The London School of Economics and Political Science

The Notion of Selective Advantage in EU State Aid Law – An Equality of Opportunity Approach

Morris Schonberg

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Declaration

I certify that the thesis I have presented for examination for the MPhil / PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

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Abstract

EU State aid control has developed in recent decades to become one of the most pre-eminent areas of EU competition law and policy and it now plays a fundamental role in the economic and regulatory landscape. Its growing profile has not, however, been matched by correspondingly high standards of clarity in relation to the definition of "State aid", and in particular, the requirement that a State measure must "*favour certain undertakings or the production of certain goods*" to be classified as State aid, i.e. the criterion of "selective advantage". The application of this criterion has been described as "*a difficult exercise with an uncertain outcome*" and is plagued by apparent analytical confusion with respect to fundamental issues, including the respective roles of objectives and effects in the assessment, and the development of seemingly very disparate classification methodologies by the EU Courts that depend on the type and form of the measure at issue.

This thesis aims to improve upon the position. Rather than accepting distinctions based on pragmatism, the thesis seeks to develop a more conceptual and ultimately principled account of the case-law of the EU Courts in relation to selective advantage, based on the principle of "equality of opportunity". This approach is grounded in the imperative of safeguarding fair competition, both in terms of *micro*-economic and *macro*-economic rivalry, and therefore ultimately, equality of opportunity between undertakings and sectors. The thesis then explores how the methodologies employed by the EU Courts represent proxies and heuristics designed to give effect to these principles. The results should lead to greater understanding of the jurisprudence and the ability to better anticipate how the EU Courts will approach the assessment going forward, leading to greater predictability in relation to the notion of selective advantage that befits the growing significance of EU State aid control.

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Contents

Chapter 1
Introduction

I. The rise of EU State aid law and its progeny

European Union State aid control has been a feature of the EU legal framework since the establishment of the European Economic Community, as it then was, through the 1957 Treaty of Rome.[1] It is one of the two main long-standing systems of international subsidy regulation, the other being that under the auspices of the World Trade Organisation ("WTO"), previously the General Agreement on Tariffs and Trade ("GATT").[2] EU State aid control is, however, very different from the WTO subsidy disciplines in that it requires State aid to be "approved" by a supranational authority, the European Commission, as being "compatible with the internal market" before it can be granted. EU State aid control therefore comprises two stages: (i) definition as "State aid"; and (ii) compatibility assessment of that State aid by the Commission.

Although long characterised as the "ugly duckling" of the EU competition law family[3] in light of its relatively low profile and seemingly arcane nature, EU State aid control has resurfaced in recent decades to become one of the most pre-eminent areas of EU competition law and policy. EU State aid law has very clearly risen to prominence during periods of crisis, including in particular, the financial crisis in 2008, the recent Covid-19 pandemic and the economic fallout from Russia's invasion of Ukraine, which heralded then-unprecedented degrees of EU Governmental intervention to support the economy.[4] But more fundamentally, EU State aid control

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1 The original Treaty basis for EU State aid control was contained in Articles 92-94 of the Rome Treaty establishing the European Economic Community ("EEC"). The current Treaty basis is now contained in Articles 107-109 of the Treaty on the Functioning of the European Union ("TFEU").

2 The main elements of WTO subsidy control are the 1994 WTO Agreement on Subsidies and Countervailing Measures ("WTO SCM Agreement") and Articles VI and XVI of the GATT. For an overview, see M Matsushita, TJ Schoenbaum and PC Mavroidis, *The World Trade Organization – Law, Practice and Policy* (Oxford: OUP, 2017), chapter 10.

3 See L Rubini, *The Definition of Subsidy and State Aid – WTO and EC Law in Comparative Perspective* (Oxford: OUP, 2009), at 59; and C Ahlborn and C Berg, 'Can State Aid Control Learn from Antitrust? The Need for a Greater Role for Competition Analysis under the State Aid Rules' in A Biondi, P Eeckhout and J Flynn (eds), *The Law of State Aid in the European Union* (Oxford: OUP, 2004) 41-67, at 41.

4 For overviews of the Commission's State aid policy and practice during the financial crisis and the Covid-19 pandemic, see L Hancher, T Ottervanger and PJ Slot (eds), *EU*

has come to occupy a significant role in the economic and regulatory landscape during the typical, "business as usual" economic cycle, as State intervention as a means to achieve important public policy objectives has increasingly become the norm rather than the exception. This is reflected, *inter alia*, by the burgeoning body of Commission State aid decisions in the areas of energy and environmental protection,[5] as EU Member States have been increasingly resorting to State aid in order to manage the green transition while ensuring security of supply, as well as in the broadband and regional aid areas,[6] as ensuring adequate connectivity across all regions and levelling-up has become an important part of EU Member States' agendas.

In addition, the Commission has itself become increasingly assertive in using the EU State aid rules as a tool to advance broader policy interests in areas where the EU State aid rules were not traditionally applied. A case in point is the Commission's far-reaching enforcement activity in relation to multinationals' tax-planning arrangements, culminating in multi-million euro recovery orders and indeed, one multi-bullion euro recovery order, against the likes of Fiat, Starbucks, Apple, Amazon and ENGIE.[7] Another significant example is the Commission's State aid enforcement activity in relation to the public financing of electricity generation adequacy measures, which was developed through the first-ever State aid sector inquiry launched by the Commission,[8] and has culminated in over 20 decisions,[9]

State Aids (London: Sweet and Maxwell, 2021), chapters 15 and 28. The Commission's State aid practice in response to the economic impact of Russia's invasion of Ukraine remains under development.

5 Since 2014, the Commission has taken over 200 State aid decisions relating to energy and environmental protection matters under its energy and environmental protection guidelines according to its decisions database.

6 Since 2013, the Commission has taken over 100 State aid decisions under its broadband and regional aid guidelines according to its decisions database.

7 The highest recovery order to date was in the Apple case, which amounted to up to around €13 billion, plus interest, although this was later overturned by the EU Courts. This area of EU State aid enforcement is addressed further in Chapter 3.

8 Report from the Commission, Final Report of the Sector Inquiry on Capacity Mechanisms, 30.11.2016, COM(2016) 752 final.

9 A full list can be found on the Commission's website, available at https://ec.europa.eu/competition-policy/sectors/energy-and-environment/state-aid-secure-electricity-supplies-sector-inquiry_en (last accessed on 1 December 2022). In this area, the Commission has rejected the position that the public financing of such mechanisms can be considered as compensation for services of general economic interest and therefore outside of the scope of EU State aid control, notwithstanding that this would seem an intuitive way to characterise such financing – see Commission Decision (EU) 2018/860 of 7 February 2018 on the Aid Scheme SA.45852 – 2017/C (ex 2017/N) which Germany is planning to implement for Capacity Reserve, OJ L 153/143 15.6.2018, recitals 87-100.

promoting the use of renewables and interconnection capacity and therefore EU market integration.

At the same time, private parties have also increasingly sought to make creative use of State aid law in order to challenge Member State measures that are contrary to their interests, either by way of complaint to the European Commission or in litigation before national courts, the latter leading to an increasingly significant volume of preliminary references to the EU Court of Justice under Article 267 TFEU. This more opportunistic use of State aid law, in conjunction with the policy-driven enforcement of the Commission, has consequently led to the expansion of the scope of application of the EU State aid rules to encompass a broad variety of measures that touch upon diverse subject-matters of State activity, including tax rulings and energy capacity markets (as mentioned above), special-purpose levies,[10] renewables schemes,[11] the grant of access to State infrastructure[12] and even preferential tax treatment granted in relation to the realm of the ecclesiastical.[13]

The increasing significance of the EU State aid rules within EU competition law and policy has further served as the catalyst for the development of additional subsidy control disciplines in relation to subsidies granted by non-EU Member States. This effective "externalisation" of the EU State aid rules, includes the detailed subsidy control requirements that the EU has insisted upon in a number of its trade agreements with third countries. Notable examples, include the provisions in the EU's association agreements such as the EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area[14] and the EU-Serbia Stabilisation and Association Agreement[15] which effectively replicate the EU State aid rules, and the post-Brexit EU-UK Trade and Cooperation Agreement ("TCA"), which as part of its

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10 See e.g. Case C-233/16 *ANGED* EU:C:2018:280 and Joined Cases C-236/16 and C-237/16 *ANGED* EU:C:2018:291.

11 See e.g. Case C-405/16 P *Germany v Commission* EU:C:2019:268.

12 See e.g. Case C-518/13 *The Queen on the application of Eventech Ltd v The Parking Adjudicator (Eventech)* EU:C:2015:9.

13 Case C-74/16 *Congregación de Escuelas Pías Provincia Betania* EU:C:2017:496.

14 EU-Ukraine Association Agreement, Title IV, Chapter 10, Section 2: State aid, Articles 262-267. For excellent overviews of the operation of these rules, see E Stuart and I Roginska, 'State Aid Regulation and Future Industrial Policy in Ukraine' (2016) European State Aid Law Quarterly 59 and K Smyrova and E Szyszczak, 'Modern Approaches to State Aid: Ukraine' (2020) European State Aid Law Quarterly 8.

15 EU-Serbia Stabilisation and Association Agreement, Article 73. For an assessment of the operation of the regime in practice, see M Milenkovic, 'The Transformation of State Aid Control in Serbia and EU Conditionality, Challenges of Integration and Reform Prospects' (2018) European State Aid Law Quarterly 66.

"level playing field" framework requires the UK to establish a domestic subsidy control regime that is similar, at least substantively, to the EU State aid regime.[16]

Another important initiative in this area is the EU's new Foreign Subsidies Regulation to address the effects of third-country subsidies in the EU.[17] The new Regulation is aimed, *inter alia*, at addressing the disadvantage faced by the EU industry that can only receive support from EU Member States in accordance with the stringent EU State aid rules, as compared to recipients of foreign subsidies that are not subject to comparable disciplines, thereby levelling the playing-field.[18] It is inspired by the EU State aid rules and will likely be heavily influenced by EU State aid law concepts.[19]

II. The problem of State aid definition and selective advantage

The increasing importance and influence of EU State aid control has not, however, been matched by correspondingly high standards in clarity in relation to the definition of "State aid", which represents the key dividing line between Member State and Commission competences with respect to Government interventions affecting the marketplace. As is well-known, the definition of State aid is set out in Article 107(1) TFEU and is simply:

> "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods… in so far as it affects trade between Member States*".

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16 EU-UK TCA, Part Two, Heading One, Title XI, Chapter Three: Subsidy Control, Articles 363-375. While the substantive aspects of the new regime are similar to the EU State aid regime, the TCA allows for significant differences in process and enforcement. For excellent overviews, see T Kotsonis, 'The Squaring of the Circle: Subsidy Control Under the UK-EU Trade and Cooperation Agreement' (2021) European State Aid Law Quarterly 15 and A Biondi, 'The New Chapter on Subsidies Regulation in the EU-UK TCA: Some First Impressions' (2021) European State Aid Law Quarterly 173.

17 See Provisional Agreement Resulting from Interinstitutional Negotiations: Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market (COM(2021)0223 – C9-0167/2021 – 2021/0114(COD)). The Regulation is due to enter into force before the end of 2022 and become applicable during mid-2023.

18 European Commission, Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, 5.5.2021 COM(2021) 223 final ("Foreign Subsidies Regulation Proposal"), page 2.

19 See in this regard, M Schonberg, 'The EU Foreign Subsidies Regulation: Substantive Assessment Issues and Open Questions' (2022) European State Aid Law Quarterly 143, which explores the parallels with EU State aid law as well as WTO subsidy law concepts.

This definition has remained unchanged since its inception in the Rome Treaty establishing the European Economic Community[20] and has been subject to over 60 years of application and practice. Yet, despite its longstanding constancy, the application of the definition of State aid has been consistently criticised in the literature as giving rise to real difficulties.[21] Indeed, in the context of its State Aid Modernisation ("SAM") initiative, the Commission itself declared that the notion of State aid required "*clarification and better explanation*"[22] and revealingly, considered it necessary to produce its own interpretative notice on the notion of State aid.[23]

The area within State aid definition that has raised the greatest difficulty in particular, and is therefore responsible for a great deal of the jurisprudence, is the requirement that the measure must "*favour certain undertakings or the production of certain goods*" in order to be defined as State aid, i.e. the criterion of "selective advantage", which is central to the notion of State aid. The application of this criterion has memorably been described by the Advocates General of the Court of Justice themselves as "*a difficult exercise with an uncertain outcome*"[24] and its lack of clarity is reflected in the high success rate in appeals against Commission decisions[25] as

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20 As Article 92(1) EEC and later, as Article 87(1) of the Treaty establishing the European Community ("EC").

21 See for instance, M Ross, 'State Aids and National Courts: Definitions and Other Problems – A Case of Premature Emancipation?' (2000) Common Market Law Review 401, at 422-423; R Plender, 'Definition of Aid' in Biondi, Eeckhout and Flynn (eds) *The Law of State Aid in the European Union*, 3-39, at 38; A Bartosch, 'The concept of selectivity?' in E Szyszczak (ed), *Research Handbook on European State Aid Law* (Cheltenham: Edward Elgar, 2011) 176-192, at 189; A Biondi, 'State Aid is Falling, Falling Down: An Analysis of the Case Law on the Notion of State Aid' (2013) Common Market Law Review 1719, noting the criticism that is put forward at 1719; and JL Buendia, C Buts and M Cyndecka, 'Review of EU Case Law on State Aid – 2019' (2020) 19 European State Aid Law Quarterly 468, at 480.

22 Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU State Aid Modernisation, COM(2012) 209 final, 8.5.2012 ("SAM Communication"), paragraph 23.

23 Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, OJ C 262/1 19.7.2016 ("Commission Notice on the notion of State aid").

24 Opinion of Advocate General Jacobs in Case C-379/98 *PreussenElektra* EU:C:2000:585, paragraph 157 and opinion of Advocate General Bobek in Case C-270/15 P *Belgium v Commission* EU:C:2016:289, paragraph 19. See also the opinion of Advocate General Kokott in Case C-75/18 *Vodafone Magyarország* EU:C:2019:492, paragraph 158: "*The examination of such selectivity in the tax legislation of the Member States always presents considerable difficulties*."

25 See P Ibáñez Colomo, 'State Aid Litigation before EU Courts (2004-2012): A Statistical Overview' (2013) Journal of European Competition Law & Practice 469. Significant examples include the high-profile defeats suffered by the European Commission in the *Hansestadt Lubeck* and the *Progressive Turnover Taxation* cases, which are addressed in Chapter 3 and the *EDF* and *ING* cases, which are addressed in Chapter 4.

well as numerous examples of reversals as between the lower EU Court, the General Court, and the higher Court of Justice,[26] on this ground.

The long-running *British Aggregates Association* saga provides an instructive example. The case related to the key issue of how a special-purpose levy, here an eco-tax imposed on certain minerals that were quarried for use as aggregates, should be assessed against the selective advantage criterion. The matter involved two Commission decisions[27] coming to different conclusions as to the existence of a selective advantage and therefore State aid and three judgments of the EU Courts[28] seemingly putting forward very different principles as to how selective advantage is to be assessed, including in relation to the significance of the environmental objective of the tax, the potential for Member States to set priorities with respect to their environmental policies and the relevance of the competitive relationship between those materials that were within and those that were outside the scope of the levy. While it may be expected that the Commission and the EU Courts would have cause to refine the notion of selective advantage and therefore State aid over time in response to evolution in the form and nature of State interventions, the fact that these kinds of fundamental principles are still being litigated following decades of jurisprudence is cause for considerable concern in light of the growing centrality of EU State aid control and its progeny to economic regulation.

The confusion is typified, in particular, by what appears to be a wholly inconsistent approach towards the respective roles of effects and objectives in State aid definition. On the surface, the jurisprudence has since the very early case-law, explicitly emphasised a so-called "effects-based approach", repeatedly stating that Article 107(1) TFEU, "*does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in*

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26 Significant examples include the *British Aggregates* cases referred to below, and the *Gibraltar* and *World Duty Free* cases, which are all also addressed in Chapter 3, and the *FIH* and the *Sardinian Airport* cases, which are addressed in Chapter 4.

27 Commission Decision of 24 April 2002 in State Aid N 863/01 – United Kingdom: Aggregates Levy, C(2002) 1478 final and Commission Decision of 27 March 2015 in SA.34775 – United Kingdom: Aggregates Levy, OJ L 59/87 4.3.2016.

28 Case T-201/02 *British Aggregates Association v Commission* EU:T:2006:25; Case C-487/06 P *British Aggregates Association v Commission* EU:C:2008:757; and Case T-210/02 RENV *British Aggregates Association v Commission* EU:T:2012:110.

relation to their effects."[29] The EU Courts have asserted that the notion of State aid is an objective one,[30] and therefore that State aid control is "objectives neutral" at the definition stage, with aims and justifications only to be taken into account in the compatibility stage.[31] In this vein, the EU Courts have routinely drawn on the "effects-based approach" to dismiss the argument that allegedly legitimate policy justifications pursued by the measure at issue, such as labour adjustment,[32] health and safety policy[33] and environmental protection,[34] could operate to exclude the measure from EU State aid control.

Simultaneously, the "effects-based approach" is commonly used to justify a wide notion of selective advantage and State aid, which encompasses, "*measures which, in various forms, mitigate the charges which are normally included in the budget and which therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect*"[35] and is therefore agnostic in relation to the specific "technique" or "means" used to confer the selective advantage in question.[36]

At the same time however, in significant areas of the jurisprudence, the EU Courts appear to take a diametrically opposed approach. First, notwithstanding the rhetoric in relation to the relegation of the apparent objective and the type or form of the measure, the EU Courts have developed very different methodologies for assessing the existence of a selective advantage that depend precisely on these very elements.

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29 See Case C-173/73 *Italy v Commission* EU:C:1974:71, paragraph 13, which is the first case in which the EU Courts put forward this "effects-based approach".

30 See e.g. Case T-67/94 *Ladbroke Racing v Commission* EU:T:1998:7, paragraph 52; Case T-266/02 *Deutsche Post v Commission* EU:T:2008:235, paragraph 71; and Case T-415/05 *Greece v Commission* EU:T:2010:386, paragraph 211.

31 See e.g. Case T-67/94 *Ladbroke Racing v Commission*, paragraph 52; Case T-14/96 *BAI v Commission* EU:T:1999:12, paragraph 81; and Case C-487/06 P *British Aggregates Association v Commission*, paragraphs 85-92.

32 Case C-5/01 *Belgium v Commission* EU:C:2002:754, paragraphs 45-47.

33 Case C-126/01 *GEMO* EU:C:2003:622, paragraph 34.

34 Case T-109/01 *Fleuren Compost v Commission* EU:T:2004:4, paragraph 54.

35 See e.g. Case C-200/97 *Ecotrade v Altiforni e Ferriere di Servola* EU:C:1998:579, paragraph 34; Case C-75/97 *Belgium v Commission (Maribel bis-ter)* EU:C:1999:311, paragraph 23; and C-596/19 P *Commission v Hungary* EU:C:2021:202, paragraph 36.

36 See e.g. Case C-487/06 P *British Aggregates Association v Commission*, paragraph 89; Joined Cases C-106 and C-107/09 P *Commission v Gibraltar and UK* EU:C:2011:732, paragraphs 87-88; and Case C-124/10 P *Commission v EDF* EU:C:2012:318, paragraph 91.

The relevant methodologies are the so-called "derogation framework" where the State is exercising public authority functions,[37] the "market economy operator principle" ("MEOP") where the State intervention takes the form of an economic transaction[38] and the so-called "*Altmark* criteria" or "compensation principle" where the State is seeking to fund services of general economic interest ("SGEI").[39] Each of these methodologies provide opportunities for State measures to escape classification as State aid on grounds which, at first sight, appear to have little to do with the measure's "effects" strictly speaking. In applying these methodologies, the EU Courts, moreover, explicitly or implicitly draw upon the objectives underlying the measure in question. A significant example of this is the operation of the "derogation framework" itself, which essentially assesses whether the measure at issue constitutes a derogation from the “reference system” of which it is a part, by differentiating between undertakings which are in a comparable factual and legal situation in light of the *relevant objective*,[40] with the result that objectives have played a determinative role in numerous cases.

Similarly, the EU Courts have placed limitations on the wide notion of State aid that would follow from the "effects-based approach" by requiring that for a State measure to be classified as State aid, it must involve State resources, in addition to being imputable to the State. This requirement, which does not appear to follow from a straightforward reading of the Article 107(1) TFEU definition, (the language of which is more ambiguous),[41] would seem inconsistent with an "effects-based approach", as the State character of the resources used to confer a benefit on the aid beneficiary should not be pertinent to the aid’s economic effects on the beneficiary and its capacity to distort competition in the market.[42] While the status of the State resources component as a separate requirement for State aid was for some time

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37 Commission Notice on the notion of State aid, paragraph 128.

38 *Ibid.*, paragraph 74.

39 Established by the Court of Justice in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* EU:C:2003:415. See Commission Notice on the notion of State aid, paragraph 70.

40 Commission Notice on the notion of State aid, paragraphs 128 and 135.

41 The Article 107(1) TFEU definition refers to "*any aid granted by a Member State or through State resources*", which could easily be interpreted as alternatives, i.e. that a measure would be subject to Article 107(1) TFEU where it was either granted by a Member State *or* through State resources.

42 A factor which featured in much of the earlier criticism of the State resources component as a separate requirement – see M Slotboom, ‘State Aid in Community Law: A Broad or Narrow Definition?’ (1995) European Law Review 289, at 296; and K Bacon, ‘State Aids and General Measures’ (1997) Yearbook of European Law 269, at 288.

unclear,[43] it was ultimately confirmed by the Court of Justice in the landmark *PreussenElektra* judgment,[44] apparently on the basis of the specific language of Article 107(1) TFEU alone (in spite of its seeming ambiguity). Accordingly, the Court held that the measure in question in that case, legislation obliging electricity supply companies to purchase electricity produced from renewable sources at minimum prices, would not give rise to State aid, notwithstanding that such an interpretation would appear counter-intuitive from a teleological or purposive perspective[45] in line with the "effects-based approach".[46]

These basic inconsistencies have not gone unnoticed in the literature,[47] where the main explanation offered is essentially a pragmatic one. Boundaries are required in order to mitigate against an over-expansive notion of State aid that would otherwise result from a "pure" effects-based approach to the notion of selective advantage and constitute an unacceptable interference with Member States' autonomy. This theme has also been echoed by a number of the Advocates General of the Court of Justice, who have emphasised the need to avoid that EU State aid control becomes an inquiry "*into the entire social and economic life of a Member State*".[48] Yet while the interest of the administrability and indeed the very viability of the system may provide

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43 In particular, the Court of Justice appeared to hold that it was not a requirement in the 1985 Case C-290/83 *Commission v France* EU:C:1985:37 and the same position was forcefully advocated by Advocate General Darmon in his opinion in Joined Cases C-72/91 and C-73/91 *Sloman Neptun v Bodo Ziesemer* EU:C:1992:130.

44 Case C-379/98 *PreussenElektra* EU:C:2001:160.

45 Which is one of the main modes of interpretation under EU law and is applied where an EU law provision is ambiguous or incomplete – see K Lenaerts and JA Gutierrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2014) Columbia Journal of European Law 3, at 32-33.

46 As indeed argued, *inter alia*, by the Commission in the *PreussenElektra* case itself, adding that if anything, the incidence of distortive effects will be greater where the cost of the aid is borne by the beneficiary's competitors as in that case, as opposed to the public purse – see the opinion of Advocate General Jacobs in Case C-379/98 *PreussenElektra*, paragraphs 134-139.

47 See J Winter, 'Re(de)fining the notion of State aid in Article 87(1) of the EC Treaty' (2004) Common Market Law Review 475; L Hancher, 'Towards a New Definition of a State Aid under European Law' (2003) European State Aid Law Quarterly 363; A Biondi, 'Some Reflections on the Notion of "State Resources" in European Community State Aid Law' (2006) Fordham International Law Journal 1426; A Bartosch, 'Is there a Need for a Rule of Reason in European State Aid Law?' (2010) Common Market Law Review 729; F de Cecco*, State aid and the European Economic Constitution* (Oxford: Hart Publishing, 2013), pages 96-97; and B Rodger, 'State aid – a fully level playing field?' (1999) European Competition Law Review 251.

48 See the opinions of Advocate General Jacobs in Case C-52/97 *Viscido and Others v Ente Poste Italiane* EU:C:1998:78, paragraph 16 and to similar effect in Case C-379/98 *PreussenElektra*, paragraph 157. See also the opinion of Advocate General Fennelly in Case C-200/97 Ecotrade EU:C:1998:378, paragraph 25.

a general justification for methodologies and elements that restrict the scope of the notion of State aid, it does not provide an explanation for why the *particular* methodologies or elements are themselves justified and it scarcely provides sufficient foundations for a stable and workable definition of State aid.[49]

This thesis aims to improve upon the position. Rather than accepting distinctions based on pragmatism, this thesis seeks to develop a more conceptual and ultimately principled account of the case-law of the EU Courts in relation to the concept of selective advantage, based on what the thesis terms as the principle of "equality of opportunity".

This should in turn lead to greater understanding of the jurisprudence and the ability to better anticipate how the EU Courts will approach assessing the existence of selective advantage going forward, leading to greater predictability in relation to the notion of selective advantage and therefore State aid that befits the growing significance of EU State aid control.

III. Purpose, scope and approach of this thesis

a. Positive account of the case-law of the EU Courts based on an "equality of opportunity approach"

The purpose of this thesis is to provide a means of rationalising the case-law of the EU Courts in relation to the concept of selective advantage within the definition of State aid and the proxies and heuristics designed to assess it in practice. The aim is therefore to provide a positive account of the case-law, in other words, rationalising the case-law as it exists, rather than a normative exposition.

In line with this, the thesis does not seek to introduce any external jurisprudential principles that are alien to the EU Treaties' competition rules. Rather, the conceptual principle that this thesis advances in order to rationalise the case-law – the principle of "equality of opportunity" – is something that has already been invoked in the case-law of the EU Courts in relation to the competition rules, most clearly Article 106(1) TFEU in conjunction with Article 102 TFEU, and as this thesis argues, is also consistently implicit in the case-law of the EU Courts in relation to EU State aid law. The thesis does go on to explain the origins of this principle, as something that is

[49] *C.f.* Plender, 'Definition of Aid', at 39.

inherent in the ordoliberal tradition that informed the development of the EU Treaties' economic rules and the restriction of both private and public power. But crucially, this thesis is not importing a new principle into EU State aid law, but rather is seeking to rationalise the case-law in line with a principle that is already implicit in the case-law of the EU Courts.

The thesis focuses on the case-law of the EU Courts, as opposed to the decision-practice or policy of the European Commission and the case-law of national courts, as it is the case-law of the EU Courts that determines the definition of State aid in Article 107(1) TFEU and therefore the notion of selective advantage, which the Commission and national courts are bound to follow.

In addition, unlike the Commission, whose decision-making is influenced by broader policy considerations, with its enforcement activity in relation to multinationals' tax-planning arrangements and in relation to generation adequacy measures as notable examples, the EU Courts are purportedly unconcerned by such considerations, but only legal considerations.[50] This reflects the basic allocation of powers between the Commission and the EU Courts in the EU's legal order. While policy-making is reserved to the Commission,[51] it is for the EU Courts to state what the law is.

Given the scope of their jurisdiction both in terms of ruling on direct actions for annulment of Commission decisions under Article 263 TFEU and ruling on preliminary references from national courts under Article 267 TFEU, the EU Courts are also in the privileged position of having to reconcile the more broader policy-driven State aid enforcement activity by the Commission as well as the more opportunistic usage of the State aid rules by private litigants in their complaints to

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50 The EU Courts pointedly do not refer to such policy considerations in their judgments. The Advocates General of the Court of Justice can be more explicit in relation to their disregard for such considerations. See by way of recent example, the opinions of Advocate General Pikamäe in Case C-885/19 P *Fiat v Commission* EU:C:2021:1028 and Case C-898/19 P *Ireland v Commission* EU:C:2021:1029 regarding multinationals' tax-planning arrangements, at paragraph 4*: "While keeping the political, economic and even societal context of the present case in mind, the Court of Justice will, in the judgment to be given, need to carry out an examination based exclusively on legal considerations of the issues arising from the approach taken by the Commission in adopting the decision at issue."*

51 Reflected in the EU Courts' very limited review of the Commission's decision-making in relation to compatibility under Article 107(3) TFEU, where the EU Courts have recognised that the Commission "*has a wide discretion […], the exercise of which involves complex economic and social assessments*" – Case C-730/79 *Philip Morris v Commission* EU:C:1980:209, paragraph 24.

the Commission and in their disputes before national courts, within an overall legal concept of selective advantage and State aid.[52]

The case-law of the EU Courts therefore represents the appropriate focal point for the thesis.

b. Examination of selective advantage within the broader context of the EU State aid regime

The subject-matter of the thesis is the concept of selective advantage within the definition of State aid under Article 107(1) TFEU. As explained above, this criterion, which is central to the notion of State aid, is the area that has raised the greatest difficulty and its clarification will do much to advance the comprehensibility of the definition of State aid.

At the same time, the thesis does not simply assess this aspect of State aid definition in total isolation, but seeks to place it within the overall scheme of EU State aid control, including the other components of the definition of State aid, as well as the compatibility stage. This seems necessary as the criterion of selective advantage does not exist in a vacuum but is part of a broader system, which must have a bearing on how it is to be applied and interpreted. Accordingly, while the thesis focuses on clarifying the notion of selective advantage, it also addresses the other definitional components and the compatibility stage, only to the degree necessary in order to contextualise the notion of selective advantage within the EU State aid regime as a whole.[53] By adopting this approach, the thesis is able to draw out

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52 It is acknowledged however, that the procedural context of the case – either an action for annulment against a Commission decision, or a preliminary reference from a national court – may have an impact on the approach of the EU Courts. For instance, a judgment on a preliminary reference may be expected to be more explicit about the conditions of the particular legal test at issue and pay more attention to its administrability, given that it is to be applied by the national court. On the other hand, in an action for annulment, the task of the EU Courts is to control the *legality* of the decision at issue and therefore the legal test set out in the decision forms the starting point for the assessment. See in this regard, P Ibáñez Colomo, *The Shaping of EU Competition Law* (Cambridge: CUP, 2018) at 75-76. A systematic analysis of this issue is however beyond the scope of our enquiry in this thesis. While the thesis notes certain examples where the procedural context of the case may have had an impact, for present purposes, given that the EU Courts themselves do not distinguish between the two sets of judgments when interpreting the notion of selective advantage, the thesis adopts the same approach, in line more generally with the positive perspective taken in the thesis.

53 The thesis' examination of these other definitional components and the compatibility stage is therefore limited and appropriate to what is necessary for this purpose. They are not assessed in detail critically, as that is not the purpose of the thesis.

broader conceptual foundations and principles in relation to the EU State aid regime of which selective advantage is a part, which can then better inform the assessment of selective advantage and therefore the definition of State aid.

c. Method – a two-stage analysis, including based on the purported objectives of EU State aid control

The method, as presented in this thesis, is essentially a two-stage process: (i) developing a conceptual framework for selective advantage drawing on the existing literature and the key elements of EU State aid control, both in terms of definition and compatibility; and then (ii) testing and refining that conceptual framework based on a more in-depth examination of the case-law of the EU Courts.

In terms of the *first main stage*, it is important to emphasise that this in itself also consists of two modes of analysis: (i) exploring the conceptual principles and approaches that derive from the existing literature; and then (ii) assessing how well these approaches embody the key elements of EU State aid control as interpreted by the EU Courts and in so doing, developing a conceptual approach for which the theory matches the reality of the key aspects of EU State aid control. Again, this is a product of the aim of the thesis, which is to provide a positive account, rather than a normative account.

As part of this, the purported aims and objectives of EU State aid control must be examined. The principal rationale put forward for EU State aid control comprises economics-related *competition and trade objectives*, such as addressing the impact of State intervention on "micro-economic competition" between undertakings and "macro-economic competition" between States. More *"paternalistic" justifications* are however also put forward, such as helping governments resist private interest groups, as a commitment device for national governments, to avoid moral hazard and rent-seeking, to improve the state of the public finances and the efficiency of public spending, to influence industrial policy and to safeguard against possible corruption and foster transparency.[54]

The possible contemporary relevance of these objectives can be seen, in particular, in the debates with respect to the recent development of additional subsidy control disciplines in relation to subsidies granted by non-EU Member States that are

[54] See the detailed discussion in Chapter 2, section III below.

summarised in section I above. The need to secure a "level-playing field" in terms of both micro-economic competition between UK and EU undertakings and macro-economic competition between the UK and EU largely drove the EU's push to incorporate the detailed subsidy control requirements in the EU-UK TCA.[55] On the other hand, the UK's establishment of its own domestic subsidy control regime pursuant to these requirements, in the form of the UK's Subsidy Control Act, is very much focused on securing a level-playing field in terms of micro-economic competition between undertakings and macro-economic competition between regions and devolved administrations within the UK's own internal market.[56] The EU's Foreign Subsidies Regulation is very much focused on micro-economic competition between undertakings operating in the EU's internal market,[57] whereas the purpose of the detailed subsidy control requirements in the EU's association agreements, such as the one with Ukraine, goes beyond just these pure competition and trade concerns but are also about securing good governance and transparency as well as changes in industrial policy.[58]

But while these contemporary debates and developments confirm the relevance of these kinds of objectives to subsidy control in general, they do not concern EU State aid control specifically. Given the aim of this thesis, which is to provide a means of rationalising the case-law of the EU Courts in relation to the notion of selective advantage within Article 107(1) TFEU, i.e. to provide a positive account, there needs to be a further exercise of setting these objectives specifically against the main aspects of the existing system of EU State aid control, to see how well they embody

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55 See the EU Council Negotiating Directives, Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement, 25 February 2020, paragraph 94; and the public statements by the EU's negotiator Michel Barnier, on 23 July 2020 and 2 September 2020 (available on the Commission's website).

56 This is evident from the elements that the UK has added to the Act that go beyond the requirements of the EU-UK TCA, namely, that the necessary effect on trade or investment for a measure to be classified as a "subsidy" can be just be an effect within the UK as opposed to between the UK and EU (section 2(d)(i)); an additional subsidy control principle, that subsidies should be designed to minimise any negative effects on competition or investment within the UK (Schedule 1, paragraph F); and an additional category of prohibited subsidy – a subsidy conditional on the recipient relocating existing activities from one area of the UK to another, unless it would reduce social or economic disadvantage (section 18).

57 See in particular, the Foreign Subsidies Regulation Proposal, at page 11: "*By remedying the distortive effects of foreign subsidies in the internal market, the proposal will create a level playing field for companies that receive foreign subsidies and those that do not, thus improving the competitiveness of companies in the EU*."

58 Smyrova and Szyszczak, 'Modern Approaches to State Aid: Ukraine', at 10.

the scheme of EU State aid control and therefore can serve as a basis for developing an appropriate conceptual framework, which is part of the second mode of analysis.

In terms of the *second main stage*, the testing and refining of the conceptual framework developed based on a more in-depth examination of the case-law of the EU Courts, the thesis analyses the case-law of the EU Courts in relation to the assessment of selective advantage in the context of the principal areas or types of State activity which have generated the great majority of the jurisprudence, for which the EU Courts have developed very different methodologies. These are: (i) where the State is exercising public authority functions and the derogation framework is applied; (ii) where the State intervention takes the form of an economic transaction and the MEOP is applied; and (iii) where the State is seeking to fund SGEI and the *Altmark* criteria or compensation principle is applied. The reason for this approach is that each of these areas appear to raise very different considerations as reflected in the development by the EU Courts of these very different methodologies and therefore this segmentation would seem most capable of shedding light on the notion of selective advantage and the proxies and heuristics designed to assess it in practice.

These three areas do not represent a selection or sample of the case-law, but are rather three angles or points of departure that are used in order to capture the great majority of the case-law in relation to selective advantage. The thesis' examination of the case-law within each of these three areas is comprehensive and certainly representative, covering all of the main case-law, including those cases giving rise to particular controversies and which may seem difficult to rationalise at first sight. This is because the aim of the thesis is to provide a means of rationalising the case-law of the EU Courts in relation to the notion of selective advantage and therefore it is necessary that the main body of the case-law, including the most apparently difficult cases, are covered. The intention therefore, is not to pick and choose certain specific case-studies, which itself could be questioned on the basis of the selections made,[59] but rather to examine the main body of the case-law as developed by the EU Courts and therefore provide a more complete analysis.

As part of this examination, it is inevitable that more attention will be devoted to the foundational cases, such as the *Altmark* case which established the framework for

[59] See in this regard, Ibáñez Colomo, *The Shaping of EU Competition Law*, at 19-20.

assessing the financing of SGEI,[60] and the most apparently difficult cases, such as the landmark *World Duty Free* cases, which appeared to challenge widely-held notions in relation to the assessment of selective advantage in the case of tax measures.[61] These two kinds of cases – the foundational cases and the most apparently difficult cases to reconcile – represent key elements on which to build and test a conceptual framework for assessing selective advantage and therefore serve as case-studies insofar as they receive the most attention in each chapter. However, they should not be seen as being selective case-studies as such.

IV. The existing literature and the thesis' contribution

During the past 20 years or so, the literature on EU State aid law, particularly in the form of legal journal articles, has become more abundant. Indeed, since 2002, there has been a journal specifically dedicated to EU State aid law, the European State Aid Law Quarterly, which publishes high quality articles. Articles on EU State aid law have also become increasingly prevalent in the mainstream EU competition law and EU law journals, such as the Journal of European Competition Law & Practice, the Common Market Law Review, and the European Law Review. Thematic collections have also been published, including the excellent "EC State Aid Law / Le Droit Des Aides D'Etat Dans La CE",[62] "EU State Aid Control: Law and Economics",[63] the "Research Handbook on European State Aid Law",[64] and

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60 Addressed in Chapter 5 below. Other examples of such foundational cases addressed in this thesis, include the *Meura* and *Boch* cases which first established the MEOP and the *EDF* case which established the framework for assessing the applicability of the MEOP, addressed in Chapter 4 below, the *Maribel bis/ter* and *Adria-Wien* cases which led to the development of the derogation framework and the *Azores* case, which established the framework for assessing so-called geographic selectivity, addressed in Chapter 3 below.

