STATE AID AND TAX - AN INTRODUCTION

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Introduction

Broadly speaking, two issues of principle arise in connexion with the application of the State aid rules in the Treaty on the Functioning of the European Union[1] that are specific to fiscal measures: (i) the problem of identifying the norm against which a supposed advantage is to be identified and evaluated; and (ii) the question of the consequences that should ensue when a fiscal measure amounts to an unlawful State aid. It should be emphasised that that does not exhaust all the issues that may arise in connexion with the characterisation of a fiscal measure as a State aid (whether or not a lawful one). Any candidate for being classified as a State aid must also distort or threaten to distort competition and be capable of affecting inter-State trade; and particular sub-issues may arise in connexion with the application of any of those criteria to the facts of any particular case, including a fiscal one.

By way of preliminary observation, the application of the State aid rules in the fiscal sphere throws up some real policy problems regarding the State aid rules. At one extreme, fiscal measures can amount to embarrassingly egregious instances of an infringement of the State rules: the tax exemption granted to one particular undertaking is an example. Another phenomenon is the use of a fiscal device to ensure that competitors end up paying for an advantage from which only one undertaking, or a selected group of undertakings, favoured by the State, can benefit. The common features of such cases are that the fiscal scheme in question is essentially discriminatory in nature (or contains discriminatory elements) and that any selective benefit that it exhibits is the product of a quirk, rather than the general logic, of the scheme. On the other hand, it may be entirely consistent with the logic of a fiscal scheme for the scheme to be differential in its application: differences in income tax rates depending upon the size of income are an example. Further, fiscal measures are not simply means of providing the State with finance. They can be used in order to achieve public purposes that are not obviously the targets intended by the State aid rules. In some instances (such as tax breaks for businesses in less well-off areas of a State, which may fall within a permitted regional aid scheme), scrutiny of the legitimacy of the policy objective and of the means used to attain it may be catered for expressly[2]. In other instances, fitting the ability of Member States to determine their own fiscal policy for legitimate ends into the structure and purposes of the State aid rules is not always a particularly easy task; and (in general terms and subject to express provision otherwise in EU law) it is always open to a Member State to organise a tax regime in such a way as to set incentives designed to achieve a particular policy objective, even if the result is to introduce into a given tax

1 TFEU Articles 107-109.

2 Cf. Case T-308/00 RENV Salzgitter AG v Commission, 22 January 2013, paras 98-99 (a case under the ECSC Treaty).

scheme something that is alien to its logic, as long as any advantage is not selective in nature or not such as to distort competition.

After making some general observations about particular aspects of the State aid regime, I will turn to some specific comments about recent State aid cases involving taxation. Cases involving process points only are not discussed. [3] The *British Aggregates* and *EDF* cases[4] will be dealt with by other speakers.

The concept of a State aid and selectivity

``Aids" have been variously described as ``benefits;'[5] ``gratuitous advantages;"[6] ``decisions of Member States by which the latter, in pursuit of their own economic and social objectives, give by unilateral and autonomous decision, undertakings or other persons resources or procure for them advantages intended to encourage the attainment of the economic or social objectives sought;"[7] ``positive benefits, such as subsidies themselves, [and] also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect;"[8] and ``an economic advantage which it [the recipient] would not have obtained under normal market conditions."[9] The core element of the concept of an "aid" is that it is a benefit; but not all benefits amount to a State aid. Thus, it has been held that the removal of a structural disadvantage is not an aid. [10]

