Tax Treatment of Common Investment Vehicles in State Aid Context

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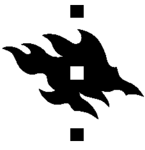

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Tiivistelmä - Referat – Abstract

Common investment vehicle (CIVs) is a widely used structure, yet relevantly little dealt topic in the case law. In a nutshell, a CIV is a legal structure used for investing. It usually consists of three separate levels, which are investors, an intermediary vehicle and an investment object. The idea is to pool the assets of private investors and invest those pooled assets to the investment object which varies. The structure creates benefits, for example it enables investing big amounts of money and thus creates new investment objectives to the private investors. Due to the intermediary level, the structure may create double taxation, which would not occur in case of direct investment. Thus, special tax measures are often needed for the elimination of multiple taxation.

The European Union's State aid regulation (among others) determines what kind of CIV tax measures can be enacted. Even though the direct taxation of Member States is not harmonized, the prohibition of State aid, imposed in the Article 107(1) of the Treaty on the Functioning of the European Union, limits internal legislative power. The State aid prohibition in the Article 107(1) TFEU consist of four separate and cumulative conditions, the most important being a selectivity condition. It is also in the CIV context, when the selectivity condition analysis usually determines the outcome.

The Court has concluded that the selectivity of a tax measure can be justified, for example on the basis of tax neutrality. Yet, it is not utterly clear, whether the purpose of achieving tax neutrality is unconditional and suffices itself. Furthermore, the Article 107(3) TFEU may justify the investments made to risk finance investments, which consequently may justify the measure applied for the investment structure.

The common investment structure is a very little dealt topic in the State aid case law of the European Union. But why so? Due to the wide use of the CIV structure it is simply impossible that any CIV measures would not have been enacted. The answer seem to lie in the relation between the State aid and fundamental freedoms regulations. Unfortunately, the relation of these two set of rules is anything but complete. Nonetheless, it seems that the fundamental freedoms often overrule the State aid regulation. However, both regulation aim to ensure free competition on the single market and thus, at least generally speaking, the desired purpose is achieved no matter which one of the rulings applied.

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Abbreviations

CIV	Common investment vehicle
CJEU	The Court of European Justice
ECR	European Court Reports
EFTA	European Free Trade Association
EU	European Union
OECD	The Organisation for Economic Co-operation and Development
RFG	Risk Finance Guidelines

1. Introduction

1.1. State Aid as Concept

The article 3(3) of the Treaty of the European Union (TEU) imposes that '[t]he Union shall establish an internal market'. Any advantage that benefits a company over others may thus distort competition, and must be prohibited. The Commission supervises that the competition is not distorted[1].

The competition may be interfered through several kind of ways. For example, beneficial tax measures may threaten the internal market. In this regard, it is talked about harmful tax competition. One of the current ways to approach the target of tackling the harmful tax competition has been intervening in the states' taxation through a State aid control. State aid supervision indeed is a useful tool to intervene in the taxation of Member states. Simply, because while the fundamental freedoms do not apply to pure internal situations, the rules on State aids do.[2]

In addition, EU law, and thus State aid law respectively, takes precedence over national law and has a direct effect.[3] Thus, despite of the fact that the direct taxation falls within the competence of the member states, State aid regulation however sets some limits in which the states may exercise their competences. It follows that State aid in the context of taxation is an area where two legal competences conflict.

The applying legal basis here is TFEU 63, imposing on the free movement of capital, whereas the paragraph 1(a) of Article 65 TFEU imposes a derogation on taxation matters, i.e. that the member states remain free 'to apply the relevant provisions of their tax law, which distinguish between taxpayers who are not in the same situation[4] with regard to their place of residence or with regard to the place where their capital is invested'.

Nevertheless, it is settled view that the competences of Member states have limitations and they must exercise the retained powers in accordance with the Community

[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
[2] Rossi-Maccanico, Pierpaolo 2013, page 1.
[3] The direct effect of European law has been enshrined by the Court of Justice in Judgment of the Court of 5 February 1963. C-26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*.
[4] About the comparability issue between resident and non-resident funds, see Tomi Viitala 'Comparability of Different CIVs under EU Law' in The Tax Treatment of CIVs and REITs. 2013. IBFD, pages 147-160.

law.[5] For example, the freedom of establishment must be obeyed. Yet, the prevailing outlook is that the 'limits apply only to the competences exercised by the Member States and thus they remain free to determine the organisation and conception of their tax system'.[6] Even so, the tax base harmonization project in progress, is already de facto limiting the possibility to determine the organisation of the tax system.

State aid is not a recently introduced concept, as the State aid control were already included in the Treaty of Rome in 1957.[7] The main rationale back then was to avoid subsidy race, which could threaten the internal market. For decades, taxation did not often show up in the State aid examinations. It was not until 1990s, when the Commission started to pay more attention to the harmful tax competition. In 1998, 'A Notice on the Application of State aid Rules to Direct Taxation' was published.[8] During the years, the emphasis of State aid control has shifted towards the governments' intervention in the economy.[9]

The current reform period started in 2012, when the Commission launched the State aid Modernisation program (i.e. SAM). The purpose of the modernisation program was to clarify the notion and explanations of State aid.[10] As will be later seen, the clarification process has not been a success story.

1.2. Common Investment Vehicles

This study concerns common investment vehicles (CIV) in the context of State aid. Generally depicted, a CIV, or as an investment 'common investment', is an alternative for a direct individual investment. What makes the investment 'common' is the pooling of investors' assets and creating an intermediary which then acts as a man-

[5] C-279/93, *Finanzamt Köln-Altstadt v Roland Schumacker*, 14 February 1995, para 21.
[6] C-446/03, Marks & Spencer. Opinion of advocate General Maduro, 7 April 2005, paras 21-22.
[7] For early cases dealing with tax State aid, see C-30/59, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community,* Judgment of the Court of 23 February 1961.
[8] Commission Notice on the application of the State aid rules to measures relating to direct business taxation 1998, C 384, 10.12.1998, page 3–9.
[9] López, Juan Jorge Piernas, 2015, page 11.; Speech of Commissioner Vestager at High Level Forum of Member States (18 December 2014).
[10] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions of the Regions of EU, State Aid Modernization (SAM). COM/2012/0209 final.

ager for the assets. From perspective of taxation, it is likely that this additional intermediary level will be taxed, and thus the structure will lead to multiple taxation.[11] Therefore, tax measures are needed for reaching the objective of tax neutrality.

What kind of tax measures are then legitimate for states to enact, depends much on the State aid law. The State aid concept ranges all kind of tax measures, and hence also the concept of CIV. As will be seen, it is far from clear how these rules allow to impose measures with a purpose of tax neutrality for example.

CIV is an internationally used concept. The investments through the CIV-structure play an important role in the global markets. The total net assets in worldwide regulated funds alone hit 49.3 trillion USD in the end of 2017 and the net assets more than doubled their level since 2008, according the Investment Company Institute.[12] Alone the numbers relating to the funds indicate the significance of the issue.

2. Scope of Study, Materials and Methods

This paper focuses on to the common investment vehicles in the State aid context, seeking to answer to what kind of CIV related indirect tax measures are prohibited from the State aid concept perspective, whether the case law of the ECJ is consistent and what is the reason for the lack of case law. Consequently, this paper asks what kinds of issues the states must consider when they design CIV-measures. These main research questions are further divided into sub-questions, which will be handled in the different sub-sections.

The author noted in the very beginning that there is a need for this study. First of all there does not seem to be research on this topic; no systematisation apart from the Commission's writings, and only a few academic articles dating back to many years. The case law on the matter is also controversial and inconsistent. The articles written seem to wonder the perpetual change of concepts and terms of use. As a consequence, no one seem to know what the actual state of law ultimately is.

[11] Vermeulen, Hein 2014, pages 3-4.
[12] Investment Company Institute (ICI), 2018 Investment Company Fact Book.

According to their website: 'ICI, following standards set by the International Investment Funds Association (IIFA), defines regulated funds as collective investment pools that are substantively regulated, open-end investment funds.'

When seeking an answer to the question of what kind of arrangements constitute prohibited State aid in the CIV context, the rulings of the ECJ are the main source of research. That simply stems from the reason that the State aid articles itself are open and general, leaving much discretion for practitioners. Thus, this paper mainly analyses the case law of the ECJ, and uses legal academic literature as a source and support, when examining whether there lies any systematic ruling practises. Therefore, State aid research in this study is mainly based on legal doctrine, with a general goal to systematize and interpret the law. This study begins with the purpose to understand the present total picture.

Every State aid case ruling requires much comparing. First, the Article 107(1) TFEU, which is the legal basis for the issue, requires internal comparing (as will be seen in the further chapters). When the Court must also weigh the situation against settled case law, the scheme is compared again. These comparative aspects or questions of comparison, which occur in different stages of State aid investigation, is also something that makes this study somewhat challenging. It is through analogy how the situations are compared, which is why the outcome can never be true and consistent in such a way as it would be in natural sciences. Hence, the author is conscious about the limits. Therefore, this study, as any other, can only outline the vague borderlines. Consequently, the main sub-research question of this paper is what the comparison group in the CIV-context is and how is this comparison process concluded. Furthermore, what kind of situations or groups actually can be compared and to what extent.

As stated above, the State aid concept ranges all kind of tax measures. Also the ones that concern the tax treaties. Sometimes, also the tax treaty articles have been interpreted as granting State aid. Nevertheless, in the context of CIVs this problem does not seem to be the main concern and thus the tax treaty issues are excluded from this study. The tax treaty aspect connects also to the cross-border situations which are also excluded from this study. It is indeed likely that the investors, the CIV and the investment(s) lie all in different countries and thus under different jurisdictions. The cross-border situations therefore bring quite a challenging aspect to the State aid examination.

The agenda of this paper begins with addressing the general guiding principles of State aid, so that they can be investigated more profoundly in the following sections.

The focus will lie on the problematic definition of selectivity. It is then in the follow-up sections, where the State aid is analysed with regard to the CIVs and where the case law is scrutinized. The cases of ECJ will demonstrate what kinds of situations have been regarded prohibited and what are the key conceptions used in the cases. Before analysing the case law, a typical structure of CIV will be described.

At this point, a few words must be said too about the special status and features of EU law. The application of EU law is often strongly teleological, as the EU law must be interpreted taking into account the goals of EU and directives.[13] The decisions of the ECJ also have a pronounced importance.

3. Commission and Court - Competences and Supervising Authority

The Commission has a special role as a State aid supervisor (The Article 108 TFEU). It supervises the existing State aid regimes and if it notices an aid which is misused or incompatible with the internal marker, it shall require that the regime is either abolished or altered. Entirely new State aid regimes must also be reported to the Commission.[14] This position is apt to provoke questions of the competences between Commission and the Court.

According to the Article 108 TFEU, the Council may on application by a Member State, decide that the aid is compatible with the internal market, in derogation from the provisions of Article 107 TFEU, requiring that the decision is justified by exceptional circumstances.

Despite of the Commission's supervising position, the first source to examine the State aid is always the case law. It is the Court, which has the power to interpret the Treaties.

In the Notice 2016, the Commission indeed stated that because State aid is a concept defined directly by the Treaty, the Commission will simply clarify the provisions, in line with the EU case-law, without prejudice to the interpretation of the Court of

[13] C-27/07, *Banque Fédérative du Crédit Mutuel v Ministre de l'Économie, des Finances et de l'Industrie,* Judgment of the Court (Fourth Chamber) of 3 April 2008 para 22. See also, C-292/94 *Denkavit*, paras 24 ja 26.
[14] Alkio, Mikko 2016. E-book, section: Verkkokirjahylly>Julkisoikeus>Valtiontuet>10 VALTIONTUKIEN ILMOITUSMENETTELY JA VALVONTA, accessed on 4 November 2018 13:56:23.

Justice of the European Union.[15] It seems that the competences of the Commission and the Court are consistent and both sharing the same view. Thus, in this paper the Commission's Notices are also used as a source, since the Notice strongly leans on the ECJ's decisions and because it is the Commission who supervises the State aids issued by the Member States.

Yet, the Commission's decision-making is not nevertheless the decisive factor when examining State aid. This has been expressly confirmed in the CIV context. The sole decisive element is whether the measure favours certain undertakings or not[16].

Commission competence however is not of the same kind in the whole State aid field. The guidelines given by virtue of Article 107(3) TFEU and the ones given on the interpretation of the Article 107(1) TFEU must be kept apart. The latter concerns an area where the Commission does not have any discretion to interpret the Treaty, but can only express its view.[17] Notwithstanding, as above mentioned, it seems that the Commission shares the view on the application of the Article 107(1) with the Court.

On the opposite, the Article 107(1) TFEU, the Commission has an exclusive competence to assess whether an aid is compatible with the internal market under the Article 107(3) TFEU. This principle stems from the case law.[18] The Article 107(3) TFEU gives to the Commission the power to accept measures designed to facilitate certain economic activities, which constitute State aid *prima facie.* The Commission has continuously used this position and issued communications, entitled as 'guidelines', 'notices' and 'frameworks'.

The guidelines concerning the Article 107(3) TFEU bind the Member States to the extent that they are consistent with the Treaty and that they do not infer to already existing aid measures.[19][20] The binding strength towards the Member States results

[15] 2016 Commission Notice, para 4.
[16] T-445/05, *Fineco*, para 145.
[17] C-83/98, *France v. Landbroke Racing Ltd and Commission,* para 25. Forrester, Emily 2018, page 20.
[18] C-431/14, *Hellenic Republic v. European Commission*, Opinion of Advocate General Sharpston delivered on 15 October 2015, paras 36–38 and the case law cited therein: C-667/13, *Banco Privado Português and Massa Insolvente do Banco Privado Português,* para 66.
[19] Bouchagiar, Antonios 2017. Footnote 16 with reference to: T-114/02 *BaByliss v Commission*.
[20] See also new case law: C-431/14, *P Greece v Commission* (ELGA), para 70.

from the fact that the guidelines bind the institution that has an exclusive competence (i.e. Commission) to assess the compatibility of the measure.[21]

4. Relevance of European Free Trade Association

European Free Trade Association (EFTA) decisions are also referred in this research for the reason that The Article 61 of the European Economic Area Agreement (EEA Agreement) contains a provision which is virtually identical to the Article 107(1) TFEU. Secondary EU State aid legislation applies to the members of EFTA equally (to the countries that have concluded the EEA Agreement). However, these countries are subject to the adaptations in Annex XV of the EEA Agreement. The Article 7 of the EEA Agreement imposes the effect of EU Directives and regulations.[22]

Moreover, the EEA State aid Rules are to be interpreted as the EU State aid rules.[23] The EFTA Surveillance Authority has also issued Guidelines, which aim to consolidate the procedural and substantive EU State aid guidelines.[24]

5. Definition of State aid: Four Cumulative Criteria

State aid definition is regulated in the Article 107 TFEU, which declares that:

> '[...] any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'

The article is read as including four cumulative criteria. First, it must be due to the state resources, secondly, it must distort or threaten to distort competition, thirdly, it must create an advantage and fourthly, it must be selective.[25]

TFEU 107(1) is applied only to undertakings. An undertaking has been consistently defined by the Court of Justice as an entity 'engaged in an economic activity, regardless of their legal status and the way in which they are financed'. Economic

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[21] Bouchagiar, Antonios 2017, page 166.
[22] Bacon, Kelyn 2017, page 126-127.
[23] Article 3 of the Surveillance and Court Agreement and Articles 6, 7 and 105-107 of EEA Agreement. See also a case: E-9/12 Iceland v EFTA Surveillance Authority (judgment of 22 July 2013)
[24] Bacon, Kelyn 2017, page 127 with reference to EFTA Surveillance Authority State Aid Guidelines.
[25] C-78/07 – C-80/08, *Paint Graphos,* para 80.

activity is a type of activity which consists of ‘offering goods or services on a market’. What then is considered as a market depends from the context, country and even, according to the 2016 Notice, ‘from time to time’. ‘Several separate legal entities’ may also be seen as constituting an entity for State aid purposes’. [26] The question of separate legal entities is important in the CIV context as well, especially on the intermediary level, where there may be a separate manager companies from the actual ‘vehicle company’.

