Tax Incentives and Territoriality within the European Union: Balancing the Internal Market with the Tax Sovereignty of Member States

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This article discusses the case law of the European Court of Justice concerning the compatibility with EU law of territorial tax incentives adopted by Member States from a legal institutional and policy perspective[1]The author will in particular focus on the potential justifications under EU fundamental freedoms to territorial ring-fencing of tax incentives, taking into account the necessary balance between the objectives of the Internal market and the EU systems of division of powers between the European Union and its Member States, based on the principles of conferral, subsidiarity and proportionality.

1. Introduction

The topic of tax incentives is certainly one of the most intensely discussed areas by economic or legal tax scholarship. It is also a very sensitive political issue, both at the domestic and international level, especially in the light of the recent initiatives aimed at curbing (harmful or aggressive) cross-border tax competition, such as for example the OECD BEPS Report and Action Plan.[2]Within the European Union, the subject takes an even more central relevance, because it lies at the core of the European control of Member States' tax sovereignty.[3]EU State aid rules and the EU freedoms of movement, as well as soft law initiatives (EU Code of conduct), all restrain the power of the Member States to use tax instruments to pursue specific policy objectives, whether of economic, social or environmental nature. The granting of a favourable tax treatment to certain categories of taxpayers or activities on a territorial basis almost inevitably triggers the suspicion that the definition of these categories by the Member State concerned could result in unduly benefiting domestic production, or more broadly distorting the allocation of resources and income, jeopardizing the EU objective of the achievement of the Internal market.

However, although this suspicion may prove right, in particular when Member States limit the benefit of tax incentives to their nationals or residents, it is argued that interpreting EU law as generally prohibiting any territorial restriction to the scope of those favourable measures would excessively hinder Member States in the pursuit of their domestic policies, without necessarily serving the purposes of EU (tax) integration. The topic in this article will be discussed in four steps. First, the author shall discuss the functions of tax incentives in light of the most recent political and academic debates and try to identify general trends in how tax incentives are treated in EU law. In section 1., the author shall examine the cases in which the European Court of Justice (ECJ) had to analyse the compatibility of territorial tax incentives adopted by Member States with European Union law provisions. The author shall focus in particular on the cases concerning the application of the European freedoms of movement. In section 2., the author critically assesses the actual and potential effects of this case law on the tax autonomy of the EU Member States. Finally, after a brief comparison of the treatment of those territorial restrictions in the area of EU State aid law (section 5.), he suggests some refinements in the criteria that the Court has used so far aimed at better balancing the requirement of the Internal market with the tax autonomy of the Member States (section 6.).

2. The Functions of Tax Incentives and Their Appraisal in EU Law

The main function of taxes is to raise the revenue necessary to finance the missions and responsibilities entrusted to public authorities, in accordance with the applicable supranational and constitutional arrangements. But taxes also serve other purposes. Tax legislators often adopt in the framework of social, environmental and/or economic policies, preferential tax provisions whose effects are to reduce the ordinary tax burden for certain activities or certain taxpayers. Sometimes, these provisions can be considered as alternatives to direct government spending programmes, or more convincingly, as subsidies.[4] These preferential tax provisions are therefore referred to as tax expenditures, tax subsidies or – focusing on the result that they are intending to achieve – tax incentives. Although these expressions do not cover exactly the same meaning, especially in economic theory,[5] the author shall nevertheless, for the purpose of assessing their compatibility with superior

EU norms from a strictly legal perspective, treat them as synonyms.

2.1. The concept of tax incentives: An inevitable evil?

Since the middle of the 20th century, tax incentives or tax expenditures have been subject to growing scrutiny, for three main reasons: political transparency, academic research and constitutional and supranational accountability.

Political transparency is certainly the first reason for the emergence of this interest. Under the influence of the United States, and in particular of Harvard Professor Stanley Surrey, Assistant Secretary of the Treasury for Tax Policy in the 1960s, and father of the "tax expenditure" concept,[6] national governments have started to identify and list the tax expenditures existing in their own tax systems. Tax expenditures have become an object of official domestic and international publications, sometimes accompanying the State budget.[7] Within the European Union, this practice has recently become an obligation since the entry into force of a directive requiring Member States "to publish detailed information on the impact of tax expenditures on revenues" as of 2014.[8]

Following the initiatives improving the transparency of tax expenditures, academic literature and numerous empirical studies have then contributed, first to define the concept of tax incentives and then to evaluate their costs and their suitability to influence behaviour as instruments of non-tax policies. The academic debate has first focused on the criteria to be used to define the tax expenditure, and in particular, whether it necessarily implies a reference to a benchmark. Moreover, this benchmark – and that was another fundamental question – could be considered from a normative point of view, i.e. as an ideal tax system or under a positive approach, which would take into consideration the ordinary tax regime applicable in the domestic tax system of the State concerned.[9] Interestingly enough, as it will be shown, a similar question arises in the application of EU State aid rules to preferential tax measures, when assessing the criteria of selectivity.[10]

Another delicate issue addressed by scholars concerns the cost and the effects of tax incentives, whether taken in isolation or compared to other policy instruments (regulatory).[11] The determination of their cost is extremely difficult, considering first that it implies to be able to determine the general system, or the framework of reference, and second that taxpayers adapt their behaviours to the existing tax framework and tend therefore to –unnecessarily – privilege behaviours favoured by tax incentives in respect to a situation where those tax incentives would not exist (or would be removed). The substitutability between tax incentives and direct spending has also been subject to academic discussion. This apparently perfect alternative between those policy instruments proved to be empirically far less obvious than it had been assumed before, not only as to the economic effects but also concerning the profound differences in the political decision-making process.[12] Studies were also made on the effect of tax incentives on economic growth and firm location decisions,[13] on the net cost or benefit of those measures for public authorities, taking into account the tax revenues generated by the economic activity they contributed to create or the lesser public expenses they permitted to avoid. Lately, a growing attention has developed around the adequacy of tax incentives in environmental policies and the question whether they have to be preferred to regulatory instruments.[14]

An improved transparency and a better knowledge of the phenomenon of tax incentives–generally tempering the belief in their efficiency- have led to the adoption of a more effective legal framework to control their use, both at the domestic and at the international level. In the domestic context, they may conflict with the constitutional principle of equality or principle deriving from it, such as equality in taxation, ability to pay or equality in competition (*Wettbewerbsgleicheit*).[15] At the international level, several organizations monitor, review and sometimes even call for the removal of certain tax incentives, considered as harmful, generally related to business and investment. This is of course the case for the European Union, with the Treaty on the Functioning of the European Union entrusting the European Commission with the mission to control State aid measures, as well as the Council initiatives in order to curb unfair tax competition.[16] Moreover, the issues of tax incentives have also been dealt with within the World Trade Organization (the control of subsidies in the GATT agreement) and the OECD (the 1998 Report on Harmful Tax Competition[17] and lately the 2013 Report and Action Plan on Base Erosion and Profit Shifting).[18]

It could have been expected that the combination of improved transparency, better knowledge and stronger control should have had as a consequence to restrain governments to make use of tax incentives, counterbalancing the tendency to adopt them in order to get the political support of certain social or economic sectors. Experts, whether from academia or government, have indeed put in evidence several weaknesses inherent to this instrument. In particular, critiques concern the inadequacy of tax expenditures to reach the goal they are assigned, their excessive costs, the fact that they may constitute hidden subsidies to certain economic actors, or that they distort international tax competition between States, by being used often in aggressive or "substanceless" tax planning strategies.[19] This original mistrust against tax incentives was indeed at the base of Stanley Surrey's initiative to have the US Congress publishing a tax expenditure budget.[20] Surrey hoped that it would induce the Congress to abandon narrowly-constructed tax incentives and replace them with better targeted spending programmes. Despite this wave of criticism, recent studies – even from governmental sources[21] – tend to adopt a more balanced approach. For example, Easson and Zolt, referring to measures aimed at encouraging investment in developing countries, consider that "tax incentives can play a useful role in encouraging both domestic and foreign investment. How useful, and at what cost, depends on how well the tax incentive programmes are designed, implemented, and monitored."[22] Moreover, the basic assumption that tax incentives (tax expenditures) could be singled out in reference to a "normal" tax base is no more universally accepted, which somewhat undermines the credibility of the benefits of tax expenditures' approach in the political decision-making process.[23]

In conclusion, tax incentives have been the object of a wide critique both from a perspective of their axiomatic compatibility with fundamental legal and economic principles (in particular neutrality and equality) and of their empirical adequateness to fulfil the goals for which they have been adopted. However, what could be called an "original mistrust" against the use of tax instruments in non-tax policies should be nuanced. Not only may it appear artificial to isolate them from the "normal" tax system, but in some circumstances, they may prove not only to be efficient, but even more adequate than alternative policy instruments.[24] Design and implementation play a fundamental role in this context. Therefore, from a more institutional viewpoint, it can be argued that supranational (or constitutional in the domestic context)[25] rules limiting the taxing powers of public authorities should be interpreted so as to avoid risks of unjustified distortions or discriminatory advantages, but should not go as far as fundamentally compromising their use in the framework of non-tax policies.