3 E.g. Cases C-465/09P to C-470/09P Territorio Historico de Vizcaya - Diputacion Foral de Vizcaya and others v Commission [2011] ECR I-83*; Case C-354/10 Commission v Greece, 1 March 2012 (failure by Member State to recover unlawful State aid); Case T-221/10 Iberdrola SA v Commission, 8 March 2012 (admissibility of action challenging unfavourable Commission decision); Case C-646/11P Falles Fagligt Forbund (3F) v Commission, 24 January 2013, an appeal from Case T-30/03 RENV Falles Fagligt Forbund v Commission, 27 September 2011. The Salzgitter case (above, note 2), contains in paras 130-169 some discussion of the calculation of the value of a fiscal aid for the purposes of its recovery.
4 Case T-210/02 RENV British Aggregates Association v Commission, 7 March 2012; Case C-124/10P Commission v Electricite de France, 5 June 2012.
5 Case 173/73 Commission v Italy [1974] E.C.R. 709, para 13.
6 Case 78/76 Steinike & Weinlig v Germany [1977] E.C.R. 595, para 22.
7 Case 61/79 Amministrazione delle Finanze dello Stato v Denkavit [1980] E.C.R. 1205, para 31.
8 Case C-200/97 Ecotrade v Altiforni e Ferriere di Servola [1998] E.C.R. I-7907, paras 34-35.
9 Case C-39/94 SFEI v La Poste [1996] E.C.R. I-3547, para 60.
10 Case T-157/01 Danske Busvognmaend v Commission [2004] ECR II-917, para 57. It is doubtful if the judgment should be read as widely as paragraph 57 suggests. The correct proposition following from the judgment is that steps taken, in the context of privatisation, for the purpose of creating an undertaking intended to operate under normal conditions of competition are not (save in exceptional circumstances) a State aid. The issue in that case concerned financial compensation given to civil servants working for a publicly-owned bus operator who changed their employment status to a normal contract of employment when the operator was privatised. That obviously related to the transformation of the operator into an undertaking subject to normal conditions of competition. It was not simply the removal of a structural disadvantage to which competing operators were not subject (which is what paragraph 57 can be read as saying). It would also be unwise to read paragraph 57 as suggesting that the concept of a State aid can be circumvented by giving a benefit to third parties instead of directly to an undertaking or by reconfiguring a benefit as a non-pecuniary benefit (which is also how para 57 can be read).

That approach makes it easy to characterise, as an aid, various types of fiscal benefit: a tax concession or tax exemption that reduces the undertaking's liability towards the State;[11] ; tax credits; reduced rates of tax; deferral of an obligation to pay tax;[12] a tax amnesty. All those examples share the characteristic of being favourable derogations from, or exceptions to, a rule. Some advantages of that sort are specific to an undertaking or a group of undertakings (including a self-selected group where, as in the case of tax incentives for investments,[13] the group is determined by the action that the undertakings in question take in response to an incentive provided by the State), in which case they usually satisfy the criterion of being selective. Others (such as a general tax amnesty) can reflect a general policy, in which case they lack selectivity. Legislation dealing with insolvent undertakings typically confers advantages on an insolvent company, such as suspension of the recovery of debts (including fiscal debts), while the company is going through a process designed either to restore it to health or to recover more money for creditors than would otherwise be the case. Where such legislation applies generally to any company in a state of insolvency and involves no greater burden on State resources than is imposed on private resources (typically by means of the suspension of the ability to recover debts from the insolvent company), no State aid issue arises. However, if the legislation is structured so as to apply selectively to particular types of undertaking (such as large industrial undertakings owing particularly large debts to the State or to classes of creditor that mainly comprise public bodies), the element of selectivity is present.[14] The same applies where a legislative scheme involving the conferring of benefits or advantages on undertakings (at the expense of the State) is expressed in so general terms as to lack selectivity but is applied by administrative decisions: in that situation, the individual administrative decisions applying or implementing the legislative scheme in relation to a particular undertaking or class of undertakings attract the element of

11 E.g. Case C-387/92 Banco de Credito Industrial v Ayuntamiento de Valencia [1994] E.C.R. I-887, paras 13-14; Case T-106/95 FFSA v Commission [1997] E.C.R. II-229; Case C-6/97 Italy v Commission [1999] E.C.R. I-2981. See also the Commission Notice on the application of the State aid rules to direct taxation (O.J. 1998 No. C384/3), the relevance and effect of which was considered in Cases C-106/09P and C-107/09P Commission v Gibraltar, 15 November 2011, paras 128-136. Some doubt seems to have been cast on the first three cases cited above by Case C-174/02 Streekgewest Westelijk Noord-Brabant v Staatsecretaris van Financien [2005] ECR I-85, paras 25-29 (para 25 being cited and followed in Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 Distribution Casino France SAS and others v Caisse nationale de l'organisation autonome d'assurance vieillesse des travailleurs non salaries des professions industrielles et commerciales [2005] ECR I-9481, para 34). The view more consistent with the general trend of the case law is that Streekgewest and Distribution Casino France are to be confined to the particular circumstances of those cases; and that conclusion is supported by the ECJ's reversion to the approach followed in the Banco di Credito Industriale case in Cases C-393/04 and C-41/05 Air Liquide Industries Belgium SA v Seraing [2006] ECR I-5293, para 30 (and note para 46). However, it cannot be excluded that the ECJ considers that the stance taken by it in cases like Banco di Credito Industrial was shown in subsequent cases (such as Case C-308/01 GIL Insurance Ltd. and others v Commissioners of Customs and Excise [2004] ECR I-4777 (see in particular the Advocate General's Opinion) to be problematical in some fiscal situations.