State aid can occur in various forms. It was already in the 60s when the Court first stated in a clear way that an aid is wider concept than a subsidy, as an aid embraces not only positive benefits, but also interventions which mitigate charges.[27] The concept of State aid must be applied to an objective situation and is evaluated on the date when the Commission takes its decision.[28]

The market economy operator test, as used normally in the State aid assessment, cannot be used in tax cases, for the reason that taxes are an expression of the fundamental sovereignty of states. Private persons can neither levy taxes nor grant reliefs.[29]

Usually, the decisive criterion is the selectivity. It is often that when the selectivity criterion is fulfilled, the rest of the criteria are almost automatically fulfilled. The four criteria will be shortly examined in the sub-sections below.

5.1. State Resources and Imputability

To be an aid that is prohibited, it must be imputable to the state. There is no requirement of positive transfer and hence it is sufficient that the state will have for example a shortfall of taxes.[30] A prohibited aid may be granted indirectly and the prohibition cannot be removed by granting the aid through a private entity/entities.[31] The word

[26] 2016 Commission Notice, paras 6-13.
[27] C-30/59, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*.
[28] T-445/05, *Fineco,* para 145.
[29] Schön, Wolfgang 2016.
[30] 2016 Commission Notice, para 51.
[31] T-136/05, *EARL Salvat père & fils, Comité interprofessionnel des vins doux naturels et vins de liqueur à appellations contrôlées (CIVDN) and Comité national des interprofessions des vins à appellation d'origine (CNIV) v Commission of the European Communities*, summary point 4 and paras 130, 139, 156.

imputable includes two aspects: first the aid must be granted through state resources, but must also derive from state resources.[32]

5.2. Distortion of Competition and Effect on Trade

One must note that only the threat to distort competition is sufficient to fulfil this criterion. The small amount of aid or the fact that the aid recipient is a small company does not preclude the aid. Thus, the effect on trade can be insignificant, but still the is aid prohibited.[33] The distortion is assessed within internal market, not within a state. Sufficient for fulfilling this criterion is for example that a position of an economic operator has strengthened when compared to its competition group(s).[34]

5.3. Advantage

Even though the advantage often follows from the selectivity, it is regarded as a separate criterion. An advantage is ‘any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention’[35].

The State aid examination is not about determining the objective of the measure but about examining what is the *effect* of the measure in question. This has been the settled view since 1974.[36] Thus, it is not possible to avoid the State aid inspection by explaining that the measure is a tax measure or that it is part of a section that is outside of the competences of EU, (e.g. social- and healthcare sector).

The advantage can be temporary[37], direct or indirect. In the context of taxation, an aid can also be a condonation of tax.[38] The examination is done internally, i.e. within a state. The position of competing undertakings in *other* member states do not rule out the advantage.[39] Furthermore, it would be impossible to make a comparison

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[32] T-309/04, T-317/04, T-329/04 and T-336/04, *TV 2/Danmark A/S and Others v Commission of the European Communities,* para 157.
[33] 2016 Commission Notice, para 189.
[34] C-730/79, *Philip Morris 1980*, paras 11-12.
[35] C-39/94, *SFEI and Others*, para 60. See also: C-342/96, *Spain* v *Commission*, para 41.
[36] C-173-73, *Family allowances in the textile industry. Italian Republic v Commission of the European Communities*, paras 27-28.
[37] T-67/94, *Ladbroke Racing Ltd v Commission of the European Communities*, para 78.
[38] 2016 Commission Notice, para 170 and footnote 256 with reference to Commission Decision 2003/601/EC of 17 February 2003 on the Foreign Income aid scheme implemented by Ireland (OJ L 204, 13.8.2003, page 51), recitals 33 to 35.
[39] 2016 Commission Notice, para 72. With reference to C-173-73, *Family allowances in the textile industry. Italian Republic v Commission of the European Communities*, para 17. See also T-55/99, *Confederación Espanola de Transporte de Mercancías v Commission*, para 85.

with an ‘EU standard’, simply due to the fact that the states have the sovereignty to determine their tax system and any kind of ‘abstract notion of what a tax system should look like’ would be a breach of EU law.[40]

Advantage and selectivity examinations remind each other, but are still seemingly separate concepts. It is not always clear, under which concept of these two, a certain matter is researched. The matter of ‘conferred tests’ will be examined later on this study.

5.4. Selectivity

The measure is selective if it favours ‘certain undertakings or the production of certain goods’. However, not all favouring measures are automatically prohibited State aid and thus under the scope of TFEU 117(1). According to the Commission Notice, the measure must grant an advantage in a selective way to certain undertaking, groups of undertakings or economic sectors in order to be prohibited. The fact that the measure is general, open to all entities or that there are objectively determined requisites to receive the aid, do not mean that the aid could not be selective.[41] Neither the fact that the measure concerns a whole economic sector, does exclude the selectivity.[42] Selectivity and State aid may also occur despite of the fact that numerous undertakings are able to claim the advantage, or that they exercise different activities.[43]

The author’s view is that selectivity as a general concept has partly developed through this kind of exclusive analysing, i.e. by determining which kind of situations do not exclude the selectivity. Yet, when speaking of a certain area, for example taxation, there are own characteristic specialities which must be taken into account in the selectivity analysis. Hence, the rulings given in the taxation concept, have determined the concept of selectivity with relation to a certain a specific scheme. Here the argumentation style has been more including kind, i.e. ruling the trigger situations.

[40] Fort, Edouard 2017 page 376.; Engelen, Frank & Gunn, Anna , page 141.
[41] 2016 Commission Notice, para 117-118.
[42] C-78/08 *Paint Graphos*, para 53. T-445/05, *Fineco*, para 155.
[43] C-172/03, *Dr. Wolfgang Heiser v. Finanzlandesdirektionfür Tirol*, para. 42.

With reference to fiscal matters, it has been ruled that if the fiscal advantage is available without distinction *to all economic* operators in a jurisdiction it is not selective.[44] However, at least theoretically, one can arrange one's affairs in a manner that meet the requirements of a certain tax measure. It can be argued, that fundamentally all the tax benefits are available to all taxpayers. Despite of this theoretical possibility, the underlying understanding of competition law is such that it is needed to look the taxpayers' current economic activity.[45] Thus, the author sees that the argumentation used in *Navantia* means in practise that only very general measures can be (at least almost) automatically regarded as non-selective. Consequently, any tax measure relating to the CIV structure cannot apply to all economic operators.

Selectivity is traditionally categorised to a material and regional selectivity, as it is also in the Commission Notice. The material selectivity means that a measure in question applies only to a certain undertaking(s) or certain sectors in a member state. Material selectivity can be by nature *de jure* or *de facto* selectivity. De jure selectivity is directly due to the legal criteria[46], whereas de facto selectivity is a much more unclear concept, and is due to an overall situation, which in turn results to the selectivity. The concept of de facto selectivity will be dealt in a later chapter.

When dealing with the regional selectivity the examination begins with looking whether the measure applies to an entire territory of member state. If so, then in principle selectivity is excluded. However, neither is this utterly clear, as also stated in the Notice: '[t]he reference system does not necessarily have to be defined as the entire Member State'.[47] Material selectivity will not be dealt in any more detail in this study.

A test of selectivity has been developed to assess the selectivity. The test itself is far from unequivocal, mainly due to that the test, as well as the terms used for describing the test, have changed over last decade. Despite of many attempts to construct a coherent and systematic assessment test, it seems that it is a never-ending project.

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[44] C-522/13, *Navantia, para* 23. In addition see C-78/08 – 80/08, *Paint Graphos*, para 52.
[45] Schön, Wolfgang 2016, page 18.
[46] 2016 Commission Notice, para 120-121.
[47] C-88/03, *Portuguese Republic v Commission of the European Communities*, para 57. Further, see: C-428/06 to C-434/06, *Unión General de Trabajadores de La Rioja*, para 47. In addition, 2016 Commission Notice, para 142.

Traditionally, the 'derogation-test' was applied. This derogation test first identifies the general regime and then assesses whether a derogation exists in favour of certain undertakings. Historically, this test is based on a decision *Italian textiles* and was to a large extent adopted by the 1998 Notice.[48] The main problem in the derogation test was the determining of normal tax regime and then specifying the derogation. The problematic question often being whether the measure is an integral part of the regime rather than an exception.

Nowadays, it seems that the derogation test is not used anymore, but the so called 'comparison test' rules in the arguments of the ECJ. Although, it must be noted already at this point that the current comparison test does have an element of derogation. The comparison test and the new notion of selectivity was initially shaped in the case *Adria-Wien Pipeline*.[49] The 'comparison test' according to *Adria-Wien Pipeline* does not focus on the derogation nature but rather looks at the recipients of tax measure as follows:

> '(. . .) under a particular 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.'[50]

The wording in the *Adria-Wien Pipeline* have been under discussion in many academic writings, especially the passage '*in the light of the objective pursued by the measure in question*'. As already stated in this paper, it is namely the *effects* of measure, not the objective, which determines whether selectivity exists.

The determining by no means did not stop to Adria-Wien Pipeline. A few years later, the Court laid down the conditions for the selectivity in a more coherent manner in the landmark case *Paint Graphos*.[51] The construction was different compared to what was stated in *Adria-Wien Pipeline* a few years earlier. In *Paint Graphos* the Court stated that:

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[48] C-173-73, *Italy v. Commission*, para 33. Luts, Joris 2014, page 258, 262.; Commission Notice 1998, para 16.

[49] Ismer and Piotrowski 2015, page 559. C-143/99, *Adria-Wien Pipeline*.

[50] C-143/99, *Adria-Wien Pipeline*, para 41.

[51] C-78/08 - C-80/08*, Paint Graphos and Others*.

> 'It is therefore necessary to determine whether tax exemptions [...] are liable to favour certain undertakings or the production of certain goods by comparison with other undertakings which are in a comparable factual and legal situation, in the light of the objective pursued by the corporation tax regime, namely the taxation of company profits.'[52]

As a consequence, the three-step assessment test was laid down in *Paint Graphos*. The Court stated that in order to classify a domestic tax measure as State aid, it is at first necessary to determine 'a common or normal regime applicable in the state concerned'. It is then assessed in relation to this common system whether the measure in question derogates from the regime inasmuch as it differentiates between economic operators, who '*in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation'.* The third assessment step asks whether the measure is justified by the 'nature or scheme' of the system.[53] It should be noted, that it is not always necessary to address all these three steps. If the measure is obviously *prima facie* selective, that suffices and there is no need to assess the justification condition.[54] The *prima facie* selectivity means simply that the basic condition is fulfilled, i.e. that the measure 'favours certain undertakings or the production of certain goods which are in a comparable legal and factual situation'.[55] This three-step test is also the chore structure for this study. Despite of the special features of taxation, it is the three-step assessment test that is applied also in the fiscal matters.[56]

The difference between the cases of *Paint Graphos* and *Adria-Wien Pipeline* is the new construction in *Paint Graphos, which* means that the assessment of selectivity is made in the light of the objective pursued by the *tax* at such. Therefore, the Court no longer seems to assess selectivity in the light of favourable tax *measure*[57], as it was laid down in *Adria-Wien Pipeline*. Nevertheless, it seems that this new construction of 'the pursued objective' is up to some point ignored and underestimated in the legal literature.[58] Many scholars seem to still argue that the selectivity must

[52] C-78/08 - C-80/08, *Paint Graphos,* para 54.
[53] C-78/08 - C-80/08, *Paint Graphos* paras 49, 65.
[54] Bacon, Kelyn 2017, page 70.
[55] 2016 Commission Notice, para 137.
[56] Hofmann, Herwig & Micheau, Claire 2016, page 133.
[57] Ismer and Piotrowski 2015, page 559.
[58] Id. page 559, with reference to Quigley, Connor 2012.

be assessed under the (old) comparison test. Some scholars claim that selectivity requires that the advantage is limited to certain undertakings and thus a measure being open to all undertakings would not be regarded as selective.[59]

Hence, as said, despite the goal to achieve consensus, the test remains far from clear and would need much simplification. The wordings are too unclear and leave therefore much space for interpretation. It is obviously not a matter of indifference whether the terminology operates with 'a measure' or 'a system'. It is possible that these two wordings lead to different outcomes.

As said, the ECJ has consistently affirmed that the State aid is defined in relation to its effects, not its aims or causes, and independently of the technique used. Consequently, the tax measure should therefore be assessed in the light of its effects only, and the objectives should be disregarded. But, as noted, in the assessment of the selectivity the objective has a role in the examination. The questions thus is how to the effect-based analysis when assessing the similar group 'in the light of the objective of the tax measure'.

It must be noted that there is a division in the observation of the objective of a measure. The Court do have refuted to made the comparison in the light of the external objectives of the measure (e.g. environmental), but accepted the comparisons made in the light of the internal objectives of the measure (e.g. taxing capital gain, energy consumption, tax neutrality). Thus, it seems that the effect-based principle must be reconciled with the comparison of the objective of measure in question.[60]

The effect-based principle may possibly even overrule the three step analysis. The Commission states in its 2016 Notice that it also needed in 'certain exceptional cases' to examine (in addition to the three-step test) 'the boundaries of the system' and if the system is designed in 'a clearly biased way'.[61] However, the author thinks that this overruling would require a clear intent to use the law for an artificial purpose.

Despite that 'the derogation test' can be seen marginalized on these days, the three-step test has retained an element of derogation. After the identification of the normal

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[59] Luts, Joris 2014, page 258, 262.
[60] Micheau, Claire 2015, page 8.
[61] 2016 Commission Notice, page 129.

regime in the member state concerned[62], it is assessed whether the advantage derogates from that common regime, regarding economic operators who are in a comparable *legal and factual situation* in the light of the objective assigned to the tax system of the Member State concerned.[63] Although, this derogation is not anymore an absolute requisite and not even decisive, as in the case *World Duty Free Group SA*, it has been ruled that ‘it is not always necessary that a tax measure, in order for it to be established that it is selective, should derogate from an ordinary tax system’.[64]

Still, some scholars even see (e.g. Claire Micheau) that despite of the different terminology used when describing selectivity, it is the same test that still applies, and that EU law does not carry out two different test, but rather has described the same test in two ways.[65]

One interpretation also presented is such that the Court shifted its emphasis on derogation totally in 2001, and that the shift culminated in 2011 in *Gibraltar* ruling. In that case, the Court held that in certain circumstances there was no need for applying the three-step test by the book and to rely on a formalistic derogation as long as the measure was designed to have the effect of relieving a certain group of companies from being taxed on their corporate profits.[66]

5.5. Conferred Tests of Advantage and Selectivity

There is much confusion among the academics, whether the advantage and selectivity are two separate concepts or whether they exist side by side. Some say that it is since *Adria-Wien Pipeline,* that the confusion has been visible.[67] Be as it may, the line between these two is blur.

The author thinks that these two still exists side by side. At first, one must bear in mind, that the Article 107(1) TFEU sets four *cumulative conditions.* This view has neither been denied, and it seems that there is a consensus among the academics regarding the existence of those four criteria.

