Cambridge Law Journal, **66(2)**, July 2007, pp. 313–324
Printed in Great Britain

HOW SELECTIVE IS SELECTIVITY? A FEW THOUGHTS ON REGIONAL SELECTIVITY

BARTŁOMIEJ KURCZ*

I. INTRODUCTION

ARTICLE 87 (1) EC prohibits any state aid in whatsoever form, unless the Commission considers it to be compatible with the common market. This prohibition significantly reduces in many cases the freedom of Member States to conduct their policies in defining the political and economic environment in which undertakings operate. Article 88 (3) EC, which provides for the notification procedure and prohibits the implementation of aid measures before the Commission's approval, also significantly reduces the Member State's playground. Rarely, however, can it be argued that the state aid control could potentially have drastic consequences for the national constitution order. Although the questions of what constitutes state resources and to which extent trade between Member States can be affected are controversial, this article focuses on only one aspect of the definition of state aid, namely selectivity, the application of which may have the most far-reaching consequences for many Member States' constitutional orders. It has to be stressed, though, that this short article does not aim to deal comprehensively with every difficult issue connected with the application of the selectivity test, but is limited to some of its aspects which may have bearing on Member States' decisions concerning the distribution of powers and especially the power of taxation.

II. SELECTIVITY

According to the settled case-law of the ECJ, a measure classified as state aid must be an intervention by the State or through State resources, which is liable to affect trade between Member States. Moreover, it must confer a selective advantage on the recipient and distort or threaten to distort competition.[1]

* This is a revised version of lecture given on 26 October 2005 at the University of Cambridge. The author expresses purely personal views which cannot under any circumstances be attributed to the European Commission.

[1] Case C-237/04 *Enirisorse* [2006] E.C.R. I-2843, para 39.

https://doi.org/10.1017/S0008197307000542 Published online by Cambridge University Press

It is settled case-law that aid granted by a Member State or through State resources encompasses aid granted by central government as well as regional, local governments or councils. State resources are understood as those belonging to or controlled by the state or by bodies (private or public) designed or established by that state to perform this task.[2] Therefore, in principle, aid has to have budgetary consequences for the state. The latter reduces its revenues by direct subsidies, failure to receive what undertakings owe to it (tax advantages), or it exposes its resources to potential decrease not in accordance with market conditions (guarantees). The measure is not considered as state aid, however, if the reduction of tax is only an incidental effect of a state measure regulating the conduct of undertakings.[3] The degree of the state's influence or control over an undertaking is significant when establishing the imputability to the state of the measures in question.[4]

In determining whether the trade concerned is affected, the ECJ has held that the mere fact that aid granted by a state or through state resources strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, is sufficient.[5] Furthermore, an aid measure may be of such a kind as to affect trade between Member States even if the recipient undertaking does not itself participate in cross-border activities.[6]

The distortion of competition appears to be a separate requirement for the measure to be considered state aid, but it follows from the fact that intra-Community trade is affected. Even small effects on such trade are sufficient to conclude that there is distortion. Recent ECJ case-law shows, however, that there may be circumstances in which the distortion of competition gains more independent role.[7] It has to be seen to what extent this creates a new approach endorsed by the Court.

For our analysis the most important criterion is a selective advantage by which the state favours certain undertakings, the production of certain goods, or even the provision of certain services. This selectivity can be based on material or geographical considerations. An advantage which mitigates the charges which an undertaking has normally to bear is equally selective when it favours companies from certain sectors (material selectivity) as well as those established only in certain geographical areas or territories for which (or for whose external relations) Member States are responsible (Article 299

[2] Case C-72-73/91 *Sloman Neptun* [1993] E.C.R. I-887.
[3] C. Quigley and A. M. Collins, *EC State Aid: Law and Policy* (Oxford 2001), p. 14.
[4] See Case C-482/99 *France* v. *Commission* [2002] E.C.R. I-4397, paras. 56–57.
[5] See Case T-55/99 *CETM* [2000] E.C.R. II-3207, para. 86.
[6] *Ibid.*
[7] See Case T-34/02 *EURL* [2006] E.C.R. nyr, para. 124.

https://doi.org/10.1017/S0008197307000542 Published online by Cambridge University Press

(4) EC) (regional selectivity). The problem of regional selectivity most blatantly appears in tax law.[8] A tax measure is selective on the regional level if it provides an exception to the application of the tax system in favour of certain undertakings established or resident in a geographically distinct part of the Member State.[9] The *Commission Notice on the Application of the State Aid rules to Measures Relating to Direct Business Taxation*[10] stipulates that in such a case the common tax system applicable should first be determined. It has to be remembered, though, that in general measures open to all undertakings operating within the Member State are presumed to be general measures and therefore do not pass the selectivity test. Only if those measures are not effectively open to all undertakings on an equal access basis do they constitute selective measures.

