State Aid, How to Distinguish It
and
Negative State Aid as a Distinct Feature

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Summary:

This paper aims to provide an overview on negative state aids. The concept of negative state aid has surfaced in some recent judgments of the ECJ. To better understand negative state aids, there is additional context through regular state aids.
First, the notion of state aid is discussed through relevant literature and case-law. The treaty provisions obviously cannot include all relevant tests, principles, exceptions, and practises applied by the courts and the Commission. Some of the most important details are overviewed in this paper.
The selectivity of aid measures is one of the hottest topics in the field of state aid regulation. Cases involving negative state aid are difficult – the concept of them is difficult too. Many undertakings nowadays pursue discrimination and violation of basic freedoms of the EU as secondary claims in state aid cases. Hence, these are touched on.
Negative state aids are measures that grant advantage to undertaking to whom the aid measure is not aimed at. In other words, the negative state aids confer selective disadvantage rather than selective advantage. There are two types of negative state aids. This research concentrates on the rarer one, the existence of which has been concluded by the ECJ once. Basically, to conclude such aid, there must be an overcompensation element and an element of hypothecation on top of regular criteria. Due to the measures' exceptionality, it must be concluded that more case-law must be created and that national courts must refer cases to the ECJ more bravely.

Key words: State Aids, Negative State Aids, Reference Framework, Selective Disadvantage, Laboratories Boiron, Ferring

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Abbreviations

AB	Aktiebolag (Swedish for Limited Liability Company)
AG	Advocate General
Art	Article
CJEC	Court of Justice of the European Communities
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECJ	(European) Court of Justice
ECSC	Treaty establishing the European Coal and Steel Community
EStAL	European State Aid Law Quarterly
EU	European Union
GC	General Court
HFD	Högsta Förvaltningsdomstolet (Swedish Supreme Administrative Court)
para	paragraph
SGEI	Services of General Economic Interest
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VAT	Value Added Tax

1. Introduction

1.1. Aim of the Research and Origins of the Subject

Innovation for this research paper was found in a court case in Sweden a Finnish state-owned power company Fortum Sverige AB (later referred to as Fortum) was pursuing. In the case Fortum argued the Swedish government was indirectly supporting Fortum's competitors through unusually high property taxes (2,8 %) on hydropower plants compared to the general tax (0,5 %) applied to other forms of production. The Administrative court ruled, that the measure constituted negative state aid to Fortum's competitors and ordered the tax be returned. The Administrative Court of Appeal annulled the decision and ruled that the case was indeed negative state aid to Fortum's competitors, but it could not be remedied by returning the tax.[1]. Furthermore, the Stockholm Administrative Court concluded that the interpretation question at hand was similar enough to previous case-law, that it had no duty to submit the case to the ECJ for preliminary ruling.[2] The Supreme Administrative Court in Sweden did not grant leave to appeal.[3]

Negative state aid has not been researched extensively. This research is aimed to compile the most relevant rules for distinguishing negative state aids and further analyse such aids. There is therefore no actual research question per se as the research is more a compilation. Should one be needed, it could be formulated as what conditions must be filled that a state action could be concluded to constitute negative state aid.

The case previously mentioned is lightly carried and referred to throughout this research[4], as it is the reason this piece of research was conducted. Moreover, the case may provide a new angle on an already complex topic, as it concerns an exception to a rule on negative state aids. The case is in a way problematic, and it is not therefore discussed in depth. The case particularly suffers from not having been submitted to the ECJ.[5]

The aim of this research was to tackle only negative state aid as per TFEU art 107 (1). As the subject would have been relatively narrow, the scope of the research was broadened to include state aid on a more general level. Hence, the aim is to firstly analyse the origins and aims of the

[1] Kamarrätten I Stockholm, case 3157-3160-20 and 5354-17. The court of appeal therefore amended lower court's decision.
[2] The court ruled that the case-law on negative state aid is clear enough that it has no duty to refer the case to the CJEU, hence the court considered the interpretation be clear enough to considered acte éclair.
[3] HFD 4210-4216-21
[4] The case is referred to as *Fortum* case
[5] The enforcement of EU law is a separate and interesting nuance of the case on hand. This is however a subject for another research.

state aid regulation and secondly to research and analyse negative state aid partially using the overview and research previously accomplished.

It is worthwhile to bear in mind that this research has one core aim which will not be discussed in length; This research is master's thesis and can be viewed as a success of sorts once it passes review. Hence this research aims to first and foremost fulfil the standard for academic research in Finland.

The language of this research will be English for one main reason; It is expected that majority of source material will be in the language at question. Researching and writing in the same language eliminates the need to translate text, therefore limiting the risk of errors in translation.

1.2. Methodology

This research has its roots negative state aid. Therefore, the specifics concern it, and this research aims at covering it first of all. Nevertheless, only focusing on negative state aid yields sub-par results for an academic paper, which is why state aid in broader terms is included in this research. As per usual recommendation in Finland the research employs *legal doctrine*.

However, the doctrine of legal history, and even legal comparison will be in use in a supportive role. The decision to approach using said methods aims to paint a clearer picture on the core research. The common rule of thumb "To understand present, one must know history" holds true. Only knowing history and background of state aid, can the present regulation be examined. This on the other hand may, perhaps, enable to peek into the future.

1.3. Limits to the Research Objective

This research focuses on negative state aid. State aid in more general terms is however discussed and researched also to provide sufficient context to negative state aid. This is of course necessary as the negative state aids are a form of state aids. Therefore, the same general rules and same primary legislation apply.

As state aid regulation plays a significant role in the research, relevant regulation is cogitated back and forth. Yet, whenever possible, it is this research's aim to reduce unnecessary clutter and therefore the regulation in the sights of this research is limited to TFEU 107 (1). Other relevant regulation, such as the same articles (2) and (3) and articles 108 and 109, are left with lesser attention, as these mainly concern what kind of aid either is or could be compatible with internal market and how a permission for an aid measure could be acquired from the

Commission. Further the other articles are more aimed at possible measures for remedies. This research concentrates more on the classification as state aid.[6]

1.4. About the Sources

The research is in bulk a summary of previous court cases and established case-law. The sources selected as a backbone reflect that as they provide a detailed overview of the relevant case-law and draw logical questions out of it. A more general and non-legal[7] source is referred to when it serves its purpose. As source critique is essential to a successful research, emphasis on its objective has been entertained carefully.

As this paper contains minority sections where history and even politics are examined and discussed the successful selection of sources is to be underlined. If referring to a biased or potentially unreliable or suspicious sources, the inclusion of such is reasoned in the footnotes. It is recommended to bear this in mind when reading sections which are not strictly legal in their nature.

2. State Aid

2.1. About State Aid

2.1.1. History

State aids and EU[8] has a way of history. Support measures that can be viewed as state aid have existed and still exist in the EU even though state aid in general has been prohibited or at least heavily regulated. In the 20th century's end aligning national state aid with the EU's system proved challenging.[9] In the early 21st century some new members failed to implement effective measures, or the bodies implemented have not been effective against state aid measures. Some, especially eastern, states have had to transition from a centrally planned economy to a market economy, the first of which heavily leans on state aids. This considerable leap has not been easy.[10]

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[6] This research does not make even an attempt to discuss possible remedies to state aids not to mention negative state aids. This limit was set to provide further focus on the issue at hand and to enable sufficient level of research for the core research. I will state here that there are two main ways to remedy a negative state aid: To remove advantage from beneficiaries, that is to say make them pay up, or refund the suffered party. Therefore, this is a question for another research paper.

[7] The source is not necessarily legal source per se, but usage of a non-legal source aims to support a legal point in general setting or in a narrower setting.

[8] And its predecessors.

[9] See Hancher and Lo̜pez 2021, p. 2–3, where the time period up to 1991 is colourfully described as "the dark ages" and maturity of sorts in state aid regulation has been reached just after 2005.

[10] Hölscher, Nulsch and Stephan 2017, p. 799–783

The regulatory framework on state aids has evolved with the EU and its growth. It is only logical to implement changes and improvements to the regulation and bodies to enforce the regulation as the block grows and needs a better functioning system for enforcing state aid regulations. This was established through so-called Lisbon Strategy.[11] The current regulation is crystalised in TFEU Article 107[12], although there is a plethora of other rules, institutional and soft-law sources through which a comprehensive and carefully crafted framework has been created. The ideological basis for the regulation however has its roots EC regulations from year 1978, which are in effect even today.[13]

When considering the history of this research's core objective, negative state aids, it is difficult to pin down any exact path it would have followed. State aid in its broad meaning has some history as previously presented, but its subcategory has much narrower history, as negative state aid is by its nature an exception to a rule[14]. That is not to say there is no history; The history has just been developing alongside with other state aid rules and rulings. There are existing court cases, as presented in this research's fifth chapter.[15]

It could however be argued that one would not be wrong in stating that history of state aid is recent. In a press release from 2003[16] it is brought into attention that a Belgian system of Co-ordination Centre regime was not considered to constitute state aid in the 1980's but upon closer inspection in the 1990's and 2000's the same regime was considered (along with a similar Dutch and Irish regimes) state aid.[17]

2.1.2. Division of State Aids

State aids can be divided many ways. One way is to divide the aids into *crisis aids* and *non-crisis aids* and their respective subcategories.[18] The research on hand focuses heavily into non-

[11] Hölscher, Nulsch and Stephan 2017, p. 783–785
[12] See Parcu, Monti and Botta 2020, p. 54
[13] Dodescu 2014, p. 68–69 and Hancher and Lo̲pez 2021, p. 1
[14] Or even an exception to said exception.
[15] This is in part a result of the history of the EU itself. The Union has obtained more and more power over the decades and has had surprisingly little powers before its current form. Furthermore, the EU law evolves through case-law. Therefore, rarer cases, like negative state aid cases, take more time to evolve. The recent nature of state aid law is evident when paying attention to the case numbers referred to in this research. Only rarely is a case referred older than thirty years.
[16] European Commission, IP/03/242
[17] In order to avoid confusion, it should be stated that in the headline is worded such that one could easily mistake the decisions to concern negative state aids (Final *negative State aid* decisions on…), but the regimes do not necessarily constitute negative state aid in the same meaning as the term is used in this research. The regimes mentioned here all constituted a direct aid of sorts through tax reliefs, not for example through elevated tax level directed at only some regimes or undertakings.
[18] Dodescu 2014, p. 70

crisis aids, as the ultimate objective is to analyse negative state aid, which are typically non-crisis aid.

Another way to divide state aids into existing aids[19] and new aids[20] as per in Art. 1 of Council Regulation 2015/1589. Unlawful aid refers to aid that has been put into effect without appropriate approval or submission to the Commission as regulated in TFEU art 108 (2).[21] A logical counterpart to unlawful aid is lawful aid, which must be established following the process regulated in TFEU art 108.

Further, state aids can be divided or more accurately labelled by the way the aid is implemented; Aid can be provided as a direct grant or investment[22], as a loan with better terms than those available on the market[23], as a tax advantage or disadvantage[24], or any other distortive measure[25], to name a few possible methods. Art 107 does not label state aid as any given measure but rather as 'any aid granted by a Member State or through State resources in any form whatsoever…'. This is why labelling state aid by its implementation is somewhat pointless, even if it can be useful for understanding the practical nature of the regulation.

Lastly state aids can of course be divided into regular and negative state aid. The said division will be discussed in further detail under the fifth chapter. It is noteworthy that the negative state aids can again be sub-divided. Further, the ways presented here are examples and do not present all of the possible ways to divide state aids.

2.1.3. Aim of Regulation and Ratio Behind General Prohibition

The EU of today inherits its roots from the 1950's when European Economic Community was established with the 1957 Rome Treaty. The community's aim was to create a customs union, deepen co-operation and ultimately create a common market.[26] The common market or the internal market is to this day one of the core elements of the EU.[27] The TFEU as a continuation

[19] Art 1(b)
[20] Art 1(c) All aids that ate not existing aids are new aids, including alterations to existing aids.
[21] Art 1(f). Classification as unlawful aid does not per se mean that the aid is illegal or incompatible. The aid could be very much allowable and well-reasoned but founded in a faulty or incomplete process. Mere lack of submission to the Commission will however cause classification as such. See Alkio and Hyvärinen 2016, p. 503
[22] For example, in the case C-39/94 SFEI, the free postal service to certain undertakings constitutes a direct grant.
[23] This situation can be reached two ways. First the state can guarantee a loan and the loaner therefore receives better conditions or lower interest rate. The second way is that the state directly grant a loan when a private undertaking perhaps would not have.
[24] See for example case C-526/04 Laboratories Boiron.
[25] Like through discriminatory transfer pricing practices. In the case the C-518/13 Eventech it was pursued that the legality to drive on bus lanes constitutes state aid, where one operator could drive there and the other could not. The case ultimately failed but this highlights that the world of state aids has little to no limits.
[26] Piris 2010, p. 7
[27] The internal market and function of thereof is a core value driving free movement of goods (Title II of TFEU) and persons, services, and capital (Title IV of TFEU).

to a failed European constitution has been crafted to strengthen EU's values.[28] Some of these values shed light on the ratio of general prohibition of state aids; Some of the core values are non-discrimination, justice, equality and rule of law.[29]

The core values reflect on and should be taken into account when evaluating EU's core aims, which are laid out in TFEU art 3.[30] Especially art 3(b) is of importance, as it lays out "the establishing of the competition rules necessary for the functioning of the internal market" as one of EU's aims.[31] So, an equal and indiscriminatory market where no undertaking receives unfair advantage is fairly logical starting point for creation of such market, hence out ruling state aids in general.

On a more state-aid-specific level the goal of state aid regulation is to guarantee a functional market, which is mandatory for market economy.[32] This again is traditionally thought to be the most efficient and functional economic system.[33] The general ban on state aids is also resting on the idea of a level playing field – not only between member states but also between undertakings – to create and sustain healthy competition.[34] Furthermore, state aid which interferes with market economy and its competitive creativeness, is not free and is ultimately covered by the taxpayer. This prompts to consider state aids alternative costs and other possible uses for funds used to give state aid.[35]

Of course, not all aid should be banned straightaway. This is reflected in the legal framework. When correct steps are taken state aid can be allowable and encouraged, as state intervention

[28] Piris 2010, p. 71
[29] Art 2 TEU. The values are scrambled as presented here. It is noteworthy that the abovementioned values are namely aimed at individuals and general values and are perhaps not directly applicable in a vertical relation. However, the values presented still describe the core values of EU and should not be bypassed when considering the thought behind rules codified in the TFEU (Art 107).
[30] Piris 2010, p. 72
[31] For example, most of EU's decisions on tax, which is outside EU's mandate, relate always to functioning of EU's internal market. This again create connection to EU law. Douma and Engelen 2008, p 228–229 See also cited authors.
[32] State aid action plan para 6, See also: Presidency Conclusions of Lisbon European Council 23 and 24 March 2000 (Lisbon Strategy) – The European Council held an special meeting, which conceived Lisbon Strategy. Part of said strategy is to transition the European economy and to structurally enhance and redirect competitiveness. Development of state aid rules is included in the strategy as a part of framework for functional market economy.
[33] Market economy is such an integral part of the EU's, and other western nations', policy and philosophy that it is here taken for granted. Other economic systems do exist, but this research will not consider them as they are not compatible with the EU.
[34] It is noteworthy that state aid can and should be used to support EU's goals. This is possible when the funds are used efficiently and directed correctly. The EU has laid some guidelines in its Lisbon Strategy but also in its 2020 growth strategy. (Europe 2020) The implementation and aims of state aid are further planned within the EU. Most notably the objectives of State Aid modernisation are threefold: "(i) to foster sustainable, smart and inclusive growth in a competitive internal market; (ii) to focus Commission ex ante scrutiny on cases with the biggest impact on internal market whilst strengthening the Member States cooperation in State aid enforcement; (iii) to streamline the rules and provide for faster decisions." SAM para 8
[35] State aid action plan, paras 7 and 8

can sometimes be helpful or even mandatory, say in the form of crisis aid. Still, the aid must not be discriminatory. Maintaining the level playing field between EU states should be prioritised.[36] Like with many other principles and pieces of legislation a healthy balance ought to be struck.

In short, the EU's state aid policy is two-fold. First and foremost, it is a tool to ensure a level playing field. Not one undertaking is neither favoured nor, importantly for this research, discriminated. There must be a level playing field not only between undertakings but also between member states. Secondly state aid policy is a tool for directing state resources in an efficient manner. Where aid is justified, it shall be implemented in an efficient manner.

2.2. Definition and Legal Framework

The framework examined here is exclusively legal framework of the EU. This should not however be taken as granted, as EU is a one-of-a-kind legal complex. EU depends solely on the agreements between its member nations and has jurisdiction only on areas assigned to it alone or jointly with member states.[37] The EU has a monopoly on establishing competition rules necessary for the functioning of the internal market.[38] Interpretation on what exactly belongs to the EU under principle of conferral can sometimes be foggy.[39] However, rules on state aid are of utmost importance to reach the goal mentioned above. Therefore, EU must have exclusive jurisdiction on state aid policy, which is why this research approaches the subject form EU law point of view.

In this research the relevant treaty provisions where criterion for state aid is set is referred to as TFEU art 107 and 108 respectively. It is important to note that this has not been the relevant treaty provision for too long. Not too long ago the art 107 was known as TEC 87 and art 108 TEC 88. For simplicity's sake they (and provisions before TEC) are bundled as TFEU provisions, as their contents are very similar and nearly identical. Moreover, the CJEU has built the settled case-law on the similarity of the provisions.

To better grasp the subject on hand, it is valuable to understand what exactly is meant with state aid. The term is defined in TFEU Art 107 (1) and is as follows:

> 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

[36] Bénassy-Quéré and di Mauro 2020, p. 71, 74
[37] TEU art 5
[38] TFEU art 3 (1b)
[39] J. Raitio 2016, p. 215–217

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.

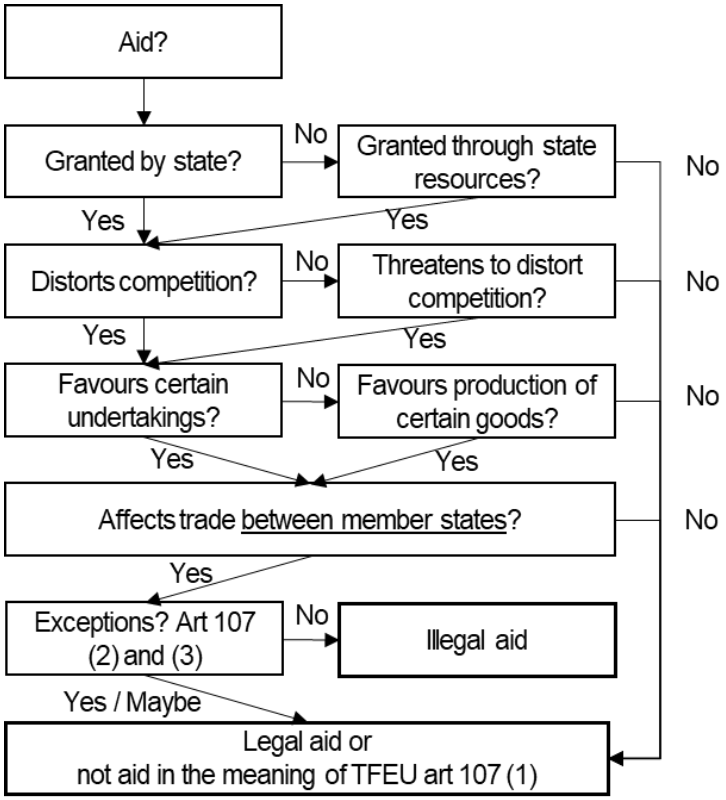

Figure 1 How the TFEU art 107 (1) seems to be interpreted at first glance. The figure lays out a general idea, but each part of this chart has internal issues and an overabundance of details who must be considered before answering the question asked.

According to settled case-law these four elements must be all met simultaneously for a measure to be considered state aid meant with the article in question.[40] There is also settled case-law on the fact that is irrelevant which form the measure takes. A measure which simultaneously fulfils said conditions is state aid in the meaning of TFEU art 107 (1).[41]

The article in question is part of Treaty on Functioning of European Union and enjoys therefore strong position as a part of primary legislation. The article is not legislated through EU institutions but rather through international treaties with which the entire union exists. A somewhat accurate comparison would be a constitution.[42] Therefore, it could be argued that TFEU art 107 and prohibition of state aids enjoy a kind of a constitutional position and protection. As mentioned, state aid belongs to EU's exclusive competence. However, enforcement has over time

[40] See case C-280/00 Altmark, para 74 and case-law cited. For further examples of case-law on the matter refer to, for example C-140/09 Fallimento Traghetti del Mediterraneo, para 31
[41] 2016 Notice, paras 66–67
[42] Äimä states that EU law is autonomic in relation to national law. This has been confirmed by the ECJ in its early judicature. Case 26/62 Van Gen den Loos and 6/64 Costa v Ennel Äimä 2011, p. 53

evolved into a more complex system, where EU courts, national courts and nations have roles too.[43]

On top of hard law sources there are soft law sources, to aid in interpretation of hard law sources and to at least attempt to create regulation. There are many ways to define what is soft law, but one of the most common definitions can be summarised as a source, which has no legal binding force, but in real terms has practical or legal effects.[44] Perhaps the most fundamental soft law source is the legal principles[45] that are stable and commonly used by ECJ. The most fundamental source is considered to be legal principles stemming from the primary legislation.

Another level of soft law can be seen in an online tool[46] which is used to collect opinions from the public concerning amongst other things, state aids. During Covid-19 pandemic and Crisis in Ukraine, use of soft law as a tool for making ad-hoc regulation spiked, as regulation or instructions for its interpretation were needed quickly.[47] Most relevant "official" soft law sources in the frame of this research include Commission Notice on the notion of State aid[48] and to some extent its 1998 predecessor[49].