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[62] C-20/17 P, *Commission v World Duty Free Group*, para 57.
[63] C-78/08, *Paint Graphos,* paras. 48-49.
[64] C-20/15 P - C-21/15 P, para 77.
[65] Micheau, Claire 2015, page 5.
[66] Lienemeyer, Max and Tomat, Flavia 2016, page 425. E-book. Accessed 5 September 2018.
[67] Schön, Wolfgang 2016, para 41 et seq.

However, there are strong similarities when assessing the advantage and the selectivity. Both test determine the identifying of two groups, one being the benefited taxpayer and the other the reference group, i.e. the ones in the similar situation not enjoying the treatment. The starting point in both tests is also the same: it is first necessary to identify the benchmark system. [68]

Despite of these obviously strong similarities, the recent Commission Notice on the notion of State aid pursuant to the Article 107(1) TFEU explicitly separates these two tests. In the 2016 Notice they are divided in two separate sections.[69]

Yet, there has been cases in which the demarcation has been missing completely. In *Gibraltar* for example, the question whether an advantage was conferred was not answered at all. Instead, it was only examined if there was any selective advantage.[70] Unfortunately, this question has to be left here only as an interesting remark. The future may well lead to the point where these two tests are dealt as 'selective advantage'.

5.6. More Categories of Selectivity – De Facto Selectivity

The ruling in *Paint Graphos* has been subsequently confirmed, for example in the *P Oy*[71] and *Navantia*[72] cases. Nevertheless, it seems that the ECJ no longer uses concrete comparisons when assessing selectivity under the three-step test. Instead, it can be argued that more abstract selectivity suffices (*Paint Graphos,* abstract criterion).[73] This has obviously widened the scope of State aid and makes the situation even more unpredictable. The wider approach of selectivity can also be seen as a review of member states' tax systems, an intervention to internal situations and thus to the tax policy in the member states.

It is based on the settled case law that a measure is not selective alone by the fact that it is likely that some economic sectors will benefit more than others. Even so, selectivity does not require a clear and explicit distinction between industries in the wording of the tax provision.[74]

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[68] Schön, Wolfgang 2016, page 8.
[69] 2016 Commission Notice.
[70] Lang, Michael 2016, page. 29.
[71] C-6/12 *P Oy*, para 19 et seq.
[72] C-522/13, *Navantia*, paras 35, 40.
[73] Ismer and Piotrowski 2015, page 559.
[74] Schön Wolfgang 2016, page 22.

The concept of selectivity has blurred over the years, and transformed from de jure selectivity towards more de facto selectivity, i.e. case-by-case analysis. The Commission handles the concepts of 'de facto selectivity' and also 'indirect selectivity' in its 2016 Notice.[75] While de jure selectivity covers any measure under which the granting authority limits the tax measure explicitly, by the contrast de facto selectivity encompasses measures which do apply to all undertakings, but in practice are only available to a limited category of undertakings. [76] In tax matters the concept of de facto selectivity is of great importance, because tax measures are often complex and selectivity thus results in practise.

According to the Commission, de facto selectivity typically arises in a situation where a measure is generally granted, but these a priori general norms are designed in a way that in the end, because of the structure of the measure, the effects benefit only certain undertakings.[77]

But de facto selectivity analysis can be seen to have reached the whole system. In the 2016 Notice, the Commission states, referring to the effect-based principle in selectivity, that the three-step analysis cannot always be applied due to the practical effects of measure. Therefore, according the Commission '[i]t is also necessary to evaluate whether 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.'[78] Here the Commission refers to the case *Gibraltar.* In that case indeed the comparability issue stemmed from external, internationally recognized standards, not from purely internal inconsistencies. Ismer Roland has stated with reference to case *Gibraltar,* that '[t]he internal consistency requirement under the three-step de jure selectivity test would then be complemented by an additional external consistency requirement.[79]

Before proceeding to the next chapter, the case *Navantia* will be briefly analysed. This case incisively indicates what kind of argumentation and interpretation the ECJ

[75] 2016 Commission Notice, para 122, 115-116.
[76] Micheau, Claire 2015, page 2.
[77] 2016 Commission Notice, para 121. With reference to J C-106/09 P and C-107/09 P, *Commission and Spain* v *Government of Gibraltar and United Kingdom*.
[78] 2016 Commission Notice, para 129.; C-106/09 P and C-107/09 s
[79] Ismer and Piotrowski 2015, page 560.

exercises. The case also shows how the effects that result in the practical level are analysed.

The case *Navantia* concerned a naval defence company, owned totally by the Kingdom of Spain. The company carried out its activity on a shipyard, which was rented from its sole shareholder, the Spanish State. The rental price was only symbolic. Under the contract terms, *Navantia* was obliged to assume that all taxes were levied on the side of the renter. In Spain, real estate is taxable, but the tax exemptions exist when the state holds the real estate itself. In the case, the shipyard was owned by the state and thus no property tax was forwarded to the company (Navantia). The EJC took the view that the arrangement led to a selective aid, as Navantia enjoyed an exemption from property tax. It was imperative that normally private entities pay the property tax when owning land where they carry on their business.[80]

The argumentation seems bizarre, as the ‘market economy actor test’ was not implied at all to the Kingdom of Spain. The ECJ also stated that this rental contract had not been attacked in the proceedings. Hence, the ECJ left out the contract and focused on the taxes and the normal situation.[81] The argumentation is interesting because the shipyard was owned by the state. Since a state is not an enterprise, the Article 107 (1) TFEU should not have applied at all. Neither under the Spanish law there was a necessity to transfer the ownership to *Navantia*. It seems that the ECJ was of the opinion, that this arrangement was about exploiting a loophole in the tax legislation, thus aiming to reduce the tax burden, and therefore the measure was prohibited.[82]

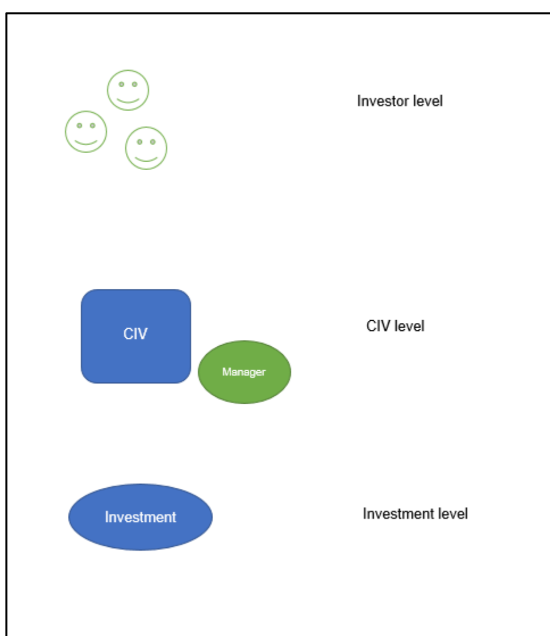
6. Definition of collective investment vehicles

In the previous sections the concept of State aid was examined in its general dimension and the main general problems have been adduced. It is now from this chapter onwards, that this study focuses on the notion of CIV and its taxation in the context of State aid.

Collective investment vehicle is a general term for a structure whose legal structure varies. A CIV may be based on a contract, a trust or it may as well be a company.[83]

[80] C-522/13, *Navantia*, para 24 et seq.
[81] C-522/13, *Navantia*, para 17.
[82] Schön, Wolfgang 2016, page 23.
[83] Oestreicher, Andreas & Hammer, Markus 2013, page 9.

An investment through an intermediary (i.e. common investment vehicle (CIV)) is an alternative for a direct individual investment. CIV-structure has benefits for the investors. First of all, it enables that the fees and risks are distributed to a larger population compared to a direct investment. By pooling the assets, the investors can also get an access to new market areas. Hence, they will gain more diversification to their investments, as some markets they would not have been able to access if they invested as private individuals.[84] All though, CIV-structure can of course be used in a minor scale.



As depicted in the picture, the typical structure for a CIV investment is composed of three main levels (or elements). The first element consists of investors, who are typically private individuals and who pool their assets to make an investment. The CIV is used as the pooling element for this purpose. The third, investment level, to which the CIV invests, may consist of any kind of investments, for instance stocks, bonds or real estate.[85] In this study no separation is made regarding the purpose of the investment.

[84] Brown, Patricia 2014, page 23.
[85] Vermeulen, Hein 2014, page 3.

Typical elements of a CIV investment are also the (fund) manager and the custodian. The manager initiates the fund and selects the investments, whereas the custodian is the one holding the legal title of the investment. Thus, there may be three main operators at the CIV level. Although, a CIV can also have a legal personality and be self-managed in such a way that there is neither a separate custodian nor the manager is a separate legal person of the CIV.[86]

CIVs are typically organized by financial service firms. The organizing firm typically serve as a manager for various CIVs which pursue different investment strategies. Typically the affiliate of the manager serves as the distributor of the shares (/other interests) and the distributor enters into arrangements with other firms that will distribute the CIV shares or units. However, the distributor may also be an unaffiliated firm. CIV shares may be distributed through many distributions channels.[87]

The manager is the provider of the services, such as portfolio management (i.e. advisory) and transfer agency (shareholder recordkeeping). The manager may also select other firms as sub-advisors. The manager (or the sub-advisor) selects the investments and makes the decisions on when the assets are bought and sold.[88]

There are normally special regimes for collective investments, due to that the normal rules would lead to double economic taxation, i.e. taxing the same income twice and taxing two different legal persons. The economic double taxation is caused by the fact that also the CIVs are regarded as entities for domestic tax purposes.[89] Thus, without the special regimes, the investors have to pay from the income they receive from CIV, as well as the CIV would have to pay corporate tax from its profits.

6.1. Definition in the Commission Guidelines – Neutrality on the Spotlight

The collective investments are also dealt in a separate section in the 2016 Commission Notice of State aid.[90]The definition in the Notice is important, especially in the

[86] Id., page 3.
[87] Patricia Brown 2014, page 24.
[88] Id., para 17. ‘Distribution of interests in the CIV is also highly regulated. Many jurisdictions require the delivery of a disclosure statement (i.e. prospectus), which may be reviewed by the regulator. Sales of interests in the CIV are effected through regulated entities that are subject to “know your customer” rules. However, there are a number of different distribution channels. Direct share purchases are effected between the ultimate investor and the CIV or its transfer agent/paying agent [...].’
[89] Vermeulen, Hein 2014, page 5.
[90] 2016 Commission Notice, section 5.4.2.

absence of new case law, although in the risk financing context the matter has been dealt.

The guideline's definition of collective investment is not limited to the meaning of collective investment according to the so called UCITS Directive[91]. The guidelines include also other kind of collective investment entities, such as Alternative Investment Funds. [92]

Despite of the said, what comes to the establishment, the Commission does refer directly to the Article 1(3) of the UCITS Directive and replicates that the common investment entity may be constituted contractually ('as common funds managed by management companies), based on trust law ('as unit trusts') or under a statute ('as investment companies').

In the 2016 Notice, the Commission takes the premise that the investment vehicles 'such as undertakings for collective investment' should be subject to tax, as they operate as intermediaries between the investors and the investment. However, the guidelines notice the problem of an additional layer between the investor and the investment. Therefore, it concludes that without any special regimes, the intermediary may be treated as a separate taxpayer, which is why the states seek to ensure that whatever the vehicle used for the investment, the final tax burden regarding the various possibilities of investments would result about to the same.[93]

Nevertheless, 'well-defined' tax measures which fulfil specific conditions and are preferential compared to the other investment vehicles that are in a comparable legal and factual situation should be viewed as selective.[94] In this regard, the Commission refers to *Fineco* judgment, which dates back to the year 2009. It is thus quite obvious that the overall CIV tax situation remains as the same than what it was at the time of the *Fineco* judgment.

An example of preferential regime is also mentioned: the situation may be for example that three quarters of the assets of the funds are required to be invested in

[91] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).
[92] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.
[93] 2016 Commission Notice, para 161.
[94] Id., para 162.

SMEs.[95] This clause in the text does not refer to any case. The commission also highlights as another example that when the favourable measure omits the EU-harmonised funds, the treatment should be viewed selective. The EU-harmonised funds are named EuVECA[96], EuSEF[97] and ELTIF[98] funds.[99]

7. Purpose of Tax Neutrality - Double Tax Elimination in Domestic Context

As the above illustrated, in the CIV context without a specific regime, double economical taxation would occur. To avoid this, there are number of various ways to remove the double taxation.

A general purpose is that any taxation should be neutral, which means that the economical operators' decisions and acts should not be affected by taxation, and thus resources will be allocated equally within a society. Once the purpose of neutrality is achieved, taxation is efficient.[100] The tax neutrality principle, as determined by the Commission, will be explicated under the chapter of 'Justification by virtue of tax neutrality'. However, the author thinks that it is consistent with the above mentioned general determination.

An integral part of the taxation of CIVs is the elimination of double taxation, in particular economic double taxation, which means that the same income is taxed twice.[101] In the CIV context it is possible that the income is taxed at all of the three levels. This of course varies between states and depends of the choices taken by the legislator.

In this study the question of international double tax elimination is not dealt at all, only the double taxation within a state. This is because of the nature of the State aid, as it must be granted through state resources of one state.

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[95] Id., para 162.

[96] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds.

[97] Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds.

[98] Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds.

[99] 2016 Commission Notice, para 162.

[100] Myrsky, Matti 2016. Vero-oikeuden oppikirja>II VEROTUKSEN YLEISIÄ KYSYMYKSIÄ >B. Verojärjestelmän hyvät ominaisuudet - mitä ne ovat? 3.10.2018 13:04:44

[101] Oestreicher, Andreas & Hammer, Markus, page 9.

What comes to the direct taxing of investments which are made through an investment vehicle, it seems that there are not much phrases in the sources of law regarding the tax neutrality in the CIV area.[102] The problem of double taxation and its advance avoidance seem to have been mainly discussed under the fundamental freedoms. Hence, one must ask whether the rules adopted under that context could be applied analogically to the CIVs in the State aid context. Although, at first must be asked that is that case law even relevant for the application of Article 107(1) TFEU, since it does not have an equivalent in the fundamental freedoms.[103] The author here sees the neutrality as a principle and the double tax elimination indeed as two, up to some point separate matters, but nevertheless thinks that the tax neutrality here is connected to (or categorized to) the double taxation.

Before examining more precisely the case law, the main techniques used for the elimination are briefly described in the following paragraphs.

The common technique used to eliminate the double taxation is that the taxation is eliminated at the level of the CIV. If only the investors remain to be taxed, then the situation is the same as it would have been if the investors invested directly to the investment, and the purpose of neutrality is achieved.[104]

First, the CIV may be exempted for corporate tax purposes. An example from this is a Luxembourgian SICAV. (In SICAV context also the question of "exempt the SA as per se as legal form" was discussed, but passed over.)[105] Secondly, an alternative is that the CIV is ignored for corporate tax purposes, i.e. characterised as transparent entity, such as a common partnership.[106] Third option is that the CIV is entitled to deduct dividend distributions from its taxable basis. Such arrangement is

[102] Vermeulen, Hein 2011, page 155.
[103] Szudoczky, Rita 2016, page 135-136. More about the issue and the lack of focus on the purpose of neutrality, see e.g: David Weisbach, The use of neutralities in international tax policy, available at http://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Working_Papers/series-14/WP1414.pdf.
[104] Vermeulen, Hein 2014, pages 3-4.
[105] Steichen, Alain 2013. Website, accessed 5 September 2018-
[106] Vermeulen, Hein 2014, page 4.

used in the United States for US regulated investment company[107] and US real estate investment trust[108]. Fourthly, the CIV can be taxed at a zero corporate tax rate.[109]

Essentially, these techniques should eliminate the double economic taxation. However, there can be a situation in which the eliminating technique is working only partially. Such a situation exists for example in Spain, as there the tax per cent is reduced, but not a zero.[110]

It is also possible that the taxation is removed at the level of the investors, so that the taxation is left to the level of CIV. For example, Swiss tax law have adopted this regime in certain circumstances.[111] The level of investors will be dealt in a later chapter.

