State Aid and Taxation: Selectivity and Comparability Analysis

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Abstract There is a close connection between the criteria of financing from State resources, the given advantage and selectivity relating to the classification of a measure as State aid. The criterion of selectivity is however of superior importance when examining if there is a prohibited State aid. Finally the ECJ is not applying anymore the principle of rule and exception for its selectivity examination. Instead the selectivity examination as such comprises two parts: It must be examined if a measure is selective and if the selective measure is justified and proportional.

1 The State Aid Prohibition under Union Law

The prohibition of State aid under Union law is laid down in Art 107 para 1 TFEU: *"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market"*. From the case law of the ECJ it is often concluded that the classification of a measure as State aid requires that each of the four cumulative criteria for prohibited State aid is met: The measure has to be granted by the State or

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through State resources (first criterion), it has to favour an undertaking or the production of certain goods (second criterion), it has to be selective (third criterion) and it has to affect trade between Member States resulting in a distortion of competition (fourth criterion).[1]

However, two of these criteria are often examined together. This can be illustrated by an analysis of three of the more recent and famous cases in the area of State aid: *Presidente del Consiglio dei Ministri v. Regione Sardegna*,[2] *Paint Graphos Soc. coop. arl ua*[3] and *Commission and Spain/Government of Gibraltar and United Kingdom*.[4] The opinions of the Advocates General and the judgements of the ECJ in these cases clearly show that in assessing whether a tax measure constitutes a prohibited State aid, there is not only a close connection between the criteria of financing from State resources, the given advantage and selectivity, but that they even merge with each other and eventually can be exchanged arbitrarily.[5]

The Advocate General *Kokott* in *Presidente del Consiglio dei Ministri v. Regione Sardegna* ascertained without detailed examination whether the measure was granted by State resources on the basis of the fact that the Autonomous Region of Sardegna had forgone its resources in a manner of *"renunciation of tax revenue by confining the tax liability to non-residents [was] sufficient for the presumption that finance is provided by the State or through State resources for the purposes of Article 87(1) EC"*.[6] Moreover, the different treatment of different tax payers was considered to be an advantage without any further examination.[7] However, the Advocate General then focused primarily on examining if the selectivity criterion was fulfilled.[8] Advocate General *Jääskinen* showed in his conclusions for the two other cases that he actually does not see any conceptual difference between the prerequisite of an advantage and that of selectivity.[9] In his opinion in *Paint Graphos*, he then decided *"to streamline"* his elaborations by merely examining formal aspects in advantage examination, followed by the actually materially relevant aspects in the scope of selectivity. In his opinion in the case *Gibraltar*, Advocate General *Jääskinen* favoured to examine separately if there is an

[1] *See* Lang (2009), pp. 10 et seq.; Jaeger (2011), at m. no. 4 et seq.

[2] Case C-169/08 (*Presidente del Consiglio dei Ministri v. Regione Sardegna*), judgement of 17 November 2009.

[3] Joined Cases C-78/08 to C-80/08 (*Paint Graphos and others*), judgment of 8 September 2011.

[4] Joined Cases C-106/09 P and C-107/09 P (*Commission and Spain v. Government of Gibraltar and United Kingdom*), judgment of 15 November 2011.

[5] Lang (2012), p. 418; *see* in detail, and with critical reflections Schön, Tax Legislation and the Notion of Fiscal Aid—a Review of Five Years of European Jurisprudence in this volume.

[6] AG Kokott, Case C-169/08 (*Presidente del Consiglio dei Ministri v. Regione Sardegna*), Opinion of 2 July 2009, para. 145.

[7] Lang (2012), p. 412.

[8] Lang (2012), p. 412.