State aid may even recommend at times, which has been taken into account with the legal framework. TFEU art 107 (2) includes narrow definition for aids, which are compatible with the internal market by definition. Characteristics for aids that can be considered compatible with internal market are laid down in TFEU art 107 (3). When an aid that can be allowable is considered, there is a pre-control system, where the Commission must be informed about intentions to implement an aid measure and they shall permit or prohibit intended aid.[50]

Finally, it is important to note that legal framework consists of a web of regulation of different kinds. The articles mentioned here are in the most significant role but are not the sole regulation relevant to this research. Legal principles, such as principles on equality and its implementation are important, as negative state aids nearly always have connection to inequal conduct. After

[43] Hancher and Lo̓pez 2021, p. 252–254, see also C-284/12 Deutsche Lufthansa, paras 27–28. The case-law underlines the Commissions exclusive right to assess aid measure's compatibility and the liability of national courts to guard obedience of prohibition of state aids.
[44] Stefan, Avbelj, et al. 2019, p. 9–10
[45] According to Zalasinski fundamental legal principles give guidance in a conflict situation of how to solve an issue. The principles support courts in their decision making, but don't have the same enforcement as primary law. Brokelind 2014, p. 305
[46] https://competition-policy.ec.europa.eu/public-consultations_en Though it is maybe farfetched to consider this a proper soft law source, but it could be argued. The source does undeniably have some weight.
[47] Stefan 2022
[48] 2016 Notice
[49] 1998 Notice
[50] TFEU art 108. See also case T-626/20 Landwärme, para 125, which refers to Commission's obligation to investigate the circumstances.

all negative state aid comes into question, if one (or more) undertaking is set to worse conditions than its competitors through measure in question and the measure fills the state aid criterion in TFEU art 107. This question is discussed in further detail in the fifth chapter.

It is noteworthy, however that the regulation is in constant change[51], and it is and should be developed continuously. Perhaps the very best crystallisation of the modernisation of state aid regulations is the following: "(i) to foster sustainable, smart and inclusive growth in a competitive internal market; (ii) to focus Commission *ex ante* scrutiny on cases with the biggest impact on internal market whilst strengthening the Member States cooperation in State aid enforcement; (iii) to streamline the rules and provide for faster decisions."[52] Though the quote is some ten years old, it is still relevant in a sense, as regulation develops always slower than the free market it aims to create and foster.

3. Core Points of State Aid Regulation

3.1. How to Distinguish Between Aid Measures and Measures Not Constituting Aid?

Although there is a fairly straight-forward advance control system in place for state aids, there is much case-law. This stems from the fact that most often the case-law is about a case where it is unclear whether an action constitutes a state aid measure or not. Often a state has overlooked the regulation, not considering that an action could constitute state aid. Hence the unclear situation ends up in the Court of Justice of the European Union to be interpreted.[53]

There are three kinds of decisions of court and lower instances can give. Firstly, the measure under inspection may not be aid at all, if it does not tick all the boxes set out in TFEU art 107 (1). Secondly, if the measure is indeed aid, it can be, or could be, allowed or legal aid. Thirdly, the measure could be aid and not compatible with the internal market at all. For the purposes of this research and limitations set out previously, second and third options are viewed as one and this research for the most part ignores the advance control system.

As previously stated, it is important to know the basics to comprehend the finer details. That is why one must answer question: "What is state aid?", as the answer is not always quite so unambiguous. On the surface, the answer seems clear, as aid could be perceived as a subsidy to

[51] This is due to new phenomena in the market and the world at large. The new phenomena forces the CJEU to produce new case-law. As with any legal system, the regulation itself is also in constant change, in the member states and in the EU too.
[52] SAM, para 8
[53] Undertakings can lodge a complaint about a state measure through Commission. States rarely consider their measures as state aid. This is one way to end up in the ECJ to process the state aid nature of a measure.

an undertaking, paid by a state or its entity. And here one hits the first stumbling block: the term "aid", as the term is occasionally confused with term "subsidy".

Finally, an interesting, partially philosophical, question arises when defining what counts as one continuous aid measure and what constitutes several measures. In legal practise it has been ruled that several interlinked measures may constitute as one state aid measure.[54] For this research the question is mostly philosophical though a nice-to-know detail. Single measures should be investigated separately, unless they constitute a scheme.

3.2. Treaty on Functioning of the European Union, Article 107 (1)

For a measure to constitute state aid in the sense of TFEU art 107 (1), several conditions are to be met. The conditions as follows are broken into pieces and each piece is inspected with due care through relevant case-law and other legal sources. It must be borne in mind that for a measure to constitute state aid all the criterions in TFEU art 107 (1)[55] must be simultaneously met for the measure to constitute state aid. Said aid can be allowable, if correct procedure is followed and the procedure results in affirmative decision.

The characteristics of state aid are commonly split into four blocks.[56] Some sources divide the criterion set out in TFEU art 107 (1) even further.[57] This research follows the thought of the four blocks on the level of headlines, but the individual blocks are split further under each headline. Unfortunately, as the article referred is very intertwined and individual words are surprisingly significant, headlines do not and cannot match their subject matter word-for-word.[58]

It is important to note that it is impossible to establish an unambiguous split as the words of the article could each be interpreted separately to a respectable depth but that would ignore the system established with the combination of the supposedly separately interpreted words. Glossing too generally over the article however results in an overly simplified picture. The division here goes into detail but attempts to maintain the bigger picture as well. This problematic nature

[54] See for example C-486/15 P France Téleécom, para 47 and joined cases C-399/10 P and C-401/10 P Bouygues Télécom, paras 103–104

[55] It is noteworthy that the exact wording of the article referred does not convey all the criteria stemming from case-law.

[56] See for example Willis 2013, p. 172 and Quigley 2015, p. 53 It is noteworthy that the CJEU follows the school of thought that the criterion is splitable four ways. See C-280/00 Altmark, para 75.

[57] There is no clear split between the elements of aid and some elements presented in the sources are overlapping. See for example Hancher, Ottervanger and Slot 2021 Chapter 3 and Hofmann and Micheau 2016 Part II.

[58] This is not to say that either the four-way split or the split in this research is the correct way, should one start an argument over the "correct" way. Comme ci comme ca the question is of theoretical difference. This research is aimed at clarity and therefore the split id taken further in places.

is shown well by the fact that CJEU is yet to present a comprehensive and consistent interpretation of the article and its conditions in its decisions.[59]

Further and more detailed chapter division is needed as the problematics of TFEU art 107 (1) (and its predecessors) root to single words and their meanings. At places a counterintuitive way of interpretation has been established through relevant case-law. This piece of research is no comprehensive guide on state aids – far from it, as only collecting such a guide on application of TFEU art 107 (1) and relevant case-law and articles conjoined to it would overshoot the scope of any Masters' thesis. Finally, the relevant details for this piece of research are weighed and irrelevant details are either only touched on or left out altogether.

3.2.1. "Aid -- in Any Form Whatsoever"

General

The CJEU has established with case-law the term aid, in the meaning of TFEU is wider than that of a subsidy.[60] The distinction is of essence to this research, as the term subsidy refers to a somewhat straight forward transfer of funds or other positive payments in kind whereas aid has a broader meaning, covering for example tax reliefs, certain transfer pricing practises[61] and advance tax rulings[62] to name a few examples.

Settled case-law derived from CJEC case 30/59 reveals that defining state aid with the dictionary meaning of aid, would lead one to faulty conclusions. Aid is to be interpreted more broadly, as previously stated, including measures, which "mitigate the charges which are normally included in the budget of an undertaking and – – are similar in character and have the same effect [as aids]"[63]. These aids of negative character are discussed in more detail later in this chapter. For now, it is enough to establish this cornerstone of a case and the rule of law embedded in it.

It should be noted that the cited case-law has sightly deteriorated with time, since it dates to the times of European Steel and Coal Community, whose treaty of establishment did not include as detailed definition of aid as TFEU does. Hence, even though the case-law cited established a cornerstone for state aid's definition[64] it must be interpreted with due respect regarding the case's age.

[59] Bacon 2013, p. 20
[60] See for example C-53/00 Ferring, para 15 and case-law cited.
[61] See for example joined cases C-182/03 and C-217/03 Forum 187
[62] See for example E. Raitio 2020
[63] C-143/99 Adria-Wien Pipeline, para 38 and cited case-law
[64] See case 30/59, De Gezamenlijke Steenkolenmijnen

Not only the above-mentioned distinction between subsidy and aid is important but even more significant is if a measure is considered aid in the light of TFEU art 107 (1). The definition leaves certainly room for interpretation. The distinction of aid grows more important when negative state aids are concerned. Suttle details are therefore important when considering whether a measure is aid or not. A paradox is on hand as the term aid is researched; to determine aid one must invent rules. Rules such as those in TFEU art 107 (1).

The definition established in TFEU art 107 (1) is high level and open to interpretation within its legal framework. The legal framework, case-law and soft law surrounding the article does bring more clarity to the table. The definition is "to be interpreted on the basis of objective factors, without any room for discretion".[65] The term which is open for interpretation is aid; the way in which the aid is achieved is not significant – it is significant that advantage which is not available in day-to-day business endeavours for all undertakings, exists. The means are not significant but the effects.

The TFEU art 107 (1) refers to undertaking as a criterion for aid. The recipient or beneficiary of a measure must be an undertaking. In competition law the concept covers entities engaged in economic activity. The case is similar in state aid cases, so long economic activity is partaken in. The juridical form of the entity is indecisive as private persons as professionals[66], non-profits offering services in the market, public companies[67] or a blend of the aforementioned can count as undertakings. Employees are excluded from the concept of undertaking even though benefits granted to them may lead to conclusion of indirect aid, where their employer (an undertaking) is the final recipient of aid.[68]

Advantage

For successful satisfaction of criterion set out in the article, there must be aid in the sense of economic advantage.[69] Bacon draws their conclusions from case-law, such as *Altmark*[70]. In the case cited, aid is determined as measure that confers economic advantage an undertaking would

[65] Bacon 2013, p.21
[66] This is evident in the case C-172/03 Heiser, as even very small amount of aid conferred to private practitioner constituted aid. This holds true even though the amount is smaller than that meant in the de minis regulation.
[67] even in fields such as education, science, healthcare, public transport etc.
[68] Bacon 2013, p. 25–29
[69] Bacon 2013, p. 20
[70] C-280/00 Altmark

not have obtained in normal market conditions.[71] The availability of the measure on hand on free market therefore plays a big role.[72]

The CJEU has cemented in its case-law, that an economic advantage must exist for a state aid to exist.[73] Or rather economic advantage (along with other criterion) may lead to conclusion of state aid. For example, Bacon has concluded that there must be economic advantage in order to there exist state aid.[74] I disagree. The case-law cited by Bacon and other scholars alike, do not specifically call for *economic* advantage. The term aid should, in my view, be interpreted more broadly.

Any advantage should be sufficient to constitute state aid, such as creating additional costs for some undertakings in a selective manner.[75] However this interpretation exquisitely collides with other criterion of the article, say the criterion of the funds originating from the state resources.[76] It is important to note that a competitive advantage which can be regarded as aid have almost always economic characteristics, hence the conclusion by Hancher is justifiable.

It is shown in the legal practise that no practical arguments or other such "sounds of reason" justify not applying the state aid provisions. This is shown for example in an unpublished decision concerning Greece. In the case the state argued that special circumstances[77] should be considered in the matter. In the headline the case concerns "Aid to remedy a serious disturbance in the economy of a Member State". The appeal to consider the measure such that TFEU art 107 would not apply was rejected first by the GC and then the ECJ.[78]

The aid, most often purely economic in its nature, can be granted directly or indirectly. It is noteworthy that for a measure to constitute state aid, the measure must benefit an undertaking.[79] The way an undertaking benefits from the aid resolves the nature of the aid. It is not significant

[71] ibid, paras 83–84; joined cases C-34/01 to C-38/01 Enirisorse, para 30; C-206/06, Essent Netwerk Noord, para 79
[72] The advantage criterion is a difficult criterion. The advantage in *Fortum* case discussed in the introduction is easier to handle as disadvantage. This too is an advantage of sorts if viewed from a different angle.
[73] C-342/96 Spain v Commission, para 41
[74] Bacon 2013, p. 20
[75] See for example C-486/15 P, France Télécom. In the case several declarations of state over time constituted state aid. No actual transfer of funds was made. This resulted in enhanced credit rating which then resulted in more favourable financing and therefore financial advantage. The *direct* aid from the state constitutes at best *competitive* advantage. Compare with Hancher, Ottervanger and Slot 2021, p. 46 The mentioned creation of costs is economic advantage, but only indirectly. Indirectly it is also competitive advantage, as the aided undertaking enjoys a better position in the market as a result.
[76] Though, as discussed below, this criterion has been satisfied somewhat easily and, in some cases, no factual transfer of resources is required.
[77] The serious disturbance in the economy ought to be obvious given the timeframe of the decision (2010's). Hence the case is referred to, disregarding its unpublished nature and limited availability in languages.
[78] Cases T-150/12 and C-296/14 P, Greece v Commission
[79] Or production of certain goods. See for example Bacon 2013, p. 25 for the requirement of undertaking as beneficiary.

whether the aid is granted directly or indirectly as the measure is aid nonetheless – the division does however ease comprehension of types of aid.

Direct Aids

Direct aid is relatively straight forward as a concept. Aid is granted directly to an undertaking who in turn receives an unfair advantage – a state aid or even a subsidy. The direct advantage again can be positive or negative, a relief from a general measure or levy or the direct aid can be a levy or obligation set on only some undertakings in the market. That is so long the measure is selective.

Direct aids can take many different forms: Clear-cut state aid is in question when state subsidises an applicable undertaking with no intention of collecting the subsidy back. When the subsidy takes form of investment, the state aid nature is no longer obvious.[80] The water gets even muddier as the subsidy is expected to be paid back in full, with interest, when a loan is under investigation.

Loans granted through state resources can constitute aid, if the conditions, or interest of a loan are such that are not available in capital market.[81] On the flipside of the coin, a loan, whose conditions, and payment terms can be harsher than those available in the market, can constitute state aid if the capital of the loan is so great that it is not available in the market.[82]

Direct aids through legislative measures are also possible. A desirable goal, reduction of emissions, can turn sour if the goal is pursued wrongly. Netherlands for example created an emission market for NO_x emissions and made emission rights tradeable, therefore creating a market for the rights.[83] As the rights were granted cost-free, the undertakings not needing the full amount, benefited from the system on the behalf of undertakings needing said surplus, hence creating advantage to undertakings not needing the full amount granted.[84]

Not all cases of legislative measures, which are prima facie distortive or discriminatory are aid. In the *Eventech* case the ECJ found no state aid in the meaning of TFEU art 107 (1). In the case, it was investigated whether the fact that the iconic black taxis in London could use bus lanes

[80] For further details see about private investor test later in this chapter.
[81] See for example C-148/19 P, BTB Holdings, paras 15–16
[82] Hancher, Ottervanger and Slot 2021, p. 53 See for example the Commission decisions on aid granted to Lufthansa and Uniper. The decisions set out precise conditions on how the aid may be granted and what are the limitations for the loan and its interests in context with the aid in question. (State Aid SA.56714 and SA.103791)
[83] T-233/04 Netherlands v Commission, para 70
[84] Ibid para 74

and regular, compared internationally, taxis, had no such right[85]. It is obvious that the black cabs enjoy an advantage. However, it is of utmost importance to note that the black cabs have burdens the so-called regular taxis need not consider. All things considered the court concluded that no state aid in the sense of TFEU art 107 (1) exists.[86]

Some, not necessarily even prima facie discriminatory cases have been tested with the ECJ. In the *Viscindo* case the claim of economic advantage was grounded on the fact that the Italian post office could, contrary to general provisions in the law, harness fixed-term employment contracts. The ECJ concluded that there was neither direct nor indirect advantage granted to undertaking(s).[87] That is not to say that the case is irrelevant.

The difference compared to another case, *Sloman Neptun*, is not huge. In the case the court had to decide if different minimum standards of pay, and social protection applied to nationals of non-member states constitutes state aid. The national court concluded that the measure in question is indeed state aid. The ECJ disagreed and found that there is no advantage and therefore no state aid exists.[88]

Public declarations can constitute state aid in the meaning of TFEU art 107. In the relevant case here, *France Télécom*, the French state publicly claimed that they would step in should the credibility of the undertaking in question be under threat. A trusted actor providing credit ratings caught onto the claim and kept the credit rating higher compared with a scenario where the state would not have acted. The ECJ, after considerable back and forth, concluded that there was advantage and under the conditions on hand the advantage constituted state aid in the meaning of TFEU art 107.[89]

Indirect Aids

In broad terms aid must be granted to an undertaking for the measure to be aid in the meaning of the article.[90] In the case of direct aids this criterion is relatively simple and uncontested. When the measure under investigation involves indirect aid, the criterion becomes a question worth further investigation. The measure constituting the aid may be directed and granted to individuals who are not undertakings in the meaning of the TFEU art 107 (1). The measure may

[85] The "normal" taxis could pick up and drop off customers with booked rides. Other uses for bus lanes is prohibited.
[86] C-518/13 Eventech, para 61
[87] Joined cases C-52/97, C-53/97 and C-54/97 Viscido. Especially para 14, where the court states that no state resources had been transferred, therefore no aid exists.
[88] Joined cases C-72/91 and C-73/91 Sloman Neptun, especially paras 14, 21, 22, and 29
[89] C-486/15 P France Télécom
[90] Bacon 2013, p. 24

still constitute state aid as the measure may indirectly grant such advantage to undertakings that a state aid may be in question.[91]

The ECJ has ruled on indirect aids in cases such as *Mediaset*[92] and *Sardinian Airports*[93]. In *Mediaset* aid was granted to consumers for them to obtain digital decoders for television viewing as the national law called for transition to digital transmission from all terrestrial broadcasters – not the satellite broadcasters. The question in the case was if aid granted to consumers[94] constituted indirect aid to the broadcasters which it does.

In the *Sardinian Airports* case the court concluded that subsidies paid to airports did not, in the light of the cases other facts, constitute state aid directly. As the usage of the subsidy was heavily regulated, the measure did constitute state aid to the airlines operating in the airports.[95] The aid enjoyed by the airports was viewed as benefit, they would have enjoyed anyways when traffic at the airport increased, as demand for services and goods available in airports and their vicinity increases.[96]

It is important to bear in mind that the aid can be both direct and indirect at the same time.[97] In the 2016 Notice the Commission does not name examples of cases where such aid would have been granted. According to Bacon these conditions have in fact come true and an aid measure has been considered direct and indirect aid at the same time.[98] If the direct recipient of a subsidy is a mere vehicle, a façade of sorts, to grant the aid to a third actor, there is no aid conferred to the façade but only the indirect beneficiary.[99] Therefore, if the direct recipient cuts a part of the aid granted, both are considered recipients of the aid.[100]

This piece of research does not aim to be a conclusive guide on types of aid. Hence the division between indirect and especially direct aids discussed above ought to be viewed as a list of a few examples. It is not possible to gather a comprehensive list of types of aid measures nor is it practical or meaningful. It is worthwhile to know the difference between these even if distinction between them may be challenging especially when considering negative state aids.

[91] Hancher, Ottervanger and Slot 2021, p. 55–56
[92] C-403/10 P Mediaset
[93] Joined cases C-331/20 P and C-343/20 P Sardinian Airports, The case is widely known as Sardinian Airports.
[94] In this context consumer cannot be viewed as an undertaking and hence there is no direct aid in the meaning of the article.
[95] Ibid paras 36 and 109
[96] Hancher, Ottervanger and Slot 2021, p. 56
[97] 2016 Notice, para 116.
[98] Bacon 2013, p. 30
[99] Ibid, footnote 179
[100] This kind of situation is rare, and it should be remembered that this represents only marginal cases.

Positive and Negative Aids

Finally, the advantages that undertakings may enjoy can be divided between positive and negative aids. Positive aids are clear; such aid is in question when the state engages in an action that causes a market operator to enjoy a benefit that would not exist without said state measure. Negative aid is in question when the state engages in an action which confers advantage to the undertakings who need not bear the consequences of the actions in the state has engaged in. In simpler terms: tax reliefs and liberation from a generally levied charge or obligation.

It is of utmost importance to note that negative aid is a wide concept considering the negative state aids actually examined in the fifth chapter of this paper. Negative state aids are the measures, which cause the undertaking to whom the measure is aimed at to bear the consequences.[101] The negative aids meant here are for example exemptions from taxes that generally must be paid.[102] Labelling negative state aids logically is not easy and a compromise in this research must be made. Some types of negative aids are discussed in further detail under the fifth chapter.

Finally, as a starting point it must be established, that negative aids do exist, although their history is turbulent; The ECJ has previously rejected existence of negative aids, citing that they do not belong in the system established in the TFEU arts 107–109 emphasising that they rather belong to under the regulations on distortion of competition.[103] As Bacon states and this research finds negative aids do exist but they are not perhaps intuitive or as consistent as "regular" aids.

Tests to Detect Advantage

There are many tools which aid in determining whether a measure confers advantage or not. A handy set of tools can be found in tests such as private investor and private debtor test. All these tests root their idea to the thought if a private market operator would have engaged in a measure under investigation. The tests are elaborate and very useful in determining whether an advantage exists, but the tests do suffer inflation when one tries to apply them to negative state

[101] See for example C-526/04 Laboratories Boiron, para 39 where it is claimed that tax itself is the aid measure, not exemption from it. This is the only case where such claim has succeeded. This is also the type of aid this research ultimately aims to clarify.
[102] A negative aid is in question for example in C-200/97 Ecotrade. In the case an undertaking was freed from paying their debt to another undertaking. The acquittal was granted through state measures. It is noteworthy that the court cites previous case-law in para 34 (and cited case-law) and reaffirms that the term "aid" must be interpreted in a wide way. Better still if the aid is the tax in question like in the case mentioned in the previous footnote.
[103] See Bacon 2013, p. 37 and cited case-law

aids due to their different nature. Hence the following is extremely concise summary of the tests.

From a point of view of state aids, a state can obviously act as a nation, therefore enabling the measure to be considered state aid.[104] On top of that the state can act as a true market operator therefore ruling out applicability of state aids.[105] This distinction roots back to the idea that an aid is in question when a measure would not have taken place in a free market with no state intervention.[106] This is a no-frills model of a test in itself.