In addition to the mid-level and CIV taxation, it is possible that the fund manager is also taxed based on the managing fee it receives.

However, despite of the techniques and their obviously relevant purpose of tax neutrality, it is not clear whether the purpose of tax neutrality alone suffices in the State aid context. This problem will be examined in the next chapter under the justification step of the State aid assessment. It is explicitly through the step of justification how the avoidance of double taxation (i.e. tax neutrality) is taken into account.

8. About justification (Third Phase of Three-Step Test)

A measure may be *prima facie* selective, but if the justification condition is met (the third step of the three-step assessment test) the aid is allowed in the light of Article 107(1) TFEU. When 'a measure derives directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system' it is justified.[112] The same has been depicted in many cases.

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[107] Id., page 6.
[108] Id., page 6.
[109] Vermeulen, Hein 2014, page 6.
[110] Vermeulen Hein 2014, page 6 with reference to 'M. Loran Meler, A. Burgos Sainz, & I. Alonso de la Puerta, Spain – *Investment Funds & Private Equity*, secs. 4.1.1.1 and 4.1.1.2.1, Topical Analyses IBFD' [online collection].
[111] Glauser, Pierre-Marie 2013, pages 8-9.
[112] 2016 Commission Notice, para 138 with reference to C-78/08 to C-80/08, *Paint Graphos and others*, para 69.

The burden of proof here lies on the shoulders of Member States. A Member State must be able to show that the measure results directly from the basic or guiding principles of its tax system.[113]

As aforementioned, The ECJ has clarified that the *objective* pursued by the measure is not sufficient to exclude the measure outright from the classification as aid. The provision 'does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects'.[114] Therefore, it seems clear, that the justification must be derived from the tax-policies taken by the legislator in that member state.[115] In this regard, also the Commission states in its recent notice, that 'it is not possible to rely on external policy objectives which are not inherent to the system.'[116]

In *Paint Graphos* the ECJ added new elements to the selectivity analysis. The Court stated that in addition it is also necessary to ensure that the measure is consistent regarding 'the manner in which the tax system is implemented'. According to the ECJ, the *prima facie* selective tax measure can be justified only if it does not go beyond what is necessary and if the measure is consistent with the principle of proportionality. The measure meets the condition of necessity if the objective pursued could not be attained by less far-reaching measures.[117] *Paint Graphos* was the first time, when the ECJ explicitly paid attention to the principle of proportionality when assessing selectivity.[118]

Selectivity is the opposite of general. Measures of purely general application which do not favour certain groups are not under the scope of TFEU 107(1).[119] But the case law has shown that despite of that, the measure which at first seems general may be regarded as selective, as the fact is that some may benefit de facto more than others from general measures.

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[113] C-78/08 and C-80/08, *Paint Graphos and others* paras 64-65.
[114] Joined Cases C-78/08 - C-80/08, Paint Graphos and others, paras. 67-68.
[115] Quigley, Connor 2015, pages 119-123.
[116] 2016 Commission Notice, para 138. See C-78/08 and C-80/08, *Paint Graphos and Others,* paras 69-70;
[117] 2016 Commission Notice, para 140 and C-78/08 and C-80/08, *Paint Graphos and Others,* paras 73, 75.
[118] Douma, Sjoerd 2014, page181.
[119] 2016 Commission Notice, para. 118.

8.1. Justification by Virtue of Tax Neutrality

EU law seem to follow a narrow application of the justification condition. Only certain justifications have been accepted in quite a limited number of cases.[120] One of the justification condition may be the principle of tax neutrality. With regard to that, the Commission refers explicitly to the common investment vehicles in its 2016 Notice.[121] In addition, the basis may be the need to avoid double taxation.[122] As aforementioned, these concepts in this study are regarded as such a way that double taxation rules out the tax neutrality.

According to the 2016 Notice of Commission, once the measure has a purpose to ensure the tax neutrality, it should not be regarded as constituting prohibited State aid. Such regimes may thus reduce or demolish the double economic taxation 'in accordance with the overall principles inherent to the tax system in question'. Nevertheless, the Commission refers to the *Fineco* –case and clarifies that the measure nevertheless should not have 'the effect of favouring certain undertakings for collective investment or certain types of investments'.[123] The case *Fineco* will be studied later on in this study.

However, as it will be provided in the following sections, it is still far from clear where the borderline lies in the justification on the basis of neutrality, as it still seems that the purpose of neutrality itself may not suffice for the justification. What blurs the situation here on top of that is the fact that the issue of taxing possibly all the three levels in CIV has often been investigated in the risk financing context. Yet, in risk financing there is an additional justification element, as the Article 107(3) TFEU may justify the measure.

At least, the definition of tax neutrality is laid down in a clear and coherent manner in the 2016 Notice. According to that, the neutrality means that the taxpayers are treated in a similar way, regardless of whether they invest directly or indirectly in the assets. In consequence, the Commission concludes that the tax scheme applied to

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[120] Micheau, Claire 2015, page 6.
[121] 2016 Commission Notice, para 139
[122] 2016 Commission Notice, footnote 215: C-78/08 and C-80/08, *Paint Graphos and others*, in which the Court referred to the possibility of relying on the nature or general scheme of the national tax system as a justification for the fact that cooperative societies which distribute all their profits to their members are not taxed themselves as cooperatives, provided that tax is levied on the individual members (paragraph 71).
[123] T-445/05, *Fineco*, para 78 onwards.

the entities that are acting as common investment vehicles and *fiscal transparent*, could be justified by the tax measures inherent to the tax scheme, 'provided that the prevention of double economic taxation constitutes a principle inherent to the tax system in question'. [124] The author wants to point out the term used, 'fiscal transparent', as it is possible, and even likely, that this term itself may be understood and interpreted in various ways.

Yet, the Commission clears up, that the tax neutrality nonetheless does not mean that 'the investment vehicles should be entirely exempted from any taxes'. Either it does not mean that the fund managers should be exempted from the tax regarding the fee that they charge from the managing of the funds.[125] The neutrality principle also applies only to the fund capital, neither to the management companies' own capital nor revenues. With this regard, the Commission refers to the logic of the Decision of the EFTA Surveillance Authority of 18 March 2009 with regard to the taxation of investment undertakings in Lichtenstein. That case will be examined more closely in the next chapter.

The Commission also refers to the Finnish REIT Case[126] and concludes that neither does the principle of neutrality justify the more favourable treatment of common investments compared to the individual investments.[127]

8.1.1. The EFTA Decision of 18 March 2009

The Commission referred to the logic of neutrality expressed in this case in its 2016 Notice.[128] According to the Commission, '[t]he logic of neutrality behind the special taxation of investment undertakings applies to the *fund capital*, but not to the management companies' own revenues and capital.'[129] The reasoning sounds logical, as there is a fundamental difference between these two. The fund capital is a resource from the investors and is to be invested to the investment object. The fund capital is thus just a temporary part of the transferring intermediary's total capital.

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[124] 2016 Commission Notice, para 162.
[125] 2016 Commission Notice, para 163.
[126] Commission Decision of 12 May 2010, N 131/2009, Finland, Residential Real Estate Investment Trust (REIT) scheme, recital 33.
[127] 2016 Commission Notice 2016, para 163.
[128] 2016 Commission Notice 2016, Footnote 246.
[129] 2016 Commission Notice 2016, footnote 245: 'See State aid Decision of the EFTA Surveillance Authority of 18 March 2009 […].'

Before examining the neutrality logic, the case will be briefly summed up. The case examined a situation in Liechtenstein where the *investment companies* did neither pay any income nor coupon tax, but only reduced capital tax on their own assets.[130]

The Court compared the investment to 'the other undertakings, in particular towards the fund direction of investment funds who were subject to ordinary taxation on revenues from their business activities'.[131] The wording expressed in such a way indicates that the comparable group nevertheless was not strictly limited only to the investment funds.

Supposedly, the Authorities did not keep relevant the point which Liechtenstein authorities pointed out, that undertakings are *free to choose their form*. The EFTA Court referred to the already settled principle in EU case law, that a measure 'cannot be attributed a general character just because it could be used by any interested undertaking […]'.[132] Here thus a reference to EU case law was made.[133]

The advantage was concluded to be selective and the form how the investment undertakings were organized was the decisive factor. The EFTA Court stated that:

> 'Investment companies are legal entities incorporated under Liechtenstein law in the form of companies limited by shares which gain revenues from the management of placements by investors and dispose of capital'.[134]

The neutrality logic then was expressed in the following way (referred in its totality):

> 'The tax relief for the management's own assets falls neither within the logic of the general tax system in Liechtenstein, nor within the logic of the taxation of investment undertakings as such. The Liechtenstein taxation rules and taxation practice shows that the logic behind the special taxation of investment undertakings applies to the fund capital, but not to the management companies' own assets. Indeed, the fund

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[130] The EFTA Decision of 18 March 2009, page 9.
[131] The EFTA Decision of 18 March 2009, page 10
[132] The EFTA Decision of 18 March 2009, page 11.
[133] The EFTA Decision of 18 March 2009, Footnote 35: 'The Court of First Instance has e.g. recognized that a fiscal measure does not lose its character as a being selective just because it is based on objective criteria, see judgment T-148/99, *Diputación Foral de Álava e.a.* v *Commission*.
[134] The EFTA Decision of 18 March 2009, page 11.

direction of the investment funds has always been subject to ordinary business taxation for its own revenues and own capital.'

According to the conclusion of the Authority, there was 'nothing in the organizational form of investment companies' which could be regarded as justification for the beneficial treatment, when compared to the management activities of an investment fund. Both must also keep separated the assets of the investors from their own assets.[135] Therefore, here apparently lies the link to the Commission 2016 Notice (footnote 245). By virtue of tax neutrality is not possible to justify such beneficial treatment of companies.

No clear argumentation of the neutrality issue in particular was nevertheless expressed and any word referring literally to neutrality was not used. The issue was discussed in general terms 'logic of general tax system' and 'logic of the taxation of investment undertakings'. However, either the Commission did not refer directly to a certain page or paragraph, only to the case in general. Additionally, the author did not face any legal writings referring expressly to the case and its neutrality logic. As aforementioned, neither are much academics writings written on the justification by virtue of tax neutrality.

9. Risk Finance Guidelines[136] and CIV – Another Justifying Element

The CIV may be constructed in a context where the tax measure has a specific purpose of incentive. Especially lately, the case law in the CIV context seem to have been mainly investigated under the risk finance tax measures. The many cases that are referred in this study exemplify that. The author thinks that it is due to the fundamental structure or nature of risk financing, which is often organized it often involves an intermediary vehicle. It is not common that the private investors themselves would invest directly to such an uncertain investment.

Thus, also the risk finance guidelines deal with the scope of this study. The reason why the cases regarding the risk finance concept are now dealt up to a certain point within this study is that the risk finance context often deals with the same kind of basic dilemma: there is a risk of State aid arising at the three different levels (the

[135] Id.
[136] Guidelines on State aid to promote risk finance investments 2014/C 19/04.

investors, the intermediary vehicle and the investment) [137]. However, due to that the private investors themselves cannot be regarded as the recipients of State aid, this 'occurring at three levels' is actually a bit misleading.

The Commission issued 'Guidelines on State aid to promote risk finance investments' (RFGs) in 2014. It was regarded that the small- and mid-cap companies are facing difficulties to access financing, and it was thought that the public measures might evolve the overall situation in the markets.[138]

The legal basis, is in the Article 107(3) TFEU, which gives to the Commission the power to accept measures designed to facilitate certain economic activities, which *prima facie* constitute State aid.[139] Therefore, when the tax measure concerns risk financing, there is an additional judicial basis that may justify the measure. Hence, the situation is different compared to the so called 'normal CIV-structure, by which the author means that there is not any specific economical purpose in the designing, but where the purpose of the measure, as stated in this study, is the tax neutrality itself. Thus, the difference here ensues from the last level of the CIV-structure, (i.e. the investment level).

Notwithstanding, the author sees the structure of CIV fundamentally in such a way, that despite of the context, and hence also in the risk financing, the CIV structure always requires that the tax neutrality is obtained. Here the neutrality is threated especially if the same income is taxed twice. No matter what the actual object of investment. Otherwise, the measure is not efficient. It is just here, that there is this additional element: the purpose of facilitating financing, which may *by itself* justify the beneficial treatment on the basis of the Article 107(3) TFEU. The author has not confronted to such an argumentation that there could be a situation where there was more than one justification condition which was weighed or that they should be weighed against another. Therefore, it seems that the Article 107(3) weighs more than the argumentation under the Article 107(1).

Because of this difference in the investment object, the argumentation used in the case law which examines CIV, but in the context of risk financing, can be applied to

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[137] Risk Finance Guidelines 2014, paras 31-45.
[138] Risk Finance Guidelines 2014, para 3.
[139]The Article states that:' [T]he Commission '*may consider compatible with the internal market State aid designed to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.*

the so called general CIV structure only up to a certain degree. Yet, here lies again one of the Achilles heel regarding the area of this study. When studying the common investment structure one must bear in mind that this structure itself (when talking in general and from a simplified view) is used in a many different kind of contexts, especially when talking from the viewpoint of the investment.

The Commission points out that it applies the principles set out in the Risk Finance Guidelines *'only in the risk finance schemes'.*[140] Consequently, principles set out in that context apply certainly only in the CIV context and when the investment fulfils the condition of risk financing. Even so, it is hard to believe that in a similar context, but where a risk financing is not the investment objective of measure, the view would be radically different. Further, the recent case law deals only with risk financing issues. For this reason, the arguments may be used at least for analogical interpretation.

What comes to the substantial aspects dealt in the RFGs, especially the question of only 'a mere vehicle' is dealt. According to the RFGs, in general the Commission considers 'a financial intermediary only as a vehicle for the transfer of aid to investors in which the investment is made, rather than a beneficiary of aid'. Nevertheless, when the aid 'measure involves a direct transfer to the intermediary or when the measure requires a co-investment, it may constitute State aid, if the same would not be accepted to a normal economic operator'.[141] The same has been also expressed in the 2016 Notice, although with a bit different wording. In the 2016 Notice it was stated that '[i]n case' the intermediary is 'a mere vehicle', '[...] it should not normally be considered as a recipient of State aid.'[142] Here it is noticeable that the Commission does not refer to any case law.

The purpose of facilitating access to financing itself does not automatically lead to a justification. The RFGs provide that 'certain categories of schemes may be subject to an evaluation, in order to further ensure that distortions of competition and trade are limited'.[143]

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[140] Risk Finance Guidelines 2014, para 19.
[141] Risk Finances Guidelines 2014, paras 37-38. See also, SA.37370 (2014/N) – *Poland JEREMIE Holding Fund*.
[142] 2016 Commission Notice, para 115, footnote 179 [without any reference to case law].
[143] Risk Finance Guidelines 2014, Section 4, paras 170-171.

The Commission points out that if the State aid occurs at all the first two levels (investor and the intermediary) the target company will receive at least partial State aid. Despite of the possible pure economical reason behind.[144] Thus, at least in the Risk Financing context it seems quite obvious that because the indirect beneficiary concept it will automatically follow that the target company is also a beneficiary. The concept of indirect advantage and selectivity will be dealt in detail in the later chapters.