61 Addressed in Chapter 3 below. Other examples of such apparently difficult cases include the *Gibraltar* case, in which the derogation framework was disregarded by the Court of Justice, also addressed in Chapter 3 below, the *Hungarian PPA* cases, in which the EU Courts applied the MEOP with reference to the situation prevailing after the measure in question had been taken and the *FIH* case in which the Court of Justice disregarded the State's existing economic exposure in the undertaking concerned in applying the MEOP, addressed in Chapter 4 below, and the *BUPA* case, in which the General Court effectively disregarded a number of the *Altmark* criteria, addressed in Chapter 5 below.

62 *EC State Aid Law – Le Droit des Aides d'Etats dans la CE, Liber Amicorum Francisco Santaolalla Gadea* (The Hague: Kluwer, 2008).

63 P Werner and V Verouden (eds), *EU State Aid Control: Law and Economics* (Kluwer, 2017).

64 E Szyszczak (ed), *Research Handbook on European State Aid Law* (Cheltenham: Edward Elgar, 2011) and L Hancher and JJ Piernas López (eds), *Research Handbook on European State Aid Law* (Cheltenham: Edward Elgar, 2021).

"Milestones in State Aid Case Law",[65] among others. Insofar as State aid definition is concerned, most of these contributions focus on individual components / methodologies,[66] or the application of those individual components / methodologies in the case of specific types of State measures, such as fiscal measures[67] and most recently, tax rulings in the context of multinationals' tax-planning arrangements.[68] While some of these contributions address the application of a particular component / methodology in depth, many focus on or respond to a particular new development in the case-law of the EU Courts or the decision-practice of the European Commission.

A number of monograph and book-length contributions by individual authors addressing the definition of State aid have also been published. The notable examples include an in-depth comparative analysis of EU State aid definition and WTO subsidy definition written by Luca Rubini,[69] a monograph by Francesco de Cecco, focusing on the contribution of EU State aid law to the wider European economic constitution embodied in the EU's internal market project,[70] a work by Juan Jorge Piernas López analysing the components of the definition of State aid from a dynamic perspective in light of the evolving policy and enforcement

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65 C Buts and JL Buendia-Sierra (eds), *Milestones in State Aid Case Law – EstAL's First 15 Years in Perspective* (Berlin: Lexxion, 2017) and C Buts and JL Buendia-Sierra (eds), *Milestones in State Aid Case Law – EstAL's First 20 Years in Perspective* (Berlin: Lexxion, 2022).

66 By way of notable examples, see in relation to the MEOP: M Parish, 'On the Private Investor Principle' (2003) European Law Review 70 and N Khan and KD Borchardt, 'The Private Market Investor Principle: Reality Check or Distorting Mirror' in, *EC State Aid Law – Le Droit des Aides d'Etats dans la CE,* 108-123; in relation to selectivity and the derogation framework; M Prek and S Lefèvre 'The Requirement of Selectivity in the Recent Case-Law of the Court of Justice' (2012) European State Aid Law Quarterly 335; and M Honoré, 'Selectivity,' in Werner and Verouden (eds), *EU State Aid Control: Law and Economics*, 119-168; in relation to the assessment of SGEI funding and the *Altmark* framework: E Szyszczak, '*Altmark* assessed' in Szyszczak (ed), *Research Handbook on European State Aid Law*, 293-326; and JL Buendia-Sierra, 'Finding the Right Balance: State Aid and Services of General Economic Interest' in *EC State Aid Law – Le Droit des Aides d'Etats dans la CE,* 191-222.

67 See e.g. B Pérez-Bernabeu, 'Refining the Derogation Test on Material Tax Selectivity: The Equality Test' (2017) European State Aid Law Quarterly 582 and C Micheau, 'Tax selectivity in European law of state aid: legal assessment and alternative approaches' (2015) European Law Review 323.

68 See e.g. T Iliopoulos, 'The State Aid Cases of Starbucks and Fiat: New Routes for the Concept of Selectivity?' (2017) European State Aid Law Quarterly 263 and P Nicolaides, 'Can Selectivity Result from the Application of Non-Selective Rules?' (2019) European State Aid Law Quarterly 15.

69 Rubini, *The Definition of Subsidy and State Aid*.

70 De Cecco, *State aid and the European Economic Constitution*.

considerations during different periods[71] and a book by Malgorzata Cyndecka analysing the applicability and application of the MEOP.[72] [73]

In sum, much more is now being written on EU State aid law, reflecting the rise of the discipline as it has become far more important both quantitatively and also qualitatively. Insofar as the literature on the definition of State aid is concerned, all of these contributions provide substantial and valuable insight into the interpretation of individual components and methodologies within the definition of State aid. The literature however remains relatively undeveloped from a conceptual perspective. This may be because EU State aid law has only recently come into vogue and much of the literature is still being written predominantly by practitioners, both lawyers and economists, with the result that the focus tends to be on individual cases, or narrowly-defined issues, rather than considering broader issues in the context of the discipline as a whole. Indeed, even in the case of the wider-ranging accounts, for the most part, these address individual components / methodologies in the definition of State aid in isolation, i.e. without reference to the other components / methodologies. They also tend to avoid addressing the second assessment stage of the EU State aid regime, the compatibility assessment.[74] This inevitably limits their conceptual import, as it seems important to place the individual components / methodologies within the broader concept of State aid and EU State aid control as a whole, in order to provide a more meaningful conceptual account.

A partial exception to the above however, is the debate among commentators during the early 2000s over the role of economic analysis in EU State aid law,[75] triggered by the 2005 State Aid Action Plan ("SAAP") of the Commission which advocated the

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71 JJ Piernas López, *The Concept of State Aid under EU Law, From internal market to competition and beyond* (Oxford: OUP, 2015).

72 M Cyndecka, *The Market Economy Investor Test in EU State Aid Law, Applicability and Application* (Wolters Kluwer: 2016)

73 There are also now a number of excellent textbooks that provide complete coverage of EU State aid control – see in particular, K Bacon (ed), *European Union Law of State Aid* (Oxford: OUP, 2017); Hancher, Ottervanger and Slot (eds), *EU State Aids*; L Flynn, N Pesaresi, C Siaterli and K van de Casteele (eds), *EU Competition Law: Volume 4 State Aid* (Leuven: Claeys & Casteels, 2016); and H Hofmann and C Micheau (eds), *State Aid Law of the European Union* (Oxford: OUP, 2016). Their aim however, is to provide a comprehensive guide to the case-law and practice, and they do not, for the most part, critically analyse the jurisprudence in a systematic manner.

74 For an example of a rare exception, see A Biondi and E Righini, 'An Evolutionary Theory of State Aid Control' in D Chalmers and A Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford: OUP, 2015) 670-689.

75 For a summary and commentary in relation to this debate, see Rubini, *The Definition of Subsidy and State Aid*, at 59-67.

use of a more "*refined economic approach*".[76] This call was echoed by a number of legal and economic commentators who argued that the greater use of economic analysis and tools would bring increased predictability and effectiveness to EU State aid control,[77] some drawing comparisons with the injection of economic analysis in EU competition law.[78] At the same time, a confronting group of commentators contested this proposed expansion in economic analysis, arguing essentially that EU State aid control should be seen as a species of the EU internal market rules rather than the EU competition rules and should thus also eschew economic effects-based analysis in line with EU internal market law.[79]

On the surface, the debate might have seemed of relatively limited conceptual import as a major focal point was whether the EU State aid regime had more in common with the EU competition rules or the EU internal market rules.[80] The discussion did however address the purposes and nature of the EU State aid rules, and therefore

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76 European Commission, 'State Aid Action Plan – Less and better targeted State aid: roadmap for state aid reform 2005-2009', 7.6.2005, COM(2005) 107 final ("SAAP Communication"), at paragraphs 18-23.

77 See e.g. W Friederiszick, LH Roller and V Verouden, 'European State Aid Control: An Economic Framework' in P Bucirossi (ed), *Handbook of Antitrust Economics* (Cambridge MA: MIT Press, 2008) 625-669; M Merola, L Hancher, P Ibáñez Colomo, M Cristina Santacroce, R Nitsche and P Papandopoulos, 'The most appropriate economic tool for a better targeted State aid policy' in J Derenne and M Merola (eds), *Economic Analysis of State Aid Rules – Contributions and Limits* (Berlin: Lexxion, 2007) 29-67; and P Crocioni, 'Can State Aid Policy Become More Economic Friendly?' (2006) World Competition 89.

78 See Ahlborn and Berg, 'Can State Aid Control Learn from Antitrust?' (actually pre-dating (or perhaps anticipating) the SAAP); D Hilderbrand and A Schweinsberg, 'Refined Economic Approach in European State Aid Control – Will it Gain Momentum?' (2007) World Competition 449; and Crocioni, 'Can State Aid Policy Become More Economic Friendly?'.

79 See e.g. JL Buendia-Sierra and B Smulders, 'The Limited Role of the "Refined Economic Approach" in Achieving the Objectives of State Aid Control: Time for Some Realism' in *EC State Aid Law – Le Droit des Aides d'Etats dans la CE,* 1-26; V Di Bucci, 'Comments on the Paper 'Selectivity, Economic Advantage, Distortion of Competition and Effect on Trade' in Derenne and Merola (eds), *Economic Analysis of State Aid Rules – Contributions and Limits*, 156-160; and A Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' in C Barnard and O Odudu (eds), *Cambridge Yearbook of European Legal Studies, Vol 12, 2009-2010* (Oxford: Hart Publishing) 35-52. These positions do not of course represent the totality of views in relation to the SAAP and its "*more refined economic approach*" as a number of criticisms were made without reference to this standpoint.

80 De Cecco summarises the debate as follows: "*A recurring question among those who write on State aid law concerns 'family resemblances': whether State aid bears great similarities to antitrust or to free movement law."* See De Cecco, *State aid and the European Economic Constitution*, at 31.

it serves as the logical starting point for any further conceptual analysis in relation to EU State aid law.

The present thesis seeks to develop further this conceptual approach and therefore help address a gap in the literature. It seeks to do so in two main ways. First, and as explained in section III above, while the subject-matter of the thesis is the concept of selective advantage, i.e. one of the components of the definition of State aid, the thesis does not assess this component in total isolation. Rather, it seeks to place the concept of selective advantage within the overall scheme of State aid control, including the other components of the definition of State aid, as well as the compatibility stage, in order to draw out broader conceptual foundations and principles in relation to the EU State aid regime as a whole, which can then inform the concept of selective advantage. This enables the thesis to take a more conceptual approach, addressing a gap in the existing literature.

Second, and as part of this more conceptual approach, the thesis seeks to develop the existing literature on the role of economic analysis in State aid law, which represents the logical starting point for further conceptual analysis, by placing it within the context of broader debate on the nature of international subsidy control arising in the existing well-developed literature relating to the GATT and later the WTO subsidy control framework and using this established literature to build on the former. This particular thought process in order to develop conceptual themes in relation to EU State aid control is not something that has been carried out in the EU State aid literature to-date and therefore represents a novel approach.

V. Outline of the thesis

In terms of structure, the main body of the thesis is divided up into four chapters, which pursue the two main analytical stages of the thesis.

Chapter 2 represents the *first main stage*, the development of a conceptual framework for selective advantage, drawing on the existing literature and taking into account the key elements of EU State aid control, both in terms of definition and compatibility. As explained above, this first stage itself consists of two modes of analysis: (i) an exploration of the conceptual principles that derive from the existing literature, including in relation to the purported aims and objectives of EU State aid control and the discussion in relation to the role of economic analysis in EU State

aid law, as placed within the context of the broader debate on the nature of international subsidy control; and (ii) an assessment of how well these conceptual principles embody the key elements of EU State aid control and in so doing, developing a conceptual approach based on the principle of equality of opportunity, for which the theory matches the reality of the key aspects of EU State aid control.

Chapters 3 to 5 represent the *second main stage*, the testing and refinement of this conceptual framework based on a more in-depth examination of the case-law of the EU Courts in the three principal areas of State activity that have generated the main body of the jurisprudence in relation to the notion of selective advantage. As enumerated above, these are: (i) where the State is exercising public authority functions and the derogation framework is applied; (ii) where the State intervention takes the form of an economic transaction and the MEOP is applied; and (iii) where the State is seeking to fund SGEI and the *Altmark* criteria or compensation principle is applied.

In each of these three chapters, the established case-law is set against the conceptual framework developed in Chapter 2 in a two-way process, demonstrating how the conceptual framework based on an equality of opportunity approach carries explanatory power in relation to the distinctions made by the case-law and at the same time, refining the conceptual framework to best provide a basis for the notion of selective advantage.

Finally, Chapter 6, the conclusions chapter, draws together the key findings of the earlier chapters and finally reflects on how the full potential of the more conceptual and principled account in this thesis could be realised in order to clarify the notion of selective advantage and State aid.

Chapter 2
Conceptual Foundations

I. Introduction

This chapter undertakes the first main stage of this thesis' method, the development of a conceptual framework for selective advantage drawing on the existing literature and the key elements of EU State aid control, both in terms of definition and compatibility.

To begin with, and in order to frame the analysis, section II of this chapter provides an overview of the key substantive aspects of the EU State aid regime, providing additional detail in particular, in relation to the compatibility stage, which was only briefly touched upon in Chapter 1.

The remaining sections in the chapter then carry out the two modes of analysis under this stage: (i) an exploration of the conceptual principles and approaches that derive from the existing literature; and (ii) an assessment of how well these approaches embody the key elements of State aid control and thereby, developing a conceptual approach that adheres to the key elements of EU State aid control.

Section III begins by first exploring the purported aims and objectives that are put forward for EU State aid control and sets those objectives against the key elements of State aid control as interpreted by the EU Courts, ultimately concluding that competition and trade considerations represent the appropriate starting point. It then continues by examining the existing literature that addresses these considerations.

As explained in Chapter 1, while the literature specifically in relation to EU State aid law is relatively limited from a conceptual perspective, there is more literature in relation to the other main system of international subsidy regulation, first the GATT and later the WTO subsidy control framework, within which some of the EU State aid debate can be contextualised. Starting with this literature, Section III introduces the two traditional standpoints on State subsidisation that informed discussions in relation to the GATT and WTO subsidy control framework, the “anti-distortion” and “injury-only” approaches, which broadly speaking, take very different perspectives on the desirability of State subsidies and therefore the point of departure and emphasis that should be taken by any subsidy control regime. It is then explained

how these standpoints can be said broadly to find expression in the specific context of EU State aid control in the forms respectively of the so-called “internal market” and “competition” approaches that were advanced in the debate around the role of economic analysis in EU State aid law triggered by the SAAP.

Section IV then assesses how well these two approaches embody the key aspects of the existing system of EU State aid control as interpreted by the EU Courts. It finds that EU State aid control draws on both of these approaches, insofar as State aid definition and compatibility address both the issues of micro-economic rivalry between undertakings that is emphasised as part of an "injury-only / competition approach" as well as macro-economic rivalry between States that is emphasised as part of an “anti-distortion / internal market approach", and also draws on assessment methods from both approaches, while distinguishing between the definition and compatibility stages.

In light of this analysis, and building in particular on some of the key insights of the "internal market approach", section V then develops an "equality of opportunity approach", drawing on existing jurisprudence in relation to this notion, based on securing equality of opportunity both as between undertakings and also between categories of undertakings and / or sectors within a Member State, that together cover both the micro-economic and macro-economic competition dimensions.

Section VI then explores how this "equality of opportunity approach" may be operationalised in the assessment of selective advantage in a manner that conforms with the scheme of EU State aid control as interpreted by the EU Courts. It sketches how this translates into an assessment that tests whether the object of a State measure is to create inequality of opportunity and favour certain undertakings or sectors, or whether the object of the measure is consistent with the principle of equality of opportunity.

II. Overview of the EU State aid regime

In this section we provide an overview of the key features of the EU State aid regime, addressing both the definition and compatibility stages. The purpose is not to provide an exhaustive account but rather to set out the main substantive aspects in sufficient detail so as to inform the discussion in relation to conceptual foundations that follows.

a. Definition as State aid

As explained in Chapter 1, State aid classification is based on the definition of "State aid" under Article 107(1) TFEU, which is as follows: "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods… in so far as it affects trade between Member States*".

In the case-law, this definition is traditionally broken down into the following "components", which are cumulative in the sense that they all need to be fulfilled to define an intervention as State aid. State aid must: (i) be imputable to the State; (ii) be granted through State resources; (iii) provide a financial or economic advantage; (iv) be selective, in that it favours certain undertakings or the production of certain goods; and (v) distort or threaten to distort competition and affect trade between EU Member States.[81] These components can be divided up between two categories: (i) those which address the scope and impact of the measure itself, namely the advantage, selectivity and distortion of competition and effect on trade components; and (ii) those that relate to the required nexus between a measure and State authority and the State's budget, namely the State imputability and State resources components.

In terms of the first category, the advantage and selectivity components represent the focus of the assessment, which as explained in Chapter 1, is made with reference to different methodologies depending on the type of measure or intervention at issue. Where the State is exercising public authority functions, the case-law has focused on the *selectivity* component and the question of whether the measure favours "*certain undertakings or the production of certain goods*" within the meaning of Article 107(1) TFEU, which the EU Courts have interpreted as referring to measures that favour certain undertakings or economic sectors.[82] In the case of a measure that applies to a single undertaking only, the measure will be considered

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81 See the Commission Notice on the notion of State aid, paragraph 5 (albeit adding the existence of a recipient undertaking given that the rules apply only in relation to aid to "undertakings" as defined under EU law); and Bacon, *European Union Law of State Aid*, at 18-19.

82 Commission Notice on the notion of State aid, paragraph 117. The favouring of "*the production of certain goods*" within the Article 107(1) TFEU definition has been reformulated by the EU Courts as referring to "*certain sectors of activity*" – see e.g. Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* EU:C:2016:981, paragraph 55.

as selective without any further examination.[83] Where the measure applies to more than one undertaking however, i.e. a category or categories of undertakings or a sector / certain specific sectors, the EU Courts apply the so-called "derogation framework",[84] which essentially assesses whether the measure at issue constitutes a derogation from the “reference system” or “normal” regime of which it is a part, by differentiating between undertakings or sectors which are in a comparable factual and legal situation in light of the relevant objective.

On the other hand, where the State intervention takes the form of an economic transaction, such as the provision of equity or debt finance, or the purchase of goods and services, the assessment of *advantage* is made by determining whether the transaction is undertaken on terms and in conditions which would be acceptable to a private operator under normal market economy conditions, the MEOP.[85]

Finally, in the area of public funding of SGEI the case-law has established the so-called "*Altmark* criteria" or “compensation principle”[86] to assess the existence of an *advantage* in this context. Pursuant to this framework, such funding can be considered as compensation for the discharge of SGEI and thereby escape classification as State aid provided various conditions are met with respect to the nature of the obligations imposed on the recipient and the calculation of the funding, including that the funding does not exceed the additional costs of the SGEI taking into account relevant receipts and that those costs are efficiently incurred.

While the case-law formally distinguishes between the advantage and selectivity components[87] and has traditionally identified the methodologies mentioned above with one out of the two, there is obviously significant overlap as both components

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83 See Case C-15/14 P *Commission v MOL* EU:C:2015:362, paragraph 60; Case C-270/15 P *Belgium v Commission* EU:C:2016:489, paragraph 49; and Case C-211/15 P *Orange v Commission* EU:C:2016:798, paragraphs 53-54.

84 Commission Notice on the notion of State aid, paragraph 128.

85 Commission Notice on the notion of State aid, paragraph 74.

86 Established by the Court of Justice in Case C-280/00 *Altmark*. See Commission Notice on the notion of State aid, paragraph 70.

87 The EU Courts have explained that although “*concomitant*”, the two must be distinguished, “*in that, where the Commission has identified an advantage, understood in a broad sense, as arising directly or indirectly from a particular measure, it is also required to establish that that advantage specifically benefits one or more undertakings*", although in the case of measures applying to a single undertaking only, “*the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective*." See Case C-15/14 P *Commission v MOL*, paragraphs 59-60 and Case C-270/15 P *Belgium v Commission*, paragraph 48-49.

require a comparison of the treatment of the beneficiary or beneficiaries with the treatment accorded to others,[88] meaning that in the majority of cases, a measure would only give rise to an "advantage" if it is "selective".[89] Indeed, in many recent judgments, the EU Courts have simply referred to the two components together as "selective advantage"[90] and have accepted that they may be examined concurrently.[91] In practice, while one or the other component may be given greater prominence, depending on the type of measure at issue,[92] the two components together embody the idea of "favouring" certain undertakings or sectors over others, and "selective advantage" is therefore the terminology used in this thesis.

The remaining component in this category on the other hand, distortion of competition and effect on trade between Member States, plays a much less significant role in State aid definition as these criteria have been interpreted as representing such a low threshold to make them almost superfluous in most cases.[93] According to the established jurisprudence, to satisfy these criteria, it is sufficient simply to show that the aid "*strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade*".[94] In contrast to the approach taken to very similar criteria under EU competition law,[95] the Commission,

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88 Such that the formulation of these components in Article 107(1) TFEU is "*somewhat elliptical*" in the words of Advocate General Cosmas in his opinion in Case C-353/95 P *Tiercé Ladbroke v Commission* EU:C:1997:233, paragraph 30.

89 See P Papandropoulos, R Nitsche, B van de Walle de Ghelcke, D Waelbroeck, J Derenne, F Louis, M Merola, P Ibáñez Colomo, J De Beys and J Bousin, 'Selectivity, Economic Advantage, Distortion of Competition and Effect on Trade' in Derenne and Merola (eds), *Economic Analysis of State Aid Rules – Contributions and Limits*, 119-152, at 138.

90 By way of recent examples, see Case C-562/19 P *Commission v Poland* EU:C:2021:201, paragraph 27 and Case C-596/19 P *Commission v Hungary* EU:C:2021:202, paragraph 33.

91 See Joined Cases T-755/15 and T-759/15 *Luxembourg and Fiat v Commission* EU:T:2019:670, paragraph 122 and Joined Cases T-760/15 and T-636/16 *Netherlands and Starbucks v Commission* EU:T:2019:669, paragraph 129.

92 For instance, in the case of State transactions which are assessed under the MEOP, there is normally only a single beneficiary of the measure, i.e. the counterparty to the transaction, which means that it makes sense just to focus on the advantage component as opposed to the selectivity component.

93 Merola, Hancher, Ibáñez Colomo, Cristina Santacroce, Nitsche and Papandopoulos, 'The most appropriate economic tool for a better targeted State aid policy', at 38. According to the Commission Notice on the notion of State aid, "*For all practical purposes, a distortion of competition within the meaning of Article 107(1) of the Treaty is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition*" (paragraph 187).

94 Joined Cases C-197/11 and C-203/11 *Eric Libert and Others* EU:C:2013:288, paragraph 77.

95 In particular, under Articles 101(1) and 102 TFEU.

"*is not required to carry out an economic analysis of the actual situation on the relevant market, of the market share of the undertakings in receipt of the aid, of the position of competing undertakings and of the trade flows in respect of the goods or services in question between the Member States,*"[96] and there is also no *de minimis* threshold.[97]

Indeed, the EU Courts have only ever interfered with the findings of the Commission in relation to these criteria in extreme cases where the circumstances of the aid were atypical in that there was no direct connection between the aid and the beneficiary's activities on the EU markets and / or where the reasoning of the Commission had not gone much further beyond simply summarising the case-law in relation to these criteria without applying them to the specific facts at hand.[98]

Disquiet with this position has been raised in some of the literature, including even by certain of the Advocates General of the Court of Justice.[99] For its part, the Commission has more recently sought to accord greater significance to the effect on trade criterion, taking the position that this criterion would not be met where: (i) the aid beneficiary had local activities only, (ii) was unlikely to attract customers from other Member States and (iii) the aid would not have more than a marginal effect on

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96 Joined Cases T-80/06 and T-182/09 *Budapesti Erőmű v Commission* EU:T:2012:65, paragraph 96.

97 Joined Cases C-278/92 to C-280/92 *Spain v Commission (Hytasa)* EU:C:1994:325, paragraph 42. The Commission for its part however, has enacted *de minimis* exemption regulations (in particular, Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 TFEU to *de minimis* aid, OJ L 352/1 24.12.2013), which the Court of Justice has accepted as part of the Commission's exercise of its discretion to assess the possible economic effects of aid – see Case C-351/98 *Spain v Commission* EU:C:2002:530, paragraph 52.

98 See in particular, Case T-304/04 *Italy and Wam v Commission* EU:T:2006:239 and Case C-494/06 P *Commission v Italy and Wam* EU:C:2009:272, where the Commission's statement of reasons was found to be wanting. The cases concerned loans of relatively low value to finance expenditure for a non-EU Member State market penetration programme and which therefore were not directly linked to the activity of the beneficiary on the EU markets. While some commentators suggested that this could be the beginning of a new more effects-orientated approach to the distortion of competition and effect on trade criteria, this has not come to pass and in the case's sequel, Case T-303/10 *Wam Industriale v Commission* EU:T:2012:505, the General Court ultimately upheld the Commission's revised decision rectifying the statement of reasons. For concurring commentary, see Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy', at 51.

99 Opinion of Advocate General Wahl in Case C-518/13 *Eventech* EU:C:2014:2239, paragraphs 77-88. In terms of the commentary, see: Ahlborn and Berg, 'Can State Aid Control Learn from Antitrust?'; J Temple Lang, 'EU State Aid Rules – The Need for Substantive Reform' (2014) European State Aid Law Quarterly 440; and Rubini, *The Definition of Subsidy and State Aid*, at 393-398.

the conditions of cross-border investment or establishment.[100] However, this represents a minor progression only from the existing position and it still remains to be seen whether it will be followed in the EU Courts.[101]

The practical position therefore is that State aid is considered essentially as *per se* distortive,[102] and where a selective advantage has been identified, it will be defined as State aid, irrespective of its actual or potential effects on competition and trade. This position is in stark contrast to the general approach under the WTO subsidy control rules, which generally require material injury or the threat thereof to other Members' domestic industry or serious prejudice to their interests to be rigorously demonstrated, in order for a subsidy to be challengeable,[103] and is therefore a major area of focus in subsidy cases based on the WTO rules.[104] [105]

In terms of the second category of components, imputability and State resources, the imputability criterion has proven the more straight-forward. The issue is whether the measure in question can be considered as attributable to the public authorities. In the vast majority of cases, this does not give rise to any particular difficulties as subsidies tend to be directly granted by the State or public authorities. The situation is different however, where the subsidy is granted by a public undertaking which, while being majority-owned by and controlled by State authorities, is not itself part

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100 Commission Notice on the notion of State aid, paragraphs 196-197.

101 In one case, Case T-728/17 *Marinvest and Porting v Commission* EU:T:2019:325, the General Court seemed to endorse the Commission's position, upholding a decision based on this new approach. But this judgment has not been referred to in subsequent judgments, which continue to reflect the traditional position – see e.g. Case C-659/17 *Azienda Napoletana Mobilità* EU:C:2019:633, paragraphs 29-31 and Case C-385/18 *Arriva Italia* EU:C:2019:1121, paragraphs 42-45.

102 In this regard, the following statement of Advocate General Capotorti in the very early *Philip Morris* case appears prescient: "*Interference from outside which is selective in its nature cannot but distort the work of competition. It is permissible therefore to start from the presumption that any public aid granted to an undertaking distorts competition – or threatens to distort it … – unless exceptional circumstances exist*" - opinion of Advocate General Capotorti in Case C-730/79 *Philip Morris v Commission* EU:C:1980:160, page 2698 (translation from original French version).

103 See the WTO SCM Agreement, Articles 5 and 6, footnote 45 and Article 15, which set out the definitions and methodological considerations involved.

104 For an example of this assessment in practice, see the WTO Panel Report in *EC and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R (30 June 2010), at pages 833–1045, which was part of the long-running EU and US Airbus / Boeing subsidy dispute at the WTO. By contrast, in most European Commission State aid decisions, the section examining the competition and trade criteria in the definition of State aid typically does not run beyond 1-2 pages.

105 The limited exception to this are export subsidies and import substitution subsidies, which are prohibited without regard to their effects – see the WTO SCM Agreement, Article 3.

of the State. The EU Courts, starting with the landmark *Stardust Marine* case,[106] have taken the position that imputability cannot simply be presumed, given that a public undertaking may act with more or less independence according to the degree of autonomy left to it by the State, and therefore it must be separately proven. At the same time, and acknowledging that it may be difficult to demonstrate that the public authorities specifically instructed the undertaking to take the measure in question in light of the potential lack of transparency in relations, the case-law provides for imputability to be established on the basis of indicators that would indicate the authorities' actual involvement or the unlikelihood of the authorities not being involved.[107]

The application of this assessment has been subject to some litigation during the past years.[108] Most recently, in the *Bank Tercas* case,[109] the EU Courts confirmed that a similar kind of indicators-based assessment is also to be used in order to establish whether a measure taken by a private undertaking can be considered as imputable to the State. In particular, the Court of Justice clarified that the standard of proof in this context is the same as that applicable to measures taken by public undertakings, albeit the indicators and evidence to be taken into account will necessarily differ, given the absence of links of a capital nature between a private undertaking and the State.[110]

While the application of the criterion has therefore been subject to continued refinement and development by the EU Courts, the main principles have been essentially settled. Moreover, conceptually, the criterion is relatively uncomplicated as it is simply about meeting a threshold of proof in relation to the State's actual or likely involvement in the measure in question.

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106 Case C-482/99 *France v Commission (Stardust Marine)* EU:C:2002:294.

107 *Ibid*., paragraphs 50-57. See also the Commission Notice on the notion of State aid, paragraphs 40-43.

108 See e.g. Case C-242/13 *Commerz Nederland v Havenbedrijf Rotterdam* EU:C:2014:2224; Case C-472/15 P *SACE and Sace BT v Commission* EU:C:2017:885; and Case C-160/19 P *Commune di Milano v Commission* EU:C:2020:1012.

109 Case T-98/16 *Italy and Others v Commission (Bank Tercas)* EU:T:2019:167 and Case C-425/19 P *Commission v Italy and Others (Bank Tercas*) EU:C:2021:154.

110 Case C-425/19 P *Commission v Italy and Others (Bank Tercas*), paragraphs 69-73. This was in doubt following the General Court's judgment, which contained language suggesting that a more stringent standard of proof may be applicable in the case of a measure taken by a private undertaking.

The State resources component has, however, proven more difficult to pin down.[111] While *PreussenElektra* appeared to establish a relatively bright-line test in terms of requiring that aid "*is granted directly or indirectly through State resources*",[112] the notion of what constitutes "State resources" has since been expansively interpreted by the EU Courts to encompass aid measures which are ultimately financed from the resources of private undertakings in a variety of situations, so long as those resources can be considered as being under "public control" (loosely defined) and therefore as "available" to the authorities.[113] State aid has thus been found to exist in the case of aid financed by way of parafiscal charges or compulsory charges imposed by the State on consumers and managed and apportioned in accordance with legislation, even if not administered by the public authorities;[114] payments required by the State that transit through a public entity which channels them to the beneficiaries and even in the case of a private entity intermediary designated by the State and subject to State control;[115] and payment obligations where the funds pass directly between the relevant private entities, if the additional costs are subject to an offsetting mechanism from the State.[116]

More recent case-law however, has stemmed the tide somewhat. In particular, in the *ENEA* case,[117] which has been credited by some commentators as "reviving" the *PreussenElektra* ruling,[118] a Polish scheme obliging electricity suppliers to provide to consumers a minimum percentage of electricity produced by cogeneration was held not to involve State resources as the additional costs to suppliers could not be passed on systematically to consumers.[119] Evidently conscious of the need to reign in the tendency to find State resources, the Court of Justice rejected an

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111 See M Clayton and MJS Catalan, 'The Notion of State Resources: So Near and yet so Far' (2015) European State Aid Law Quarterly 260, at 270; and Buendia, Buts and Cyndecka in their 'Review of EU Case Law on State Aid – 2019', who memorably comment at 483 that: "*the search for the precise elements that would transform private resources into State resources has become a quest as challenging as that of the search for the 'philosopher's stone' by the alchemists in the Middle Age […] As of today, it is still hard to predict, in view of the case law, whether certain schemes will be considered as involving State resources or not.*"

112 Case C-379/98 *PreussenElektra*, paragraph 58.

113 Case C-482/99 *France v Commission (Stardust Marine)*, paragraph 25.

114 Case C-262/12 *Vent De Colère and Others* EU:C:2013:851, paragraph 25.

115 Case C-206/06 *Essent Netwerk Noord and Others* EU:C:2008:413, paragraphs 66-70.

116 Case C-262/12 *Vent De Colère*.

117 Case C-329/15 *ENEA* EU:C:2017:671.

118 T Iliopoulos, 'Is *ENEA* the New *PreussenElektra*?' (2018) European State Aid Law Quarterly 19.

119 Case C-329/15 *ENEA*, paragraphs 27-30.

argument that the scheme involved State resources on the basis that many of the suppliers subject to the supply obligations were State-controlled public undertakings. The Court explained that these obligations applied to all suppliers, irrespective of whether or not they were public undertakings and the State-owned suppliers' resources were employed not due to the State exercising a controlling influence over them as shareholder, but rather due to the legislation providing for the purchase obligations,[120] echoing in a sense, the imputability assessment established in *Stardust Marine*.[121]

The Court has since moved further to consolidate the return to *PreussenElektra*. In a case concerning Germany's "EEG" renewable energy support scheme,[122] the Court of Justice dismissed the notion that a finding of State resources could be made simply on the basis that the legislation establishing the scheme permitted energy suppliers to pass-on the scheme's surcharges to consumers which they did so in practice, annulling a General Court judgment which very much represented the high-watermark for identifying State resources in this area.[123]

Therefore, the State resources criterion, while encompassing resources that go some way beyond public resources in the normal meaning of that term, remains a criterion that meaningfully restricts the notion of State aid. It is also an important ground of distinction between the notion of State aid under EU State aid law and the notion of a "subsidy" under the WTO anti-subsidy rules. Under the latter, for there to be a subsidy, it is sufficient that the State authorities direct a private body to provide a financial contribution from its own resources and the Appellate Body has explicitly rejected a "cost to Government" approach,[124] with the result that a

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120 *Ibid*., paragraphs 31-35. Similar reasoning was also applied by Court of Justice to restrict the notion of State resources in Joined Cases C-434/19 and C-435/19 *Poste Italiane* EU:C:2021:162, paragraphs 46-47.

121 See in this regard, Iliopoulos, 'Is *ENEA* the New *PreussenElektra*?', at 25 and A Giraud and S Petit, 'The *ENEA* Judgment: A formalistic Interpretation of Transfer of State Resources' (2018) European State Aid Law Quarterly 305, at 308.

122 Case C-405/16 P *Germany v Commission* EU:C:2019:268.

123 Case T-47/15 *Germany v Commission* EU:T:2016:281.

124 WTO Appellate Body Report in *Canada – Measures Affecting the Export of Civilian Aircraft*, WTO/DS70/AB/R (2 August 1999), at paragraph 160. For an analysis of this distinction, see M Slotboom, 'Subsidies in WTO Law and in EC Law – Broad and Narrow Definitions' (2002) Journal of World Trade Law 517, at 539-540.

PreussenElektra type arrangement could nonetheless be classified as a "subsidy" under the WTO anti-subsidy rules.[125]

Finally, and as with all of the EU competition rules, EU State aid law and therefore Article 107(1) TFEU only defines State aid in the case of measures taken in relation to "undertakings". The notion of an "undertaking" is common across the EU competition provisions, including the antitrust rules in Articles 101 and 102 TFEU, as well as the State aid rules and serves to define the scope of application of these rules.[126] Under the established case-law, a functional approach is to be adopted insofar as the classification of an entity as an "undertaking" is always relative to a specific activity. In this regard, the starting point is that activities are to be considered as being "economic" and therefore attracting the status of an "undertaking", if they consist in offering goods and services on a market,[127] which generally presupposes the existence of actual or potential competition. That said, in the area of healthcare and social security, services may be excluded from the application of the competition rules where they are provided in accordance with the principle of solidarity.[128]

The application of these conflicting principles has proven complex and the EU Courts have wrestled with the question of the applicability of the EU competition rules to healthcare and social security systems with varying degrees of public and private participation and competition.[129] The most recent case-law however, re-balances the position somewhat. In the landmark judgment of the Court of Justice in *Dôvera*,[130] which concerned the applicability of the EU State aid rules to Slovak public health insurance bodies, the Court of Justice held that the existence of a certain amount of competition with private operators in relation to the quality and scope of services, could not call into question the non-economic nature of those services where they were provided in accordance with the principle of solidarity

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125 Slotboom, 'Subsidies in WTO Law and in EC Law – Broad and Narrow Definitions', at 539-540.

126 This is a specific application of the broader principle that the dividing line between "economic activities" and "non-economic activities", serves to demarcate the application of the economic rules of the EU Treaties. See E Szyszczak, ' Public Service Provision in Competitive Markets' (2001) Yearbook of European Law 35, at 39.

127 See e.g. Joined Cases C-180/98 to C-194-98 *Pavlov and Others* EU:C:2000:428, paragraph 75.

128 See e.g. Joined Cases C-159/91 and C-160/91 *Poucet and Pistre v AGF and Cancava* EU:C:1993:63.

129 See e.g. D Gallo, 'Functional Approach and Economic Activity in EU Competition Law, Today: The Case of Social Security and Healthcare' (2020) European Public Law 569.