12 Case T-67/94 Ladbroke Racing Ltd. v Commission [1998] E.C.R. II-1, upheld on appeal in Case C-83/98P France v Ladbroke Racing Ltd and another [2000] ECR I-3271. But compare Case C-342/96 Spain v Commission [1999] E.C.R. I-2459.

13 Case 70/72 Commission v Germany [1973] E.C.R. 813. Note, in that connexion, the Salzgitter case (above, note 2), paras 112-129: special depreciation allowances on investments made for the protection of the environment (largely inconclusive discussion because, in that case, the tax advantages had been obtained independently of the environmental objective of the investments - see para 126).

14 E.g. the Ecotrade case (above, note 8), paras 37-40.

selectivity.[15] On the other hand, a measure is not necessarily "selective", even if it favours some undertakings and not others, if the difference of treatment is objectively justifiable by reference to such things as the logic or scheme of the legislation in question[16]. Thus, the introduction of a higher rate of tax than the prevailing standard rate, for the purpose of dealing with a particular fiscal problem, is not a State aid even if the result is to differentiate between undertakings paying the higher rate and those paying the standard rate.[17]

Granted by the State or through State Resources

"State" aid is necessarily aid that is attributable in some way to the State.[18] The expression ``aid" necessarily implies advantages granted directly or indirectly through State resources or constituting an additional charge for the State or for bodies designated or established by the State for that purpose.[19] The phrase ``granted by the State or through State resources" makes it clear that it makes no difference whether the aid is granted directly by the State or by public or private bodies established or appointed by the State to administer the aid: in applying the State aid rules, regard must primarily be had to the effects of the aid on the undertakings or products favoured by it and not on the status of the institutions entrusted with the distribution and administration of the aid.[20] Further, a measure adopted by public authority and favouring certain undertakings or products may still be an aid even if it is wholly or partially financed by contributions imposed by public authority and levied on the undertakings concerned.[21] Thus, a benefit may be an aid if it has been decided upon and financed by a public body, implemented subject to the approval of the public authorities, granted in the same way as an ordinary State aid, and represented as being part of a package of measures that are accepted as being State aids.[22] Where the aid is financed from private sector sources it will be a State aid only if the finance is provided through State compulsion and not voluntarily. Accordingly, where an advertising campaign was funded by resources made available by a public body, and those resources were obtained through compulsory levies imposed on private sector undertakings, there was no State aid because the campaign originated in a private sector

15 E.g. the Ecotrade case (above, note 8), paras 39-40.

16 Cf. Case C-351/98 Spain v Commission [2002] ECR I-8031, paras 40-43 (aid to SMEs not justified by the nature and scheme of the aid); Case C-409/00 Spain v Commission [2003] ECR I-1487, para 52; Case C-159/01 Netherlands v Commission [2004] ECR I-4461, paras 42-47; Case C-148/04 Unicredito Italiano [2005] ECR I-11137, paras 49-51; Case C-222/04 Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA and others [2006] ECR I-289, paras 135-138.

17 Case C-308/01 GIL Insurance Ltd. and others v Commissioners of Customs and Excise [2004] ECR I-4777, paras 65-78.

18 E.g. Case T-351/02 Deutsche Bahn v Commission [2006] ECR II-1047, paras 102-103 (a tax exemption derived from EU legislation that the Member State concerned was obliged to implement), where attribution to the State was considered to be distinct from the need for the aid to come from State resources.