2.2. EU law and tax incentives: An ambiguous relationship

This original mistrust against tax incentives has crossed the Atlantic and is particularly strong within the European Union. The "economic constitution" of EU integration has been indeed profoundly influenced by the ordoliberal ideas of economic freedoms and undistorted competition.[26] From the concept of "an open market economy with free competition, favouring an efficient allocation of resources" expressly spelled out in article 120 of the TFEU almost naturally stems the neutrality (but not the absence) of State intervention, a principle at odds with the preferential treatment of defined (economic and non-economic) activities characterizing tax incentives. This underlying economic policy – can be illustrated by the general prohibition made to the Member States to adopt measures constituting State aid (even if exceptions exist), by the obligation to apply tax incentives in a non-discriminatory way under the fundamental freedoms, or the initiatives consisting in reviewing and sometimes ordering the dismantling under the 1999 Code of Conduct on business taxation of favourable tax regimes put in place by Member States.[27]

Another illustration of the skepticism of EU institutions towards tax incentives can be found in the instruments of coordination of economic policies (in particular the European Semester and the Economic adjustment programmes for Member States requesting EU financial assistance).[28] In this period of crisis and tight budget constraints, Member States, often – it has to be underlined – under pressing recommendations from the European Commission,[29] have undertaken several reforms in order to limit the effects of certain tax incentives.[30] The most spectacular application of this anti-tax expenditures doctrine are to be found unsurprisingly in the Member States that have been the object of Economic adjustment programmes by the European Union, the Eurozone and the International Monetary Fund (like Greece and Portugal where most of the tax incentives have disappeared).[31]

Another last confirmation of this trend can be found in the proposal of the European Commission on a common consolidated corporate tax base, which does not include a provision that can be characterized as a tax incentive.[32] Moreover, by fully harmonizing the tax base, the Commission implicitly denies the right for the Member States to adopt such measures at the domestic level. This stance, based on an approach of tax neutrality, has been challenged by the European Parliament, which considers that Member States should retain the power to adopt certain incentives for businesses, particularly in the form of tax credits.[33] It is unclear how the CCCTB project would interact with State aid rules, considering that the Commission through its State aid guidelines allows Member States to adopt a wide range of corporate tax incentives for different goals as such research and development, environmental protection, business restructuring or regional development. Of course, Member States would keep the power to fix different rates and to adopt tax credits in order to pursue those goals. Nevertheless, one can wonder why the Commission proposed this limitation of power – both for Member States and for the European institutions – to adopt corporate tax deductions. This latter type of measures tends indeed to be less costly for the Member States' budgets than tax credits as well as sometimes better targeted to reach certain goals, such as for example to foster investments.

However, although it can generally be said that in most cases European law limits the power for Member States to adopt tax incentives this is not always the case. Other EU law provisions do not only authorize, but sometimes require Member States to adopt tax incentives. Besides the exceptions to the prohibition of State aid, listed at paragraphs 2 and 3 of article 107 of the TFEU, an extensive use of tax incentives is made in the indirect tax directives, such as VAT and excises duties. Those measures not only take the form of individual of collective derogations to the harmonized system (like for example the possibility to introduce reduced VAT rates or to exempt or reduce the level of excise duties in favour of environmental-friendly energies),[34] but are sometimes also a mandatory part of the harmonized system, like for example most of the VAT exemptions (provided that they can be considered as favourable regimes).[35] Therefore, the position of EU law towards tax incentives in general can be described as ambiguous. This ambivalent position from the European institutions towards tax intensive is not new. Already in the Council conclusions examining the Ruding report on 23 November 1992, the Council, while endorsing the concern expressed by the Commission and the Ruding Committee about the negative effects of "special tax arrangement designed to attract internationally mobile capital and other tax incentives where these tax arrangements or incentives result in loss of revenue to the member states and unfair competition", acknowledged at the same time that "favourable tax treatment can in certain circumstances have a legitimate role to play in particular as one element in a cohesive regional development policy".[36]

Moreover, in practice, Member States, in order to ensure the sustainability of their public finance and the so-called European social model (which is also reflected in the objectives of the EU – *see* article 3 of the EU Treaty), have to adopt strategies to maintain growth, competiveness and a decent level of employment. In this context, tax policies play a very important role, along with educational, innovation and labour market policies. And developing new growth-friendly tax policies almost necessarily implies the adoption of measures favouring certain behaviours, and therefore tax incentives. It could also be added that this recourse to tax expenditures may also be justified in order to foster trust and visibility of domestic governments. Tax incentives are indeed a very powerful way to send a signal to the population, to economics actors and to European and international institutions that governments are acting in favour of determined objectives and therefore contribute to enhance trust in public institutions and more generally in the state of the economy.[37] A quick empirical look at the use of tax expenditures by national governments shows that despite experts' and international organizations' recommendations, States continue to make a very extensive use of them. To give some examples, in a 2010 report (based on data collected between 2006 and 2008), the OECD listed as tax expenditures 86 measures in Germany, 100 in the Netherlands, 136 in Spain and up to 381 in the United Kingdom. In Italy, a special

Committee established for this purpose listed in 2011 720 measures for a total cost of EUR 253 billion.[38] These numbers should be read with caution, and certainly not serve as a valid basis for a comparison between countries, because differences in methodology in classifying measure as tax expenditures may vary greatly. They reveal nonetheless that the recourse to tax incentives is very widespread in EU Member States and therefore that EU provisions limiting the power of Member States to adopt them can have a very significant impact throughout the European Union.

3. Territorial Tax Incentives and Fundamental Freedoms in the ECJ Case Law

Assuming that it is illusory, and maybe counterproductive, – to dream about a world without tax incentives, it is essential to focus on their design.[39] A primary step consists of being aware of the existing limitations of these instruments. These limitations can be related to the economic efficiency, to the political feasibility or to their compatibility with the existing constitutional and legal framework. In this article, the author will address only this latter aspect, focusing on the limits imposed by EU law to the Member States. Furthermore, the author will limit his analysis to the freedoms of movement included in the Treaty of the Functioning of the European Union (TFEU), with a limited comparison with State aid rules. The ECJ has intervened in the European debate about tax incentives. Apart from its role of reviewing European Commission's decision on State aid, the Court has had the opportunity to test domestic tax incentives against the fundamental freedoms. These freedoms guarantee the free movement of persons as well as the different means of production such as goods, services and capital throughout the European Union, and even with third countries (for the free movement of capital).[40]

3.1. Types of measures

The reason why the Court came across tax incentives in its case law on the fundamental freedoms is quite simple. Tax incentives are most of the time associated with conditions, in order to target more adequately the objective pursued or to limit their budgetary impact. These conditions can be quantitative, qualitative, temporal and territorial. Under territorial conditions, the benefit of the tax advantage is geographically limited, usually to the territory of the Member State (or even to the region within the Member State), which may trigger the application of freedom of movements. In the vast majority of the cases, the Court held these territorial restrictions to be tax incentives incompatible with the fundamental freedoms. The ECJ indeed does not only interpret the fundamental freedoms as prohibiting differences in treatment between nationals and non-nationals, or between resident and non-resident taxpayers. It is also considers incompatible with the freedoms any disadvantageous unequal treatment of a cross-border situation in comparison with a domestic situation. Those restrictions are therefore also not admitted under EU law, unless an “overriding reason in the public interest” as defined by the Court justifies such treatment.[41]

The Court examined in its case law both not only economic or business-related tax incentives, related to investment and R&D but also tax regimes aimed at achieving social or general interest objectives.

Among business-related incentives, several cases concerned incentives for research and development. Member States legislations allowed the deduction (*Baxter*) [42] or a tax credit (*Laboratoires Fournier* [43] and *Commission v. Spain*) [44] for research expenditures for scientific and technical research carried out exclusively in their territory. Other cases dealt with investment incentives. Cases decided by the Court concerned an investment tax premium for assets used in a domestic place of business and excludes vehicles leased to foreign businesses (*Jobra)* [45] an investment tax credit denied for capital goods physically used in the territory of another Member State (*Tankreederei I)* [46] or more recently, the exclusion of a deduction with respect to risk capital invested in a permanent establishment located in another Member State (*Argenta*).[47] Investment of savings by private individuals in domestic shares may be also encouraged by granting a tax incentive for the acquisition of shares in resident companies, which was denied in respect of foreign participation (*Weidert and Paulus*).[48]

The other tax incentives that came under the Court’s scrutiny pursued very diverse goals. For example, some of them were related to social security in the broader meaning, namely pension planning and healthcare. These cases, such as the famous *Bachmann* and *Commission v. Belgium* cases, mostly concerned the deductibility of premiums paid to private insurance companies and their limitation to insurance companies established in the domestic territory.[49]

Other cases dealt with cultural and educational policy. The Court has examined domestic measures allowing the deduction of tuition fees paid only to private educational establishments located in their own territory (*Schwarz* [50] and *Commission v. Germany*),[51] limiting the deduction for cross-border education by a “close-to-home” requirement to the amount paid for national tuition fees (*Zanotti*)[52] or denying the deduction for gifts made to foreign research and teaching institutions (*Commission v. Austria*).[53]

Territorial restrictions to the preferential tax regime to gifts and legacies to charitable bodies were also analysed by the Court in the *Missionswerk Werner Heukelbach* case which concerned a reduced tax rate[54] or *in Persche* about the deductibility of gifts in the hands of their donors.[55]

Member States can also use tax incentives for housing policies, primarily to facilitate the access to ownership or the change of domicile. Examples in the ECJ case law are the granting of a deferral or an exemption from capital gains tax arising from the sale of a private dwelling on the condition that the taxpayer reinvests the proceeds within their territory.[56] Other illustrations are cases concerning a tax reduction for the computation of the tax due on the purchase of a property used as a dwelling based on the fact that a registration tax had already been previously paid for the acquisition of a property in the same Member State (*Commission v. Belgium* and *Commission v. Hungary*).[57]

3.2. Justifications

In all these cases, the Court considered that those measures constituted restrictions to the freedom of movement. In a small proportion of them, the Court accepted the justifications put forward by the Member States.

The justifications invoked by Member States are the loss of revenues due to the extension of the incentive to cross-border situations, the need to safeguard the effectiveness of fiscal supervision and the fight against tax evasion and abusive practices, the need for a connection between the recipient of a benefit and the society of the Member State concerned the preservation of the allocation between Member States of the power to tax and the need to preserve the coherence of the tax system.