[9] Lang (2012), p. 418.

advantage conferred and if the selectivity criterion is fulfilled, but in the end, the same arguments on both levels were put forward after all.[10]

The ECJ limited itself to a cursory examination of whether favouring certain undertakings was present in its judgement *Presidente del Consiglio dei Ministri v. Regione Sardegna*.[11] The selectivity examination was decisive. If selectivity applies, favouring is present in any case. In *Paint Graphos*, the ECJ also focussed on the examination of the selectivity criterion.[12] The question of whether there is an advantage was not answered at all. After a similar general examination, based on which it found an advantage to be present, in *Presidente del Consiglio dei Ministri v. Regione Sardegna*, the ECJ determined that the measure was granted by State resources due to the financial benefits of individual entities subject to taxation.[13] In *Gibraltar* the question whether an advantage was conferred was not answered at all. Instead, it was only examined if there was any selective advantage.[14] All of this shows that the independent examination of the criteria of financing from State resources, favouring and selectivity of the measure cannot be consistently applied in tax-law situations in any case. The first criteria merge with selectivity, which is of superior importance when examining if there is a prohibited State aid.

2 Selectivity in the Case Law of the ECJ

The criterion of selectivity is therefore extremely important: Often selectivity is described by defining a reference system and identifying an exceptional rule which is derogating from the general rule. At first glance the judgment in *Presidente del Consiglio dei Ministri v. Regione Sardegna* gives this impression as well. In this judgement the ECJ examined the question of tax benefits in the context of the criterion of the use of State resources and stated that the waiver of tax revenues which could have normally been generated may constitute State aid.[15] It seems that the ECJ asks about the rule-exception relationship when assessing whether there is any favouring at all.[16] A more precise analysis of the judgement, however, shows that the ECJ considers "*exemption of the operators of aircraft intended for private transportation of people and leisure boats with tax residence in the area of the region from the regional landing tax*" to be sufficient already to assume a use of

[10] Lang (2012), p. 418.

[11] Lang (2012), p. 418.

[12] *Paint Graphos* supra (note 3), para. 48 et seq.

[13] *Presidente del Consiglio dei Ministri v. Regione Sardegna* supra (note 2), para. 55 et seq.

[14] Lang (2012), p. 418.

[15] *Presidente del Consiglio dei Ministri v. Regione Sardegna* supra (note 2), para. 55 et seq.

[16] Lang (2010), p. 577.

public resources.[17] The ECJ apparently did not consider a more detailed examination to be necessary.[18] It did not perform any more detailed inspection of which tax income Sardinia "*usually could have achieved*". The question of whether the majority of the aircraft and leisure boats arriving in Sardinia were operated by persons also resident there or by persons resident outside of Sardinia was not examined by the ECJ. Moreover, also the submitting court did not have to answer this question. Therefore, the examination of the selectivity criterion was decisive: If there is a different treatment of comparable situations according to the selectivity examination, it must be assumed that there is a tax benefit.

The reasoning of the Court in *Paint Graphos* is structured similarly: "*In order to classify a domestic tax measure as 'selective', it is necessary to begin by identifying and examining the common or 'normal' regime applicable in the Member State concerned. It is in relation to this common or 'normal' tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation [...]*".[19] The ECJ then assumed that "*[...] corporation tax must therefore be regarded as the legal regime of reference for the purpose of determining whether the measure at issue may be selective*".[20] After the ECJ has developed the criteria for the comparability examination, it stated: "*In the final analysis, it is for the referring court to determine, in the light of all the circumstances of the disputes on which it is required to rule whether, on the basis of the criteria set out at paragraphs 55 to 62 above, the producers' and workers' cooperative societies at issue in the main proceedings are in fact in a comparable situation to that of profit-making companies liable to corporation tax*".[21] The ECJ then ordered the national court: "*If the national court concludes that, in the disputes before it, the condition set out in the preceding paragraph is in fact met, it will still be necessary to determine, in accordance with the Court's case-law, whether tax exemptions such as those at issue in the main proceedings are justified by the nature or general scheme of the system of which they form part [...]*".[22] This justification examination is followed by the examination of proportionality: "*In any event, in order for tax exemptions such as those at issue in the main proceedings to be justified by the nature or general scheme of the tax system of the Member State concerned, it is also necessary to ensure that those exemptions are consistent with the principle of*