19 The Ecotrade case, note 8, above.

20 E.g. Case C-126/01 Ministre de l'Economie, des Finances et de l'Inustrie v GEMO SA [2003] ECR I-13769, paras 25-27.

21 Case 78/76 Steinike & Weinlig v Germany [1977] E.C.R. 595, paras 21-22; Case 173/73 Italy v Commission [1974] E.C.R. 709, para 16.

22 Case 290/83 Commission v France [1985] E.C.R. 439, paras 14-15. See also, in that connexion, Case 57/86 Commission v Greece [1988] E.C.R. 2855.

initiative and the public body had acted only as a vehicle for raising the finance from private sector undertakings and distributing the aid to them.[23] State resources include the financial resources of a private-law undertaking that is controlled by the State or a State body.[24]

On the other hand, where an advantage is conferred by the State but it does not involve the employment of State resources, whether directly or indirectly, it has previously been held not to be a State aid.[25] In one case, the alleged State aid was a legal provision relieving a particular undertaking from a generally applicable obligation imposed on employers to recruit staff under employment contracts of indeterminate duration, as opposed to fixed term contracts. The legislation gave the favoured undertaking a flexibility not available to other undertakings operating in the same sector. Nonetheless, the advantage was not held to be a State aid because it did not involve any direct or indirect transfer of State resources to the beneficiary.[26] In that context, a direct transfer is simply a payment. Indirect transfers encompass situations where the State forgoes a payment to which it would otherwise be entitled, such as where it creates a tax exemption and thereby accepts a drop in tax revenue but does not employ its resources for the benefit of the favoured undertaking in any positive way;[27] and situations where the State provides funds to a person or body, enabling that person or body to release resources (whether the same or other resources) to an undertaking or for the production of certain goods.[28] In order to be a State aid, an advantage must therefore involve some additional burden for the State. If the advantage does not involve some additional burden, by comparison with the situation that would otherwise prevail, it may not be a State aid.[29]

The Consequences of Illegality

The primary consequence of the unlawfulness of a State aid is that it must cease to be paid and, where it is new aid granted without prior notification to the Commission, any past payments of aid will be clawed back from the recipient either by virtue of a recovery injunction or order made by the Commission or by virtue of an order made by a national court, subject to any defence that the recipient of the aid may have. A Commission decision (whether a recovery injunction or a recovery order) is challengeable before the

23 Case C-345/02 Pearle and others v Hoofdbedrijfschap Ambachten [2004] ECR I-7139, paras 36-39.
24 Case C-482/99 France v Commission [2002] ECR I-4397, paras 32-39 and 50-58; Cases C-328/99 and C-399/00 Italy and another v Commission [2003] ECR I-4035, para 33. As appears from those cases, the mere fact that the body granting the advantage in question is controlled by the State is not in itself sufficient to conclude that the advantage is a State aid.
25 E.g. Case 82/77 Openbaar Ministerie v van Tiggele [1978] E.C.R. 25, paras 24-25 (fixing of minimum retail prices); Cases 213-215/81 Norddeutsche Vieh- und Fleischkontor v BALM [1982] E.C.R. 3583, paras 22-23 (allocation of a tariff quota opened by a Council Regulation - the levy waived was part of the EU's own resources, not State resources); Case T-95/03 Asociacion de Empresarios de Estaciones de Servicio de la Comunidad Autonoma de Madrid and another v Commission [2006] ECR II-4739, para 104.
26 Cases C-52/97, C-53/97 and C-54/97 Viscido v Ente Poste Italiano [1998] E.C.R. I-2629, paras 12-16.
27 Cf. The tax concession at issue in Case C-156/98 Germany v Commission [2000] ECR I-6857, paras 26-28; Ministero dell-Economia e delle Finanze v Cassa di Risparmio di Firenze SpA and others (above, note 16), paras 131-133. Another example of an indirect transfer would be the debt rescheduling in Case C-278/00 Greece v Commission [2004] ECR I-3997, paras 51-54.
28 E.g. Case C-303/88 Italy v Commission [1991] E.C.R. I-1433, para 11-14.
29 Case C-200/97 Ecotrade v Altiforni e Ferriere di Servolo [1998] E.C.R. I-7907, para 43.