10. Case Law (and Lack of It) in CIV Context

10.1. *Fineco* - Indirect Advantage

This case is one of the most important rulings of the Court when determining what constitutes State aid in the CIV context. Mainly so, because of the small amount of case law in the field. Interestingly, there are neither much references to this case in the legal literature.

In *Fineco* the measure constituted illegal State aid and was therefore recovered. The measure in question was a tax scheme implemented by Italy for specialised investment vehicles. *Fineco Asset Management SpA* was the asset management undertaking, which managed two funds specialized in small- and mid-caps. Its legal structure was a company limited by shares.

The measure in question amended the tax treatment of certain undertakings for collective investment in transferable securities, which were specialised in shares in small- and medium-capitalisation companies listed on a regulated market of the European Union. According to the measure, the capital revenue accruing to the specialised investment vehicles (after certain conditions were fulfilled[145]) were subject to the corporation tax of 5 %, instead of the standard corporate tax of 12.5 %. The reduced normal rate of 5 % substitute tax was also applied to the capital revenue accruing to Italian non-specialised investment vehicles that invest in Italian special-

[144] Risk Finance Guidelines 2014, para 44.

[145] T-445/05, *Fineco,* para 6. It was according the measure that '[a]ll Italian investment vehicles and the foreign undertakings for collective investment in transferable securities can benefit from the reduced rate of 5%, provided that they are specialised in investing in stocks of small- and medium-capitalisation companies listed on a regulated European stock exchange ('small- and mid-caps').'

ised investment vehicles, for the part that their income derives from Italian specialised investment vehicles.[146] Similar mechanism applied to pension funds which invested to special investment funds.[147]

The question of *locus standi* was not certain. *Fineco Asset Management SpA* managed two of the three common funds specialised in small- and mid-caps which have benefited from the tax measure.[148] The Court argued that '[…] because the State aid decision is addressed to the state concerned it is needed to be examined whether the measure has of direct and individual concern. Alone that the applicant belongs to the sector to which the measure is addressed may not suffice. However, the Court stated that *Fineco Asset Management SpA* was the actual beneficiary of the aid, the recovery ordered, and therefore the decision of individual concern to it. It was also stated, that the decision was of direct concern.[149]

The selectivity then was assessed in relation to the CIVs or (and to the managing companies) and in relation to the small- and mid-caps whose shares were held by CIVs.[150] What was interesting in this decision was how the measure was categorised as State aid in relation to its *indirect beneficiaries*, who according to the Commission and the Court were specialised investment vehicles, their managing companies and small- and mid-caps. It is notable that the Commission did not find in its argument that the investors were the direct beneficiaries of the measure, while the Court thought that it was 'apparent'. The Court went on and stated that the Commission nevertheless did not 'err in law' although it assessed the measure in relation to its indirect beneficiaries[151]. Despite this difference, the private investors could not have been regarded as recipients of aid within the meaning of Article 107(1) TFEU.

It was after this argument when the Court noted that it must be looked into whether the indirect beneficiaries are '*undertakings'*. The attention was paid on the two-sided fact that the investment vehicles themselves may be companies and thus can benefit themselves from the advantage. On the opposite, the investment vehicles may lack the legal personality, but are nonetheless managed by (other) companies.[152] It

[146] Id., para 50, 25.
[147] Id., para 5
[148] T-445/05, para 25.
[149] Id., paras. 42- 46, 51.
[150] Id. paras 50, 25.
[151] Id. paras 130-132. (See also paras 127-128.)
[152] Id.134-135

was consequently laid down by the Court, that despite of the specialised investment vehicles being 'mere pools of assets lacking the legal personality […] the undertakings which manage them' are the ones that benefit, although indirectly. Consequently, it was concluded that the measure in questions favoured the undertakings.[153]

The Court also noted that the selectivity criteria regarding the vehicles that lack the legal personality is nevertheless met when their 'status as undertakings is not disputed', and refers to the Adria-Wien Pipeline case law.[154] What the Court actually meant by that is not fully clear. The author sees that this comment indicated some kind of continuity, i.e. a comparison to the already existing and settled case law at that moment, and that according to the Court, the argumentation in *Fineco* was not much different from that.

In this Italian case, the measure in question was described as *State aid scheme*, why the Court stated that it was thus not necessary to examine each particular case, but it was sufficient that the measure benefits certain undertakings. State aid was not excluded '[…] by the fact that it may also benefit entities which are not undertakings'. It is thus adequate for the Commission to show that in certain cases the investment vehicles are undertakings and 'the Commission could legitimately confine itself to examining the general characteristics of the measure'.[155] Any different argumentation would have been impossible in this regard, as it is necessary for the functioning of the TFEU 107(1) to work in a situation where both undertakings and mere pool of assets without legal personality at the same time may benefit from the measure. It would also be impossible to show that each case under a particular scheme is against the Article TFEU 107(1).

Selective advantage in favour of the specialised investment vehicles or of the undertakings which manage them exists, according to the Court, even if the measures are not subsidies 'in the strict sense', but if they 'mitigate the charges which are normally born in the budget of an undertaking', if the measure has the same effect and are similar in character as subsidies.[156] This finding was not a new argument.

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[153] Id., 135.
[154] Id., 154, see para 148.
[155] Id.,136.
[156] I.d. 138 with reference to C-75/97 *Belgium* v *Commission*.

What was indeed regarded as constituting the indirect advantage to the intermediary vehicle, was that the tax reduction ‘prompts investors to buy shares in such vehicles, thereby providing additional liquidity and extra income in terms of management and entry fees’. Thus, the investment vehicle received an advantage; increased demand of their shares.[157] The measure at issue were described as ‘selective also in respect of managing undertakings of specialised investment vehicles, when they lack the legal personality.’ The managing companies were regarded as being the indirect beneficiaries in such a situation.[158]

The selectivity was assessed also in relation to the small- and mid-caps whose shares were held by the investment vehicles. The Court concluded that the measure concluded an indirect advantage for those companies, as the measure increased the demand of their shares.[159]

Also, a situation where an already received advantage may be cancelled out was dealt. The Court noted that this fact does not solely mean that the advantage could not be regarded as selective. What is sufficient for fulfilling the condition of favouring, is that the measure increases the demand of shares, ‘hence the management and entry fees charged by those vehicles or by the undertakings managing them’.[160]

The measure in *Fineco* was selective because the measure was regarded as limited to the specialised investment vehicles and their managing undertakings ‘to the detriment of other undertakings offering alternative forms’. The fact that all investment vehicles which fulfil the laid conditions can benefit from the measure has no effect to selectivity.[161]

The comparable group was determined vastly, as ‘the undertakings offering alternative forms’ is quite the most open phrase which can be used as a standard of comparison. Here the word used was ‘undertaking’, which raises another general question, one which has already been expressed in the academic literature. Is the comparison in CIV context in general and in practise required to be made to other investment funds or to the other companies?[162]

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[157] Id. 139-153
[158] id. 156, 86
[159] Id. para 165
[160] Id. 143-144
[161] Id. para 150, 152.
[162] Douma, Sjoerd 2015, pages 169-173, 179.

It was concluded that 'no arguments have been presented by the plaintiff', that the situation of collective investments in small- and mid-caps could not be compared to the investments in other companies or even that of individual investments'. The comparison between small- and mid-caps and the large-capitalisation companies was not considered to be precluded solely by the fact that large-capitalisation companies' capitalization is 'considerable' and, as the sole fact that they are already heavily present on the markets.[163] Thus, also the standard of comparison with regard to the small-and mid-caps was vast, but more fixed than it was on the investment vehicle. Here, it was coherent that the comparable factor was a group of companies.

The Court also repeated its previous ruling, that a measure that allows an undertaking to increase their own resources on more favourable terms may itself constitute State aid. A mere increase in liquidity can therefore constitute a prohibited advantage.[164]

The measure's objective (diversifying the portfolios of investors) was neither a sufficient justifying factor. The Court confirmed the already settled case law that 'the objective pursed by the measure cannot enable it to escape being' State aid. The Court based its argument on efficiency, and that if such an objective would be regarded as justifying, the Article 107(1) (ex. 87(1) EC) would lose its effect.[165] The author agrees with this argumentation, because if the objective of measure could justify it, this could lead to a justified situation in almost every case.

However, another question remained, as how such a factors as 'increase' can and should be assessed coherently (being it economic benefit or more precisely the increase in demand)? In the argumentation of the Court, this question did not receive much attention. It was mainly passed extensively, with some phrases consisting of elements such as 'increased demand for their shares' and 'increased liquidity owing to the enhanced attractiveness of the investment'[166]. The Commission stated in its initiation decision that 'by increasing their after-tax income, it favoured demand on the part of investors for shares in those vehicles'.[167] Therefore, it seems that it may

[163] Id., para 168.
[164] Id., para 163.
[165] T-445/05, *Fineco*, para 170.
[166] Id., para 159.
[167] Id., para 86.

even be sufficient that the demand is only theoretically foreseeable, i.e. that the increase can be clearly assumed.

10.1.1. Fineco Conclusions

Fineco acknowledged that even though the advantage is granted directly to certain natural or legal persons who are not undertakings, the State aid may be constituted on the indirect recipient of the State aid who then is an undertaking. In *Fineco,* the increase in demand was one of the decisive factors.

In *Fineco* the question of risk financing was not on the spotlight, which is due to the objective of the measure, as it was to diversify the portfolios of investors. *Assogestioni* indeed challenged the Commission by that 'the measure at issue aims to foster the capitalisation […]'[168]. Another kind of argumentation by *Assogestioni* may have led to another kind of result.

The plaintiff side did not either refer to the justification by virtue of tax neutrality, which is why the Court was not able to express any arguments on that basis. The question nevertheless arises what if the parties would have appealed that the purpose of the measure was to ensure tax neutrality, would the measure have been justified then on the basis of Article 107(1) TFEU? Assumingly, in this current context, tax neutrality would not have overruled the selectivity. In the end, the justification analysis is counterweighing against the selectivity analysis, and thus a kind of value weighing.

10.2. Commission Decision 2010 on the Residential Real Estate Investment Trust (REIT) Tax Scheme in Finland

The following is a REIT tax scheme case. In the legal literature there is often made a dichotomy between the CIVs and the REITs, and the concepts are dealt separately. However, in general, the fundamental difference is not that remarkable that it would require that the REIT scheme should be excluded from this study.

The general structure of REIT can be described in general terms similarly as CIV's. (The author refers to the CIV determination in this study). The essential difference

[168] T-445/05, *Fineco*, paras 123,164

between CIV and REIT is at investment objective. REITs are also common or pooled investments, investing in the real estate property.[169]

The following case is a Finnish one, in which the Commission accepted the tax exemptions for the Finnish Real estate investment trusts. The measure here tackled the double taxation at the intermediary level.

The measure concerned was 'Act on the Tax Exemption of Certain Limited Companies engaged in rental housing markets' which authorized the creation of Real Estate Investment trusts (REITs). REIT under this act had a form of Limited Liability Company and is exempted from corporate tax after certain requisites are fulfilled.[170]

The objective of the measure was to 'encourage investment in the rental housing market in Finland so as to increase the supply of affordable rental accommodation'. It was stated, that in certain areas in Finland the demand for smaller 'rental dwellings' significantly exceeds the supply of affordable accommodations. To achieve the objective, the elimination of double taxation in the REIT structure, at the level of the trust, was considered to be the most important obstacle to tackle.[171] Although the decision text does not refer to the tax neutrality directly, it is obvious that the actual purpose of the measure was indeed the tax neutrality (i.e. remove tackle the economic double taxation). The decision text for its part indicates this clearly.

According to the decision text and the chapter '1. Description of the measure', '[a] key characteristic of REIT is that it is exempted from corporate income taxation and the requirement of immediate distribution of profits to the shareholders'. In addition, the 'principle behind' was that the investment is comparable to a direct investment, i.e. 'investors can invest in a portfolio […] as if they owned them directly'.[172] Here again, the words used for describing the measure prove that the tax neutrality objective is strongly part of the argumentation. The author points out, that compared to the other cases, the principle of neutrality, is not often this clearly referred (here: 'principle behind'.)

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[169] Hermeulen, Vein 2014, page 3 onwards.
[170] Commission Decision, 12 May 2010, N131/2009 – Finland, Residental Real Estate Investment Trust (REIT Scheme).
[171] Id., paras 4-5
[172] Id., para 10.

The requisites was laid down quite in detail. First, only public limited companies registered as a REIT could benefit from the measure and the operational area was limited to cover only 'rental property activities'. In addition, The REIT is required to distribute as dividends at least 90 % of its profits to shareholders, although a certain amount was allowed to retain as a means to be investment later in new rentals. (Last condition changed due to the Commission requirement). REIT either 'cannot carry out construction business, but may act as a developer for its own behalf'. In addition, the measure included rules of the minimum share of rental income, asset structure, the minimum period of ownership and maximum shareholding requisites.[173][174] Here the minute requirement specification must have played a role in the Commission decision, facilitating the determination of the State aid recipients, and consequently the comparison group.

The Commission compared the situation to a situation where a transparent entity (such as Finnish limited partnership) or individual investors invest directly to a real estate. The Commission argued that in this context, there exists a reasonable demand to set the REIT to a similar position.[175] In this situation, only the investor level and the distributed profit are always taxed. Once again in an argumentation, which is clearly tax neutrality reasoning. One is left wondering, why it is so that more specific determination, of neutrality seem to be avoided in this case also. Although, it is so, that the argumentation rules, not a single term. Yet, clear argumentation requires determinations.

The measure was justified according to the last phase of the three-step test, i.e. based on the 'nature or general scheme of the Finnish tax system.'[176] The author sees the logic of this case in such a way, that the neutrality logic did indeed have a role in the justification, although not clearly referred or determined. In the written argumentation however, the purpose of the measure indeed related to the objective, which was to increase the amount of rental dwellings in Finland.

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[173] Id., para 11.
[174] Id., para 33: 'However, Finland finally had to change the point which concerned the "reservation of 30 % of the accounting period profit. This reserve was not regarded as being according to the Finnish taxation system.'
[175] Id., para 36.
[176] Id., para 37.

It seems that the scope of REIT was so clearly limited, i.e. investments only to rental housing and land lording of rental housing, *de minimis* assets, were determined, that it resulted to a situation where no comparison could not be made. The Commission thus determined the comparison group to be '*other* public limited companies' meaning that it did not find any selective difference in the treatment. Further, it specified that '[i]n particular, public limited companies not being tax transparent are in a legal and factual situation that is not comparable to that of a REIT.[177] Thus, the Commission expressed that such limited liability companies which are not taxably transparent, cannot be compared to REITs.

10.3. The Walloon CIW-Regime[178] - Reduction in Personal Income Tax

When the situation remains that there are not new case law after *Fineco,* focusing on the subject of this research area, in order to answer thoroughly to the question of 'what constitutes the border between prohibited and accepted', an enquire must be done to the case law where it at first glance seems that it is a State aid case, but nevertheless the case has not been examined as a State aid case.