[17] *Presidente del Consiglio dei Ministri v. Regione Sardegna* supra (note 2), para. 57; Lang (2012), p. 413.
[18] Lang (2010), p. 577.
[19] *Paint Graphos* supra (note 3), para. 49.
[20] *Paint Graphos* supra (note 3), para. 50.
[21] *Paint Graphos* supra (note 3), para. 63.
[22] *Paint Graphos* supra (note 3), para. 64.

proportionality and do not go beyond what is necessary, in that the legitimate objective being pursued could not be attained by less far-reaching measures".[23]

In *Gibraltar* Advocate General *Jääskinen* insisted on identifying rule and exception: However, Advocate General *Jääskinen* also agreed *"that derogation-based approach has been criticised in the legal literature since neither the Commission nor the Court of Justice has succeeded in determining precisely what is covered by the term 'derogation from the norm' or what constitutes the 'norm' or 'a general system'. Writers have also emphasised the difficulty in determining a 'normal' tax rate in order to establish the rate which may be regarded as departing from the norm".*[24] Subsequently, the Advocate General discussed possible alternatives:[25] *"Apart from a derogation-based approach, the idea has been put forward that a measure should be regarded as general when it derives from the internal logic of the tax regime or where it is intended to achieve equality between economic operators. Among the approaches proposed by academic writers, it has been suggested in particular that a measure is general as long as any undertaking, in any sector, is eligible to benefit from it. Under this approach it is necessary to carry out a two–stage test, the first stage comprising identification of the targets of the measure ('revealed potential targets'), and the second being intended to identify the scope of the measure ('revealed potential scope'). It would be at the second stage that it would be possible to identify the reasons underlying the measure proposed by the Member State. According to another suggestion, an analysis in three successive stages would involve, first, seeking to ascertain whether the measure is capable of applying to all undertakings that are in a comparable factual and legal situation, second, verifying whether certain undertakings enjoy more favourable treatment (discrimination) and, finally, ascertaining that the measure can be justified by the nature or structure of the tax regime".*[26]

In the end, Advocate General *Jääskinen* still was of the opinion that the question to be asked was that about the generally applicable tax system and the deviation from it: *"Notwithstanding the criticisms mentioned above, the derogation-based approach seems to me to be the one most consonant with the allocation of powers between the Member States and the Commission. Whilst accepting that Member States retain competence to organise their tax regimes, it seems to me to be justified to take the view that the authority which the Commission derives from Article 87 (1) EC must be circumscribed so as to apply only to measures that amount to a derogation from the generally applicable system".*[27] He also argues as follows: *"Furthermore, I am of the opinion that the justification for the approach of seeking to identify, initially, a general regime and, subsequently, derogation from that*

[23] *Paint Graphos* supra (note 3), para. 75.

[24] AG *Jääskinen*, Joined Cases C-106/09 P and C-107/09 (*Commission and Spain/Government of Gibraltar and United Kingdom*), Opinion of 7 April 2011, para. 184.

[25] AG *Jääskinen* supra (note 24), paras. 184 et seq.

[26] AG *Jääskinen* supra (note 24), para. 185–187.

[27] AG *Jääskinen* supra (note 24), para. 189.

regime stems from the logic underlying the concept of State aid, which requires the existence of an advantage to be established".[28] The Advocate General eventually based his opinion on selectivity on his earlier statement on the advantage situation, even though he demanded that the two criteria of the term of State aid be kept apart and reviewed separately. Apparently, based on the assumption of the Advocate General both the determination of the generally applicable tax system and the deviation from it are required to verify whether there is any advantage at all and to assess whether this advantage is selective.

In the *Gibraltar* judgement the ECJ chose an entirely different approach: "*As regards appraisal of the condition of selectivity, it is clear from settled case-law that Article 87(1) EC requires assessment of whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation*".[29] The ECJ based this on its consistent case-law.

