put forward that an enterprise receives state aid if it is relieved from charges "normally borne" by similar firms.[21] This strand of jurisprudence established the view that any tax exemption, tax deduction or tax deferral which creates a benefit when compared to regular treatment amounts to state aid. This approach requires the definition of a benchmark, an "average sea level" against which preferential treatment can be measured and identified. The Court put it succinctly in the recent "France Telecom" case: fiscal aid constitutes an "exception to the general law regime"[22] and the Commission in their recent guidance on the notion of state aid explicitly requires a "shortfall" in tax (and social security) revenue due to exemptions or reductions granted by the Member State.[23]

[18]European Commission (2012), at para 1.2.

[19]Case 30/59 (Gezamenlijke Steenkolenmijnen), judgment of 23 February 1961, ECR 1961, p. 19; Piernas López (2015), pp. 67 et seq.; European Commission (2016), at para 66 et seq.; Engelen and Gunn (2013), pp. 138 et seq.; Micheau (2014), pp. 189 et seq.

[20]Case C-105/14 (Taricco) judgment of 8th September 2015, para 61–62; Case C-417/10 (3 M Italia) judgment of 29 March 2012, para 37 et seq.

[21]Case C-78/08 – 80/08 (Paint Graphos) judgment of 8th September 2011, para 45; case C-279/08 P (Commission vs. Netherlands) judgment of 8th November 2011, para 61, 86; Case C-73/11 P (Frucona Kosice), judgment of 24th January 2013, para 69; Case C-5/14 (Kernkraftwerk Lippe-Ems) judgment of 4th June 2015, para 71; Case C-522/13 (Navantia) judgment of 9th October 2014, para 22; European Commission (2016), at para 68; Micheau (2014), p. 195; Quigley (2015), pp. 8, 50.

[22]Case C-81/10 P (France Telecom) judgment of 8th December 2012, para 16–18.

[23]European Commission (2016), para 51.

Over the years, both in the jurisprudence of the CJEU,[24] the Advocate Generals' pleadings[25] and in academic writing,[26] this notion of "advantage" has been conflated with another important feature of state aid discipline: the notion of "selectivity".[27] According to Art. 107 par. 1 TFEU only measures which aim at favouring "certain undertakings or the production of certain goods" qualify as unlawful state aid requiring clearance under Art. 107 par. 2 or 3 TFEU. This leads to a distinction to be made between "certain undertakings" or "certain goods" which benefit from the tax measure, and other undertakings or other goods which do not—although they are in a similar factual or legal situation. But in practice, we often find the two-pronged test of "advantage" and "selectivity" merged into the question of whether a taxpayer enjoys a "selective advantage" under the examined tax legislation.

This confusion of "advantage" and "selectivity" is clearly visible in the test applied by the Court to tax benefits since its judgment in "Adria-Wien Pipeline"[28]:

> (41) The only question to be determined is whether, under a statutory scheme, a State measure is such as to favour certain undertakings or the production of certain goods (. . .) in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question (. . .).
>
> (42) According to the case-law of the Court, a measure which, although conferring an advantage to its recipient, is justified by the nature or general scheme of the system of which it is part does not fulfil that condition of selectivity (. . .).

Indeed there exist strong similarities between the "advantage" test and the "selectivity" test. Both distinguish between one group of taxpayers enjoying a tax benefit and another group of taxpayers subject to reference treatment.[29] Both tests involve the necessity to identify a benchmark defining the foil against which forbidden state aid can be ascertained. Nevertheless, the recent "Commission Notice on the notion of State aid pursuant to Article 107 (1) TFEU" explicitly separates the two tests from each other.[30] And also the larger part of the Court's recent judgments still adheres to this analytical approach.[31]

---

[24]Case C-6/12 (P Oy) judgment of 18th July 2013, para 17–19; Case C-78/08 – 80/08 (Paint Graphos) judgment of 8th September 2011, para 49; AG Kokott, Case C-66/14 (Finanzamt Linz) opinion of 16th April 2015, para 74 et seq.; The Court did not address these issues in its final judgment as the judges found the questions raised with regard to state aid law to be inadmissible (Case C-66/14 (Finanzamt Linz) judgment of 6th October 2015, para 16 et seq.

[25]While AG Kokott supra (note 24) does not dwell on the notion of "advantage" any more, she reaches a similar dichotomy by separating from each other the notion of "selectivity" and the notion of "specificity".