130 Joined Cases C-262/18 P and C-271/18 P *Commission and Slovak Republic v Dôvera zdravotná poist'ovňa, a.s.* EU:C:2020:450.

under State supervision. This approach, which has since been followed by the General Court in the *Italian National Health Service* case,[131] can be seen as part of a broader trend within the case-law and practice, towards the shielding of healthcare and social security from the application of the EU State aid rules.[132]

b. Compatibility assessment

Under the scheme of EU State aid control, in principle, all "State aid" as defined under Article 107(1) TFEU is unlawful and cannot be implemented unless it is notified to and approved by the Commission as State aid that is "compatible with the internal market",[133] subject to certain exemption regulations, the most important of which is the so-called General Block Exemption Regulation.[134]

Unlike the State aid definition stage where, as explained in Chapter 1, the rhetoric of the case-law denies the relevance of objectives, the State aid compatibility stage is orientated around the policy aim pursued. The various compatibility bases are set out in Articles 107(2)-(3) and 106(2) TFEU, which provide for different bases that depend on the purpose of the aid. These include aid to make good the damage caused by natural disasters or exceptional occurrences and aid to remedy a serious disturbance in the economy of a Member State, under Articles 107(2)(b) and 107(3)(b) TFEU respectively, which served as the compatibility bases for much of the financial crisis and Covid-19 aid, and most recently, aid to address the economic impact of Russia's invasion of Ukraine, under special "temporary frameworks" adopted by the Commission. Article 106(2) TFEU is the specific compatibility basis for the funding of SGEI. The most important compatibility provision is however, Article 107(3)(c) TFEU, which covers "*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*", and which

131 Case T-223/18 *Casa Regina Apostolorum della Pia Società delle Figlie di San Paolo v Commission* EU:T:2021:315.

132 In this context, see A Biondi and O Ștefan, 'EU Health Union and State Aid Policy: With Great(er) Power Comes Great Responsibility' (2020) European Journal of Risk Regulation 894.

133 Article 108(3) TFEU.

134 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 187/1 26.6.2014. This provides for certain categories of aid to be deemed as compatible, provided they meet detailed and prescriptive conditions, which are based around the Commission's "common assessment principles" (on which see below).

serves as the broadly applicable and "business as usual" compatibility base used by the Commission.

The Commission has substantially developed its approach to applying Article 107(3)(c) TFEU over time, including notably through the SAAP process in 2005-2009[135] and the more recent SAM initiative in 2012-2014,[136] and it has adopted detailed aid-type and sector specific guidelines setting out how it applies Article 107(3)(c) TFEU in each of these areas. The focus for the SAM was as much procedural as substantive, with the ambition of the Commission to be "big on big and small on small" by expanding the scope of the General Block Exemption Regulation and therefore reserving individual assessment by the Commission to the cases involving the most potentially distortive State aid.[137] From a substantive perspective however, the main innovation of the SAM was to devise "common assessment principles" against which all types of aid across all sectors were to be assessed and to revise all of the Commission's State aid compatibility guidelines in order to orientate them around this approach.[138]

The common assessment principles as formulated as part of the SAM required that: the aid pursues a well-defined “objective of common interest”, i.e. an objectively “good” or valuable policy aim recognised at the EU level; the aid is necessary in that it brings about an improvement in the objective of common interest that the market alone cannot deliver, including by remedying a well-defined market failure; the aid is an appropriate policy instrument to address the objective of common interest; it has an incentive effect on the beneficiary by causing it to act in a different manner to how it would in the absence of the aid; it is proportionate in that it is limited to the

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135 See the SAAP page on the European Commission's website, at https://ec.europa.eu/competition/state_aid/reform/archive.html (last accessed on 1 December 2022).

136 See the SAM page on the European Commission's website, at https://ec.europa.eu/competition-policy/state-aid/legislation/modernisation/background_en (last accessed on 1 December 2022).

137 SAM Communication, paragraphs 19-20. The aim was for the General Block Exemption Regulation ultimately to cover around 90% of all State aid measures – see EC Competition Policy Brief, ' State aid modernisation – a major revamp of EU State aid control', November 2014, at 1.

138 SAM Communication, paragraph 18. These guidelines were recently subject to a “fitness check” review which concluded in 2020 and are now being revised in line with the results of the review – see Commission Staff Working Document, *Fitness Check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance*, SWD(2020) 257 final, 30 October 2020 ("Fitness Check Commission Staff Working Document").

minimum necessary to deliver the contribution to the objective of common interest; and undue distortions of competition and trade are avoided and the overall balance of the measure is positive in light of its contribution to the objective of common interest.[139]

As can be seen from the above, the compatibility assessment both in terms of its Treaty basis as well as the policy approach of the Commission, is therefore orientated around the objective or policy justification pursued, which Article 107(3)(c) TFEU termed as the "*the development of certain economic activities or of certain economic areas*" and which following the SAM, the Commission had required to be an "objective of common interest", namely a legitimate public policy objective falling within the scope of the EU Treaties. This orientation was also supported by the case-law, which emphasised that the compatibility of an aid measure under Article 107(3)(c) TFEU must be assessed in light of the particular objective actually pursued, as opposed to other possible worthy public interest objectives.[140]

At the same time, while the policy justification of the measure is at the heart of the exercise, the assessment of distortions of competition and trade as part of the so-called "balancing exercise" is much more effects-focused than at the definition stage. Although the balancing of positive and negative effects is not necessarily carried out in a very scientific manner,[141] the competition and trade distortions arising from the aid are assessed more systematically. In particular, the Commission typically assesses two main types of effects: (i) the effects on the product markets concerned, including distortions of the competitive entry /

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139 See e.g. Communication from the Commission, Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200/1 28.06.2014. section 3.1.

140 See e.g. Case T-356/15 *Austria v Commission (Hinkley Point C)* EU:T:2018:439, paragraphs 224-226, 381 and 390.

141 In most cases, where the other common assessment principles are met and distortions of competition and trade can be considered to be relatively limited or can be addressed through remedial measures, the Commission effectively assumes that the positive effects of the aid outweigh the negative effects. While the Commission put forward proposals for a detailed economic approach to the balancing of positive and negative effects in its 2009 draft Communication: Common Principles for an Economic Assessment of the Compatibility of State Aid under Article 87.3 (section 6), this paper was not issued in final form and its proposals were not followed in practice. See also P Nicolaides, 'Shedding Light into the 'Black Box' of State Aid: The Impact of *Hinkley Point C* on the Assessment of the Compatibility of State Aid' (2021) European State Aid Law Quarterly 4, at 6, which refers to this aspect of the Commission's decision-practice as being the "black box" of EU State aid control, "*in the sense that the conclusions of balancing exercises are presented with little, if any, explanation of why the positives outweigh the negatives*".

expansion and exit process and therefore the creation of inefficient market structures, distortions of dynamic incentives, the possible creation or maintenance of market power, as well as the impact on upstream and downstream markets such as inputs; and (ii) potential location and trade effects in terms of displacement of economic activities.[142]

The focus of the Commission's assessment will often depend on the type of aid that is at stake, in light of the relevant market circumstances. In the case of the most competitively distortive types of aid, such as rescue and restructuring aid for undertakings in difficulty, the effects on the product markets in which the bailed-out company operates form the main part of the assessment, with far-reaching structural and behavioural remedies often required to be imposed on the beneficiary in order to limit the competitive impact of the aid on its rivals.[143]

Similar kinds of remedies have also been required in the case of the most competitively distortive types of emergency aid – the bail-out aid to financial institutions during the financial crisis[144] and the recapitalisations of individual companies during the Covid-19 pandemic under the Commission's Covid-19 Temporary State Aid Framework.[145] As an example of the latter, in its *Lufthansa* decision, which involved a €6 billion recapitalisation by the German Government of the airline group, the Commission required Lufthansa to divest airport slots and related assets at the airports at which it considered Lufthansa had significant market

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142 See e.g. Communication from the Commission, Framework for State aid for research and development and innovation, OJ C 414/1 28.10.2022 ("Commission RD&I Framework"), section 3.2.5; and Communication from the Commission, Guidelines on regional State aid, OJ C 153/1 29.4.2021 ("Commission Regional Aid Guidelines"), section 5.6.1; and Communication from the Commission, Guidelines on State aid to promote risk finance investments, OJ C 508/1 16.12.2021 ("Commission Risk Finance Guidelines"), section 3.2.5.2.

143 See the Communication from the Commission, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249/1 31.7.2014 ("Commission Rescue and Restructuring Aid Guidelines"), section 3.6.2. These may include divestments and reduction of capacity or market presence, prohibition on acquisitions and restrictions on certain commercial behaviours. Market opening measures from either the Member State or the beneficiary may also be considered.

144 See Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, OJ C 195/9 19.8.2009, section 4.

145 Communication from the Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, OJ C 91I/1 20.3.2020 (as amended), section 3.11.6.

power, in order to enable viable entry or expansion of activities by other airlines and therefore "*preserve effective competition"* at these airports. [146]

The Commission's assessment may also go beyond the specific markets on which the beneficiary is active. In particular, where the aid relates to new types of economic processes / activities, and conditions on the relevant input markets may be constrained, the impact on those markets will form a major consideration.[147]

On the other hand, in the case of regional aid, which is specifically intended to influence the choice made by investors of where to locate investment projects, the impact of those locational effects with respect to other alternative investment locations and the counterfactual more generally, will be key to the assessment.[148] The same is true where an aid scheme relates to specific sectors.[149]

The extent of economic and quantitative analysis will also depend on the specific circumstances of the case, including often the magnitude of the aid and therefore the degree of possible distortions, and has included economic modelling of the effects of the aid on factors such as market prices, trade flows, competitor entry / alternative investments and on the possible strategic behaviour of the aid recipient.[150]

For the most part, the EU Courts have left the Commission free to develop its own policy approach to assessing compatibility, reflecting the discretion that is explicitly

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146 Commission Decision of 25 June 2020 in SA.57153 (2020/N) – Germany – COVID-19 – Aid to Lufthansa, recital 230.

147 By way of example, see Commission Decision (EU) 2017/1436 of 1 December 2015 on State aid for Lynemouth Power Station biomass conversion SA.38762 (2015/C) which the United Kingdom is planning to implement, OJ L 2015/70 8.8.2017, which concerned State aid for conversion of coal-fired plants to biomass. As part of its examination, the Commission considered in some depth the possible distortions on the input market for industrial wood pellets and the further upstream raw material market for wood fibres.

148 See the Commission Regional Aid Guidelines, paragraphs 109-110.

149 See e.g. Commission RD&I Framework, paragraph 118; Commission Regional Aid Guidelines, paragraph 119; Commission Risk Finance Aid Guidelines, paragraph 175: "*A regional risk finance measure focussing only on certain sectors might also have negative delocalisation effects*".

150 See the Commission Decision (EU) 2015/658 of 8 October 2014 on the aid measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for support to the Hinkley Point C nuclear power station, OJ L109/44 28.4.2015, recitals 495-549, which represents a relatively high watermark in terms of the economic analysis of competition and trade distortions at the compatibility stage.

reserved to the Commission under Article 107(3) TFEU itself.[151] In its recent landmark judgment in the *Hinkley Point C* case,[152] however, the Court of Justice adopted what may be considered as a more liberal approach towards compatibility, emphasising that the only legal requirements under Article 107(3)(c) TFEU were that the aid is granted "*to facilitate the development of certain economic activities or of certain economic areas*" and that "*it must not adversely affect trading conditions to an extent contrary to the common interest*".[153]

Accordingly, there was no requirement that the aid be aimed specifically at a so-called "objective of common interest"[154] as all that was required was that the aid be intended to facilitate development of certain economic activities or areas and while the existence of a market failure was a relevant consideration, it was not an indispensable requirement.[155] The Court therefore appeared to follow the approach of its Advocate General Hogan, who conceived of Article 107(3)(c) TFEU and therefore the compatibility assessment of the Commission as being concerned solely with avoiding distortions of competition and trade in the EU internal market, as opposed to furthering broader EU policy objectives.[156]

The Commission has not formally responded to the *Hinkley Point C* judgment, although from its subsequent decision-practice and the revised compatibility guidelines it has published as part of its recent "fitness check" review, it would seem that the approach of the Commission is to maintain continuity. Indeed, the Commission has sought to retain most of its common assessment principles by

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151 Which introduces the compatibility bases under Article 107(3) TFEU by stating that "*The following may be considered as compatible with the internal market*" (emphasis added). See in this regard, Case C-730/79 *Philip Morris v Commission*, paragraphs 17 and 24.

152 Case C-594/18 P *Austria v Commission (Hinkley Point C)* EU:C:2020:742.

153 *Ibid*., paragraph 19.

154 *Ibid*., paragraphs 20 and 24. The application of this apparent requirement had been one of the main areas of dispute in that case, i.e. whether State aid in support of new nuclear energy generating capacity could be considered as pursuing an "objective of common interest". As noted, the Commission had interpreted this concept as covering a legitimate public policy objective falling within the scope of the EU Treaties. Austria had however argued that this concept required that the objective needed to be consonant with the interest of all or a majority of the EU Member States. The General Court had dismissed this argument, explaining that the concept of an objective of common interest meant that the objective pursued had to be in "the public interest" as opposed to just the private interest of the recipient of the aid. The Court of Justice, however, went further, rejecting the existence of the requirement altogether. See Nicolaides, 'Shedding Light into the 'Black Box' of State Aid', at 8-9.

155 *Ibid*., paragraphs 66-67.

156 See the opinion of Advocate General Hogan in Case C-594/18 P *Austria v Commission (Hinkley Point C)* EU:C:2020:352, paragraphs 56-57.

linking them to the two criteria in Article 107(3)(c) TFEU that had been identified by the Court of Justice,[157] with the "balancing exercise" for instance, being part of the "negative" condition that the aid does not unduly affect trading conditions to an extent contrary to the common interest. This also appears to be confirmed by the fact that these common assessment principles have essentially been reflected in the subsidy control chapter of the UK-EU TCA as the general principles of legality with which subsidies granted by both Parties must comply.[158]

The only clear change in the practice of the Commission thusfar, is that instead of referring to the policy objective of the aid as an "objective of common interest", the Commission now refers to this as the "development of an economic activity".[159] While the approach of the Commission now seems somewhat less prescriptive, it still appears to consider, notwithstanding the *Hinkley Point C* judgment, that it may place certain restrictions on what kinds of "economic activities" Member States may decide to support through State aid through the "balancing exercise". In the context of its new Climate, Environmental and Energy Guidelines for instance, the Commission effectively rules out State aid to support certain fossil fuels[160] and places additional conditions on aid in relation to natural gas,[161] given their negative effects from an environmental perspective.

It still remains to be seen how practice in relation to State aid compatibility may yet evolve following the *Hinkley Point C* judgment. On the basis of the current position however, the approach has not significantly changed. In particular, compatibility assessment crucially remains orientated around the relevant policy justification pursued by the aid measure, although it is possible in principle that a broader range of policy justifications could be admitted, rather than the more narrowly-drawn "objectives of common interest" introduced by the Commission.

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157 See e.g. the 2022 Commission RD&I Framework, paragraph 39.

158 See the UK-EU TCA, Article 366. As these TCA requirements are also applicable to subsidies granted by the EU, they cannot be inconsistent with the compatibility principles that would normally apply under the EU State aid regime (at least in the Commission's view).

159 For an account of the Commission's initial decision-practice since the *Hinkley Point C* judgment reflecting this, see Nicolaides, 'Shedding Light into the 'Black Box' of State Aid'.

160 Communication from the Commission, Guidelines on State aid for climate, environmental protection and energy 2022, OJ C 80/1 18.2.2022, paragraphs 74 and 128.

161 *Ibid*., paragraphs 74 and 129.

III. The existing conceptual principles and approaches to EU State aid control

Having sketched out the key aspects of both the definition and compatibility stages of the EU State aid regime, the next sections now move to the conceptual discussion. We begin by exploring the purported aims and objectives of EU State aid control and, having regard to the key elements of EU State aid control as interpreted by the EU Courts, conclude that competition and trade considerations represent the appropriate starting point. We then examine these considerations further, beginning with the two traditional standpoints on State subsidisation that informed the thinking in relation to the GATT and later WTO subsidy control framework, the "anti-distortion" and "injury-only" approaches, and their effective embodiments in the specific context of EU State aid control in the forms respectively of the so-called "internal market" and "competition" approaches.

a. The purported aims and objectives of EU State aid control

As explained in Chapter 1,[162] two main categories of aims and objectives are put forward in the literature in order to provide a justification for EU State aid control. The first and principal category of rationales is directly economics-based and is concerned with addressing the impact of subsidies on proper market functioning and their effects on competition and trade.[163] The second main category of rationales are more political economy-based and paternalistic. They include conceiving of EU State aid control as a commitment device for national governments which may have shorter-term horizons based on the domestic political cycle, to resist special interest groups that hold political power, or to foster better governance and transparency.[164] The development and coordination of EU Member States' industrial policy is also raised in this context, given the impact of the Commission's General Block

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162 Chapter 1, section III:c.

163 See the detailed discussion in sections III:b-c below.

164 See D Spector, 'The Economic Analysis of State Aid Control' in Derenne and Merola (eds), *Economic Analysis of State Aid Rules – Contributions and Limits*, 7-27, at 9-13 and V Verouden and P Werner, 'Introduction – The Law and Economics of EU State Aid Control', in Werner and Verouden (eds), *EU State Aid Control: Law and Economics*, 7-62, at 13-14, for a summary. See also the SAM Communication itself, which refers to the role of EU State aid control as "*a tool promoting a sound use of public resources for growth-orientated policies*" and that " *State aid control can also help Member States to strengthen budgetary discipline and improve the quality of public finances resulting in a better use of taxpayers' money*" (paragraphs 6 and 14).

Exemption Regulation and State aid compatibility guidelines, including its crisis "temporary frameworks", in shaping Member States' interventions.[165]

From a positive perspective, in line with the approach of the thesis, it seems evident that addressing the impact of aid on competition and trade constitutes the major objective of EU State aid control. This follows from the very definition of State aid in Article 107(1) TFEU itself, which refers to "distortions of competition" that "affect trade between EU Member States",[166] as well as the main compatibility basis in Article 107(3)(c) TFEU, which only allows State aid that "*does not adversely affect trading conditions to an extent contrary to the common interest*". It is also the objective that is invoked by the EU Courts themselves, which commonly state that the aim of Article 107 TFEU, "*is to prevent trade between Member States from being affected by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods*."[167]

On the other hand, the more paternalistic justifications for EU State aid control do not find any expression within the relevant provisions of Article 107 TFEU nor in the case-law of the EU Courts. Indeed, the relevance of such objectives for EU State aid control appears to have been rejected by the Court of Justice in the *Hinkley Point C* case,[168] through its finding that the only legal requirements for compatibility, and therefore the only factors by which the Commission may exercise control, were that the aid facilitates the development of certain economic activities or areas and that it does not adversely affect trading conditions to an extent contrary to the common interest in terms of its effects on the internal market. In particular, and as explained

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165 M Merola and F Caliento, 'Is the notion of aid broadening or shrinking over time, and if so, why? A subjective view on the rationale of the case-law', in L Parcu, G Monti and M Botta (eds), *EU State Aid Law: Emerging Trends at the National and EU Level* (Cheltenham: Edward Elgar, 2020) 18-53.

166 Article 107(1) TFEU states as follows: *"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market"* (emphasis added).

167 Case C-173/73 *Italy v Commission*, paragraph 13. By way of further example, see Case C-39/94 *SFEI and Others* EU:C:1996:285, paragraph 58 and Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* EU:C:2006:403, paragraph 27. The General Court recently put it more succinctly as the objective being simply "*to prevent intervention by a Member State from distorting the conditions of competition within the internal market*" – Case T-47/19 *Dansk Erhverv v Commission* EU:T:2021:331, paragraph 66..

168 Case C-594/18 P *Austria v Commission (Hinkley Point C)*.

above,[169] the Court disavowed the notion that State aid needed to be aimed specifically at a so-called "objective of common interest" from the perspective of EU public policy and industrial policy.

In fact, the Advocate General of the Court, whose opinion the Court largely followed, was even more explicit, stating that, "*As part of the competition chapter, that provision's [Article 107(3)(c) TFEU] purpose is to avoid distortions of competition and negative effects on trade. Its position in the Treaty does not point towards the aim of giving the Commission additional competences by way, for example, of a quasi-audit power to ensure that Member States spend public moneys in an efficacious and cost-effective fashion.*"[170]

Accordingly, and in light of the approach of this thesis in seeking to provide a positive account rather than a normative account, the thesis focuses solely on the economic competition and trade considerations in seeking to develop a conceptual framework for the notion of selective advantage.

b. Competition and trade considerations: the "anti-distortion" and "injury-only" approaches

The starting point for exploring the competition and trade considerations that inform international subsidy control are the two traditional standpoints on State subsidies, the "anti-distortion" and the "injury-only" approaches, which represented the two main strands of debate with respect to the competition and trade considerations which influenced discussions in relation to the GATT and later WTO subsidy control framework.[171] The two approaches, which were embraced explicitly or implicitly in

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169 Section II:b.

170 Opinion of Advocate General Hogan in Case C-594/18 P *Austria v Commission (Hinkley Point C)*, paragraph 56. It is further notable that such paternalistic considerations are not drawn on meaningfully in any of the existing literature in seeking to explain the concept of State aid. In Merola and Caliento, 'Is the notion of aid broadening or shrinking over time, and if so, why?' referred to in note 165 above, the authors ultimately note that theirs, "*is of course an entirely subjective view, based only on observation of the oscillatory trends in the case law, taking some distance from the peculiarities of the cases*" (at 50), rather than identifying clear instances of how such considerations played a role in shaping the notion of State aid.

171 See GC Hufbauer, 'Subsidy Issues After the Tokyo Round' in F Bergsten and W Cline (ed), *Trade Policy in the 1980s* (Washington: Institute for International Economics, 1983) 327-362, at 335-337; Rubini, *The Definition of Subsidy and State Aid*, at 43; and R Chari, H Hofmann and C Micheau, 'Rationales for State Aid Rules' in Herwig, Hofmann and Micheau (eds), *State Aid Law of the European Union*, 1-63, at 19, for overviews of the debate, which are drawn on in this section.

these discussions and the further academic debate that followed, held very different views on the merits of State subsidisation as an instrument of policy, and consequently, on the degree of control to which they should be subject.

On the one hand, the “anti-distortion approach" viewed subsidies negatively, essentially on the basis that they introduce distortions to market functioning by creating a disparity between the actual costs incurred in producing certain goods and those which must be borne by those firms undertaking their production. State subsidies therefore would reduce economic efficiency and overall welfare, potentially enabling the subsidising countries to establish “first-mover advantages” in new industries while “weathering out” adjustment in older industries and ultimately leading to damaging emulation from other countries, resulting in further wasteful distortions. Although the “anti-distortion approach" conceded that certain subsidies can address market failures, it considered any positive impact of subsidies to be “vastly exaggerated” and that any such justification is mostly self-serving and a cover for the principle that “one bad distortion deserves another”.[172] Consequently, the “anti-distortion approach" advocated an interventionist stance against State subsidies, with the response to a State subsidy offsetting so far as possible the initial distortion, irrespective of the specific level of trade impact.

On the other hand, the “injury-only approach" took a more benign view of State subsidies, recognising their importance in addressing market failures and considering that any market distortion will largely be felt in the subsidising State itself, while importing countries would enjoy the benefits deriving from cheap prices on subsidised goods. Consequently, the “injury-only approach" viewed subsidy control as being an issue that should primarily lie at the domestic level of the subsidising State, with control at the international level warranted only insofar as the subsidies in question concretely cause injury or otherwise have an actual negative impact on other countries’ interests.

The “anti-distortion” and “injury-only” approaches serve as the starting point for analysing GATT and WTO subsidy control in the academic literature, which builds upon them in various ways.

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[172] Hufbauer, ‘Subsidy Issues After the Tokyo Round', at 336.

The chief criticism of the “anti-distortion approach" has long been the charge that it fails to take sufficient account of the potential positive effects of State subsidisation in addressing market failures highlighted by the “injury-only approach", or at least fails to explain why such positive effects should be irrelevant to subsidy control.[173] One influential response to this was the so-called “entitlement model”, which sought to argue that domestic operators in one country are “entitled” as a matter of right to whatever domestic market outcome would have resulted from a “fair” competitive process that had not been distorted by foreign government subsidisation, irrespective of whether the subsidy might be considered as ultimately “efficient” from an economic perspective.[174] Such an “entitlement model” was however criticised on the basis that it is not clear why domestic operators ought to be “entitled” to such an outcome i.e. what are the sources of such “entitlement” from a legal or policy perspective and how does this differ from the rationalisation of purely protectionist impulses.[175]

One potential source of such entitlement, however, may be identified in the literature which positions international subsidy control within the context of the multilateral trade agreements under the WTO that form the baseline of international economic relations,[176] and bilateral free trade agreements that build upon these foundations. In this context, it is argued that international subsidy control is necessary in order to safeguard the market access commitments made under these agreements by preventing States from using subsidies in a manner that would nullify the commitments made,[177] which provides a basis for the “entitlement”.

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173 See for instance, W Schwartz and E Harper, 'The Regulation of Subsidies Affecting International Trade' (1972) Michigan Law Review 831.

174 See C Goetz, L Granet and W Schwartz, 'The Meaning of 'Subsidy' and 'Injury' in the Countervailing Duty Law' (1986) International Review of Law and Economics 17; and R Diamond, ‘A Search for Economic and Financial Principles in the Administration of United States Countervailing Duty Law’ (1990) Law and Policy in International Business 507.

175 See e.g. J Jackson, ‘Perspectives on Countervailing Duties’ (1990) Law and Policy in International Business 739.

176 The most important being the GATT in relation to trade in goods and the General Agreement on Trade in Services ("GATS") in relation to trade in services.

177 A Sykes, 'The Economics of WTO Rules on Subsidies and Countervailing Measures', Chicago John M Olin Law & Economics Working Paper No. 186 (2nd Series), May 2003; K Bagwell and R Staiger, 'Will International Rules on Subsidies Disrupt the World Trading System?' (2006) The American Economic Review 877; R Howse, 'Do the World Trade Organization Disciplines on Domestic Subsidies Make Sense? The Case for Legalizing some Subsidies' in K Bagwell, G Bermann and P Mavroidis (eds), *Law and Economics of Contingent Protection in International Trade* (Cambridge: CUP 2009) 85-

In this regard, it is argued that subsidies may not only have the effect of protection against imports, reducing the value of agreed reductions to tariffs and tariff rate quotas in the subsidising State, but they may also have an impact in relation to market access in third countries by diverting customers from one exporting country to the exporting country engaging in State subsidisation of its exporters.[178] Even in specific sectors where no substantive market access commitments may have been made, it is argued that subsidy control is a *sine qua non* to create the conditions for these ultimately to come about and is therefore justified "across the board".[179]

On the other hand, the "injury-only approach", with its emphasis on determining the overall impact of a State subsidy, is buttressed by a substantial body of literature examining the issues from an economic perspective and therefore seeking to identify more precisely the circumstances in which subsidies may produce harmful effects. This includes notably, the strategic trade literature,[180] which grounds the justification for international subsidy control in addressing possible rent-seeking in imperfectly competitive markets, leading to a reduction in overall welfare.[181]

In the context of the "injury-only approach", there is also an influential strand in the literature which questions whether countervailing action[182] has any justification at all on the basis that the welfare effects in the importing country from subsidised imports

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102; and A Sykes, 'The Questionable Case for Subsidies Regulation: A Comparative Perspective' (2010) Journal of Legal Analysis 473.

178 Sykes, 'The Economics of WTO Rules on Subsidies and Countervailing Measures'.

179 In this context however, it is also questioned whether subsidy control disciplines could be counter-productive insofar as they could discourage States from entering into trade agreements in the first place in that they reduce their ability to use subsidies as a valuable policy instrument for purposes other than trade protection – see Bagwell and Staiger, 'Will International Rules on Subsidies Disrupt the World Trading System?'; and Sykes, 'The Questionable Case for Subsidies Regulation: A Comparative Perspective'.

180 The starting point for the strategic trade theory is the initial work of Brander and Spencer, in J Brander and B Spencer, 'Export Subsidies and International Market Share Rivalry' (1985) Journal of International Economics 83, and summarised in P Krugman, M Obstfeld and M Melitz, *International Economics Theory and Policy* (Boston: Pearson, 2015), at 330-333.

181 As explained, the potential for States to use subsidies in order to rent shift arises where the market is imperfectly competitive and therefore there are supra-competitive profits or rents to appropriate, although this leads to a reduction in overall welfare. The strategic trade theory has however been criticised on the basis that, *inter alia*, States seeking to behave in this manner would require much more information that is likely to be available, in particular, in relation to the possible reaction of foreign competitors of the subsidised firm.

182 Countervailing action refers to unilateral trade defence measures undertaken by the importing country against subsidised imports, which are now regulated under the WTO SCM Agreement.

are generally net-positive, whereas any welfare reductions would principally occur in the subsidising country itself and should not be the concern of international subsidy control.[183] One response to this is that the unfettered use of subsidies in international trade can lead to a tit-for-tat policy of counter-subsidies in escalating progression which could seriously damage overall welfare, drawing on real-world experience in the agricultural sector as an example.[184]

c. The "anti-distortion" and "injury-only" approaches in the EU State aid context – the "internal market" and "competition" approaches

Having sketched out the two traditional standpoints on State subsidies, we now move to the specific context of EU State aid control and explain how these standpoints correspond to the strands in the debate around the SAAP in relation to the purpose and nature of the EU State aid rules,[185] which as explained above, represents the logical starting point for any further conceptual analysis in relation to EU State aid law.

The "anti-distortion approach" as developed, may be said broadly to find expression in the so-called "internal market approach", which represented the most trenchant criticism of the SAAP. In particular, proponents of the "internal market approach" argued against the use of a more "*refined economic approach*" in EU State aid law analysis that was proposed in the SAAP.[186] Rather, in line with EU free movement

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183 See A Sykes, 'Countervailing Duty Law: An Economic Perspective' (1989) Columbia Law Review 199; M Trebilcock, 'Is the Game Worth the Candle – Comments on a Search for Economic and Financial Principles in the Administration of US Countervailing Duty Law' (1990) Law and Policy in International Business 723; and A Green and M Trebilcock, 'The Enduring Problem of World Trade Organization Export Subsidies Rules', in K Bagwell, G Bermann and P Mavroidis (eds), *Law and Economics of Contingent Protection in International Trade* (Cambridge: CUP 2009) 116-171. In the view of some of these commentators, provocatively, rather than imposing countervailing duties, the importing country could simply "send a thank you note".

184 Jackson, 'Perspectives on Countervailing Duties'.

185 We are not discussing the SAAP here to consider the Commission's approach in the compatibility stage, which is addressed in section II:b above. Rather, it is to introduce the debate in the literature in relation to the purpose and nature of the EU State aid rules that the SAAP sparked off.

186 See principally: Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy'; Biondi, 'Some Reflections on the Notion of "State Resources" in European Community State Aid Law'; Buendia-Sierra and Smulders, 'The Limited Role of the "Refined Economic Approach" in Achieving the Objectives of State Aid Control: Time for Some Realism'; and Di Bucci, 'Comments on the Paper 'Selectivity, Economic Advantage, Distortion of Competition and Effect on Trade'. For a summary, see T Kleiner, 'Modernization of State aid policy' in E Szyszczak (ed), *Research Handbook on European State Aid Law*, 1-27 (referring to the "derogatory model").

law analysis,[187] it was argued that State aid law analysis must necessarily be *qualitative* rather than *quantitative*, drawing on similar notions of discrimination as under the free movement rules[188] and with the compatibility bases under Articles 107(2)-(3) TFEU and 106(2) TFEU considered as being akin to the public interest-orientated derogations to the free movement rules which are, like the State aid compatibility bases, assessed in light of the principle of proportionality.[189]

In line with the interventionist approach to subsidy control proposed by the "anti-distortion approach", it is argued that there is no particular "numerical threshold" as such in terms of impact on competition and trade for intervention, as is the case under the EU free movement rules,[190] provided an aid is identified. Drawing inspiration from repeated pronouncements of the EU Courts emphasising the unity of purpose shared by the EU State aid rules and the internal market rules as to "*ensure free movement […] under normal conditions of competition*",[191] this approach essentially construes the rationale for EU State aid control as reinforcing the specific trade liberalisation committed to within the EU as per the developed "anti-distortion approach", namely the EU internal market as an area of undistorted competition.[192] In this sense, proponents of the "internal market approach" argue

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187 See C Barnard, *The Substantive Law of the EU – The Four Freedoms* (Oxford: OUP, 2019).

188 For a paradigm example of the potential similarity in approach see A Biondi, 'Every Family is the Same, Every Family is Different: State Aid and Free Movement' (2017) European State Aid Law Quarterly 34, which discussed Case C-169/08 *Presidente del Consiglio dei Ministri* EU:C:2009:709. As pointed out by Biondi, the Court of Justice applied both the free movement and EU State aid rules and essentially the same arguments were used to find that the measure at issue infringed the free movement of services as well as constituting State aid.

189 Albeit while the free movement rules do not permit derogations for economic considerations, this is evidently accepted under the State aid compatibility bases, in particular, Article 107(3)(c) TFEU itself, which covers "*aid to facilitate the development of certain economic activities or of certain economic areas*".

190 In the seminal *Dassonville* case, the Court of Justice explained that any measures "*enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions"* (Case C-8/74 *Dassonville* EU:C:1974:82, paragraph 5.) For an example of the wide scope of application, see Case C-67/97 *Bluhme* EU:C:1998:584, which concerned restrictions on the keeping of bees other than brown bees on the small and remote Danish island of Læsø.

191 See e.g. Case C-18/84 *Commission v France* EU:C:1985:175, paragraph 13.

192 The nature of the internal market as an area of undistorted competition now appears in the TFEU at Protocol (No 27) on the Internal Market and Competition. This was previously at Article 3(g) EC, but it was moved into a protocol in the Lisbon Treaty, albeit with no apparent legal impact as the EU Courts have continued to refer to "*a system of undistorted competition, such as that provided for by the Treaty*" (see e.g. Case C-1/12 *Ordem dos Técnicos Oficiais de Conta*s EU:C:2013:127, paragraph 88).

that the EU State aid rules seek to prevent Member States using subsidies to replace the State barriers to free movement eliminated by the EU free movement rules i.e. to prevent protectionism against foreign goods, services, workers and capital, and disadvantages due to discriminatory taxation.

Finally, they also place significant weight on the Spaak report that ultimately led to the Treaty of Rome establishing the original European Economic Community[193] and its reference to State aid as distorting "*competition and the distribution of economic activities*".[194] Drawing on this, they argue that the EU State aid rules also seek to prevent Member States using subsidies as a tool of *macro-economic competition* to promote their own industries in penetrating cross-border markets and attracting investment and economic activities to their territories, i.e. to maintain a level-playing field between EU Member States in the internal market,[195] as opposed to simply being about *micro-economic competition* between undertakings.

As for the "injury-only approach", in the specific context of EU State aid control, this approach broadly correlates with the "competition approach", advocated by commentators who essentially supported the use of a more "*refined economic approach*" in EU State aid law analysis in line with the SAAP.[196]

On the "harm" side, this approach grounded State aid control principally in the rationale of avoiding negative spill-over effects in the form of competitive distortions, affecting, in particular, operators from other Member States, which granting authorities fail to internalise in their decision-making and ultimately, potential subsidy

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193 Intergovernmental Committee Created by the Messina Conference, Report of the Heads of Delegation to the Ministers of Foreign Affairs, 21 April 1956, known unofficially, as the "Spaak Report".

194 Spaak Report, at page 57.

195 See also in this regard, the more recent opinion of Advocate General Wathelet in Joined Cases C-20/15 P and C-21/15 P *European Commission v World Duty Free and Others* EU:C:2016:624, which stated that the State aid rules "*are intended in particular, to ensure that a Member State is not able to favour undertakings that pursue cross-border activities*" those rules, "*being the 'flip side' or 'mirror', as they were called at the hearing, of the FEU Treaty provisions on the free movement of goods, persons, services and capital which are intended to prevent obstacles being put in the way of cross-border activities*" (paragraph 137).

196 See principally: Friederiszick, Roller and Verouden, 'European State Aid Control: An Economic Framework'; D Neven and V Verouden, 'Towards a More Refined Economic Approach in State Aid Control' in W Mederer, N Pesaresi and M Van Hoof (eds), *EU Competition Law – Volume IV: State Aid* (Leuven: Claeys and Casteels, 2008) Book 1, Part 1, Chapter 4; and the majority of the contributions in Derenne and Merola (eds), *Economic Analysis of State Aid Rules – Contributions and Limits*. For a summary, see Kleiner, 'Modernization of State aid policy' (referring to the "competition model").

wars. Some proponents of this approach therefore argued that greater emphasis be given to the distortion of competition and effect on trade component in the first stage of State aid analysis – the definition of State aid – in order to distinguish between subsidies that would or would not be harmful from this perspective,[197] which is in line with the greater emphasis on the specific effects of a given State aid under the "injury-only approach".

Others proposed that the assessment of competitive distortions be carried out as part of a "balancing test" in which the overall impact of the State aid would need to be analysed in detail, weighing up both the positive and negative effects to determine whether, on balance, the impact is positive and therefore the State aid measure is justified.[198] On the "positive" side and recognising the role of State aid in addressing pre-existing distortions in line with the "injury-only approach", this standpoint accorded a central role to the concept of market failure[199] which would otherwise prevent the attainment of an important public policy objective and therefore served as the justification for State intervention.[200]

In terms of assessing distortions, whether they would be analysed upfront as part of a screening exercise, or as part of a "balancing test", the "competition approach"

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197 See: Crocioni, 'Can State Aid Policy Become More Economic Friendly?'; Ahlborn and Berg, 'Can State Aid Control Learn from Antitrust?'; Hilderbrand and Schweinsberg, 'Refined Economic Approach in European State Aid Control – Will it Gain Momentum?'; Papandropoulos, Nitsche, Van de Walle de Ghelcke, Waelbroeck, Derenne, Louis, Merola, Ibáñez Colomo, De Beys and Bousin, 'Selectivity, Economic Advantage, Distortion of Competition and Effect on Trade', which also proposed a greater "effects-based approach" to identifying whether there is a "selective advantage" – to similar effect, see also JL Da Cruz Vilaça, 'Material and Geographic Selectivity in State Aid — Recent Developments' (2009) European State Aid Law Quarterly 443.

198 See in particular: Friederiszick, Roller and Verouden, 'European State Aid Control: An Economic Framework'; R Nitsche and P Heidhues, 'Study on Methods to Analyse the Impact of State Aid on Competition' Report prepared for the European Commission, Directorate General for Economics and Financial Affairs (Final Report ECFIN/R/2004/004) Bruxelles (2005); Office of Fair Trading, 'European state aid control', OFT82, November 2005, as well as the SAAP itself and the Commission's 2009 draft Communication: Common Principles for an Economic Assessment of the Compatibility of State Aid under Article 87.3.