GC by the recipient of the aid. A failure to do so within time will preclude the recipient from disputing the lawfulness of the Commission decision in national proceedings brought against the recipient in implementation of the decision.[30] A further consequence of the illegality of an aid is that the validity of the legislative or administrative provisions giving effect to the aid may be impugned.[31] However, it is not clear how far that goes because the general principle is that, where domestic measures are incompatible with EU law, the result is not that the former are non-existent but that they must be disapplied in the individual case in order to give effect to rights derived by individuals from EU law.[32] Accordingly, it does not appear that, where a State aid is illegal, the domestic legislative or administrative provisions giving effect to it are void or voidable in the technical sense, although one of the consequences of disapplication is that any sums raised in order to finance the aid are recoverable by those from whom they were obtained.[33] Where the unlawful State aid is an exemption from the imposition of a charge (or from the full amount of the charge), such as a fiscal impost, the illegality of the State aid and of the legislation giving effect to it does not impugn the validity of the charge itself or entitle those paying the charge to immunity from its imposition or to recover of sums already paid.[34] The position is otherwise where the aid can be analysed as the imposition of a liability on a competing undertaking, the favoured undertaking escaping that liability.[35]

Recent tax cases

Case C-6/12 *P Oy*[36], concerned Finnish income tax legislation permitting losses to be deducted from profits in order to determine the liability to tax. Losses could not be deducted if more than one half of a company's shares changed hands but the tax authorities had power to allow a deduction for special reasons (that is, derogate from non-deduction), where it was necessary for the continuation of the activities of the company. P Oy applied for a derogation but was refused it because it had not demonstrated a special reason. On appeal, the Finnish court considered that the State aid rules might in any event preclude the grant of a derogation and made a reference for a preliminary ruling. The ECJ held that a State measure placing a person into a more favourable

30 Case C-188/92 TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland [1994] E.C.R. I-833.
31 E.g. Case C-39/94 SFEI v La Poste [1996] E.C.R. I-3547, para 40, where the ECJ said that ``national courts must offer to individuals the certain prospect that all the appropriate conclusions will be drawn from an infringement of the last sentence of Article [108(3)] of the Treaty, in accordance with their national law, as regards the validity of measures giving effect to the aid".
32 Cases C-10/97 to C-22/97 Ministero delle Finanze v IN.CO.GE. `90 Srl and others [1998] E.C.R. I-6307.
33 E.g. Cases C-261/01 and C-262/01 Belgium v van Calster and others [2003] ECR I-12249, paras 53-65 (in that case, the method of financing was an intrinsic part of the aid and had not been communicated to the Commission when the aid was notified, thus leading to the (partial) unlawfulness of the aid; but the same result ensues whatever the reason for the unlawfulness of the aid).
34 Case C-390/98 H.J.Banks & Co. Ltd. v Coal Authority and another [2001] ECR I-6117, para 80; Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 Distribution Casino France SAS and others v Caisse nationale de l'organisation autonome d'assurance vieillesse des travailleurs non salaries des professions industrielles et commerciales [2005] ECR I-9481, paras 40-44; Air Liquide Industries Belgium SA v Seraing (above, note 11), paras 43-45.
35 Case C-526/04 Laboratoires Boiron SA v Union de recouvrement des cotisations de securite sociale et d'allocations familiales [2006] ECR I-7529, paras 30-40 (the precise formulation of the proposition to be derived from the Boiron case is not easy to define; and the case may best be explained as one in which the structure of the domestic legislation in issue did not permit application – or easy application – of the principle set out in the cases cited in the preceding footnote).
36 18 July 2013.

financial position than other taxpayers is a State aid even if it does not involve a transfer of State resources but advantages open to all economic operators are not a State aid. An advantageous fiscal measure is selective (and therefore a State aid) if it amounts to a derogation from the normal operation of the tax regime in the Member State in question by differentiating between operators that are in a comparable factual and legal position from the perspective of the objective of the regime[37] (a more discursive examination of the point appears in Cases C-106/09P and C-107/09P *Commission v Gibraltar*.[38]) Advantages justified by the nature or general scheme of the regime are not selective; but even exceptions to the regime can be justified if they result from its basic or governing principles.[39] A system of authorisations granted by administrative decision is also permissible if the tax authorities are applying objective criteria set out in the legislation that are justified by its objectives.[40] So far as the case itself was concerned, the ECJ clearly thought that the Finnish system, comprising a general prohibition on the deduction of losses in certain circumstances, subject to the grant of individual derogations, did not give rise to a State aid if the underlying rationale was, for example, to prevent trade in deductible losses; but making derogations available in order to protect jobs or in pursuit of a regional development or social policy could not be justified by reference to the nature and scheme of the tax regime.[41]