The market investor test, violently compressed into one sentence is designed to determine if the state has engaged in an action where it conferred a selective advantage to an undertaking by transferring funds to said undertaking, most of all as a stakeholder in said undertaking.[107] The test has since been extended to say, sales and acquisitions of assets.

The private creditor test aims to, again expressed in an extremely short manner, determine if state has acted as a creditor who functions in a free market. Similar details are examined in market operator test as in applicability of TFEU art 107 itself; discriminatory nature[108] and arm's length principle are examined for instance. [109]

The market operator test has been applied by the ECJ diligently.[110] It must be noted that the comparison is in the last resort made to an imaginary market actor. This is somewhat often the case. Existence of a real investor in the owner-structure of the undertaking eases the test significantly, given that the independent investor[111] operated in similar conditions with the state.[112] The applicability of the market operator tests is often limited to economic activity and does not

[104] This is the case for example when the state uses its legislative powers. This is evident in the negative aid cases which often include tax measures and parafiscal charges.
[105] This is not a "get out of jail -card" as the state may assert its power on a market operator and as a consequence the measure turns into state measure. The state cannot hide behind a façade.
[106] See for example Bacon 2013, p. 31 and 2016 Notice para 66
[107] The characterisation of market operator test in this research is grossly simplified as the test fits very loosely to negative state aids. For analysation with due attention to detail, please refer to for example Hancher, Ottervanger and Slot 2021, p. 96–104, Bacon 2013, p. 38–46 and the examples proceeding and 2016 Notice chapter 4.2. As the aim of examination of positive or regular state aids in this research is to assist in determining negative aids, the market operator tests are glossed over; negative state aid is difficult to examine or determine through market operator tests.
[108] Unbiased availability to all undertakings
[109] For details see 2016 Notice chapter 4.2.3.
[110] This diligence is evident in the amount of CJEU cases in for example the sources cited above.
[111] A state should be compared to an investor, but it must not be set to the same bar as venture capital investors for instance. A more long-term view should be employed – the state should therefore be compared to a private equity investor or a holding company of sorts. Bacon 2013, p. 40. See for example T-11/95 BP Chemicals, paras 170 and on for an example of situation where prima facie desperate measure is not necessarily considered aid. A third pulse of investment could not automatically be expected from a venture capital investor, but from a private equity investor such investment can possibly be expected from.
[112] Bacon 2013, p.42

reach to use of powers characteristic to the state. The ECJ has though however deviated from this rule in cases with specific circumstances.[113]

The private creditor test can and should be used when considering if the state as a creditor grants biased terms with its finances. Also, the test ought to be considered when assessing if the state takes unjust risk as a creditor; minimisation of future losses must be pursued, just like private creditors would.[114]

Other Methods for Detecting Advantage

In summary a measure constitutes state aid if no such measure would be available in an undisturbed market with no state intervention. The previously discussed tests and characteristic features ease in distinguishing aid, but do not make distinction simple or uncontested. Therefore, there are additional rules for interpretation for ambiguous cases when the existence of advantage is unclear and calls for complex economic analysis.

For instance, in *Tiercé Ladbroke*, it was claimed that Belgian interest groping enjoyed an advantage as in the light of the facts and legislation relevant to the case, the Belgian interest grouping received benefit from the increase of horse-betting originating from France, at the cost of the French government. For context it is relevant to know that both France and Belgium regulate horse-betting and place a levy on said betting. The advantage was claimed to exist due to an agreement between the two operators. The GC rejected the existence of aid, stating that "in situations involving complex economic appraisals, judicial review must be limited to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers." [115]

The court found no aid. The mere existence of the agreement did not constitute aid. Furthermore, the increase in betting resulting in further turnover was no aid. The mechanism under investigation cannot be a state aid measure, as the agreement fits the national legal systems and functions according to their logic and ratio.[116] No aid exists despite the fact that the Belgian organisation benefited from the arrangement: The benefit enjoyed did not differ from a scenario where the Belgian undertaking itself would have partaken in the bet instead of the French one.

[113] Hancher, Ottervanger and Slot 2021, p. 97
[114] Bacon 2013, p. 45 Several other conditions ought to be considered. For further details refer the cited source pages 45–46, para 2.54 and cited case-law.
[115] T-471/93 Tiercé Ladbroke, para 55. See cases cited. The GC states that there exists settled case-law on the matter. The applicant in the case had also submitted a plea of failure to state reasons for the inexistence of aid, essentially a technicality. The GC rejected the plea.
[116] Hancher, Ottervanger and Slot 2021, p. 52

Hence, no unjust advantage exists as the TFEU art 107 (1) should, as discussed above, be interpreted objectively with no room for discretion.[117]

On burden of proof: The ECJ has lined that the Commission must show existence of aid and that the undertaking under investigation has indeed benefited from said aid. The evidence cannot consist exclusively of negative presumptions.[118] This is in line with the Commission's liability to investigate the compatibility of an announced aid.[119]

The court has had to rule on the accuracy how the aid must be shown, for example in the case *Mediaset*. The exact amount of aid need not be shown or calculated for a measure to constitute advantage in the meaning of art 107 (1).[120] The decision was given in the context of private investor test, discussed briefly above. The decision could however be interpreted and utilised in a wider sense through analogy.

One can draw a conclusion from these points – the burden of proof on existence of aid is on the Commission or the party claiming existence of aid. The burden is not such that the fulfilment of it is obvious; there must be concrete proof of unlawful aid even if no exact calculations are to be demanded.

To recap; there must be aid for there to be possibility to a state aid in the meaning of TFEU art 107 (1) to exist. The term aid is loosely defined and could be interpreted as advantage and/or measure who is selective[121]. In other words, there must be a measure who would not exist in a free undisturbed economy.[122] Secondly, for the measure to constitute aid it must be confer the advantage to an undertaking.

For example, in the *Fortum* case innovating this research the economic advantage, and therefore aid, is enjoyed by Fortum's competitors in the form of de facto lower tax rate. She second condition mentioned above is obviously fulfilled as the recipients of aid (other electricity producers) enjoy the normal (lower) tax rate.

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[117] Bacon 2013, p. 21 This decision shakes hands with the basic freedoms of movement and establishment safeguarded by the EU.
[118] C-148/19 P BTB Holdings, para 48
[119] See for example case T-626/20 Landwärme, paras 28–30 for the details of the commissions liability to investigate the compatibility.
[120] C-403/10 P Mediaset, para 126 and case-law cited. It is obvious that no clear amount of aid is needed to be shown as settled case-law shows that the recipient of aid can themselves work out the amount that needs to be paid back.
[121] As discussed later in the research the conditions for advantage and selectivity are often times considered together.
[122] Hancher, Ottervanger and Slot 2021, p. 52 As Hancher puts it rather aptly: "For art 107 to apply, the undertaking must have obtained an advantage or benefit which it would not have received in the normal course of business."

3.2.2. "Granted by a Member State or Through State Resources"

State Resources

At first glance the criterion of the aid originating from the state or being financed through state resources seems very ambiguous and clear. Unfortunately, the situation has differed for a long time. There has been uncertainty on resources originating from market actors[123] and as presented below the exact wording of the TFEU art 107 (1) does not match with the legal praxis. Some uncertainty stems from the concept of aid measures that do not per se involve actual transfers of state resources. The legal state however seems to be clearer in the present day.[124]

Historically there has been controversy surrounding the criterion of the aid being granted by the state. The court cleared up the controversy in its decision *PreussenElektra*[125]. Before the decision the condition was interpreted in a fairly free form. In the case the ECJ ruled that legislation which requires private market operators to obtain electricity at a fixed minimum price from other private market operators and obligating so to say conventional electricity producers to compensate the additional costs, did not constitute state aid, as state resources were not involved.[126]

Historically, before *PreussenElektra*, the article was interpreted in a wider meaning, where any action taken by a state which fulfils other conditions can be considered a prohibited state aid disregarding the question if the measure involves any financial burden on the state.[127] The court changed their direction on interpretation of the article.[128] The aim of the article is to underline that the regulation applies not only to grants directly form state but also through state's subsidiaries.[129] It is therefore important to note that the case on hand handles only the first part of the state resources criterion – it does not handle indirect advantages through state resources.[130]

For this research it is especially interesting to study how parafiscal charges, taxes, and other levies shake hands with the criterion of origination from state resources. First and foremost, it should be stated that these aid measures are belong under the residual category of the article –

[123] Who are owned by state or controlled by state
[124] Hancher, Ottervanger and Slot 2021, p. 62
[125] C-379/98 PreussenElektra. Regardless of the cases significance, the latter case-law has indeed further clarified the legal situation. To that extent see Theodoros, EStAL 1/2018, p. 26
[126] Hancher, Ottervanger and Slot 2021, p. 62 As Szyszczak points out, this the line of interpretation in *PreussenElectra* does not come without its problems. The interpretation opens up a way to circumvent the state resources criterion. Hofmann and Micheau 2016, p. 66
[127] Bacon 2013, p. 61–62 See also case-law cited. In a more recent case, it was considered whether the ability to drive taxis on bus lanes involves transfer of state resources. It does not. C-518/13 Eventech, para 63
[128] The clarification was made with C-379/98 PreussenElektra but the change was long time coming: C-189/91 Kirsammer-Hack, para 16 and joined cases C-72/91 and C-73/91 Sloman Neptun, para 19
[129] Joined cases C-72/91 and C-73/91, Sloman Neptun, para 19 and C-379/98 PreussenElektra, para 58
[130] Hancher, Ottervanger and Slot 2021, p. 62–63

that is the aids that are granted through state resources. The ECJ has ruled that funds under public control or funds functioning as subsidiaries of state can be considered state resources, if the resources of the fund are collected through mandatory contributions or other levies.[131]

There is a wide set of rules on boundaries of state resources[132]. Funds consistently held by authorities may be considered state resources, even if they are not permanently designated to be held by the authority[133]. Even private funds, namely in private hands, can be considered state resources, if the state exercises adequate powers on the fund and legislates on the upkeeping of the fund as in *Essent Network Noord*.[134] The key is that the funds must be in practise at disposal of the state for them to constitute state aid. Just passing through state resources does not mean the funds are under states control in such a way that they would constitute state resources and therefore state aid.[135]

The level of state control required is difficult to exactly nail down. For example, vague natural or "organic" control on resources does not entail such control that the resources would constitute state aid.[136] These are to name a few of the borderlines. Perhaps counterintuitively the state control over resources is discussed in further detail under imputability.

Significant, when considering negative state aids is that obligations set to undertakings or measures causing losses to undertakings are seldom viewed as measures involving state resources. The court has ruled so especially when it has ruled on cases involving employment law and price-fixing[137] by regulation. There is no established legal praxis on the subject though: There have been cases where a measure has been viewed involving state resources, especially when the funds collected under the measure have been pooled and the pool itself is under state control.[138] On the other hand, funds in possession of a state body may not involve state resources insofar as the public body acts merely as a vehicle for levying and allocating resources meant

[131] Bacon 2013, p. 64
[132] It is important to note that measures originating from EU resources do not constitute state aid. The article presumes origination from a member state. This has been shown through the practise of the CJEU. Bacon 2013, p. 66. This does indeed shake hands with the idea that the very goal of state aid regulation is aimed to ensure frictionless functioning of the EU internal market. Afterall, the Union itself has in a way established the internal market and drives its functioning. Moreover, the whole organisation of EU is built in such a manner that it prevents pursuing advantage of any member state or actor of thereof.
[133] T-25/07 Iride, para 25
[134] C-206/06 Essent Netwerk Noord. This may extend even as far as funds to whom contributions are voluntary. T-139/09 France v Commission, para 64
[135] Bacon 2013, p. 65 Typically, taxes are seen to be under state control as state has a monopoly to collect taxes and taxes in general are used to fund functions of state and its bodies.
[136] Hancher, Ottervanger and Slot 2021, p. 71
[137] Price-fixing can of course constitute a measure prohibited under other regulations by EU.
[138] Bacon 2013, p. 65 and Hancher, Ottervanger and Slot 2021, p. 76

for a purely commercial purpose. Even if the basis for the levy originates from legislation or other public use of power.[139]

It is however important to note that funds originating from a member state do not constitute aid in the meaning of the article insofar as the basis of their transfer is attributable to EU regulation. Any transferred resources in excess of the relevant EU regulation however may be viewed as attributable to the state and may therefore constitute state aid.[140] Furthermore, this rule assumes that the national institutions succeed in implementation of EU regulation. If a directive is implemented poorly or if a regulation is implemented in wrongly by a member state, the regulation seemingly from EU can constitute state aid.[141]

As with all aid measures, the involvement of state resources can be labelled as direct or indirect. In familiar manner the direct way being simpler. The direct involvement of state resources means practically that actual transfer of state resources, or other resources under factual control of the state has taken place. Indirect transfer therefore indicating that no actual and real funds have changed hands.[142]

Examples of indirect transfers of state resources, and therefore aid, are tax exemptions, guarantees and creation of sellable rights for instance.[143] By definition, the aid must originate from the state in one way or another. Another, sometimes more convenient way to measure this is to inspect whether the action under scrutiny places financial burden on the state or an authority.[144] The ECJ has established that no actual transfer of real state resources needs to take place for the TFEU art 107 (1) to apply.[145] The key with indirect transfer of fund is revenue foregone – revenue the state could have obtained, but through the measure has lost the ability to.[146]

One should not however be fixated to this simplified model: Guarantees given by a state constitute indirect transfer of state resources, even though the credit risk would never actualise –

[139] C-345/02 Pearle, para 37
[140] Hancher, Ottervanger and Slot 2021, p. 78
[141] There are many ways to fail legislating. To name an example the Finnish implementation of Council Regulation 2022/1854 is poorly in line with said regulation. See the regulation from HE 320/2022 vp. Furthermore, there are other ways to fail legislating. For example, Douma and Engelen name eight ways to fail legislating. These ways are known as Fuller's principles and concern most of all legal certainty. As Douma states, ECJ respects these Fuller's principles. Douma and Engelen 2008, p. 219 See also Fuller 1964, p. 38–39
[142] See for example Bacon 2013, p. 66 and joined cases C-236/16 and C-237/16 ANGED, para 27 where tax advantage, which itself involves no actual transfer of resources was viewed to involve transfer of state resources in the meaning of TFEU art 107 and constituting state aid, as the measure placed an undertaking in a more favourable position compared to its competitor.
[143] See Chapter 3.2.1 for examples of aid measures. Specifically, tax exemptions that are selective within undertakings and in similar position must be considered state aids.
[144] Willis 2013, p. 172
[145] See for example C-387/92 Banco Exterior de España, para 14 where the court cites established case-law on the matter.
[146] Bacon 2013, p. 66–67

so the state never loses any funds even if it must tolerate the risk of losing the collateral. This supports the case ECJ has ruled on *Forum 187*.[147] There must be at least some kind of burden on state for an aid measure to be arguable.[148] There is a small section of cases which however seem counterintuitive given the legal praxis discussed here. [149]

Imputability

Whether the state aid is granted by state or through state resources, it must be shown that the measure is imputable to the state.[150] It is understood that the part of TFEU art 107 (1) under examination here is to be interpreted as cumulative not alternative as the wording suggests.[151] I differ from this opinion slightly – the court did indeed clear up the interpretation, but the clarification is that the aid measure must be imputable to the state. This is in fact a condition not directly visible from the article.

The key to solve whether a measure fulfils the criterion is twofold in the light of the case-law. Firstly, one must establish whether the measure involves transfer of state resources in some way. Mainly the two options here are direct and indirect transfers though alternative methods of determinations can be used such as revenue foregone. Secondly it must be established that the measure in question is imputable to the state.

Unlike the article leads one to believe it is not relevant if the measure originates directly from state resources or from resources de facto under state control. The ECJ has established that grants from local governments and local bodies of state may involve transfers of state resources. Furthermore, it has been ruled that grants or other benefits from state institutions and bodies can be considered state aid so long they originate from the public sector.[152]

Regardless of my opinion, the current legal situation stays the same; The ECJ established in *PreussenElektra* that the measure under investigation must be imputable to state. The imputability test should be applied only to the residual category of origination from state resources; that is origination directly from state resources calls for no proof of imputability.[153] It is not

[147] The CJEU ruled on the case that coordination centres subsidised by state received state aid even though the centres paid taxes in excess of 500 million euros a year, therefore covering their costs. It is enough that a burden (tax exemption and social security relief) is placed on the state. C-182/03 and C-217/03 Forum 187, paras 128–129. In the case the measure benefited the state, therefore one could argue the situation to be illogical in a sense.
[148] Raitio and Miettinen, Valtiontuet ja SGEI-palvelut 2021, p. 8
[149] Hancher, Ottervanger and Slot 2021, p. 65 The case cited here by Hancher is only a Commission level decision though.
[150] 2016 Notice, para 38 and Sauter and Schepel 2009, p. 198
[151] See for example Bacon 2013, p. 63
[152] C-305/89 Italy v Commission, para 13 See also Bacon 2013, p. 63 and cited case-law
[153] 2016 Notice, para 39 This is because the measure is imputable to the state in the first category already by definition.

necessary to find exact and concrete transfer of state resources[154], or resources under de facto control of state so ling the measure is indisputably imputable to state.[155] State aid regulation cannot be circumvented by creating a technically private company.[156]

It should be noted that the imputability test should be applied only when the aid measure under examination originates from a body at least loosely joint to a state. This loose adhesion to a state can of course be partially concluded from the state interference criterion of imputability. So, measures originating from truly private undertakings does not constitute state aid.[157] It can and should be assumed that a private undertaking does not undertake an action which could be considered aid, as aid is after all a measure that transfers funds free of charge or under considerable discount. A private undertaking cannot partake in such actions as they have no valid business reasons. However, even funds conferred by a truly independent undertaking may constitute aid if the funds are sourced from a mandatory levy or tax imposed by a state. In a sense the funds are again state funds, although indirectly.[158]

Imputability must however always be shown when the aid did not originate directly from state resources. The proof required varies case by case, and even after cases, which are considered to clear up the state of the law the practise is messy at places.[159] To show imputability, state control of the resources alone is insufficient, but on the other hand no concrete purpose intended by authorities or other public bodies need be shown to constitute state aid.[160] As there is no one standardised test for showing imputability and the existing rules originating from case-law the criterion here is approached weighing matters endorsed by the courts.

For the imputability criterion to be fulfilled a certain threshold of state intervention must be fulfilled. As it has been established, the mere fact that a measure originates from state resources cannot automatically mean that the measure fulfils criterion of TFEU art 107 (1), even when

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[154] It must be weighed that the term resources do not exclude payments in kind. Imputable transfers can be for example exemptions from a tax or other levy generally applied. As this entails foregoing of state resources, transfer of state resources can be indicated. This should be compared with a situation where it is required to show transfer of state funds. See 2016 Notice, para 53

[155] Hancher, Ottervanger and Slot 2021, p. 64 The author cites C-482/99 Stardust, as example of a measure where no concrete transfer of funds or foregoing revenue must be found or pointed out. The case cited is in line with the norm set in *PreussenElektra*. The court stated that finding that state control on a public undertaking cannot be automatically presumed. Involvement of state and therefore imputability must be investigated taking subtleties of the case into account (para 52). See also 2016 Notice, para 40. The court then reasons that the fact that the party where aid originates is founded as a public company and that the company in question is independent does not impede fulfilment of immutability criterion (paras 55–57).

[156] Bacon 2013, p. 69

[157] Bacon 2013, p. 67–68 Should a truly private undertaking partake in a measure which appears state aid it is likely illegal in other ways like disguised distribution of dividends.

[158] 2016 Notice, para 65 and C-262/12 Vent De Colère, para 25

[159] Hancher, Ottervanger and Slot 2021, p. 71 and Raitio and Miettinen, Valtiontuet ja SGEI-palvelut 2021, p. 9

[160] 2016 Notice para 41

the measure originates from a public undertaking. These, by their nature, involve some level of state intervention, hence a threshold must exist before a measure constitutes transfer of state resources.[161]

The involvement of a state can and should be inferred from a collection of indicators.[162] The circumstances in which the decision was taken should be taken into account. It is not necessary to show direct steering by state or its bodies, but a kind of indirect steering, requirements of state, can indicate sufficient state involvement. Although inferring state control from purely organic factors is prohibited, they can contribute to inferring imputability.[163]

The ECJ did highlight integration into public administration, nature of activities partaken by the party conferring aid, public undertaking's position compared with independent market operators, legal status of undertaking, intensiveness of public bodies' intervention, and "other indicator" in the *Stardust* case, which is considered to clear up the legal situation.[164] Further indicators of imputability are listed in the 2016 Notice[165].

These criteria should be considered when judging sufficient involvement of state. It should be emphasised that the criteria are part of overall assessment. As there is room for assessment it is difficult to present an exhaustive list of details to be taken into account and it is unmeaningful to list further examples of considerable details than what is above.[166]

The baseline set out in *Stardust* was endorsed in the *Pearle* case. The latter however went beyond the baseline set out previously – the court went on to investigate if the decision to transfer resources was attributable to state, where the *Stardust* case was more limited to investigate if the resources themselves were attributable to the state.[167] The case however cited should not be considered a precedent.[168]

As tax legislation is involuntarily in focus when considering negative state aid questions, some special attention in this research should be paid to tax provisions. It should be noted, that if the state itself had discretion when legislating or otherwise deciding the provision under scrutiny,

[161] C-482/99 Stardust, para 55
[162] Hancher, Ottervanger and Slot 2021, p. 72, see also AG Kokott's Opinion on case C-160/19 P Commune di Milano, para 37 and case-law cited
[163] ibid and the case-law cited there
[164] C-482/99 Stardust, para 56
[165] para 43
[166] Should a broader list of examples of details be needed one should investigate 2016 Notice para 43 and Bacon 2013, p. 68–69 and the case-law cited within the sources mentioned.
[167] C-345/02 Pearle, para 35
[168] Hancher, Ottervanger and Slot 2021, p. 73 There are special details in the case. Although the same could be stated from any given case. Attention should be paid to how attributable the action is to a state or how much state has influenced the decision-making process. This should be accepted as the flexibility of the EU regulation partially leans on the CJEU's ability to give the decision, which naturally consider the details of each case.

can the measure be considered aid and imputable to state. However, a measure constitutes no aid if it originates from the EU.[169] The key is the state discretion.[170] It is therefore important to highlight that junction to EU should not lead automatically to the conclusion that the measure cannot be imputed to the state as the state has discretion when implementing EU directives. The exact implementation may lead to a state aid measure even unintentionally, if implemented carelessly. The situation is same if the EU regulation or directives are drafted carelessly or give too much discretion to states.