199 The market failures most commonly referred to include: externalities; public goods (as a distinct form of externality); information asymmetries / missing markets; coordination problems and the creation of market power.

200 While market failure is seen as being of central importance, there is also a recognition that the concept of market failure should not be drawn too narrowly to exclude any equity considerations, which also motivate State aid measures, and should not only focus on "pure" efficiency considerations. The Commission's 2009 draft Communication for its part, addresses such equity objectives separately.

proposed a systematic assessment,[201] focusing on the impact on the beneficiary's competitors and using similar economic analytical tools to those in traditional competition law analysis.[202] For instance, the relevant economic market or markets would need to be defined and the more concentrated a market is, the greater the degree of existing market power held by the beneficiary, the more selective the aid and if the aid affects the beneficiary's marginal or variable costs and therefore its output and pricing decisions, the more likely that the aid would give rise to competitive distortions.[203] On the effect on trade side, market definition analysis also would be used to assess whether the relevant geographic market is wider than just national and encompasses an area which covers at least two Member States.

IV. The application of the "injury-only / competition" and "anti-distortion / internal market" approaches to contemporary EU State aid control

Contemporary EU State aid control appears to draw on both the "injury-only / competition" and "anti-distortion / internal market" approaches. In terms of their substance, State aid definition and compatibility appear to address both the issues of micro-economic rivalry between undertakings that is emphasised as part of an "injury-only / competition approach" and also macro-economic rivalry that is emphasised as part of an "anti-distortion / internal market approach". These two elements were in fact already explicit in the Spaak Report, which referred not only to State aid distorting "*competition and the distribution of economic activities*", i.e. the macro-economic competition dimension, but also "*the essential guarantees that must be given to businesses, that the game would not be distorted by artificial*

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201 The distortions of competition most commonly referred to include: distortions caused by supporting inefficient production affecting entry and exit decisions; distortion of dynamic incentives including incentives to innovate; distortions caused by increasing market power leading to potential predation and foreclosure of rivals; and distortion of production and location decisions across Member States.

202 Although proponents of this approach acknowledge that these concepts would need to be adapted for the purposes of State aid control seeing that the measures concerned and therefore the manner in which they harm competitors, are different – see e.g. Ahlborn and Berg, ''Can State Aid Control Learn from Antitrust?', at 48-49.

203 Specifically in relation to competitive distortions, see in particular, Office of Fair Trading, 'Public Subsidies', OFT750, November 2004 and Frontier Economics, 'The effects of public subsidies on competition, a report prepared for the Office of Fair Trading', November 2004, which sets out the main characteristics of the relevant market and the subsidy itself which are important in determining the magnitude of the effect on competition.

advantages given to their competitors",[204] i.e. micro-economic competition, and they have both been reflected as part of contemporary EU State aid control.

Insofar as the State aid definition stage is concerned, the MEOP and the *Altmark* criteria or compensation principle, which typically concern individual measures that apply only to single undertakings, appear intuitively to be primarily concerned with micro-economic competition. Certain individual aid measures may of course have the capacity to engage macro-economic competition concerns, in particular, where the domestic undertaking favoured is a significant player that has the capacity to really affect cross-border competition and trade in the relevant markets, or where a foreign undertaking is incentivised to invest in the Member State concerned. But the more immediate and salient concern in the case of most individual aid measures in favour of a single undertaking only would seem to be the impact on those undertakings that compete with the undertaking favoured.

This would appear also to be confirmed by the language the EU Courts themselves use in the context of the MEOP and the *Altmark* framework, referring to measures which place the recipient undertaking "*in a more favourable financial situation than that of its competitors*"[205] or "*in a more favourable competitive position than the undertakings competing with them*."[206] It is also arguably apparent from the fact that the free movement law provisions, which provide the inspiration for the macro-economic competition focus of the "internal market approach", apply only with respect to Member State "measures", i.e. rules that are of broader application than just decisions in individual cases, for which a certain degree of consistency and generality is required.[207]

On the other hand, the "derogation framework" that is applied to assess the selectivity of public authority measures that are more broadly applicable to

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204 Spaak Report, page 57.

205 See e.g. Case C-124/10 P *Commission v EDF*, paragraph 76: Case T-747/15 *EDF v Commission* EU:T:2018:6, paragraph 76; and Case C-131/15 P *Club Hotel Loutraki and Others v Commission* EU:C:2016:989, paragraph 75.

206 See e.g. Case C-280/00 *Altmark* itself, at paragraph 87; Case C-34/01 *Enirisorse* EU:C:2003:640, paragraph 31; and Joined Cases C-66/16 P to C-69/16 P *Comunidad Autónoma del País Vasco and Itelazpi v Commission* EU:C:2017:999, paragraph 45.

207 See e.g. Case C-21/84 *Commission v France* EU:C:1985:184, paragraph 13; and Case C-387/99 *Commission v Germany* EU:C:2004:235, paragraph 42. See also, the opinion of Advocate General Darmon in Case C-45/87 *Commission v Ireland (Dundalk)* EU:C:1988:329, paragraphs 61-68, which addresses the application of this criterion in the case of a single public procurement exercise.

categories of undertakings and / or a particular sector or sectors, appears to be more concerned with macro-economic competition than micro-economic competition.

This is evidenced from various examples in the case-law, in which sectoral measures were shown to be animated by protectionist concerns.[208] It is further apparent from the fact that the competitive relationship between those undertakings to which the measure applies and those to which it does not, and therefore the issue of micro-economic competition, is not normally a relevant factor for assessing factual and legal comparability under the test,[209] and that even if a measure applies to all undertakings in a sector and therefore to all undertakings which are in a relationship of competition, it can still be considered as selective if the derogation test is met.[210] This also seems to be confirmed by the language that the EU Courts use in the context of measures applicable to categories of undertakings and where the derogation test is applied, referring to measures which place those to which it applies "*in a more favourable financial position than other taxpayers*"[211] or simply "*others*"[212] rather than specifically compared to the beneficiaries' competitors.

Importantly, the macro-economic competition dimension also provides a satisfactory justification for the “State resources” requirement in the definition of State aid, which as noted above, is not a requirement under the WTO anti-subsidy rules. As explained in Chapter 1, when the status of the State resources component was finally confirmed as a separate requirement for definition as State aid in the landmark

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208 See for instance, Case C-75/97 *Belgium v Commission (Maribel bis-ter)*, which concerned reductions in social charges for manual workers in those sectors which were expressed by the scheme as being the sectors that were most exposed to international competition; and Case C-66/02 *Italy v Commission* EU:C:2005:768, which concerned preferential tax treatment for the banking sector and which the Court of Justice ultimately found was intended to improve the competitiveness of domestic operators in a sector where they faced strong international competition. Both cases are discussed in Chapter 3 below.

209 See Chapter 3, section IV below.

210 A good example is Case C-143/99 *Adria-Wien* EU:C:2001:598, which concerned an Austrian rebate of energy taxes for all energy intensive undertakings in the manufacturing sector, but not in the services sector. As explained in Chapter 3, section II below, the Court of Justice considered the rebate to be selective on the basis that both the manufacturing sector and the services sector were comparable in light of the ecological objective of the overall energy taxation scheme in Austria (notwithstanding the lack of competition between them).

211 E.g. Joined Cases C-78/08 to C-80/08 *Paint Graphos* EU:C:2011:550, paragraph 46; Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free and Others*, paragraph 56; and Joined Cases C-164/15 P and C-165/15 P *Air Lingus and Ryanair v Commission* EU:C:2016:990, paragraph 41.

212 E.g. Case C-270/15 P *Belgium v Commission*, paragraph 48.

PreussenElektra case,[213] it was seemingly on the basis of the language of Article 107(1) TFEU alone,[214] and without reference to any underlying rationale that could provide a justification.[215] Meanwhile, the main rationale that is advanced in the broader literature, including by various Advocates General, that the State resources requirement is essentially a pragmatic one to avoid the requirement to screen all regulation for possible selective advantages and it therefore serves to limit the interference of EU State aid law with regulatory autonomy,[216] does not seem entirely satisfactory. While such a rationale may provide a general justification for requirements that restrict the scope of the notion of State aid, it does not necessarily provide an explanation for why the particular requirement, the involvement of State resources, is itself justified.

The imperative of securing a level-playing field between EU Member States in terms of macro-economic rivalry, however, provides a more specific explanation. While all of the EU Member States are fundamentally equal within the scheme of the EU Treaties,[217] they have very different financial capacities and therefore very different capabilities to support their industries and economies. The potential for such "deep-pockets distortions" in the internal market has long been recognised by the Commission[218] and was exposed in stark terms by EU Member States' disparate State aid responses to the financial crisis and the Covid-19 pandemic.[219] This in

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213 Case C-379/98 *PreussenElektra*.

214 *Ibid*., paragraphs 57-58.

215 And contrary to a teleological approach based on the purported aim of the State aid rules in avoiding competitive distortions in line with the "effects-based approach" as explained above.

216 See in this regard, the opinions of Advocate General Jacobs in Case C-52/97 *Viscido and Others v Ente Poste Italiane*, paragraph 16 and in Case C-379/98 *PreussenElektra*, paragraph 157. See also Biondi, 'Some Reflections on the Notion of "State Resources" in European Community State Aid Law', who refers to the State resources requirement as *inter alia* serving the purpose of "*balancing legitimate State policies against the needs of the single market*" and representing an "*acknowledgement of the need to ensure that EC law is not excessively overstretched*" (at 1438).

217 Article 4(2) TEU.

218 See e.g. the speech by the then Commissioner for Competition, 'Doing more with less – State aid reform in times of austerity: Supporting growth amid fiscal constraints', King's College London, 11 January 2013 (available on the Commission's website): "*State aid control is more essential than ever to ensure even conditions in the Single Market. To do this, our control will also respond to the growing disparities in the fiscal capacities of different EU countries – we can call them the 'deep-pockets distortions'.*"

219 In relation to the Covid-19 pandemic, see A Lamadrid and Buendia-Sierra, JL, 'A Moment of Truth for the EU: A Proposal for a State Aid Solidarity Fund' (2020) Journal of European Competition Law & Practice 3. For detailed analysis of EU Member States' Covid-19 State aid response, see I Agnolucci, 'Will COVID-19 Make or Break EU State Aid Control? An Analysis of Commission Decisions Authorising Pandemic State Aid

turn, led to the establishment of the ground-breaking EU Recovery and Resilience Facility, a temporary EU fund to support Member States' recovery and adaptation plans[220] and there have been calls for this kind of common EU fund to become a permanent feature of EU economic policy,[221] including on account of redistribution or fairness.

In this sense, the State resources component in the definition of State aid incorporates a fairness aspect to the macro-economic competition that may be pursued by Member States through State measures. Ultimately, it is only where State support involves State resources that such macro-economic rivalry is a particular cause for concern given the very different financial capacities of the EU Member States. The expansive interpretation of what constitutes "State resources" in this context can further be justified with reference to the fact that Member States' respective economic strengths are ultimately attributable to the size and productivity of their national economies,[222] and the profitability of their private undertakings.

Similarly, when it comes to the State aid compatibility stage, the detailed assessment of the effects of the aid in terms of competitive and trade distortions addresses both micro-economic and macro-economic competition issues. As explained above, the micro-economic competition dimension is reflected in the Commission's examination of product market effects and is particularly apparent from the framework for assessing the most competitively distortive types of aid, namely rescue and restructuring aid for undertakings in difficulty and emergency bail-outs and recapitalisations during the financial and Covid-19 crises, where significant structural and behavioural remedies have been required to limit the competitive impact of the aid on the beneficiary's competitors. At the same time, the macro-economic competition dimension is encapsulated by the assessment of whether the aid results in locational effects, which is particularly significant in the case of regional aid and aid schemes which relate to specific sectors.

Measures' (2022) Journal of European Competition Law & Practice 3. The same phenomenon appears again to be emerging in Member States' State aid responses to the energy crisis resulting from Russia's invasion of Ukraine – see Financial Times, 'German €200bn energy support plan sparks 'animosity' within EU', 30 September 2022.

220 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57/17 18.2.2021.

221 See E Cornago and J Springford, 'Why the EU's recovery fund should be permanent', Centre for European Reform Policy Brief, November 2021.

222 Indeed, State budgets are largely dependent on taxation, which in turn, depends on economic performance.

Similarly, in terms of assessment methods, EU State aid control draws on both the "injury-only / competition" and "anti-distortion / internal market" approaches, but interestingly, distinguishes between the State aid definition and compatibility stages. On the one hand, as explained above, the assessment of distortion of competition and effect on trade at the definition stage, is qualitative as opposed to quantitative and in principle, is set at a very low threshold such that it is, for all intents and purposes, effectively presumed, meaning that State aid is considered essentially as *per se* distortive, i.e. irrespective of its effects.[223] On the other hand, the assessment of competitive and trade distortions at the compatibility stage is based on more rigorous and systematic effects-based assessment, including quantitative economic analysis as appropriate, as explained above.

This kind of distinction appears meaningful and is not observed in other areas of EU economic law, where their respective definition and justification stages are internally consistent in terms of assessment techniques. For instance, when it comes to EU competition law, the questions of whether there is a *prima facie* restriction of competition or abuse for the purposes of Articles 101 and 102 TFEU and whether the agreement or conduct in question may nonetheless be justified on the basis of efficiencies pursuant to those provisions, are both based on systematic and often quantitative economic analysis.[224] Similarly, with respect to EU free movement law, the questions of whether a State measure *prima facie* infringes the relevant provisions or may nonetheless be justified on the basis of public interest concerns are addressed with reference to concepts, including direct and indirect discrimination, hindrance to market access and proportionality, that are all assessed

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223 It also seems difficult to argue that the selectivity component somehow serves as a proxy for distortions of competition and trade as it does not have reference to economic markets – see Papandropoulos, Nitsche, Van de Walle de Ghelcke, Waelbroeck, Derenne, Louis, Merola, Ibáñez Colomo, De Beys and Bousin, 'Selectivity, Economic Advantage, Distortion of Competition and Effect on Trade', at 142.

224 By way of example, see the Commission's decision of 25 May 2013 in Case COMP/AT.39595 – *Continental / United / Lufthansa / Air Canada*, which concerned the revenue-sharing joint venture between these Star Alliance members in relation to transatlantic routes. The assessment of restriction of competition for the purposes of Article 101(1) TFEU involved the prior definition of the relevant economic markets and the assessment of likely anti-competitive effects based in particular on the key market characteristics, namely, market shares, closeness of competition, demand price elasticity and buyer power, and whether the parties' competitors could counter any likely anti-competitive effects. Similarly, the assessment of whether the agreement could nonetheless be justified on the basis of efficiencies pursuant to Article 101(3) TFEU, involved economic analysis, including the use of a theoretical model of competitive interaction to assess whether a fair share of the claimed efficiencies would accrue to consumers.

qualitatively, rather than quantitatively.[225] The distinction in assessment methods when it comes to State aid definition and State aid compatibility suggests that there is a very different nature to the assessment as between these two stages.

In light of the above, and to conclude this section, a coherent conceptual framework for State aid control requires an approach that meets two requirements. First, it must place central emphasis on both the micro-economic competition and macro-economic competition aspects, i.e. competition between undertakings and competition between States. Second, it must also distinguish between and rationalise the very different nature of the assessment at the definition and compatibility stages.

V. Building on the "internal market approach" with the notion of equality of opportunity

To meet this challenge, this thesis proposes building on the "internal market approach" to develop an "equality of opportunity approach". Under this approach, the existence of a selective advantage and therefore State aid, would be assessed with reference to whether a State measure creates inequality of opportunity between undertakings or economic sectors, and therefore undermines fair micro-economic competition between undertakings or fair macro-economic competition between EU Member States.

a. The relationship between the nature of the international subsidy control framework and the substantive liberalisation commitments

To begin, the central point of reference of the "internal market approach", that the EU State aid disciplines are a reflection of the specific liberalisation commitments

[225] By way of example, see Case C-333/14 *The Scotch Whisky Association* EU:C:2015:845, in which the Court of Justice held that the system of minimum pricing for alcoholic drinks proposed by the Scottish Government could *prima facie* infringe Article 34 TFEU on the free movement of goods on the basis that it was capable of hindering access to the market for alcoholic drinks that are lawfully marketed in other Member States as it "*prevents the lower cost price of imported products being reflected in the selling price to the consumer*" (paragraph 32). In terms of justification, the Court recognised that the system could be justified on public health grounds, in that it appeared capable of reducing the consumption of alcohol and was part of a broader policy by the Scottish Government to reduce the consumption of alcohol, which was applied in "*a consistent and systematic manner*" (paragraph 38). However, the Court ultimately considered that the measure was more restrictive than necessary, as a system of taxation could achieve the same objective yet would interfere less with retailers' price formation.

made as part of the EU internal market, carries intuitive appeal as it provides a justification for the low threshold required for competitive and trade effects in the definition stage and the consequent invasiveness of EU State aid control.

By putting the trade agreement of which the subsidy / State aid rules are a part at the heart of subsidy / State aid control, this approach provides an intuitive justification for the differences between the WTO anti-subsidy rules and the EU State aid rules, as the nature of any international subsidy control will be influenced by the nature of the broader substantive obligations in the specific trade agreement that it is designed to complement. In the context of the WTO Agreements, those commitments concern market access, and are essentially limited to the restriction of import duties to those committed to under each Member's GATT schedule as well as the prohibition of quantitative restrictions[226] and the most-favoured-nation ("MFN") and national treatment non-discrimination obligations[227] in the area of goods, and shallower versions of these obligations in the area of services.[228] In comparison, the degree of integration under the EU internal market is much deeper in light of the free movement of goods, services, capital and workers, with the result that a far more intrusive subsidy control applies and with the concept of State aid biting at lower thresholds of competitive and trade impacts.

The same relationship is also borne out by the EU's own practice in its trade agreements with third countries. The EU has been very active in seeking to broaden international subsidy control by including additional disciplines on subsidies in its trade agreements that go beyond the WTO anti-subsidy rules.[229] Broadly speaking,

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226 GATT, Articles II and XI:1.

227 GATT, Articles I:1 and III.

228 Under the GATS, the obligations relate to: “market access” under Article XVI GATS in the specific areas where individual Members have commitments in their GATS schedule, but which do not in fact confer market access at all insofar as that term is commonly understood, but just entail the prohibition of extremely blunt restrictions, such as restrictions on the number of foreign service suppliers; national treatment under Article XVII GATS, again, only to extent that individual commitments are made; and MFN treatment under Article II:1 GATS, only to the extent that individual exemptions have not been entered. Indeed, and arguably in reflection of this lower level of market access commitment, the WTO subsidy control rules apply only to trade in goods and not services, where the WTO Members are only required under Article XV GATS to enter into negotiations to develop multilateral disciplines (which has not since been substantially progressed).

229 For an overview and discussion of these additional disciplines, see L Borlini, 'Subsidies Regulation Beyond the WTO: Substance, Procedure and Policy Space in the 'New Generation' EU Trade Agreements' in G Capaldo (ed), *The Global Community: Yearbook of International Law and Jurisprudence 2016* (Oxford: OUP, 2017) 145-174.

there are two main categories of subsidy disciplines in these trade agreements.[230] The first category are trade agreements with "parallel" State aid systems, either multilateral or domestic, which essentially provide for the establishment of a State aid system that is substantially equivalent or very similar to the EU State aid system. It includes the EEA Agreement and the association agreements with the current EU accession candidate countries, such as Serbia and Ukraine, and other Eastern European countries that are not currently accession candidates but might become so in future.

As for the second category, these are trade agreements with 'WTO plus' provisions, which take the WTO anti-subsidy rules as a starting point and add further substantive and/or procedural disciplines, but which are much more limited in scope than trade agreements providing for "parallel" State aid systems. Examples include the EU's trade agreement with Korea, which adds further "prohibited subsidies" to the list under the WTO anti-subsidy rules as well as reporting obligations,[231] and the EU's trade agreement with Canada, which only contains additional obligations relating to the provision of information and consultations if a subsidy adversely affects the other State party's interests.[232]

In line with our argument, the difference between these two sets of subsidy disciplines can be rationalised by reference to the substantive degree of trade liberalisation under the underlying trade agreement of which they are part.[233] The EU trade agreements with "parallel" State aid systems each provide, to varying degrees, for the creation of a free trade area incorporating substantial aspects of the EU free movement principles and can be seen as envisaging the potential of full internal market membership as future EU members. In contrast, the EU trade agreements with "WTO plus" provisions tend to be more 'traditional' trade agreements, in that they focus mainly on reducing or eliminating tariffs applied with respect to trade in goods between the State parties and providing for a degree of liberalisation of trade in services, but they do not envisage EU internal market

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230 See in this regard, M Schonberg, 'Continuity or change? State aid control in a post-Brexit United Kingdom' (2017) Competition Law Journal 47.

231 EU-Korea Free Trade Agreement, Articles 11.9-11.15.

232 EU-Canada Comprehensive Economic and Trade Agreement, Articles 7.1-7.9.

233 See Schonberg, 'Continuity or change? State aid control in a post-Brexit United Kingdom', at 52-54. The detailed, but not quite "parallel" subsidy control requirements in the UK-EU TCA are broadly in line with this trend, while also likely being influenced by the degree of "trade proximity" between the EU and UK.

integration. In other words, there is a relationship between the nature of the market access provided for and / or envisaged and the extent of the subsidy control disciplines required in order to complement and safeguard that market access.

Building on this relationship between the quality of the international subsidy control system and the nature of the obligations in the underlying trade agreement, we would go further and argue that the free movement of goods, services, capital and workers under the TFEU does not encapsulate the whole of the "internal market" that is relevant for these purposes. Rather, the nature of the liberalisation under the EU internal market also encompasses a broader fairness or "equality of opportunity" dimension, which is reflected in the EU State aid rules. It is this equality of opportunity dimension, we argue, that accounts for the important distinction between the concept of State aid under the EU State aid rules and the concept of a subsidy under the WTO anti-subsidy rules in the form of the State resources criterion, which as explained above, incorporates a fairness aspect to the macro-economic competition that may be pursued in the context of the EU internal market.

b. The origins of equality of opportunity and its incidence in EU economic law

The notion of equality of opportunity is something that is inherent in the ordoliberal tradition that informed the development of the EU's economic constitution encapsulated by the Treaties,[234] and its emphasis on economic freedom, which entails the restriction of both private and public power.[235] It has featured in a number of areas across EU economic law,[236] but perhaps most prominently in the EU Courts'

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234 See for instance, L Warlouzet, 'The EEC/EU as an Evolving Compromise between French Dirigism and German Ordoliberalism (1957-1995)' (2019) Journal of Common Market Studies 77 and N Gicoli, 'Competition versus Property Rights: American Antitrust Law, the Freiburg School and the Early Years of European Competition Policy' (2009) Journal of Competition Law and Economics 747. There is some debate as to the extent of the role that ordoliberalism played in the context of individual policy areas, and in particular, in the context of EU competition law – see e.g. P Akman, *The Concept of Abuse in EU Competition Law* (Oxford: Hart Publishing, 2012), Chapter 2. But few deny that ordoliberal thought had an influence on the discussion and formulation of the Treaty rules.

235 E Deutscher and S Makris, 'Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus' (2016) Competition Law Journal 181, at 189-191.

236 Including also EU public procurement law (see Case T-406/06 *Evropaïki Dynamiki v Commission* EU:T:2008:484, paragraph 84) and EU telecommunications regulation (see Joined Cases C-327/03 and C-382/03 *ISIS Multimedia and Firma 02* EU:C:2005:622, paragraph 39).

case-law in the competition law area,[237] and in particular, in the context of Article 106(1) TFEU in connection with Article 102 TFEU regarding measures taken in relation to public undertakings and undertakings with "special and exclusive" rights in connection with abuse of dominance.[238]

These cases typically concern Member State measures that bestow upon the undertaking in question rights that provide it with an advantage over its competitors. Examples have included: the grant of the exclusive power to authorise motorcycling events to a company which itself also organised motorcycling events;[239] the allocation of certain mobile telecommunications frequencies to the incumbent without the payment of a fee whereas all other operators were charged a fee for the allocation of frequencies in the same band;[240] the grant of exclusive exploitation rights over the great majority of national lignite deposits to the incumbent electricity company;[241] and the grant of exclusive rights in relation to the delivery of hybrid mail to the national postal incumbent.[242]

In these cases, the EU Courts have explained that "*a system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured between the various economic operators*"[243] and if "*inequality of opportunity between economic operators, and therefore distorted competition, results from a State measure, such a measure constitutes an infringement*".[244] While the extent of the competitive advantages conferred as a

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237 For an overview, see R Nazzini, *The Foundations of European Union Competition Law: Objectives and Principles of Article 102* (Oxford: OUP, 2011), at 144-148.

238 Although the notion of equality of opportunity has also begun to feature more in "ordinary" Article 102 TFEU cases, i.e. cases without measures taken in relation to public undertakings and undertakings with "special and exclusive" rights per Article 106(1) TFEU. A notable case is the General Court's recent judgment in the Google Shopping case, in which the General Court held that self-preferencing practices by Google can be considered as abusive since, "*as is clear from the case-law, a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators […]*" (Case T-612/17 *Google and Alphabet v Commission* EU:T:2021:763, paragraph 180). For commentary on this recent trend, see P Ibáñez Colomo, 'Will Article 106 TFEU Case Law Transform EU Competition Law?' (2022) Journal of European Competition Law & Practice 385.

239 Case C-49/07 *MOTOE* EU:C:2008:376.

240 Case C-462/99 *Connect Austria* EU:C:2003:297.

241 Case C-553/12 P *Commission v DEI* EU:C:2014:2083.

242 Case T-556/08 *Slovenská pošta v Commission* EU:T:2015:189.

243 See Case C-49/07 *MOTOE*, paragraph 51; Case C-462/99 *Connect Austria*, paragraph 83; Case C-553/12 P *Commission v DEI*, paragraph 43; and Case T-556/08 *Slovenská pošta v Commission*, paragraph 100.

244 See Case C-462/99 *Connect Austria*, paragraph 84; Case C-553/12 P *Commission v DEI*, paragraph 44; and Case T-556/08 *Slovenská pošta v Commission*, paragraph 100.

result of the measures in question in these cases would have been different, the relevant threshold to establish an infringement of Article 106(1) TFEU in conjunction with Article 102 TFEU as stated in the most recent case-law, is simply whether the measure creates "*unequal conditions of competition*" between the beneficiary and its competitors and was therefore liable to result in potential anti-competitive consequences.[245]

Our argument is that a similar equality of opportunity principle also drives the notion of State aid.[246] Unlike the case-law in relation to Article 106(1) TFEU in connection with Article 102 TFEU, this principle is not explicitly referred to in the case-law in relation to Article 107(1) TFEU. It is however, implicit in the consistent terminology used by the EU Courts in describing State aid measures as placing those to whom they apply in "*a more favourable financial situation*" or "*position*" than others.[247] It has also been invoked by the Advocates General of the Court of Justice, who have explained the rationale of Article 107(1) TFEU as being "*to achieve a level playing field in terms of competition for all undertakings operating in the internal market*"[248] and in similar terms, to ensure "*uniform conditions of competition for all undertakings operating in the internal market ("level playing field")*"[249] and "*maintaining equal conditions of competition between rival traders*".[250] Finally, it has also been recognised in the statements of the Commission in major policy pronouncements in

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245 See Case C-49/07 *MOTOE*, paragraphs 49-51; Case C-553/12 P *Commission v DEI*, paragraphs 46-47; and Case T-556/08 *Slovenská pošta v Commission*, paragraphs 102-103.

246 Indeed, the *Connect Austria* case which involved the allocation of mobile telecommunication frequencies without requiring a fee, could in principle, have itself been analysed as a State aid case.

247 For examples, see the cases cited at notes 205-206 and 211-212 above. See also the recent statements of the General Court in the *Ryanair Covid-19* judgments in relation to the nature of individual aid measures: "*individual aid, such as that at issue, by definition benefits only one company, to the exclusion of all the other companies, including those in a situation comparable to that of the recipient of that aid. Consequently, such individual aid, by its nature, brings about a difference in treatment, or even discrimination, which is however inherent in the individual character of that measure*" – Case T-378/20 *Ryanair v Commission (Denmark: SAS)* EU:T:2021:194, paragraph 65; and Case T-388/20 *Ryanair v Commission (Finland: Finnair)* EU:T:2021:196, paragraph 81.

248 Opinion of Advocate General Szpunar in Case C-579/16 P *Commission v FIH Holding and FIH Erhversbank* EU:C:2017:911, paragraph 58.

249 Opinion of Advocate General Kokott in Case C-73/11 P *Frucona Košice v Commission* EU:C:2012:535, paragraph 55.

250 Opinions of Advocate General Darmon in Joined Cases C-72/91 and C-73/91 *Sloman Neptun*, paragraph 40 and Case C-189/91 *Kirsammer-Hack* EU:C:1992:458, paragraph 22, cited by Advocate General Wathelet in his opinion in Case C-656/15 P *Commission v TV2/Danmark* EU:C:2017:404, at paragraph 51.

relation to the EU State aid rules, including the SAAP, the SAM as well its recent "fitness check" review, in which it emphasised the role of State aid control in maintaining a level playing field in the internal market, both as between undertakings as well as Member States.[251]

c. The relevant equality of opportunity standard and its application to EU State aid law

In terms of what should be the relevant equality of opportunity standard, one can distinguish between different conceptions,[252] the most well-known being "Rawlsian fair equality of opportunity", which seeks to equalise the prospects of success for those of the same talent and ability regardless of their initial place in the social system.[253] The equality of opportunity standard that we put forward however, is the more modest "formal equality of opportunity,[254] which essentially embodies the principle of "fairness" or "fair competition" in process terms.

Debate in relation to the notion of fairness in the broader EU competition law sphere has enjoyed something of a resurgence as of late,[255] in particular, within the context of the rules on abuse of dominance, where commentators have noted that it has been advanced eagerly in public statements by the present Commissioner for Competition as a justification for greater antitrust intervention. Indeed, it has been noted that the Commissioner invoked "fairness" as a guiding principle in around 85 per cent. of speeches delivered in her first term in office.[256] It has received a somewhat mixed reception in practitioner and academic circles however, where a recurring criticism raised in the literature is that notions of fairness are too vague to

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251 See in particular, the SAAP Communication, paragraphs 7 and 9; the SAM Communication, paragraph 6; and the Fitness Check Commission Staff Working Document, pages 14, 19 and 32.

252 See R Arneson, 'Four Conceptions of Equal Opportunity' (2018) The Economic Journal 152.

253 J Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1999), at 73.

254 Arneson, 'Four Conceptions of Equal Opportunity', at 153.

255 See for instance, the collections of papers in the 2018 13th GCLC Annual Conference, recently published in book format in D Gerard, A Komninos and D Waelbroeck (eds), *Fairness in EU Competition Policy: Significance and Implications, An Inquiry into the Soul and Spirit of Competition Enforcement in Europe* (Brussels, Bruylant: 2020) and in the CPI Antitrust Chronicle, October 2017, vol. 1, *Antitrust Policy and Inequality of Wealth*.

256 N Dunne, 'Fairness and the Challenge of Making Markets Work Better' (2021) Modern Law Review 230, at 238. For a very recent example, see the Commissioner's speech, 'Fairness and Competition Policy', European Competition Day, Prague, 10 October 2022 (available on the Commission's website).

use as a free-standing substantive criterion to determine outcomes in individual cases in practice.[257]

In discussing the application of any notion of fairness however, it is helpful to make a key distinction, sometimes overlooked in the debate in the literature, between fairness of process on the one hand and substantive fairness or fairness of outcome on the other.[258] In basic terms, fairness of process relates to the rules according to which resources are allocated, whereas substantive fairness relates to the outcome of an allocation of resources. Given that rules in relation to competition are concerned with the process by which resources are allocated i.e. the process of competition, the notion of fairness in its process sense seems potentially more relevant than substantive fairness, which would raise distributional questions for which other instruments appear better suited, such as taxation on profits, income and consumption etc. with distributional principles.[259]

The criterion of equality of opportunity falls within the process dimension of fairness and is therefore something that might potentially be applicable to competition law on this basis.[260] Agreements between undertakings and the unilateral conduct of

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257 See in particular, M Dolman and W Lin, 'How to Avoid a Fairness Paradox in Competition Policy', and T Lübbig, 'Fairness in Competition Law: Nothing More than a Feel-Good Epithet?', in Gerard, Komninos and Waelbroeck (eds), *Fairness in EU Competition Policy*, at 27-76 and 77-84; and Akman, *The Concept of Abuse in EU Competition Law*, who concludes in summary that "*there is an inherent difficulty with defining and operationalising 'fairness' and that, even when a definition if provided, a significant element of vagueness and arbitrariness remains*" (at 7).

258 See in this regard, Nazzini, *The Foundations of European Union Competition Law: Objectives and Principles of Article 102*, at 22; H Jenkins and A Blankertz, 'Regulating E-Commerce Through Competition Rules: A Fairness Agenda?', in Gerard, Komninos and Waelbroeck (eds), *Fairness in EU Competition Policy*, 109-123, at 111; and M Motta, *Competition Policy: Theory and Practice* (Cambridge: CUP, 2004), at 26.

259 Nazzini goes so far as to argue that if fairness in competition law were to be concerned with the substantive allocation of surplus rather than the process of its allocation, competition law would be superfluous – see Nazzini, *The Foundations of European Union Competition Law: Objectives and Principles of Article 102*, at 22-23. This appears to be supported by more systematic analysis of the notion of substantive fairness in competition law, which concludes that it is only of limited relevance – see M Trebilcock and F Ducci, 'The Multifaceted Nature of Fairness in Competition Policy', CPI Antitrust Chronicle, October 2017, volume 1 and their longer paper, 'The Revival of Fairness Discourse in Competition Policy' (2019) Antitrust Bulletin 79.

260 See the references at note 258 above, and also Dunne, 'Fairness and the Challenge of Making Markets Work Better', which notes at 236 that an "*equality of opportunity approach*" is reflected in the common refrain to be found in the case-law that the competition system, "*aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such*" (see e.g. Case C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* EU:C:2009:610, paragraph 63).

dominant undertakings could be assessed against the yardstick of their impact on the competitive opportunities of others. The difficulty with this however, is that the criterion of equality of opportunity fails to provide any concrete principles for addressing one of the central issues in competition law: how to take into account the position and interests of the undertaking(s) whose conduct is under examination, which itself fundamentally must also be required as part of any kind of notion of "fairness".

Instead, it is apparent that adjudicating between the interests of the undertaking(s) whose conduct is under examination and those of the undertakings affected by that conduct, necessitates reference to factors that are independent of fairness. For instance, in the case of unilateral conduct by dominant undertakings, key factors established by the case-law include the relative efficiencies of the undertaking concerned and its competitors in the form of the "as efficient competitor principle",[261] which itself is excepted in certain circumstances;[262] the assessment of whether the conduct produces an actual or likely exclusionary effect;[263] and the question of whether conduct which produces an actual or likely exclusionary effect, can nonetheless be objectively justified on the basis of efficiency gains.[264] Justifiably

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261 Which serves as one of the fundamental principles in assessing many forms of price-based conduct under Article 102 TFEU, e.g. predatory pricing (see Case C-62/86 *AKZO v Commission* EU:C:1991:286, paragraphs 71-72, setting out a framework based on benchmarks of the dominant undertaking's own costs) and margin-squeeze (see Case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603, paragraph 183, explaining that a margin squeeze is itself an abuse in view of the exclusionary effect that it can create for competitors who are at least as efficient as the dominant undertaking).

262 See Case C-23/14 *Post Danmark ("Post Danmark II")* EU:C:2015:651, paragraphs 59-60, where in examining a rebates scheme, the Court of Justice explained that in circumstances where the dominant undertaking held a very large market share and structural advantages conferred by a statutory monopoly over a significant part of the market, "*applying the as-efficient-competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible*" while "*the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking*." For a recent application of this principle and detailed discussion of the legal and economic aspects, see the judgment of the UK Competition Appeal Tribunal of 12 November 2019 in *Royal Mail PLC v Ofcom* [2019] CAT 27, at paragraphs 470-590.

263 See e.g. Case C-209/10 *Post Danmark ("Post Danmark I")* EU:C:2012:172, at paragraph 44, setting out the requirement for an effects assessment in the case of selective price-cutting lower than average total costs but higher than average incremental costs; and Case C-23/14 *Post Danmark II*, paragraph 69, in relation to rebates schemes.

264 Case C-209/10 *Post Danmark I*, paragraphs 41-42; Case C-413/14 P *Intel v Commission* EU:C:2017:632, paragraph 140; and Case C-307/18 *Generics (UK) and Others* EU:C:2020:52, paragraphs 165-166.

therefore, in the words of one commentator, fairness "*is not capable of being accurately defined and applied in practice without resorting to further criteria*".[265]

In the case of measures taken by the State however, the criterion of equality of opportunity may be more readily applied. Unlike private undertakings, Member States have access to public authority prerogatives and economic resources stemming from taxation[266] which allow them to influence competitive conditions in ways that private undertakings cannot. Furthermore, Member States are also themselves signatories to the EU Treaties and therefore unlike private undertakings, are directly responsible for creating and maintaining the conditions for the internal market as an area of equality of opportunity. In this sense, Member States' responsibilities evidently go far beyond even the so-called "special responsibility" of dominant undertakings under Article 102 TFEU[267] and therefore, as argued by Advocate General Lenz, *"it is in principle justified to apply a stricter standard as regards the conduct of Member States than as regards the conduct of undertakings*".[268]

At the same time, and fundamentally, Member States are not in many cases, themselves directly participating in the competitive process as an economic "undertaking", which means that the question of balancing interests, which impedes the application of a fairness criterion to the conduct of private undertakings, does not arise in the same way when applying this criterion to State measures. This is the case for two out of the three main areas of State conduct which fall to be assessed under the State aid rules – where the State is exercising public authority functions and where the State is seeking to fund SGEI. As for the third main area of State conduct, where the State intervention takes the form of an economic transaction and therefore the State may be acting as an undertaking, the framework

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265 Nazzini, *The Foundations of European Union Competition Law: Objectives and Principles of Article 102*, at 23-24.