[26]Micheau (2015), p. 323 at 236 et seq.; Romariz (2014), p. 39 at 40 et seq.

[27]Kühling (2013), p. 113 at 115; Tomat (2012), p. 462 at 465 et seq.; López López (2010), p. 807 at 808 et seq.; Quigley distinguishes between "economic advantage", "selective advantage" and "competitive advantage". See Quigley (2015), pp. 4 et seq.

[28]Case C-143/99 (Adria-Wien Pipeline GmbH) judgment of 8th November 2001, para 41 et seq.

[29]Nicolaides and Rusu (2012), p. 791 at 792.

[30]European Commission (2016), at section 4 (Advantage) and section 5 (Selectivity); see also López López (2010), p. 809; Quigley (2015), pp. 5–6, 99, 110–111.

[31]Case C-15/14 P (MOL) judgment of 4th June 2015, para 59; Case C-522/13 (Navantia) judgment of 9th October 2014, para 34.

In recent writing, it has been proposed to do away with benchmarking altogether and to reduce the examination of fiscal state aid to a mere “discrimination” test.[32] The core issue shall be whether two groups of taxpayers who are in a comparable factual and legal situation are treated differently without any visible justification. The sometimes aporetic quest for a reference system under national tax legislation should be abandoned and replaced by a rule-of-reason examination of existing differentials. Such a non-discrimination test would also lead to an alignment with the theory behind other tax-relevant provisions of the Treaties like the non-discrimination and non-protection clauses in Art. 110 TFEU and the way the fundamental freedoms are brought to bear in the context of taxation.[33]

3.2 Benchmark Test Versus Discrimination Test

3.2.1 British Aggregates, Sardinian Stopover Tax and Government of Gibraltar

The deeper problem informing the debate on “benchmarking” is related to the ongoing sovereignty of Member States in the tax area. Given the fact that Member States are in principle free to decide which events should be taxed and how to set the tax base and the tax rate, the relevant benchmark treatment cannot be derived autonomously from European law and it cannot be determined by reference to fiscal standards as applied in other States inside or outside the European Union. In order to protect the Member States’ prerogative in tax matters, the decisive benchmark for fiscal state aid can only be the tax legislation of the relevant country itself.[34] If and so far as a taxpayer benefits from a lowering of the tax burden in the context of domestic legislation, Art. 107 par. 1 TFEU can be applied. This approach has been criticized as both circular and subcritical. According to critics,[35] once it can be shown that different treatment of two groups of taxpayers cannot be justified in the light of the factual and legal circumstances Art. 107 par. 1 TFEU should intervene. The focus should not be on the often futile search for a real or hypothetical norm level but on the justification of the differential as such.

In the jurisprudence of the Court, the 2006 judgment in the “British Aggregates” case led the way towards this non-discrimination test as the Court simply confirmed the existence of selective state aid when the UK Government was not able to show any justification for the tax differential between a tax levied on different kinds of

[32]AG Kokott, Case C-66/14 (Finanzamt Linz) opinion of 16th April 2015, para 88; Azizi (2013), at XV; Heidenhain (2010), pp. 189 et seq.; Lang (2012), p. 411 at 418 et seq.; Cordewener (2012); Biondi (2013), p. 1719 at 1732; Lyal (2015), pp. 1032 et seq.

[33]AG Kokott, Case C-66/14 (Finanzamt Linz) opinion of 16th April 2015, para 103.

[34]European Commission (2016), at para 134; Hey (2015), p. 331 at 334 et seq.; Ismer and Piotrowski (2015), p. 559 at 561.

[35]Supra note 32.

granular materials.[36] In a similar vein, in the 2009 judgment on the Sardinian luxury tax on stopovers, the Court declared the tax differential between international and domestic air and sea traffic to run foul of Art. 107 par. 1 TFEU without caring about which one defined the "regular" treatment.[37] For many observers, the final breakthrough towards a mere discrimination test came with the "Gibraltar" judgment in 2011.[38] In the national legislation examined in this landmark case, the Government of Gibraltar had replaced its traditional corporate income tax by a corporate tax on expenditure for payroll and property occupation. The major beneficiaries of this tax reform were offshore companies whose payroll and property expenditure was typically small or non-existent. Commercially active local companies were subject to a higher tax base but they benefitted from the rule that the expenditure tax was capped at 15 % of the corporate profit—therefore they were factually treated like under the previous corporate income tax. While both the General Court in its decision[39] and the Advocate General[40] in his opinion failed to identify a reliable "benchmark" within the new tax system of Gibraltar, the Court found the tax system of Gibraltar to confer selective advantages to offshore companies.[41]