Lastly, it is noteworthy that it is sufficient to investigate if a measure originates from state or entails transfer of state resources. A measure can be considered aid in the meaning of TFEU art 107 (1) even if the recipient of aid belongs to same group of companies.[171] Although, it is possible that state only interferes[172] with the decision making of parent company, therefore leaving the subsidiary de facto independent. Although, even then the state exercises its powers on the subsidiary in a way, as the parent company is at least partially under state control and the parent company directly controls its subsidiary.

3.2.3. "Which Distorts or Threatens to Distort Competition"

The aid measure must distort competition between member states in order to count as state aid. This criterion is often bundled with the criterion of affecting trade between member states[173] as the criterion is also, a stump. It must however be pointed out that the criterion is completely separate from said criterion.[174] The criterion is indeed a stump criterion as is effect on trade between member states. The bar set by the criterion is low and easily surpassed.[175] The criterion is indeed so easy to meet that the applicability of the criterion has been doubted by the court in its early judicature.[176] The doubts of existence have since been eradicated[177] and the criterion has indeed been the decisive fact in certain cases.[178]

[169] See for example T-351/02 Deutsche Bahn, para 102 and Hancher, Ottervanger and Slot 2021, p. 75 As mentioned previously, this is not as black and white as one might hope. Bad use of legislative powers may lead to exceptions.
[170] Hancher, Ottervanger and Slot 2021, p. 76
[171] C-39/94 SFEI, para 62
[172] Which is necessary to constitute a state aid if resources are transferred.
[173] Which is discussed in chapter 3.2.5.
[174] Bacon 2013, p. 82
[175] Hancher, Ottervanger and Slot 2021, p. 95 For example, in the case *Fortum* the Swedish real estate tax distorts the competition between Nordic countries, who have common electricity market.
[176] Bacon 2013, p. 82
[177] See for example joined cases C-393/04 and C-41/05 Air Liquide, para 34
[178] Bacon 2013, p. 83 names a few examples of cases where the criterion on hand has been decisive in their footnote 542. For example, joined cases C-15/98 and C-105/99 Italy and Sardegna Lines is cited by Bacon.

As stated, the bar for fulfilment of this criterion is low, but the fulfilment cannot be assumed, as it must be shown.[179] The very same applies to need to show effect between states. This does not mean that the bar is high as stated previously. As a matter of fact, the ECJ has concluded that that no actual and real effects on trade need be shown. It suffices that the measure is liable to do so[180] or the measure is capable of distorting competition[181]. Purely hypothetical ability to distort market will not suffice however.[182]

The criterion can be satisfied even if no actual competitors are pointed out even if the distortion between competitors must be shown. As the criterion is a brother of selectivity the criterions are partially similar[183]; when considering distortion between undertakings, as here the mere fact that a market operators' position is enhanced may suffice. There is no need to pin down market operators to compare the improvement to. Pointing out high competition may ease the argumentation of distortion though.[184] With selectivity it is irrelevant if a selective measure enhances or even deteriorates the undertaking's position. With distortion of market the ability to maintain a stronger position on market may satisfy the distortion criterion.[185]

Even though the bar is low, it might be meaningful to consider when the distortion criterion is not satisfied disregarding temporarily the fact that distortion cannot be assumed. The fact that member states are engaged in unlawful aid measures does not permit the use of prohibited aid measures even if the aim is to remedy the distortion. As a matter of fact, such further aids make the market situation even further distorted.[186] The Commission has approved certain criterion, for SGEIs who, if fulfilled, lead to judgement of no distortion, even with natural monopolies.[187]

[179] This need for consideration has been reviewed for example in the joined cases T-254/00, T-270/00 and T-277/00 Hotel Cipriani, paras 228–229, by the GC. Note however, that the Commission has stated that when it comes to negative aids, the distortion can *generally* be assumed. 2016 Notice, para 189
[180] C-372/97 Italy v Commission, para 44
[181] C-387/92 Banco Exterior De España, para 15
[182] 2016 Notice, para 189
[183] The similarity is not enough to simply repeat the criterion.
[184] Bacon 2013, p. 84–85 On the flipside of the coin, even small aids can be distortive. The aid measure does not need to be massive to constitute aid. 2016 Notice, para 189
[185] Hancher, Ottervanger and Slot 2021, p. 95
[186] Bacon 2013, p. 84–85
[187] See 2016 Notice, para 188. The para discusses the criterion of state aid controls for natural monopolies.

3.2.4. "By Favouring Certain Undertakings or the Production of Certain Goods"

General

For the measure to constitute state aid in the meaning of TFEU art 107 (1) it must be selective.[188] This is a core characteristic[189] to a state aid but also one of the most difficult to apply. That is to say that the measure must favour certain undertakings or the production of certain goods. As this criterion is, again, quite vague[190] the court has adopted tests for determining what measures constitute adequate selectivity. Moreover, the court has established some negative criterion, which indicate the fact that a measure is not necessarily selective in the meaning of TFEU art 107 (1) even if it prima facie seems to be. To add confusion, selectivity has different criterion compared to discrimination, which, at least to a layman, seems same or similar.

The court has ruled on specific situations where a measure is not aid. It has devised a test to distinguish the situations when a measure is not selective in the purpose of TFEU art 107 (1)[191] which selectivity test the court applies quite aggressively even in cases which concern subjects in which national governments have competence[192]. The test in question is the three-step-test, who is best suited for tax related assessments on selectivity.[193] It is however argued that the test fits other cases as well. Unfortunately, the test is extremely difficult to master as even scholars occasionally struggle with it.[194] It should be obvious that the criterion of selectivity is one of the hot potatoes of negative state aid, given that it is controversial under "regular" state aid.[195]

For a starting point it is noteworthy that a general measure cannot be and is not selective in the context of state aids. For example, lowering the general tax rate is not aid.[196] This rule should not be applied too widely, however. A general measure must be general enough, as applying a

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[188] The CJEU has itself stated the obvious here: "Article 87(1) EC prohibits aid which '[favours] certain undertakings or the production of certain goods, that is to say aid which is selective." See for example C-66/02, Italy v Commission, para 94.
[189] Bacon 2013, p. 70
[190] See Bacon 2013, p. 70. The author cites AG Jacobs' opinion on C-379/98 PreussenElektra, where the advocate general states that determining state aid is "a difficult exercise with an uncertain outcome". Hancher goes deeper into the rabbit hole and points out two additional advocate generals, who have given similar statements. Hancher, Ottervanger and Slot 2021, p. 79. Furthermore, even singular elements and tests adopted by CJEU can be complicated to apply successfully. See Hancher and LoÌpez 2021, p. 153
[191] Bacon 2013, p. 70
[192] Arnull and Chalmers 2015, p. 681 The most commonly used test is known as material selectivity test or three-step-test. Other tests have been suggested and used over the years as discussed below, but the teste mentioned here is the go-to test employed by the ECJ.
[193] Bacon 2013, p. 71
[194] Hancher and LoÌpez 2021, p. 153
[195] It must be noted that the following presentation on selectivity concentrates heavily on tax cases. There are different tools for other kinds of aids which are ignored here for the most part as irrelevant. The concentration on tax cases stems from the fact that most negative stat aid cases concern taxes or charges comparable to them.
[196] Hancher, Ottervanger and Slot 2021, p. 79 The author cites AG Geelhoed's Opinion on case C-308/01 GIL Insurance. The reason behind this is that it *indiscriminately* applies to all undertakings.

"general" measure to a certain set of businesses or sector, it is not perhaps general in the meaning chased here.

Moreover, an apparently selective measure may not constitute state aid, as the measure fits the framework and legal system. More on this along with the three-step-test. It must be noted that a measure of exceptional burdens can constitute state aid and be considered selective.[197]

Once again, as with many other criterions of state aid, the fulfilment of selectivity must be shown, and it cannot be assumed. Even though it is not necessary to categorise possible ways of selectivity, it may prove useful when considering if a measure is selective or not. The article itself has a certain two-way categorisation built in – the measure can be selective towards certain undertakings or production of certain goods. There is also another significant component to consider: The measure can be materially or regionally selective.[198]

Unlike the criterion on involvement of state resources, the selectivity criterion between areal and material selectivity is not cumulative. One can pick their poison. For this reason, it is meaningful to split these criteria even though the technical execution of selectivity is not significant, but the selectivity itself is.[199]

Framework

To establish a baseline, one must determine what to compare a measure against. Afterall, selectivity is subjective, and it must be compared to something to show selectivity. The CJEU has in its judicature established how to find the reference framework to which comparisons should be made. This does not mean that there is a singular, clear path. Rather, there is case-law to derive samples from.[200]

The reference framework is never the rules of national law previously applied on the undertakings or sector.[201] The previous system is irrelevant regardless of whether it is beneficial or harmful to the undertakings to whom the measure is aimed at.[202] This is purely logical as a change in law nearly inevitably, at least marginally, affects market actors negatively or

[197] This is an existential condition for negative state aids. As is evident with this research, negative state aids exist as a concept and the CJEU has ruled on these and ruled that aid exists. This should be compared to opinion para 77 in the previous footnote.
[198] 2016 Notice, para 119
[199] C-374/17, A-Brauerei, para 32
[200] As Cisotta points out, the framework is a difficult criterion, as there is certain mobility in the framework and the CJEU's rulings on the reference framework seem arbitrary at places. Hofmann and Micheau 2016, p. 143
[201] Case 57/86 Greece v Commission, para 10
[202] C-143/99 Adria-Wien Pipeline, para 41

positively. Hence, any change in law would automatically and inevitably lead to the conclusion of selectivity and possibly aid measure.

The Commission has given a general – yet somewhat cryptic – definition of the reference framework: "[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."[203] The Commission continues by naming a couple of examples of reference frameworks pointed out by the CJEU in its judicature.[204] This is not necessarily a bad idea, as the framework should be tailor fitted to each case and a detailed and incontestable set of rules is impossible and impractical to create, given that the courts themselves have struggled with determination of the framework.[205] Very limited examples will be discussed here to limit the extent of this research.[206] Please see sources referred for examples.

Selectivity – General

At first sight the framework may seem obvious – a measure applied to only some but not all companies in a market with functional market competition, the measure is obviously selective, regardless of how the discriminated undertaking is picked out. The conclusion should be similar if the operators are amongst themselves in comparable situation and the whole group is placed under a special levy or freed from a generally applicable charge or tax. The true problems for interpretation start when a set of operators in the market – say electricity producers – are freed from an obligation or placed under one.[207]

Selectivity can take form of material selectivity or areal selectivity. Material selectivity stems from determining which undertakings or other market operators are in similar factual and legal situation as the allegedly aided undertaking. There is a strong link to definition of discrimination,[208] which is a different problem in itself. It must be remembered that these definitions do not shake hands per se despite their similarities. More on this under fourth chapter.

[203] 2016 Notice, para 133
[204] ibid para 134. Unsurprisingly, the frameworks cited are exclusively taxation based: general framework of tax on insurance, general income tax and VAT.
[205] Hancher, Ottervanger and Slot 2021, p. 81
[206] In the *Fortum* case the framework should be set onto the level of normal real estate tax (0,5 %). The higher rate (2,8 %) applied to hydropower should be the exception. The Swedish Supreme Court confirmed in a similar case that the normal tax (0,5 %) is the framework, and a lower tax rate (0,2 %) on wind powerplants constitutes state aid. HFD 3873-18
[207] Bacon 2013, p. 71–72
[208] Hancher, Ottervanger and Slot 2021, p. 79

With material selectivity, the comparison consists of undertakings and other actors who are "in a comparable legal and factual situation".[209] The limit of the comparison has been set to effect on those undertakings, who are pursued by the measure under scrutiny.[210] The bulk of cases concerning selectivity are investigated through this comparison. With these types of cases the reference framework is consistently system of "normal" taxation.[211] The application of the rules set on framework set by CJEU is somewhat limited to tax cases, as is implied in *Hansestadt Lübeck*. The majority of cases concerning reference framework are about taxes, although as stated by the court, the legal praxis in not limited to just these.[212]

Selectivity – Material

Once the relevant framework has been established, it must be investigated if the measure under scrutiny is selective in the sense that it is deviating from the general measure in force within the reference framework. At first glance the deviation might understandably seem easy to judge[213] but rapidly one is reminded that the selectivity criterion is considered one of the most convoluted criteria, and for a good reason.[214] The practise has come to accept selectivity if the measure appears prima facie[215] selective. In practise it is investigated if the measure deviates from the general system applied to the sector of the reference framework.[216]

As there are many different possible ways to create selective conditions for a receiving aid or rather benefits or concessions from state or through its resources the conditions for establishing selectivity presented here are limited to cases already brought forth to the court. The scholars and peers are bound by the same limitations. On the opposite side, the legislator or authority who are blamed for conferring aid are only bound by the limitations of their imagination.[217] Therefore, this research only briefly and broadly compiles some of the cases judged by the court.

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[209] T-210/02 RENV British Aggregates, para 47. Bacon 2013, p. 71 It is not directly stated that this is settled case-law, but it is indirectly suggested through the number of cases backing up this line of interpretation.
[210] ibid A significant amount of cases are cited in the case, and it is justifiable to call this a piece of settled case-law. This is not to say that the reference framework is clear: far from it. The case-law should be interpreted in the context of rules to be applied to find the reference framework and how to apply the rules.
[211] Bacon 2013, p. 71 and case-law cited by them.
[212] C-524/14 P Hansestadt Lübeck, para 55
[213] Bacon 2013, p. 74 Sometimes this assumption is indeed true, but there is a plethora of cases where the selectivity has been considered as one of the primary questions.
[214] See for example Hancher and Lo̓pez 2021, p. 153 and Nicolaides 2018, where the authors concludes that the ECJ erred in its judgment in C70/16 P Comunidad a Utónoma De Galicia and Retegal v Commission, finding no selectivity and therefore deviating from its previous judicature.
[215] Freely translated as "at first sight".
[216] See for example Alkio and Hyvärinen 2016, p. 68 and Hancher, Ottervanger and Slot 2021, p. 81
[217] Not necessarily a state aid case of the CJEU, but in case C-265/99 France v Commission the court had to rule if a measure, where France imposed tax rules on vehicles based on the vehicles' engine displacement and gearing as French manufacturers exclusively benefited from the rules, is selective.

The ECJ has established case-law on deetmining the framework; The undertakings in the reference framework should be in similar legal and factual situation.[218] The criterion is far from ambiguous. In short, the similarity of the situation must be assessed separately with each case. An interesting ruling had to be made in the *Eventech* case, where the court had to assess the comparability of the legal and factual situation between internationally standard taxis and London cabs. The latter could use bus lanes where the first could not. The market operators were considered to be in different situation, as the London cabs were otherwise more heavily regulated.[219]

Another way to assess selectivity is to establish if the measure is prima facie selective. The prima facie selectivity may be filled even if the contested measure spills to some undertakings outside the group the aid was aimed at.[220] Therefore, the fact that the measure is regulated in a way that it perhaps even intentionally confers advantage to such undertakings, is not a get out of jail card. On the side of negative aids, the fact that tax relief granted to an undertaking is not mended by conferring similar advantage to other actors in the sector.[221]

Prima facie selectivity cannot be deduced from the fact that some superficially similar operations are treated differently. This is again highly dependent on the actual facts of a given case. An enlightening example can be found from the *Tiercé Ladbroke* case, where different bets on horse races were treated differently and the court ruled that the measure was not selective.[222]

The criterion of prima facie selectivity should be interpreted in tandem with areal selectivity. A measure where the action taken differentiates undertakings based on their location should be viewed selective. A philosophical question arises if it is contemplated if the measure is materially or regionally selective.

Selectivity can and must be applied to individual measures, tailor made to specific undertakings and to schemes, through which the aid can be granted. Hence if the criterion for conferring aid is just a façade designed to hide the selectivity of a measure, the measure must be deemed as illicit aid despite of its ostensible equality.[223] That is to say that a measure is selective whether de jure or de facto selective. De jure selectivity means that the selectivity is baked directly into

[218] See for example C308/01 GIL Insurance, para 68 and case-law cited.
[219] C-518/13 Eventech, paras 59–61
[220] C-126/01 GEMO, paras 36–39 and case-law cited
[221] Bacon 2013, p. 78
[222] C-353/95 P Tiercé Ladbroke, para 33 It should be noted that the operators were based in different member states, but this was not the key difference on hand.
[223] See for example Bacon 2013, p. 76–77 and the case-law cited by them.

the law. Da facto selective measures on the other hand are measures which seem equal but in reality, disproportionally affect undertakings in their relevant framework.[224]

Furthermore, the selectivity criterion is easily filled with ad hoc measures. Or rather it need not be shown in the first place, as positive individual measures are, logically, might I add, viewed automatically selective.[225] This is not to say that all individual measures are automatically aid. For example, in the case *Commission v Gibraltar* the measure was viewed selective only in connection with other actions.[226]

Selectivity can stem from discretion. Discretion of authorities may cause the measure to become selective if the discretion is applied in a manner that directs the measure to a certain section of undertakings. This policy was adopted by the court as in the case under assessment the authority enjoyed autonomy of sorts to decide the criterion for aid.[227] Discretion granted to authorities does not however automatically equal state aid. For example, in case *Commission v France* ability to point out beneficiaries, amount of aid, and the conditions for the aforementioned led to the conclusion of aid.[228] Unlike in case *MOL*, where although enjoying discretion, the authority had no such say in deciding the aid that it would have counted selective. Furthermore, the discretion granted to the authority was defined by law and was not unlimited.[229]

The benefit, as aid itself, can be conferred directly or indirectly to a sector of economic operators. Direct aids can be for example tax reliefs to an entire sector, like road hauliers on banking sector in a defined area. Indirect aid to a sector can be constituted like in the case *Italy v Commission*[230] where aid in the form of reduced social charges aimed at a predominantly female section of industry was viewed selective and therefore state aid.

The selectivity of a measure can be based on the size of the recipient undertaking.[231] Public services and undertakings can often be considered as beneficiaries to state aids as they receive

[224] Hancher, Ottervanger and Slot 2021, p. 82–83 See however Douma and Engelen 2008, p. 237–238 which handles similar restrictions in the free market frame. The ECJ has established that measures "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be regarded as measures having an effect equivalent to quantitative restrictions and thus prohibited [in the internal market]".
[225] Hancher, Ottervanger and Slot 2021, p. 84–85
[226] Joined cases C-106/09 P and C-107/09 P Commission v Gibraltar, paras 100–104
[227] Hancher, Ottervanger and Slot 2021, p. 83
[228] C-241/94 France v Commission, paras 23–24
[229] C-15/14 P MOL, paras 54–55 and 64
[230] C-173/73 Italy v Commission
[231] The TFEU art 107 (1) does not differentiate between undertakings based on their sizes, as is evident from case C-172/03 Heiser, para 29 etc. where a small dentist business was found to be the recipient of state aid. On the other side small market operators can escape the state aid regulation through de minimis regulation. Bacon 2013, p. 75, 191. The beneficiary is often thought to be a small to medium sized undertaking, but sometimes the bigger market operators can be the recipient undertakings. Sometimes the benefit is justified. For example, in case C-323/18 Tesco a progressive tax was not considered to be selective in the meaning of TFEU art 107 (1), even though the measure can be viewed at least somewhat selectively aimed at big market operators.

preferential treatment. That is if the criterion of undertaking meant with state aid regulation is fulfilled.[232]

It must be borne in mind that there is an aerial limit to applicability of material selectivity. The legal practise on this limit is mostly limited to that of GC. The reference framework cannot be the system in place in another member state.[233] As previously stated, the areal factor on selectivity must be considered. Therefore, this is to say that this "top limit" on the area that must be considered is the area of the state in question. The reference area can however be narrower than the area of a state.[234]

When considering material selectivity, it must be noted that there is a certain areal element too. The reference framework can be jurisdiction of a sub-national body. Often such framework is namely easy to point out. As the selectivity criterion is most often contested, when viewing cases on selective taxes and other levies, such areal framework often points to a general tax system applied in a member state.[235] The area can however be narrower. The ECJ has adopted a view according to which a truly autonomous region, who has power to legislate on taxes in its area can be constitute a reference framework.[236]

Selectivity – Areal

Areal selectivity should be handled as its own entirety,[237] however it is however easily shadowed[238] by the convoluted and unclear material selectivity criterion.[239] Areal selectivity is somewhat straight-forward to diagnose. A measure is regionally selective, if the criteria established in *Portugal v Commission*[240] discussed below are not fulfilled. To not count as aid, the measure should cover all of the state in question or all of the area under control of a truly autonomic authority.[241]

Advocate general Geelhoed presented three scenarios on a limited areal framework who differ aerially from the borders of a state, which were adopted in the case concerned. Moreover, the

[232] Bacon 2013, p. 76
[233] Hancher, Ottervanger and Slot 2021, p. 81 This is again, very logical. As a private person, it would be marvellous to go for lower income tax as an employee, petitioning the fact that other member states have a more lenient income tax than Finland.
[234] C-88/03 Portugal v Commission, para 57
[235] Therefore, the material selectivity should be investigated within the national tax rate.
[236] C-88/03 Portugal v Commission. In the case the specific criteria for limiting the reference framework did not materialise (para 78), but the court considered the possibility of narrower framework.
[237] See for example 2016 Notice, para 119
[238] As it is overshadowed in Bacon 2013. This is not to say that the areal selectivity criterion is not researched – this is to say that areal selectivity criterion is hidden within the material selectivity as a trivial detail.
[239] As Bartosch considers it, although in different words. Hancher and Lo̩pez 2021, p. 153
[240] C-88/03 Portugal v Commission
[241] Alkio and Hyvärinen 2016, p. 72–74 and Hancher, Ottervanger and Slot 2021, p 86–87

criteria have been cited by the court in its latter judicature.[242] First scenario concerns an obvious selective measure, where central government aims a measure at a limited geographic area, regardless of the level of autonomy enjoyed by it.[243]

The second scenario described by AG Geelhoed is about autonomous regions, who can collect taxes and levies with no reference to national law or government. In this case the reference framework must be that of the tax system of the autonomous region. It makes no sense to compare the allegedly selective measure to say national average tax. The framework should therefore be limited to the area on which the legislator had jurisdiction over.[244]

The third scenario concerns a prima facie selective measure embarked on by a local authority. Here the key is again the level of procedural and economic autonomy enjoyed by the authority in question. The authority must be independent from a higher authority or body insofar as the decision making is concerned and the measure must not be subsidised or otherwise aided by a higher authority or body: that is the authority must be economically independent. If all the criterion on autonomy set out by the AG Geelhoed are filled, the measure should not be viewed as selective, so long it is not selective in the established framework.[245]

It must again be noted that measures spanning the whole state and concerning all undertakings with no discrimination is not aid.[246] As is the case with measures stemming from union regulation, as discussed previously. This does assume the correct implementation of the union legislation by national legislators.