266 See Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission ("WestLB")* EU:T:2003:57, paragraph 272.

267 See e.g. Case C-280/08 P *Deutsche Telekom v Commission*, paragraph 83; and Case C-52/09 *TeliaSonera Sverige* EU:C:2011:83, paragraph 24. This notion stems from the position that where an undertaking has market power, the competition that remains on the relevant market is already "weakened" because of the presence of the dominant undertaking and must be preserved in order to protect competition – see Case C-549/10 P *Tomra v Commission* EU:C:2012:221, paragraph 17 and the opinion of Advocate General Kokott in Case C-95/04 P *British Airways v Commission* EU:C:2006:133, paragraphs 68-69.

268 Opinion of Advocate General Lenz in Case C-102/87 *France v Commission* EU:C:1988:287, paragraph 25.

applied by the EU Courts to assess the existence of selective advantage, the MEOP, is in fact precisely calibrated in order to ensure fairness by importing into the assessment the relevant factors that are specific to the State's position that affect the economic rationality of the transaction, as we will show in Chapter 4 below.

d. The content of the equality of opportunity standard under EU State aid law

While the equality of opportunity standard in the context of Article 106(1) TFEU and Article 102 TFEU is solely concerned with equality of opportunity between undertakings, i.e. between the beneficiary of the measure in question and its competitors, we would argue that it is broader in the EU State aid context. Rather, the equality of opportunity standard under Article 107(1) TFEU would encompass a "total" level playing field or area of undistorted competition, which encapsulates not only equality of opportunity *between undertakings*, but also equality of opportunity *between categories of undertakings / economic sectors* within a Member State.

The equality of opportunity between "undertakings" dimension is already broad, given the functional approach to the notion of an "undertaking" under EU competition law, which as explained above, depends on an entity's activities and whether they consist in offering goods and services on the market in competition or potentially in competition with others.[269] While the case-law has excluded, in particular, healthcare and social security services in certain instances (with the precise balance continuing to develop), the concept of an undertaking, and by extention, the notion of equality of opportunity between undertakings is therefore, in principle, sufficiently broad to encompass the overwhelming majority entities that are in competition with each other in the EU internal market, including the mix of State / public involvement in the economy. It therefore effectively addresses the micro-economic competition aspect to EU State aid control and effectively provides the source of the "entitlement" that arises in the literature on the "anti-distortion approach" to subsidy control introduced in section III:b above, as implied by the reference in the Spaak Report to "*the essential guarantees that must be given to businesses, that the game would not be distorted by artificial advantages given to their competitors*".

The additional dimension of equality of opportunity *between sectors* is nonetheless crucial, in particular, in order to provide for fair *macro-economic competition* between

[269] See section II:a above.

EU Member States, given the use of sectoral measures as a tool of macro-economic competition by States in strengthening their own industries to penetrate cross-border markets or indeed to protect them from foreign competition, as well as attracting investment into their territories. This is evident from the case-law and Commission decision practice in relation to sectorally selective measures referred to above,[270] as well as recent experience in the renewable energy sector, where countries have been subsidizing heavily not only for the pursuit of environmental goals, but also for industrial policy purposes in order to promote economic development.[271]

These two aspects together, equality of opportunity between undertakings and between sectors, correspond to "*favouring certain undertakings or the production of certain goods*", i.e. the expression of the notion of selective advantage within the Article 107(1) TFEU definition of State aid and its application by the EU Courts to designate measures that are either undertaking-selective or sectorally-selective as State aid.[272]

The equality of opportunity standard we put forward, providing for equality of opportunity both between undertakings and between sectors, therefore meets the first part of the challenge set at section IV above by placing central emphasis on both the micro-competition and macro-competition aspects that form part of contemporary EU State aid control.

The equality of opportunity standard also meets the second part of the challenge set, as it provides a rationale for the very different nature of the approach to assessing distortions of competition and trade at the definition stage and at the compatibility stage.

Starting with the definition stage, as noted above, the distortion of competition and effect on trade are assessed qualitatively rather than quantitatively and are given a

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270 See in particular, Case C-75/97 *Belgium v Commission (Maribel bis-ter)* and Case C-66/02 *Italy v Commission* (concerning the Italian banking sector) discussed at note 208 above and the Commission Regional Aid Guidelines, paragraphs 109-110, the Commission RD&I Framework, paragraph 118, the Commission Regional Aid Guidelines, paragraph 119 and the Commission Risk Finance Aid Guidelines, paragraph 175, discussed at notes 148-149 above.

271 See J Lewis, 'The Rise of Renewable Energy Protectionism: Emerging Trade Conflicts and Implications for Low Carbon Development' (2014) Global Environmental Politics, Vol.14(4) 10.

272 See page 31 above. The EU Courts have considered sectoral measures as selective since the very early case-law (e.g. Case C-173/73 *Italy v Commission (Textiles)*).

very low weighting such that they are effectively presumed. One of the main criticisms of this approach, in particular, is that it fails to draw a distinction between subsidies that merely improve the recipient's financial situation and those that cause a change of the recipient's behaviour.[273] According to the literature, only the latter type of subsidy is capable of adversely affecting the position of competitors and therefore distorting competition. This will be the case where the subsidy changes the costs or benefits associated with taking a particular action by, for example, reducing the recipient's marginal costs, therefore leading them to produce more than they would have otherwise done, or by affecting sunk costs, therefore changing entry, expansion and exit decisions. On the other hand, it is argued that a lump sum payment by the State without specific conditions may not affect behaviour in ways which have an impact on competitors, but may just result in an increase in the recipient's profits.[274]

This distinction, however, becomes irrelevant in light of the equality of opportunity principle, as the question is not whether the recipient actually makes use of the subsidy in a manner that concretely distorts competition, but rather whether the recipient was provided with the means and therefore *the opportunity to do so*. In other words, and in a similar vein to the approach to the equality of opportunity principle under Article 106(1) TFEU in conjunction with Article 102 TFEU, the favouring by the State of an undertaking or a category of undertakings / a sector by granting a subsidy in itself breaches the equality of opportunity standard, irrespective of the subsidy's actual effects on competition.[275]

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273 See in particular, Rubini, *The Definition of Subsidy and State Aid*, at 393-398.

274 Neven and Verouden, 'Towards a More Refined Economic Approach in State Aid Control', paragraphs 1.9-1.15; Rubini, *The Definition of Subsidy and State Aid*, at 382-383, citing R Diamond, 'Economic Foundations of Countervailing Duty Law' (1989) Virginia Journal of International Law 767, which contains a detailed examination how a subsidy can cause the recipient firm to change its behaviour.

275 The Court of Justice's judgment in Case C-494/06 P *Commission v Italy and Wam*, is notable in this regard. As explained above at note 98, in this case, the Court of Justice held that the Commission had failed to state adequate reasoning in relation to the distortion of competition and effect on trade components in the specific circumstances where the aid was relatively insignificant and remote from the EU market. At first instance, in criticising the paucity of the Commission's reasoning, the General Court had noted emphatically that an improvement to the recipient's financial situation is something which is inherent in all grants of State aid, including those grants which do not fulfil the other criteria of Article 107(1) TFEU, which was also recited with approval by Advocate General Sharpston on appeal. Yet the Court of Justice itself, while upholding the General Court's annulment, appeared pointedly not to refer to it. See Case T-304/04 *Italy and Wam v Commission*, at paragraph 67 and the opinion of

Where a measure is in breach of the equality of opportunity principle, however, the assessment then moves to the compatibility stage where the question, in terms of distortion of competition and trade, is whether the measure is best designed to limit these negative impacts deriving from the breach of equality of opportunity such that the benefits of the policy aim pursued outweigh the negative. Given the nature of this exercise, the assessment by necessity focuses on the concrete negative effects of the aid, which requires a more detailed assessment of the distortions to competition and trade and therefore the impact on micro-economic competition and macro-economic competition. This distinction in terms of what is being assessed at the definition and compatibility stages therefore accounts for the very different approaches to the assessment of competitive and trade distortions at the two stages.

VI. Operationalising the equality of opportunity principle in the notion of selective advantage

The above sections addressed the conceptual principles informing EU State aid control at the broader level and put forward an equality of opportunity approach as a means of adequately giving expression to the key issues driving EU State aid control. In this section, our enquiry narrows and focuses on the notion of selective advantage and explores how this equality of opportunity approach may be reflected and operationalised in the assessment of selective advantage.

a. Effects-based vs object-based approaches

To begin with, one could apply an equality of opportunity approach to selective advantage in pure effects-based terms. A measure would be in breach of this standard whenever it may have the effect of benefitting certain undertakings or sectors more than others. The difficulty with such an "absolute equality of opportunity principle", however, is that it would have no natural limits.[276] Governments intervene in their economies in a myriad of ways, which have a

Advocate General Sharpston in Case C-494/06 P *Commission v Italy and Wam* EU:C:2008:639, at paragraph 47.

276 Which is a criticism made more generally against the use of a "fair competition" standard in anti-subsidy rules – se M Trebilcock and R Howse, *The Regulation of International Trade* (London: Routledge, 2013), at 390-391; and Rubini, *The Definition of Subsidy and State Aid*, at 384.

divergent impact on different economic actors,[277] and it is difficult to think of any State measures that have an identical impact on all economic actors.

For instance, State investment in general road infrastructure, while in principle for the benefit of all users, may be said to benefit undertakings that provide delivery services substantially more than other undertakings. Similarly, State funding of universities' R&D activities could be said to benefit those undertakings that are active in commercialising such technologies and State funding of redundant workers' re-training programmes may be said to benefit those undertakings active in the areas to which the training relates. Yet there are no indications in the EU Treaties that State aid control was intended to subject the full extent of Member States' activity to the jurisdiction of the European Commission and indeed the State aid rules have not been interpreted as having such an extensive scope.

More fundamentally, such a wide notion of selective advantage and therefore State aid would be inconsistent with the scheme of State aid control set out under the TFEU as elucidated in the case-law.[278] First, it would diminish the practical significance of the concept of selective advantage altogether and therefore the Article 107(1) TFEU definitional requirement that the State measure must "*favour certain undertakings or the production of certain good*s" to be classified as State aid, as a multitude of State measures involving State resources could effectively fall within the definition of State aid on account of their disparate impact. Second, it would create a disconnect with the State aid compatibility assessment stage, which as noted in section II:b above, is orientated around the justification for the aid itself, i.e. the policy goal that the State is seeking to achieve *through* favouring the undertakings / sectors concerned. If State measures would typically be classified as State aid just based on the fact that they had a disparate impact where favouring those undertakings / sectors was *not* the purpose of the measure as the means of

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277 As noted by Advocate General Darmon in his opinion in Joined Cases C-72/91 and C-73/91 *Sloman Neptun*, citing MJ Sussman writing in relation to the concept of "subsidies" under the GATT: "*no government benefit is used by every citizen; all accrue to specific sectors. For example, paved roads are mainly used only by vehicle drivers, and in developing countries, large portions of the population may gain little from such benefits*" (paragraph 56).

278 By way of analogy, see G Marenco, 'Competition Between National Economies and Competition Between Businesses – A Response to Judge Pescatore' (1986) Fordham International Law Journal 420 with respect to the application of the EU competition law rules.

achieving particular policy goals, it would be difficult to see how such State aid measures could ever be approved as compatible.

Instead, the compatibility assessment stage points to a different criterion for assessing when a measure is inconsistent with the notion of equality of opportunity, namely the object, i.e. the objective purpose of the measure. This allows for coherence between State aid definition and compatibility. It is only where the object of the measure is to create inequality of opportunity and favour particular undertakings or sectors as a means itself of achieving particular policy aims that we can then assess, as part of the compatibility stage, the State's policy justification in seeking to favour those undertakings / sectors.

Assessing the existence of a selective advantage based on an object approach also gives this component more practical meaning as it would exclude measures that merely have disparate impacts from classification as State aid. Returning to the examples mentioned above, while investment in general road infrastructure might benefit undertakings providing delivery services more than other undertakings, provided access to the infrastructure is granted to all economic actors on the same or non-discriminatory terms and it is not in fact dedicated infrastructure that is designed to benefit specific undertakings or activities only, it seems clear that the object of the measure is not to create inequality of opportunity and favour particular undertakings or sectors. Rather, the object is simply to improve basic transport infrastructure for the benefit of all users, which is consistent with the notion of equality of opportunity. Similarly, the object of State funding of universities' R&D activities is normally simply to improve the state of knowledge and understanding for the benefit of all, as opposed to favouring the specific undertakings which are active in the areas to which the R&D activities relate, while the object of State funding of training for unemployed workers is normally to assist workers in finding productive employment for the benefit of society at large, as opposed to favouring the undertakings which may ultimately benefit from the improved skills of the workforce.

An object-based approach also carries explanatory power in relation to the EU Courts' approach in assessing indirect advantages resulting from a State measure, which draws a distinction between "*mere secondary economic effects that are*

inherent" and where "*the measure is designed in such a way as to channel its secondary effects towards identifiable undertakings or groups of undertakings*".[279]

As an example of the latter, we can refer to the *Mediaset* case,[280] in which the payment of subsidies by the Italian State to pay-TV subscribers for the purchase of digital terrestrial decoders, but not for digital satellite decoders, was considered to give rise to a selective advantage to terrestrial pay-TV broadcasters. The EU Courts reasoned that building up an audience is a crucial part of the business model of broadcasters and the measure at issue provided an incentive to consumers to switch from analogue to digital terrestrial mode, enabling terrestrial pay-TV broadcasters to consolidate their existing position on the market.[281] Given the design of the measure, part of its object, or objective purpose, could therefore be seen as being to provide a selective advantage to terrestrial pay-TV broadcasters.

Similarly, in the *Areoporti di Sardegna* cases,[282] which concerned payments made by the region of Sardinia to local airports for the purpose of financing commercial agreements with airlines in order to improve the island's air service and promote it as a touristic destination, the General Court identified the airlines as the aid beneficiaries of the measure, even though they were not the direct recipients of the payments. This was on the basis of the payment mechanism established by the region of Sardinia, which ensured that the funds corresponded to the remuneration paid by the airport operators to the airlines through a kind of clearance system, which conditioned payments on the presentation of documents allowing the region of Sardinia to verify that the activities had been implemented correctly and the costs properly incurred.[283]

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279 Commission Notice on the notion of State aid, paragraph 116, as applied by the General Court in Case T-607/17 *Vototea v Commission* EU:T:2020:180, paragraph 109; and Case T-8/18 *easyJet Airline v Commission* EU:T:2020:182, paragraph 226.

280 Case T-177/07 *Mediaset v Commission* EU:T:2010:233 and Case C-403/10 P *Mediaset v Commission* EU:C:2011:533.

281 Case T-177/07 *Mediaset v Commission*, paragraph 62 and Case C-403/10 P *Mediaset v Commission*, paragraph 64.

282 Case T-607/17 *Volotea v Commission*; Case T-716/17 *Germanwings v Commission* EU:T:2020:181; and Case T-8/18 *easyJet v Commission*. The General Court's judgments in the *Volotea* and *easyJet* cases were ultimately overturned by the Court of Justice, not specifically on the ground of indirect aid, but rather in relation to the General Court's finding that the MEOP was not applicable. The Court of Justice's judgment is addressed in Chapter 4 below.

283 Case T-607/17 *Volotea v Commission,* paragraphs 68-77; Case T-716/17 *Germanwings v Commission*, paragraphs 74-83 and Case T-8/18 *easyJet v Commission*, paragraphs 94-98.

In other words, and in our reading, the object of the measure was considered as being to provide funds to the airlines in order to achieve the public policy interests pursued, not to the airport operators, which were to be considered as only intermediaries.[284] The fact that the airport operators themselves may have benefitted from the increase in air traffic and passenger volumes could not displace the finding of State aid to the airlines, as that was to be considered as merely "*a secondary effect of the aid scheme at issue from which the entire Sardinian tourism sector benefitted*".[285]

b. Operationalising an object-based approach

In terms of operationalising this assessment of whether the object of a measure is to create inequality of opportunity and therefore a selective advantage, a good starting point would seem to be to look at the actual scope of the measure set by the State itself. Where the application of a State measure that may confer a benefit is limited only to certain undertakings or sectors, that could raise *prima facie* concerns. Giving significance to the scope of the measure itself seems justified, as this is something that is directly and consciously determined by the State, in contrast to any indirect disparate effects that may result from a measure.

However, this would only be the initial stage of the assessment, as it would still need to be considered whether the measure, even though it applies only to certain undertakings or sectors and therefore has an element of selectivity, nonetheless does not have the object of creating inequality of opportunity.

Making this assessment, and distinguishing between State measures which have the object of creating inequality of opportunity and favouring particular undertakings or sectors and those that do not, would by necessity be a case-by-case assessment which must be based on all of the relevant circumstances, including in particular, the context in which the State is acting, the type and composition of the measure at issue as well as, significantly, the objective of the measure.[286] However, while an individualised assessment of the State measure at issue is undoubtedly required, it

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284 *Ibid*.

285 Case T-607/17 *Volotea v Commission*, paragraph 109 and Case T-8/18 *easyJet v Commission*, paragraph 226.

286 See by way of analogy, Case C-67/13 P *Cartes Bancaires v Commission* EU:C:2014:2204, paragraph 53, in relation to agreements that have the object of restricting competition for the purposes of Article 101(1) TFEU under EU competition law.

is this thesis' argument that the three main and apparently very different methodologies applied to assess the existence of selective advantage in the three principal areas of State activity: (i) the "derogation framework" where the State is exercising public authority functions; (ii) the MEOP where the State intervention takes the form of an economic transaction; and (iii) the *Altmark* framework or compensation principle where the State is seeking to fund SGEI, in fact, represent frameworks that are designed specifically to assess this question in light of the respective contexts and circumstances that they address.

In particular, it is argued that these methodologies are intended to assess whether the State measure at issue has the object of creating inequality of opportunity between undertakings or sectors, or rather is consistent with the normal conditions of competition deriving from the constituents of the broader framework under the EU Treaties that would otherwise provide for effective equality of opportunity.[287] These are the normal conditions of competition based on the interaction of the market mechanism with rules of general economic and regulatory policy which are consistent with EU law.

The market mechanism is specifically entrenched within the EU Treaties under Article 3 TEU, which refers to the internal market as a "*highly competitive social market economy*" and Articles 119-120 TFEU which refer to economic policies conducted in accordance with "*the principle of an open market economy with free competition*".[288] In terms of the other pillar, the EU law which otherwise constrains Member States when setting rules of general economic and regulatory policy comprises the free movement rules, including the free movement of goods, services,

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[287] The fact that normal conditions of competition would ordinarily provide for effective equality of opportunity for these purposes follows from the case-law in relation to Article 106(1) TFEU in connection with Article 102 TFEU that is referred to at pages 67-68 above, which as explained, addresses State measures that are considered problematic on the basis that they create inequality of opportunity between undertakings. The presumption behind this case-law must be that, if not for the distortions created by the State measure concerned, the normal conditions of competition that would otherwise ensue would ordinarily provide for effective equality of opportunity, as a matter of principle.

[288] Similarly, Article 4 EC also referred to economic policies conducted in accordance "*with the principle of an open market economy with free competition*" and Article 98 EC also referred to economic policies in accordance "*with the principle of an open market economy with free competition*". While references to the "market economy" were only first inserted through the Treaty of Maastricht in 1992, the original Treaty of Rome already contained in Article 3(f) the requirement to establish "*a regime which assures that competition in the common market is not distorted*".

workers and capital and the rules against discriminatory taxation, as well as the general principles of EU law, including non-discrimination and proportionality, when EU Member States are acting within the scope of EU law (such as in the context of the free movement rules).

Both of these pillars may be readily linked to equality of opportunity. The significance of the market mechanism in this regard is evident from the ordoliberal tradition that informed the development of the EU's economic constitution encapsulated by the Treaties, and which viewed a competitive market as indispensable in order to secure economic freedom and therefore, ultimately, equality of opportunity.[289] In this sense, the market mechanism provides everyone with an equal right to transact and participate in market arrangements without discrimination, based solely on objective value.[290] Similarly, and at a broader level, the EU free movement rules and applicable general principles of EU law, such as non-discrimination and proportionality may also be conceived of as providing for a level playing field for economic operators in the internal market.

On this basis, where the State measure takes the form of an economic transaction, the assessment would be whether the object of the measure is to create inequality of opportunity and favour the individual counterparty or counterparties, or whether the measure rather represents entirely commercially or economically rational conduct in line with the market mechanism and therefore ultimately, with equality of opportunity. A similar approach would also apply where the State funds SGEI in accordance with the *Altmark* criteria, and thereby in a manner that can essentially be considered as being *market-orientated*.

Finally, on this basis, where the State is exercising public authority functions, the derogation framework would assess whether the State is acting contrary to equality of opportunity by favouring particular undertakings / sectors, or in fact, is enacting a measure which legitimately forms part of general economic or regulatory policy,

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289 See notes 234-236 above and H Hagemann, 'Ordoliberalism, the Social-Market Economy, and Keynesianism in Germany, 1945-1974' in R Backhouse, B Bateman, T Nishizawa and D Plehwe (eds), *Liberalism and the Welfare State: Economists and Arguments for the Welfare State* (Oxford: OUP, 2017) 57-75, at 60, citing W Eucken's 1952 work, *Grundsätze der Wirtschaspolitik*.

290 C Sunstein, *Free Markets and Social Justice* (Oxford: OUP, 1997), at 3: "*A system of free markets seems to promise not merely liberty but equality of an important sort as well, since everyone in a free market is given an equal right to transact and participate in market arrangements*."

again consistent with equality of opportunity.[291] This assessment in particular, accounts for the distinction in treatment under the EU Treaties between distortions arising from selective advantages which are subject to State aid control and those arising from disparities in national legislative and regulatory measures, which are subject only to potential EU legislative harmonisation under Article 114 TFEU,[292] reflecting the legislative space reserved to Member States under the Treaties and a tolerance of regulatory competition.[293]

On this analysis, it is argued that while the main methodologies for assessing selective advantage may appear very different, they in fact represent an embodiment of the same essential principle and assessment, namely, whether the object of the measure in question is consistent with the principle of equality of opportunity, as adapted to the context and type of measure in question.[294]

Adopting this "object" approach, it is proposed that the claimed objectives pursued by the State would form an important part of the inquiry not only at the compatibility

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291 The approach proposed would have some commonalities with that put forward by Advocate General Lagrange in the very first Court of Justice case concerning State aid, Case C-30/59 *De gezamenlijke Steenkolenmijnen in Limburg v High Authority* EU:C:1960:41, based on ascertaining "*the real purpose of the measure*". The distinction proposed by the Advocate General there however, was between where "*the real object of the measures is economic*" as opposed to non-economic objects, such as social purposes (see pages 42-43). The distinction proposed here however, is between measures whose object is to favour certain undertakings and measures that have an object which is consistent with the notion of equality of opportunity.

292 Article 114(1) TFEU provides for the enacting of "*measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market*," the scope and limits of which were elucidated by the Court of Justice in the well-known tobacco advertising case, Case C-376/98 *Germany v Parliament and Council* EU:C:2000:544.

293 In this regard, see Di Bucci, 'Comments on the Paper 'Selectivity, Economic Advantage, Distortion of Competition and Effect on Trade', at 156-160 and the opinion of Advocate General Wahl in Case C-524/14 P *Commission v Hansestadt Lübeck* EU:C:2016:693, at paragraphs 64-65. See also, Barnard, *The Substantive Law of the EU – The Four Freedoms*, at 30-31.

294 *C.f.* F De Cecco, 'The Many Meanings of Competition in EC State Aid Law' (2007) Cambridge Yearbook of European Legal Studies 111, who considers but ultimately rejects the application of a "level playing field" approach to State aid definition as lacking explanatory potential due to what he considers as the divergent approaches under these methodologies. In particular, De Cecco argues that the MEOP and *Altmark* frameworks are based on "efficiency criteria" from the perspective of market actors whereas the derogation test is not. In our view however, while there are evident differences between the methodologies, all are geared towards the same assessment, whether the object of the measure is consistent with the principle of equality of opportunity, as will be explored in the next chapters.

stage, but also at the definition stage.[295] However, once it has been established that the object of the measure is to create inequality of opportunity and favour particular undertakings or sectors, the specific claimed policy objective, even if linked to entirely legitimate public policy goals, would not then have any further impact on the measure's classification as State aid and this is how the "effects-based approach" and its perspective on the role of objectives must be interpreted.[296]

The policy aim pursued then, however, returns to significance as part of the second stage of the State aid analysis, the compatibility assessment, which is based on assessing whether the favouring of particular undertakings / sectors established as part of the first stage, essentially is necessary and proportionate to attaining the legitimate public policy aim that is pursued, weighing up and balancing in a more concrete manner the extent of the positive and negative effects of that favouring.

VII. Conclusion

In this chapter, we undertook the first main stage of this thesis' method, the development of a conceptual framework for selective advantage drawing on the existing literature and the key elements of State aid control, both in terms of definition and compatibility.

The purported aims and objectives put forward for EU State aid control were first examined and set against the key elements of State aid control, with the conclusion that the competition and trade-orientated considerations underlying State aid control represent the appropriate starting point. The literature addressing these considerations in the context of the GATT and WTO subsidy control framework was

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295 It may be noted that in the *Steenkolenmijnen* case, which was the very first Court of Justice case concerning State aid and predated the introduction of the "effects-based approach", the Court used a formulation to describe the concept of State aid which placed emphasis on the State's "purpose" or objective, explaining: "*An aid is a very similar concept [to a subsidy], which, however, places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help*." (emphasis added) Case C-30/59 *De gezamenlijke Steenkolenmijnen in Limburg v High Authority* EU:C:1961:2, at 19, highlighted in Plender, 'Definition of Aid', at 6.

296 In this regard, we share the ultimate conclusion (but not the reasoning) of Winter, who writes that, "*The ritualistic repetition that Article [107(1)] does not concern itself with a measure's aims or causes but only looks at its effects is misleading. It is only after it has been established that a measure constitutes aid […] that the formula can be used in order to explain why the worthy social, environmental, cultural and other objectives pursued through a measure will not be able to deprive it of its character of being State aid within the meaning of Article [107(1)]*," see Winter, 'Re(de)fining the notion of State aid in Article 87(1) of the EC Treaty', at 503.

then examined, introducing the two traditional standpoints on State subsidisation, the “anti-distortion” and “injury-only” approaches and their near-embodiments in EU State aid literature, the “internal market” and “competition” approaches.

It was explained how contemporary EU State aid control appears to draw on both of these kinds of approaches, insofar as State aid definition and compatibility address both micro-economic rivalry between undertakings and macro-economic rivalry between States and also borrows assessment methods from both approaches, while distinguishing between the definition and compatibility stages. In light of this analysis, the chapter then developed an "equality of opportunity approach" based on securing equality of opportunity both as between undertakings and also between categories of undertakings and / or sectors within a Member State, which together cover both fair micro-economic and macro-economic competition and correspond to the criterion of "*favouring certain undertakings or the production of certain goods*" i.e. the expression of the notion of selective advantage, within the Article 107(1) TFEU definition of State aid. We then sketched out how this equality of opportunity approach would be reflected in an operational concept of "selective advantage" as an object assessment which seeks to test whether the object of a State measure is to create inequality of opportunity and favour certain undertakings or sectors, or whether the object of the measure is consistent with the principle of equality of opportunity.

The next three chapters now move to the second main stage of this thesis, the testing and refinement of this conceptual framework based on an in-depth examination of the case-law on the notion of selective advantage covering the three principal areas of State activity which have generated the main body of the jurisprudence, namely: (i) where the State is exercising public authority functions and the derogation framework is applied; (ii) where the State intervention takes the form of an economic transaction and the MEOP is applied; and (iii) where the State is seeking to fund SGEI and the *Altmark* criteria or compensation principle is applied.

In these chapters we demonstrate how viewing the methodologies deployed by the EU Courts from this lens, as testing whether the object of the measure is to create inequality of opportunity between undertakings or sectors, provides explanatory power in relation to these methodologies and the various distinctions that they draw, while at the same time, further refining our conceptual framework to best provide a basis for the assessment of selective advantage and therefore State aid.

Chapter 3
The State as Public Authority

I. Introduction

In this chapter we examine the case-law of the EU Courts in the first of the three main areas of State activity that have generated the main body of the jurisprudence on the notion of selective advantage, where the State is exercising public authority functions in its general capacity as a public authority i.e. it is not acting with respect to a measure which could be characterised as an economic transaction, nor in the specific area of SGEI funding.[297] In this context, the main analytical framework that has been used to identify the existence of a selective advantage is the so-called "derogation framework", although as we explain below, the EU Courts have also had regard to other methods in determining the existence of a selective advantage in this context.

As explained in Chapter 2, in line with the approach to selective advantage advanced in this thesis based on assessing whether the object of the State measure concerned is consistent with equality of opportunity, we contend that the assessment where the State is exercising public authority functions seeks to determine whether the object of a State measure, which applies only to certain undertakings or sectors, is to create inequality of opportunity and favour those undertakings / sectors, or in fact, represents a measure that forms part of general economic or regulatory policy and is therefore consistent with equality of opportunity.

In the present chapter, we test this claim by examining the operation of the derogation framework and the other assessments made by the EU Courts in this area in greater detail. In section II below, we first introduce the derogation framework before charting how it was developed, including through the foundational *Maribel bis/ter* and *Adria-Wien* cases, explaining ultimately that it represents a more systematic application of the more *ad hoc* assessments being made by the EU Courts in earlier case-law based on the coverage of the measure and its ostensible purpose. In light of this earlier practice, it is then explained how the derogation framework assesses whether the measure forms part of general economic or

[297] Which are the subjects of the following chapters.

regulatory policy by way of a type of "consistency test" which essentially asks whether the measure is consistent with the relevant reference system to which it purports to pertain.

In sections III to V, we then analyse the three steps of the more systematic derogation framework, explaining how each one is geared towards testing this central premise. These sections seek to demonstrate this with reference both to the important cases that provided significant insight into the application of the three stages, such as the *Azores*, *Hansestadt Lubeck, British Aggregates Association* and *Eventech* cases, as well as the most apparently difficult to rationalise cases, such as the *World Duty Free* cases.

In section VI, we then consider the cases in which the EU Courts have considered going beyond and effectively disregarding the derogation framework. We explain how these cases demonstrate that the derogation framework is ultimately only a proxy for determining whether the object of a measure is consistent with equality of opportunity and that other alternative proxies or methods may be resorted to insofar as is necessary in order to address apparent inequality of opportunity in the particular circumstances of the case, which is the key driver for the assessment of selective advantage. This section addresses, in particular, the landmark *Gibraltar* case and the recent *Progressive Turnover Taxation* cases which concerned challenges to the reference system put forward by the Member State itself, as well as the recent *Tax Ruling* cases, concerning the Commission's innovative use of State aid rules against multinationals' tax-planning arrangements. Section VII finally concludes.

II. The derogation framework and its development

As explained above, the “derogation framework” is the main assessment framework that is now used by the EU Courts to assess the existence of selective advantage in the case of State measures taken in the context of public authority functions, which apply to more than one identified undertaking, i.e. they are broadly applicable to groups of undertakings or a sector / sectors.[298] It consists in principle of three stages as developed in the jurisprudence, on which basis it is also sometimes referred to

[298] Commission Notice on the notion of State aid, paragraphs 127-128. As explained at pages 119-121 below, the EU Courts have held that this derogation test does not apply in the case of measures that apply solely to a single undertaking.

as the "three-step test".[299] The first step is to identify the reference system or "normal" regime applicable. Second, it must be assessed whether the measure in question derogates from that reference system by granting an advantage that differentiates between undertakings which are in a comparable factual and legal situation in light of the relevant objective, in which case the measure *prima facie* gives rise to a selective advantage. Third and finally, it must be considered whether the measure may yet be justified by the nature or general scheme of the system of which it forms a part.

A paradigm example of the derogation framework in practice is provided by the *Paint Graphos* case,[300] which concerned corporation tax exemptions enacted by Italy in favour of cooperative societies. The Court of Justice began by first identifying the reference system as being the ordinary Italian corporation tax regime and noted that the exemptions from corporation tax appeared to derogate from the general rule under that regime by granting a tax benefit to cooperatives to which profit-making commercial companies were not entitled.[301] The Court however subsequently considered that the measure would not give rise to a selective advantage under the second step, as the cooperative societies were not, in principle, in a comparable factual and legal situation to that of commercial companies in light of the objective pursued by the corporation tax system, the taxation of company profits. This was because cooperative societies could be distinguished from commercial companies, essentially as they were based on the principle of mutuality, in that their activities are conducted for the mutual benefit of their members, who were at the same time, users, customers or suppliers; their reserves and assets are non-distributable and must be dedicated to the common interest of their members; and they generally have limited access to equity markets and generate low profit margins.[302] Finally, the

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299 *Ibid*. While the derogation framework has also been expressed in certain cases as having only two steps, rather than three steps, this does not denote a material difference – as explained by Advocate General Bobek in his opinion in Case C-270/15 P *Belgium v Commission*, paragraph 28: "*On closer inspection, it would appear that the only discernible difference between the two approaches is rather academic. It consists of splitting the first step into two separate steps in the three-step approach. Under both approaches, it is necessary to define the appropriate reference framework. However, within the two-step approach, that definition is less apparent, being hidden in the first step.*"

300 Joined Cases C-78/08 to C-80/08 *Paint Graphos*, which itself features significantly in the Commission's expounding of the three-step test in its Notice on the notion of State aid (paragraphs 132-141).

301 Joined Cases C-78/08 to C-80/08 *Paint Graphos*, paragraphs 50-53.

302 *Ibid*., paragraphs 54-62.

Court considered that the tax exemptions could also potentially be justified by the nature or general scheme of the Italian national tax system under the third step, essentially because they were necessary in order to avoid double taxation, provided that income tax was actually levied on the individual members of the cooperative societies and the exemptions were consistent with the principle of proportionality.[303] Accordingly, the tax exemptions for cooperative societies would not confer a selective advantage.

As noted above, the derogation framework is not something that has always been applied consistently by the EU Courts but represents the results of an evolutionary approach in the jurisprudence towards a more sophisticated and systematic test.[304] In the earlier case-law, the EU Courts instead followed an *ad-hoc* approach to determine whether the measure in question gave rise to a selective advantage, which was based purely on the scope or coverage of the measure, *de jure* and *de facto*, and its ostensible purpose.[305] As we will demonstrate, this can be considered essentially as a more rudimentary approach to assessing whether the object of the measure was to create inequality of opportunity and favour certain undertakings or sectors in reflection of the fair micro-economic and macro-economic competition concerns underlying the EU State aid rules, in line with the central claim in this thesis.

This basic approach is already apparent from one of the earliest State aid judgments in the 1969 *Commission v France* case,[306] which concerned a favourable rediscount rate on debts for exports applied by the French Central Bank. In concluding that this gave rise to State aid, the Court of Justice referred both to the fact that the favourable rate was granted only in relation to national products that were being exported and also that the purpose of the measure was to help those products to compete in other

303 *Ibid*., paragraphs 64-75.

304 The first case in which the current formulation of the derogation framework with its three constituent steps was put forward in its entirety was Case C-88/03, *Portugal v Commission (Azores)* EU:C:2006:511 in 2006. For depictions of the evolving nature of the selective advantage assessment in this area before the derogation framework or three-step test became normalised, see K Bacon, 'The Concept of State Aid: The Developing Jurisprudence in the European and UK courts' (2003) European Competition Law Review 54; B Kurcz and D Vallindas, 'Can general measures be... selective? Some thoughts on the interpretation of a State aid definition' (2008) Common Market Law Review 159; and Bartosch, 'Is there a Need for a Rule of Reason in European State Aid Law?'.

305 For an analysis of some of these earlier cases, see Piernas López, *The Concept of State Aid under EU Law*, at 103-129.

306 Joined Cases C-6/69 and C-11/69 *Commission v France* EU:C:1969:68.

Member States,[307] in other words, indicating that the measure had the object of creating perhaps the most blatant sectoral inequality of opportunity that ran directly contrary to the fair macro-economic competition imperative.

Similarly, in the 1986 *Cofaz* case,[308] which concerned the application of a preferential gas tariff by the Netherlands State-owned producer applicable to undertakings fulfilling various apparently objective criteria, including their amount of consumption and load factor, the Court of Justice considered that this measure gave rise to State aid on the basis essentially that its object was to benefit the Netherlands ammonia industry only.

This finding was based on the fact that the new tariff had replaced the previous preferential tariff applied by the State-owned entity in favour of the Netherlands ammonia industry only[309] and all of the Netherlands ammonia producers which had benefitted from the previous tariff system all continued to benefit from the new tariff, including even a number of ammonia producers that did not in fact meet all of the criteria. Furthermore, the State-owned entity had given a commitment to one of the Netherlands ammonia producers that it would further review the level of the tariff if the new price threatened to harm its competitiveness. In those circumstances, the fact that the preferential tariff was also applied to at least one undertaking that was not in the ammonia industry could not displace the finding that the preferential tariff could be considered as "*sectoral in nature*" in the words of the Court,[310] meaning that its object was essentially to protect Netherlands ammonia producers, again running contrary to the fair macro-economic competition imperative.

As part of this *ad-hoc* approach applied by the EU Courts during the earlier period, the existence of discretion on the part of the public authority in applying the measure in question, was also an important factor. As an example, in the *Kimberly Clark*

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307 *Ibid*., paragraph 20. The Court of Justice notably did not endorse the approach of its Advocate General Roemer, who had proposed an extremely broad formulation to selectivity that would be untethered to the kinds of considerations advanced in this thesis, arguing that it covers any measure which simply does not apply to all the undertakings in a Member State – see the opinion of Advocate General Roemer in Joined Cases C-6/69 and C-11/69 *Commission v France* EU:C:1969:51, at page 552.

308 Case C-169/84 *Cofaz v Commission* EU:C:1990:301.

309 This earlier preferential tariff had been abolished and replaced by the new tariff at issue following a State aid investigation in which the Commission had considered that it constituted State aid.

310 *Ibid*., paragraphs 22-23.

case,[311] the Court of Justice reasoned that although the measure in question, French State funding of a social plan adopted in the context of a restructuring, was formally open to all undertakings in the Member State concerned, there was State aid as the State had significant discretion to adjust the financial assistance, meaning that the operation of the scheme was "*liable to place certain undertakings in a more favourable situation than others*".[312] This makes sense when the assessment is viewed from the perspective of whether there is inequality of opportunity between undertakings contrary to the fair micro-economic competition imperative. The reservation of discretion to the State aid authorities in applying the scheme was therefore effectively treated itself as being indicative of an object to favour certain undertakings.[313]

As the multiplicity of State aid cases increased over time and the EU Courts began to face more complex measures, the EU Courts began to sow the seeds towards developing and moving to the more systematic derogation framework. The most important cases in this regard were the *Maribel bis/ter* case in 1999 and the *Adria-Wien* case in 2001.