The loss of State revenue or the erosion of the tax base as such has always been rejected by the Court. However, this does not mean that a Member State may not limit the importance of the tax advantage. For example, in the *Zanotti* [58] case, the ECJ held that Italy could limit the tax deductibility of university tuition fees incurred at a university established in another Member State up to the maximum tuition fees that would have been paid in the national State university nearest to the taxpayer's residence.

Another grounds for justification rejected by the Court in its case law on tax incentives is based on the administrative difficulties that Member States could face when trying to control the direct or indirect beneficiaries of the tax incentives in other Member States. The Court refused to accept the argument by stating that the national authorities could use existing EU instruments of administrative cooperation[59] or even ask the taxpayer to provide the necessary evidence.[60] Moreover, with regard to the right to fight against tax evasion and abuse, the Court did not accept the fact that an activity carried out abroad could create a general presumption that those activities were "wholly artificial arrangements aiming at avoiding the tax normally due".

The Court also rejected the argument based on "the need for a connection between the recipient of a benefit and the society of the Member State concerned".[61] This justification was formerly accepted – at least, in principle – by the ECJ in several tax and non-tax cases, in particular the *Gottwald* case,[62] concering the granting of an annual toll disc free of charge to resident disabled persons.[63] In the *Tankreederei I* case, concerning an investment tax credit for capital goods used in the territory of another Member State, the Court held that "as regards the need for a connection between the recipient of a benefit and the society of the Member State concerned, (…) with regard to benefits that are not covered by European Union law, Member States enjoy a wide margin of appreciation in deciding which criteria are to be used when assessing the degree of connection to society". However, in this case, the justification was rejected by the Court: "in circumstances such as those of the case in the main proceedings, where a national provision consistently refuses the benefit of a tax advantage when the investment is not used in national territory, notwithstanding the fact that the investment in question is unconnected with any social objective, such a refusal cannot be justified by such considerations".[64]

A contrario, the Court seems to leave open the fact that the existence of a social objective could allow Member States to restrict the benefit of (tax) advantages to certain categories of beneficiaries. However, in the *Missionswerk Werner Heukelbach* case, concerning a reduced rate for legacies made to charitable bodies of certain Member States where the donor had a specific connection, the ECJ, concluded that "whilst it is lawful for a Member State to require, for the purposes of granting certain tax advantages, that there be a sufficiently close link between the bodies which that Member State recognizes as pursuing some of its charitable purposes and the activities pursued by those bodies (…), that Member State cannot grant such advantages only to bodies which are established in its territory and whose activities are capable of relieving that State of some of its responsibilities (…)".[65] According to the Court, the effect would be to indirectly recognize the justification based on the need to prevent the reduction of tax revenues, which is not considered as an overrid ing reason of public interest.

More surprisingly, in the *Argenta* case,[66] the Court refused to admit the connection between a tax advantage and a subject-to-tax clause in a cross-border context. The Court held that a Member State could not deny the application of a tax incentive as regards the capital invested in a foreign permanent establishment of a Belgian company on the sole ground that the profits of this foreign permanent establishment are exempted from Belgian corporate income tax under a double taxation convention. The tax incentive concerned was the notional interest deduction, a measure aimed at reducing the difference in tax treatment between debt and equity, similar to what has been called allowance for corporate equity in the economic literature.[67]

As far as the territoriality of tax incentives is concerned, the only ground of justification accepted by the Court is the need to preserve the coherence of the tax system, which is defined as "a direct link (…) established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy". The Court accepted this justification in 1992 on the deductibility of sickness and invalidity insurance contributions and pensions and life assurance contributions[68] and, in the context of housing policy in two decisions of 1 December 2011 (*Commission v. Belgium* and *Commission v. Hungary)*. [69]Both measures at stake were tax rebates for the purchase of residential property granted under the condition that the purchaser had already owned his previous residence on the territory of the State or the region adopting the measure. The Commission had argued without success that the fact that these rebates were not granted to taxpayers having had their previous residence in another Member States was a restriction to the free movement of persons (inbound restrictions).

4. Critical Assessment of the Potential Consequences of ECJ Case Law on Member States' Tax Autonomy

This case law of the Court on tax incentives and its consequences on the tax autonomy of the Member States has raised criticism among policymakers and tax academics. Luc De Broe, in a comment on the *Argenta* case, said that "this judgment may cause a headache to tax legislators in Member States who wish to limit the scope of tax incentives to profit which comes within the purview of their tax jurisdiction".[70] Critiques even came from outside the European Union, as US Professors Michael Graetz and Alvin Warren, in their *Income Tax Discrimination and the Political and Economic Integration of Europe* pointed out that "the Court's decisions also threaten the ability of Member States to use tax incentives to stimulate their economies".[71]

The author shares these concerns. This case law in its present state can be criticized under three distinct lines of arguments: the first based on its tax policy implications, the second based on the legal principles governing the allocation of powers between the European Union and its Member States, in particular the principles of conferral, subsidiarity and proportionality, while the third is inspired by considerations based on the nature of the nexus between taxpayers and the States, as it is presented in classical and modern tax theories.

From a tax policy perspective, there is a fundamental incoherence resulting from the interpretation of the EU freedoms as requiring Member States to apply tax incentives to residents and non-residents for activities carried out on their territory and at the same time to extend the scope of application of those incentives to activities carried out by residents – and even non-residents (for example permanent establishments) – on the territory of other Member States.

Two fictive examples can help to illustrate these inconsistencies. The first example concerns tax incentives in favour of investments and it is largely inspired from the *Argenta* case. Let's assume that a Member State under a rescue plan (or "economic adjustment programme") wants to adopt an incentive to stimulate its economy, foster growth and employment in order to ensure the sustainability of its public finances and get out of the very pressing tutelage of the Troika institutions.[72] Logically, in line with these objectives, this country should try to make this tax incentive attractive to a company that invests within the country. By applying the *Argenta* case law, it appears rather unlikely that this Member State could not under the fundamental freedoms impose a minimum activity on the national territory and would have to grant the incentive to investments made in other Member States. In this context, Greece or Portugal, for example, would have to fund with their own budget the foreign branches of their companies investing in, say, Germany or in Finland, thus for the exclusive benefit of these Member States, since they would not be in the position to tax the profits from these branches, having entered into double taxation agreements with those countries. From the taxpayers viewpoint, cross-border activity would not only be put on an equal footing but would be clearly favoured in respect to domestic activities: the taxpayer would indeed be able to benefit from tax incentives provided by two Member States (its State of origin and the State of activity), while being taxed on the profits generated with the help of those tax incentives only once, assuming that double taxation is prevented due to the application of the bilateral double taxation convention. Is that a desirable result? Should Greece and Portugal spend public money on the funding of economic activity in Germany or Finland without getting any return? Should the taxpayer get a double benefit when investing across borders? Or does it imply that those countries should refrain from adopting such tax incentives, leaving this possibility (or privilege) only to the Member States that have enough financial resources to fund pan-European tax subsidies on their own national budget?

The second example concerns tax incentives in the area of environmental policy. Let's assume that Member State A in the framework of its environmental policy wishes to give a tax incentive for the acquisition of solar panels by individuals and their placement on the roof of their dwelling. By contrast, the neighboring Member State B adopts a tax incentive to promote the use of wind energy by allowing a specific deduction for the acquisition of wind turbines by individuals. If these Member States want their tax incentives to comply with the fundamental freedoms as they are currently interpreted by the Court, they should ensure that their incentives are available to non-residents owning immovable property on their territory as well as to residents (and any other persons whom they consider subject to taxation) in relation to investments made in other Member States. This is also the case if income from immovable property (or business income through a permanent establishment) is exempt in the residence State by virtue of the double taxation convention. The obligation on Member States to grant incentives to non-residents making green investments on their territories does not raise particular policy questions. Indeed, it would clearly be discriminatory to deny the tax advantage to non-residents – who adopt the behaviour encouraged by the State on whose territory they make their investment – solely on the basis of their residence. However, forcing Member States to grant incentives to investments realized outside their territories does not appear reasonable. It not only creates a risk of significant loss of revenue caused by tax planning schemes, but moreover, the obligation to extend tax incentives to cross-border situations leads to spill-over effects and a serious encroachment on the policy choices made by other Member States. In the example described above, a Member State would be forced, in order to apply its own national environmental programme, to fund the installation of solar panels on dwellings located in a Member State that has chosen to favour wind and not solar energy. This practical consequence is certainly not in line with what could be understood as sound tax policy.

Moreover, by imposing rather severe justification requirements to territorial restrictions to tax incentives, the ECJ case law seems to implicitly contain a bias in favour of direct subsidies and against tax expenditures. In the *Schwarz* case, the Court rejected the argument of the German government that Member States should not be obliged to "(…) support, by way of a tax advantage for school fees, educational establishments which fall under the education system of another Member State".[73] According to the Court, the German legislation did not provide for a "direct subsidy (…) to the schools concerned but for the grant of a tax advantage to parents in respect of school fees incurred on behalf of their children".[74] Does it mean that the issue of this case would have been different, had Germany opted for a direct subsidy? If so, the Court would indirectly favour the use of subsidies over tax advantages, while the (political) choice between these two policy instruments should be left to the Member States.[75] This bias also raises concerns as regards the overlap with a specific instrument provided by the treaty to control State subsidies, whether in the form of direct expenditure of tax incentives, i.e. the control of State aid provided by articles 107-108 of the TFEU.[76]

Secondly, this case law leads to inconsistent results also when analysed in light of the principles of conferral, subsidiarity and proportionality (article 4 and 5 of the TEU). According to the Treaties, certain competences have been entirely transferred to the European Union, others are shared between the European Union and the Member States and the rest of the competences, according to the principle of conferral, have remained within the exclusive jurisdiction of the Member States. Fundamental freedoms should be interpreted in accordance with this system of division of powers. The area of tax incentives raises specific issues since it shows that tax incentives have a hybrid nature, since they pursue goals that are linked to non-tax competences, such as – education,[77] health,[78] social policy,[79] employment,[80] research and development,[81] economy and business, or even land use planning or housing policies.[82] These non-tax competences have a different impact on the achievement of the Internal market and the other goals of European integration. For example, the distorting effects of territorial tax incentives in the area of Research, Development and Innovation (like the so-called "patent boxes") cannot be compared to preferential tax measures applicable in the residential housing sector, an area where spillover effects on other Member States are much less important and certainly less damaging to European integration. Therefore, this hybrid nature of tax incentives should be properly taken into consideration.