Escaping the Label of Selectivity

As is evident from the TFEU as well as introduction to this research, aid measures can sometimes be acceptable and therefore even prima facie selective measures may sometimes escape criterion of selectivity.[247] To make a long story short, a measure which fits the nature or general scheme of the reference system can be accepted even when obviously selective.

Basically, the nature or logic of the system calls for the measure to have some kind of publicly approved aim like need for combating fraud or tax evasion, evading double taxation, creating

[242] See for example joined cases C-428/06 to C-434/06 UGT-Rioja, para 67 and more generally in joined cases C-106/09 P and C-107/09 P Commission v Gibraltar, para 90
[243] AG Geelhoed's Opinion on case C-88/03 Portugal v Commission, para 51
[244] ibid, paras 52–53
[245] ibid paras 53–56. See Bacon 2013, p. 72–73, where the system established in the AG opinion cited is taken further into practise and investigated in further detail.
[246] Bacon 2013, p. 78
[247] 2016 Notice, para 138 and Bacon 2013, p. 78–79 citing Case 173/73, Italy v Commission as the pioneering case, where the acceptability criterion was first established.

progressive tax system,[248] or otherwise creating a just and functional society[249]. The measures must remain proportional[250] and the application of the non-selective, yet prima facie selective, measure must be monitored.[251] Moreover, the conditions cannot be haphazardly applied to undertakings; even if the exception applies undertakings in similar factual and legal situation should not be discriminated against their peers.[252] The exception cannot include de jure selection.

Even though the burden on proof to establish selectivity of a given measure is on the Commission, the claim of fitting the logic and general scheme calls for specific arguments from the state as the exception on hand must be applied strictly and exclusively as an exception. Showing this criterion however has been difficult as the court did not bother opening what goes into the logic and general scheme. In the 21st century the court has however clarified this somewhat unclear set of rules in its judicature. [253]

The justification measures are summarised very well by Hancher: "[T]he justification appears to comprise two elements. First, the differentiation must be inherent to principles or mechanisms of the system of which it forms part. Secondly, there must be safeguards to ensure that it is applied consistently and proportionately."[254]

Concluding the Three-Step-Test

The criteria presented above form the three pillars for a three-step-test applied by the court. The test is mostly applied to cases concerning taxation, even though it is argued that the test is a good tool for establishing selectivity in cases about different questions. To recap the test consists of identifying the reference framework, establishing deviation from the reference system insofar as it differentiates between economic operators[255] and lastly the selectivity must not fill

[248] The aforementioned examples directly mirror the examples given by the Commission in 2016 Notice, para 139.
[249] See for example Bacon 2013, p. 79–80. The acceptable grounds can be for example environmental or social. For details, please refer to the examples of specific cases provided by Bacon in footnote 510 and on page 81.
[250] The principle of proportionality does not create any subjective rights but is a tool for interpreting legislation and limits public use of power. The principle bears significance in the EU law. Brokelind 2014, p. 305–306. An example in case-law can be found in C-390/98 Banks, para 35. In short, the settled case-law on discrimination concerns difference in treatment, and provision of disadvantage to different operators in like cases.
[251] 2016 Notice, para 140
[252] Bacon 2013, p. 80
[253] Bacon 2013, p. 79 For clarifying judicature see ibid footnote 249
[254] Hancher, Ottervanger and Slot 2021, p. 86 Furthermore, as Rossi-Maccanico has concluded the criterion only applies to tax schemes. This is only logical as it would be difficult to depict a situation where ad hoc measure or singular aid would be justifiable by the logic of the system. Rossi-Maccanico, EStAL, 2/2009, p. 175–176
[255] i.e. the measure is prima facie selective within the established framework

the criterion for exemption, i.e., it cannot be acceptable through the logic and nature of the general system.[256]

The three-step-test is most often applied to tax cases, but it arguably fits other cases as well.[257] The test should be viewed as a valuable tool to be applied or at least be attempted to apply to negative state aid cases universally, even if it is described as onerous.[258] The tool has been applied by the commission to even cases it was not designed for, and attempts to replace the test has been rejected by the court regularly.[259]

The alternative for the three-step-test is a general availability test devised by AG Saugmandsgaard Øe in his opinion on case *A-Brauerei*. In the opinion AG Øe goes on to criticise the three-step-test[260] as a general discrimination test[261] and doubting the quality of analysis required to establish existence of aid in formal terms[262]. AG Øe then goes onto apply the traditional test, which was approved by the court in the case. Therefore, it is safe to assume that the three-step-test has made it to settled case-law.[263]

3.2.5. "Affects Trade Between Member States"

A measure which is allegedly state aid must, according to TFEU art 107 (1), affect trade between member states. In reality, similarly to distortion of market, it suffices if the measure is able to affect trade. This is well in line with the fact that the criterion is often considered along with the criterion of market distortion. Some go as far as to state the two inescapably linked, even if they remain separate legal concepts.[264] To emphasise this, they are here handled separately.

Further, similarly to distortion the criterion is easy to bypass as a formality which it indeed is not, even if some consider the criterion to be "negative" as it could almost be assumed true.[265] The criterion is mostly a benchmark of sorts for distinction between jurisdiction of states and that of the EU.[266] The standard between the two compared criterions starts to drift slightly when

[256] For clear-cut breakdown see for example Hancher and Lo̜pez 2021, p. 153
[257] ibid p. 154–155. The author cites cases C-403/10 P Mediaset v Commission, C-518/13 Eventech and C-524/14 P Hansestadt Lübeck as examples of cases where the test has been applied.
[258] Hancher and Lo̜pez 2021, p. 158
[259] Hancher and Lo̜pez 2021, p. 157–159 The test is primarily aimed at aid schemes, not individual measures. Apparently, this has not hindered the court from applying the test to individual measures regardless.
[260] AG Saugmandsgaard Øe's Opininon on case C-374/17 A-Brauerei
[261] ibid para 73
[262] ibid para 82–86, although the doubts are well argued.
[263] Though, it should be stated that the general availability test has been used in legal practise, as pointed out by Alkio and Hyvärinen Alkio and Hyvärinen 2016, p. 69–70.
[264] Bacon 2013, p. 82 and Hancher, Ottervanger and Slot 2021, p. 92
[265] Arnull and Chalmers 2015, p. 682
[266] Bacon 2013, p. 85

inspecting the threshold for the satisfaction of the criterion. As with the distortion, the criterion is easily satisfied, and the bar is generally set at the ability to affect markets .

The difference is that with effect on trade test is sometimes fulfilled with showing that it is not inconceivable that the measure distorts market.[267] Further, the purely local nature of the aid recipients' business or other conduct will not save the measure from being considered aid: It may still affect trade, as it hinders other operators' opportunity to penetrate the market[268] and the small amount of aid is again, similarly to aid criterion itself, is not a reason to conclude that there is no effect on trade[269]. It is not a problem for the satisfaction for the criterion if there is no trade to be affected.[270]

Criterion of effect on trade should be viewed in a farsighted manner: The fact that no trade exists, does not mean that there could be cross-border trade to be affected in the future. This test must be applied in reverse too. If the recipient trades nearly exclusively with non-EU states[271], it does not mean, that the undertaking could not redirect its trade, therefore there could be effect on trade.[272]

The CJEU has ruled on the existence of effect on trade. For example, cross-border trade, significant trade within EU, close proximity to state border, open competition in the market, increased opportunity of the recipient to partake in international trade due to aid, over satisfied market, existence of internationally trading competitors, and EU level market liberalisation have been considered to indicate effect on trade. On the other hand, there have been situations where the criterion has not been satisfied. These are though mainly limited to measures that concern very local SGEIs and local cultural actors and to legacy cases where no market liberalisation within EU was established at the time.[273]

The rejection of aid is rarely based on the criterion on hand, but unheard-of. As the cases are few and far between, there is room for interpretation left which does not promote legal certainty

[267] This conclusion can be deduced AG General Tizzano's opinion on case C-172/03 Heiser, para 58, which is considered in the case at para 35.
[268] Hancher, Ottervanger and Slot 2021, p. 93
[269] Hancher, Ottervanger and Slot 2021, p. 94 This is very obvious with case C-172/03 Heiser, where the De minimis limit was fallen short of.
[270] Bacon 2013, p. 86
[271] It must be remembered that the market discussed here is the internal market of the EU. Trade with third nations, like UK or USA are namely not covered by the article.
[272] Bacon 2013, p. 86 and Hancher, Ottervanger and Slot 2021, p. 87 Furthermore, the fact that there is no international trade, does not indicate the lack of effect on trade between member states, as even trade with exclusively external states can cause secondary effects to the trade within EU.
[273] Bacon 2013, p. 85–87 and Hancher, Ottervanger and Slot 2021, p. 94

on the criterion.[274] The Commission has in its decisions indeed played around with new ideas for concluding effect on trade and distortion too. For example, breach of freedom of movement could possibly be used, though it would raise the bar for the criterion. Then conclusive evidence would be required.[275]

3.3. Escaping Classification of Unlawful Aid

As stated above, not all measures who fulfil the previously analysed criterion are automatically labelled as forbidden aid. There are provisions to escape this classification. These are discussed very briefly, as they are only marginally relevant for this research. It suffices that their existence is acknowledged. For the most part this research assumes that these exceptions are not applicable.

There are primarily three ways to escape the classification. First the aid can be notified to the Commission and allowed by them in accordance with TFEU art 108. Second, the aid can be classified as de minimis aid and therefore allowable. And third the aid can be allowed as a block exemption in accordance with commission regulation[276].[277]

De minimis aid concerns only aid is exempt from the notification process of measures which otherwise are state aid in the meaning of TFEU art 107 (1). The applicability of the exemption is limited as it only applies certain agricultural activities and in a limited manner to singular undertakings.[278] The exemption only covers small[279] aids granted to these undertakings.[280] It is noteworthy that the form of the aid and condition of the recipient business are relevant. For instance, aid cannot be granted to an economically unhealthy undertaking or in the form of loan.[281]

SGEIs are often discussed as a specialty question within state aid measures. These measures have been distinctly regulated within TFEU art 106. The article cited generally places such measures as compatible with the common market so long the criteria of TFEU art 106 (2) are

[274] Schotanus, EStAL 3/2019, p. 365 The article concerns a case, where the lack of effect on trade lead to the conclusion of inexistence of aid.
[275] Arnull and Chalmers 2015, p. 683
[276] Commission Regulation No 651/2014 of 17 June 2014. The block exemption is not further examined here, as the regulation concerns fairly narrow set of cases and only measures who are relatively small in size.
[277] Työ- ja elinkeinoministeriö 2016, p. 7
[278] There is a separate regulation on de minimis aids for SGEIs. This is again not analysed here in any further detail as it is mostly irrelevant for this research.
[279] One or two hundred thousand euros depending on the industry. The calculation of the threshold is neither as straight forward as one might assume.
[280] Commission Regulation No 1407/2013 of 18 December 2013. The sectors governed by the regulation are interpreted tightly, and even small aids falling outside the regulation's framework are consistently deemed aid in the meaning of art 107 and therefore forbidden. Bacon 2013, p. 90
[281] Työ- ja elinkeinoministeriö 2016, p. 13

fulfilled. The specialty regulation has been characterised as important and somewhat significant with the significance increasing in recent years and for a good reason.[282] On the other hand, the specialty of the article has suffered from the ECJ's judicature.[283] As with de minimis aid this set of rules is not discussed here in meaningful length.

Aids meant in TFEU art 107 (2) are automatically compatible with internal market and need not be notified – these aids therefore escape the scope of art 107 (1). These block exemptions are threefold: social aids, disaster aids and finally certain Cold War aids to Germany[284]. The social aids are to be granted to individual consumers and without discrimination. This means in practise that most often the recipient lacks the status of undertaking and as they must be granted without selectivity, the aid cannot be selective per se.[285] Therefore, the article seems in a sense excessive. Disaster aids are to be interpreted strictly. There have been certain situations where this provision has been activated, most notable and far reaching have been the 2008 financial crisis and COVID-19-pandemic.[286]

Finally, the TFEU art 107 (3) governs aids that may be compatible with the common market. These aid measures are considered case-by-case by the Commission. In practise this piece of legislation enables the Commission to grant general exemptions, such as the aforementioned block exemptions. As the article grants the Commission room for discretion, it is mainly meaningful to briefly overview the principles the Commission is liable to consider when exempting an aid. The measure aimed must be considered as well as the aim of the regulation. The appropriateness of aid and its effectiveness and proportionality and its the side effects, like distortion, must be considered with due care.[287]

3.4. Existence of Notification Procedure, Possible Remedies and General Distinctive Features of State Aid

The TFEU art 108 concerns the notification and review processes of state aids. If the aid is announced to the Commission in accordance with the article, it can be deemed compatible with the internal market. On the other hand, the article also includes general provisions which determine if the aid is reimbursable. As stated within the introduction this significantly overshoots the scope of this research. The reimbursement is discussed here very briefly, as it is one of the most significant parts of state aid regulation from the point of view of the disadvantaged party.

[282] Raitio and Miettinen 2021, p. 129
[283] Bacon 2013, p. 115
[284] Which are not included in this piece of research.
[285] Bacon 2013, p. 95–97
[286] Hancher, Ottervanger and Slot 2021, p. 159–161
[287] Bacon 2013, p. 101–102

Furthermore, it is interesting for the theory of negative state aids[288]. The procedural part is skipped wholly. To repeat what is already said: This is not a research paper on this subject and further research is needed.

The first step is to establish broad limits as to what can be required to be returned. The answer, in short is unlawful aid. On the surface this seems clear, so long the conditions of TFEU art 107 (1) are met, and the measure is not allowed through the notification process or through block exemption. As seen previously, the challenge is that states, the Commission, and the court for that matter may have differing interpretation son the TFEU art 107 (1) and on exceptions on it.[289] The review process covers new aids, unlawful aids, misuse of aids and existing aids.[290]

Significant for negative state aids, the art 108 itself nor legislation stemming from it[291], take any stance on the question how negative state aids should be recovered. From a point of view of a layman it might seem tempting to extend the unbeneficial measure to all undertakings in the established framework.[292] A more fitting remedy would be the state compensating the negative state aid measure to the undertakings suffering from the measure. However, the litigation process is not that simple, as the ECJ has often denied reimbursement. The mere unlawfulness of an aid measure does not free the strained party from its obligation to perform its – unlawfully set – obligation.[293]

The TFEU art 108 and legislation conjoined to it cover the notification procedure, through which a otherwise unlawful aid can be allowed. If the procedure is not followed, the measure constitutes an unannounced aid, which is unlawful. This announcement process is not opened here at all. Therefore, for the purposes of this research it can be assumed that aid measure discussed is not announced.

State aid regulation calls for transfer of state funds, or inequal legislation indirectly leading to such transfer, amongst other things. Hence not all inequal of discriminatory measures constitute state aid as the criterion is at least partially left unsatisfied. Such measures may even then be unlawful or unconstitutional, though national law and state constitutions play far more

[288] The interest stems from the fact that negative state aid in the meaning of this research means aid measures, where the unlawful measure itself is the measure causing disadvantage to the party to whom the measure is aimed at. That is the competitors benefit from the measure. This leads to the question, how such aid is recovered.
[289] Hancher, Ottervanger and Slot 2021, p. 1001
[290] Alkio and Hyvärinen 2016, p. 466
[291] Such as Council Regulation 2015/1589 of 13 July 2015 or the soft-law regulation 2019 Recovery Notification
[292] This would indeed remedy the measure and force the inapplicability of TFEU art 107 (1), therefore nullifying the notion of state aid. This is not sustainable, as this would often require retroactive law, which is obviously out of the question. Eliminating the measure constituting aid does resolve the question, but it does not remedy the already suffered disadvantage.
[293] See for example C-526/04 Boiron, para 18 and case-law cited

significant roles when considering national discriminatory legislation. A prohibition of discriminatory legislature of sorts has though been enforced by the CJEU.[294]

Sometimes the alleged state aid measures – and negative state aid measures especially – fly close to measures that infringe on freedoms of movement and establishment. As such conduct is as well prohibited, it is worthwhile to research such infringements at least superficially. To a layman such infringements may seem the same, as inequal measures are at least somewhat selective or seem to include transfer of state resources. And in a sense, they might be similar: both constitute a sort of unlawful conduct.

3.5. Summary

Most useful way to present a summary of the substance above might be to repeat the first figure of this research with further detail. With the exception, that instead of creating a labyrinth of arrows, the following chart assumes positive answer to each question. A single negative answer points directly to the conclusion of no aid.

[294] See for example C-127/07 Société Arcelor Atlantique para 23 and case-law cited. The court refers to the principle of equal treatment in the case. This principle is one of the EU's core values and should be protected.

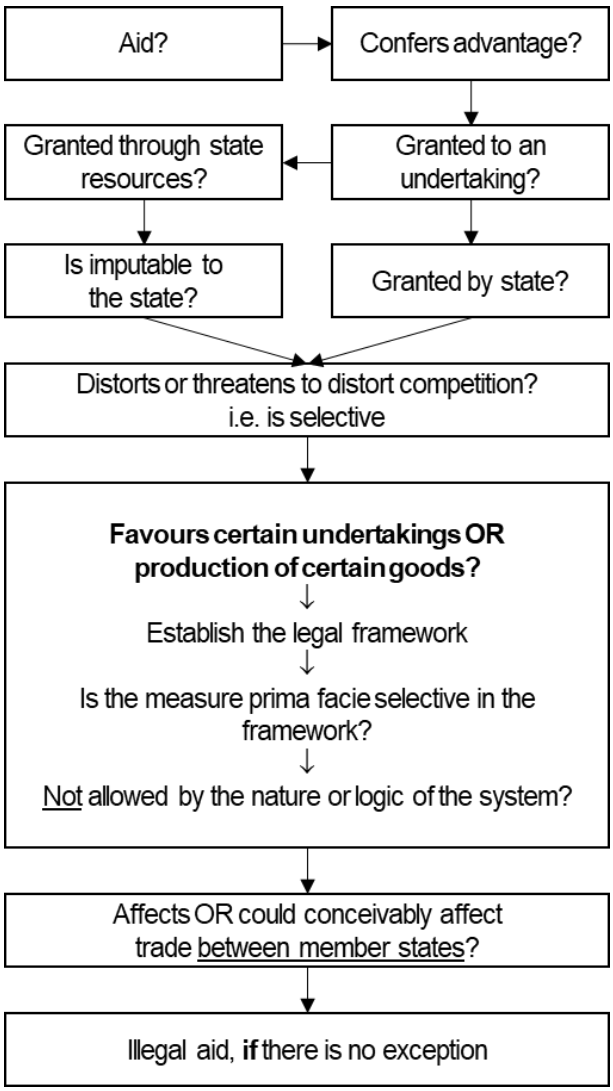

Figure 2 TFEU art 107 (1) if opened up a little further. To make it very clear: each box above describes at the bare minimum a set of tests and principles and demands adequate consideration. At the worst the box describes a set of rules and principles with tangled legal praxis, where small nuances between seemingly similar cases lead to opposite conclusions. As is usual in the field of law.

4. Level Playing Field and Discriminatory Conduct

Brief overview of some core points of fundamental rights and discrimination within the EU legal framework will prove beneficial when considering negative state aids, which have been characterised as tangled.[295] This is for an understandable reason as the CJEU has intentionally given judgments that seem at first sight contradictory. The notion of negative state aid is dependent on fine details on top of those determined directly and indirectly for that matter in the TFEU art 107 (1). The notion of negative state aid is often a balance act between state aid and

[295] See for example Agnolucci's analyse on C-75/18 Vodafone and C-323/18 Tesco. They conclude that in their interpretation of the court's decisions the sets of rules between state aids and free movement rules of EU are not mutually exclusive. The cases do consider infringements on both rules. Agnolucci, EStAL 2/2020, p. 197

discriminatory[296] conduct.[297] Nevertheless, a measure is most often pursued as either, but rarely both. Though, measure can be in violation of fundamental rights granted within TFEU and state aid provisions simultaneously.[298]

Goal of this chapter is to provide a very broad overview on discriminatory conduct. Secondly the aim is to analyse the conditions for deducing unlawful discriminatory conduct instead of unlawful state aid from a "suspicious" measure. And once again, to make it very clear: Purely discriminatory measure is different to the notion of state aid. There are no "measures equivalent to aid" as CJEU has made clear in its old judicature.[299] No general principles shall be used to extend the meaning of state aid.[300]

A prima facie discriminatory measure may be unlawful even when the measure does not constitute state aid. The presentation here is far from a comprehensive guide on legislation on discrimination and equal treatment, already on the basis that this research focuses merely on primary legislation, disregarding secondary legislation and even some primary legislation[301]. This aims merely to stir up thoughts on the possibility of a measure being discriminatory or inequal and therefore in violation of Treaty provisions even if the measure does not constitute state aid.