A. Selectivity and Justification by the Nature or General Scheme of the System

It appears that the most important thing for the assessment of selectivity is the choice of the correct benchmark which creates a standard, a point of reference. Everything that departs from it can be considered as derogatory and therefore specific or selective. It is the same idea that is found, although perhaps not expressed very fortunately, in Advocate General Maduro's opinion in the *Enrisorse* case.[11] He says that the purpose of state aid rules is to identify only those distortions of competition brought about by a Member State seeking to give a particular advantage to certain undertakings by measures that depart from its overall policy approach. This *particular* advantage we would prefer to call selectivity, since the classification of the measure does not depend on the degree or *particularity* of the mitigation of costs which undertakings have to normally bear. It is submitted that it is only when a selective advantage – a difference in treatment between undertakings reducing the costs they normally have to bear - can be established, that we can move to the level of justification.[12] The existence of selective treatment can be justified by the nature or general scheme (economy) of the statutory system of which it is a part. In such a case the selective measure is put outside state aid control. It does not render it non-selective, however, unless

[8] See M. Aldestam, *EC State Aid Rules Applied to Taxes. An Analysis of the Selectivity Criterion* (Uppsala 2005), 76.
[9] See C. Panayi, "State Aid and Tax: The Third Way?" (2004) 32 Intertax 289.
[10] EC [1998] OJ C 384/3.
[11] Advocate General Maduro's Opinion of 12 January 2006 in Case C-237/04 *Enirisorse* [2006] E.C.R. I-2843, para. 46.
[12] Such approach would be more consistent with fundamental freedoms where the Court first establishes a restriction and then goes on analysing its possible justification. The case-law provides, however, for a different approach so far, e.g. Case C-143/99 *Adria-Wien Pipeline* [2001] E.C.R. I-8365, para. 42. It all depends, however, on how we define selectivity.

https://doi.org/10.1017/S0008197307000542 Published online by Cambridge University Press

we accept the dichotomy between general and selective measures.[13] Such distinction makes every measure that is justified by the nature or general scheme of the system a general measure, thereby automatically making it non-selective.

The difficulty of classifying selective measures justified by the nature of the general scheme of the system is not new.[14] Even if some scholars agree that the concepts of general and selective measures are not mutually exclusive, they run into great difficulties when justifying their proposed divisions. Instead of simply justifying the derogations from the generally applicable tax scheme by its nature, they introduce the distinction between "derogations from the general scheme which are themselves general measures and those which are not (and therefore state aid)".[15] Without precisely defining the reference point, such a distinction may lead to the confusing conclusion that selective (derogatory) measures can themselves be general measures.

The justification by the nature or general scheme of the system can be used to explain why, for instance, "the polluter pays" principle underlying the tax legislation requires a differentiated treatment of undertakings established in one Member State. The same goes for selectivity in treating companies which may be justified by progressive taxation principles.[16] It must be stressed, however, that the efficiency of a tax measure or the simplification of tax scheme are not accepted as being within the logic of the system. Nor are the "external" objectives of a tax scheme – for example, social or regional objectives – which fall outside the scope of the justification accepted.[17] In contrast, the principles of tax neutrality or avoiding double taxation are considered as being inherent in any tax system.[18]

The justification is an old concept which actually pre-dates the formulation concerning the appropriate reference point in *Belgium* v. *Commission*[19] and more precisely in *Adria Wien*.[20] Already in 1974 the ECJ pointed out that the nature or general scheme of the social