While some commentators[42] regard this judgment to herald a change of paradigm towards a mere discrimination test, the European Commission—in their recent "notice"—rightly emphasizes the exceptional nature of the case and the Court's reasoning.[43] Taking a closer view, the Court did not leave behind the concept of advantage and benchmark altogether: the judges rather took a "substance over form" view of how the benchmark should be ascertained.[44] This should not depend—to borrow from the language of the Court—on the "regulatory technique" employed by the legislator.[45] In the Gibraltar case, the fact that the business

[36]Case C-487/06 (British Aggregates) judgment of 22 December 2008, para 82–92; Honoré (2009), pp. 527 et seq.

[37]Case C-169/08 (Presidente del Consiglio) judgment of 17th November 2009 para 59 et seq.; see also AG Kokott, opinion of 2nd July 2009 para 123 et seq.; for a critical analysis see Engelen (2012).

[38]Joined Cases C-106/09 P and C-107/09 P (Government of Gibraltar) judgment of 15th November 2011.

[39]Joined Cases T-211/04 and T-215/04 (Government of Gibraltar) judgment of 18th December 2008, para 171–173.

[40]Advocate General Jääskinen, Joined Cases C-106/09 P and C-107/09 P (Government of Gibraltar), opinion of 7th April 2011, para 155 et seq.

[41]Joined Cases T-211/04 and T-215/04 (Government of Gibraltar) judgment of 18th December 2008, para 85 et seq.

[42]Lang (2011), p. 593 at 596 et seq.; Lang (2012), pp. 414 et seq.; Lyal (2015), p. 1039.

[43]European Commission (2016), para 129–130.

[44]Piernas López (2015), p. 144; Kühling (2013), pp. 118 et seq.; Nicolaides and Rusu (2012), p. 801; Rossi-Maccanico (2012), p. 443 at 446 et seq.; Rossi-Maccanico (2013), p. 39 at 50 et seq.; Dubout and Maitrot de la Motte (2012), pp. 44–54; for a critical assessment of this attempt to create a "hypothetical" benchmark, namely a mainstream corporate income tax see: Temple Lang (2012), p. 805 at 812.

[45]Joined Cases C-106/09 P and C-107/09 P (Government of Gibraltar) judgment of 15th November 2011, para 92; Quigley (2015), pp. 112–114.

expenditure tax was arbitrarily capped at 15 % of the corporate profit clearly showed that from a substantive point of view this tax was still a corporate income tax disguised as an expenditure tax. And against the baseline of a corporate income tax, offshore companies enjoyed huge advantages under this regime. The message to be derived from "Gibraltar" is clear: mere technicalities of legislative drafting and labeling are not relevant when it comes to the definition of the benchmark. But the concept of "advantage" and "normal tax treatment" has not been abandoned and it came up in a good number of other judgments later on.[46]

3.2.2 The Problem of the Missing Benchmark

Yet this reading of the Court's jurisprudence does not solve the fundamental issue whether a pure discrimination test would be superior to a benchmark test. To a large extent, the outcome would be the same anyway: all cases of unequal treatment which can be justified in the light of the inherent logic of the tax system would be in the clear: either because they comply with benchmark treatment or because they can be justified in the light of the legal and factual circumstances of the case. Moreover, it will not be possible to discuss the comparability of taxpayers and taxable events unless one has identified the underlying purpose and system of a given tax regime.[47] So what's the difference?

The test case is the "missing benchmark". Is it conceivable that domestic tax legislation is so chaotic and irregular that it is simply impossible or useless to identify any sort of benchmark? And should this lead to the non-application of Art. 107 par. 1 TFEU? I do not think this is a large problem. Basically, there are two kinds of taxes. Firstly, there are those which merely aim at raising revenue and which tap the ability to pay of taxpayers. For these—purely fiscal—taxes the benchmark is set by the ability to pay principle and the legislator's choice of a suitable indicator for this ability—like income, net wealth or consumption. Any tax rule that does not address ability to pay in this sense is deemed to deviate from the benchmark.[48] And secondly, there are taxes with a primarily regulatory goal. In this case, the achievement of this regulatory goal sets the benchmark for domestic legislation.[49]

One has to admit that there are some doubtful situations. A case currently pending before the European Courts concerns a special German tax provision on corporate loss carry-forward.[50] The German corporate income tax regime provides

---

[46]Case C-452/10 P (BNP Paribas) judgment of 21st June 2012, para 66–68; Advocate General Szupnar, Case C-5/14 (Kernkraftwerk Lippe-Ems GmbH) opinion of 3rd February 2015, para 68.