The legal framework of applicable fundamental rights is far more convoluted than that of state aids, as the equality within the EU legal frame leans heavily on general principles, rather than on direct and unambiguous treaty provisions or even directives.[302] The requirement for equal treatment is compressed fairly well in the treaty articles pleaded to in *Hervis Sport*[303].

As can be observed from the question of the national court in *Hervis Sport* the principle of non-discrimination within the EU legal framework is based on a principle. The principle further

[296] The non-discrimination principle in the EU law according to Vanistendael must be interpreted like hard law. Brokelind 2014, p. 33
[297] Deciding between these two is hard as a grey area and overlap exists here. Furthermore, the applicable legislation has quite an effect on the available remedy, as pointed out by Galdino. Galdino, EStAL 4/2019, p. 513–517
[298] See for example C-451/03 Servizi Ausiliari Dottori Commercialisti, paras 50 and 72. It should be noted, that the measure under investigation was only conditionally viewable as state aid.
[299] Case 290/83 Poor Farmers, para 18
[300] Bacon 2013, p. 24 Similarly, the meaning of discrimination in the state aid sense should not be mixed with that of discrimination in the internal market. In the internal market the bar for applicability of discrimination is obviously higher. Moreover, in the frame of internal market the principle is bound to nationality unlike in state aid cases.
[301] Applicability and limited similarity of TFEU art 101 has been argued. However, situations where it has been applied seem to be few and far between.
[302] Craig and De Búrca 2015, p. 932
[303] C-385/12 Hervis Sport, para 16

stems from TFEU arts 18 and 26[304], as the question shows – though certain similarities can be seen in certain provisions of TEU.

The fundamentals of EU's values and aims are encoded into TEU. The art 2 of the treaty does include the values of equality, rule of law, and non-discrimination as values of the union. Further the art 6 includes provisions to force the applicability of ECHR. That treaty does escape the scope of this research somewhat even if it partially may be applied in the context of rule of law and right to a fair trial. The core take on these articles here is that the these freedoms have similar weight as the core freedoms of the internal market.[305] These may be important when considering discriminatory legislation such as unequally directed tax laws and the taxpayer's[306] legal protection.

The TFEU art 18 prohibits discrimination generally on the basis of nationality. Nationality in this context is viewed to cover undertakings too.[307] The treaty provision is in other matters applied in tandem with art 19, which prohibits discrimination on other grounds than nationality. The provision is a general one and applies only to subjects under EU law and should not be applied when there is a more specific provision available.[308]

The equality as a principle and right must be applied carefully with measures nearly approaching definition of state aid, as they cover a wide set of groups who can be discriminated against. The articles often applied in tandem with the article under examination deal with discrimination on the grounds of gender, race, sexual orientation, and other such reasons mostly irrelevant in the scope of this research. It should be noted that the principles of non-discrimination and equal treatment go hand in hand with some of the general freedoms of EU, like the TFEU art 54 (1) concerns equal treatment of undertakings established in different member states.

Like with state aids, discrimination can and should in some circumstances be accepted. Unlike with aids there is a wider frame for discretion of the court when considering acceptable

[304] The TFEU 26 concerns internal market and principles to reinforce it and its existence. As can be observed from the previously referred case C-385/12 Hervis Sport, para 16, the provision is a part of the general principle of non-discrimination. As the principle is here handled otherwise, the specific article is not further analysed. It can be viewed to be handled otherwise in tandem with treaty provisions on freedoms of movement of capital, workforce etc. as the functional internal market is de facto reliant on these and those freedoms are a condition for the existence of the internal market.
[305] Ojanen 2016, p. 153–154
[306] Who, in the context of state aids would be the recipient of aid or more interestingly in the context of negative state aids the party suffering from the aid measure.
[307] The art 18 has been since the early case-law been connected to the fundamental four freedoms of the internal market. Giovanni 2021, p. 79. This is in contrast with for example with the Finnish constitution, which somewhat rarely applies to undertakings in a sense that undertakings would receive protection.
[308] Giovanni 2021, p. 120–121

discrimination. The discrimination can be accepted if it is "really necessary", appropriate given the aim, and necessary to achieve the goal pursued.[309]

As the principle of equal treatment and prohibition of discrimination are quite vague[310] and deserve further research it is appropriate to mention the possible applicability of certain human rights provisions. The ECJ has applied some provisions of the ECHR which has been brought to the scope of EU law. The judicature has thus far been very careful, but it has been accepted by the member states even though it stretches the ECJ's jurisdiction.[311] The most important provisions stemming from the ECHR are the right to a fair trial and protection of property.[312] Therefore, the provisions should, at least at the time of writing this research, be relevant only if a discriminatory measure is obviously that: discriminatory.

Under the topic of fundamental rights in the EU framework, the four freedoms of movement must not be overlooked. Some of these freedoms are naturally more relevant than others, but they only form a coherent unity as a group. The freedoms are the freedom of establishment and freedoms of movement of capital, goods, and people (workforce). Perhaps the most important of these are the freedom of establishment and free movement of capital[313] when comparing them with the notion of state aid, though the freedoms are handled as a whole here for the purposes of this research.

Freedom of establishment stems from TFEU art 49 and it is in a way extended through art 56 who concerns freedom to provide services. In *Hervis Sport* the measure under investigation was in the end considered to violate these treaty provisions, even though the measure was pursued as a state aid measure as well.[314] State aids most often are aimed at domestic undertakings in order to aid them. This clashes with said fundamental freedoms, as the freedom of establishment by its nature is an extension to principle of non-discrimination and includes the freedom for an

[309] Craig and De Búrca 2015, p. 948
[310] See for example Craig and De Búrca 2015, p. 938–939 for exceptions from the principle of non-discrimination.
[311] See Kofler, Maduro and Pistone 2011, p. 65–66. Lennaerts and Gutierrez-Fons consider that ECJ accomplishes a mission of legal order within EU as ECJ has aligned the new legal order of the Union with the basic constitutional tenets common to EU's member states, in other words common to number of member states constitutions. Furthermore, TEU art 19 contains a version of rule of law in supranational context recognized and approved in member states' constitutions Gutiérrez-Fons and Lenaerts 2010, p. 1632–1633. Snell confirms that rights with economic angle get a stronger protection. Snell 2015
[312] Kofler, Maduro and Pistone 2011, p. 445–446
[313] All these freedoms are important for undertakings, but one could argue that the freedom of establishment and free movement of capital are the most crucial for undertakings. It must be borne in mind that all the freedoms are ultimately created for business, as can be seen from the free movement of people, which is arguably most valuable of the freedoms for average consumers; the freedom implies free movement of workforce.
[314] C-385/12 Hervis Sport, paras 15 and 45

undertaking to, basically, open a branch, business, or any other kind of for-profit operation in any member state.[315]

The ECJ has devised a severability test to distinguish between state aids and infringements on the four freedoms. The test is however somewhat unclear. Furthermore, the test is not unambiguous in a sense that would block a measure from conceivably being interpreted as either and the court has had to resolve cases where there have been questions in place concerning both provisions on state aids and the aforementioned four freedoms.[316] The two are sometimes difficult to distinguish from one another[317] even if it is absolutely worthwhile to keep these separate. For example, the remedies for violating these prohibitions or rights are completely different.[318]

When considering the difference between state aid and measures in violation of the four freedoms of the EU, it may throw an unexperienced researcher off that there are some similar conditions. For a measure to violate freedom of establishment, it must discriminate foreign market operators. For a measure to be discriminatory, it must be selective. Therefore, for a measure to be either state aid or in violation of EU's basic freedoms it must be selective.[319] On the other hand selectivity has been connected to the measure conferring advantage. The ECJ has stated that in the frame of TFEU art 49 discrimination can be viewed as a measure that places EU citizens at a disadvantage.[320] It should be noted that the standards to establish selectivity differ, even it has vaguely been suggested, that the two should approach one another. Similarly, discrimination and selectivity are different.

A certain similarity to condition of distortion of internal market and effect on trade can be seen with freedom of establishment, as violations on freedom of establishment and right of free movement of currency place roadblocks on free trade therefore affecting function of internal market. This is not to say that the similarity bears significance in judicature, as the criterion of effect on trade between member states is a condition that namely exists. This observation may

[315] Storey and Turner 2013, p. 250
[316] Hancher and Lòpez 2021, p. 89–91
[317] Hancher, Ottervanger and Slot 2021, p. 117
[318] Hancher and Lòpez 2021, p. 100
[319] See for example C-451/03 Servizi Ausiliari Dottori Commercialisti, paras 36 and 56. In para 36 the ECJ concludes that the measure is discriminatory as the special tax only applies to undertakings of third nations and other member states of the EU. It must be argued that this measure is discriminatory exactly because it is selective. Which the measure obviously is, as the court concluded that the measure may, under certain conditions, conduce state aid. It should be noted though that the court fails to acknowledge this in para 56, even if the condition of selectivity is widely accepted as a condition for state aid, as discussed in chapter 3.2.4. of this research.
[320] Davies 2013, p. 159

bear more significance, should the court steer the interpretation of state aid's effect on trade towards a more careful application. Which seems unlikely at best.

In conclusion, it must be borne in mind that equality handled here is different to discrimination. The fact that a measure is not discriminatory[321] does not mean that a measure is equal. Further it must be noted that the subject matter presented here barely scratches the surface. Several master's theses could be written on the topics presented under this chapter. The point of this chapter is to prove and drive home, that a measure can be unlawful in other ways than because of state aid regulation. On the flipside of the coin, it must be made clear that the fact that a measure is prima facie selective does not mean it is selective in a sense that it infringes on the four freedoms of the EU. Such a measure may however be prohibited state aid.[322] That is to say that the threshold for state aid may be lower compared to such infringements, even if those should be pursued in a court as a secondary claim whenever applicable.

5. Negative State Aid

5.1. What Is Negative State Aid, Exactly

Negative state aids are a semi-special breed of state aids. Their mere existence has been controversial as the ECSC included provisions on imposition of special charges, but the TFEU does not.[323] The ECJ went as far as to state that "It follows that a single measure cannot at the same time constitute both an aid and a special charge within the meaning of Article 4(c) of the ECSC Treaty." therefore practically rejecting the existence of negative state aids by concluding that a measure cannot simultaneously constitute an aid measure and a special charge.[324] In practise a negative state aid measures are an exception amongst state aids that also constitute state aid, should the relevant criteria be filled.

Even has the ECJ has drawn such a conclusion, tightening the criterion for state aids, the court has since gone back on its conclusions in its latter judicature, even though the relevant treaty on the face of it tightened the criterion by scrapping the provision of special charges.[325] This is not to say that concluding the existence of negative state aid is some kind of axiom; quite the opposite as the conclusion is an exception to the rule.

[321] In the meaning it has in EU law context.
[322] See for example cases C-203/11 and joint cases C-236/16 and C-237/16 ANGED
[323] Bacon 2013, p. 37
[324] C-390/98 Banks, para 34
[325] See for example the, in the context of this research, often referred C-526/04 Laboratories Boiron.

There are, as discussed previously in this research, conflicting terms to the concept of negative state aid, mostly the concept of negative aid. To recap, the negative aid concerns situation where an exemption to the rule is granted, which grants leeway compared to the main rule. A prime example would be tax relief or exemption.[326] For the purposes of this research the main subject is referred to as negative state aid, when there is significant risk of confusion, to establish a distinction. Negative state aid concerns situations where the party to whom the measure is aimed at is put into a weaker position compared to its competitors or other peers of the relevant reference framework. That is to say, the aid is enjoyed by the peers of the party to whom the measure under scrutiny is aimed at. A fairly enlightening way to view negative state aid is to view it as selective disadvantage instead of selective advantage. As the TFEU art 107 (1) only concerns aid, the selective disadvantage must be flipped as negative advantage to the competitors.[327]

This research focuses here broadly on fiscal measures as the negative state aids most often take the form of taxes, other levies, and parafiscal charges.[328] Therefore, most of the relevant case-law concerns these types of cases. To foreshadow the conclusions of the research, there is no reason to conclude that negative state aids are per se limited to said types of cases, as more case-law is needed.

5.2. Categorisation of Negative Aids

Negative state aid is state aid. Were one to live on the edge, one could draw the conclusion that all the criterion for regular state aid needs to be fulfilled for the measure to constitute state aid. That is the measure must grant an undertaking an advantage, the measure must involve transfer of state resources and be imputable to the state, the measure must be selective, and finally the measure must at least threaten to distort competition. It is perhaps somewhat surprising that the ECJ has found it beneficial to create settled case-law around the fact that the conditions must exist simultaneously[329] even though this distinction is very clear within the TFEU art 107 (1).

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[326] A prime example of this is the previously referred case in Sweden on real estate taxes on wind powerplants. Those powerplants receiver tax relief in the form of lower real estate tax. HFD 3873-18

[327] Hancher, Ottervanger and Slot 2021, p. 452 and the AG Hogan's opinion on joined cases C-105/18 to C-113/18 UNSEA, para 92

[328] This is logical, as a good word for context in negative state aids is obligation. Obligation to do something, to pay tax or levy. Similarly, the tax itself is an obligation to pay said tax. See for example Hancher, Ottervanger and Slot 2021, p. 441–442 for further context. The tax nature is further underlined if the aid is called by its other name. According to Galdino the measure is also known as asymmetrical *tax* measure. Furthermore, according to Galdino the negative state aid resolutions by the court concern only tax cases. The extension to parafiscal charges is through analogy. Galdino, EStAL 4/2019, p. 511, 517 In my view, this affirms that there is no absolute barrier per se that would hinder the application of these rules to other types of obligations.

[329] C-280/00 Altmark, para 74

The negative state aids are no different form regular state aids in the regard that the same criterion applies to them too. The discussion starts to lean heavily towards philosophy when one starts giving consideration to the distinction whether the additional criteria for negative state aids are part of the aforementioned criterion or additional to them. What is important, is that there is, in fact, a narrow set of additional criteria.

The case *Laboratories Boiron* could be considered a pioneering case for negative state aids, as there exists very limited legal praxis before said case. As previously stated, in the case the tax, not exemption from it was considered aid. A question arises: Why? The answer is somewhat complex.

Upon closer inspection two distinct criterion can be perceived. First the aid element of the criterion must be fulfilled. In the case the measure under investigation was stated to bring the relevant market operators to equal footing by implementing a tax on direct sales which compensates the liabilities set for wholesale distributors.[330] The problem with said compensation is that the compensation is not in proportion, causing overcompensation, and therefore causing advantage by distorting the market. This is to say there is further specified criterion to the existence of advantage.

Second, the special tax and the aid measure must be inseparable. The fiscal measure is at the same time the charge, which places a strain on the undertaking, and the very same measure enabling the existence of aid. That is aid whose positive effects are enjoyed by the parties who need not suffer from the measure.[331]

Under the surface lurks yet another criterion, however. This criterion is a part of the selectivity criterion in disguise and more specifically its framework distinction. See, in order to conduce a state aid, the reference framework, to whom the alleged aid is compared to in order to establish selectivity, must be established. In other words, the reference framework must be established to decide if the aid measure is a relief or exemption to a general tax (the framework) or a special, increased, tax rate or charge compared to the general tax (the framework).[332]

The other way to conclude negative state aids is to show that there is a special charge and an aid measure and that the two separate measures are sufficiently linked together. This has been established by the court in its, in context, numerous decisions.[333] Upon closer inspection these cases are a sort of quasi negative state aid: Some cases have a lot in common with regular state

[330] C-526/04 Laboratories Boiron, paras 27 and 28
[331] ibid, para 45
[332] ibid paras 33–35
[333] See for example C-510/16 Carrefour Hypermarchés, para 14 and case-law cited.

aids, whereas some cases centre around the negative element of the aid. With the overcompensation element, discussed briefly above taking more relevance, an interesting question of distinction arises: If the tax itself is not necessarily the aid itself, is the element ultimately constituting the aid the tax or the de facto tax relief? Therefore, the relevant reference framework yet again arises as more and more important element.

The two ways of concluding negative state aid are therefore different yet surprisingly similar. Diligent analyse of case-law sheds light on the matter, as the first of the previous two sub-categories is exactly that: a sub-category or an exception to the latter. Finally, both categories are after all state aids, therefore the TFEU art 107 (1) criterion must be satisfied for a negative state aid to exist.

Therefore, there can be three different kinds of aids stemming from tax measures or measures similar to taxes, which have the following core differences. To name some, regular examples of the regular measures, they are for example lowering the basis for tax, reimbursing the tax or part of it or delaying tax debts, renouncing them, or temporarily restructuring them.[334]

	Regular aids	Negative aid, type 1	Negative aid, type 2
Rule or exception to it?	General rule	Exception to general rule	Exception to exception to general rule
Reference framework	General tax	Special tax / charge	General tax / charge
What is the aid measure?	Exemption / reimbursement / other relief	De facto exemption from the special tax	The special tax is the aid measure
Classification	Regular / positive aid	Negative aid	

Figure 3 Core characteristics of tax measures constituting state aid.

5.2.1. Two Separate, Yet Linked Measures

The aim here is to investigate the types of aids the table above and the headline suggest. In other words, the below approaches negative aids in which the contested measure is not the aid itself, but a separate yet conjoined effect of the measure. These types of aids are difficult in the sense that the CJEU has consistently set the bar for receiving protection high, as a tax cannot be ordered to be removed or the measure constituting state aid to be expanded to all undertakings generally to terminate the aid. The definition of state aid is approached widely from a tax point of view and through the battery of conditions itemised in TFEU art 107 (1).

To briefly recap the conclusion of state aid calls for the measure to confer economic advantage, involvement of state resources and imputability to the state, selectivity, and effect on trade

[334] Alkio and Hyvärinen 2016, p. 114

between member states. The last of which is for the purposes of this research bypassed. The negative state aids have special criteria, which, as observed above, build on these criteria.

Advantage

First the aid measure must constitute economic advantage. The advantage element is the element that makes the aid negative. The party whom the measure constituting the aid directly concerns is not the beneficiary as usual. In other words, their competitors enjoy the aid.

Often the requirement is interpreted in tandem the TFEU art 107 (1) term aid. The term and therefore existence of economic advantage is interpreted to be wider than the meaning of a mere benefit, which would be relatively easy bar to pass. In the case *Air Liquide* the court did find that an economic advantage exists. The key here is that the measure must have "same effect" as subsidy.[335] In the case *Ferring*, which is described as one of the most interesting cases of the type of aids on hand[336] the court implies that the tax on direct sales has the same effect as exempting wholesale distributors from tax.[337]

The only possible conclusion in the light of the settled case-law is that the first of the TFEU art 107 (1) criterion can be satisfied under negative state aids. An exemption or de facto exemption can have same effect as a subsidy. The settled case-law does not end there; as long as a measure has *the same effect as subsidy* it can constitute state aid. This criterion is therefore possible to satisfy.

However, the existence of economic advantage must not be assumed. Even though in the case *Ferring* the court concluded that it is possible there exists an advantage the court latter turned back on its general statement in the light of further details. The aid must really exist, and it must be shown, as discussed in the third chapter.