In the same judgement in respect to "*normal taxation*", the ECJ stated as follows: "*The Court admittedly held in paragraph 56 of Portugal v Commission that the determination of the reference framework has a particular importance in the case of tax measures, since the very existence of an advantage may be established only when compared with 'normal' taxation. However, contrary to the General Court's reasoning and the proposition put forward by the Government of Gibraltar and the United Kingdom, that case-law does not make the classification of a tax system as 'selective' conditional upon that system being designed in such a way that undertakings which might enjoy a selective advantage are, in general, liable to the same tax burden as other undertakings but benefit from derogating provisions, so that the selective advantage may be identified as being the difference between the normal tax burden and that borne by those former undertakings. Such an interpretation of the selectivity criterion would require, contrary to the case-law cited in paragraph 87 above, that in order for a tax system to be classifiable as 'selective' it must be designed in accordance with a certain regulatory technique; the consequence of this would be that national tax rules fall from the outset outside the scope of control of State aid merely because they were adopted under a different regulatory technique although they produce the same effects in law and/or in fact*".[30]

The ECJ's judgment *P Oy* fits in this line of reasoning.[31] At first glance, the ECJ gives the impression that everything depends on distinguishing the rule from the exception: "*The Court has held that in order to classify a domestic tax measure as 'selective', it is necessary to begin by identifying and examining the common or*

[28] AG Jääskinen supra (note 24), para. 190.

[29] *Gibraltar* supra (note 4), para. 75.

[30] *Gibraltar* supra (note 4), paras. 90–92.

[31] C-6/12 P (*P Oy*), judgement of 18 July 2013.

'normal' tax regime applicable in the Member State concerned".[32] However, then the Court continues by referring to the comparability analysis: *"It is in relation to this common or 'normal' tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation".*[33] A few paragraphs later the ECJ confirms this approach: *"[...] if the competent authorities have a broad discretion to determine the beneficiaries or the conditions under which the financial assistance is provided on the basis of criteria unrelated to the tax system, such as maintaining employment, the exercise of that discretion must then be regarded as favouring 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued, are in a comparable factual and legal situation".*[34]

In *Kernkraftwerke Lippe Ems GmbH*[35] it was only briefly summarized what had become obvious for the ECJ: *"As regards appraisal of the condition of selectivity, it is clear from settled case-law that Article 107(1) TFEU requires assessment of whether, under a particular legal regime, a national measure is such as to favour certain undertakings or the production of certain goods in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation".*[36]

However, since the ECJ often confusingly repeats statements about the *"normal"* tax regime and the derogations thereof, it does not come as a surprise that still until today lower courts sometimes give the impression that they do not follow a clear line when deciding State aid cases and occasionally combine the outdated "rule-exception" logic with the much more convincing comparability reasoning: Just recently the General Court in the case *GFKL Financial Services AG v. Commission* dealt with the issue, as to whether Section 8c(1) of the German Corporate Income Tax Act should be classified as a measure that is prohibited under EU State Aid Law.[37] In this context the court referred to statements of the ECJ made in previous cases and stated that it is necessary to identify the *"normal"* tax regime in a first step. And in the second step it needs to be assessed, whether *"the tax measure may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators, who in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation".*[38]

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[32] *P Oy* supra (note 31), para 19.

[33] *P Oy* supra (note 31), para 19.

[34] *P Oy* supra (note 31), para 27.

[35] Case C-5/14 (*Kernkraftwerke Lippe-Ems*), judgment of 05 June 2015.

[36] *Kernkraftwerke Lippe-Ems* supra (note 35), para. 74.

[37] T-620/11 of 4 February 2016, para. 100.

[38] Case T-620/11 (GFKL Financial Services AG/Commission), judgement of 4 February 2016, para. 100.