A tax measure of this kind was the Belgian Walloon CIW-regime, which concerned a tax reduction at the level of private individuals. In 2009 a Walloon region legislator implemented a tax reduction for individuals buying shares or bonds in a specific public investment fund, the '*Caisse d'Investissement de Wallonie.'*[179] The measure had a purpose to increase investments in SMEs not noted on the stock exchange. Consequently, the CIW was only allowed to invest in such enterprises.[180] The reduction was conditional, one requirement being that the individual investing to the CIW is a resident of the Walloon region.[181]

The Commission started investigations and it did focus on the questions of State aid at first, but nevertheless made a conclusion that the CIW-regime is discriminatory

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[177] Id. paras 38-39. In addition *de minimis* assets consisting of housing were determined.
[178] European Commission Press Release IP/12/281, 22 Mar. 2012. Furthermore, see Pakarinen, Laura 2013, section 1.3.1.1.
[179] 8 Décret du 3 avril 2009 portant création de la Caisse d'Investissement de Wallonie et instituant une réduction de l'impôt des personnes physiques en cas de souscription d'actions ou d'obligations de la Caisse (1), Moniteur Belge 4 mai 2009.
[180] Article 2 para. 3 Décret du 3 avril 2009 portant création de la Caisse d'Investissement de Wallonie et instituant une réduction de l'impôt des personnes physiques en cas de souscription d'actions ou d'obligations de la Caisse (1), Moniteur Belge 4 mai 2009
[181] Article 3 Décret du 3 avril 2009 portant création de la Caisse d'Investissement de Wallonie et instituant une réduction de l'impôt des personnes physiques en cas de souscription d'actions ou d'obligations de la Caisse (1), Moniteur Belge 4 mai 2009.

and infringes the free movement of workers (Article 45 TFEU). This was due to that the reduction was only available to the residents of Walloon region. The residency was applied strictly, as not even the individuals that earned a part or all of their income from the region were allowed to the reduction.[182]

The Commission thus formally requested Belgium to amend the law at issue.[183] The Walloon legislator nonetheless did not take any actions regarding the requirement. So, the Commission referred the case to the Court of Justice.[184] However, Belgium eventually did change the legislation in question, and the case was closed before the procedure.[185]

The Commission did neither consider this case as an infringement to the free movement of capital. Even though, it is apparent that (also here) the capital investments should qualify as capital in the sense of the TFEU 63. In the academic writings, it was noted that this might have been due to the fact that the infringement of free movement of capital was less obvious in the case, taking into account the fact that the regime was implemented by the regional sub-authority, not by the federal authorities.[186]

In addition, neither was the CIW-reduction regarded as State aid. The Commission stated, that in order the measure to constitute State aid, the regimes need to provide for a tax benefit to undertakings.[187]

It thus seems, that the Commission did totally ignore the concept of indirect beneficiaries. The Commission seem to have considered the measure only in relation to its direct beneficiaries, i.e. private individuals. Thus, totally overriding the already concluded concept, and the ECJ's case law dealing with different levels of recipients/beneficiaries. From the author's point of view, it is clear that the CIW qualifies as an undertaking.

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[182] Staes, Melanie 2014, footnote 61.
[183] European Commission Press Release IP/12/281, 22 March 2012.
[184] European Commission Press Release IP/13/136, 21 February 2013.
[185] C-130/14, *Commission v Belgium*.
[186] Staes, Melanie, page112 with reference to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Art. 67 of the Treaty, OJ L 178, 8 Jul 1988, Annex I, (I) & (VIII); C-35/98 *Verkooijen*, paras 26-27.
[187] 8 Décret du 3 avril 2009 portant création de la Caisse d'Investissement de Wallonie et instituant une réduction de l'impôt des personnes physiques en cas de souscription d'actions ou d'obligations de la Caisse (1), Moniteur Belge 4 mai 2009.

In the academic literature, it has also been seen that the CIW-regime did indeed infringe also State aid law.[188] Consequently, this kind of legal interpretation awakes a question whether the combined application of fundamental freedoms and State aid is a possible approach, or whether either one of these two overrules.

11. Investors and Subsequent Levels – Question of Indirectness

11.1. The Level of Investors

When tax concessions are granted to private individuals to encourage them to invest in certain companies or certain specific investment funds, it is unlikely that such schemes would be concerned as prohibited. Above all, to be prohibited according to the Article 107(1) TFEU, the individuals should qualify as 'undertakings'.

To be concerned as undertakings, the private individuals would need to be 'engaged in an economic activity' which according to the settled case law means that the activity consists of 'offering goods and services on a market'.[189] In case of private individuals, this requisite seems such would fulfil only in exceptional situation. However, there is still a possibility, as the undertaking status is not tied up to a legal status.[190]

In an Italian case *Incentivi fiscali all'investimento,* a measure concerned individuals in such a way, that the investors liable for personal income tax could deduct from their gross income tax an amount equal to 19 % of their invested capital, a maximum investment amount not exceeding EUR 500 000 per tax year. Where the deduction amounted to a greater amount than the gross tax, the excess could be deducted in the subsequent years. The measure however had limitations regarding investors, among others, that the '[…] indirect investments made through collective investment undertakings and other capital companies that are directly or indirectly publicly owned'.[191]

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[188] Staes, Melanie 2014, page 121.
[189] 2016 Commission Notice 2016, para 12, with references to C-118/85, *Commission* v *Italy*, para 7; C-35/96, *Commission* v *Italy*, para 36; C-180/98 and C-184/98, *Pavlov and Others*, para 75.
[190] 2016 Commission Notice, para 7.
[191] Commission Decision SA.36866, *Incentivi fiscali all'investimento in star-up innovative* (5 December 2013), section 2.3.3.

The Commission found that the measure was selective at the private investor level. It was concluded, that 'where a measure allows private investors to make investments on more favourable terms than the public investors, or than if they had undertaken such investments in the absence of the measure, then those private investors will be considered to receive an advantage.'[192] Despite of that, it was decided that the Article 107(1) TFEU applies only where an advantage is conferred on an undertaking. Consequently, the measure did not constitute State aid within the meaning of TFEU 107(1) to 'natural persons without any registered business activities'.[193]

Yet, alone the fact that the measure does not constitute State aid at the investor level, does not indicate that it would not constitute State aid at all, as it may be prohibited at the level of investment vehicle or at the level of beneficiary undertakings.[194] Thus, the following sections focus on the subsequent levels, where the focus is on the concept of indirectness.

11.2. Indirect Advantage and Indirect Beneficiary

11.2.1. Indirect advantage in Commission Notice

The most important concept to take into account when imposing tax measures which relate to CIV concept, is the concept of indirect beneficiary.

According to the Commission 2016 Notice, which remains the latest summary source on the matter, the aid 'can be conferred on undertakings *other* than the undertakings to which the aid is *directly* transferred'. The situation can also be such that the other undertaking receives the aid directly and the other indirectly. For example, it may be that there is an intermediary company who receives the indirect advantage, as it is operating in a subsequent level. Although, if it is a mere vehicle, it should not be considered as receiving any advantage, according to the Notice. What must be noted is that there is no requirement that the direct recipient should be engaged in economic activity. The direct recipient can be either natural or legal person.[195]

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[192] Id., para 45.
[193] Id., paras 46-47.
[194] Bacon, Kelyn 2017, page 184. With reference to T-445/05 and Commission Decision of 30 September 2009 on aid scheme No C2/09 which Germany intends to grant to modernize the general conditions for capital investments (notified under document C(2009) 7387).
[195] 2016 Commission Notice, para 115; T-424/05, *Italy* v *Commission,* paras 136 to 147.

The indirect advantages must be distinguished from 'mere secondary economic effects', which according the Commission 2016 Notice are inherent in almost all State aid measures. Example used by the Commission is increase in output. An indirect advantage however occurs if due to the designation of the measure, its secondary effects are channelled to identifiable undertakings.[196]

Regardless of the said, if the intermediary is 'a mere vehicle', it should not normally be considered as a recipient of a State aid.[197] But the concept of 'mere vehicle' is not a clear one. It can also be read from the Notice, that there can be derogations in which the intermediary is indeed the beneficiary (i.e. the recipient of the State aid).

The questions of indirect beneficiary will be dealt in the following sections, which deal with the relevant case law.

11.3. Commission Decision MoraKG

In the German aid scheme *MoraKG[198]*, which concerned general conditions for capital investments, it was regarded that the income tax benefit to private individuals constituted indirect State aid to selected group of enterprises, i.e. target enterprises (later called TE).

The scheme consisted of three measures which were incorporated into the Bill to Modernise the General Conditions for Capital Investments. All the three measures shared a goal of facilitating the provision of private venture capital to a specific group of companies (TE). The third measure concerned taxation, under which the private investors investing into the TEs were entitled to *income tax benefits* in the case of capital gains on divestures.[199]

The case is especially interesting for the reason that here the Commission challenged the compatibility of the risk capital guidelines.[200] The reason for the questioning was that the Risk Capital Guidelines provide that State aid in the form of risk capital cannot be granted among others to large enterprises [...]'[201]. Hence, also the

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[196] 2016 Commission Notice, para 116.
[197] 2016 Commission Notice 2016, para 179.
[198] Commission Decision of 30 September 2009 on aid scheme No C2/09, paras. 32–45.
[199] Id., para 4.
[200] Id., para 35-37 about the compability issue.
[201] Id. para 35 and footnote 15. According to the Commission Decision '[t]he definition of a TE in the MoRaKG does not match the SME definition of the EU.

large enterprises could benefit from the measure. This case thus indicates the borderline when the Article 107(3) and the justification by virtue of the risk financing applies. The reasoning of this kind indicates that the measure may be justified only if it is demarcated in a way that it is available only to the target group, which must exclude large enterprises.

The measure called '*MoRaKG'* aimed to encourage private investors to invest in TEs by offering tax advantages for the profits derived from their investment.[202] It was noted that the measure would only have a limited effect, as the amount of taxes saved by the private individuals as due to the measure is quite small, and the benefit granted only in the event of successful exit. Hence, the distortive effect between the target enterprises and non-target enterprises would be limited. [203] The Commission did state that 'it is extremely difficult to precisely quantify the advantage that TEs will receive ex ante'. Here the wording 'extremely difficult' is notable, because the Commission could have thought that it is unlikely that the target enterprises actually receive any remarkable benefit. Nevertheless, it was regarded that the income tax benefit is selective and indirectly favours the companies (TE level) and consequently constitutes indirect State aid to the TEs.[204]

The Commission concluded that the income tax benefit measure is not compatible with the Risk Capital Guidelines.[205] Pretty much none of the requirements of Risk Capital Guidelines were met. The essential part seemed to be that the measure could benefit also the large enterprises, but in addition there was not either 'any evidence of a particular market failure affecting TEs' which then could have launched the more detailed assessment.[206]

Interestingly, the Commission did see some sense in the measure, as it finally ruled that the measure may be adjusted to the Risk Capital Guidelines under the conditions it laid.[207] First, the definition of TE should be limited only to SMEs and it must exclude the other groups which are not under the Risk Capital Guidelines (i.e. shipbuilding, coal and steel industry.) Additionally, the maximum investment tranches

[202] Id., para 102.
[203] Id., para 83.
[204] Id., paras 85-88.
[205] Id., para 104.
[206] Id., para 103.
[207] Id., para 104.

were laid down, but no special legal requisite for the legal form was required from the TE. Further, Germany must ensure the compatibility of the measures with the Risk Capital Guidelines regarding the reporting and cumulation rules.[208]

11.4. Commission Decision *Dispositif ISF-PME* – Tax Reduction for Private Individuals

The case *Dispositif ISF-PME*[209] is an example of a situation where the tax scheme was eventually accepted after an investigation. The case concerned a tax scheme aimed to facilitate investments in innovative SMEs (i.e. PME). The measure granted a tax reduction to private individuals from the wealth tax (impot de solidarité sur la fortune) who subscribed to the capital of innovative SMEs either by way of mutual funds for innovation (fonds communs de placement dans l'innovation, FCPI) or local investment funds (fonds d'investissements de proximité, FIP)'.[210]

ISF-PME measure, open only to private individuals, offered a reduction of 50 % of the wealth tax.[211] The Commission argued that the Article 107(1) TFEU does not apply to private individuals. Therefore, as only the private investors may benefit from the measure, it is not State aid in the meaning of Article 107(1) TFEU.[212]

In *Dispositif ISF-PME* the Commission considered that the financial intermediary is a structure with the purpose of transferring the aid, rather than a beneficiary of aid in its own right, irrespective of whether the intermediary has a legal status, or that the intermediary is merely a bundle of assets managed by a management company. However, the Commission did state, in quite general phrase, that it is nevertheless possible that a measure involving direct transfers in favor of the intermediary, or measures involving a co-investment, may constitute State aid, unless they are made under such terms which would be acceptable to a normal economic operator. Notwithstanding, it was concluded that there was not such direct transfers of aid in favor of the funds and that the fiscal advantage benefits only the private investors.[213] Thus, the Commission took the view that the intermediary is a mere vehicle.

[208] Id, article 3 of the decision.
[209] Commission Decision SA.41265 (2015/N) – *France - Dispositif ISF-PME pour les investissements dans les FCPI et FIP.*
[210] Press release, *Commission approves two schemes aimed at encouraging investment in innovative SMEs*. Brussels, 5 November 2015.
[211] Commission Decision, SA.41265 (2015/N), *France - Dispositif ISF-PME*, paras 4-5.
[212] Id., 56-57.
[213] Commission Decision, SA.41265 (2015/N), *Dispositf ISF-PME*, paras 59-60.

Despite of that, the SMEs were regarded as the beneficiaries, and the received benefit as a selective advantage, as they were the only recipients of aid. The fiscal measure lead to a situation where the SMEs possibilities to access financing is facilitated, which then, according to the Commission, creates them an indirect advantage.[214]

Eventually, the measure was justified based on the Article 107(3) point c.[215] The Article 107(3) c justifies 'aid [which aim] is to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

It is interesting that compared to the case *Fineco*[216], in which both the SMEs as well as the intermediary vehicle were regarded as indirect beneficiaries, in the both cases the aim was the same: to promote the investments in SMEs and to thus increase the market value of SMEs. However, in *Fineco*, the fact how the tax neutrality was constructed to be achieved was different, as the double taxation was demolished at the level of the investment vehicle. Neither was the Article 107 (3) even dealt in *Fineco.*

11.5. Conclusions

The above depicted case law provides that the application of State aid cannot be circumvented by granting the tax measure to private investors, which are outside the scope of Article 107(1) TFEU.

In reference to the aforementioned case law, the general rule seems to be that the intermediary is only a vehicle used for the transfer of aid. This general rule applies especially when the intermediary has been set up only as a transferring element.

However, the Commission has stated that the alongside co-investment(s) may change the situation, among other case law, also in *Dispositif ISF-PME*.[217] In such

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[214] Id., paras 64-65.
[215] Id., para 128.
[216] T-445/05, *Fineco*, para 162: '*[...] Italian Republic has argued that the measure at issue is designed to foster the market capitalisation of small- and mid-caps as opposed to other companies listed in Europe [...].*'
[217] Among others in Commission Decision SA.41265 (2015/N), *Dispositif ISF-PME,* para 59.

a situation, the decisive factor seems to be whether the investment is made under normal market terms.[218] [219]

Thus the ‘mere vehicle’ approach seem to be related to the way how the intermediary has been constructed and whether it is a co-investor. To ensure, that no aid is constituted at the intermediary level, it seems that aid measure must be arranged legally in such a way that the investment vehicle is not able to co-invest and that it cannot clearly benefit from the measure.

It can be noted that in the case law, normally the manager is not dealt separately at the intermediary level. There is a presumption of no aid, if the manager is chosen through open and transparent procedure. If the manger’s remuneration does not reflect market terms, then it might constitute a State aid. Thus, it is well possible that the manager would be also a recipient of aid.[220]

Having developed such a concept of indirect recipient of State aid, it can be argued that both the Commission and the Court apply the Article 107(1) TFEU in quite an expansive way.