[13] See P. Nicolaides, M. Kekelekis and P Buyskes, *State Aid Policy in the European Community* (The Hague 2005), 24.
[14] See Panayi "State Aid and Tax" (2004) 32 Intertax 289, 294.
[15] *Ibid.*
[16] Advocate General Geelhoed's Opinion of 20 October 2005 in Case C-88/03 *Portugal* v. *Commission* [2006] 3 C.M.L.R. 45, para. 18.
[17] See *Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation*, EC [1998] OJ C 384/3, point 26.
[18] See Aldestam, above note 8, 202. Aldestam makes also a distinction between the principles inherent in the tax system, being within the logic and the nature of the tax system and those necessary to the functioning and effectiveness of the tax system. Even if such a distinction may be justified by the wording of the Commission's notice on state aid and direct business taxation (cited above), it is practically a little bit artificial. The principle of avoiding double taxation can be both inherent in the tax system, being within its logic and necessary to the functioning and effectiveness of the tax system.
[19] Case C-75/97 *Belgium* v. *Commission* [1999] E.C.R. I-3671, paras. 28 to 31.
[20] Case C-143/99 *Adria-Wien Pipeline* [2001] E.C.R. I-8365, para. 41.

https://doi.org/10.1017/S0008197307000542 Published online by Cambridge University Press

security system might be a possible justification of an alleged state aid measure.[21] In 2001 the Court added that favouring certain undertakings or the production of certain goods must always be assessed on the level of undertakings which are in a *legal and factual* situation that is comparable in the light of the *objective pursued by the measure* in question. In theory, the notion of the nature of the system is much wider than the objective of a particular measure.[22] In practice, however, the principles of the measure and of the system itself often coincide.[23] In many instances it can be argued that, without the need to have recourse to the justification by the nature or general scheme of the system, selectivity cannot be established anyway owing to the different legal and factual situations of undertakings in the light of the objective pursued by the tax measure in question. Again, it is submitted that we should start with the latter analysis before applying the justification.[24] For instance, the different rates of taxation for the consumption of energy by undertakings supplying services and those manufacturing goods can neither be justified by the nature of the tax system in question nor rightly differentiate their legal and factual situation in the light of the ecological objectives underlying the measure in question. No matter how we look at it, energy consumption by each of those sectors is equally damaging to the environment.

In light of the above, it is true that the justification by the nature or general scheme of the system may seem to be an amorphous concept[25] which confuses the objective definition of aid[26] and the justification provided by principles underlying the system in which selectivity between undertakings takes place.

B. Regional Selectivity

As Advocate General Maduro points out, it is obvious that economic and fiscal policy differences between Member States are liable to confer relative economic advantages on certain undertakings in the single market. And yet, these differences cannot be remedied by state

[21] Case C-173/73 *Italy* v. *Commission* [1974] E.C.R. 709, para. 15.

[22] The Court states that justification based on the nature or overall structure of the tax system reflects the consistency of a specific tax measure with the internal logic of the tax system of which it forms part - Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v. *Commission*, [2002] E.C.R. II-1275, para. 164.

[23] It is maybe the reason why point 24 of the Commission's notice on state aid and direct business taxation (cited above) contains a statement that "some conditions may be justified by objective differences between taxpayers" under the heading "justification of a derogation by 'the nature or the general scheme of the system".

[24] According to Tridimas, difference in treatment between *comparable situations* is not prohibited where it is *objectively justified*, see T. Tridimas, "The Application of the Principle of Equality to Community Measures", in A. Dashwood and S. O'Leary (eds.), *The Principle of Equal Treatment in EC Law* (London 1997), 225.

[25] Advocate General Geelhoed's Opinion of 20 October 2005 in Case C-88/03 *Portugal* v. *Commission* [2006] 3 C.M.L.R. 45, para. 62.

[26] Case T-274/01 *Valmont* [2004] E.C.R. II-3145, para. 37.

https://doi.org/10.1017/S0008197307000542 Published online by Cambridge University Press

aid rules. Such competitive advantages for companies established or taxed are simply the result of legal and economic disparities that are the consequences of Member States legitimately exercising their legislative autonomy. It cannot be excluded, however, that the distortion of competition is less significant in cases where the level of general corporate tax in an intra-state entity is lower than that applicable in the Member State as a whole (regional selectivity) rather than in case of substantial differences in corporate taxation between states. Nonetheless, the economic advantage enjoyed by undertakings in the latter case, or the degree of distortion of competition, cannot be the sole indicators to trigger the state aid control.

As the current wording of the EC Treaty stands, Article 87 operates by reference to States and not to regions or independent territories or their resources. The sole interlocutor of the Commission in state aid procedure is the Member State, even if represented by regional authorities. The source of contention is that the drafters of the Treaty did not foresee a special provision to deal with situations where power is constitutionally devolved to regional authorities. They seemed to have assumed that in most cases the granting of aid by the State or through state resources would encompass also aid granted by regional or intra-state authorities. Had it been otherwise, it would have been easy for Member States to grant aid in any amount by claiming that it was granted not by the state, but through autonomous regional resources over which the state had no control. This would result in the evasion of the state aid rules.