The *Gibraltar* case[42] (an important decision) makes some useful points about how one approaches tax regimes from the perspective of the State aid rules. The ECJ made it plain that (unless there has been some relevant harmonisation at EU level) Member States are free to determine the base of assessment of a tax and decide how to spread the tax burden across different factors of production.[43] On the other hand, they must be careful to avoid designing into a tax any selective advantage. On the question of selectivity, the classic examples of fiscal State aids are, as noted above, advantageous (and discriminatory) divergences from a rule in the tax system. In *Gibraltar,* the ECJ made it clear that, in order to identify whether or not such a situation has arisen, it is not enough to see whether the tax regime in question has a rule, from which there is a derogation benefiting only one or a few undertakings. Instead, it is necessary to look at the overall effect of the regime. In that case, the ECJ was confronted with what it considered to be a combination of elements based on criteria of a general nature that, nonetheless, produced discrimination between undertakings in a comparable situation, rather than the more naked example of a rule subject to a derogation. The search is for the identification, in the regime, of a privileged category.[44] The creation of that privileged category must, however, follow from the design of the tax regime (whatever that design is). It is not enough if random events can produce a privileged category. Accordingly, limiting payroll tax and a business property occupation tax to companies making a profit and capping the tax at 15% of the profit made do not satisfy the test of selectivity: all

37 Paras 18-19 of the judgment.
38 Above, note 11, paras 71-75.
39 P Oy (above, note 36), para 22.
40 Ibid., paras 23-27.
41 Id., paras 26-30.
42 Above (note 11).
43 Para 97.
44 See paras 85-93, 101 and 104.

economic operators without distinction are capable of being so favoured and the fact that any one of them is so favoured at any one time is not the product of the design of the regime but the consequence of the random, external event that the operator concerned is profitable or has happened to make a larger profit than another operator.[45] In that connexion, it should be noted that the ECJ observed that the fact that the features of the system at issue just mentioned were alien to the logic of the tax scheme in question did not make them selective.[46] Hence, incompatibility with the logic of the scheme is not a sufficient condition for concluding that an advantage is a State aid. Other aspects of the Gibraltar system did not get the same favourable treatment: the ECJ did not think that the non-taxation of offshore companies was a random consequence - it was the inevitable consequence of the design of the system.[47] It should also be noted that, in that case, the UK and the Government of Gibraltar neglected to justify the problematical aspects of the tax regime by reference to its nature and general scheme during the Commission's investigation. The case law is clear that the burden of justification lies on the Member State concerned; and the failure to try to discharge that burden prejudiced the position of the UK and the Government of Gibraltar later on in the litigation.[48]

An example of advantageous differential fiscal treatment that could not be justified by reference to the nature and scheme, or logic, of the tax regime in question appears in Case C-452/10P *BNP Paribas and another v Commission*.[49] That case concerned a purported attempt to achieve fiscal neutrality in relation to the application of Italian capital gains tax on the sale of assets in return for shares. The upshot was that companies to which assets had been transferred following transactions under a particular Italian statute were able to continue to realign the value of the assets for tax purposes with their book value by payment of a substitute tax. That was a tax advantage that other companies did not have. Different explanations for that state of affairs were given by the Italian authorities and by BNP Paribas. In that type of situation, the burden lies on the State itself to explain its own tax system and how the advantage in question fits into it. The ECJ analysed the Italian legislation but concluded that the advantage was anomalous and could not be explained. It therefore gave rise to a State aid (all the other conditions for being a State aid having been satisfied).