3 Conclusions

The approach of using *"normal taxation"* and the deviation from it as a basis, which is not preferred by the ECJ, is the effort to determine the rule and identify the exception from it.[39] The approach properly discarded by the Grand Chamber of the ECJ does not lead to satisfactory results. Differentiation of *"normal taxation"* from exceptions where different tax provisions are applied actually differentiates between at least two provisions that have a different scope and intend different legal consequences.[40] What criteria can be used to determine which one of these provisions is the rule and which one is the exception? Coincidences of legislative techniques must not be decisive.[41] Searching for the legislator's intention also cannot lead to any result[42]: Notwithstanding the terminology used by legislators, the legislator in the end only wishes to apply one legal consequence under certain conditions and another one under different ones.[43] Asking about which one of the provisions has the larger and which the smaller area of application with a view of differentiating the rule from the exception that must be justified on the basis on this assessment will cause the problem that general provisions abstractly circumscribe their addressees and the number of concretely affected tax payers cannot be foreseen.[44] Even if the corresponding forecasts exist, there is no reason to perform the selectivity examination only under the prerequisite that the minority has a privilege as compared to the majority. The ECJ therefore rightfully did not let this in the *Gibraltar* judgement from classifying the tax-exemption of offshore companies as selective, even though the conclusions of the Advocate General noted that the provisions suggested by Gibraltar lead to a situation where *"[...] less than 1 % of companies are actually taxed"*.[45] The question about the *"regular burden"* therefore is not sensible since the stipulation of rule and exception is, in the end, arbitrary.[46] Once a specific provision is considered the rule, however, the favouring exception deviating from it is automatically *"suspected of being State aid"*.[47] If the examination scale depends on an advance decision on which provision is the rule and which one is the exception, this does not increase rationality. Rather, concealed valuation is usually performed when specifying the rule and coated in an

[39] *See, e.g.* Pistone (2012), p. 87; critical in respect of this approach, *see* Lang (2009), pp. 25 et seq; also Lang (2010), pp. 574 et seq.
[40] *See* Lang (2009), pp. 25 et seq.
[41] *See* Sutter (2004), p. 43.
[42] Lang (2010), pp. 574 et seq.
[43] Lang (2009), p. 26.
[44] Lang (2009), p. 25.
[45] AG Jääskinen supra (note 24), para. 239.
[46] *See* for a different opinion Schön (2010), pp. 28 et seq.
[47] Lang (2010), p. 577.

appearance of rationality.[48] The ECJ therefore did well in finally not applying the principle of rule and exception for its selectivity examination.[49]

In the *Gibraltar* judgement the ECJ has noted that even its older case-law on State aid law is not entirely targeted at *"normal taxation"*.[50] The accusation of Advocate General *Jääskinen* that was already raised regarding the Commission's decision, according to which an approach not targeted at the exception from *"the generally applicable tax regime"* for applying the prohibition of State aid *"would be tantamount to triggering a methodological revolution"*[51] therefore is not justified. Advocate General *Mengozzi* already summarized the case-law until that time correctly in his conclusions in *British Aggregates v. Commission*: *"With particular reference to State measures of a fiscal nature, the case-law shows, however, that even measures which are selective, in that they differentiate between undertakings, may escape being classified as aid, if that differentiation is justified by the nature or structure of the tax regime of which they form part. It follows, according to the Court, that, in order to determine whether or not a measure is selective for the purposes of applying Article 87(1) EC, 'it is appropriate to examine whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings by comparison with others which are in a comparable legal and factual situation'"*.[52]

A selectivity examination as such comprises two parts:[53] On the one hand, it must be examined if a selective measure is present. On the other hand, it must be examined whether the selective measure is justified and proportional. The necessity of proportionality examination was emphasised by the ECJ particularly in *Paint Graphos*. In the first step mentioned, it must be inspected if specific companies are treated differently - namely better -by tax provisions than other companies. Therefore, two provisions must be compared: the beneficial and the less beneficial one, or the tax provisions and the relief from or lack of a provision. Favouring of specific companies or entire industry branches only meets the selectivity criterion if the companies treated differently under tax provisions are actually *"in a comparable factual and legal situation"*.[54]

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[48]In this vein *see* Lang (2009), p. 25; Lang (2010), p. 577; similar opinion Pöschl (2008), p. 189, with criticism on the court of administration's jurisprudence relating to the use of the principle of equality.

[49]Lang (2009), p. 29; Lang (2012), p. 419.

[50]Lang (2009), p. 28.

[51]AG *Jääskinen* supra (note 24), para. 202.