The same concern was expressed by Advocate General Saggio in his opinion in *Guipúzcoa*.[27] He was afraid that a Member State could easily avoid the application of provisions of Community law on state aid in part of its own territory simply by making changes to the internal allocation of competence on certain matters.

The lack of specific provisions with regard to autonomous regions or territories results in questions concerning state resources and the relevant point of reference for assessing selectivity.

As regards state imputablity and state resources, the Court has constantly held that this criterion is satisfied by tax reductions granted by regional authorities, leading to lower state revenue.[28] The fact that the aid scheme was adopted by a state in a federation or by a regional authority and not by the federal or central power does not prevent the application of Article 87 (1) EC, if the relevant conditions are satisfied. Such a conclusion has constitutional implications for a number of Member States.

[27] Advocate General Saggio in his Opinion in joined cases C-400/97, C-401/97 and C-402/97 *Juntas Generales de Guipúzcoa et Diputación Foral de Guipúzcoa* [2000] E.C.R. I- 1073. This case was withdrawn before the ECJ delivered judgment.

[28] Case C-248/84 *Germany* v. *Commission* [1987] E.C.R. 4013.

https://doi.org/10.1017/S0008197307000542 Published online by Cambridge University Press

1. Symmetrical and Asymmetrical Devolution of Power

Finding the relevant benchmark for regional selectivity assessment is not easy. The difficultly manifests itself most obviously in a situation where we have to deal with regional fiscal autonomy within a Member State. It is immediately apparent that the distinction between general and selective measures can have a different meaning in the two contexts.[29] A regional corporate tax rate can be seen as a general measure on the level of the region concerned and as a selective measure on the level of the state. In this way, taking a region or an independent territory as a point of reference, a selective measure may become general on the part of the state territory. In such a case the choice of the relevant benchmark for selectivity assessment gains a constitutional importance. The way the power is devolved and actually exercised in a Member State has great significance for the correct state aid assessment. At the first sight, it would seem logical that if the power is symmetrically devolved, then there is no central point of reference (no common system applicable) and therefore differences between corporate tax rates in various regions would escape state aid control as being non-selective. *A contrario*, if the power is devolved asymmetrically, only to one or to a few regions, then a national benchmark exists and the use of regional tax autonomy to derogate from the national tax rate by lowering it should be considered as selective.

This approach, however, has its opponents. It has been argued that, first of all, there is no logical or doctrinal ground for distinguishing between "symmetrical" and "asymmetrical" devolution of tax powers.[30] Secondly, it has been submitted that such an approach does not take into consideration historical and economic circumstances which lead to the creation of many tax autonomous territories, in many cases predating the entry into force of the EC Treaty.

It follows that the key question seems to be how to reconcile the fear expressed by Advocate General Saggio of state aid control avoidance and the right of a Member State to have meaningful tax autonomy within its territory.[31] The Advocate General was quite clear when he stated that exclusive competence (under national law) was not sufficient to justify the preferential treatment reserved to companies

[29] Obviously, we have to exclude from this analysis a scenario in which the central government of a Member State unilaterally decides that the national tax rate should be reduced within a defined geographic area. Such a measure is clearly selective and has nothing to do with the regional tax autonomy

[30] Advocate General Geelhoed's Opinion of 20 October 2005 in Case C-88/03 *Portugal* v. *Commission* [2006] 3 CMLR 45, para 60.

[31] By meaningful tax autonomy I understand not only power to raise, but predominately to lower taxes. Regional tax increases would rightly escape state aid control as an 'exceptional burden' imposed within the area, rather than the grant of aid to taxpayers falling under the general regime who are subject to a 'lower' tax rate - AG Geelhoed, above note 30, para. 49.

https://doi.org/10.1017/S0008197307000542 Published online by Cambridge University Press

only in certain regions or provinces.[32] On the other hand, Advocate General Geelhoed saw no reason to preclude genuinely autonomous regions from being able to adopt general measures which would not be assessed against a national benchmark. Is reconciliation possible? It depends mainly on whether we would like to stick to an objective concept of selectivity or rather to move towards a more subjective concept of *genuine* or *true* autonomy.[33] This submission is without prejudice to differences and similarities in facts between the two cases Advocates General Saggio and Geelhoed had to deal with. In the Azores case the special tax regime concerned two constitutionally autonomous regions (Azores and Madeira) sharing the same characteristic from the Portuguese Constitution point of view, whereas in the Spanish case tax differences were the consequence of the Economic Agreement between the Spanish State and the Autonomous Community of the Basque Country.