Thirdly, forcing Member States to expand the scope of tax incentives to situations that fall outside the scope of their territorial jurisdiction could also be seen as being at odds with most of the theories developed in order to justify taxation in contemporary States. What these theories all have in common is that they propose ethical foundations to the relationship between citizens, taxpayers and public authorities. Among those theories, the one developed by the late Klaus Vogel, one of the most inspiring tax lawyers of the 20th century appears particularly relevant in this case. In his article *The Justification for Taxation: A Forgotten Question*,[83] Vogel criticizes the two classical theories for justifying taxation: the benefit theory and the sacrifice or social contract theory. Under the benefit theory, taxes are the price paid by each individual in compensation for the public services provided by the State to him or her individually. Under the sacrifice or social contract theory, taxes are based on the assumption that each individual should contribute to the common wealth according to his capacities or ability to pay while the States should grant to its public services according to the needs of each individual.[84] Denouncing the inadequacy of these theories, Vogel proposes instead to justify taxation on the basis of the principle of reproductivity. According to this principle, which he took from Lorenz von Stein,[85] but which shares some similarities with what has been more recently referred to in the US literature as “expanded or new benefit principle” or partnership theories,[86] the State is entitled to a share of the benefits it contributed to create by spending measures.[87] Although this theory may be criticized as regards its exact normative content, it would imply in a cross-border situation that a Member State should be entitled to benefit from the effects of the activities it contributed to foster through the adoption of tax incentives, or at least, that it should not be forced to subsidize economic activities generating revenues lying outside the legal boundaries of its power to tax.

5. Comparison with the State Aid Approach

Although the main focus of this article is the compatibility of (territorial) tax incentives with fundamental freedoms, it appears important to briefly address the treatment of this type of measures under the State aid rules. Tax incentives adopted by the Member States may indeed entail territorial restrictions, which under the State aid terminology, could be considered as selective by the Commission and/or the ECJ.

As a preliminary caveat, it seems important to remember that not all tax incentives fall into the scope of application of the EU State aid provisions. Only the advantages granted directly or indirectly to “undertakings” are indeed susceptible of being characterized as State aid. And, as we have seen above, Member States can choose to grant tax reductions to (mostly non-economic) activities carried by persons or bodies that do not qualify as undertakings for the purpose of article 107 of the TFEU. State aid control may indeed be seen as an important tool of economic policy, characteristic of a legal system whose principal aim is the achievement of the Internal market, where ideally economic competitors are put on equal footing, independently of their country of origin and/or the nature or form of their activity. It is however not aimed at influencing non-economic policies, less intimately linked to the Internal market, where according to the principle of conferral expressly acknowledged in articles 4 and 5 of the TEU, Member States retain full sovereignty. Therefore, if State aid rules do not apply to tax incentives granted to taxpayers that do not qualify as undertakings, only the economic freedoms of the Treaty could potentially be applicable, provided however that these incentives do not apply to economic transactions ultimately beneficial to undertakings.

Concerning the existence of State aid, as the ECJ case law provides, four criteria are to be fulfilled in order to declare a national measure prohibited by article 107 of the TFEU. According to the Court, these criteria are:

> First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition.[88]

Moreover, the Court adds another requirement to complete the analysis: “according to settled case-law, the concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective where that differentiation arises from the nature or the overall structure of the system of charges of which they are part (see, to that effect, Case 173/73 *Italy v. Commission*, paragraph 33, and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 51)”.[89]

In the area of taxation, the defining criteria for establishing that a measure constitutes State aid is the existence of an advantage in favour of “certain undertakings or the production of certain goods” referred to as the *selectivity* criteria. The assessment of selectivity implies a comparison between the favoured group of undertakings “with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question”.[90] The selectivity of a measure can be of a different nature: sectorial, material or territorial. In this latter case, a tax measure will be considered territorially selective if it grants a tax advantage only to undertakings situated in a part of a geographical area constituting the reference framework. This reference framework is usually the territory of the Member State as a whole, but in some cases be restricted to the territory of a region, which enjoys sufficient constitutional, procedural and economic autonomy to adopt its own tax measures and to bear the consequences of its policies.[91] In the same way Treaty freedoms may also prohibit territorial limitations to the granting of tax advantages by Member States based on distinctions between taxpayers. A distinction made by a tax measure between (comparable) domestic and cross-border situations may lead to declare it – if unjustified – incompatible with EU law. There is certainly a similarity between the two systems in that both constitute a form of European control of the definition made by Member States of the categories of taxpayers benefiting from a tax advantage and those that do not. To a certain extent, both systems reflect a certain idea of neutrality and of non-discrimination.

There is however an important distinction between the State aid and the fundamental freedoms regime concerning the territorial framework in which the assessment of the compatibility of a national tax measure takes place. In the State aid regime, the reference framework is the territory of a single Member State (or a region within it), and not the territory of the European Union as a whole.[92] On the contrary, in the assessment of the compatibility of a national tax measures with the EU freedoms, the Court always tends to consider a broader territorial framework, i.e. the Internal market. The comparison between purely domestic situations and cross-borders situations are indeed inherent to the Treaty freedoms control. In the State aid control, the Internal market dimension is certainly taken into account in the verification of the condition related to the affection of the trade between Member States; it is however not an essential feature in the selectivity test.

The *Germany v. Commission* case is particularly interesting in the analysis of the distinction between State aid and Treaty freedoms as regards territorial restrictions to tax incentives. In this case, the Court upheld the Commission's decision, in which a German tax scheme aimed at fostering investment in the *Länder* of the former East Germany was considered incompatible both with the prohibition of State aid and the freedom of establishment. The scheme consisted in the right to set off a gain resulting from the sale of shares against the costs of purchasing new shares in capital companies, provided that the latter companies had both their registered office and their central administration in one of the new *Länder* or in Berlin, and that they have no more than 250 employees at the time the shares are acquired (or were holding companies whose sole objective is to administer participations in companies having such characteristics). According to the Commission, "the tax scheme confers a direct advantage on certain natural and legal persons, who are the direct beneficiaries, to encourage them to acquire certain assets from certain firms, who are the indirect beneficiaries."[93] The selectivity of the measure could be further established as the measure targeted undertakings in a specific geographical area and of a specific size (more than 250 employees). On the compatibility with Treaty freedoms, the Commission decided that "the scheme thus favours east German and Berlin companies as compared with companies with their registered offices outside Germany, and consequently infringes the ban on discrimination in [the provisions of Treaty on the freedom of establishment]". The Court followed the Commission on both grounds. Concerning the freedom of establishment, the Court focused – contrary to the Commission which did not address this issue – on the absence of objective difference between "undertakings having their registered office on its territory", and "undertakings having their registered office in another Member State" in light of the objectives of the measure. According to the Court, "there can, however, be no such objective difference of situation between a company established in a Member State other than the Federal Republic of Germany and carrying on economic activity in the new *Länder* through a branch, agency or fixed establishment, a company which cannot claim the benefit of the contested measure, and a company having its registered office on German territory, which does profit from the tax concession introduced by that measure.[94] This latter paragraph of the Court's decision refers to two different aspects of the German tax measure. Under a first aspect, the measure favoured only undertakings which were active in a certain geographical area. Under another aspect, the measure was not applicable to undertakings that, however being materially in a comparable situation of those benefiting from the advantage as to the geographical area of activity, did not fulfill a criteria of residence because not being a legally distinct entity of a legal person having its registered office in another Member State. However, since the German legislator had used in order to consider that an undertaking was active in the new *Länder* the criterion of the place of the registered office, the overlap was almost inevitable.[95]

As the Court repeatedly held, the Commission cannot authorize under State aid rules a Member State to apply tax measures which do not fulfill the requirements of equality of treatment imposed by the Treaty freedoms.[96] The recent Commission Regulation of General Block Exemption echoes this constraint, by stating that it shall not apply "to State aid measures, which entail, by themselves, by the conditions attached to them or by their financing method a non-severable violation of Union law, in particular:

(a) aid measures where the grant of aid is subject to the obligation for the beneficiary to have its headquarters in the relevant Member State or to be predominantly established in that Member State; However, the requirement to have an establishment or branch in the aid granting Member State at the moment of payment of the aid is allowed;
(b) aid measures where the grant of aid is subject to the obligation for the beneficiary to use nationally produced goods or national services;
(c) aid measures restricting the possibility for the beneficiaries to exploit the research, development and innovation results in other Member States".[97]

The examples of territorial conditions constituting non-severable[98] violations of Union law given in the Regulation are either strongly restrictive or discriminatory or in contradiction with explicitly recognized Union objectives. In line with the *Laboratoires Fournier* case law, since Member States have agreed to pursue the objective of "achieving a European research area" at the EU level,[99] it seems rather logical that tax incentives or other forms of aid in favour of research and development should not entail territorial restrictions.[100]