12. The Problematic Selectivity Criterion – Further Questions

12.1. What is Reference Framework in CIV Context?

When assessing selectivity, the first phase of selectivity test requires that the general framework is identified, in order to show that the measure in question derogates from the general system in a selective way. The reference system thus is the benchmark, against which the measure’s selectivity is assessed.[221]

According to the Commission 2016 Notice, with no reference to case law of ECJ, the reference system consists of ‘a consistent set of rules that generally apply - on the basis of objective criteria - to all undertakings falling within its scope as defined by its objective’. The Commission clarifies that in a typical situation, ‘[…]those rules define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of undertakings subject to it and the technicalities of the functioning of the system’.[222] The Commission does not refer to the

[218] Bacon, Kelyn, page 184. See also Risk Finance Guidelines, paras 37-39
[219] Commision Decision SA.33984 (2012/N) – *United Kingdom Green Investment Bank*, para 6.
[220] Commission Decision SA.37370 *Poland Jeremie Holding Fund*, para 61.
[221] 2016 Commission Notice, para 132.
[222] 2016 Commission Notice, para 133.

case law at all when it determines the reference system in the 2016 Notice. Despite of this, the Commission's view is not controversial to EJC's. Although, a reference to the case law would have clarified this, and left no space for suspicions of Commission's own interpretations. A reason for the lack of references is probably that the Court has not never actually taken any general view, but only determined the system in a specific context.

The theoretical idea of reference framework seems first clear, but there lies many problems in the identifying process. On the one hand, the framework can be too narrow or too wide, and on the other, in the end the derogation and thus selectivity is directly dependable on the wideness of the reference framework. In the ultimate end lies the possibility that the measure itself would be regarded as the framework itself. In the other ultimate end lies on the opposite the question that how small parts can the total tax system be divided in.

The Commission notes on its 2016 Notice that '[…] for example, a reference system could be identified with regard to the corporate income tax system[223], the VAT system, or the general system of taxation of insurance.'[224] According to the Commission, the reference system itself is based on elements, such as the tax base and the taxable persons.[225] Hence, the Court and the Commission seem to have a reasonable view with regard to the reference system. The rationale behind seem to be that the reference framework is a coherent set of rules. Yet, one must anyway note, that the Court has used various terms when it refers to the reference system. It has used for example the terms of 'ordinary tax system'[226] , general tax scheme'[227] and 'normal regime'[228].[229]

States having prerogative in tax matters means that the benchmark can be only a situation within a state. So, the benchmark in fiscal matters can only be the tax legislation of one country. This is also due to that the comparative analysis between

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[223] 2016 Commission Notice, with reference to *Paint Graphos and others*, C-78/08 and C-80/08, para 50. The Court sometimes applies in this context the term of 'the ordinary tax system' (see C-182/03 and C-217/03, *Belgium and Forum 187 ASBL v Commission*) or 'the general tax scheme' (see C-100/15, *Netherland Maritime Technology Association*).
[224] C-308/01, *GIL Insurance*, paras 75 and 78.
[225] 2016 Commission Notice, para 134.
[226] C-182/03 and C-217/03, *Belgium and Forum 187* v *Commission*, para 95.
[227] C-66/02, *Italy* v *Commission*, para 100.
[228] C-78/08 and 80/08, *Paint Graphos*, para 50.
[229] 2016 Commission Notice, footnote 205.

economic operators is made 'in light of objective assigned to the tax system of the Member State concerned'.[230] Widening the benchmark, and making the reference framework a gross-border consideration, would not be possible, due to the nature of taxation and State aid.

Yet, in the case of tax exemption, determining the reference framework, i.e. the general regime, is more complex. This is due to that the aid now consists of failure to act, i.e. to impose a tax. In the legal literature, Claire Micheau has presented a view that in order to determine that failure to be an expenditure, a hypothetical tax should be determined.[231] When performing this study, the author has not collided with any case argumentation in which any hypothetical taxes would have been determined before deciding the reference framework.

However, the case law proves that it is possible that the reference system is a narrower set of rules than just for example a corporate tax system. In the case *VTM Fund management*, which concerned the taxation of investment companies, the EFTA Court identified the taxation of *all undertakings* as the reference system for normal taxation by stating that 'it is common ground that the measures at hand do not apply to all economic operators, but are granted only to undertakings exercising a specific activity in a determined legal form, that is investment companies.[232]

In addition, one must keep in mind, that this reference framework and a derogation from it alone does not constitute State aid. The measure may either be justified or the situation may be that the derogation nevertheless does not result in selectivity, for example due to the fact that the economic operator(s) cannot be held in a comparable situation to its comparison operator group. The latter was indeed the situation in *Paint Graphos*[233]*.*

[230] C-78/08 and 80/08, *Paint Graphos*, para 49.
[231] Micheau, Claire 2015, page 3, see also footnote 16.
[232] EFTA Liechtenstein, E-17/10 and E-6/11, *VTM Fundmanagement*; Ismer and Piotrowski 2015, page 563.
[233] C-78/08 and 80/08, *Paint Graphos*, paras 50-51, 61. 'A derogation from the reference framework did exist but *[t]he cooperative societies were not held being in a comparable factual and legal situation compared to commercial companies'.*

12.2. Should Aid be Quantified with Reference to Other Investment Funds, Investment Companies or to What? (The Comparison Test and its New Forms)

The next section in this paper analyses more about the selectivity criteria, and the aforementioned comparison test. The research question whether the aid is quantified with reference to other investment funds or to other companies, is on the spotlight in this section. First the research focuses to find this kind of argumentation from the case law and Commission's decision. Some references were already made in the above sections.

As mentioned, the *Paint Graphos* initially set the comparison test used in nowadays and which focuses on the assessment of different treatment between 'economic operators, who in light of objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation'.[234] The comparability seem to require a considerable competitive relationship[235], but is something which is assessed case-by-case.

A query must now be made into the case law in order to answer more specifically to the question what does this test actually mean and what does the comparison require in the CIV context. First, it must be borne in mind that the intermediary may have various forms: it may or may not have a legal status. It may be a company or it can as well be just a bundle of assets without any certain legal form. These many possible forms make the comparing process complex, adding difficulties to a coherent application of law.

Criticism has been set forth in the academic literature, and for a good reason. The three-step test is far from consistent. One view set forth in the academic literature is that 'the Court prefers a *substantial* approach', which means that the Court instead of carrying out a proper comparison regarding the comparison groups' treatment and 'intrinsic and extrinsic objectives,' instead applies an effect based approach (i.e. the analysis of the effects of state's tax system as a whole). This kind of application method makes possible to reach the desired outset.[236] Especially, in the case *Paint*

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[234] C-78/08 and 80/08, *Paint Graphos*, para 49.
[235] Lang, Michael 2016. See footnotes 50 – 60.
[236] Hofmann, Hervin & Micheau, Claire 2016, page 146. See also: C-106/09 P and C-107/09 P, *Commission and Spain v Government of Gibraltar and UK*, cit. C-78/08 and 80/08, *Paint Graphos*, cit.

Graphos, the Court held that the cooperatives in question where not comparable to the for-profit societies or other cooperatives under the objective of profit taxation. Thus, the adopted application was a very broad one, even though it did not result in selectivity. It is notable that here the Court did weigh the special features of the cooperative societies in a few paragraphs, and noted that these features make them separable from the others economical actors.[237]

The Commission has stated in its 2016 Notice that the comparison is to be made 'in the light of the *intrinsic* objective of the system of reference', referring to the case *Paint Graphos* and to the Court's argumentation in that case where it nevertheless considered that the cooperative societies could not be compared. According to case law, 'external objectives cannot be relied upon the member state'.[238]

Therefore, another important question is the distinction between corporations and non-incorporated businesses, and consequently how they are determined and separated. In the older Notice (2014), the Commission considers 'all undertakings having an income [. . .] to be in a similar legal and factual situation from the perspective of direct company taxation'.[239] The author noted that this phrase is something that the Commission *does not repeat* in its 2016 Notice, although it refers to the same case law (*Paint Graphos*) and also that the 2016 Notice's structure is pretty much similar at that point ('Identification of the reference system'). Despite the lack of this phrase in 2016 Notice, the author sees in the light of the case law researched, that the approach (' all undertakings having an income…') has not changed radically since 2014.

In the before mentioned case *Fineco*, the Court noted that the measure was selective because it was intended to be limited to well-defined investment vehicles and their managing undertakings, for 'the detriment of *other undertakings* offering alternative forms of investment'. [240] In *Fineco* the group of comparison was set vastly. Nonetheless, this does not mean that the group of comparison could be regarded to cover also the 'normal companies' because the wording defines that these undertakings must 'offer […] forms of investment'. Seeing in such a way (i.e. excluding

[237] C-78/08 and 80/08, *Paint Graphos*, para 50 and 48, 76.
[238] 2016 Commission Notice, para 135 with reference to C-6/12, *P Oy*, para 27 et seq.
[239] 2014 Commission Notice, para 135 and footnote 195.
[240] T-445/05, *Fineco*, para 150.

normal companies) it means that the comparison group was basically the other investment companies. Furthermore, again the Court was quite short-spoken what comes to the comparison itself. No such ‘special features’ analysis was made, as was the situation for example in *Paint Graphos,* where the cooperatives’ special features were listed and analysed in detail and compared to the for-profit organizations.

Before drawing conclusion, a case *VTM Fund management* is examined in a light on the comparison group and will be investigated separately in the following paragraph.

12.2.1. E-17/10 and E-06/11 - Principality of Liechtenstein and VTM Fund Management v EFTA Surveillance Authority

The EFTA Court in *VTM Fundmanagement* decision established the presence of selectivity by directly comparing the taxation of investment companies with the taxation of investment funds.

The case concerned a Liechtenstein set of tax rules introduced already in the 1996. Those rules applied to ‘the collective capital of investment undertakings, including [both] investment funds and investment companies’, which were exempted from the income tax and were subject to a reduced capital taxation. In addition, the coupon tax was removed. Regardless of the literal formulation, the 1996 measures resulted in a different treatment regarding the taxation of own assets of investment funds and investment companies. The *investment funds* remained under the normal taxation due to that its own assets were separated from the assets it managed.[241]

The Court stated that, as these 1996 measures ‘do not apply to all economic operators in Liechtenstein, these measures cannot be considered to be general measures of tax or economic policy’ and the tax exemption was held to be against the mechanism of the tax system in question.[242] Instead of that it was regarded that the measure indeed was built to attract certain undertakings.[243]

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[241] E-17/10 and E-06/11, *VTM Fund Management*, paras 9-10.
[242] Id., paras 61, 77.
[243] Id., para 76.

The EFTA Court ruled that the investment companies were treated selectively and determined the comparison group as '*other fund management undertakings* operating in Liechtenstein'. Here the focus seemed to be on the similar characteristics in their common operations, and the Court went on by stating that the investment funds also 'offer the same kind of services in the Liechtenstein'. [244] Unfortunately, the Court did not determine more closely what exactly made these two companies similar. Although, the Court did state that the fact that the companies and funds differ by their legal forms, did not affect to the result.[245] The author refers to the above 'Selectivity' section and wants to note that it is settled case law that the legal structure of undertaking does not prevent the application of TFEU 107(1).

12.2.2. Conclusions

As a matter of fact, the whole rational behind the comparison is actually the prohibition of providing unequal treatment in a comparable situation.[246] Thus, the whole selectivity analysis and especially the comparison process, is about analysing the joint features and differences. To start the features comparison process, it must be identified which features are to be compared, i.e. determine the *tertium comparationis*.[247]

Both *Fineco* and *VTM Fundmanagement* cases indicated that the comparison is not made vastly with reference to the other 'normal companies'.[248] In *Fineco* the comparison was made to the 'other undertakings offering alternative forms of investment'.[249] Whereas, in *VTM Fundmanagement* the comparison group was 'other fund management undertakings operating in Liechtenstein'.[250] In both *Fineco* and *VTM Fundmanagement* thus the investment companies and investment funds were assimilated.

In addition, it seems that the *legal form* does not have much, if any, decisive power to the comparison. Especially in *VTM Fundmanagement,* the Court concluded that

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[244] Id., para 58.
[245] Id., para, 62.
[246] Lang, Michael 2016, page 36.
[247] Id., page 36.
[248] Douma, Sjoerd 2014, page 180.
[249] T-445/05, *Fineco*, para 150.
[250] E-17/10 and E-06/11, *VTM Fundmanagement*, para 58.

'[t]he fact that investment companies and investment funds do not have the same legal form cannot affect this conclusion.'[251]

Roland Ismer argued in his article, when commenting the *VTM Fundmanagement,* that the comparison test is not a necessary condition, but rather a simplifying element in the assessment process. Ismer regarded that the analysis started with the identifying of the reference system and 'then went on to establish the presence of selectivity by directly comparing the taxation of investment companies with the taxation of investment funds'.[252]

The author does not share Ismer's view in total, and thinks that this directly 'went on to establish the selectivity' must have indeed contained the comparison process, although possibly in a straightforward form. The author thinks that it is the wording of the judgment which at first glance seem to hide this comparing process. Yet, the comparison can be seen in the wording of the case. Expressly, the paragraph 58, in which the EFTA Court established the selectivity 'in comparison with other fund management undertakings', proves the comparison.

Regarding the said, the author noted that Ismer joints his argumentation to the new approach, i.e. that the Court does not anymore rely on concrete comparisons under the three-step test, but rather relies on the abstract selectivity arguing.[253] Whichever the truth, alone the fact that the Court would have omitted a more simplified method regarding the comparison does not mean that this step would have been forgotten. As stated above, the rationale behind is to ensure the equal treatment. Thus, the author sees that this comparison part of the three-step test (or argumentation) can be ignored competently, and the Court may change its argumentation, only up to the point in which it is certain that the equal treatment is secured.

The pawn is the comparison to be made 'in the light of the objective assigned to the tax system'. One reason why it seems reasonable that the comparison could be made alternatively also in relation to other companies, is that if 'the objective assigned to the tax system' is regarded as taxing company profits, the 'normal companies' would be within such a comparison group. Therefore, from the author's point of view, the argumentations used so far might also indicate the fact that there

[251] Id., para 62.
[252] Ismer and Piotrowski 2015, page 563.
[253] Id., page 563.

have not been a necessity to extend the group of comparison to cover farther groups, and thus cannot be ultimately relied as a proof. Thus, even the literal interpretation would render such application.

Hence, it appears that the Court indeed follows increasingly a more case-by-case analysis in the comparison part of the three-step test, and thus the *de facto* -analysis seems to gain increasingly more and more scope as a method in the application process.

12.3. Availability to Certain?

Besides the above, the selectivity analysis does contain another element which must be determined. The Article 107 (1) TFEU prohibits advantages which are awarded to 'certain enterprises' and to 'the production of certain goods'. The author regards that 'certain' as a word means something that is separable from the others, something that must have its own special features which make it 'certain'. The wording itself is rather wide and leaves much discretion. But, in the light of case law, it seems that this is not a separated question and is thus dealt together (or within) the comparison phase of the three-step test. The 'certain' determination seem to relate to the undertaking determination, which is the starting point for the comparison itself.

The word 'certain' relates to the group of comparison. It is argued in the legal literature that a lack of a clearly demarcated favoured group(s) in the case law does not automatically mean that the case should always be a one with the clear borderlines and that selectivity could not arise also in the situation of unclearly demarcated comparison group.[254] The author challenges this view and sets a question that if no clear demarcation is required, what relevance would the word 'certain' have then?

'Certain' may also be understood regionally and may thus mean that the undertakings of a specific area are regarded as a 'certain group'.[255] However, in the CIV-context, it is hard to see that the benchmark could be assessed regionally, as the impacts of tax measures normally do not cover only one specific area.