[52]AG *Megozzi*, Case C-487/06 (*British Aggregates v. Commission*), Opinion of 17 July 2008, at para. 83 reference is made to para. 56 of Case C-88/03 (*Portugal v.* Commission); *see also* Case C-143/99 (*Adria Wien Pipeline*), judgement of 8 November 2001, para. 41.

[53]Lang (2009), pp. 25 et seq.

[54]Case C-75/97 (*Belgium v. Commission (Maribel)*), judgment of 17 June 1999, para. 28; Case C-143/99 (*Adria Wien Pipeline*), judgement of 8 November 2001, para. 41; Lang (2012), p. 420.

The selectivity examination therefore turns out to be a version of equality examination.[55] For purposes of the State aid provision, it is essential whether the companies treated differently under tax provisions *"are in a comparable factual and legal situation"*.[56] Whether or not a situation is legally or factually comparable cannot be assessed in isolation but requires a benchmark. Any equality inspection is not about arbitrary, but about essential joint features and differences according to the respective context. The basis on which these essential features are determined, ie the *tertium comparationis* according to which the comparison must be made, is important.[57] The prohibition of State aid under Union law is not a general requirement of equal treatment, but a prohibition of providing for unequal treatment that may cause distortion of competition under the proviso of Article 107 et seq TFEU.[58] According to the opinion of the ECJ, all companies of a specific region, for example, are also possibly *"certain undertakings"*.[59] In the light of this, all companies that are in considerable competitive relationships according to Article 107 et seq TFEU may be considered comparable.[60]

However, this does not automate the comparability examination under State aid law.[61] Whether a competitive relationship between companies is essential for the purposes of the provisions of Article 107 et seq TFEU must be interpreted according to the intensity of the competitive relationship. In the end, this must be determined by a decision of a judge.[62] The direction of the comparability examination, however, is provided for by this. Not every case of differentiation therefore is forbidden. Companies that are not even in a potential competition with each other may be treated differently. The intensity of the competition must be examined in the scope of proportionality. In case of different tax law consequences, it does not matter whether the more beneficial provision refers to the larger or the smaller number of companies in a comparable situation.[63]

Once, a different treatment has been proven for companies in a comparable situation, this does not necessarily constitute State aid: *"However, according to settled case-law, the concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective where that differentiation arises from the nature or the overall structure of the*

[55] *See* Schön (2001), p. 111; *see* also Kube (2004), p. 244; in detail *see* Lang (2009), pp. 25 et seq; Lang (2012), pp. 577 et seq; legal comparability considerations are also discussed by Jaeger (2011), at m. no. 70.

[56] *Belgium v. Commission (Maribel)* supra (note 53), paras. 28–31; *Adria Wien Pipeline* supra (note 51), para 41; *Gibraltar* supra (note 4), para. 75 with further references.

[57] *See* Pöschl (2008), p. 155.

[58] *See* in this volume Schön, Tax Legislation and the Notion of Fiscal Aid - a Review of Five Years of European Jurisprudence.

[59] To this opinion, *see* Arhold (2006), p. 720.

[60] Lang (2012), p. 420.

[61] Lang (2009), p. 27.

[62] Lang (2009), p. 27; for different opinion *see* Schön (2010), pp. 80 et seq.

[63] Lang (2009), pp. 26, 28 et seq; Lang (2012), p. 420.

system of charges of which they are part [. . .]".[64] A measure may, according to the ECJ, be justified by the nature and the inner structure of the tax system *"if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system. In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives".*[65]

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[64] *See* Case C-88/03 (*Portugal v. Commission*), judgment of 6 September 2006, para. 52; Case C-173/73 (*Commission v. Italy*), judgment of 2 July 1974, para. 33; Case C-148/04 (*Unicredito Italiano*), judgment of 15 December 2005, para. 51; Lang (2012), p. 420.

[65] *See* Case C-88/03 (*Portugal v. Commission*), judgement of 6 September 2006, paras. 52 and 81; for a detailed analysis of the meaning of immanence of tax system *see* Mamut (2008), pp. 177 et seq.

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