On the contrary, the wording seems to imply that the Commission could authorize – and therefore not consider incompatible with the EU freedoms – "softer" territorial restrictions in particular the obligation to perform an economic activity on the territory of the Member States granting the aid. This differentiated approach finds a remarkable application in some decisions adopted by the Commission allowing Member States to impose territorial restrictions for the granting of a preferential tax regime in the area of audiovisual works.[101] *In casu*, the tax advantage was linked to the obligation for the beneficiary to invest a very significant part of the aid within the territory of the Member State granting the advantage. Far from being isolated cases, those decisions are based on a general Commission Communication, stating that "a certain degree of territorialisation of the expenditure may be necessary to ensure the continued presence of the human skills and technical expertise required for cultural creation".[102] On the grounds of the promotion of culture (art. 107 (3)(d) of the TFEU), the Commission accepted "as an eligibility criteria territorialisation in terms of expenditure of up to 80% of the production budget of an aided film or TV work". In a recent Communication of 14 November 2013, the Commission substantially confirmed its approach.[103] Moreover, the Commission deemed necessary to give arguments to justify the territorial spending restrictions. According to the Commission:

> 29. Territorial spending obligations constitute a restriction of the internal market for audiovisual production. Therefore, the Commission commissioned an external study on territorial conditions

> imposed on audiovisual production which was completed in 2008. As stated in the 2009 extension of the Cinema Communication, overall, the study was inconclusive: it could not judge whether or not the positive effects of territorial conditions outweighed the negative effects.
>
> 29. However, the study found that the costs of film production seem to be higher in those countries which apply territorial conditions than in those which do not. The study also found that territorial conditions may cause some obstacles to co-productions and may make them less efficient. Overall, the study found that the more restrictive territorial spending obligations do not lead to sufficient positive effects to justify maintaining the current levels of restrictions. It also did not demonstrate the necessity of these conditions in view of the objectives pursued.
>
> 30. A national measure which hampers the exercise of fundamental freedoms guaranteed by the Treaty may only be acceptable when complying with several conditions: it has to pursue an overriding reason of general interest, it has to be suitable for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it. The specific characteristics of the film industry, in particular the extreme mobility of productions, and the promotion of cultural diversity and national culture and languages, may constitute an overriding requirement of general interest capable of justifying a restriction on the exercise of the fundamental freedoms. Therefore, the Commission continues to acknowledge that, to a certain extent, such conditions may be necessary to maintain a critical mass of infrastructure for film production in the Member State or region granting the aid. (ref. omitted)

The Commission therefore has directly assessed in this case the compatibility of territorial spending obligations in the area of cultural production under the fundamental freedoms, on the basis of the relevant ECJ case law.[104] However, there is an essential difference between the Commission's and the Court's approaches. Unlike the Court, which assess the compatibility of exercise of Member States' competences against individual rights and freedoms (which almost naturally implies a bias in favour of the latter), the Commission weights the respective interests of European and national policies. Such a balance between policies does not contain the same bias and seems to allow more room for the Member States to justify the reasonableness of their policy choices, while safeguarding the effectiveness of the objectives of European integration. Moreover, by switching from a rights-based to a competence-based analysis, the Commission's approach to territorial conditions to tax incentives mitigates the tendency to regard the freedoms of movements in the Treaty as absolute economic rights,[105] looking at the policy objectives and the overall constitutional framework behind them.[106]

As a conclusion, it is interesting to see that the Commission seems to acknowledge the *a priori* violation of the fundamental freedoms only as regards differences in treatment based directly or indirectly on the nationality (i.e. residence) of the beneficiaries. The other potential restrictions, i.e. the measures which tend to restrict cross-border economic transactions by granting them a less favorable treatment than purely domestic transactions, are analysed with more flexibility. For example, in its analysis of the compatibility of territorial restriction to tax schemes in favour of audiovisual works, the Commission often strikes a balance between conflicting interests, according to the proportionality as regards the objective that the proposed tax scheme pursues.

6. Proposing an Analytical Framework To (Try To) Justify Territorial Tax Incentives

At the moment, uncertainties exist about the extent to which the case law of the Court jeopardizes the possibility for Member States to adopt tax incentives with territorial conditions. Currently, there is a risk that a too strict interpretation of the fundamental freedoms as prohibiting any conditions of this type to the granting of tax incentives would seriously damage the effectiveness of their economic and social policies. It has indeed been shown that, in light of recent economic literature tax incentives, if properly designed and implemented, can play a specific role in domestic policies and that, contrary to previous approaches, their use should not be systematically limited.

The author does not however, envisage a complete overturn of the principles governing the division of taxing powers between the European Union and Member States, i.e. that as some have advocated in the past there should be areas – such as taxation – reserved to Member States where fundamental freedoms should not be applied (and the ECJ should not intervene). Tax incentives, as any domestic (tax) measures, should be reviewable under the freedoms. Nevertheless, there seems to be room for enhancing the interpretation framework of the fundamental freedoms, in particular as regards the notion of proportionality. Why indeed endorse an interpretation of the fundamental freedoms that would lead as a result that Member States are excessively hindered in the exercise of their exclusive competences according to the European treaties if there is an alternative interpretation that allows for a more harmonious exercise of the powers between both levels of government?

Although there are many examples in the case law of the ECJ of a balancing of interests between the application of EU fundamental and the exercise of MS retained powers,[107] it is generally presented as a conflict between a (EU) individual right and a (national) rule. As such, it has not (yet) been framed in terms of conflict (or sharing) of competences (or policies). However, as it is explicitly recognized in article 4 of the TEU, the principle of proportionality may also be used – in conjunction with the principle of subsidiarity – to solve a potential conflict of competences, resulting from EU intervention is an area where it has no exclusive competence, as is the case in the Internal market.[108]

Such a proportionality test can be found in the constitutional tradition of some Member States, like Belgium. When having to assess whether a rule adopted by the level of government does not encroach too much into the powers conferred to other levels of government, the Belgian Constitutional Court applies its own definition of the principle of proportionality.[109] According to this principle, a level of government making use of its taxing powers and influencing, by doing so, within an area of responsibility of another level of government must ensure that its tax measures do not encroach too far upon the other government's constitutional responsibilities. According to the Constitutional Court, it is not sufficient in order to prove a breach of the proportionality principle to ascertain that the measure taken by one level of government has an impact on an area within the competence of another level of government. Since in a federal structure, competences inevitably do intersect, it must also be proven that this impact negatively affects the policy determined by this level of government in its own area of competence. In Belgium, this principle applies vertically to the relation between the Federal State and Regions, but also horizontally to the relation between the Regions. This case law of the Belgian Constitutional Court – as well as a renewed approach of the notion of territoriality – could inspire the ECJ to refine its case law on tax incentives. The concept of territoriality, which is also one of the founding principles of federalism, could be of great help in achieving a better balance in the division of competences between Member States. Indeed, the territoriality principle – and the recognition of Member States' individual choice as to the territorial limits of their respective tax policies – could be used in order to determine which States have to grant the tax advantage and which States are entitled to deny it.[110] It is also worth noting that such a concept of proportionality has emerged in a constitutional context where conflicts of attribution between public authorities are not generally solved through the application of a principle of primacy of one level of government on the other. Considering the *sui generis* dimension of European integration, such an approach could fit appropriately into the paradigm of constitutional pluralism[111] or the similar concept in the German scholarship of multi-level constitutionalism,[112] to describe the relationship between the EU and the Member States' legal orders. The originality of the approach would be to accept to test the proportionality of the interpretation given to the fundamental freedoms in the way similar to the proportionality of EU secondary acts.[113]

Moreover, the Court should adopt a slightly different approach for business-related (or income-related) tax incentives and for social (not income-related) tax incentives. This distinction has particular relevance in the EU context for two reasons. On the one hand, business-related tax incentives fall within the scope of State aid provisions, while social tax incentives generally do not. Whilst, on the other, business-related tax incentives are clearly connected with the achievement of the Internal market, an area where Member States have entrusted the European Union with wide powers, while social tax incentives generally concern domains which remain under the exclusive competence of the Member States, such as social policy, education and culture.

On the one hand, concerning business tax incentives, the Court should consider that Member States cannot in principle subject their application to territorial conditions, with one exception. Contrary to its approach in the *Argenta* case, the Court ought to recognize the coherence of the Member States' choice to grant a tax advantage only in respect to activities directly or indirectly connected to the generation of income taxable under the domestic legislation. For this purpose, the exemption under a double taxation convention should not be considered as the exercise of taxing rights but recognition that a particular item of income falls within the taxing competence of another Member State. This is logical and not detrimental to the achievement of the Internal market: the exemption from taxation should be seen as an advantage per se, that should be seen as an alternative to the situation of being subject to tax but being granted the tax advantage. On the other hand, with regard to non-business-related tax incentives (or social tax incentives), the Court should assess the proportionality of the territorial limitation with respect to two considerations. First, the Court should examine whether territoriality is not necessary for the Member States to implement a policy in the area of their exclusive competence which has little impact on the objectives of the European Union. Second, the Court should take into account the negative incidence of an extension of the scope of application of this tax incentive to situations or activities taking place in other Member States.

The author acknowledges that the distinction between economic and social tax incentives is not clear-cut (although this could be clarified if used as synonyms of income-related or not income-related incentives), and lacks an explicit basis in the European Treaties. However, the Court in its case law on fundamental freedoms has always left (relatively) open the list of public interest or public policies justifications (which would broadly intersect with the category of social tax incentives), while being much more restrictive in accepting purely (domestic) economic reasons.[114] In the author's view, this scheme of analysis does not necessarily have to be explicitly implemented; it could simply be used by the Court as a background in the assessment of the proportionality of the restrictive character of the domestic measure at stake. As it was shown in the area of State aid, as regards the European Commission's acceptance of territorial spending obligations concerning (tax) incentives to audiovisual works, such a proportionality test would not be completely new in the European landscape.