In the case *Ferring* the alleged aid was compared with indemnity which was based on the polluter pays principle. In the case of the indemnity the measure was not considered aid as the cost resulting from the indemnity was lesser or similar to that borne by undertakings not strained by the measure. In the light of the facts on hand in *Ferring* the tax imposed on Ferring SA and its

[335] Joined cases C-393/04 and C-41/05 Air Liquide, paras 29. The cited case concerns a negative aid case, of the type on hand here. In the cited paragraph the court refers to numerous cases, where the fact that measure who has similar effect to subsidy constitute aid. The ECJ cites cases C-143/99 Adria-Wien Pipeline, where the economic advantage claimed to constitute aid is tax rebate, C-501/00 Spain v Commission concerned tax deductions and C-66/02 Italy v Commission, where there were multiple different aids, stemming from state's legislation, taxes and to some extent company's legal form. That is to say that if there is advantage there may be aid.
[336] Alkio and Hyvärinen 2016, p. 141
[337] C-53/00 Ferring, paras 15, 18, and 20

peers placed same strain on the undertaking as the public service obligations placed on wholesale distributors. Therefore, as the strain is the same, there was no aid in the case on hand.[338]

In essence, the measure accused to constitute state aid must overcompensate the possible other obligations set to the undertakings who the measure does not concern. This criterion is interesting, as there exists also an opposite line of interpretation in more "regular" types of cases: Identifying difference in treatment should not take into account the aim of offsetting other disadvantage in the market. It must be noted that the advantage criterion here is very closely intertwined with that of selectivity.[339]

To determine advantage, one must know to whom compare. This comparison between undertakings is close to the three-step-test which is involved in determining the reference framework, which again is important when discussing selectivity.[340] In fact, the two measures were handled as one by Alkio when analysing this[341]. Furthermore, the CJEU and the Commission have started a trend of investigating the existence of selective advantage disregarding the fact that these are technically two different criterions.[342] Then again, the court does every now and again successfully separate the two distinct features.[343]

Per se non-taxation cannot constitute state aid. Otherwise, one could argue, that state is aiding undertakings by not taxing the breathing of its employees. The non-taxation of breathing is the general system. Just as granting tax reliefs in the reference of systematic taxation, say VAT, confers selective advantage to the freed parties, a tax levied on breathing only on employees of car dealers for instance is selective and can be argued to constitute advantage favouring motorcycle salesmen. The key is to establish the normal conditions or normal tax, here the general VAT[344] or the non-taxation of breathing.[345]

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[338] ibid, paras 26–27
[339] Miladinovic 2022, p. 127
[340] Hancher, Ottervanger and Slot 2021, p. 447–448
[341] Alkio and Hyvärinen 2016, p. 141–142 This goes to cement the fact that the two criteria are closely tangled together. Therefore, it is only logical to handle them as a whole here too.
[342] Hancher, Ottervanger and Slot 2021, p. 448. Schön cites the joined cases C-20/15 P and C-21/15 P World Duty Free, para 53. The ECJ seems to de facto rewrite the established TFEU art 107 (1) criterion in said case at least when comparing to its settled interpretation. In the second case cited by Schön, the court directly writes about selective advantage. C-374/17 A-Brauerei, para 19 This is in line with the fact that the GC has established as an objective fact that reference framework is important when considering both selectivity of the aid and the advantage element of the aid. Joined cases T-778/16 and T-892/16 Apple, para 144
[343] Hancher, Ottervanger and Slot 2021, p. 449
[344] Or special VAT. One cannot argue successfully that a lower tax on medicine or food constitutes aid in the meaning of TFEU art 107 (1). Firstly, these differing tax rates are legislated through EU directive. (2006/112/EC) Secondly, the argument that, a lower VAT on foodstuffs puts breweries in disadvantage limps. If the lower tax was to apply to only certain foodstuffs, the argument would have slim chances for success. Wissel and Becker are on similar stances in their commentary on the case *Laboratories Boiron* as they criticise taxes on a specific industry to be regarded as aid. Wissel and Becker, EStAL 1/2007, p. 103–104
[345] Hancher, Ottervanger and Slot 2021, p. 448

The third TFEU art 107 (1) criterion is selectivity. The order is intentionally scrambled as the selectivity is logical to handle in conjunction with advantage. When assessing selectivity, especially concerning negative state aids, it is useful to keep in mind that the analysed measure is most often a full-on scheme instead of individual measure. This complicates the assessment, as yet again the reference framework for the scheme steps out and calls for attention. Furthermore, the criterions can be seen separately as advantage test, answering if aid exits, and as selectivity test to answer if the aid is selective.[346]

Selectivity

To kick off the selectivity criterion, one could start from one of the vast and most general principles: arm's length. The principle is extremely broad and fits many cases beyond state aids. As such a broad principle it is difficult to pin down one exact use case. The principle can be used for establishing selectivity but also the reference framework. The principle is for most part not handled here due to its extent.[347]

The GC has fairly recently started a line of interpretation where the arm's length principle[348] was successfully used to establish the correct reference framework and therefore selectivity.[349] The principle and its applicability are discussed below. The applicability of this criterion does not come without its problems as the court has not explicitly confirmed its applicability even if it has strongly hinted it.[350]

A second principle, that has been followed, is that of testing de facto selectivity of a measure. This has indeed been handled in chapter three, but it is worth emphasising, that even when a measure may prima facie be objective and fair, the application of the criterion leads to selectivity. Realising the selectivity in case of de facto selectivity may be difficult.[351] For example, making an aid accessible only to undertakings of adequate size, factually cutting off domestic

[346] Hancher, Ottervanger and Slot 2021, p. 446 and 449
[347] This is evident instantly as one views the headline of one of the sources used here. "Selectivity and the Arm's Length Principle in EU State Aid Law" The principle therefore overshoots the scope of master's thesis by a long shot as a book can be written on said subject.
[348] The principle is somewhat widely used. The term portrays that the conditions are "independent and on an equal footing" Merriam-Webster n.d.
[349][349] Rapp cites *Starbucks* and *Luxembourg and Fiat Chrysler Finance Europe v Commission* cases. Hancher and LoÌpez 2021, p. 44–45. The confirmation of applicability of arm's length principle and its more defined application can be found in in joined cases T-755/15 and T-759/15 Fiat Chrysler, para 143 and in joined cases T-760/15 and T-636/16 Starbucks, para 151. Furthermore, it must be noted that not all new phenomena lead to permanent change. The judicature of the courts do evolve overtime, as is natural. Even if this is an obvious fact the same can be seen in hindsight with recent case-law from before 2012. As Lang put it in 2012 the unequal treatment between companies in comparable situation does not constitute state aid. Even if the recent case-law at the point vaguely suggested so. Lang, EStAL 2/2012, p. 420–421
[350] Miladinovic 2022, p. 93
[351] Alkio and Hyvärinen 2016, p. 121

operators[352] is de facto selective, even if the exact wording of the legislation is objective. Similarly, a tax "regime" was considered as de facto selective in *Commission v Gibraltar* as in practise only certain undertakings could enjoy the aid.[353]

More recently the court has steered its interpretation towards grounding the establishment of selectivity and therefore reference framework to discrimination. This interpretation abandons the concept of reference framework as such and attempts to show discrimination between undertakings, approaching the interpretation discussed in chapter four of this research.[354] This further underlines the importance of understanding the other provisions of TFEU concerning discrimination and free market.

As the previous approach is somewhat new, the legal praxis is yet limited. This approach is not examined here in extensive detail, as the interpretation may evolve still. It is noteworthy, that the approach enables two benefits: no need for identifying exact groups to compare and the ability to consider any discriminatory tax as a selective measure, as made clear by the ECJ in *World Duty Free* case.[355] It should be noted that the case does not fully abandon the reference framework, as the selectivity can be crystalised as follows: "All that matters in that regard is the fact that the measure -- should have the effect of placing the recipient undertakings in a position that is more favourable than that of other undertakings, although all those undertakings are in *a comparable factual and legal situation* in the light of the objective pursued by the tax system concerned."[356]

To recall, the reference framework can have aerial features[357], the selectivity does not have to be based on objective regulation[358] and other frameworks. The framework here is further different, and of more importance, as the same framework is often used in establishing the mere existence of aid on top of the selectivity.[359] The ECJ has employed the three-step-test widely within cases concerning state aids through taxation to establish selectivity, which cannot be

[352] See 2016 Notice paras 121–122 and Hancher, Ottervanger and Slot 2021, p. 484–485 discussing joined cases T-92/00 and T-103/00 Diputación Foral De Álava, para 39. Similar selectivity was attempted to pass as a negative state aid question in C-323/18 Tesco.
[353] Joined cases C-106/09 P and C-107/09 P Commission v Gibraltar, para 104
[354] Hancher, Ottervanger and Slot 2021, p. 449–450 It must be noted however, that on the level of GC resolutions it has been well established that the art 107 does not extend to equal treatment in the field of taxation. Hancher, Ottervanger and Slot 2021, p. 451
[355] Hancher, Ottervanger and Slot 2021, p. 449
[356] Joined cases C-20/15 P and C-21/15 P World Duty Free, para 79
[357] The aid can be federal and local. Even though locally legislated aids are rarely in contradiction with TFEU art 107 (1) they can be. This is only logical as the states would otherwise dodge the regulation by delegating all aid measures to sub-state actors. Hancher, Ottervanger and Slot 2021, 442–443
[358] It must be borne in mind that prima facie objective legislation can be a façade; the "objective" measures may target a very narrow market share. Moreover, measures which leave much to the discretion of authorities are perhaps even more easily state aids. Hancher, Ottervanger and Slot 2021, p. 446
[359] Hancher, Ottervanger and Slot 2021, p. 448

presumed to the same capacity as with normal aids.[360] To recall the three-step-test, it involves the tests for identifying the reference framework, testing for deviations from it and ensuring that the measure does not fit the general system and its logic.

Three-Step-Test

The ECJ has often adopted a wide reference framework, that is to say "normal tax" has been thought to be a general tax like income tax. The court has compared the alleged measure to the general system and general tax to which the measure under investigation is an exception to. Even the whole (Spanish) tax system has been considered the reference framework.[361] It is important to note that the selection of reference framework bears significance as the tax through which the accused aid measure is implemented may belong to the sovereignty of national taxation therefore precluding the argument of state aid.[362]

Problems may however arise if no clear reference framework can be determined, like in *Commission v Gibraltar* case.[363] The state aid case ultimately failed, even though de facto selectivity[364] was established and this remedied the lack of unambiguous reference framework. The case concerned multiple taxes implemented simultaneously. The case is considered to be a landmark case steering the direction of state the reference framework and selectivity towards discrimination.[365]

As satisfying as it might be to present a conclusive and fool proof guide on how to correctly identify the correct reference framework, I am afraid creation of such general guide is impossible and the framework must be established in each separate case[366], as the reference framework can vary between competitors in a certain industry, like in *Laboratories Boiron* and entire industries like the medical industry or publicly owned businesses.[367]

When establishing selectivity, in other words discrimination between undertakings, or in even other words reference network, a thorough analysis of all the rules, their purpose, applicability with other rules and interplay must be assessed carefully. The question is always relative and applicable only to the case on hand.[368] The court has established that the determination of the envelope, the reference framework, in which discrimination between operators in similar

[360] Hancher and Lòpez 2021, p. 43
[361] Hancher and Lòpez 2021, p. 43–44
[362] Hancher, Ottervanger and Slot 2021, p. 471
[363] Joined cases C-106/09 P and C-107/09 P Commission v Gibraltar
[364] Discussed in further detail above
[365] Lang, Pistone, et al. 2018, p. 119–120
[366] Far more enlightened scholars do seem to share this view. Miladinovic 2022, p. 131
[367] Hancher, Ottervanger and Slot 2021, p. 481–482
[368] Miladinovic 2022, p. 128

conditions must be established must take into account the legal system in a wide sense and it must be understood how the provisions within the framework interact.[369]

Traditionally the identification of reference framework has started by determining if the undertakings under investigation are in comparable legal and factual situation.[370] This approach does not come without its problems: This is evident in the with the newer approach discussed below. Secondly the establishment of reference framework is to some extent dependent on the case.[371] Certain repetitiveness can be found between the cases, but at the end of the day the "normal tax" must be established separately in each case, as even the tiniest details might affect the end result significantly.[372]

The ECJ does not seem to have an unambiguous and coherent set of rules on how to establish the reference framework. To put it colourfully, one would be hallucinating if they were to state that such a ruleset could be established within the frame of existing legal praxis. As far as the material collected for this research the best attempt at creating such a ruleset is that of AG Mr. Bobek in *Belgium v Commission*[373]. The short version, which does not give justice to the opinion, is that the starting point should be to determine the scope of application of the measure in relation to those concerned.[374] Second the objective of the measure should be determined.[375] Third it ought to be considered if there are some auxiliary factors, like substitutability of the products involved.[376] The first condition should be considered a starting point to which other points may perhaps be nuances. The first and second conditions should however be always considered. Finally, to repeat myself, "Their [the conditions above] precise articulation and their respective weight will depend on the circumstances of each particular case".[377]

The establishment of the reference framework is therefore here left to stump, given its far reaching importance. Further details on establishing the reference framework can be found in chapter three and the source material. It is obvious that establishing the reference framework has potential subject for further research. Those criteria fit directly here, as long as it is kept in mind,

[369] C-6/12 P Oy, paras 19–20
[370] For slightly more background, please refer to chapter 3.
[371] As is anecdotally shown Hancher, Ottervanger and Slot 2021, p. 456–460, 417–472
[372] This is evident for example when comparing cases like joined cases C-393/04 and C-41/05 Air Liquide and C-526/04 Laboratories Boiron. The cases have many similarities, but the end result differs. The rulings have been published relatively close to one another (15th June 2006 and 7th September 2006) and the hearings for the cases were held on the same day, 13 October 2005. This indicates that the ECJ has been willing to emphasise the fact discussed here.
[373] AG Mr. Bobek's Opinion on case C-270/15 P Belgium v Commission, paras 32–35
[374] ibid para 32
[375] This must point ought to be viewed from the point of view of the object of legal protection aimed to foster. Ibid para 33
[376] This has however not gained popularity in the ECJ. Ibid para 34
[377] ibid para 35

that most often the reference framework is "normal taxation" and that the compared undertakings must be "in comparable legal and factual situation".

Finally, it must be borne in mind that taxes per se are outside of reach of TFEU art 107 (1), as the member states maintain sovereignty over tax legislation, excluding VAT. Say tax on alcohol or tobacco or other Pigouvian taxes are accepted, just as some monopolies are accepted to promote health or other goods.[378] Similarly importing used cars between member states may include tax consequences, which seems at first sight illogical, as tolls and other such costs ought to not exist between member states.

What comes to the steps two and three of the three-step-test, the step two is here bypassed as prima facie selectivity, that is deviation from the established framework is straight-forward to identify, at least compared to the process for successfully and objectively establishing the framework. The fit to the general scheme however may provide some difficulties. It is worth a little further investigation, as the fit may spoil otherwise plausible state aid case. In simpler terms: If there is selective disadvantage, there may be aid unless the following criterion of fitting the general scheme is fulfilled.

To recall; even if the measure is deemed selective within the established reference framework in accordance with the two first steps of the three-step-test, the end result may be watered down by the third criterion which limits the selectivity criterion's ability to bite. If the measure at hand fits the nature and general scheme of the regulation and legislation, the measure must be allowed.[379] In practise this means that the measure must be allowed if it is necessary for the functioning and effectiveness of the system[380] and the measure complies with principle of proportionality.[381]

The objectives of tax systems should be divided two ways, internal and external objectives, the first of whom may lead to the end result where a selective measure must be allowed. Internal measures are measures necessary for the tax system, like provisions to avoid double taxation, tax avoidance or provisions enabling the tax to be progressive. External objectives are such that

[378] Hancher, Ottervanger and Slot 2021, p. 452
[379] Hancher, Ottervanger and Slot 2021, p. 467–468
[380] 1998 Notice, para 23.
[381] Joined cases C-78/08 to C-80/08 Paint Graphos, para 75. Principle of proportionality was created, and still is, as Zalanski puts it, the principle is a "night watchman" setting limits to regulators in regulating different aspects of economic and social life. Zalanski considers principle of proportionality to be one of the core principles of modern public law. Brokelind 2014, p. 303–306

are not absolutely necessary for the effectiveness for tax system, like environmental objectives baked into income tax system.[382]

The test most often in tax cases frees certain non-profit organisations like foundations and associations from the selectivity.[383] Other allowed reasons might lean towards the ratio of the legislation under examination, like aiming at principle of tax neutrality or avoiding tax avoidance, or on the other hand double taxation.[384] The burden of proof to show that the measure fits the general scheme is on the state.[385] For further details one should turn again to the third chapter of this research, as the fit has been researched there in further details.

Involvement of State Resources

The second TFEU art 107 (1) criterion is to test for involvement of state resources and imputability to the state. This criterion is here split two-ways. First, the aid must be financed through state resources in the traditional sense, just like the article criterion describes. Secondly the tax, or other parafiscal charge must finance the aid in question. The second condition actually being a different criterion.

First, the TFEU art 107 (1) criterion call for the aid be financed by the state and the measure must be imputable to the state. Here one must be reminded that the issue on hand here considers mostly taxes, other levies, and parafiscal charges who are actually very similar in character to taxes. Logically taxes have a natural link to state resources, as a majority of state resources are collected through taxes.

Tax reliefs are easily deduced to originate from state resources. These deviations from the established "normal tax" lead to situation, where the state loses resources, it would otherwise have obtained. Therefore, there is an additional burden placed on state resources.[386] This describes however poorly the situation, where the measure accused of constituting illegal aid is a special tax, not an exemption from a "normal tax". The question must therefore be approached differently.

The second and final criterion in the frame of the aid being financed through state resources as mentioned above, which could be considered a criterion originating purely from case-law or a

[382] Lang, Pistone, et al. 2018, p. 121
[383] Hancher, Ottervanger and Slot 2021, p. 469
[384] 2016 Notice, para 139
[385] 2016 Notice, para 141 In the case of stating that the measure avoids potential double taxation must not be allowed. It must be shown that the measure is actually effective. Hancher and Lòpez 2021, p. 46–47
[386] Lang, Pistone, et al. 2018, p. 116

part of the requirement of originating from state resources discussed above, is that the requirement that the extra cost or the "selective disadvantage" must finance the aid in question.

As the TFEU art 107 (1) considers only advantages, not disadvantages, the question must be approached from the angle whether the advantage stemming from the tax originates from tax resources. This is exactly what the court set out to seek in the case *Van Calster*.[387] The court considered if the tax levied in the case was connected with the advantage in a sense that they could be considered to be in conjunction with each other in the sense that the disadvantage directly finances the advantage.[388] This is different from the case where the advantage and disadvantage are the same measure, like in *Laboratories Boiron*.

The use of the tax must be shown, and it is insufficient to merely state that the measure enables a lower tax or that it is automatically allocated to financing the de facto beneficiaries of the measure. The tax must be "hypothecated to the aid measure under the relevant national rules."[389] The bar for such hypothecation is high. It is insufficient that the even if the connection is established in one and same statutory regime.[390] This seems to set the bar for the existence of such a negative aid extremely high. One could argue that this criterion alone makes it "unfairly" difficult to seek remedies against prima facie selective measures implemented by states through the state aid regulation.

Even when the sufficient link between the aid and the measure funding it is established there lies a roadblock for potential plaintiffs. In order to conclude that the disadvantage must be reimbursed, the proceedings from the levy or tax must be pooled to their own separate budgetary pool.[391] This does not mean that the measure itself could be considered unlawful. For example, in the case *Herbert Scharbatke* the ECJ concluded that a parafiscal charge may in fact be considered unlawful aid.[392]

The funds must also actually pass through the state. Transfers merely between private undertakings does not constitute transfer of state resources.[393] Thus there can exist no state aid, unlawful or lawful. This principle is endorsed by the CJEU.[394]

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[387] Hancher, Ottervanger and Slot 2021, p. 486–487
[388] Joined cases C-261/01 and C-262/01, Van Calster, para 46
[389] C-323/18 Tesco, para 39. Similar question was brought in front of the court in the *Vodafone* case where the court ended up in the same result in the light of already settled case-law. C-75/18 Vodafone, para 27
[390] Hancher, Ottervanger and Slot 2021, p. 487
[391] ibid
[392] C-72/92 Herbert Scharbatke, para 20. It must be noted that the court did mention in the case that the end result depends on how the revenue is used. All in all, the court did however conclude that the parafiscal charge can under the condition be considered unlawful state aid.
[393] 2016 Notice, para 61
[394] Hancher, Ottervanger and Slot 2021, p. 445

Residual Criteria

Finally, as the CJEU has established in its judicature, the fourth and final TFEU art 107 (1) criterion is fairly easy to conclude. Defying the settled case-law establishing that this criterion cannot be merely assumed[395], the criterion is in the frame of this research neglected intentionally, as the fulfilment of said criterion has seldom ended to hinder the deducement of state aid. Moreover, as discussed in the third chapter, the cases where this criterion has played the decisive role, seem to fit negative state aids most poorly.

As stated by Miladinovic it is not a valid reason to adjust tax system to include measures conferring aid in order to bring domestic system to equal footing with foreign market, even when they belong to the internal market.[396] As stated in previous chapters of this research granting aid is no valid remedy for unlawful aid. On the contrary, it makes the situation even worse.

The link between the tax measure and aid is not sufficient to be freed from paying up the illicitly constituted tax or other burden as the court has established. This luxury has been granted once, in the *Laboratories Boiron*, which is after all an exception to an exception. The ECJ has narrowed down the applicability of this rule in its latter judicature.[397] More on this shortly, in chapter 5.2.2.

In summary, the criterion of negative aid is surprisingly difficult to satisfy, at least in a manner that the process leads to a remedy. The court has created considerable amounts of case-law along the years. The fruits can perhaps be compressed to two most important points, which differentiate these from "regular" state aids. First, the selectivity test differs from the regular, as the CJEU calls for the special three-step-test or more recently establishment of selective advantage (or selective disadvantage) viewing the legislation from discrimination angle. Secondly, the CJEU calls for the tax or other levy to be directed at funding the aid in question. This criterion is difficult to fully satisfy and most often blocks the possibility for obtaining reimbursement.

5.2.2 One and Same Measure

As taxes and other obligations are perceived as things to avoid, if possible, it is difficult to see that a tax would be advantage. A tax or other obligation could far more easily be sold as a disadvantage and hence in principle outside the application of TFEU art 107 (1) which concerns only selective advantages. The ECJ has once though granted exception to this, even if the

[395] Although it seems to be assumed in legal practise. Lang, Pistone, et al. 2018, p. 124–125
[396] Lang, Pistone, et al. 2018, p. 125
[397] Hancher, Ottervanger and Slot 2021, p. 452–453

exception has since been interpreted in a restrictive manner.[398] This may in part be due to the fact that state aid proceedings have often been regarded as "nuclear option" for cases involving tax disadvantage or discrimination.[399]

The following approaches therefore the question from the angle of the case *Laboratories Boiron*[400] and a selection of cases where the exception granted was denied. First, the operation must start from the rule of this chapter, the case *Laboratories Boiron*, which is again the exception. It must be examined, what exactly makes the case special, to fathom the case-law and norm created through it. On top of that also case *Ferring*[401] is analysed as relevant. The case is seemingly very similar, but the result is different. The case aids seeing the importance of nuances.

The nuances must be taken into account when giving consideration to the criterion above, that is the criterion clearly set out in TFEU art 107 (1) and settled case-law conjoined to it. Furthermore, the nuances can make or break the claim of state aid when considering the special criteria, or instructions for interpretation, given by the court.

Laboratories Boiron

Both of the cases[402] concern French pharmaceutical distributors. The short version of the French medicine distribution system is that there are two types of distribution networks: wholesale and direct sales. The French legislation imposes public services obligations on wholesale distributors. Namely the distributors must keep certain products in supply in the area they operate in. This socially well-grounded obligation naturally means additional costs to the undertaking, an operator in absolutely free market would probably not impose itself on.

To balance out the additional cost to wholesale distributors the state could hypothetically pay the undertakings for the public service, as it could otherwise be viewed as discriminatory. The legislator did not opt for this choice as it went instead for a tax imposed on the direct sellers to return balance. It is this tax, that is levied only on direct sales, which are freed from the public service obligation, which is argued to constitute the state aid. To put it differently, the tax not levied on wholesale distributors, who are strained by the obligation, is alleged to constitute an aid measure.

[398] Hancher, Ottervanger and Slot 2021, p. 452–453
[399] Farmer and Whitehead 2022, p. 14
[400] C-526/04 Laboratories Boiron
[401] C-53/00 Ferring
[402] The two cases cited in the two previous footnotes.

The two keywords that should be paid attention to are overcompensation and hypothecation, although it must be remembered that aid is aid and therefore the TFEU art 107 (1) criterion must be applied. Therefore, there must be an advantage, which originates from state resources and is imputable to the state, is selective and finally is liable to distort the market.