The *Maribel bis/ter* case[314] concerned reductions in social charges for manual workers introduced by Belgium in the interests of the promotion of employment of manual workers. Belgium had argued that a relevant matter was whether these reductions comprised a general measure of economic policy or favoured "*certain undertakings*" within the meaning of Article 107(1) TFEU and that this had to be assessed with reference to whether the measure in question applied to all undertakings which "*are in an objectively similar position*".[315] To respond to this

311 Case C-241/94 *France v Commission (Kimberly Clark)* EU:C:1996:353.

312 *Ibid*., paragraphs 23-24. To similar effect, see also, Case C-200/97 *Ecotrade*, paragraph 40; Case C-295/97 *Piaggio* EU:C:1999:313, paragraph 39; and Case T-36/99 *Lenzing v Commission* EU:T:2004:312, paragraphs 129-132.

313 The existence of discretion in the application of a scheme also remains an indicator in the recent case-law – see e.g. Joined Cases T-515/13 RENV and T-719/13 RENV *Spain and Others v Commission* EU:T:2020:434, paragraphs 87-101. Interestingly this line of case-law was effectively departed from in the *MOL* case, where the relevant margin of discretion reserved to the State, in relation to the setting of mining fees under agreements extending mining rights, was considered as justified precisely because it allowed for the modulation of the fees appropriately to reflect individual circumstances and therefore "*the imperatives arising from the principle of equal treatment*". This meant, in our interpretation, that it was not indicative of an object to favour in that case. See Case C-15/14 P *Commission v MOL*, paragraphs 64-65.

314 Case C-75/97 *Belgium v Commission (Maribel bis/ter)*.

315 *Ibid*., paragraph 17.

argument, the Court of Justice assessed the measure with reference both to its claimed objective as well as the objectives of the general Belgian social security system and concluded that the scope of the measure nonetheless could not be justified as it excluded some sectors with significant manual labour rates, including the tertiary and building sectors,[316] while including certain sectors, such as horticulture and forestry in which manual labour rates were low.[317]

In so doing, the Court of Justice effectively applied a variant of what would become the second and third steps of the derogation framework. The subtext to the case was that the measure expressed on its face that it applied to undertakings in those sectors that were most exposed to international competition,[318] and therefore appeared to be motivated by a protectionist impulse. While this element was not explicitly drawn upon in the reasoning of the Court, it was noted in the judgment,[319] and was drawn upon by Advocate General La Pergola in his opinion as confirming the conclusion that the scheme could not be considered as a general measure.[320]

The *Adria-Wien* case,[321] which concerned a tax rebate for energy intensive undertakings in the manufacturing sector in the context of a new taxation scheme applying to energy taxation in Austria, followed the same pattern, save that in this case, the Court of Justice referred to the second and third steps of the derogation framework explicitly. Citing its *Maribel bis/ter* judgment, the Court explained that it had to be determined, "*whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' within the meaning of Article [107(1)] of the Treaty in comparison 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*," and that, "*a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part does not fulfil that condition of selectivity*."[322]

316 *Ibid*., paragraphs 28-31.
317 *Ibid*., paragraph 36-39.
318 Belgium had noted that this reference was "unfortunate" but claimed that it was not one of the relevant factors taken into account in restricting the scheme to certain sectors.
319 Case C-75/97 *Belgium v Commission (Maribel bis/ter)*, paragraph 20.
320 Opinion of Advocate General La Pergola in Case C-75/97 *Belgium v Commission (Maribel bis/ter)* EU:C:1998:534, at page 3679.
321 Case C-143/99 *Adria-Wien*.
322 *Ibid*., paragraphs 41-42.

Applying these steps together, the Court considered that the rebate amounted to State aid as both the manufacturing sector and the services sector (to which the rebate did not apply) were comparable in light of the ecological objective of the overall energy taxation scheme in Austria. The Court explained that services sector undertakings may also be major consumers of energy while energy consumption by both sectors is equally damaging to the environment and there was no indication that the rebate in its current form was just a temporary measure to allow undertakings affected disproportionately to adapt gradually to the new energy taxation scheme.[323] Significantly, the Court also added that the statement of reasons for the Austrian law itself stated that the advantageous terms to manufacturing undertakings were intended to preserve the competitiveness of Austria's manufacturing sector within the EU,[324] indicating again that the Court considered that the measure had the object of creating sectoral inequality of opportunity in a manner that ran contrary to the fair macro-economic competition imperative.

In both the *Maribel bis/ter* and the *Adria-Wien* cases, the assessment applied by the Court of Justice therefore essentially amounted to a type of derogation or indeed a "consistency test", to determine whether the scope of the measure in question was consistent with its own claimed objectives and / or the objectives or logic of the broader system of which it formed part, with the aim of determining the true nature of the measure. As part of this assessment, the Court also appears to have taken into account indications that the measures in question were motivated specifically by the aim of maintaining international competitiveness and therefore protectionist impulses.

The inspiration for this approach appears to lie in the seminal opinion of Advocate General Darmon in the *Sloman Neptun* case in 1992.[325] While this opinion is perhaps best known for its forceful repudiation of a separate State resources requirement in the definition of State aid (which was ultimately not followed by the Court of Justice), an important part of the opinion lies in the Advocate General's argument that the definition of State aid should be more focused on the requirement

323 *Ibid*., paragraphs 49-53.
324 *Ibid*., paragraph 54.
325 Opinion of Advocate General Darmon in Joined Cases C-72/91 and C-73/91 *Sloman Neptun*.

under Article 107(1) TFEU that the measure favours "*certain undertakings or the production of certain goods*", i.e. the selective advantage requirement.

According to the Advocate General, this came down to assessing whether the measure, "*should constitute a derogation, by virtue of its actual nature, from the scheme of the general system in which it is set*."[326] The Advocate General explained that the concept of derogation was, "*unquestionably related to the political and philosophical conceptions regarding the role of the State and the limits of its intervention in the economic sphere,*" as, "*the ratio legis of Article [107] is to subject to joint supervision intervention by the State which goes beyond the general legislative framework of economic activities*." The Advocate General continued to explain that, "*The concept of derogation makes it possible, as I see it, far more than the identification of specific beneficiaries, to distinguish between aid and those general measures of economic and social policy*."[327]

This imperative of distinguishing between general measures and State aid is something that was highlighted by a number of Advocates General following the opinion of Advocate General Darmon.[328] In particular, Advocate General Poiares Maduro has explained that a distinction must be drawn between, "*general measures to regulate economic activities, which fall outside the State aid rules, and measures of economic and financial intervention, which are properly the subject of scrutiny*" and that the former, "*must be accepted in as much as their only purpose is to establish the parameters within which business is carried on and goods and services produced*."[329] Significantly, according to the Advocate General, where special treatment cannot be justified on the basis of a general system or where it does not

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326 *Ibid*., paragraph 50.

327 *Ibid*., paragraph 55.

328 See e.g. the opinion of Advocate General Jacobs in Case C-241/94 *France v Commission (Kimberly Clark)* EU:C:1996:195; the opinion of Advocate General Fennelly in Case C-200/97 *Ecotrade*, paragraph 25; the opinion of Advocate General La Pergola in Case C-75/97 *Belgium v Commission (Maribel bis/ter)*, paragraph 8; the opinion of Advocate General Stix-Hackl in Case C-66/02 *Italy v Commission* EU:C:2005:510, at paragraph 67; and the opinion of Advocate General Jaaskinen in Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Gibraltar and UK* EU:C:2011:215, paragraph 178. This consideration has also been mentioned explicitly by the EU Courts in certain judgments – see Case T-219/10 *Autogrill España v Commission* EU:T:2014:939, paragraph 34; Case T-399/11 *Banco Santander and Santusa v Commission* EU:T:2014:938, paragraph 38 and Case T-696/17 *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission* EU:T:2019:652, paragraph 128.

329 Opinion of Advocate General Poiares Maduro in Case C-237/04 *Enirisorse* EU:C:2006:21, paragraphs 44 and 51.

result from a consistent application of the system to which it belongs, in those circumstances, "*it is reasonable to assume that the measure has no other justification than to afford preferential treatment to a certain class of economic agents*."[330] Summarising the essence of the test, Advocate General Kokott put it concisely that, "*The Court undertakes a consistency test, where inconsistency ultimately indicates abuse*."[331]

The derogation framework represents the culmination of efforts to operationalise this consistency assessment and is explicable specifically with reference to the public authority context in which the State is acting, essentially, in the legislative policy or regulatory sphere. As per the central claim in this thesis, the framework therefore seeks to distinguish between measures which have the object of creating inequality of opportunity and favouring certain undertakings or a sector / sectors on the one hand, and measures that legitimately form part of general economic and regulatory policy which are therefore consistent with the principle of equality of opportunity on the other. As part of this assessment, and as is apparent from the *Maribel bis/ter* and *Adria-Wien* cases themselves, direct evidence in relation to the true purpose of the measure, and in these cases, indications that the measure was motivated by international competitiveness concerns directly contrary to the macro-economic competition imperative underlying the EU State aid rules, are also relevant.

Returning to the *Paint Graphos* case, which we introduced at the start of this section as a paradigm example of the derogation framework in practice, on our

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330 *Ibid*., paragraph 52. To similar effect, see also the opinion of Advocate General La Pergola in Case C-75/97 *Belgium v Commission (Maribel bis/ter)*, at paragraph 8, "*can the derogations or amendments introduced by the disputed measures into the general social security system, which they leave in place, be said to be objectively justified by the economy and the nature of such an arrangement under the ordinary law, having regard to its internal logic, or do they serve the sole purpose of arbitrarily benefiting certain undertakings or specific sectors?*" and the opinion of Advocate General Ruiz-Jarabo Colomer in Case C-6/97 *Italy v Commission* EU:C:1998:416 at paragraph 27, "*it will be for the State which introduces [exceptions] to show that they are, on the contrary, what have come to be known as 'measures of a general nature' and that, as such, they fall outside the scope of [Article 107]. To that end, the State must make clear which aspect of the system's internal logic those measures obey, and thereby prove that they do not in any way seek to improve the position of one particular sector in relation to its foreign competitors*."

331 Opinions of Advocate General Kokott in Case C-233/16 *ANGED* EU:C:2017:852, paragraph 82 and Joined Cases C-236/16 and C-237/16 *ANGED* EU:C:2017:854, paragraph 82. To similar effect, see also the opinion of Advocate General Kokott in Case C-75/18 *Vodafone Magyarország* EU:C:2019:492, paragraphs 166-168 and the opinion of Advocate General Pitruzzella in Joined Cases C-51/19 and C-64/19 *World Duty Free Group and Spain v Commission* EU:C:2021:51, paragraph 19.

interpretation, what the Court effectively decided was that the corporation tax exemptions did not have as their object to create inequality of opportunity in favour of cooperative societies, but rather legitimately formed part of general taxation policy, specifically, an appropriate adjustment of the corporation tax system to account for the particularities of cooperative societies.

In the sections below, we go through the three steps in the derogation framework in greater detail and explore how the nature of this assessment, a test of consistency to determine whether the measure can be considered as forming part of general economic and regulatory policy which would be in accordance with equality of opportunity, can be demonstrated with reference to each of the three steps.

III. First step – identification of the reference system

In the three-step test, the identification of the reference system establishes the relevant general regulatory or economic policy framework to which the measure may pertain, and therefore effectively, the benchmark against which the existence of a selective advantage is assessed, in terms of the relevant undertakings / sectors whose treatment is to be compared as well as the relevant objective in light of which that comparison should take place.

In many cases, the reference system is not something that is the subject of detailed debate but is identified relatively intuitively as simply the broader regulatory policy framework to which the measure at issue is connected. To take an example, in the *NOx* case,[332] which concerned the setting up of an emission trading scheme by which the largest 250 undertakings in the Netherlands were able to trade among each other credits reflecting their own efforts in reducing emissions, the Court appears to have considered, without any significant discussion, that the broader system was simply the national environmental legislation imposing obligations on operators to limit or reduce their emissions.[333]

Similarly, in many cases involving fiscal measures, the EU Courts simply consider the general corporation taxation rules as being the reference system. For instance, in the *Paint Graphos* case referred to above, the general corporation tax system was considered to be the reference system as the basis of assessment of cooperative

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332 Case C-279/08 P *Commission v Netherlands (NOx)* EU:C:2011:551.
333 *Ibid*., paragraphs 64 and 67.

societies was determined in the same way as all other undertakings, namely on the basis of the amount of net profit earned at the end of the tax year (albeit cooperative societies then benefitted from the tax exemptions at issue).[334]

A similar broad frame of reference was ultimately settled upon by the EU Courts in the *World Duty Free* litigation, which concerned a Spanish tax scheme allowing for the deduction of goodwill in relation to acquisitions of shares in foreign companies, and is the subject of a detailed examination in section IV of this chapter. In the *Renvoi* case, the EU Courts reached the view that the reference system constituted the general rules in relation to the tax treatment of goodwill and that the measure at issue was not itself the relevant reference system. This was because, among other things, the measure was merely a particular way of applying a wider ranging tax, namely corporate tax, and it did not introduce a new general rule in its own right relating to the deduction of goodwill, but rather an exception to the existing general rule.[335]

In our view, the EU Courts are not doing anything particularly innovative conceptually in their application of the first step of the derogation framework in these cases, nor do they in the majority of cases. The identification of the reference system follows from the objective composition and content of the measures and broader regimes at issue as devised by the State, as well as their objective purposes or object, with an emphasis on substance over form.[336]

In certain cases however, the identification of the reference system has been the subject of more conceptually interesting analysis. This was the case in the *Azores* judgment,[337] which is well-known for originally laying down the framework for assessing selective advantage in the case of measures taken by regional State bodies, referred to in the commentary as so-called "geographic selectivity". The case concerned reduced tax rates adopted by the regional legislative assembly of

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334 Joined Cases C-78/08 to C-80/08 *Paint Graphos*, paragraph 50.

335 That only business combinations may lead to the deduction of goodwill. Case T-219/10 RENV *World Duty Free v Commission* EU:T:2018:784, paragraphs 134-135, upheld by the Court of Justice on appeal in Case C-51/19 P *World Duty Free v Commission* EU:C:2021:793.

336 See in this regard, Case C-203/16 P *Andres (faillite Heitkamp BauHolding) v Commission* EU:C:2018:505, at paragraph 104, where the Court of Justice criticised the General Court for attaching importance to the fact that the measure under consideration was worded in the form of an exception to another rule, as opposed to the substance of the rules concerned.

337 Case C-88/03 *Portugal v Commission (Azores)*.

the Azores bodies which necessarily, only applied to undertakings within their regional sphere of competence and therefore the critical issue was whether the reference system should be defined as being limited to the Azores region or as covering the entirety of Portugal. If it was the latter, then the measures would have most likely been deemed to give rise to selective advantages as they evidently benefitted undertakings in the Azores region only.

In resolving this issue, the Court of Justice explained that the critical question was to establish whether the regional body was sufficiently autonomous vis-à-vis the central government of the Member State, "*with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environmental in which undertakings operate,"*[338] in which case, the regional body's geographical area of competence could serve as a relevant reference system, as opposed to the country as a whole. To assess this, the Court set out criteria designed to assess institutional, procedural and economic autonomy namely, that the regional body must have a status that is separate from that of the central government from a constitutional, political and administrative point of view; the measure must have been adopted without the central government being able to intervene directly in relation to its content; and finally, the financial consequences of the measure must not be offset by aid or subsidies from other regions or central government.[339]

The criteria set out by the Court do not of course relate to the effects of the measure itself, which are identical irrespective of whether or not these criteria are fulfilled.[340] Rather, in our view, they serve to determine whether there is a sufficient nexus between the central government and the measure undertaken by the regional body concerned, in a similar way to the general imputability criterion applicable in State

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338 *Ibid*., paragraph 58.

339 *Ibid*., paragraph 67. These criteria have been applied by the EU Courts in a number of further cases, notably, Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others* EU:C:2008:488; and Joined Cases T-211/04 and T-215/04 *Gibraltar and UK v Commission* EU:T:2008:595.

340 Indeed, in the *Azores* case, the Commission had argued against adopting a narrower reference system on the basis that a regional tax reduction would inevitably create a competitive distortion – see the opinion of Advocate General Geelhoed in C-88/03 *Portugal v Commission (Azores)* EU:C:2005:618, paragraph 58. This argument however, was not addressed explicitly by the Court and appears to have been disregarded. For criticism in relation to this point, see J Winter, 'Case C-88/03, *Portuguese Republic v Commission*' (2008) Common Market Law Review 183 and Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy', at 49-50.

aid definition. Essentially, whether it is the central government which, is in fact, the relevant protagonist.[341] Where such a nexus does not exist, the measure is such that it could potentially be found to be a legitimate measure of general economic or regulatory policy taken by the competent State actor, this being the regional authority. Where such a nexus between the central government and the measure does exist however, then the measure would need to be assessed against the generally applicable framework in the whole country, and will most likely be found to give rise to a selective advantage as it amounts to favouring undertakings from the region concerned.[342]

In this sense, we would argue that the *Azores* framework does not represent an instance where the EU Courts have been overly deferential to Member States' internal constitutional arrangements to the detriment of effective application of the EU State aid rules[343] or as a separate species of assessment, so-called "geographic selectivity", as suggested in the commentary which analyses this framework separately from so-called "material selectivity".[344] Rather, in our view, the *Azores* framework is simply a logical application of the essential test of whether the object of the measure is to create inequality of opportunity between undertakings or sectors, in this particular situation, geographical sectors, or potentially represents measures of general economic or regulatory policy undertaken by the relevant regional authority.

A similar approach can be seen in the *Hansestadt Lübeck* judgment,[345] which, although it is not concerned with a measure taken by a regional authority, is based on similar principles. In *Hansestadt Lübeck*, the issue arising was whether the

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341 This interpretation seems confirmed by the Court of Justice's further clarification in Joined Cases C-428/06 to C-434/06 *UGT-Rioja* that the third criterion in relation to financial autonomy must be determined with respect to the *specific measure in question,* holding that the existence of financial transfers in general between the central State and its infra-State bodies cannot in itself suffice to demonstrate the absence of financial autonomy since such transfers may take place for reasons unconnected with the tax measures that were at issue (see paragraph 135).

342 Which was ultimately the result of the Court's assessment in the *Azores* case itself.

343 Contrary to Piernas López, *The Concept of State Aid under EU Law*, at 133; and Winter. 'Case C-88/03, *Portuguese Republic v Commission*', at 194-195.

344 See e.g. Da Cruz Vilaça, 'Material and Geographic Selectivity in State Aid — Recent Developments'; H López López, 'General Thoughts on Selectivity and Consequences of a Broad Concept of State Aid in Tax Matters' (2010) European State Aid Law Quarterly 807; and Bartosch, 'The concept of selectivity?'.

345 Case C-524/14 P *Commission v Hansestadt Lübeck* EU:C:2016:971, in which the Court of Justice upheld the earlier judgment of the General Court in Case T-461/12 *Hansestadt Lübeck v Commission* EU:T:2014:758.

charges set by Lübeck airport in Germany,[346] constituted a selective advantage to those airlines using the airport, as compared to competing airlines using other airports, which set higher charges. The Court of Justice explained that as each airport, exercising a power of its own, draws up the scale of charges applicable to that airport, the relevant reference system in this case was not the German legislation under which all airports set their charges, but rather the specific schedule of charges adopted by each airport. As such, airlines using other German airports were not in a comparable position to those using Lübeck Airport and therefore on the basis that Lübeck Airport's schedule itself applied in a non-discriminatory manner to all airlines using the airport, in the absence of any further reasoning from the Commission,[347] there was no selective advantage.[348] Again, by identifying the relevant protagonist and its specific sphere of influence, the Court of Justice essentially found that the measure could not have the object of creating inequality of opportunity between certain airlines, but was akin to a general measure.

The *Hansestadt Lübeck* case is also notable in that the Court effectively concluded that there was no broader relevant reference system, but rather that the measure itself, the schedule of charges, constituted the relevant reference system.

This has been a feature of the EU Courts' analytical approach where the measure at issue is a stand-alone measure that does not form part of any obvious pre-existing framework. Another important example of this is the *British Aggregates Association Renvoi* case,[349] which concerned a new environmental levy imposed in the UK in relation to the exploitation of aggregates and which is notable for being one of the first cases where the derogation framework with all of its three-steps was applied in a detailed and methodical manner to the assessment of the material scope of a levy. In this case, the General Court reasoned that the aggregates levy itself constituted the reference system on the basis that it established a specific tax system applicable

346 The question of State aid arose in the first place because the fee schedule had been subject to approval by the regional State supervisory authority and the airport itself was owned by the City of Lübeck during the period of the fee schedule's application – see Commission Decision of 22 February 2012 in SA.27585 and SA.31149 (2012/C) (ex NN/2011, ex CP 31/2009 and CP 162/2010) Alleged State aid to Lübeck airport, Infratil and airlines using the airport (Ryanair, Wizz Air and others), OJ C 241/56 10.8.2012, recitals 257-262.

347 The Commission had based its finding of a selective advantage solely on the basis that the lower schedule of charges benefitted only those airlines using Lübeck airport.

348 Case C-524/14 P *Commission v Hansestadt Lübeck*, paragraphs 61-64.

349 Case T-210/02 RENV *British Aggregates Association v Commission*.

to the aggregates sector in the UK, and the Court went on to define the "normal taxation principle" underlying the aggregates levy as being based on the "*notion of the commercial exploitation in the United Kingdom of a material that is taxable as an 'aggregate'*".[350] It then moved to the second step and examined whether the scope of the levy was consistent with its apparent environmental objective.[351]

In other cases, the EU Courts have simply moved to the second step without explicitly defining the reference system, an example being the *Eventech* case[352] which concerned the bus lanes policy of Transport for London in allowing black cabs to use bus lanes while other minicabs were excluded from using bus lanes. In assessing the existence of a selective advantage, the Court of Justice did not consider any broader regime or system within which the bus lanes policy was situated, but rather moved straight into the second step and considered the comparability of black cabs and other minicabs in light of the objective of the bus lanes policy itself i.e. the measure in question, of ensuring a safe and efficient transport system.[353]

The approach taken in all of these cases is ultimately the same however, in that the measure in itself and its own objective are treated as being effectively the reference system. In this sense, the derogation framework is applied flexibly in light of the particular circumstances of the case, with the first stage simply being to identify the relevant general regulatory or economic policy framework for the measure against which the question of consistency is to be assessed.

IV. Second step – differentiation between undertakings in a comparable legal and factual situation in light of the relevant objective

The second step of the derogation framework, an assessment of whether the measure in question differentiates between undertakings in a comparable legal and factual situation in light of the relevant objective, self-evidently seems closely associated with the principle of non-discrimination, according to which essentially,

350 *Ibid*., paragraphs 51-55.
351 *Ibid*., paragraphs 62-81.
352 Case C-518/13 *Eventech*.
353 *Ibid*., paragraphs 55-61.

comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.[354]

This link, initially made by a number of Advocates General[355] has also now been explicitly confirmed by the Court of Justice in its landmark judgments in the *World Duty Free*[356] and *Hansestadt Lübeck*[357] cases issued on the same day by its Grand Chamber. In these cases, the Court stated that the selective advantage assessment, "*requires a determination whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and who accordingly suffer different treatment that can, in essence, be classified as discriminatory*"[358] and that, "*The examination of whether such a measure is selective is thus, in essence, coextensive with the examination of whether it applies to that set of economic operators in a non-discriminatory manner. The concept of selectivity […] is thus linked to that of discrimination*"[359] (emphasis added).

The application of a non-discrimination principle is another important point of distinction between the notion of State aid under EU State aid law and the notion of a "subsidy" under the WTO anti-subsidy rules[360] and is therefore, a unique feature of the selective advantage assessment within the definition of State aid.

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354 See e.g. Case C-127/07 *Arcelor Atlantique and Lorraine and Others* EU:C:2008:728, paragraph 23; Case C-264/18 *P.M. and Others v Ministerraad* EU:C:2019:472, paragraph 28; and Case C-220/17 *Planta Tabak-Manufaktur Dr. Manfred Obermann GmbH & Co. KG v Land Berlin* EU:C:2019:76, paragraph 36.

355 The first explicit recognition of this link was made by Advocate General Bobek in his opinion in Case C-270/15 P *Belgium v Commission*, at paragraph 29. It was however, also foreshadowed by the General Court in its renvoi judgment in Case T-210/02 RENV *British Aggregates Association v Commission,* paragraph 68.

356 Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free*. See also in this regard, Honoré, 'Selectivity,' at 127, which refers to the second step as "*non-discrimination in the light of the objective of the measure*".

357 Case C-524/14 P *Commission v Hansestadt Lübeck*.

358 Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free*, paragraph 54.

359 Case C-524/14 P *Commission v Hansestadt Lübeck*, paragraph 53.

360 Under the WTO anti-subsidy rules, the approach to specificity is focused on the more straight-forward question of whether a measure only benefits certain enterprises either in law or in fact, for which the Appellate Body has confirmed that there is no need to demonstrate the existence of discrimination – WTO Appellate Body Report in *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R (8 December 2014), paragraphs 4.371-4.390.

This reflects the key and specific function of the non-discrimination principle in this context, which we argue serves as the means by which the consistency of a State measure with the relevant reference system to which it purports to pertain, and therefore the question of whether it can be considered as a measure of general economic and regulatory policy or a measure whose object is create inequality of opportunity, is assessed. This particular function in turn, influences the nature of the specific non-discrimination principle that is applied and in this regard, the assessment therefore places sole emphasis on the objective underlying the relevant reference system in line with its nature as a consistency assessment, as opposed to other potential modes of comparability, such as the competitive relationships between the undertakings impacted by the measure. While some confusion may have resulted from the earlier cases setting out the second step of the derogation framework,[361] the centrality of the relevant objective of the reference system to the assessment is now clear from more recent case-law.

The first cases to address this issue directly were the *British Aggregate Association* cases, which as mentioned above, concerned the UK's aggregates levy, a UK environmental tax on aggregates. At first instance, notwithstanding that the aggregates levy did not apply to all aggregates materials, the General Court considered that there was no selective advantage on the basis that Member States when introducing environmental levies should be able to set their own priorities as regards environmental protection, meaning that the fact that an environmental levy does not apply to all similar activities which have a comparable impact on the environmental situation does not give rise to State aid.[362]

On appeal to the Court of Justice, Advocate General Mengozzi criticised this approach on the basis that it involved assessing State aid independently of the competitive relationship that may exist between those aggregates operators liable to pay the levy and those outside its scope and therefore independently of the effects of the measure in question, which was inconsistent with the "effects-based approach" that the Advocate General considered as underlying the definition of State

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361 In particular, some of the earlier case-law set out the second step simply as testing whether the measure "*constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation*" i.e. omitting "*in light of the relevant objective*". See e.g. Case C-88/03 *Portugal v Commission (Azores)*, paragraph 56; Joined Cases C-428/06 to C-434/06 *UGT-Rioja*, paragraph 46; and Case C-487/06 P *British Aggregates Association v Commission*, paragraph 82.

362 Case T-201/02 *British Aggregates Association v Commission*, paragraph 115.

aid. In addition, the Advocate General explained that the approach of the General Court meant that differences in treatment could be justified even if based on objectives unconnected with the protection of the environment and consequently unrelated to the internal logic of the measure in question.[363]

The Court of Justice followed the reasoning of the Advocate General in large part, including seemingly his emphasis on the effects of the measure and overturned the judgment of the General Court, leading some commentators to speculate that the judgment represented the affirmation of a more "effects-based approach" in assessing the existence of selective advantage, to the exclusion of objectives.[364] However, and in contrast to the opinion of the Advocate General, the Court pointedly did not refer to the possible competitive relationship between those operators subject to the levy and those that were not, but based itself entirely on the matter of differentiation in light of the environmental objective of the measure, criticising the General Court for finding that there would be no State aid even though the levy did not apply to all similar activities which have a comparable impact on the environment.[365]

Taking its lead from the judgment of the Court of Justice, the General Court in the renvoi case, emphasised the centrality of the relevant objective in determining the comparability of the materials subject to the levy and those that were not.[366] Going

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363 Opinion of Advocate General Mengozzi in Case C-487/06 P *British Aggregates Association v Commission* EU:C:2008:419, paragraphs 98-99.

364 See in this regard, Bartosch, 'Is there a Need for a Rule of Reason in European State Aid Law?', at 737.

365 Case C-487/06 P *British Aggregates Association v Commission*, paragraphs 86-87. At paragraph 87, the Court of Justice goes on to explain that such an approach, "*excludes a priori the possibility that the non-imposition of the [levy] on operators in comparable situations in the light of the objective being pursued might constitute a 'selective advantage', independently of the effects of the fiscal measure in question, even though Article 87(1) EC does not make any distinction according to the causes or objectives of State interventions, but defines them on the basis of their effects*." Unlike the Advocate General however, whose reference to "effects" related to the levy's impact on competition between those operators liable to pay the levy and those outside its scope, the Court's reference to "effects" related to the levy's impact on the environment and in line with its stated objective.

366 Case T-210/02 RENV *British Aggregates Association v Commission*, paragraphs 62-70. As mentioned in note 355 below, in doing so the General Court drew on the established case-law on the EU law notion of non-discrimination, explaining in light of this case-law, that ,"*the elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject-matter and purpose of the act which makes the distinction in question, as well as the principles and objectives of the field to which that act relates*" (see paragraph 68).

further than the previous judgments, the General Court went on to pinpoint the relevant environmental objective of the levy as being specifically to “shift demand” from materials extracted for their commercial exploitation as aggregates towards alternative sources of aggregates not extracted for their commercial exploitation as aggregates but which could serve as such.[367] In light of this objective, the General Court explained that the materials outside the scope of the levy were in a comparable situation to those subject to the levy on the basis that there was "*at least a potential link in terms of competition or of substitutability between the various aggregates as regards their use or commercial exploitation*" and that "*the extraction of untaxed materials, particularly slate and clay, is at least equally, if not more, harmful to the environment than the extraction of other, taxed, materials, which also produce spoil, waste or other by-products capable of being used as aggregates*."[368]

The reference to “*competition*” and “*substitutability*” in the renvoi judgment has been drawn upon by some commentators as indicating that competitive effects and even potentially market definition analysis should be taken into account as part of the selective advantage assessment.[369] But we would argue that these references are simply attributable to the specific environmental objective at issue, based on the uses of the materials as aggregate and given that their substitutability was key in terms of achieving the "shift in demand", a fact which is clear from other parts of the judgment.[370]

The Court of Justice would appear in any event to have categorically settled the issue in the *Eventech* case,[371] which as explained above, concerned the bus lanes policy of Transport for London in allowing black cabs to use bus lanes while other minicabs were excluded from using bus lanes.

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367 *Ibid*., paragraph 64.

368 *Ibid*., paragraphs 71-72.

369 See e.g. P Nicolaides and I E Rusu, ‘The Concept of Selectivity: An Ever Wider Scope’ (2012) European State Aid Law Quarterly 791, at 796-797; G Lo Schiavo, ‘The General Court Reassesses the British Aggregates Levy: Selective Advantages “Permeated” by an Exercise on the Actual Effects of Competition?’ (2013) European State Aid Law Quarterly 384; and Honoré, ‘Selectivity', at 152.

370 See paragraphs 89-90. See also in this regard, Biondi, ‘State Aid is Falling, Falling Down: An Analysis of the Case Law on the Notion of State Aid’, who states at 1737 that the language of the General Court in referring to competitive substitutability may have been slightly misleading.

371 Case C-518/13 *Eventech*.

The case is notable for a number of reasons, not least because the Court of Justice applied the derogation framework to assess the existence of State aid in a relatively novel context, that of granting privileged access to public infrastructure. The Court reasoned that where public infrastructure is not operated for profit, but rather to achieve regulatory objectives, here to ensure a safe and efficient transport system, the non-charging for access would not give rise to State aid if charging would compromise the realisation of those regulatory objectives and the criteria for determining the privileged access is transparent and non-discriminatory.[372]

In other words, and as elucidated by the Court's Advocate General Wahl, there could be no State aid if the State was genuinely acting in a regulatory capacity in managing access to public infrastructure.[373] Taking the view that charging for access could deter black cabs from using the bus lanes, the Court reasoned that the question of whether the right of access was granted in a non-discriminatory manner was subsumed in the second stage of the derogation assessment.[374] The derogation framework was therefore ultimately applied in order to assess whether the State was genuinely acting in a regulatory capacity and therefore in accordance with equality of opportunity, demonstrating again the purpose of the derogation framework.

For the purposes of the present discussion however, in applying the non-discrimination standard and therefore the second step of the derogation framework, the Court of Justice eschewed an approach that would take into account competitive impacts, contrary to the opinion of its Advocate General Wahl, and considered the comparability of black cabs and other minicabs solely in light of the stated objective of the bus lanes policy, which was to establish a safe and efficient transport system. The Court pointedly considered that the comparability assessment could not be confined to that prevailing in the market sector in which minicabs were in competition with black cabs, namely the pre-booking sector, as "*[i]t cannot be seriously doubted that all the journeys made by Black Cabs and minicabs are liable to affect the safety and efficiency of the transport system on all the road traffic routes in London*"[375] i.e. the stated objective of the bus lanes policy. The Court then concluded that the two sets of operators were not comparable for these purposes, given the specific

372 *Ibid*., paragraphs 48-49.
373 Opinion of Advocate General Wahl in Case C-518/13 *Eventech*, paragraph 32.
374 Case C-518/13 *Eventech*, paragraph 53.
375 *Ibid*., paragraph 59.

requirements attaching to black cabs[376] which meant effectively that they played a special role from the perspective of establishing a safe and efficient transport system, making its assessment without reference to competitive considerations.

In contrast, Advocate General Wahl had proposed incorporating a proportionality criterion in order to take into account possible competitive distortions, noting that black cabs could use their resulting competitive advantage over minicabs in the pre-bookings segment and arguing that the aim of maintaining a safe and efficient transport system should not allow the distortion of competition caused by the bus lanes policy on the market for pre-bookings to be unrestricted.[377] This was not taken up by the Court, however.

These cases demonstrate that the specific non-discrimination assessment at issue in this second step of the derogation test is one that is independent of the competitive effects of the measure but is entirely focused on the relevant objective. As explained above, this follows from the nature of the assessment as being ultimately a type of "consistency test" in order to determine whether the measure legitimately forms part of general economic and regulatory policy or has the object of creating inequality of opportunity and favouring certain undertakings or sectors. The question is whether the substance of the measure and the differentiations that it introduces, are consistent with the State's own relevant objective? As explained by Advocate General Poiares Maduoro above, where this is not the case, the object of a measure with differential application may be presumed as being to create inequality of opportunity in favour of those undertakings or sectors that benefit, or indeed, in the words of Advocate General Kokott, "*inconsistency ultimately indicates abuse*".[378]

Given the centrality of objectives to this determination, the identification of the relevant objective for the purposes of the assessment is fundamental and the EU Courts' determinations in this regard are further instructive as to the nature of the assessment at hand and therefore the concept of selective advantage.

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376 In particular, black cabs were subject to the rule of "compellability"; they had to be recognisable and capable of conveying persons in wheelchairs; their drivers had to set the fares for their services by means of a taxi meter; and they had to have a particularly thorough knowledge of the city of London – see paragraph 60.

377 Opinion of Advocate General Wahl in Case C-518/13 *Eventech*, paragraphs 71-72.

378 See pages 94-95 above.

The first point to note is that the Commission cannot select an objective for its assessment which is different from that put forward by the Member State concerned, a point on which it was heavily criticised by the General Court in the recent *Progressive Turnover Tax* cases,[379] which are addressed in detail in section VI below. This of course follows from the nature of the test as a type of consistency assessment, based on the Member State's stated objectives.

The only circumstances where the EU Courts have discounted certain objectives as relevant bases for the selective advantage assessment, are where those objectives are concerned with improving the international competitiveness of the particular sectors at issue. This was the case in the *British Aggregates Association* judgment, where the Court of Justice rejected the aim, *"to maintain the international competitiveness of certain [aggregate] sectors*" as a possible basis to justify the distinctions made by the aggregates levy.[380] Similarly, in the *Italy v Commission* case which concerned preferential tax treatment for the banking sector in Italy, the Court of Justice reached the view that the measures at issue could not be considered as an adaption of the general tax scheme to meet particular characteristics of banking undertakings as it was clear that "*they were explicitly put forward by the national authorities as a means of improving the competitiveness of certain undertakings at a given time in the development of the sector*".[381] Such considerations of course cannot be drawn upon to justify distinctions in treatment as part of the selective advantage assessment, because they embody the very mischief that the fair macro-economic competition dimension of EU State aid control seeks to address.[382]

The second point to note is that the identification of the relevant objective flows from the choice of the reference system, and in particular, whether a broader reference system such as the general tax system is the appropriate reference system as in the *Paint Graphos* case, or whether a narrower reference system, such as the measure at issue itself, as effectively in the *Eventech* case, is appropriate.[383] In the case of

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379 See Case T-20/17 *Hungary v Commission* EU:T:2019:448, paragraphs 86-90 and Joined Cases T-836/16 and T-624/17 *Poland v Commission* EU:T:2019:338, paragraphs 71-77.

380 Case C-487/06 P *British Aggregates v Commission*, paragraph 88.

381 Case C-66/02 *Italy v Commission*, paragraph 101.

382 *C.f.* also the relevance of this consideration to the Court's assessment in the *Maribel bis/ter* and *Adria-Wien* cases, as explained in section II above.

383 Importantly, the relevant objective is always that of the relevant reference system, not the measure at issue (unless the measure is itself the reference system), as affirmed

the latter, the assessment becomes essentially one of *internal consistency* i.e. is the scope of the measure and its application consistent with its stated objective? Whereas in the case of the former, the assessment is one of *consistency with the broader regime* of which the measure appears to form a part.