Moreover, in recent Opinions in two different cases, Advocate General Kokott seems to adopt an angle of approach that is not dissimilar to the one proposed by the author. By referring to "the intensity of the prejudice to the Internal market" in order to justify on the basis of the conservation of national natural heritage and cultural heritage, the application of favourable tax regimes limited to estates situated in the Netherlands, the Advocate General implicitly acknowledges that some territorial restrictions are more harmful than others to the functioning of the Internal market, and that a graduated approach is necessary.[115]

In conclusion, the proposed approach would not put at risk the achievement of the Internal market and of fundamental freedoms, but, by introducing the concepts of conferral, subsidiarity and proportionality in the interpretation of the fundamental freedoms, would ensure Member States proper room for manoeuvre in designing tax incentives in the framework of the policies in their area of (exclusive) competence. Of course, this is a second-best option compared to a European Union with common economic, social and tax policies (including tax incentives), as well as pan-European solidarity mechanisms, funded through an adequate EU budget. But such a situation appears at the moment so remote from the institutional and legal European reality: suggesting the Court to adopt those interpretative tools, far from jeopardizing this apparently illusory objective, could be a further step in the direction of a more harmonious system, which coherently reflects the diversity of the EU constitutional pluralism within an integrated market.

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2. OECD Ctr. for Tax Policy and Admin., *Addressing Base Erosion and Profit Shifting and Action Plan on Base Erosion and Profit Shifting*, (OECD 2013), International Organizations' Documentation IBFD. For an overview, *see* Y. Brauner, *BEPS: An Interim Evaluation*, 6 World Tax J. 1, pp. 10-39 (2014) Journals IBFD.

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7. *See* OECD Ctr. for Tax Policy and Admin., *Tax Expenditures in OECD Countries*, (OECD 2010), International Organizations' Documentation IBFD. The situation of ten countries is analysed: Canada, France, Germany, Japan, the Netherlands, South Korea, Spain, Sweden, the United Kingdom and the United States; *see also* OECD, *Choosing a Broad-Base – Low Rate Approach to Taxation*, Tax Policy Studies, vol. 19, p. 39.

8. The Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States requires Member States "to publish detailed information on the impact of tax expenditures on revenues"; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, *Official Journal*, L 306, 23 November 2011, pp. 41-47 (article 14).

9. *See supra* n. 6, S.S. Surrey's works references. *See also* for a critical analysis in the framework of the US Federal income tax reform: Boris I. Bittker, *Accounting for Federal 'Tax Subsidies' in the National Budget*, 22 National Tax Journal, pp. 244-45 (1969); W.D. Andrews, *Personal Deductions in an Ideal Income Tax*, Harvard Law Review, 1972, vol. 86, no. 2, pp. 309-385; M.G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an 'Ideal' Income Tax and Why They Fit Worse in a Far from Ideal World*, Stanford Law Review, 1979, vol. 31, no. 831, pp. 835-858; and S.S. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, Harvard Law Review, 1970, vol. 84, p. 352.

10. *See* European Commission, Notice on the application of the State aid rules to measures relating to direct business taxation OJ C 384 , 10/12/1998 pp. 3-9, §26. On (the impossible definition of) tax selectivity in the area of State aid, *see* Cases T-211/04 and T-215/04. *Commission and Spain v. Government of Gibraltar and the United Kingdom*, 2008 II-03745; Joined Cases C-106 & 107/09 P, *Commission and Spain v. Government of Gibraltar and the United Kingdom*, 2011 I-11113 and the comment of P. Rossi-Maccanico, *Beyond the Pillars of Hercules of Selectivity*, EstAl, 2012, p. 443 ; A. Biondi, *State aid is falling down, falling down, falling down: an analysis of the notion of aid*, Common Market Law Review, 2013, pp. 1719-1744; M. Lang, *State Aid and Taxation: Recent Trends in the Case Law of the ECJ*; EStAl 2012, 411 (412); and W. Schön, *Taxation and State Aid Law in the European Union*, CMLR 1999, p. 29 et seq.

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31. On Portugal, *see* European Commission, Commission staff working paper: Assessment of the 2011 national reform programme and stability programme for Portugal, SEC/2011/0730, p. 3, stating that “On the revenue side, some of the measures include the broadening [of] the corporate and personal income tax bases by reducing tax deductions and special regimes, the convergence of personal income tax deductions applied to pensions and labour income, changes in property taxation, broadening of VAT bases by reducing exemptions and rearranging the goods subject to intermediate and reduced”. *See also* Memorandum of Understanding of 17 May 2011 on Specific Economic Policy Conditionality, between Portugal and the EC, ECB and IMF, p. 4. On Greece, *see* European Commission, The Second Economic Adjustment Programme for Greece First Review – December 2012, European Economy – Occasional Papers n. 123, p. 36 et seq.

32. Proposal for a Council Directive of 16 March 2011 on a Common Consolidated Corporate Tax Base (CCCTB), 16 March 2011, COM (2011) 121/4.

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34. Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

35. EU VAT Directive, art. 132 et seq. On the issue whether VAT exemptions without the right to deduct input VAT are preferential regimes, R.F. Van Brederode, Systems of General Sales Taxation : Theory, Policy, and Practice, Kluwer, 2009, pp. 127 et seq.

36. *See* O. Ruding, *Report of the Committee of Independent Experts on company taxation*, Luxembourg: Office for Official Publications of the European Communities, 1992; M. Devereux, *The Ruding Committee Report: An Economic Assessment*, Fiscal Studies, 1992, 13, pp. 96-107; J.E. Brinkmann & A. O. Riecker. *European Company Taxation: The Ruding Committee Report Gives Harmonization Efforts a New Impetus*, The International Lawyer, 1993, pp. 1061-1073.

37. From this perspective, several Member States have therefore introduced incentives to investment and entrepreneurial activity, *See* European Commission, *Tax reforms in EU Member States 2013 – Tax policy challenges for economic growth and fiscal sustainability*, Taxation papers, n. 38, 2013, p. 24.

38. OECD Ctr. for Tax Policy and Admin., *Tax Expenditures in OECD Countries*, (OECD 2010), International Organizations' Documentation IBFD.

39. A. Easson, *Tax Incentives for Foreign Direct Investment – Part II: Design Considerations*, 55 Bull. Intl. Fiscal Docn. 8, p. 365 (2001), Journals IBFD.

40. *See* for a review J. Malherbe, P. Malherbe, I. Richelle & E. Traversa, *The Impact of the rulings of the European Court of Justice in the area of direct taxation 2010*, Report requested by the European Parliament’s Committee on Economic and Monetary Affairs, 2011, available at http://www.europarl.europa.eu/document/activities/cont/201203/20120313ATT40640/20120313ATT40640EN.pdf; B.J.M. Terra & P.J. Wattel, *European Tax Law*, 6th ed., Alphen aan het Rijn: Kluwer Law International, 2012.

41. *See* J. Malherbe et al., *supra* n. 40.

42. E2: ECJ, 8 July 1999, Case C-254/97, *Société Baxter, B. Braun Médical SA, Société Fresenius France and Laboratoires Bristol-Myers-Squibb SA v. Premier Ministre, Ministère du Travail et des Affaires sociales, Ministère de l’Economie et des Finances and Ministère de l’Agriculture, de la Pêche et de l’Alimentation*, ECJ Case Law IBFD.

43. FR: ECJ, 10 Mar. 2005, Case C-39/04, *Laboratoires Fournier SA v. Direction des vérifications nationales et internationales*, ECJ Case Law IBFD.

44. ES: ECJ, 13 Mar. 2008, Case C-248/06, *Commission of the European Communities v. Kingdom of Spain*, ECJ Case Law IBFD.

45. AT: ECJ, 4 Dec. 2008, Case C-330/07, *Jobra Vermögensverwaltungs-Gesellschaft mbH v. Finanzamt Amstetten Melk Scheibbs*, ECJ Case Law IBFD.

46. LU: ECJ, 22 Dec. 2010, Case C-287/10, *Tankreederei I SA v. Directeur de l'administration des contributions directes*, ECJ Case Law IBFD.

47. BE: ECJ, 4 July 2013, Case C-350/11, *Argenta Spaarbank NV v. Belgische Staat*, ECJ Case Law IBFD.

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49. BE: ECJ, 28 Jan. 1992, Case C-204/90, *Hanns-Martin Bachmann v. Belgian State*, ECJ Case Law IBFD; E2: ECJ, 28 Jan. 1992, Case C-300/90, *Commission of the European Communities v. Kingdom of Belgium*, ECJ Case Law IBFD; SE: ECJ, 28 Apr. 1998, Case C-118/96, *Jessica Safir v. Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län*, ECJ Case Law IBFD; SE: ECJ, 26 June 2003, Case C-422/01, *Försäkringsaktiebolaget Skandia (publ) and Ola Ramstedt v. Riksskatteverket*, ECJ Case Law IBFD; FI: ECJ, 3 Oct. 2002, Case C-136/00, *Rolf Dieter Danner*, ECJ Case Law IBFD; BE: ECJ, 5 July 2007, Case C-522/04, *Commission of the European Communities v. Kingdom of Belgium*, ECJ Case Law IBFD; PL: ECJ, 19 Nov. 2009, Case C-314/08, *Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu*, ECJ Case Law IBFD; DK: ECJ, 30 Jan. 2007, Case C-150/04, *Commission of the European Communities v. Denmark*, ECJ Case Law IBFD; and NL: ECJ, 11 Aug. 1995, Case C-80/94, *G.H.E.J. Wielockx v. Inspecteur der Directe Belastingen*, ECJ Case Law IBFD.

50. DE: ECJ, 11 Sep. 2007, Case C-76/05, *Herbert Schwarz und Marga Gootjes-Schwarz v. Finanzamt Bergisch Gladbach*, ECJ Case Law IBFD.

51. DE: ECJ, 11 Sep. 2007, Case C-318/05, *Commission of the European Communities v. Federal Republic of Germany*, ECJ Case Law IBFD.