As it is well established, there must be advantage, for there to be aid. Therefore, it seems extremely counter-intuitive that tax would be advantage in the meaning that it would constitute aid. That is why it is important it differentiate between advantage and the measure constituting the advantage.[403] The advantage would be the absence of the liability, which is not possible if there is no tax.[404] The advantage in the case is enjoyed by the wholesale distributors[405] who could be said to be de facto exempted from the tax.[406] This does not mean that the measure constituting aid is exemption from the tax, as the measure conferring aid is still the tax itself.

The key here is overcompensation. The tax must overcompensate the costs stemming from the public service obligations. One possible way to think about the advantage is to set a certain reference level for pharmaceutical companies, on top of which wholesale distributors must entail certain cost from public service obligations, and a tax constituting similar strain on direct sellers. The difference between these is the aid.

Reimbursement of a tax is so often blocked by the court on the basis of lack of overcompensation that one could mistake it to lack always and that the rule is a piece of settled case-law.[407] The case *Laboratories Boiron* functions as a counter-example. It is clearly established that there is overcompensation, and that the overcompensation is in fact an inseparable part of the aid measure.[408] The tax and the advantage created by it are one and same measure, therefore fulfilling the need for their sufficient hypothecation as they are indeed one and same measure.[409]

A valid question at this point would be why there is no aid in the case Ferring, as the case considers the same exact legislation and a very similar actor. The cases are similar to an extent

[403] C-526/04 Laboratories Boiron, para 39
[404] ibid, para 37
[405] ibid, para 47
[406] One would however err should they state that there is an exemption. There is no exemption from tax, as the reference framework is the level of no tax. Therefore, the tax is a special charge and there cannot logically exist an exemption from a special charge.
[407] Even if the ECJ seemingly avoids stating that the fact that "businesses liable to pay an obligatory contribution cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that contribution" is settled case-law, even if it factually seems to be that. The court does though admit that this is clear from case-law. See C-368/04 Transalpine Ölleitung, para 51 and case-law cited. Please note that this and the case-law cited are far from the only cases where the citation above is referred to.
[408] This is established for example in joined cases C-393/04 and C-41/05 Air Liquide, para 46. The aid and tax must be hypothecated for there to be aid. It is not possible to find that exemption from aid is hypothecated to aid in order to establish aid. See also case-law cited by the ECJ.
[409] C-526/04 Laboratories Boiron, para 45

that scholars have anecdotally questioned the line of interpretation by the court. The undertakings occupy a market share in a similar manner, but not exactly similarly. The Laboratories Boiron SA functions as a wholesale distributor and as a direct seller whereas Ferring SA operates exclusively through direct sales. This alone however is not what seems to be the key difference.

On the contrary, the difference seems to stem from the criterion for overcompensation, the existence for advantage. Laboratories Boiron were obliged to pay up tax from wholesales and direct sales, of which it disputed only the tax on turnover for wholesales.[410] As the Agence centrale des organismes de sécurité sociale (ACOSS) demands turnover tax be levied for turnover for both distribution networks, the Laboratories Boiron SA seems to have a dual disadvantage on part of its business. It has to fulfil the public service obligation and pay tax for it too. This makes it clear why there is overcompensation.

In the case *Ferring* the court gives an open-ended decision, as it states that the measure at hand "may in fact constitute State aid – inasmuch as it does not apply to wholesale distributors."[411] The ECJ immediately proceeds stating that "it is necessary to consider whether the specific public service obligations imposed on wholesale distributors – precludes the tax from being State aid."[412] Finally, the court ends up stating that "a measure such as the tax – amounts to State aid to wholesale distributors only to the extent that the advantage is not being assessed to the tax on direct sales of medicines exceeds the additional costs they [the wholesale distributors] bear in discharging the public service obligations."[413]

The result is therefore similar but not same. In *Laboratories Boiron* the advantage – the overcompensation – is obvious and the court can conclude state aid. In the case *Ferring* the overcompensation is not prima facie obvious and further evidence needs to be provided. The court must conclude that the process must be continued in national courts.

The other important and distinctive feature with negative state aids is the previously mentioned hypothecation between the measure implementing the aid, that is the tax, parafiscal charge, or other comparable charge, and the advantage conferred. The bar for fulfilment of this criterion is high, as in the case *Laboratories Boiron* it was held fulfilled when the two measures are not really two measures, but one – the tax is the aid.[414]

[410] ibid, paras 11–13
[411] C-53/00 Ferring, para 22
[412] ibid, para 23
[413] ibid, para 29
[414] C-526/04 Laboratories Boiron, para 39

Even though the condition might seem intimidating it factually is fairly simple. It roots from case *France v Commission*[415] and concerns involvement of state resources – a criterion set out in TFEU art 107 (1). Afterall the neither the advantage nor the disadvantage would involve transfer of state resources in any formation in a system where lower tax of the comparison constitutes the reference framework. The criterion is therefore logical; for a tax to be aid the tax and the factual advantage must be hypothecated, they must be inseparable, or the tax must form an integral part of the factual advantage.[416]

The court has referred to this principle multiple times, but in the light of the case-law of *Laboratories Boiron* and its nature as a black sheep of the herd the principle must be interpreted in a strict manner. It could be argued that the measure implementing the aid and the advantage must actually be one and same measure and even a high level of hypothecation may not be sufficient.[417]

The conclusion from these two cases must therefore be that on top of the criteria set out in TFEU art 107 (1), when assessing if an obligation or a levy is state aid it must be shown that the measure giving effect to state aid – the selective disadvantage – must be hypothecated to the aid, the de facto advantage enjoyed. In the light of the case-law analysed here and the findings of Schön[418] it could be said that the measures must be inseparable, one and same measure.

Another finding must be that there must be overcompensation and its existence and amount must be shown. A flimsy connection must be made here: The reference framework must be selected correctly. In the cases on hand previously, the framework is that of taxes levied and obligations placed on pharmaceutical undertakings in France. If the framework would be selected differently, the selective disadvantage might step up as the baseline, and the lower taxation would be clear-cut exemption and the overcompensation would flip to under compensation.

Here one comes to a somewhat paradoxical question of when is the measure on hand an exemption and when is it a special tax or levy – a negative state aid? With negative state aids one cannot talk about a measure having same effect as an exemption, as the exemption is not the aid measure. If the measure has same effect as an exemption, the aid is a regular aid and the

[415] Case 47/69 France v Commission, paras 17, 20–21
[416] Joined cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 Casino France, para 40 and C-174/02 Streekgewest, para 26
[417] For further research one could go back to chapter 3 on involvement of state resources. Other similar cases could apply directly and at the minimum analogically.
[418] The finding that the case *Laboratories Boiron* is the sole decision where conclusion of state aid has been reached. Hancher, Ottervanger and Slot 2021, p. 453 The case is somewhat divisive as for example Wissel and Becker criticise the case for its state aid nature. They argue that the case should have been handled by the national court outside state aid framework. Wissel and Becker, EStAL 1/2007, p. 104

criterion applied is arguably far easier to fulfil. The question is solved in each case separately through the selection of reference framework, which is as previously discussed a step to which it is impossible to give unambiguous and clear frames.

In the case *Laboratories Boiron* the aid is deemed to exist, and its amount is measured as the difference between the cost stemming from the tax and the cost stemming from the public service obligation. When assessing public services obligations, one should recall the case *Altmark*. The case answers to the question whether a public service obligation can or cannot constitute state aid, as some specific criterion is established.

First the obligations must actually exist, and they must be well defined. Second the basis for deciding the compensation must be clearly laid out and transparent in order to avoid overcompensation. Third, the recipient cannot achieve profit beyond what is reasonable. Fourth and finally, the compensation must mirror the actual costs borne by the obliged, should the obligation fall on them outside of a public procurement procedure.[419] Although not explicitly stated by the court, the second criterion should be examined especially carefully as it readily considers the overcompensation seemingly set as a criterion by the court. This has been diligently done by the court as evident in the cases following shortly.

As the overcompensation stems from a public service obligation state aid test, it is interesting to consider if the criterion applies to possible state aid cases outside public services obligations. There is no conclusive answer, as all the other cases where such a situation is on hand[420] have indeed failed, and therefore there is no case-law on how the overcompensation should be accounted for.

An interesting sidenote must be made. In the case *Laboratories Boiron* the tax was ordered to be returned, as the tax itself was the measure giving effect to aid. It would be interesting how the court would have solved the case if there were no public service obligations. Would the tax pass as a state aid? Would it be deemed unlawful as discriminatory or as violating the principles of internal market? In the same manner the tax would confer advantage, be selective, be imputable, originate from state resources, and affect trade between member states. In my opinion the measure should still pass as negative state aid, even more so as the overcompensation element would be even grosser.

As stated, multiple times, the case *Laboratories Boiron* is the sole decision in favour of negative state aids. To put it differently, the same result has been chased several times after the fact and

[419] C-280/00 Altmark, paras 89–93
[420] See for example case C-323/18 Tesco

none have succeeded. This begs the question why. Further, the perhaps more interesting question how these cases have failed, arises as the answer would shed light on why the ECJ has opted for a narrow application.

Cases Where There Is No State Aid in the Same Meaning

Unlike with the successful cases, the unsuccessful attempts at chasing negative state aid are numerous and therefore all of the cases are not and cannot be presented here. A pallet of cases has though been selected and they do present the majority of reasons why the case is unsuccessful. The pallet presented here represents cases in which it is stated that a certain rule is stated to be established case-law or it could be reasonable argued that the rule is or should be established case-law.

The first category is cases that may on the surface seem like negative state aid but actually are not. At the risk of nagging it must be stated that exemptions to taxes are not negative state aid at least in the meaning pursued here. In other words: If the established reference framework, the "normal" tax is higher than the compared level of tax one is looking at regular aid, an exemption to a tax. The sought levy here is a higher tax than the "normal" tax. Therefore, the successful establishment of reference framework is vital.[421]

The distinction between these types of aids is difficult, not only to the researcher but seemingly to taxpayer too. This is evident as the application of *Laboratories Boiron* was attempted in a case it most definitely does not fit.[422] There is a plethora of cases where similar attempts could be made, even if it is obvious the attempt is designated to fail.[423] A particularly interesting case in my opinion is case *Transalpine Ölleitung* which concerns "a law which excludes certain undertakings from a partial rebate on energy taxes".[424] The court was not to investigate the measure in relation to TFEU art 107 (1), but it is interesting to give the measure a thought. Is the "normal tax" the tax to which the rebate is an exception, or is the "normal tax" the rebate, and exclusion from it is the exception. In my view the measure is "regular" negative aid, as the exclusion from the deduction does not fund any aid.

The second category is cases is a pallet where the criterion set out in TFEU art 107 (1) is not fulfilled, thus no aid can exist. The reasons vary and include the classical examples like the

[421] This is established by the court respectively. Although nominally different subject the ECJ has stated this fairly explicitly. Joined cases C-105/18 to C-113/18 UNESA, paras 61–62
[422] Joined cases C-164/15 P and C-165/15 P Aer Lingus, paras 119–120
[423] See for example C-126/01 GEMO, C-143/99 Adria-Wien Pipeline and C-172/03 Heiser
[424] C-368/04 Transalpine Ölleitung, para 33

measure not being selective[425], failing the three-step-test[426], and the advantage not existing[427]. This is to say, that even unconventional and complex state aids need to shake hands with TFEU art 107 (1) in order to constitute state aids.

The third category presented here is the specialty category. These measures are taxes and parafiscal charges which stumble on the high threshold for hypothecation. Similarly, the cases which ended in the result that there is no aid because there is no overcompensation could be added here.[428] The threshold for hypothecation seems to be that the aid and the measure giving effect to the aid must be one and same. The threshold is high and has stopped some cases.[429]

The fourth and final category is a residual category. These cases are cases where the court has investigated a question close to the subject matter at hand but not quite it. Controversially "fashionable" cases are also included here. These are cases which the Commission has stabbed at and ultimately failed, like the *Tesco* and *Apple* cases, where progressive tax and certain agreements concerning taxes were attempted as state aid.[430] The progressive tax in particular has been attempted in numerous cases.[431]

5.3. Summary

Negative aids, that is aids that stem from obligations or in other words confer competitive disadvantage can be approached from two different angles. The selected, or rather applicable angle affects significantly the end result. The first channel of negative aids must be selected when a de facto tax exemption, deduction, reimbursement, or similar advantage in other obligations is granted, and the TFEU art 107 (1) criterion is fulfilled. This means that the reference framework, the normal tax, is the higher tax i.e. the non-relieved tax. There are nominally no specialty criteria compared to regular aids. The one distinction is that an instead of the regular selectivity

[425] C-417/10 3M, paras 42 and 44
[426] For example, in the case *GIL Insurance* the measure under scrutiny was deemed to be justified by the nature and the general scheme of the national system C-308/01 GIL Insurance, para 78. Similarly, there are cases where the reference framework has been wrongly concluded and therefore the aid does not exist. For example, in case *UNESA* the GC erred and the ECJ concluded that the compared undertakings are not in a comparable factual and legal situation. Joined cases C-105/18 to C-113/18 UNESA, paras 61–64 and 67.
[427] For example, the case *Ferring* fell to this. There was no overcompensation, i.e., no advantage. C-53/00 Ferring.
[428] This statement might stir some dissenting opinions, as not all special taxes have a "counterweight". I am going to keep this category here, as the only successful case (*Laboratories Boiron*) has this element. Furthermore, it would be naïve to assume that national legislators are so incompetent in legislating that a tax measure would be interpreted as state aid. Even if such case was ever to be brought to the ECJ the risk of other breaches of the treaties (like tax discrimination or breaches of the basic freedoms granted in the treaties) would be significantly higher.
[429] Examples include joined cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 Casino France, para 56, and case C-449/14 P DTS, para 72
[430] C-323/18 Tesco and joined cases T-778/16 and T-892/16 Apple. The Apple case is currently pending in ECJ.
[431] For example, C-75/18 Vodafone, *Tesco* as above, C-562/19 P Commission v Poland and C-596/19 P Commission v Hungary

analysis, the three-step-test should be employed. That is unless the ECJ establishes the new system fully, which embraces the criteria for discrimination more.

The second and perhaps more interesting sub-category is the category, where the aid measure is not the de facto exemption from tax but the tax itself. That means that the reference framework must be the tax itself, compared to which there is a special tax or levy. A tax or other similar obligation placed on an undertaking can constitute state aid if, firstly the measure fulfils the TFEU art 107 (1) criteria, secondly overcompensates the measure it is aimed at compensating, and thirdly the tax and the aid are one and same measure, i.e., they are hypothecated.

Interesting detail is that only the latter category there could be consistent right for reimbursement of the aid. The court has multiple times denied this right in the first category of cases. The reason why the consistency is uncertain is that the ECJ has only once found that all the necessary criterion are met in the meaning of this category of aids. In the sole case the tax was ordered to be reimbursed. When an exemption is granted, like in the first category here, the remedy is not to grant the aid, the exemption, to further undertakings, as this would only worsen the situation.

This research was inspired by a Swedish court case on Fortum Sverige AB's claim on negative state aid in a question of real estate tax on hydro powerplants. Fortum's claim was based on the fact that hydro powerplants are subject to 2,8 % real estate tax compared to other industrial buildings, including other forms of powerplants which are taxed at the standard rate 0,5%[432]. Fortum claimed that this higher real estate tax constitutes a negative state aid as it sets hydro powerplants in a worse position than other producers of the same product, that is electricity. The tax would therefore be selective. In the circumstances hydro powerplants suffer from the measure and all other producers receive de facto aid. Therefore, the aid is created by the tax, which in turn constitutes state aid.

Stockholm administrative court confirmed the negative state aid in 2017 ordering even a repayment of the aid to Fortum Sverige.[433] The court argued that the higher tax rate, that was a result of multiple increases of real estate tax rate for hydro powerplants over time, was neither announced to the Commission nor having any justification.[434] Court considered also that the aid is impacting the competition and state is granted through disposing state funds. Court argued

[432] Excluding wind powerplants that are taxed at a rate of 02, %.
[433] Förvaltningsrätten i Stockholm, cases 6154-16, 6156–6159-16, and 7105-16
[434] The administrative court referred to proposal 2009/10:206 pages 9–10 where the government argues that the hydro powerplants benefited from higher power prices due to low fuel costs and that the tax would finance the audit exemption for small entities.

that the Commission has in its 2016 Notice guided on state aid definition in TFEU art 107 (1) and concluded that the reference rate is 0,5%.[435]

Later on, the court of appeal ruled over the administrative court decision on the remedies, but basically confirmed the state aid.[436] Supreme Administrative court did not grant the appeal in spite of the clear connection to EU law. It is a pity that administrative court did not refer the case to ECJ as, as the case has significant similarities with *Laboratories Boiron*.[437] I think, however, that the administrative court made a correct decision; all the steps for negative state aid were fulfilled. In my opinion, the fact that the Swedish government lowered the real estate tax for hydro power plants gradually down to 0,5 % supports the claim of state aid.[438]

6. Conclusions

State aids as a legal concept seems simple on the surface but turns into a far more nuanced interpretation of a given case. A measure which appears like state aid must fulfil TFEU art 107 (1) criteria in order to be classified as state aid. The goal of this research is not to cover the question, then what? This research covers only to the point that a measure may be deemed state aid regardless of whether it is allowed or unlawful, announced or unannounced to the Commission.

For a measure to be classified as state aid it must first, confer advantage to an undertaking. This disguises two criteria, the recipient must be an undertaking and an advantage must be granted. It is not significant how the advantage is granted so long it is granted.

Second, the advantage must originate from the state or its resources, but according to settled legal practise the measure must also be imputable to the state. This criterion does not however mean, that an actual burden must be placed – a threat of such is sufficient. If a government guarantees a loan, which is paid in full the guarantee may constitute state aid regardless. Furthermore, the mere fact that government or its body has resources at its reach which it then gives up on, constitutes transfer of state resources as the possible income is revenue foregone. It must be borne in mind that regardless of the method of funding, the transfer of funds must also be imputable to the state.

Thirdly, the advantage granted must be distributed selectively to undertakings. If a measure is universal, it is difficult to view as state aid. If, say the general tax rate is dropped, it is not

[435] The pages 11–12 of the administrative court's decision.
[436] Kammarrätten I Stockholm, 3157–3160-20
[437] The HFD is known not to refer cases to ECJ, see for example Bernitz 2016 and Bernitz 2010
[438] See Swedish Government proposal 2017/18:228

selective, thus not state aid. This does though assume that there is no special tax which would constitute negative state aid. The selectivity criterion is of quite some importance and could be viewed as the most difficult to show. Most often it is viewed in tandem with advantage granted, as selective advantage. The selectivity calls for subjective criteria when assessing selectivity through the three-step-test employed by the CJEU, as the establishment of reference framework requires adequate consideration.

Last criterion set out in the article is that the measure must be liable to affect trade between member states. Although not actually true, this criterion can, in my view, be considered automatically fulfilled. This criterion has only blocked the conclusion of state aid in marginal cases, like aid to local cultural services which do not conceivably attract tourists, but only locals.

Each step of the way employs different tests and different considerations and involve application of case-law and soft law accumulated over decades of existence of the Union and its predecessors respectively. This research covers only the very basics.

This research touches on prohibited discriminatory measures and basic freedoms of the EU briefly. This is only to highlight the most important principles. These bear importance or are likely to bear importance in the future when assessing selectivity criterion with state aids. These principles, rights, and freedoms are also meaningful when considering negative state aids as these could provide a remedy should the channel of state aid regulation fail, which it often does with alleged negative state aids.

State aids can take many different forms and are not necessarily bound to types of aids already established by the court. Different sectors of industry and services have their respective differences, and those differences need to be considered. On top of this the aid can be classified many other ways. The final goal of this research is to investigate one of those classes, negative state aids, in more layman terms aids, which confer selective disadvantage. These kinds of aids can further be divided two ways.

Negative aids take form of obligations to do something, most often to pay taxes and other special charges. An exemption from a tax is a fairly obvious form of state aid. These types of state aid mostly call for extra attention in the selectivity criterion, and therefore the ECJ has devised a three-step-test. The test begins by establishing a framework for comparison, then compares the operators in the framework for prima facie selectivity. Finally, the test investigates if the measure fits the general scheme and should therefore be allowed regardless.

The question of existence of aid becomes more interesting, when the first step of the three-step-test spits out a result that the reference framework is the normal tax to which there is an exemption; a higher tax. The higher tax can in narrow set of cases constitute state aid.

In the light of legal practise by the court the tax must essentially be the same measure as the advantage. The advantaged party often has some other obligation, as otherwise the tax measure would be disproportional, discriminatory, and therefore prohibited outside state aid regulation. The tax measure which allegedly constitutes aid measure must overcompensate for said measure.

The legal situation on these negative state aids is still unclear, and it is far from reaching a status where national courts could declare a situation is act eclair and not ask for a ruling from the ECJ. These cases are nuanced as evident from the singular successful case; a similar case in same member state in same industry ended differently. The conclusion is that negative state aids should be chased more often and be submitted more bravely to the ECJ for preliminary ruling.

There needs to be more legal practise, as the threshold for sufficient hypothecation between the aid and the measure implementing the aid is unclear. This is evident in the *Fortum* case in the Swedish court. In my view the Swedish court erred in its decision. The end result is false, but far more concerningly they erred in not submitting the case to the ECJ. The established interpretation seems to be that the hypothecation must be "sufficient" or that the measures in question must be one and same question.

Further, most of the cases consider tax law or other levies. More questions should be brought to court, like the applicability to progressive taxes recently. It would be interesting to see a similar case on say, transfer pricing or purely public services-oriented case, in which there are the elements for negative aid. Exact example is impossible to provide, as it calls for excellent imagination to come up with one.

In the latter cases, which there is legal practise on a singular case, the remedy for the aid is simple: return the tax levied. For the first set of cases the remedy is more difficult, as it would result into granting aid to all undertakings, or to eliminating the exemption. According to the court the disadvantaged party cannot demand tax be returned.

The remedies issue however is a question for further research. Similarly, a more unambiguous pallet of rules for correctly selecting the reference framework could be researched. There is a

ton of court practise on these and a compilation of these could benefit judicature, better still if such research were to draw conclusions for an emerging set of rules or a test.