This difference stems from the nature of the assessment at issue – whether the differentiation introduced by the measure is consistent with the *relevant generality* in the case of the specific measure at hand such that it can be considered as a general economic or regulatory policy measure. While some commentators have questioned why on certain occasions the EU Courts have looked to the objective of the reference system and on others they have looked to the objective of the measure,[384] this is simply attributable to the identity of the relevant reference system and whether or not it coincided with the measure at issue.

In this sense, and contrary to the impression that may be suggested by some of the language used in the judgments quoted at the beginning of this section, the second step of the three-step test by necessity cannot be synonymous with a pure discrimination test as the relevant measure may be entirely non-discriminatory in light of its own objective but if it fails to cohere to the logic of the broader reference system of which it forms a part, it will be deemed to give rise to selective advantages. For example, a measure providing for a reduction in corporation tax for all companies that develop emission reduction technologies and goods, with the aim of incentivising such production for environmental purposes, might be entirely non-discriminatory in light of the relevant objective (depending on the detail of how it is designed). Nevertheless, it would still likely give rise to selective advantages in favour of these companies in light of the relevant objective of the broader reference system, that of the general corporation tax system in taxing company profits.

In theory, it would seem that there would be greater scope for differentiations to be justified in light of the relevant objective (and therefore avoid a finding of State aid) where the reference system and its objective are that of the measure at issue itself,

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recently by the Court of Justice in the *World Duty Free* renvoi appeal judgment – Case C-51/19 P *World Duty Free v Commission*, paragraph 125.

384 See e.g. Bartosch, 'Is there a Need for a Rule of Reason in European State Aid Law?', at 742; Micheau, 'Tax selectivity in European law of state aid: legal assessment and alternative approaches', at 336-337; and L Panci, 'Latest Developments on the Interpretation of the Concept of Selectivity in the Field of Corporate Taxation' (2018) European State Aid Law Quarterly 353, at 356.

as the measure then only needs to adhere to its own inherently narrower logic, as opposed to a broader logic inherent in a wider system that by definition must encapsulate a broader umbrella of measures.[385] This indeed seems borne out by the fact that most of the cases in which the Courts have ultimately held that differentiation may be justified in light of the relevant objective i.e. that there was no selective advantage based on the second step of the derogation framework, have concerned instances where the measure itself has effectively been considered as the reference system.[386]

This has led some commentators to raise the concern that Member States could devise a self-contained measure, i.e. a measure which itself constituted the relevant reference system, where the objective was precisely to favour a specific category of undertaking, meaning that distinctions made by the measure to this end would be in line with the objective and would therefore not give rise to selective advantages, effectively evading State aid control.[387]

We would not share this concern however, as such an objective ought to be discounted as antiethical to the assessment of selective advantage in line with the case-law addressing objectives associated with international competitiveness

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385 As noted by J Rapp, "*the fact that special purpose levies often form their own reference system modifies the selectivity test from the classic three-step test into a "consistency check" with the result that they are often not considered to constitute State aid*." See J Rapp, 'Taxation and State aid', in Hancher and JJ Piernas López (eds), *Research Handbook on European State Aid Law*, 40-63 at 52.

386 To the *Eventech* case already mentioned we can add: the *ANGED* case which concerned a new Spanish tax on retail establishments pursuing environmental protection and town and country planning objectives from which, *inter alia*, smaller establishments were exempted (Case C-233/16 *ANGED* EU:C:2018:280; Joined Cases C-234/16 and C-235/16 *ANGED* EU:C:2018:281 and Joined Cases C-236/16 and C-237/16 *ANGED*; in contrast, the exception for large collective outlets was considered to give rise to a selective advantage); the *Kernkraftwerke Lippe-Ems* case which concerned a German tax on the use of nuclear fuel for the commercial production of electricity (Case C-5/14 *Kernkraftwerke Lippe-Ems* EU:C:2015:354); the *3M Italia* case, which concerned a tax amnesty / settlement scheme aimed at concluding tax litigation that had been ongoing for more than 10 years (Case C-417/10 *3M Italia* EU:C:2012:184); and the *UNESA* case, which concerned a special-purpose tax on the use of inland waters for the production of electricity aimed at the protection and improvement of public water resources (Case C-105/18 *UNESA* EU:C:2019:935), among other cases. It may be noted that all of these cases were preliminary references, which may have also had some impact (see note 52 above).

387 See JL Buendia-Sierra, 'Finding Selectivity or the Art of Comparison, Annotation the Judgment of the Court of Justice of the European Union (First Chamber) of 8 September 2011 in Joined Cases C-78 to 80/08, *Paint Graphos*' (2018) European State Aid Law Quarterly 85.

referred to above.[388] Indeed, this principle even appears to have been codified in the UK-EU TCA's subsidy control chapter, which sets out the specificity assessment for "special purpose levies" as follows: "*special purpose levies shall not be regarded as specific if their design is required by non-economic public policy objectives, such as the need to limit the negative impacts of certain activities or products on the environment or human health, insofar as the public policy objectives are not discriminatory"* (emphasis added).[389] In addition, the reference system could itself also be further subject to challenge in line with the *Gibraltar* judgment, which is addressed in further detail in section VI below.

That said, it has been noted that the operation of the derogation framework does appear to lead to an inherent bias in favour of Member States using special purpose levies or taxes as policy instruments, as opposed to using the general tax system,[390] particularly in light of the recent *World Duty Free* judgment (see next page) which further increases the risk of selective advantages being found where the relevant reference system is the general tax framework. This may reflect a greater degree of suspicion in the case of the latter, as exemptions from general taxes have more traditionally been used as means of favouring certain undertakings or sectors and can often be subject to lower transparency than the enactment of special levies or taxes.

In addition, in this context it is also important to have regard to both aspects of the State aid control framework, definition and compatibility assessment by the Commission. Where a measure is found to derogate from a broader system and therefore confer selective advantages it may of course still be approved as compatible on the basis of its own objective i.e. where the measure pursues an important public policy aim, which would not otherwise be attained in the same way and it is best designed to achieve that positive objective while limiting distortions of competition and trade. On the other hand, where the measure at issue itself constitutes the reference system and is found to confer selective advantages as it

388 See page 108 above.

389 See UK-EU TCA, Article 363(2)(c).

390 See in this regard, the opinion of Advocate General Saugmandsgaard Øe in Case C-374/17 *A-Brauerei* EU:C:2018:741, at paragraphs 152-153 and JJ Piernas López, 'Revisiting Some Fundamentals of Fiscal Selectivity: The *ANGED* Case – Annotation on the Judgment of the Court of Justice of the European Union (First Chamber) of 26 April 2018 in Case C-233/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Generalitat de Catalunya* (2018) European State Aid Law Quarterly 274.

does not adhere consistently with its own stated objective, there would seem to be very limited potential for it still to be approved as compatible by the Commission as by definition, it could not be considered as appropriate and proportionate to achieving the relevant public policy aim.

The final point to address in relation to this second step is that notwithstanding the focus of the discrimination assessment on the relevant objective to the exclusion of competitive relationships, for a measure to give rise to a selective advantage, it must of course operate to the benefit of certain undertakings or sectors over others and therefore conflict with the notion of equality of opportunity, which it is argued, underlies the concepts of selective advantage and State aid. In this vein, it has been stressed on numerous occasions in the case-law of the EU Courts that an advantage resulting from a measure that is "*applicable without distinction to all economic operators does not constitute aid"*.[391]

That said, this basic tenet of the selective advantage assessment appeared to have been called into question by the landmark judgment in the 2016 *World Duty Free* case,[392] where the Court of Justice seemed to hold that for a finding of selective advantage, it was not required to identify a specific category of undertakings which are exclusively favoured by the measure concerned, only that the measure differentiated between undertakings which were in a comparable situation in light of the relevant objective.

The *World Duty Free* case concerned a Spanish tax scheme, under which companies acquiring a shareholding in a foreign company of at least five per cent. were able to deduct the resulting goodwill from their corporation tax base. Drawing on earlier case-law,[393] the General Court had held that the measure did not result in a selective advantage on the basis that a category of undertakings exclusively favoured by the measure could not be identified.[394] In particular, the condition for applicability of the measure did not set any minimum amount in value for the five per

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391 See e.g. Case C-203/16 P *Andres (faillite Heitkamp BauHolding) v Commission* EU:C:2018:505, paragraph 85; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Gibraltar and UK*, paragraph 72; and Case C-6/12 *P* EU:C:2013:525 paragraph 18.

392 Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free*.

393 Including the earlier *Gibraltar* judgment covered in section VI below.

394 See Case T-219/10 *Autogrill España v Commission*, paragraphs 41-84 and Case T-399/11 *Banco Santander and Santusa v Commission*, paragraphs 45-88.

cent. threshold and therefore, according to the General Court, did not restrict potential beneficiaries to those that possessed sufficient financial resources.[395]

The Court of Justice however annulled the judgments of the General Court, emphasising that for a finding of selective advantage it was required only that the measure distinguishes between undertakings in a comparable position in light of the objective of the tax system, which may be fulfilled in this case on the basis that the measure distinguished between undertakings acquiring shareholdings in foreign companies as compared to undertakings acquiring shareholdings in domestic companies, which would not obtain the tax advantage.[396] The Court further dismissed the position of the General Court that a category of undertakings exclusively favoured by the measure had to be identified, distinguishing the earlier case-law the General Court had relied upon.[397]

Reaction to the *World Duty Free* judgment was for the most part critical,[398] with commentators suggesting that the Court had introduced a new concept of "behavioural selectivity", whereby any favouring of certain undertakings would not be the effect of the measure itself but rather the effect of the choice of undertakings

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395 Case T-219/10 *Autogrill España v Commission*, paragraph 58 and Case T-399/11 *Banco Santander and Santusa v Commission,* paragraph 62.

396 Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free*, paragraphs 86-87.

397 Including the earlier *Gibraltar* case which appeared to point towards such a requirement, on the basis that this case did not itself involve a "derogation", but rather the application of a general tax scheme based on criteria that were in themselves also general.

398 See in particular, J Derenne, 'Commission v World Duty Free Group a.o.: Selectivity in (Fiscal) State Aid, quo vadis Curia?' (2017) Journal of European Competition Law & Practice 311; and the entries on the "Chillin' Competition" blog, 'AG Opinion in Joined Cases C-20/15 P y C-21/15 P, Santander and World Duty Free Group (ex-Autogrill): Wathelet proposes nothing short of a revolution', 26 July 2016 and 'The implications of today's Judgment in Cases C-20/15 and C-21/15 P (World Duty Free, Santander and Santusa), 21 December 2016, written by P Ibáñez Colomo and A Lamadrid de Pablo, respectively (the former commenting on the Advocate General's opinion, whose approach the Court ultimately followed); P Nicolaides, 'Excessive Widening of the Concept of Selectivity' (2017) European State Aid Law Quarterly 62; and the opinion of Advocate General Saugmandsgaard Øe in Case C-374/17 *A-Brauerei*, who distinguishes between the so-called "availability test" or "traditional method of analysis" on the one hand, and the so-called "discrimination test" or "reference framework method" on the other based on the *World Duty Free* judgment, and advocated for a return to the former approach. The Court of Justice however re-affirmed the *World Duty Free* approach in that case. For an alternative and supportive view, see A Giraud and S Petit, 'Bury Them Deep: The Court of Justice Annuls the *Autogrill* and *Banco Santander* Judgments of the General Court – Annotation on the Judgment of the Court of Justice of the European Union (Grand Chamber) of 21 December 2016 in Joined Cases C-20/15P and C-21/15P *Commission v World Duty Free Group*' (2017) European State Aid Law Quarterly 310.

deciding to or not to invest in foreign companies. The significance of this approach from a functional and institutional perspective, in leading to an appreciable increase in tax measures that could be subject to State aid control and thereby supervision by the European Commission, was also noted with concern.

On the surface, it would seem that the judgment may be driven by what we termed in Chapter 2 as a more "absolute equality of opportunity principle".[399] In this regard, where an undertaking needs to partake in a particular activity, such as a transaction, in order to qualify for a tax advantage, the fact that this requirement on its face does not appear to exclude any particular category of undertaking and therefore favour any particular category of undertaking, does not mean that certain undertakings will not find it easier than others to fulfil that condition and therefore ultimately be favoured.

In the words of Advocate General Wathelet in the *World Duty Free* case, "*the fact that the conditions imposed by the measure at issue were not very strict and the benefits which that measure conferred were therefore available to many undertakings does not call into question its selective nature but only its degree of selectivity*".[400] Ultimately, setting any such condition for obtaining a tax advantage will result in that tax advantage benefitting certain undertakings more than others as certain undertakings will always be more (or less) well placed to partake in the activity on which the tax advantage is conditioned. Looking at the specific case at hand it is not inconceivable that notwithstanding the potentially low monetary threshold, some undertakings would have been excluded, in particular, if they had already expended resources acquiring shareholdings in domestic companies and also owing to possible practical barriers in making cross-border investments compared to domestic investments.

The difficulty with this interpretation however, is that it would raise all of the problems associated with such an "absolute equality of opportunity principle" that were raised in Chapter 2 above, and in particular, the creation of such a wide notion of State aid that would significantly diminish the practical relevance of the selective advantage requirement altogether. Similarly, it would also conflict with the established case-law principle that "*the fact that only taxpayers satisfying the conditions for the*

399 See pages 76-78 above.
400 Opinion of Advocate General Wathelet, paragraph 88.

application of a measure can benefit from the measure cannot, in itself, make it into a selective measure" (which was explicitly re-affirmed in the *World Duty Free* judgment itself[401]), as any measure conferring a benefit subject to conditions would ultimately always be selective on this basis.

On another reading of the judgment, the approach adopted by the Court of Justice was very much bound up with the export promotion character of the specific measure at issue, which the Commission had considered to be aimed at, "*favouring the export of capital out of Spain in order to strengthen the position of Spanish companies abroad, thereby improving the competitiveness of the beneficiaries of the scheme*"[402] and which therefore was considered to be inimical to the EU internal market. Writing in the *ANGED* case, Advocate General Kokott has explained that the *World Duty Free* judgment, "*concerned a special case of 'export promotion' for domestic undertakings, which runs counter to the legal principle laid down in Article 111 TFEU. Accordingly, specific export subsidies can satisfy the selectivity criterion even where they apply to all taxable persons*".[403] On this reading, the judgment would therefore be a corollary of the fair macro-economic competition dimension of EU State aid control, and would be in line with the case-law on the discounting of objectives linked to promoting international competitiveness from the consistency assessment as explained above.

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401 Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free*, paragraph 59.

402 See Commission Decision of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain, OJ L 7/66 11.1.2011, recital 128 and Commission Decision of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions No C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain, OJ L 135/1 21.5.2011, recital 154. In this regard, a number of non-Spanish companies had made submissions to the Commission arguing that the measure had provided a significant advantage fuelling the merger appetite of Spanish companies, in particular in the context of auctions.

403 Opinions of Advocate General Kokott in Case C-233/16 *ANGED* and Joined Cases C-236/16 and C-237/16 *ANGED*, at paragraph 85. In a similar vein, see the presentation by P Ibáñez Colomo in the 'Chillin' State Aid workshop, 14 June 2019, 'Selectivity and Advantage: charting the territory'. In his opinion in the *World Duty Free* case itself, Advocate General Wathelet stated that he considered that, "*a tax measure of that kind is particularly harmful to the internal market because it creates an immediate distortion of trade between Member States*" and as already noted, that the State aid rules, "*are intended in particular, to ensure that a Member State is not able to favour undertakings that pursue cross-border activities*" those rules, "*being the 'flip side' or 'mirror', as they were called at the hearing, of the FEU Treaty provisions on the free movement of goods, persons, services and capital which are intended to prevent obstacles being put in the way of cross-border activities*" (see paragraph 37).

While it is possible that this may have been a factor that motivated the *World Duty Free* judgment, the difficulty however, is that the Court presented its position as a generally applicable point of principle and has indeed since applied it in other cases, where the same particular export promotion consideration appeared to be absent.[404]

Instead, while we share this macro-economic competition reading of the *World Duty Free* judgment, we would suggest that the concern that the Court seeks to address is broader than just export promotion measures, but more generally measures that target, as the Court itself put it, "*certain sectors of activity*",[405] and here, certain types of transactions or investments.[406] In particular, as capital has become more mobile, Member State measures designed to manipulate investment flows to their economic advantage have become an important weapon in Member States' macro-economic competition arsenal, as further signified by the inclusion of an "effect on investment" criterion within the subsidy definition under the UK-EU TCA as an alternative to the "effect on trade criterion".[407] Measures that have as their object the favouring of certain types of investments are consequently caught by the definition of State aid irrespective of whether they are explicitly export-promotion orientated, on account of their impact on macro-economic competition between Member States with respect to investment flows.

V. Third step – justification by the nature and general scheme of the system

As for the third step in the derogation framework, the question of whether the measure may yet be justified by the nature and general scheme of the system of

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404 Including e.g. Case C-128/16 P *Commission v Spain and Others* EU:C:2018:591, concerning the Spanish tax lease system. See also the opinion of Advocate General Pitruzzella in the renvoi appeal case, Joined Cases C-51/19 P and C-64/19 P *World Duty Free Group and Spain v Commission*, at paragraph 27, who looking back at the way the the judgment has been applied, rejected the reading that it is restricted to export promotion measures.

405 Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free*, paragraph 55.

406 This is further apparent from various parts of the judgment that highlight transaction-specificity as being a basis of founding selective advantage – see paragraphs 88 and 119. The also appears to be the way the judgment was interpreted by the General Court in Joined Cases T-516/18 and T-525/18 *Luxembourg and ENGIE v Commission* EU:T:2021:251, at paragraph 369.

407 See UK-EU TCA, Article 363(1)(b)(iv), which sets as one of the definitional components that the financial assistance in question, "*has, or could have, an effect on trade or investment between the Parties*" (emphasis added).

which it forms a part, this is perhaps the stage where there remains the greatest degree of uncertainty as to its practical application.[408]

In cases involving fiscal measures that form part of the ordinary tax system and where this is therefore the relevant reference system, the basic distinction made in the case-law is between differentiation which is justified on the basis of the "*basic or guiding principles of the reference system*" or where it is the result of inherent mechanisms "*necessary for the functioning and effectiveness of the system*" on the one hand, and the "*extrinsic objectives*" of the measure concerned on the other, which cannot be taken into account.[409] Therefore in the *Diputación Foral de Álava* cases[410] which concerned regional tax credits for certain entities undertaking new significant investment, the General Court admitted the potential for fiscal advantages being justified on the basis of progressiveness in taxation (justified by the tax system's aim of redistribution) and efficiency in tax collection. However, the measure in question breached the progressiveness principle as it had a minimum investment criterion, meaning that it favoured undertakings with more resources and there was no indication as to how the measure could contribute to efficiency in tax collection. On the other hand, the aim of the measure itself in promoting economic development and employment was rejected as a possible justification as it was unrelated to the general tax system.[411]

In this sense, the third step provides a means of demonstrating that notwithstanding the existence of a *prima facie* derogation as part of the second step, the measure concerned still somehow coheres to the reference system concerned, such that it may yet be considered as being a measure of general economic or regulatory policy as opposed to a measure with the object of creating inequality of opportunity and favouring certain undertakings or sectors.

Cases in which the third step has been applied positively, i.e. where a measure was considered as justified by the nature and general scheme of the system, remain very limited and therefore it is difficult to critically assess how the EU Courts have been

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408 This third step was notably described by Advocate General Geelhoed in his opinion in Case C-88/03 *Portugal v Commission (Azores)* as "*an (as yet) amorphous concept*" (see paragraph 62).

409 See Case C-88/03 *Portugal v Commission (Azores)*, paragraph 86 and Joined Cases C-78/08 to C-80/08 *Paint Graphos*, paragraph 69.

410 Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others v Commission* EU:T:2002:59.

411 *Ibid*., paragraphs 162-169.

applying this criterion.[412] The clear cases where this criterion was considered to be met however, *GIL Insurance,*[413] *Paint Graphos*[414] and *A-Brauerei*,[415] interestingly concerned justifications which appeared to have little to do specifically with the guiding principles or logic of the broader tax systems in question.

In *GIL Insurance*, the measure at issue was the introduction of a higher rate of insurance premium tax ("IPT") in relation to certain insurance contracts and the question was whether this gave rise to State aid being conferred to those operators offering contracts subject to the standard rate. While the Court of Justice acknowledged the potential for State aid to arise in this scenario,[416] it found that there was no State aid as the measure was justified in light of the IPT and VAT system as a whole. This was because the aim pursued by the higher rate was to act as a deterrent to the conclusion of connected insurance contracts leading to the loss of VAT revenue rather than being intended to confer an advantage on operators offering contracts subject to the standard rate.[417]

Similarly, in *Paint Graphos*, which as noted above, concerned corporation tax exemptions enacted by Italy in favour of cooperative societies, the justification effectively related to the avoidance of double taxation as cooperative societies which distributed all their profits to their members ought not to be taxed themselves as cooperatives in circumstances where that tax is levied on the individual members.[418] As for *A-Brauerei*, which concerned an exemption from German property transfer tax for restructurings involving companies of the same group, the justification was also essentially the avoidance of double-taxation. The Court of Justice accepted that the transfer of such property is, as a general rule, already taxed at entry, that is

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412 For examples of cases in which this criterion was considered not to be met, in addition to the *Diputación Foral de Álava* cases referred to above, see Case T-210/02 RENV *British Aggregates Association v Commission* and Case C-279/08 P *Commission v Netherlands (NOx)*. In his opinion in Case C-203/16 P *Andres (faillite Heitkamp BauHolding) v Commission* EU:C:2017:1017, Advocate General Wahl noted that "*it may be particularly arduous to save a tax measure at this third step*" and that there was in effect, "*a de facto irrefutable assumption that tax measures to be a priori selective are, in reality, selective*" (paragraphs 182 and 187).

413 Case C-308/01 *GIL insurance and Others* EU:C:2004:252.

414 Joined Cases C-78/08 to C-80/08 *Paint Graphos*.

415 Case C-374/17 *A-Brauerei* EU:C:2018:1024

416 Which at the time, was itself a novel proposition i.e. that State aid could arise in subjecting only certain contracts to a higher rate, as opposed to providing for exemptions or lower rates for certain undertakings against a generally applicable higher rate.

417 Case C-308/01 *GIL insurance and Others*, paragraphs 72-78.

418 Joined Cases C-78/08 to C-80/08 *Paint Graphos*, paragraphs 64-76.

to say, at the time when the company owning that property is integrated into the group of companies and therefore that the taxation of an internal group transfer as part of a restructuring would result in the same property being taxed twice.[419]

In these cases, the EU Courts therefore accepted justifications that seemed to have little to do with the guiding principles or logic of the broader tax systems formally speaking, but in fact, were based on the EU Courts accepting that notwithstanding the existence of differentiation that may be inconsistent with the broader reference system, the object of the measure was not to upset equality of opportunity to the benefit of the undertakings to which it applied.

In this regard, the third step therefore reinforces the nature of the derogation test as an assessment of whether the object of the measure at issue is to create inequality of opportunity to the benefit of certain undertakings or sectors. However, although it is presented as being part of the same assessment as the earlier two steps of the derogation test to determine whether the measure at issue can be conceived of as a measure of general economic or regulatory policy, on the basis of the concrete examples discussed above in which the test was met, it would seem to be more flexible than this and effectively serves as a broader catch-all for other case-specific factors which demonstrate that the object of the measure is not to create inequality of opportunity.

VI. Beyond the derogation framework and the three-step test

While the derogation framework has been applied flexibly in order to best assess the measure at issue for inequality of opportunity, there are two categories of cases where the EU Courts have pointedly disregarded it altogether. These cases shed further important light on the nature of the derogation framework and its limitations.

The first category of cases concern measures applying to individual companies only. Thus in the *Orange* case,[420] which concerned a State reform of the arrangements for financing the retirement pensions of civil servants working for France Télécom, the EU Courts were faced with the argument that the measure should only be considered to confer a selective advantage on France Télécom if it favoured that company in comparison to other undertakings in a comparable factual and legal

419 Case C-374/17 *A-Brauerei*, paragraph 46.

420 Case T-385/12 *Orange v Commission* EU:T:2015:117 before the General Court and Case C-211/15 P *Orange v Commission* before the Court of Justice.

situation, in line with the discrimination assessment under the second step of the derogation framework. Given France Télécom's special situation as an ex-State owned undertaking, it was possible that a credible argument could be made out that the measure did not discriminate in its favour on this basis.

The EU Courts however, rejected this argument on the ground that such an assessment "*is based on, and justified by, the assessment of whether measures of potentially general application are selective and that test is therefore irrelevant where, as in the present case, it would amount to assessing the selective nature of an ad hoc measure which concerns just one undertaking and is intended to modify certain competitive constraints which are specific to the undertaking.*"[421] In a similar vein, Advocate General Wahl had explained that this examination was only meaningful "*when the measure at issue is a State measure of general application*."[422] In other words, a measure which applies to an individual undertaking only, is in principle presumed to give rise to a selective advantage irrespective of whether there are any operators which are in a comparable factual and legal situation in light of the relevant objective.

The non-application of such a comparability test where the measure in question applies only to an individual undertaking, we would argue, is a direct corollary of the nature of the assessment at issue. While the application of such a test could make sense if the assessment was ultimately a general discrimination assessment only, this is not the case. Rather, the derogation assessment is concerned with distinguishing between measures with the object of creating inequality of opportunity in favour of certain undertakings or sectors on the one hand and those which constitute measures of general economic and regulatory policy in accordance with the principle of equality of opportunity on the other. A measure clearly cannot be

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421 Case T-385/12 *Orange v Commission*, paragraphs 52-53 and Case C-211/15 P *Orange v Commission*, paragraphs 53-54. The Court of Justice had already foreshadowed this position in the earlier *MOL* case, in which it stated that, "*the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective. By contrast, when examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity*" – see Case C-15/14 P *Commission v MOL*, paragraph 60.

422 Opinion of Advocate General Wahl in Case C-211/15 P *Orange v Commission* EU:C:2016:78, paragraph 66.

considered as a measure of general economic and regulatory policy where it applies to a single undertaking only.[423]

The second category of cases concern situations in which, notwithstanding its apparently general nature, the Commission and the EU Courts have considered that inequality of opportunity is effectively "hard-wired" into the relevant reference system itself. This is what happened in the landmark *Gibraltar* case,[424] which concerned the setting-up of a new corporate taxation system in Gibraltar. The Commission had considered the new tax system gave rise to State aid in favour, *inter alia*, of offshore companies, as the new main bases of corporate tax, a payroll tax based on the number of employees and a business property occupation tax, inherently favoured companies which had no real physical presence in Gibraltar. On appeal, the General Court had annulled the decision of the Commission on the basis that the Commission had identified neither the relevant reference system nor a derogation therefrom, and consequently had assumed the role of the Member State with regard to the determination of the Member State's tax system.[425]

This was overturned by the Court of Justice on appeal on the basis that such an approach was "*based solely on a regard for the regulatory technique used by the proposed tax reform*".[426] This is because it would require that the finding of State

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423 On the other hand, where a measure is, in principle, open to other undertakings and therefore could be assimilated to a measure of general economic and regulatory policy, the derogation framework must be applied, even if the measure was intended to benefit a particular undertaking. This was the position reached in *British Sugar Plc, R (On the Application Of) v Secretary of State for International Trade* [2022] EWHC 393 (Admin), a judgment of the English High Court applying EU State aid law under the Brexit Withdrawal Agreement Northern Ireland Protocol to assess an autonomous tariff quota for imported raw cane sugar, put into place by the UK Government post-Brexit. Even though it was clear from the evidence that the purpose of the measure was to ensure the viability of the only cane sugar producer in the UK, Tate & Lyle, which also stood to be the only undertaking that would meaningfully benefit from the measure, the Court found that the quota was in principle open to any other undertaking. More specifically, the Court considered that the particular design features of the quota were not such to limit its application to Tate & Lyle alone. Accordingly, the derogation framework had to be applied, and on this basis, the Court ultimately concluded that there was no selective advantage.

424 Joined Cases C-106/09 P and C-107/09 P *Commission v Gibraltar and UK*.

425 Case T-211/04 *Gibraltar and UK v Commission*, paragraphs 145 and 170-185. The General Court also pointedly noted that direct taxation falls within the competence of the Member States and therefore they had the competence to devise systems of corporate taxation which they consider to be best suited to their economies (see paragraph 146).

426 Joined Cases C-106/09 P and C-107/09 P *Commission v Gibraltar and UK*, paragraph 88.

aid in the context of a tax system be conditional upon that system being designed in such a way that undertakings are in general liable to the same tax burden but then benefit from derogating provisions (as say, in the *Paint Graphos* case), when the same result could be achieved by adjusting and combining general taxation rules in such a way that their very application results in a different tax burden for different types of undertakings, as was the case here.[427]

Instead, the Court of Justice assessed whether there was discrimination between companies which were in a comparable situation with regard to *the objective of the proposed tax reform*, namely to introduce a general system of taxation for all companies in Gibraltar.[428] In applying this test, the Court of Justice explained that a different tax burden resulting from the application of a general tax regime is not sufficient on its own to establish a selective advantage and therefore the criteria forming the basis of assessment of a tax system must also "*be such to characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category, thus permitting such a regime to be described as favouring 'certain' undertakings or the production of 'certain' goods*."[429] On this basis, the Court found that the reform would grant a selective advantage to offshore companies, as the fact that they were not to be taxed was not a "*random consequence of the tax regime at issue, but the inevitable consequence of the fact that those bases of assessment are specifically designed so that offshore companies, which by their nature have no employees and occupy no business premises, have no tax base under the bases of assessment adopted in the proposed tax reform*."[430]

The background to the *Gibraltar* case arguably was also instructive. In his opinion in the case, Advocate General Jääskinen had noted that Gibraltar had been identified by the OECD as a tax haven[431] and that "*there [was] hardly any doubt […]*

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427 *Ibid*., paragraphs 87-93.

428 *Ibid*., paragraph 101.

429 *Ibid*., paragraphs 103-104.

430 *Ibid*., paragraph 105. In contrast, the Court held that other elements of the new tax system under examination by the Commission, namely the requirement to make a profit and the capping of tax at 15% of profits, did not lead to selective advantages on the basis that those criteria were of general application and could not be said to favour unprofitable operators or very profitable operators as those effects are "*merely the consequence of the random event that the undertaking in question is unprofitable or very profitable during the period of assessment*" (see paragraph 83).

431 Opinion of Advocate General Jääskinen in Joined Cases C-106/09 P and C-107/09 P *Commission v Gibraltar and UK*, paragraph 170.

that the Gibraltar legislature has sought to equip itself with a system of unfair tax competition vis-à-vis the Member States."[432] But this notwithstanding, in the view of the Advocate General, the Court could not find a selective advantage here because to do so would require, "*triggering a methodological revolution in the application of the rules relating to State aid*" as "*the existence of an advantage would be assessed no longer on the basis of a comparison between the measure and the generally applicable tax regime but by virtue of a comparison between the tax regime as it exists and another – hypothetical and non-existent – system*."[433] Essentially, the Advocate General was of the view that the established methodology for assessing the existence of a selective advantage – the derogation framework – could not be abandoned just because it did not lead to the result desired by the Commission in an individual case.[434]

The Court of Justice, however, taking into account the purpose of the assessment in determining whether the object of a State measure is to create inequality of opportunity in favour of certain undertakings or sectors, and apparently having regard to the background of the tax reform and its impact which pointed to an aim of privileging a specific category of undertakings, was of a different view.[435]

The *Gibraltar* case is extremely significant as it demonstrates that the derogation framework and the three-step test is ultimately a proxy only for the central assessment of whether the object of a measure is to upset equality of opportunity, as the EU Courts are prepared to disregard the derogation framework in order to address apparent inequality of opportunity in the specific circumstances of a particular case.[436] Indeed, and perhaps deliberately, the Court did not define very

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432 *Ibid*., paragraph 174.

433 *Ibid*., paragraph 202.

434 *Ibid*., paragraph 203.

435 See in this regard Piernas López, *The Concept of State Aid under EU Law*, at 143, who notes that the judgment recalls "the *real purpose test*" proposed by Advocate General Lagrange in Case C-30/59 *Steenkolenmijnen*, as referred to in note 291 above; and J Temple Lang, 'The Gibraltar State Aid and Taxation Judgment' (2012) European State Aid Law Quarterly 805, who ultimately argues that the Court seems to have made a finding of fact about the intentions of the Gibraltar authorities without sufficient evidence in his view and without regard to the fact that the Court's appeal jurisdiction was limited to points of law.

436 Commenting on the *Gibraltar* judgment, the Court of Justice remarked in the *World Duty Free* judgment that, "*Indeed, while it is not always necessary that a tax measure, in order for it to be established that it is selective, should derogate from an ordinary tax system, the fact that it can be so characterised is highly relevant in that regard*" (Joined Cases C-20/15 P and 21/15 P *Commission v World Duty Free*, paragraph 77).

precisely the circumstances in which disregarding the derogation framework, as it had done, would be justified, thereby preserving a certain degree of discretion. The Court did not explicitly refer to the background included in the opinion of its Advocate General and the criterion used of whether the bases of assessment of the system are "*such as to characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category*", is something that appears capable of very divergent interpretation.[437]

The boundaries of the *Gibraltar* judgment were tested by the Commission when it sought to apply the case in a raft of State aid decisions in relation to progressive turnover taxes.[438] The measures concerned were a Polish retail sector tax and three Hungarian measures: an advertising sector tax; food chain inspection fees imposed on stores in relation to fast-moving consumer goods; and health contributions imposed on tobacco businesses, and each of the levies at issue applied a progressive scale of charges based on relevant turnover.

In these cases, the Commission argued that the progressive rate structure that constituted the reference systems at issue had been specifically designed so as to favour smaller operators over larger ones by subjecting undertakings with lower turnover to a lower average effective levy rate than undertakings with a higher turnover. According to the Commission, the less favourable treatment accorded to larger undertakings was not justified in light of what it considered to be the objectives of the levies at issue: for the retail and advertising turnover taxes, essentially to tax the turnover of all operators within the tax's area of application;[439] for the food chain inspection fees, to finance health and safety-related checks of food;[440] and for the

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437 In particular, as regards the meaning of the terms "*properties*" and "*privileged category*" in this context.

438 Commission Decision (EU) 2016/1846 of 4 July 2016 on the measure SA.41187 (2015/C) (ex 2015/NN) implemented by Hungary on the health contribution of tobacco industry businesses, OJ L 282/43 19.10.2016 ("Hungary Tobacco Health Contribution Decision"); Commission Decision (EU) 2016/1848 of 4 July 2016 on the measure SA.40018 (2015/C) (ex 2015/NN) implemented by Hungary on the 2014 Amendment to the Hungarian food chain inspection fee, OJ L 282/63 19.10.2016 ("Hungary Food Chain Inspection Fee Decision"); Commission Decision (EU) 2017/329 of 4 November 2016 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover, OJ L 49/36 25.2.2017 ("Hungary Advertising Tax Decision"); and Commission Decision (EU) 2018/160 of 30 June 2017 on the State aid SA.44351 (2016/C) (ex 2016/NN) implemented by Poland for the tax on the retail sector, OJ L 29/38 1.2.2018 ("Poland Retail Tax Decision").

439 See the Hungary Advertising Tax Decision, recitals 47-56 and the Poland Retail Tax Decision, recitals 42-49.

440 Hungary Food Chain Inspection Fee Decision, recitals 44-45.

health contributions imposed on tobacco businesses, to collect funds for the health care system in light of the role that smoking plays in contributing to increased health expenses.[441] For the retail and advertising turnover taxes, the Commission further considered that the taxes could not be justified on the basis of the principle of redistribution as is the case for profit-based taxes,[442] as a turnover-based tax does not take into account the costs incurred in the generation of sales and therefore hits companies in respect of their size, rather than their profitability or their ability to pay.[443]

A strong undercurrent to these cases was the fact that the charges at issue appeared to be targeted at foreign operators, and in some of the decisions, the Commission specifically noted that the larger undertakings with higher turnovers that would be most affected tended to be foreign-owned,[444] and further considered that the charges could be in breach of Article 49 TFEU on the freedom of establishment.[445]

The decisions of the Commission in the retail and advertising turnover tax cases were appealed to the General Court which overturned then.[446] In particular, the General Court held that the Commission should have considered the redistributive purpose of the taxes at issue as part of their objective, and the design of the reference system based on a progressive rate structure was consistent with this objective as, contrary to the position of the Commission, an undertaking which achieves high turnover, for example, because of economies of scale, will have proportionately lower costs than an undertaking with a small turnover and therefore may have proportionately greater disposable revenue which makes it capable of paying proportionately more in terms of turnover tax.[447]

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441 Hungary Tobacco Health Contribution Decision, recitals 33-34. In these cases, the Commission had gone on to redefine the reference system taking a single, flat rate as being the normal taxation principle, and assessed the existence of derogations as against that.

442 Noted in the Commission Notice on the notion of State aid, paragraph 139.

443 See e.g. the Hungary Advertising Tax Decision, recitals 67-69 and the Poland Retail Tax Decision, recitals 56-60.

444 See the Poland Retail Tax Decision, recital 75 and the Hungary Food Chain Inspection Fee Decision, recital 62.

445 Poland Retail Tax Decision, recital 47 and the Hungary Food Chain Inspection Fee Decision, recital 45.

446 Case T-20/17 *Hungary v Commission* concerning the Hungary Advertising Tax and Joined Cases T-836/16 and T-624/17 *Poland v Commission* concerning the Poland Retail Tax.

447 Case T-20/17 *Hungary v Commission*, paragraphs 88-89 and 103 and Joined Cases T-836/16 and T-624/17 *Poland v Commission*, paragraphs 74-75 and 91. In this regard,

As for the fact averred by the Commission that the tax at issue would place a greater burden on foreign-owned undertakings which tended to be the larger undertakings, the Court considered that this was simply a corollary of the application of a progressive tax structure corresponding to the objective and general scheme of the tax in question.[448] Similarly, the fact that the application of the tax led to striking results in that the vast majority of undertakings operating in the retail sector would be exempt from the Polish retail tax as their turnovers fell below the threshold for applicability[449] and the two highest tax brackets in the Hungarian advertising tax applied only to one undertaking which furthermore paid around 80 per cent. of the overall tax take,[450] was not considered as decisive.

