State aid and taxation: a few thoughts
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## ECJ Case Law on Tax Schemes: A Selective Overview (1)

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<th>Gibraltar Corporate Tax Reforms</th>
<th>Spanish ‘goodwill’ cases</th>
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<td>• <strong>Measure?</strong> Proposed reform of Gibraltar’s corporate tax system - some elements favoured ‘offshore’ companies with no physical presence in Gibraltar</td>
<td>• <strong>Measure?</strong> Spanish scheme allowing the amortisation of financial goodwill for undertakings acquiring a 5% shareholding in a foreign company</td>
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<td>• <strong>2001 Commission Decision</strong> selective, incompatible aid</td>
<td>• <strong>2011 Commission Decisions</strong> incompatible aid - selective since only applies to companies investing abroad and the 5% threshold lower than the general reference system for the amortisation of goodwill</td>
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<td>• <strong>2008 GC Judgment (T-211/04 &amp; T-215/04)</strong> no selectivity</td>
<td>• <strong>2014 GC Judgments (T219-10 &amp; T-399/11)</strong> no selectivity since derogation available to all undertakings and no financial threshold on shareholding. Rejected Commission’s argument that measure equivalent to incompatible aid to companies exporting goods (since such aid schemes limited to an identifiable category of companies)</td>
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<td>• <strong>2011 ECJ Judgment (C106/09P &amp; C107/09P)</strong> reinstated Commission decision - selectivity present in general tax regime if benefit limited to identifiable group of undertakings e.g. ‘offshore’ companies with no physical presence in Gibraltar</td>
<td>• <strong>On appeal to ECJ</strong></td>
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## ECJ Case Law on Tax Schemes: A Selective Overview (2)

### Spanish ‘tax lease’ scheme cases

- **Measure?** Spanish scheme granting tax advantages to Economic Interest Groups (EIGs) and investors purchasing ships through certain finance lease agreements

- **2013 Commission Decision** selective, incompatible aid (unless certain conditions met)

- **2015 GC Judgment (T-515/13 & T-719/13)** no selectivity for investors since any undertakings could invest in the EIGs, no economic advantage for EIGs (since passed on any benefits to investors)

- **On appeal to ECJ**

### British Aggregates

- **Measure?** Exemption for shale extraction from British levy on aggregates. The general levy was designed to encourage use of recycled aggregates and reduce environmental damage

- **A very long saga starting in 2001**

- **2015 Commission Decision** majority of measure not selective; exemption for certain shale extraction incompatible aid - selective since shale was extracted in certain quarries for commercial use as aggregates whereas other producers of aggregates subject to levy; exemptions for slate/clay not selective since these were not extracted for commercial use as aggregates.

- **2016 GC Judgment (C100/15P)** upheld GC judgment
... So where are we now on selectivity?

Selective

- Individual tax rulings (but still need to show an economic advantage)
- Schemes applying to certain sectors/limited to clearly identifiable category of undertakings e.g. offshore companies, companies exporting goods
- Need to identify category of undertakings that can benefit and compare to relevant category of undertakings that can’t benefit (e.g. in same sector/market)

Not selective

- Schemes open to all undertakings in Member State e.g. companies investing in overseas companies or in finance lease arrangements
- Derogations that apply equally to all undertakings involved in particular sector?

Is there a clear enough distinction in practice? Will the court provide greater guidance?
Some interesting points on recovery in tax cases

- General rule in State aid cases - recovery will be ordered (subject to 10 year limitation period) subject to impossibility (strict test) and recovery contrary to EU general principle of law e.g. legal certainty.
- Spanish tax cases - Commission decisions (overturned by GC on selectivity grounds) did not order recovery for a period of time in which the beneficiaries had a legitimate expectation that the scheme was lawful.

**Spanish ‘goodwill’ cases**

Recovery limited to period from date when Commission’s (Phase II) opening decision published

*Reason:* early Commission statements to the European Parliament had suggested that the tax scheme did not constitute aid. Beneficiaries therefore had legitimate expectation that the scheme was lawful until date the opening decision was published.

**Spanish ‘tax lease’ scheme**

Recovery limited to period from date of publication of a Commission decision that found a comparable scheme in France conferred State aid

*Reason:* prior to date of French decision there was uncertainty about whether such a scheme would involve aid. Beneficiaries therefore had legitimate expectations that the scheme was lawful until date the French decision as published.
Some possible discussion points

• Where should we be drawing the line between schemes that involve selectivity and those that do not?
• Does the distinction between the case law on export of goods (selective) and export of capital (not selective because anyone could invest abroad) make sense?
• What should businesses be doing to assess their risks and mitigate against them?
• Given the stance on recovery in the Spanish decisions, is there an ongoing need for monitoring Commission new decisions to check that the State aid assessment has not changed?