In any case, it seems that there is wide agreement that in the case of symmetrical devolution of tax power, where each local authority has the freedom to set its tax rate independently of the central government, it makes no sense to take the whole Member State territory as a comparison framework for selectivity purposes. The idea of an "exception" or "derogation" makes conceptual sense only if one can establish a nation-wide "rule" – which is impossible in a situation where each local authority has autonomous power to set its own tax rates.

There is no agreement so far as to the qualification of tax measures in case of asymmetrical devolution of tax powers.[34] Advocate General Geelhoed proposes to consider tax lowering for undertakings only in a certain part of the Member State territory as a non-selective measure if the decision is taken by a "truly" autonomous region. He establishes a three-stage test to define this. It must be: (a) institutionally autonomous; (b) procedurally autonomous; and (c) economically autonomous. Although such a test, in its intention, is supposed to reduce the legal uncertainty of the application of Article 87 EC, one may wonder if this is achieved . The Advocate General reveals that to be institutionally autonomous, "the decision must be taken by a local authority with its own constitutional, political and administrative status separate from that of the central government". Does it mean that even where the territory is constitutionally and administratively

[32] Advocate General Saggio's Opinion, above note 27, para. 37.

[33] It seems that one should use the concept of full autonomy rather than true or genuine autonomy. The latter is likely to be less objective.

[34] See P. Nicolaides "Fiscal State Aid in the EU: The Limits of Tax Autonomy" (2004) 27 World Competition 393. He claims that only an arbitrary measure (non-objective or not resulting from the logic of the system) derogating from the tax adopted on the regional level can be considered as selective.

https://doi.org/10.1017/S0008197307000542 Published online by Cambridge University Press

"separate" but is politically ruled by the same party as the central government, it ceases to politically autonomous? Does the Commission have to measure the *de facto* political relationship between the central and local government? What happens if there are no constitutional arrangements between the two, but the territory is autonomous by virtue of international law?

Furthermore, to be economically autonomous, "the lower tax rate applicable within the region must not be cross-subsidised or financed by central government, so that the economic consequences of these reductions are borne by the region itself". Does the Commission, when making its state aid assessment, have to measure the financial transfers from the state to regions which compensate the shortfall of revenues deriving from the exercise of regional tax autonomy? Is it objectively measurable?[35] Will a Member State ever be able to prove that there is neither cross-subsidisation nor compensatory transfers in the other domains to offset the shortfall of revenues?

It is true that in the case of tax autonomy, as the Advocate General rightly points out, undertakings resident within and outside the region are often operating in different legal and economic frameworks which cannot be compared. The reverse may be true for undertakings operating in border regions of different Member States. Is it then a valid reason to cut all the links with the central government? As practice shows, measures which are selective on a regional level tend to concentrate the benefits in a group of economic agents while the costs are spread over the whole of society which, admittedly, may often be very remotely connected with autonomous government in question. In other words, a tax reduction in a single region could in practice be borne by companies from the rest of the country owing to the existence of financial transfers between regions and the central government foreseen by other policies. This is not like the case of corporate tax differences between Member States when costs are spread over all companies of the country with low taxation.

The procedural autonomy would probably be the easiest to verify:

> The decision must be taken by the local authority pursuant to a procedure where the central government does not have any power to intervene directly in the procedure of setting the tax rate, and without any obligation on the part of the local authority to take

[35] Nicolaides seems to believe that it is possible to examine whether transfers from the central government overcompensate the region in order to enable it to maintain a lower tax rate. He admits, however, that compensatory state measures have to be seen in the overall context of an inter-regional agreement with the central government that makes possible decentralisation of tax responsibility. The analysis becomes even more complicated as the Commission and then the Court in its assessment would be required to take into account inter-regional solidarity that may be inherent in the devolution of tax powers. See Nicolaides, above note 34, 390–392.

https://doi.org/10.1017/S0008197307000542 Published online by Cambridge University Press

> the interest of the central State into account in setting the tax rate.[36]

Nevertheless, what happens if the central government has a power to intervene indirectly? Is the local authority then politically or procedurally non-autonomous?