52. IT: ECJ, 20 May 2010, Case C-56/09, *Emiliano Zanotti v. Agenzia delle Entrate – Ufficio Roma 2*, ECJ Case Law IBFD.

53. AT: ECJ, 16 June 2011, Case C-10/10, *European Commission v. Republic of Austria*, ECJ Case Law IBFD.

54. BE: ECJ, 10 Feb. 2011, Case C-25/10, *Missionswerk Werner Heukelbach eV v. État Belge*, ECJ Case Law IBFD.

55. DE: ECJ, 27 Jan. 2009, Case C-318/07, *Hein Persche v. Finanzamt Lüdenscheid*, ECJ Case Law IBFD. *See also* on charities, DE: ECJ, 14 Sep. 2006, Case C-386/04, *Centro de Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, ECJ Case Law IBFD.

56. SE: ECJ, 18 Jan. 2007, Case C-104/06, *Commission of the European Communities v. Kingdom of Sweden*, para. 26 et seq., ECJ Case Law IBFD; PT: ECJ, 26 Oct. 2006, Case C-345/05, *Commission of the European Communities v. Portuguese Republic*, para. 29 et seq., ECJ Case Law IBFD; and PT: ECJ, 11 Oct. 2007, Case C-443/06, *Erika Waltraud Ilse Hollmann v. Fazenda Pública*, para. 55 et seq., ECJ Case Law IBFD.

57. BE: ECJ, 1 Dec. 2011, Case C-250/08, *European Commission v. Kingdom of Belgium*, ECJ Case Law IBFD; and HU: ECJ, 1 Dec. 2011, Case C-253/09, *European Commission v. Republic of Hungary*, ECJ Case Law IBFD. Concerning the case *Commission v. Belgium*, we could argue whether the portability of registration fees, denied if the sold real estate is situated in another Member State, should be considered as a tax incentive, insofar as its goal seems more to compensate a negative tax consequence of a certain type of behaviour (change of residence) than to encourage a more general type of behaviour (in this case the acquisition of a new real property). In this sense, the ECJ speaks more about a "tax advantage" than a "tax incentive", the "advantage" being also a "compensation" aimed at avoiding multiple taxation.

58. *Zanotti* (Case C-56/09), *supra* n. 52.

59. Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64, 11.3.2011, pp. 1-12.

60. *Persche* (C-318/07), *supra* n. 55. *See also Baxter* (Case C-254/97), *supra* n. 42., para. 16; *Laboratoires Fournier* (Case C-39/04), *supra* n. 43; and *Commission v. Spain* (Case C-248/06), *supra* n. 44.

61. *Tankreederei I* (Case C-287/10), *supra* n. 46*,* para. 30 et seq.; ECJ, *Missionswerk Werner Heukelbach v. Belgian State* (Case C-25/10), *supra* n. 54, para. 30; and *Centro di Musicologia Walter Stauffer* (C-386/04), *supra* n. 45, para. 37.

62. ECJ, 1 October 2009, Case C-103/08 *Gottwald*, ECR I-9117 The Court has recognized in other cases that it may be legitimate to ensure that there is a certain link between the recipient of the social benefit or advantage and the Member State concerned. *See*, for instance, ECJ, Case C-499/06 *Nerkowska* [2008] ECR I-3993, paragraph 37; Case C-287/05 *Hendrix* [2007] ECR I-6909, para. 35; Case C-192/05 *Tas-Hagen an Tas* [2006] ECR I-10451, para 34 and 35; Case C-138/02, *Collins* [2004] ECR I-2703, para. 67 and Case C-209/03 *Bidar* [2005], ECR I-2119 para. 54.

63. Comment by L. Waddington to ECJ, 1 October 2009, Case C-103/08, *Gottwald*, Maastricht Journal of European and Comparative Law, vol. 17, issue 1, 2010, p. 97.

64. *Tankreederei I* (Case C-287/10), *supra* n. 46, paras. 31 and 32.

65. *Missionswerk Werner Heukelbach v. Belgian State*, *supra* n. 54, para. 30. *See also Persche*, *supra* n. 45, para. 34.

66. *Argenta Spaarbank NV* (Case C-350/11), *supra* n. 47.

67. R.A. de Mooij & M.P. Devereux, *Alternative Systems of Business Tax in Europe: An Applied Analysis of ACE and CBIT Reforms*, Taxud Taxation Papers, 2009, 17 available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_papers/taxation_paper_17_en.pdf; and M.P. Devereux & P.B. Sorensen, *The Corporate Income Tax: international trends and options for fundamental reform*, European Commission Economic Papers, 2006, 264, available at http://ec.europa.eu/economy_finance/publications/publication530_en.pdf.

68. *Bachmann* Case C-204/90, *supra* n. 49, para. 35; and *Commission v. Belgium* (Case C-300/90), *supra*. n. 49, para. 21.

69. *Commission v. Belgium* (Case C-250/08), supra n. 57; and *Commission v. Hungary* (Case C-253/09), *supra* n. 57.

70. L. De Broe, *The ECJ's Judgment in Argenta: Narrow Interpretation of 'The Preservation of the Balanced Allocation of Taxing Rights between Member States*. *A Headache for Designers of Tax Incentives in the Union*, EC Tax Review, 2013, 5, pp. 210 and 212. *See also*, in another context, Malherbe et al., *supra*, n. 40, p. 83 ; J. English, *Tax Coordination between Member States in the EU – Role of the ECJ*, in M. Lang, P. Pistone, J. Schuch & C. Staringer (eds.), *Horizontal Tax Coordination*, Amsterdam: (IBFD 2012), p. 19. (Online Books IBFD); and Douma, *supra* n. 3, p. 255.

71. M.J. Graetz & A.C. Warren, *Income Tax Discrimination and the Political and Economic Integration of Europe*, Yale Law Journal (2006), pp. 1188 and 1215.

72. The Troika comprises the International Monetary Fund, the European Union and the European Central Bank. *See*, for example, Statement of 19 March 2014 by the European Commission, European Central Bank and International Monetary Fund on the review mission to Greece, available at http://www.ecb.europa.eu.

73. *Schwarz and Gootjes* (Case C-76/05), *supra* n. 50, para. 50, *see also* para. 67.

74. Ibid., para. 71.

75. According to Joachim Englisch, "the dividing line [between direct subsidies and incentives granted to private sector agents] is rather artificial from the perspective of an economic analysis, though, at least in so far as direct subsidies have similar effects of attracting private investments or activities to national rather than foreign sectors of the economy. Arguably, the Court's case law therefore is in need of refinement" (English, supra n. 70, p. 19. *See also* E. Traversa & B. Vintras, *The Territoriality of Tax Incentives within the Single Market*, in I. Richelle, W. Schön & E. Traversa (eds.), *Allocating Taxing Powers within the European Union*, Berlin: Springer, 2013: "Indeed, beyond the discrimination against the donors, it is important to note that these are actually indirect beneficiaries. The real beneficiaries of the measure in *Missionwerk Heukelbach*, as it was the case in *Persche* and *Schwarz*, are foreign institutions on which the Member State granting the benefit has no control", p. 179.

76. On the simultaneous application of State aid and fundamental freedoms, *see* R. Szudoczky, *The Sources of EU Law and their Relationships: Lessons for the Field of Taxation*, PhD thesis, University of Amsterdam, 2013, p. 665 et seq.; F. Engelen, *State Aid and Restrictions on Free Movement: Two Sides of the Same Coin?*, 52 Eur. Taxn. 5 (2012), Journals IBFD.; C. Micheau, *Fundamental Freedoms and State Aid Rules under EU Law: The Example of Taxation*, 52 Eur. Taxn. 5 (2012), Journals IBFD.

77. *See* the cases *Schwarz*, *supra* n. 50 and *Zanotti*, *supra* n. 52.

78. PL: ECJ, 23 Apr. 2009, Case C-544/07, *Uwe Rüffler v. Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu*, ECJ Case Law IBFD; and *Filipiak* (Case C-314/08), *supra* n. 49.

79. *See Filipiak*, *supra* n. 49; and ES: ECJ, 6 Oct. 2009, Case C-153/08, *Commission of the European Communities v. Kingdom of Spain*, ECJ Case Law IBFD.

80. *See* BE: ECJ, 25 Oct. 2007, Case C-464/05, *Maria Geurts and Dennis Vogten v. The Belgian State*, ECJ Case Law IBFD

81. *See Commission v. Republic of Austria* (Case C-10/10), *supra* n. 53.

82. *See* DE: ECJ, 10 Sep. 2009, Case C-269/07, *Commission of the European Communities v. Federal Republic of Germany*, ECJ Case Law IBFD; and *Commission v. Belgium*, *supra* n. 57.

83. K. Vogel, *The Justification for Taxation: A Forgotten Question*, Am. J. Juris, 1988, vol. 33, p. 19.

84. For a historical description of the emergence of ability-to-pay and benefit theories, *see* R.A. Musgrave, *A Brief History of Fiscal Doctrine*, Handbook of Public Economics, vol. 1, Elsevier 1985, pp. 16-21. For a contemporary critique of the benefit principle, *see* L. Murphy & T. Nagel, *The Myth of Ownership*, OUP, 2002, p. 16 et seq. Some authors, however, do not oppose the ability-to-pay and the benefit principle, and consider that they are complimentary: *see* K. Tipke & J. Lang, *Steuerrecht*, Otto Schmidt Verlag, 2012, p. 73

85. *See* L. von Stein, *Lehrbuch der Finanzwissenschaft*, 5th ed. Erster Theil and Zweiter Theil, Erste Abtheilung (1885).

86. J.M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles*, 58 Tax L. Rev. 399 (2005), p. 444. *See* L. Murphy & T. Nagel, *The Myth of Ownership*, Taxes and Justice 17, 19 (2002). On partnership theories, *see* A. Warren, *Would a Consumption Tax Be Fairer than an Income Tax?*, 89 Yale L. J., 1980, pp.1090-1093.