[47]Temple Lang (2012), p. 811; Bartosch (2010), p. 12.

[48]Schön (2012), para 10-022; Quigley (2015), pp. 114–115.

[49]European Commission (2016), at para 136, 138.

[50]Case C-102/12 (Germany vs. Commission); there are additional cases brought by individual claimants in the General Court.

in principle for losses to be carried forward in future fiscal years. This carry-forward has been restricted since 2008: when shareholders sell their participations mid-stream leading to a change in control, the loss carry-forward shall be reduced or fully suspended. But this exemption from the rule was meant to suffer a sub-exemption if the share sale was part of an overall restructuring deal saving the viability of the business. The European Commission declared this "exemption from the exemption" to violate Art. 107 par. 1 TFEU as only companies in distress would benefit from this rule.[51] In German academic writing, the majority view seems to be that this legislative technique simply leads back to the starting point, the benchmark of full loss carry-forward.[52] But the outlook for the Commission is good as in 2013, when the CJEU adjudicated on a similar case from Finland ("P Oy"), the Court of Justice sided with the Commission.[53]

This case seems to expose the unhelpfulness of the benchmark test. Under a discrimination test one might simply ask whether the distinction between regular corporate entities and those in distress can be justified in the light of the underlying tax system. Given the fact that this special treatment is meant to achieve non-tax goals of economic policy, it looks probable that Art. 107 par. 1 TFEU should be applied.

Taking a closer look, this is not a satisfying outcome. By definition, any discrimination test merely leads to the result that there exists an unjustified inequality which must be removed. But it is not clear what direction the adjustment shall take. Is it necessary (in the afore-mentioned German case) to extend loss carry-forward to all situations of change-of-control? Or should one abolish the helpful treatment of distressed companies? Art. 107 par. 1 TFEU does not simply address discrimination—it logically starts from a "favour", a "benefit" that can be measured and accounted for. All legal consequences for this "advantage" under Art. 107 and Art. 108 TFEU are built on this clear identification of positive "aid": *Ex ante* such aid has to be notified and it is prohibited to "put proposed measures into effect" (Art. 108 par. 3 s. 3 TFEU); *ex post* the unlawful aid has to be recovered in full.[54] In order to make these provisions operational, each state aid is awarded a "cash grant equivalent" which depends on the nature of the aid—full subsidy, soft loan, bank guarantee etc.—and which reflects the economic value of the benefit received.[55]

---

[51]European Commission, Decision of 26th January 2011, O.J. 2011, L-235/26.

[52]De Weerth (2012), pp. 414 et seq. (with further references).

[53]Case C-6/12 (P Oy) judgment of 18th July 2013, para 32; critical Lyal (2015), pp. 1034 et seq.; as to the repercussions of this judgment on the German tax provision see: Hackemann and Sydow (2013), p. 786; Ismer and Karch (2014), p. 130; in its recent judgments, the General Court applied the line taken in "P Oy" to the German provision on carry-forward of losses (Case T-620/11 (GFKL Financial Services AG), judgment of 4th February 2016, para 98 et seq.; Case T-287/11 (Heitkamp BauHolding GmbH), judgment of 4th February 2016, para 95 et seq.).

[54]For an account of the procedural rules in place see: Afonso (2013), pp. 57 et seq.

[55]Case C-81/10 P (France Telecom) judgment of 8th December 2012, para 22–27; Joined Cases C-106/09 P and C-107/09 P (Government of Gibraltar) judgment of 15th November 2011, para 47; Engelen and Gunn (2013), p. 140.

http://www.springer.com/978-3-662-53054-2

State Aid Law and Business Taxation
Richelle, I.; Schön, W.; Traversa, E. (Eds.)
2016, VIII, 282 p. 4 illus., 2 illus. in color., Hardcover
ISBN: 978-3-662-53054-2