III. Conclusion

I would tend to agree with Advocate General Léger that state aid definition should be, in principle, a legal notion which would allow the Community judge to exercise a full control on the question whether the scheme is effectively within the field of application of Article 87 (1) EC, unless it requires a complex economic analysis.[37] However, the ECJ, and more precisely its Grand Chamber, decided in its judgment from 6 September 2006[38] to follow very closely the test of Advocate General Geelhoed discussed above.

The Court replaced the notion of "true autonomy" by "sufficient autonomy" making the test clearer, but without significantly changing the substance of it. The Court used the term "sufficiently autonomous" to define the political and economic environment in which undertakings operate.[40] Indirectly such a modification changes the reference framework from the Member State to an autonomous territory, making an aid granted "by a Member State or through State resources" somewhat different from that granted by "autonomous intra-state entity or through its resources". It is quite surprising knowing that state aid notifications can only be submitted through Member States authorities and even sufficiently autonomous entities cannot submit them directly to the European Commission.

With regard to institutional autonomy the Court clarified the situation somewhat stating that the political and administrative status separate from the central government had to be assessed from the constitutional point of view,[42] and not that "constitutional autonomy" was a separate criterion for assessment. The Court added that as far as economic test was concerned the financial consequences of a reduction of the national tax rate for undertakings in the autonomous region could neither be offset by aid from central government nor from other regions.[44] In other words the autonomous intra-state entities must assume the political and financial consequences of corporate tax

[36] AG Geelhoed, above note 30, para. 54.
[37] Advocate General Léger's Opinion of 9 February 2006 in Joined Cases C-182/03 and C-217/03, C-399/03 *Belgium* v. *Commission* , not yet reported, para. 236.
[38] Case C-88/03 *Portugal* v. *Commission* [2006] 3 CMLR 45.
[40] Ibidem, para 58.
[42] Ibdem, para 67.
[44] Ibidem, para 67.

https://doi.org/10.1017/S0008197307000542 Published online by Cambridge University Press

reductions.[46] Interestingly, the Court found it inappropriate to speak about bearing *full* political and financial consequences. Normally the state bears full political and financial consequences of its actions, whereas it is difficult to imagine that in practice it is also the case for regions. Maybe it explains why the Court found that the Azores did not fulfil the test and could not be considered as an autonomous territory. The extent to which other territories such as Gibraltar will qualify for autonomous status remains an open question based very much on factual evidence. It would seem particularly difficult to prove that certain advantages cannot be offset by aid. The latter, according to the Court's judgment, does not necessarily have to offset the advantage in any direct way.

It appears from the above judgment that the ECJ was not afraid that the proposed solution would require not only a complex economic assessment, but also some form of *political* assessment of state aid notifications by the Commission, and even by national courts when asked to apply Article 88 (3) EC . This will further move the state aid definition away from considering it as an objective notion. Moreover, it seems to increase the lack of legal certainty and possibly also the fears of national judges when interpreting the definition of state aid in national proceedings. It may then have further bearing on the effectiveness of the prohibition in implementing national aid measures before their notification to the Commission. It has to be admitted, though, that the strict application of regional selectivity, as some tried to argue before the Court's judgment in the *Azores* case, might have been invoked in extreme cases in pleading for changes in the constitutional equilibrium of certain states.

After the Court's judgment, an interesting path of exploring the justification of tax decentralisation in an asymmetrical power devolution scenario as falling within "the nature or general scheme" of the Member State's tax system[47] is no longer possible. Taking into consideration, however, the difficulty described above in the application of such justification, it might not have been a realistic solution anyway.

In order better to reflect the economic and political reality, perhaps a change in the Treaty definition of state aid prohibition should be envisaged, recognising regional tax autonomies. This should be coupled with the new approach to corporate taxation in the Union, in particular with regard to "harmful" corporate taxation, if the notion of harm can really be substantiated economically in such cases.

[46] Ibidem, para 68.
[47] P Nicolaides 'Fiscal State Aid in the EU: The Limits of Tax Autonomy' (2004) 27 *World Competition*, 391

https://doi.org/10.1017/S0008197307000542 Published online by Cambridge University Press

Then we could look with fresh eyes at the meaning of aid granted "by a Member State or through State resources".

Since change in the Treaty seems to be too unrealistic at the moment, we will have to live with the ECJ judgment and see how it will be applied in practice. Despite the doubts about the legal certainty of the test, it seems clear at least that it will not have an impact on any constitutional changes in the Member States concerned.

https://doi.org/10.1017/S0008197307000542 Published online by Cambridge University Press