When there is a situation where the measure seems to be open to all (i.e. a general exception or similar), it can be argued that it does not constitute selectivity if the

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[254] Ismer and Piotrowski 2015, page 562.
[255] Lang, Michael 2016, page 36. With a reference to Aid C 78/2001.

measure is 'effectively open to all'.[256] In this kind of situation the three-step test may not be sufficient to establish selectivity. Thus, the so called positive test, as called by Ismer, which points out that the limitation, would be needed. [257] According to the Ismer, this has been adapted by the Court in the cases *Banco Santander and Santusa* and *Autogrill España.[258]* But, this positive test-view has aroused objection.

The ECJ indeed took the opposite view in the following decision and stated that the General Court 'erred in law' when it determined that the Commission would have been made the so called 'positive test' as a first step.[259] Sufficient was that the Commission established the derogation from the normal tax system, and it results in practice to a different treatment, nevertheless that the groups that receive the benefit and the groups that do not, are in a similar position in the light of the tax system.[260]

Thus, 'certain' within the meaning of Article 107(1) TFEU is apparently neither definite nor applied necessarily by its literal reading. It means, on its own, nothing and cannot thus be examined separately and must be applied under the terms set in the three-step test.

13. Further Questions

As the author did not find much recent case law, but mainly the Commission's decision in which would have been investigated the concept of case law, one must seek to find a reason for this absence. At the first, it comes to one's mind that the Commission simply have not investigated more precisely any CIV schemes. Possibly they have been clear enough from the perspective of State aid. Yet, it is hard to believe that the Commission would not have jumped into this problem since 2009 *Fineco* ruling. However, as the situation remains the same regarding the case law, one must ask why.

Obviously, there are many possible answers. To start with, there have been issued decisions, as the aforementioned sections prove, but they almost every time refer

[256] Nicolaides, Pheidon 2015., page 5 et seq.
[257] Ismer and Piotrowski 2015, page 562.
[258] T-399/11, *Banco Santander;* T-219/10, *Autogrill España*. The court requested in *Banco* Santander (para 46) an identification of a particular category of undertakings which are the only ones which are favored by the measure in question […]'.
[259] C-20/15 P and C-21/15 P, paras 93 and 78.
[260] Id., para 67.

to the risk scheme financing. For certain, the reason simply cannot be every time that the measures are designed to promote risk financing. In addition, it is hard to believe that the member states would not have designed such measures during the present years that there would not have been any suspicious of favouring certain enterprises over others. Unfortunately, answering thoroughly to that question, i.e. what have been designed by the member states, and consequently could that situation tell something about the investigation border of the Commission, is too vast to be answered and researched under this study.

When looking for an answer to this, the author ran into visions which might provide an answer. To start with, could it be that the State aid concept is disregarded? If so by what? Consequently, could the fundamental freedoms pass over the Article 107(1)? Hence, what happens in an overlapping situation? To answer thoroughly to these kind of questions, one would need to write another thesis. Thus, the overlapping situation among others can unfortunately be investigated only superficially. But, even a superficial inquiry may indicate if there lies a reason for the lack of the State aid investigation within the CIV context. Furthermore, that area where the State aid is confronted by the fundamental legal elements, indicates whether there actually can be measures that are not determined as State aid issues.

13.1. Fundamental Freedoms and State aid – Overlapping Situation

It is settled case law that the member states must 'not introduce or maintain legislation which entails incompatible State aid or discrimination that is contrary to the fundamental freedoms'.[261] Hence, what if legislation of this kind is introduced?

With reference to the aforementioned *Walloon* CIV-case, which was shortly examined above, the Commission did not decide the case on the basis of the State aid rules. The Commission ended up deciding the case on the basis of freedom of establishment and the free movement of workers. Yet, it seemed quite *obvious* that the measure indeed was in the scope of Article 107(1) TFEU.

In the context of State aid, there seems to lie fundamentally the possibility of overlapping with the other Articles of TFEU. Hereby, is it possible to apply a combined

[261] C-182/08, *Glaxo Wellcome*, para 34 and the case-law cited.

approach? Or can there be a situation where fundamental freedoms would overrule?

It is 'exceptional' that the State aid rules are even briefly mentioned in a case concerning fundamental freedoms.[262] This lack of references and mentions addresses also the fact that the Court has not regarded the issue even as worth to mention. Either not much legal academic literature about the issue has been written.[263] The existing literature tends to refer to the case *Iannelli & Volpi,* which dates back to 1977. Despite of the lack of case law, it is obvious, that there must have been such overlapping situations.

One must bear in mind that both the fundamental freedoms and the State aid rules aim to ensure that the free competition on the internal market is not distorted and that in an objectively comparable situation, the treatment does not differ. Hence, the objective of these two sets of provisions is pretty much the same, or at least close to each other.[264]

13.1.1.1. *Iannelli & Volpi*

In *Iannelli & Volpi*[265] the Court had to decide whether the measure at issue had to be examined from the point of State aid rules or the free movement of goods.[266] The Court recognized the existence of a situation where more than one Community law provision applied to the measure at issue. Further, the Court ruled that the Commission cannot declare a State aid regime to be compatible with the internal market when an approval of such a regime would end to a violation of the Treaty, including the fundamental freedoms.[267] This view has been maintained ever since 1977.[268]

The Court acknowledged that the provisions of TFEU have each a different field of application. In the State aid context, it is also only the Commission, not the national

[262] Engelen, Frank 2012, page 206.
[263] Staes, Melanie 2014, page 116.; Luja 2012, page 120-131.
[264] Micheau, Claire 2012, pages 210-211.
[265] C-74/76 *Iannelli & Volpi.*
[266] C-74/76*, Iannelli & Voipi*, para 9. Micheau, Claire 2012, page 211.
[267] C-74/76, *Iannelli & Volpi*, paras 9, 12 and 14.
[268] Micheau, Claire 2012, page 211.; C-390/06, *Nuova Agricast Srl v. Ministero delle Attivita Produttive*, para 50; Case C-2014/97, *Portuguese Republic v. Commission of the European communities*, para 41.

Courts, who has the competence to review the aid measure's compatibility with the internal market.[269] This principle as well has been maintained ever since.[270]

A distinction must be made between a measure where the State aid *aspects* may be evaluated separately in the light of the provisions of TFEU, and where they cannot. Separable aspects can be reviewed distinctly, provided that the other TFEU provisions are not necessary to attain the objective of aid measure in question.[271] When the situation is such that there are 'aspects of aid that contravene specific provisions of the Treaty' [other than the Articles 107 and 108 of the TFEU], which are so 'indissolubly linked to the object of the aid that it is impossible to evaluate the aid separable', the aid must be reviewed as a whole under the procedure of the [Article 108], [ex.] Article 93. The assessment of 'indissoluble linking' have been referred as a 'severability test'.[272]

In the light of the referred legal academic literature written on the issue, the author sees that when this 'indissoluble connection' exists, the aid should be reviewed under a State aid procedure, and the case cannot be concluded in a member state's court. Only the Commission is competent to review those provisions in such a case.[273] Nevertheless, one must remember that the Commission is just the supervising authority and it does not have the power to determine the scope of the Article 107(1) itself.

The author thus interprets the case similarly as Frank Engelen, and sees that the national court may review the aid's compatibility with the other TFEU provisions in a situation where there are *not any* aspect in the aid which would be indissolubly linked for the object of the aid. Nonetheless, only those aspects can be reviewed with regard to the compatibility with the fundamental freedoms. In addition, the Court concluded that if there is an aspect which is *not* necessary for the attainment of the object, and infringes the TFEU, the national court however cannot declare the aid's incompatibility with the TFEU as a whole.[274] Thus, the national court may take such

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[269] C-74/76 *Iannelli & Volpi*, paras 9, 12. See Engelen, Frank 2012, page 208.
[270] Micheau, Claire 2012, page 211.
[271] C-74/76 *Iannelli & Volpi,* para 11.; Micheau, Claire 2012, page 212.
[272] C-74/76 *Iannelli & Volpi*, para 14.
[273] Engelen, Frank 2012, page 207.
[274] Id., page 207.

an application where it ends up applying other TFEU articles than the State aid rules, although at first it seems that the measure in question is a State aid issue.

But how to determine the barrier, i.e. when there is such an indissolubly linked situation? Furthermore, what constitutes separable aspects? It seems that the questions is still unclear. Despite of the author's contribution to seek for a clear argumentation on the practical application of severability test, no clear view was found.

Nevertheless, after 1977, the General Court has applied the severability test in various judgments.[275] The General Court has followed the Court of Justice in its argumentation. It has confirmed that the Commission cannot approve any aid that infringes the fundamental freedoms. Further, it has stated that it is sometimes conceivable, 'that the separate aspects of State aid are evaluated under the fundamental freedoms, if the aspects in concern are not absolutely necessary in the light of the objective of aid'.[276]

Despite of the said, the situation remains blur, as the Court has not provided any clarifications. Especially, would it still be possible for an EU-citizen to claim a violation of a fundamental freedom, after when the Commission has already approved the scheme (based on the Article TFEU 108, which concerns only the competence of Commission in the State aid matters)[277]?

13.1.1.2. *Sardegna*

Another classic overlapping case was at hand in the *Sardegna* decision. The case concerned a regional tax measure in Sardinia, with a purpose to collect a tax on stopovers for tourist purposes by aircraft used for private transport. The measure was limited only to operators whose tax domicile was outside the territory of the region.[278] As a consequence, the aircraft service providers from elsewhere than Sardegna were treated disadvantageously.

In this case the Italian constitutional court asked from the ECJ whether the measure restricted the freedom to provide services and/or infringed the State aid provisions.

[275] Staes, Melanie 2014, page 117.; See: T-359/04, *British Aggregates II*.
[276] Staes, Melanie 2014, page 117.; T-197/97 & T-198/97 *Weyl Beef Products BV, Esportslachterij Chris Hogeslag BV and Groninger Vleeshandel BV v. Commission of the European communities*, paras 75-77.
[277] Luja, Raimond 2012, page125.; Staes, Melanie 2014, page 117.
[278] C-169/08, *Presidente del Consiglio dei Ministri v. Regione Sardegna*, paras 35-38, 62-64.

The ECJ established, that the measure in questions both infringed the State aid provisions and constituted a restriction to the freedom to provide services.[279] The material selectivity criterion was met, because it did not apply to all subjects acting in Sardinia.[280] It is possible that the reasoning would have differed should the Commission have started the investigation.

Hence, does the argumentation in *Sardegna* mean that any tax measure imposed on *non-residents*, which is in breach of fundamental freedoms, infringes also the State aid provisions? First of all, the overlapping was true only in case of non-Italian undertakings, as the scope of State aid is limited to cover solely undertakings within an internal territory, whereas the fundamental freedoms do not apply in pure internal situations.[281] Unfortunately, the ECJ did not take a stand on the priority between the State aid provisions and the fundamental freedoms.[282]

13.1.1.3. Conclusions

It is clear from the above mentioned *Sardegna* case law that a measure may fall both to the categories of State aid and fundamental freedoms. In this kind of situation the severability test seeks to provide for an answer. The test is a proof that State aid does have an area where it collides with the fundamental freedoms.

Frank Engelen states in reference to the case *Sardegna* that while a tax measure favours resident undertakings, it can be reviewed only in the light of State aid provisions. Whereas, according to him, the free movement provisions may be applied if the measure constitutes a disadvantage to non-residents. Further, he argues that both situations cannot occur simultaneously for this reason, which is why there is no conflict regarding the remedy that would be applicable.[283]

Another kind of view with reference to *Sardegna* is presented by Luja. He saw that the application of full State aid concept (including the recovery) ‘would have taken away both the State aid … [and] the infringement of the freedoms of services’ as

[279] Id., para 39.
[280] Id., paras 60, 63-66.
[281] Engelen, Frank 2012, pages 208-209.
[282] Staes, Melanie 2014, page 117.
[283] Engelen, Frank 2012, page 209.

both parties would then be treated alike.[284] Yet, he goes on by arguing that 'the Commission's approval of any State aid fulfilling one of the objectives of Article 108(3) TFEU cannot in itself provide a justification for an infringement of one of the fundamental freedoms'. Thus, Luja sees the connection more linked and prefers an effective based approach, the goal being the equal treatment.

However, the Court has neither argued on the priority nor on the practical application. It seems that the Court has applied a teleological application. The issue of cumulative application has nevertheless been raised 'as a theoretical legal defense argument in other cases'.[285] Hence, Engelen's view and the arguments do not have much backing in the case law (if any). Yet, Engelen's argumentation is logical and such an interpretation the ECJ could well adapt. The author thinks that if the Engelen's representation would work, and the author cannot see a reason why it would not, there would not be any need to apply such an approach presented by Luja. Mainly, because it is settled case law already that the regional framework in which the State aid concept can be reviewed is within a state.

In the light of this study, this brief inquiry indicates the possibility, and even a certain probability, that it is also due to the national courts that certain situations may not have been investigated as State aid issues, because the national court has interpreted the 'severability test' in a way that the 'indissolubly connection' does not exist. Furthermore, there is a probability of certain degree, that the national court has interpreted the 'severability test' wrong, even purposefully.

14. Final Remarks

The assumption in the beginning of this study was that tax neutrality would have ruled the argumentation in the case law. Surprisingly, this was not the case. Yet, despite of that it seems that there is a certain dichotomy between benefits which result from the legal structure as such (e.g. a 'mere intermediary' approach) and benefits which are awarded on the other basis.

A measure with a purpose to ensure tax neutrality is something that is required because of a legal form or structure: neutrality need to be achieved with a separate

[284] Luja, Raimond 2012, page 125.
[285] Micheau, Claire 2012, page 213.; C-113/00, *Kingdom of Spain v. Commission of the European Communities*, paras. 76-77; C-103/84, *Commission of the European Communities v. Italian Republic*, para. 19; C-249/81, *Commission of the European Communities v. Ireland*, para. 18.

measure. For that reason, any measure with a purpose of tax neutrality, should automatically justify the measure. Unfortunately, there is not enough case law in the CIV-taxation context that it could be thoroughly answered to whether the purpose of tax neutrality itself suffices and justifies the measure in *any* case. On the other hand, there seem not to lie any abstract legal understanding of the term neutrality.

Another result of this study is an observation that the issue of CIV-taxation in the State aid context has been much dealt under risk financing. That derives naturally from the fact, that the article 107(3) TFEU may justify a risk financing measure. But, the principles adopted under risk financing apply only to the risk finance schemes, according to the Commission. Despite of the investment objective (being it risk financing or just real estate), it is presumable that in a situation where a measure concerns something other than risk financing, same kind of general principles and approaches would be applied. The basic selectivity principles for example indicate this.

What comes to the general trends of State aid, it seems that the concept of de facto selectivity is dominating more and more, and the three-step assessment test ever less used. Moreover, the concept of indirect selectivity ensures that the Article 107(1) TFEU cannot be circumvented by channelling the benefit to either individual investors or to the ultimate beneficiaries. Overall, the actual selectivity assessment is changing towards a pure case-by-case analysis, threatening foreseeability. *Fineco* also demonstrated that the advantage received may be indirect and for example a mere increase in liquidity suffices to constitute a benefit.

Furthermore, the exact case analysing is much about comparing. With regards to the comparison group, the author noted that the pursued result might be achieved even if the comparison group is not extended to the farthest possible group. In the above sections, it was noted that the comparison group in the CIV-context usually is extended to the other similar companies offering alternative forms of investments (e.g. *Fineco T-445/05*).

Overall, when talking about the beginning of the State aid investigation, this study has now ended up to a kind of cross-road situation. In this CIV-context, it really seems that the fundamental freedoms may overrule the issue being regarded as a State aid case. This of course weakens the importance of State aid regulation and entails that the State aid application process is even wider than just applying the

TFEU 107. It is a possibility that a future trend will be narrower application of State aid rules. Nonetheless, as found, the ultimate objective of these two set of rules do not remarkably differ.

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