Case C-81/10P *France Telecom SA v Commission*[50] concerned the tax regime applicable to France Telecom after its partial privatisation in 1990 (the French State held more than half of its shares). French legislation subjected France Telecom to the same tax regime as private sector undertakings carrying out the same type of transactions save that, for the first four years after privatisation, it benefited from an initial temporary derogation from the application of certain taxes (in that respect, it was treated like the State) in return for paying a fixed levy. As from 1994, France Telecom was subject to a local tax regime using a special method of calculation and an additional levy intended to offset the costs

45 Paras 77-84.
46 Para 81.
47 Para 106.
48 Paras 143-152.
49 21 June 2012, paras 120-138 (on appeal from Case T-335/08 BNP Paribas v Commission [2010] ECR II-3323).
50 8 December 2011, on appeal from Cases T-427/04 and T-17/05 France and France Telecom v Commission [2009] ECR II-4315.

incurred by the tax authorities in assessing France Telecom to tax and collecting business tax from it. The special regime was brought to an end in 2003. In relation to the period from 1994, France Telecom (supported by France) claimed that the fact that it was subject to a special tax regime was not enough to conclude that it benefited from a State aid because it did not follow that it had obtained any financial advantage. That argument was based upon the fact that whether or not the special tax regime applicable to France Telecom after 1994 depended upon the annual decisions made by other State authorities concerning the level of business tax (payable by companies other than France Telecom) to be levied in a given year. Accordingly, the "advantage" obtained by France Telecom lay in the fact that its special tax regime was different and opened up the possibility of it obtaining a financial advantage; but the realisation of that possibility was entirely dependent upon factors extraneous to the special regime from which it benefited. In other words, the actual occurrence of an advantage or benefit did not flow from the special regime. Indeed, depending upon the external decisions regarding the fixing of the rate of business tax paid by the generality of undertakings, France Telecom's special regime could (in principle) have been disadvantageous for it. The ECJ conceded that the Commission was not able to determine the precise level of taxation in any given year; but the special regime was at least capable of resulting in a benefit and, apparently, had actually done so (France Telecom also benefited from a reduced rate in respect of management costs.[51] The ECJ considered that the advantage derived by France Telecom had a fixed element forming part of the special tax regime applicable to it and a variable element depending upon external circumstances (the independent decisions concerning the rate of business tax for a given year); the advantage really flowed from the former and the precise amount of the advantage from the latter.[52] France Telecom also argued that, in determining the existence and extent of the supposed State aid, account had to be taken of its liabilities under the pre-1994 regime. That was dismissed on the ground that it was right to ignore a different charge unconnected with the State aid in question.[53]

The problem with the arguments in *France Telecom* is that they were unrealistic given what appears to have been common ground that, in the period from 1994, the special regime applicable to France Telecom produced a lower tax liability than would otherwise have been the case. Given that that was so, to argue that the financial benefit flowed not from the special regime but from independent decisions of those fixing the rate of business tax was not exactly persuasive: clearly, if those independent decisions had been different, France Telecom might have ended up with a higher tax bill and there would have been no State aid; but those independent decisions were what they were and France Telecom was sheltered from the consequences by the existence of the special tax regime applicable to it. In contrast with the position in the *Gibraltar* case, where (in relation to the payroll tax and business property occupation tax) random external events (not the design of the system) would determine who was in an advantageous situation, the position in *France Telecom* was that the membership of a specific category had been fixed by the design of the system; only the extent of the benefit flowing to the sole member of that category was affected by random external events. So far as the other

51 Paras 19-20.
52 Paras 23-25.
53 Para 43.

point made by France Telecom is concerned, the evaluation of a tax (or other) regime for the purpose of deciding whether or not it generates a State aid must obviously take into account the entirety of the scheme. If (for example), it has two elements, one positive and one negative, both have to be taken into account; the positive aspect of the regime cannot be taken in isolation. The problem that arose in *France Telecom* was not simply that France Telecom was relying upon elements that applied in discrete periods of time (pre- and post-1994) but that, when one looked at the French legislation, it seemed that those elements were discrete conceptually as well as temporally.

Short point: a temporal limitation placed on a fiscal advantage may make it selective if the consequence is to exclude numerous potential beneficiaries; and it does not matter if the temporal limitation resulted from the fact that the intention was to encourage listing on the stock exchange.[54]

Now a couple of cases dealing with the recovery of public debts, including tax debts.