87. K. Vogel, *The Justification for Taxation: A Forgotten Question*, Am. J. Juris., 1988, vol. 33, no. 1, p. 33.

88. ECJ, Case C-280/00, July 24, 2003, *Altmark*, para. 75.

89. On State aid control in tax matters in general, *see* A. Rust & C. Micheau (eds.), *State aid and Tax Law*, Kluwer, 2013; C. Micheau, Droit des aides d'État et des subventions en fiscalité, 2013; C. Panayi, State aid and tax: the third way?, Intertax , 6-7/2004, p. 283; V. Di Bucci, *Direct taxation – State aid in form of fiscal measures* in V. Sanchez Rydelski (ed), *The EC State Aid Regime Distortive Effects of State Aid on Trade Competition and Trade*, Kluwer, 2006, pp. 73-90; D. Waelbroeck, *La compatibilité des systèmes fiscaux généraux avec les règles en matière d'aides d'État dans le Traité CE*, Mélanges John Kirkpatrick, Bruylant, 2004, p. 1023; R. Luja, *Assessment and Recovery of Tax Incentives in the EC and the WTO: A View on State Aids, Trade Subsidies and Direct Taxation*, Kluwer, 2003; and W. Schön, *Taxation and State aid in the European Union*, CMLR., 1999, pp. 927-928.

90. PT: ECJ, 6 Sept. 2006, Case C-88/03, *Portuguese Republic v. Commission of the European Communities*, ECJ Case Law IBFD. "Azores Case", para. 54; E2: ECJ, 8 Nov. 2001, Case C-143/99, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v. Finanzlandesdirektion für Kärnten*, ECJ Case Law IBFD, para. 41; UK: ECJ, 29 Apr. 2004, Case C-308/01, *Gil Insurance Ltd and Others v. Commissioners of Customs & Excise*, ECJ Case Law IBFD., para. 68; and AT: ECJ, 3 Mar. 2005, Case C-172/03, *Dr. Wolfgang Heiser v. Finanzlandesdirektion für Tirol*, ECJ Case Law IBFD., para. 40.

91. On territorial selectivity in the area of taxation, *see* EFTA Court, Case E-6/98, May 20, 1999, *Norway v. EFTA Surveillance Authority*, available on *www.eftacourt*, which deals with Regional differentiation in the rates applicable to employees and employers payment for social security contributions in Norway. On the definition of the reference framework in the case of regions enjoying tax autonomy, *see* ECJ, Case C-88/03, September 6, 2006, *Portugal v. Commission* "Azores Case"; ECJ, Joined Cases C-428/06 to C-434/06, 11 September 2008, *Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v. Juntas Generales del Territorio Histórico de Vizcaya and Others* and ECJ, Joined Cases C-106/09 and 107/09, November 15, 2011, *Commission and Kingdom of Spain v. United Kingdom and Government of Gibraltar*.

92. ECJ, Case C-173/73, 2 July 1974, *Commission v. Italy*, para.17.

93. Decision 98/476/EC of the Commission of 21 January 1998 on tax concessions under § 52(8) of the German Income Tax Act [notified under document number C(1998) 231] (Only the German text is authentic), OJ L 212, 30.07.1998, pp. 50-57.

94. ECJ, Case C-156/98, September 19, 2000, *Federal Republic of Germany v. Commission of European Communities*, para. 86. *See also* C-333/07 *Régie Networks v. Rhone Alpes Bourgogne*, paras. 94-116.

95. This is a typical example of non-severable violation of EU law (on severabilty, *see infra*, n. 98). *See also* ECJ, Case C-169/08, 17 November 2009, *Presidente del consiglio dei Ministri v. Regione Sardegna*. For further developments, *see* Traversa & Vintras *supra*, n. 75; and Szudoczky, *supra* n. 76, p. 681 et seq.

96. *See* the case law quoted above as well as ECJ, Case C-18/84, 7 May 1985, *Commission v. France*, para. 13.

97. Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the Internal market in application of articles 107 and 108 of the Treaty, OJ L 187, 26 June 2014, pp. 1-78, art. 1 (5). *See also* Commission Communication, Criteria for the analysis of the compatibility with the Internal market of State aid to promote the execution of important projects of common European interest, C(2014) 3290, p. 11.

98. Severability refers in this context to, according to the Court, "those aspects of aid which contravene specific provisions of the Treaty, other than Articles [107 and 108] thereof, may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately". On severability, *see* 74/76, *Ianelli v. Meroni*, [1977] ECR 557, para.14; C-73/79, *Commission v. Italy* [1980] ECR 1533, para. 11, and C-225/91, *Matra v. Commission* [1993] ECR I-3203, para. 41.

99. *See* arts. 4(3) TFEU (shared competence) and 179 TFEU.

100. *See Laboratoires Fournier* (Case C-39/04), *supra* n. 43, para. 23. On this topic, *see also* Traversa & Vintras, *supra.* n. 75, pp. 192-193.

101. *See*, for example, Decision C (2009) 5512 of the Commission of 22 July 2009 concerning Italy: "80 pc of the aid must be spent in Italy"; Decision C (2009) 10668 of the Commission of 22 December 2009 concerning the Belgian Tax shelter: "150pc of the sums invested benefiting from the tax incentive has to be spent in Belgium as production costs". A similar regime also exists since 1998 in Luxembourg (Audiovisual Investment Certificate Programme – *see* Law of 21 December 1998, *Memorial*, A-111, 24 December 1998, article 2). More recently, the Commission approved the Spanish regime under EU State aid rules Member States' support schemes in favour of films and other audio-visual works (Press release, 19 May 2014, IP-13-1074). For an analysis, *see* Traversa & Vintras, *supra* n. 75; and E. Traversa, *Criticism of the Concept of 'Regional Aid' and Relationship between State Aid Provisions and Fundamental Freedoms*, in A. Rust (ed.), *State Aid and Tax Law*, Alphen aan het Rijn: Kluwer Law International, 2013.

102. Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works, O.J.C 043, 16/02/2002, COM (2001) 0534.

103. European Commission, Communication of 14 November 2013 on State aid for films and audiovisual

works, COM (2013) 7422. *See also* Commission Regulation (EU) No. 651/2014 (GBER), p. 91.

104. In particular the UTECA case (ECJ, 5 March 2009, UTECA, Case C-222/07), which however did not concern territorial restrictions to tax incentives, but a financial measure "requiring television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for the production of works of which the original language is one of the official languages of that Member State".

105. Under this approach, EU freedoms are the expression of mostly economic values which are embodied in the EU Treaties, in essence superior to the rules implementing Member States' domestic policies and their underlying political values. *See* Poiares Maduro, *supra* n. 26, pp. 129-130.

106. For similar approach, *see* J. Snell, *Who's Got the Power? Free Movement and Allocation of Competences in EC Law*, (2003) 22 YEL 323.

107. *See*, for example, on the long developments in the *Walter Stauffer* and *Persche* cases concerning the balance between the right of the Member State to define the charitable goals to be pursued by organizations in order to benefit from favourable tax regimes and the requirement of the Internal market. DE: ECJ, 14 Sept. 2006, Case C-386/04, *Centro de Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, ECJ Case Law IBFD; DE: ECJ, 27 Jan. 2009, Case C-318/07, *Hein Persche v. Finanzamt Lüdenscheid*, ECJ Case Law IBFD., For a discussion of the arguments brought before the Court, *see* S. Heidenbauer, *Charity crossing borders: the Fundamental Freedoms' Influence on Charity and Donor Taxation in Europe*, Alphen aan den Rijn: Wolters Kluwer 2011, p. 191 et seq.; I. Koele, *How Will International Philanthropy Be Freed from Landlocked Tax Barriers?*, 50 Eur. Taxn. 9, p. 415 et seq. (2010), Journals IBFD; and S. Hemels, *Are we in need of a European charity?*, Intertax, 2009, vol. 37, issue 8/9, p. 428.

108. C. Barnard, *The Substantive Law of the EU, The Four Freedoms*, 4th ed., OUP, 2013, p. 649.

109. For a description, *see* E. Traversa & B. Vintras, *Tax Coordination in Belgium – The Role of the Courts* in M. Lang, P. Pistone, J. Schuch & C. Staringer (eds.), *Horizontal Tax Coordination*, pp. 95-120 (IBFD 2012), Online Books IBFD.

110. On territoriality and EU fundamental freedoms, *see* Traversa & Pirlot, *supra*, n. 3.

111. D. Sarmiento, *The Silent Lamb and the Deaf Wolves*, in M. Avbelj and J. Komárek (ed.), *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing 2012), pp. 285-319, at 285; M. Poiares Maduro, *Three Claims of Constitutional Pluralism* in M. Avbelj & J. Komarek (eds.) *Constitutional pluralism in the European Union and beyond*, pp. 67-84; and J Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement* (2008), European Law Journal, pp. 389-422, at p. 412 et seq.

112. I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited* (1999) 36 Common Market Law Review 703-750; I. Pernice, *Multilevel Constitutionalism in the European Union* (2002) European Law Review 511-529; and I. Pernice, *The Treaty of Lisbon – Multilevel Constitutionalism at Work* (2009) 15 Columbia Journal of European Law, pp. 349-407.

113. *See* ECJ, 2002, C-491/01, Ex p. BAT; and Barnard, *supra* n. 108, p. 651.

114. For an overview *see* C. Barnard, *Derogations, Justifications, and the Four Freedoms: Is State Interest Really Protected?*, in: C. Barnard & O. Odusu, *The Outer Limits of EU Law*, Hart, 2009, pp. 273-305; and N. Reich, *How Proportionate is the Proportionality Principle?: Some Critical Remarks on the Use and Methodology of the Proportionality Principle in the Internal Market Case Law of the ECJ*, in H.-W. Micklitz & B. De Witte (eds.) *The European Court of Justice and the Autonomy of the Member States*, Intersentia, 2012, pp. 83-111.

115. Opinions of Advocate General Kokott, of 4 September 2014, Case C-87/13, *X*, (EU:C:2014:2164) and of 2 October 2014, Case C-133/13, *Q* (ECLI:EU:C:2014:2255).