In Case C-73/11P *Frucona Kosice v Commission*[55] the ECJ reversed a GC judgment upholding a Commission decision finding that Slovakia had granted unlawful State aid to an insolvent undertaking by failing to recover the whole of a tax debt. The Slovak authorities had reached a settlement with the undertaking under which 35% of the tax debt was paid. The Commission had found in its decision that a private sector creditor would not have been so generous. The judgment is interesting for what it says about how the private sector creditor test is to be applied in the context of judicial review of a Commission decision. The GC judgment was reversed because the GC had failed to verify that the Commission had taken into account the probable length of the alternative procedure for the recovery of a debt that would have been open to a private sector creditor (as well as to the Slovak tax authorities). The case was remitted to the GC. Case C-405/11P *Commission v Buczek Automotive*[56] is a similar case. The Commission had found that the Polish authorities had granted a State aid by failing to resort to guarantees and other securities over the property and assets of an insolvent undertaking, which they could have exploited in bankruptcy proceedings in order to recover various public debts owed to them. The GC had overturned the Commission decision, in part because it took the view that the Commission lacked the evidence to conclude that a private sector creditor would have opted to go down the bankruptcy route. The Commission appealed unsuccessfully to the ECJ, which held that the Commission bears the burden of proving failure by the State to meet the private sector creditor test and that the GC had been right to hold that the application of the private sector creditor test requires an analysis of the advantages and disadvantages of the various routes open to recover a debt. The available evidence did not support the Commission's case on that point. *Frucona* and *Buczek* offer up contrasting approaches adopted by the GC to the judicial control by it of Commission decisions. A further warning note appears in *BNP Paribas and another v Commission*,[57] where the ECJ concluded that the GC had failed to adopt the correct

54 Case C-458/09P Italy v Commission, 24 November 2011, para 60 (and note also paras 63-66).
55 24 January 2013.
56 21 March 2013.
57 Above (note 49), paras 100-105. A number of other ECJ cases contain observations on the GC's powers of review:

approach to its review of the decision there in question.

Conclusion

Ever since the Advocate General's Opinion in Case 84/82 *Germany v Commission*,[58] the test or determining whether or not some action on the part of the State or a state authority amounts to the grant of a State aid, shorn of various adornments, has been based upon a comparison between that action and something that is regarded as "normal". That test originated in cases concerning State behaviour that had a parallel in the behaviour of private sector operators working under open market conditions (investment activities). It then spawned the private investor test and its associate, the private creditor test. In the case of State aids of a fiscal nature, there is no private sector comparator. Hence, a comparison is drawn with "normal" tax treatment. In a case like *France Telecom*, it is easy to identify the fact that there is one "normal" regime for all taxpayers and a special regime for only one taxpayer, or a defined class of taxpayers (France Telecom and La Poste benefited from the special French regime). The question that then has to be answered is whether or not the derogation from the "normal" regime gives an advantage (other questions then ensue). In that type of case, consistency of the derogation from the "normal" regime with the nature, general scheme or logic of the tax is not really an issue because the giveaway lies in the nature of the derogation itself. The same applies to many other types of derogation that one comes across. However, while all types of derogation from a norm amount to differential (or discriminatory) treatment, not all such treatment necessarily amounts to a State aid or, indeed, to a derogation (in the strict sense) from the norm. Conceptually, the idea of a derogation presupposes an identifiable norm; but that in turn presupposes the existence of some principle underpinning the tax that enables one to identify what the "norm" is and why a divergence from it is a true derogation rather than a necessary variation of the apparent "norm" whose intended effect is to keep the "norm" in alignment with the principle (in that situation, the "norm" does not represent the rule; it is the "norm" taken in conjunction with the supposed derogation that provides the rule or principle). Although the starting point (and often the end point) is to identify a beneficial derogation from "normal" fiscal treatment, an advantage entirely consistent with the principles on which the tax scheme is based is still capable of being a State aid if the scheme itself is fundamentally or inherently discriminatory (as was, arguably, the case in relation to the Gibraltarian tax treatment of offshore companies). Nonetheless, in all cases, whether something is a derogation from the norm or consistent or inconsistent with the nature, general scheme or logic of the tax, it still has to have the character of being selective to be a State aid; and, as can be seen from some of the cases discussed above, selectivity is a quality that must derive from the design of the scheme, not random external events.

see, for example, Case C-320/09P A2A SpA v Commission, 21 December 2011.

58 [1984] ECR 1451. See p0 1501, col 1 ("a benefit which he would not have received in the normal course".

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