The judgments of the General Court were further upheld upon appeal by the Court of Justice,[451] which affirmed that an undertaking's turnover, "*constitutes, in general, a criterion of differentiation that is neutral and a relevant indicator of the taxable person's ability to pay*" and therefore a reference system based on progressive turnover taxation could not be subject to challenge under the *Gibraltar* judgment. [452]

While the EU Courts therefore appear not to have disputed the possible applicability of the *Gibraltar* framework in the manner advanced by the Commission, they overturned the decisions on the basis of the Commission's application of that framework. We would suggest that what underlies the progressive turnover taxation judgments is that the factors advanced by the Commission were not sufficient to lead the EU Courts to consider that the object of the taxes at issue was to create inequality of opportunity in favour of smaller and essentially domestic undertakings, in particular, given the possibility of justifying the progressive turnover rate structure on the basis of ability to pay. This was in contrast to the *Gibraltar* case, where the Court of Justice considered, based on the background of the tax reform at issue and its impact, that its object was simply to create inequality of opportunity in favour of offshore companies.

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the General Court also considered that the Commission had erred in selecting an objective for the taxes at issue that differed from that put forward by the Hungarian and Polish authorities, as mentioned above.

448 Joined Cases T-836/16 and T-624/17 *Poland v Commission*, paragraph 101.

449 Joined Cases T-836/16 and T-624/17 *Poland v Commission*, paragraphs 97-98.

450 Case T-20/17 *Hungary v Commission*, paragraphs 108-109.

451 Case C-596/19 P *Commission v Hungary* concerning the Hungary Advertising Tax and Case C-562/19 P *Commission v Poland* concerning the Poland Retail Tax

452 Case C-596/19 P *Commission v Hungary,* paragraphs 46-51 and Case C-562/19 P *Commission v Poland*, paragraphs 40-44.

It remains to be seen what the EU Courts might have decided had the other Commission decisions in relation to Hungary's food chain inspections fees regarding fast-moving consumer goods and the health contributions on tobacco businesses had been appealed,[453] where the Commission's case appeared stronger. In particular, in its decision on the food inspection fees, the Commission had pointed out that there was nothing to suggest that the cost of food chain inspections would increase more than proportionately with the turnover of larger undertakings, and the argument that undertakings with larger turnovers should contribute more appeared belied by the fact that food chain operators, other than stores selling fast-moving consumer goods, would be subject to a much lower flat fee.[454] An interested party had further noted that Hungarian domestic undertakings in the sector were organised in a franchise system, whereas foreign undertakings operate branches or subsidiaries, which increased the level of their consolidated turnover, meaning that they would inevitably fall within the higher bands whereas domestic undertakings would fall within the lowest bands.[455]

It is also notable however, that the EU Courts in these judgments concretised and seemed to increase the threshold that would need to be met by the Commission in challenging the reference system pursuant to the *Gibraltar* case. The *Gibraltar* judgment had referred to whether there was discrimination between comparable operators in light of the objective of the system and the open-textured test of whether the bases of assessment under the system characterised certain undertakings *"by virtue of properties which are specific to them, as a privileged category*". But the General Court in these cases stated, that for intervention on State aid grounds, the variation in the tax levels would need to be "*arbitrary*" in light of the relevant objective or that it "*largely deprives the objective of the tax in question of its substance*".[456] In a similar vein, and emphasising the principle of Member States' fiscal autonomy, the Court of Justice on appeal posited the threshold as whether the tax was designed "*in a manifestly discriminatory manner, with the aim of circumventing the*

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453 Somewhat peculiarly, Hungary did not appeal the final decisions in these cases but only appealed the suspension injunctions adopted by the Commission as part of the opening decisions, which were ultimately overturned by the Court of Justice in Case C-456/18 P *Hungary v Commission* EU:C:2020:421.

454 Hungary Food Chain Inspection Fee Decision, recitals 54-56.

455 *Ibid*., recitals 26-27.

456 Case T-20/17 *Hungary v Commission*, paragraphs 103 and 106 and Joined Cases T-836/16 and T-624/17 *Poland v Commission*, paragraphs 91 and 94.

requirements of EU law on State aid" in light of its objective.[457] In this sense, the judgments can be seen as seeking to rein-in what the Courts saw as an over-extension of the *Gibraltar* judgment by the Commission and establish clearer parameters for its application.

The precise threshold for intervention notwithstanding, the above cases in which the EU Courts have specifically considered disregarding the derogation framework, are revealing. They indicate that this framework is ultimately only a proxy for determining whether the object of a measure is consistent with equality of opportunity, which is the key driver for State aid definition and that other proxies or considerations may be resorted to insofar as is necessary in order to address apparent inequality of opportunity or the absence thereof in the particular circumstances of a case.

We would submit that the same principle lay at the heart of the recent *Tax Ruling* cases, concerning the Commission's use of the EU State aid rules against multinationals' tax-planning arrangements, which as mentioned in Chapter 1, has been one of the most significant areas of State aid enforcement in recent years.[458]

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457 Case C-596/19 P *Commission v Hungary*, paragraphs 49-50 and Case C-562/19 P *Commission v Poland*, paragraphs 43-44. This was in line with the approach of the Court's Advocate General Kokott, who had proposed the standard of "manifest inconsistency" – see the opinions of Advocate General Kokott in Case C-562/19 P *Commission v Poland* EU:C:2020:834, paragraphs 45-46 and Case C-596/19 P *Commission v Hungary* EU:C:2020:835, paragraphs 52-53.

458 To date, the Commission has adopted six final decisions in this area in which it ordered recovery of significant amounts from the Starbucks, Fiat, Apple, Amazon and ENGIE companies, as well as the companies that benefitted from Belgium's "Excess Profits Scheme", all of which concerned tax rulings issued by the Netherlands, Ireland, Luxembourg and Belgium. Most of these decisions have however been overturned by the EU Courts. The Commission also has ongoing formal investigations open in relation to tax rulings issued by the Netherlands and Luxembourg to the IKEA, Nike and Huhtamäki companies, and in relation to Belgium's Excess Profit Scheme, which it re-opened following annulment of its earlier decision by the General Court on procedural grounds. The commentary in relation to this novel area of EU State aid enforcement is extensive – for a selection of notable examples, see the contributions referenced in Chapter 1 at note 68. There are as yet, fewer articles critically assessing the judgments of the EU Courts in this area, however – in terms of notable exceptions, see the "Chillin' Competition" blog, 'The Fiat and Starbucks Judgments', 25 September 2019, and, 'The Apple Judgment in Context (Cases T-778/16 and T-892/16)', 15 July 2020 written by A Lamadrid de Pablo; P Wattel, 'Starbucks and Fiat: Arm's Length Competition Law' (2020) Intertax 119; Rapp, 'Taxation and State aid'; and V Korom, 'Let Down by the Facts: The General Court Annuls the European Commission Decision on Irish Tax Arrangement for Apple' (2021) European State Aid Law Quarterly 227.

The cases concerned tax rulings or more specifically, advance pricing agreements, issued by tax authorities that confirm multinationals' transfer pricing. The basic thesis of the Commission is that through the tax rulings, the Member States concerned accepted multinationals' transfer pricing which deviated from the so-called "arm's length principle" ("ALP") generally applicable in international taxation practice,[459] according to which the transfer pricing used to price transactions between associated companies (i.e. inter-group company transactions) should adhere to how those transactions would be priced if they were to take place between unrelated stand-alone companies operating independently under market conditions. According to the Commission, by accepting transfer pricing that deviated from the ALP, the Member States allowed the multinationals to shift significant profits away from their tax jurisdictions to lower tax jurisdictions, resulting in an underpayment of tax and therefore a selective advantage.

Notably, these cases were presented publicly by the Commission as being driven by the imperative of fairness, in ensuring that multinationals are not able to use tax-planning arrangements to limit their tax burden compared to those companies and individuals which pay their "fair share of tax", and were therefore, insofar as the companies are concerned, placed at a disadvantage.[460] The present Commissioner for Competition went so far as to say that the cases were borne out of public anger in relation to tax avoidance and the desire to "do something" in response, using the tool set that the Commission already had.[461]

In our view, the legal substance of the cases also matched the rhetoric.[462] One of the main controversies in these cases was that the Commission considered that it

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459 The ALP has its roots in the OECD Model Tax Convention on Income and on Capital, which forms the basis for many bilateral tax treaties involving OECD member countries as well as non-member countries. The OECD provided guidance to tax administrations and multinational enterprises on the application of the ALP in its transfer pricing guidelines, with the first version issued in 1995, and revised versions in 2010 and most recently in 2017. These transfer pricing guidelines have progressively become far more detailed, with the 2017 guidelines running to over 600 pages.

460 See by way of example, the speeches of the present Commissioner for Competition: 'Working together for fairer taxation', The Tax Dialogue, Copenhagen, 2 September 2016; and 'A European Society of Fairness and Equal Opportunities', Wednesday Social, Brussels, 8 March 2017 (available on the Commission's website). See also in this regard, A Biondi, 'The First on the Flight Home: The Sad Story of State Aid Control in the Brexit Age' (2016) King's Law Journal 27:3, 442, at 449.

461 Observer interview with Margrethe Vestager, 'We are doing this because people are angry', 17 September 2017.

462 *C.f.* Dunne, 'Fairness and the Challenge of Making Markets Work Better', at 254-255 for a contrary view.

could assess Member States' advance pricing agreements against the ALP to determine the existence of a selective advantage, irrespective of whether or not the Member State concerned had actually incorporated the ALP as part of their tax code and independently of any relevant practice by that Member State in relation to the ALP or transfer pricing, which led to the Member States concerned arguing that the practice of the Commission was incompatible with the principle of Member States' fiscal autonomy.

While the reasoning of the Commission supporting this stance was not always clear, and indeed appeared to shift somewhat as the cases developed[463] in essence, its position was that the ALP reflected a general principle of equal treatment in taxation required by Article 107(1) TFEU in order to ensure parity between integrated companies and stand-alone companies, which are factually and legally comparable in light of the objective of a corporate tax system to tax the profits of all companies falling under its jurisdiction.[464] Thus, the position of the Commission was that the ALP, as applied by the Commission, was fundamental in order to ensure that integrated companies' taxable profits were determined in an equivalent way to stand-alone companies, whose transactions result from the operation of normal market conditions.

The approach of the Commission in these cases was therefore grounded in a strong equal treatment principle, based on ensuring equality of opportunity between multinational companies and stand-alone companies, requiring that the ALP is

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463 In particular, in the hearings before the General Court in the *Netherlands / Starbucks* and *Luxembourg / Fiat* cases, the Commission argued that if a Member State chooses to base its national taxation system on a so-called "separate entity approach" whereby the tax system treats and taxes each enterprise within a multinational enterprise group as a separate entity, the ALP "*is necessarily a corollary of that approach which is binding in the Member State concerned, independently of whether the arm's length principle has, expressly or impliedly, been incorporated into national law*" – see Joined Cases T-760/15 and T-636/16 *Netherlands and Starbucks v Commission*, paragraph 164 and Joined Cases T-755/15 and T-759/15 *Luxembourg and Fiat v Commission*, paragraph 153.

464 Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium, OJ L 260/61 27.9.2016, recitals 148-150; Commission Decision (EU) 2017/502 of 21 October 2015 on State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks, OJ L 83/38 29.3.2017, recitals 262-264; Commission Decision (EU) 2016/2326 of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat, OJ L 351/1 22.12.2016, recitals 226-228; and Commission Decision (EU) 2017/1283 of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple, OJ L 187/1 19.7.2017, recitals 252-256.

applied to multinationals' tax arrangements, irrespective of the Member State's own tax code and practice. While this was never explicitly stated by the Commission in its decisions, its approach was ultimately in line with the *Gibraltar* judgment, in that the Commission effectively overrode the Member State's own reference system. Although the Commission never positively demonstrated that the requirements for doing so established by the *Gibraltar* judgment were fulfilled, namely that the Member State's reference system for the taxation of stand-alone and multinational companies was such to systematically favour the latter.

On appeal, the General Court essentially upheld the approach of the Commission based on treating integrated and stand-alone companies equally, albeit the Court placed more emphasis on the applicability of the ALP and therefore this approach as deriving from the Member State's national legal system itself, i.e. the reference system at issue, rather than Article 107(1) TFEU.[465] Therefore according to the General Court, "*Where national tax law does not make a distinction between integrated undertakings and stand-alone undertakings for the purposes of their liability to corporate income tax, that law is intended to tax the profit arising from the economic activity of such an integrated undertaking as though it had arisen from transactions carried out at market prices*" i.e. in those circumstances, "normal taxation" under the reference system effectively means taxing all companies as if

[465] Indeed the General Court noted that, "*It is true that the Commission indicated […] that the arm's length principle was a general principle of equal treatment in taxation, which fell within the scope of Article 107(1) TFEU. However, that wording must not be taken out of context and cannot be interpreted as meaning that the Commission asserted that there was a general principle of equal treatment in relation to tax inherent in Article 107(1) TFEU, which would give that article too broad a scope*" – see Joined Cases T-760/15 and T-636/16 *Netherlands and Starbucks v Commission*, paragraph 168 and Joined Cases T-755/15 and T-759/15 *Luxembourg and Fiat v Commission*, paragraph 161. See also to similar effect, Joined Cases T-778/16 and T-892/16 *Ireland and Apple v Commission*, paragraph 221. For similar views in relation to this aspect of the judgments, see the articles from the "Chillin' Competition" blog, referred to at note 458 above.

they were stand-alone companies operating under normal market conditions[466] and the ALP could be used as a tool for assessing this under Article 107(1) TFEU.[467]

While the General Court thereby sought to ground the Commission's application of the ALP more in the national legal system of the Member State concerned, the way in which it set out the basis for applicability of the ALP came very close to the approach of the Commission in effect. The Commission would only be barred from applying the ALP where the national tax code specifically distinguishes between the tax liability of integrated and stand-alone companies, which seems improbable in most cases (and could itself give rise to State aid concerns). The General Court therefore effectively endorsed the approach of the Commission in overriding Member States' reference systems to apply the ALP in order to secure equality of opportunity between integrated and stand-alone companies.

The confirmation by the General Court of the Commission's approach was however overturned by the Court of Justice in the *Luxembourg* / *Fiat* case,[468] the first of the tax ruling cases in which the EU's higher court opined on the substance. The Court of Justice annulled the judgment of the General Court and the decision of the Commission on the basis that the Commission had applied the ALP without taking into account Luxembourg's specific rules in relation to the ALP and its application.[469] In so doing, the Court of Justice exhibited a greater degree of sensitivity towards the fiscal autonomy arguments that had been raised by the Member States, emphasising that "*only the national law applicable in the Member State concerned*

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466 See Joined Cases T-760/15 and T-636/16 *Netherlands and Starbucks v Commission*, paragraph 149; Joined Cases T-755/15 and T-759/15 *Luxembourg and Fiat v Commission*, paragraph 141; and Joined Cases T-816/17 and T-318/18 *Luxembourg and Amazon v Commission* EU:T:2021:252, paragraph 118. In the *Ireland / Apple* judgment, which concerned a specific type of transfer pricing, namely the allocation of profits between the head offices and resident branches of non-resident Irish enterprises, the Court's formulation differed essentially because it determined that the specific Irish legal provision that governed this, section 25 of the Taxes Consolidation Act 1997, itself required the value of the activities of the branches to be determined based on a market basis and there was evidence of the Irish authorities applying the ALP more broadly prior to its explicit incorporation into the Irish tax code – see Joined Cases T-778/16 and T-892/16 *Ireland and Apple v Commission*, paragraphs 208-211 and 218-220.

467 *Ibid*., paragraphs 151, 143, 120-121 and 214 of the four judgments respectively.

468 Joined Cases C-885/19 P and C-898/19 P *Fiat and Ireland v Commission* EU:C:2022:859.

469 *Ibid*., paragraph 105.

must be taken into account in order to identify the reference system for direct taxation".[470]

Significantly however, at the very end of the judgment, the Court left it open to the Commission to apply its approach to the ALP in certain circumstances. Explicitly citing the *Gibraltar* case, the Court explained that the Commission could challenge the Member State's specific rules in relation to the ALP if it could establish that: "*the parameters laid down by national law are manifestly inconsistent with the objective of non-discriminatory taxation of all resident companies, whether integrated or not, pursued by the national tax system, by systematically leading to an undervaluation of the transfer prices applicable to integrated companies, or some of them, such as finance companies as compared to market prices for comparable transactions carried out by non-integrated companies*."[471] In other words, the Commission could effectively override the Member State's reference system and apply its own version of the ALP if that reference system was itself inconsistent with equality of opportunity by systematically favouring integrated companies. However, as the Commission had not conducted such an examination, it was not justified in applying its approach.[472]

The Court of Justice therefore, while annulling the approach of the Commission, did not depart from the equality of opportunity principle underlying that approach. It rather subjected it to the rigours of the *Gibraltar* framework and the need positively to demonstrate that inequality of opportunity was inherent in the reference system. In line with the progressive turnover taxation judgments, the Court therefore sought to rein-in an effective over-extension of the *Gibraltar* judgment by the Commission, re-asserting the appropriate point of balance between Member States' tax autonomy and the EU State aid rules.

VII. Conclusion

In this chapter, we have shown how the derogation framework or three-step test applied where the State is exercising public authority functions amounts to an assessment of whether the object of a measure of differential application is to create inequality of opportunity, or whether the measure in reality, can be considered as

470 *Ibid*., paragraphs 73-74.
471 *Ibid*., paragraph 122.
472 *Ibid*., paragraph 123.

forming part of general economic and regulatory policy and is therefore in line with equality of opportunity. In particular, we have demonstrated that each of the three steps in the derogation framework embody a type of consistency test, which serves as the means of making this assessment. The essential question is whether the substance of the measure and the differentiations that it introduces, are consistent with the State's own relevant objective? Where this is not the case, the object of the measure may be presumed as being to create inequality of opportunity and favour those undertakings or sectors which benefit. Given the nature of this consistency-type test, it is the objective of the relevant system for the measure at issue that is central to the assessment, rather than the actual or potential competitive effects of the measure. In other words, the derogation framework is essentially a test of the State's claimed objectives, rather than the measure's effects.

The chapter has also demonstrated the importance of the fair macro-economic competition dimension as part of the derogation framework and has illustrated how it has influenced the result in cases where the measure at issue raised international competitiveness concerns, including to the point of discounting related objectives from the assessment. The fair macro-economic competition dimension is evidently key to State aid definition, and along with the fair micro-economic competition dimension, shapes the notion of equality of opportunity which must be applied.

At the same time, we have shown that notwithstanding the systematisation of the derogation framework, the EU Courts have applied it flexibly and have even in certain cases, been prepared to disregard it altogether or develop new case-specific frameworks, where doing so is required to address apparent inequality of opportunity or the lack thereof in the particular circumstances of the case. These cases demonstrate that the derogation framework is ultimately only a proxy or means for determining whether the object of the measure is consistent with equality of opportunity, which is the key driver for the criterion of selective advantage and that other proxies or considerations may be resorted to insofar as is necessary in specific cases. As we will show, this tendency is something that is common to the practice of the EU Courts across all main areas of selective advantage assessment, including the assessment of State measures that take the form of economic transactions, to which the next chapter now turns.

Chapter 4
The State as Market Operator

I. Introduction

In this chapter, we examine the assessment of selective advantage where the State is acting in the private sphere and the State measure at issue takes the form of an economic transaction. In this context, the main assessment framework that has been used to identify the existence of a selective advantage is the MEOP, which is applied broadly to any type of economic transaction undertaken by the State. This includes capital injections,[473] the provision of debt finance,[474] debt rescheduling,[475] State guarantees,[476] the supply by the State[477] as well as the purchase by the State of goods and services[478] and the sale of public assets.[479] At a high level, the MEOP is essentially the same core test as applied in each particular context, namely, is the specific transaction or conduct in question undertaken on terms which would be acceptable to a private economic operator operating under normal market economy conditions?[480] If the answer is affirmative, then that commercial transaction or conduct does not involve State aid.

Unlike the assessment frameworks in the other two main areas of State activity that fall to be assessed under the EU State aid rules, the "derogation framework" in the case of State measures taken in the exercise of public authority functions and the "*Altmark* criteria" or "compensation principle" where the State is seeking to fund SGEI, the MEOP assessment does not follow a set methodology with prescribed criteria. Instead, and by necessity, the assessment is more open textured, with different elements featuring at the more granular level depending on the specifics of the transaction involved. The jurisprudence has though distinguished between two

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473 See e.g. Joined Cases T-228/99 and T-233/99 *WestLB* – in this context, the MEOP has been traditionally referred to as the "market economy investor principle".

474 See e.g. Case C-457/00 *Belgium v Commission (Verlipack*) EU:C:2003:387.

475 See e.g. Case C-525/04 P *Spain v Lenzing* EU:C:2007:698 – in this context, the MEOP has been referred to as the "private creditor test".

476 See e.g. Joined Cases T-204/97 and T-270/97 *EPAC v Commission* EU:T:2000:148.

477 See e.g. Case C-39/94 *SFEI and Others*.

478 See e.g. Joined Cases T-116/01 and T-118/01 *P&O European Ferries (Vizcaya) and Disputación Foral de Vizcaya v Commission* EU:T:2003:217.

479 See e.g., Case C-214/12 P *Land Burgenland and Others v Commission* EU:C:2013:682 – in this context, the MEOP has been referred to as the "private vendor test".

480 See the Commission Notice on the notion of State aid, paragraphs 74-75.

methodological stages in relation to the MEOP: (i) its applicability; and (ii) its concrete application, and has set out various broader principles as to how these stages are to be examined.

These principles and their operation, however, have given rise to significant inconsistencies and complications in the jurisprudence. On the one hand, in certain cases the EU Courts have considered the perspective of the beneficiary as paramount, basing the MEOP assessment simply on the question of whether the counterparty would have been able to obtain the same terms on the private markets[481] or otherwise prioritising the position and interests of the beneficiary in assessing the market-consistency of the transaction.

This is well illustrated by the *BDB* cases, which concerned the transfer of various investment funds from the German state of Hessen to the Heleba bank in return for remuneration.[482] In setting out the MEOP assessment, the General Court explained that it should be examined whether Heleba, "*would have been able to procure funds entailing the same advantages from other investors and, if necessary, under what conditions, since a measure cannot constitute State aid if it does not place an undertaking in a more advantageous position than it would have been in if the public authority had not intervened*."[483] This starting point informed the reasoning of the General Court in relation to a number of key aspects of its assessment. For instance, the General Court explained that the question over whether the Land could have obtained a higher remuneration by investing differently or in another undertaking was irrelevant. Rather, the question was, whether, by investing the fund in Heleba under the agreed conditions, "*the Land conferred an advantage on Heleba which it could not have obtained in any other way.*"[484] Similarly, the General Court also rejected the argument that the Land should have required higher remuneration given the size of its contribution and thus commitment to Heleba and the consequential level of risk, seeing that Heleba did not need such a significant

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481 See in particular, Case C-301/87 *France v Commission (Boussac*) EU:C:1990:67, paragraphs 39-41; Case T-16/96 *Cityflyer Express v Commission* EU:T:1998:78, paragraphs 51-53; Joined Cases T-267/08 and T-279/08 *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis v Commission* EU:T:2011:209, paragraphs 159-162; and Case C-288/96 *Germany v Commission* EU:C:2000:537, paragraphs 30-35.

482 Case T-163/05 *Bundesverband deutscher Banken v Commission* EU:T:2010:59 and Case T-36/06 *Bundesverband deutscher Banken v Commission* EU:T:2010:61.

483 Case T-163/05 *Bundesverband deutscher Banken v Commission*, paragraph 37.

484 *Ibid*., paragraph 58.

increase in its funds so urgently and may have been able to obtain a similar overall contribution from a number of other investors with different risk profiles and therefore without paying any risk premium.[485]

On the other hand and more typically, the EU Courts have repeatedly stated that the MEOP requires reference to be made to a hypothetical private market actor, "*in a situation as close as possible to that of the State*"[486] and they have explicitly taken into account the specific features of the State's situation as part of the MEOP assessment. In particular, the fact of State ownership of the beneficiary in question, has featured on many occasions as a relevant consideration, with the Court of Justice explaining that a comparator parent private company may, "*for a limited period, bear the losses of one of its subsidiaries in order to enable the latter to close down its operations under the best possible conditions*" including in order "*to protect the group's image or to redirect its activities*."[487] This kind of assessment clearly prioritises the State's perspective over that of the beneficiary, seeing that the considerations referred to by the Court of Justice would evidently not be relevant to third party investors from the private capital markets in determining whether or not to invest, and implies an assessment of economic rationality from the State's perspective.

At the same time however, to the extent that the EU Courts have sought to incorporate the State actor's attributes within the MEOP assessment, this has been qualified, as the EU Courts have also insisted that public-sector obligations, costs or prerogatives cannot be taken into account. Therefore, in the *Hytasa* case,[488] in assessing Spain's decision to continue financially supporting a number of public

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485 See Case T-163/05 *Bundesverband deutscher Banken v Commission*, at paragraphs 229-231 and Case T-36/06 *Bundesverband deutscher Banken v Commission*, at paragraph 90.

486 See e.g. Case C-579/16 *Commission v FIH Holding and FIH Erhversbank* EU:C:2018:159, paragraph 55; Case C-214/12 P *Land Burgenland v Commission* EU:C:2012:318, paragraph 52; Case C-73/11 P *Frucona Košice v Commission* EU:C:2013:32, paragraph 78; and Case C-124/10 P *Commission v EDF* EU:C:2012:318, paragraph 79. In a similar vein, the assessment is also sometimes expressed as being whether the measure would have been adopted, "*in similar circumstances [by] a private investor of a dimension comparable to that of the bodies managing the public sector*" – see e.g. Joined Cases C-533/12 and C-556/12 P *SNCM and France v Corsica Ferries France* EU:C:2014:2142, paragraph 32; Case C-328/99 *Italy and SIM 2 Multimedia v Commission* EU:C:2003:252; paragraph 38; and Case C-482/99 *France v Commission (Stardust Marine)*, paragraph 70.

487 Case C-303/88 *Italy v Commission (Lanerossi)* EU:C:1991:136, paragraph 21.

488 Joined Cases C-278/92 to C-280/92 *Spain v Commission (Hytasa)*.

undertakings with a view to their privatisation rather than allowing their liquidation, the Court of Justice ruled that the additional public sector-specific costs that the State would face upon the liquidation of an undertaking, such as redundancy costs and unemployment benefit payments, could not be taken into account in the calculus of which course of action would be the least costly for the State. Similarly, in the *WestLB* case,[489] the General Court dismissed the argument that potential increased tax revenues resulting from the transaction in question could be taken into account.[490]

The EU Courts have not offered much by of explanation for this position, simply stating that, "*a distinction must be drawn between the obligations which the State must assume as owner of the share capital of a company and its obligations as a public authority*".[491] The negation of such public sector attributes however, when they would be relevant to the financial consequences of the State's course of action, compromises the construct of the MEOP as an economic rationality assessment from the perspective of the State.

The dichotomy between objectives and effects is another particular area of apparent conceptual confusion. The landmark *EDF* case,[492] which established the test for the applicability of the MEOP, provides an illustration. The case concerned the waiving of a tax claim by the French State that was owed by EDF, then a fully State-owned undertaking, in the context of a broader restructuring of its balance sheet and recapitalisation. In the administrative procedure before the Commission, France had claimed that the waiving of the tax claim represented a capital injection and was therefore a commercial investment rather than an aid measure. This was dismissed by the Commission, essentially on the basis of the form of the measure, taking the position that the MEOP could not be applied to an intervention undertaken by means of a fiscal measure, seeing that such a measure would not be available to a private investor.[493]

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489 Joined Cases T-228/99 and T-233/99 *WestLB*.

490 *Ibid*., paragraph 317.

491 Joined Cases C-278/92 to C-280/92 *Spain v Commission (Hytasa)*, paragraph 22. To similar effect, see Case C-334/99 *Germany v Commission (Gröditzer)* EU:C:2003:55, paragraph 134 and Joined Cases T-228/99 and T-233/99 *WestLB*, paragraph 317.

492 Case C-124/10 P *Commission v EDF*.

493 Commission Decision of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries, OJ L 49/9 22.2.2005, recitals 95-97.

The Court of Justice however, took the position that the form of the intervention could not be decisive, explaining that the MEOP "*is applied in order to determine whether, because of its effects, the economic advantage granted, in whatever form, through State resources to a public undertaking distorts or threatens to distort competition and affects trade between Member States. The intention underlying Article [107(1) TFEU and the MEOP] is thus to prevent the recipient public undertaking from being placed, by means of State resources, in a more favourable position than that of its competitors […] However, the financial situation of the recipient public undertaking depends not on the means used to place it at an advantage, however that may have been effected, but on the amount that the undertaking ultimately receives*."[494]

The Court of Justice therefore appeared to cast the MEOP as being a test of "effects" insofar as the MEOP assesses whether the recipient undertaking is placed in a more favourable position than its competitors, meaning that the form of the measure used to provide the economic benefit was less important than the amount actually received. The Court, however, then went on to establish a test for the MEOP which undercuts this logic, requiring a "global assessment" to determine whether the State is acting in a private operator capacity, taking into account all "*relevant evidence*" including, in particular "*the nature and subject-matter of the measure in question, its context, the objective pursued and the rules to which the measure is subject*".[495] The end result therefore, is that the Court appeared to advocate the application of an effects-based MEOP, while putting forward a test for its applicability that depends in part on the State's objectives, which moreover, ultimately played a significant role in the conclusion that the Commission could not have excluded the applicability of the MEOP in that case.[496]

At the same time, while objectives were accorded central significance in the *EDF* case, in other cases they have been expressly disregarded. In particular, in the *Frucona* case,[497] the EU Courts held that the MEOP could be applicable to the partial write-off of a tax debt by Slovakia, even though the Member State had not sought to invoke the MEOP before the Commission and had conceded that the measure

494 Case C-124/10 P *Commission v EDF*, paragraphs 89-91.
495 *Ibid*, paragraph 86.
496 This was the position of the General Court in Case T-156/04 *EDF v Commission* EU:T:2009:505, which the Court of Justice upheld on appeal.
497 Case T-103/14 *Frucona Košice v Commission* EU:T:2016:152 before the General Court and Case C-300/16 P *Commission v Frucona Košice* EU:C:2017:706 before the Court of Justice.

should be considered as rescue aid, with the EU Courts rejecting the argument of the Commission that the MEOP "*aims to reveal the 'subjective state of mind' of the Member State granting the alleged aid*."[498]

The existing literature largely fails to provide an account of the MEOP that can explain these apparent contradictions. Despite its long-standing application in the field of EU State aid law, the MEOP has only been subject to limited scrutiny in the academic literature relative to the other strands of EU State aid law[499] and in particular, there is only limited analysis in relation to its conceptual basis. From what there is in the existing literature, however, two main themes emerge.

The first theme in the literature is that the MEOP assesses whether there is an actual advantage in *economic terms*. Simply put, the argument is that the beneficiary would receive no real economic "advantage" for the purposes of Article 107(1) TFEU if it could have obtained the same economic benefit in the private markets in any event in the absence of the State's intervention.[500] The MEOP so conceived would therefore be a type of "counterfactual assessment",[501] a familiar tool used more broadly in EU competition law for assessing whether a particular practice has the actual or likely effect of restricting competition.[502] This approach also finds support in the case-law referred to above, including the *BDB* cases, which prioritise the

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498 See the opinion of Advocate General Wahl in Case C-300/16 P *Commission v Frucona Košice* EU:C:2017:331, paragraph 52, and the Court of Justice judgment, paragraph 11.

499 In terms of the notable exceptions, see the contributions referred to in Chapter 1, note 66, as well as Rubini, *The Definition of Subsidy and State Aid*, chapter 8 and De Cecco, *State aid and the European Economic Constitution*, chapter 4.

500 See B Slocock, 'The Market Economy Investor Principle' (2002) EC Competition Policy Newsletter 2(23), at 23; D Grespan and S Santamato, 'Favouring certain undertakings or the production of certain goods: Advantage' in Mederer, Pesaresi and Van Hoof (eds), *EU Competition Law: Volume 4 State Aid*, at 2.326; and A Jones and B Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford: OUP, 2014), Additional Chapter on State Aid, 52.

501 In the words of Slocok, 'The Market Economy Investor Principle', at 23: "*This is an example of the fact that the presence of advantage in a state measure is assessed by reference to what would be the case in the measure's absence, not the position relative to e.g. competitors in other Member States*." For the general principle that the existence of an "advantage" is assessed by comparing the position of the beneficiary with its position in the absence of the measure at issue, see Joined Cases C-91/17 P and C-92/17 P *Cellnex Telecom SA and Telecom Castilla-La Mancha v Commission* EU:C:2018:284, paragraph 114.

502 Originally, laid down by the Court of Justice in Case C-56/65 *Société Technique Minière v Maschinenbau Ulm* EU:C:1966:38, pages 249-250. See more generally, D Geradin and I Girgenson, 'The counterfactual method in EU competition law: The cornerstone of the effects-based approach' in J Bourgeois and D Waelbroeck (eds), *Ten years of effects-based approach in EU competition law* (Brussels, Bruylant: 2012) 211-237.

perspective of the beneficiary and base the assessment on the alternative opportunities open to it in the private markets.

The second theme in the literature is that the MEOP reflects the principle of neutrality between public and private ownership embodied in Article 345 TFEU, pursuant to which, the Treaties "*shall in no way prejudice the rules in Member States governing the system of property ownership*".[503] In the words of one commentator, the MEOP "*is designed to alleviate the contradiction created by the simultaneous co-existence of the two inconsistent articles*", namely Article 107(1) TFEU which restricts State intervention in the economy and Article 345 TFEU, which permits State ownership of private companies.[504] This neutrality reasoning has also found expression in a number of Court of Justice judgments, which have stated that, "*pursuant to the principle that the public and private sectors are to be treated equally, capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid*."[505]

It is submitted however, that both of these attempted explanations have clear problems or limitations. In terms of the counterfactual approach, this appears at first sight somewhat paradoxical in the State aid context. If alternative private market capital were to be available, why would a counterparty require or indeed accept a capital injection from the State?[506] More fundamentally however, while the application of a "counterfactual assessment" could have a place under the MEOP in that a State intervention would *not* be classified as State aid where the beneficiary could have obtained the same benefit in any event from the normal operation of the market, the reverse does not follow from the case-law. This is apparent from the

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503 See Parish, 'On the Private Investor Principle', at 71 and Khan and Borchardt, 'The Private Market Investor Principle: Reality Check or Distorting Mirror', at 111.

504 Parish, 'On the Private Investor Principle', at 71.

505 See by way of notable examples, Case C-399/00 *SIM 2 Multimedia v Commission* EU:C:2003:252, paragraph 37; Case C-482/99 *France v Commission (Stardust Marine)*, paragraph 69; Case C-261/89 *Italy v Commission* EU:C:1991:367, paragraph 15; and Case C-303/88 *Italy v Commission (Lanerossi)*, paragraph 20. See also the second opinion of Advocate General Léger in the *Altmark* case: "*Application of that criterion [the MEOP] is justified by the principle of equal treatment between the public and private sectors, which requires that intervention by the State should not be subject to stricter rules than those applicable to private undertakings*" (second opinion in Case C-280/00 *Altmark Trans* EU:C:2002:188, paragraph 21).

506 See also in this regard J Kavanagh, G Niels and S Pilsbury, 'The market economy investor: an economic role model for assessing State aid', in Szyszczak (ed), *Research Handbook on European State Aid Law,* 90-104, who note at 90 that "*To an economist, there is at first sight something inherently paradoxical in the [MEOP]. Does not the mere fact that the State spends money imply that no private party would do so?*".

judgments which admit the attributes of the State in the assessment and therefore factors that would evidently not be relevant to alternative transaction counterparties, as explained above.

More fundamentally, the MEOP is still typically applied to a broad range of situations to assess whether the transaction at issue gives rise to a selective advantage and State aid where the only source of the particular contribution in question is the State alone.[507] A common example is the procurement by the State of specific goods and services for which there would not be a private market, such as the outsourcing of tax and benefits administrative functions and the running of prisons, where it is accepted that provided the remuneration for such outsourced services is on market terms, there should be no State aid.

In terms of further notable instances arising in the case-law, the well-known *Chronopost* case[508] provides an important example. In this case, the main State measure in question was the grant by the State-owned La Poste of access to its postal network to its subsidiary, SFMI Chronopost, which operated in the express sector that was open to competition. The La Poste network was without parallel in France and indeed would never have been created by a private undertaking as it was funded by the French State and supported by a legal monopoly granted to La Poste over the general postal sector in order to enable it to provide a universal service. Notwithstanding that the State-owned La Poste was therefore the only potential source of the benefit in question, there was consensus between the General Court and the Court of Justice that an MEOP-type assessment could be applied to determine the remuneration that La Poste should have required from SFMI-Chronopost to avoid a finding of selective advantage and therefore State aid. As will be explained further in this chapter, the only difference between the EU Courts was over what precisely the correct benchmark should be.

As for the principle of neutrality between private and public sectors, while this principle has been referred to in the jurisprudence, its interpretative potential in relation to the MEOP seems inherently qualified, as the MEOP obviously places

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507 Indeed, the General Court has itself also commented that: "*The very purpose of the private investor test is to establish whether, despite the fact that the State has at its disposal means which are not available to a private investor, the latter would, in the same circumstances, have taken an investment decision comparable to that taken by the State*" – see Case T-156/04 *EDF v Commission*, paragraph 261.

508 Joined Cases C-83/01, C-93/01 and C-94/01 P *Chronopost and Others* EU:C:2003:388.

restrictions on Member States' ability to enter into transactions to which private operators are not subject. This was laid bare in the *WestLB* case,[509] in which the General Court was confronted with the argument that using the average rate of return for the sector concerned as a tool for assessing the compliance of an investment under the MEOP was contrary to the equal treatment principle, as private undertakings were (by definition) not subject to such a constraint.[510] The General Court responded that there was no breach of equal treatment in subjecting public investors' conduct to this requirement and indeed the requirements of the MEOP more generally, as public investors are not in the same situation as private investors. The General Court explained that whereas private investors can only rely on their own resources to finance their investments and are liable up to those limits for the consequences of their decisions, public investors have access to resources flowing from the exercise of public power, namely taxation.[511]

While this legal reasoning seems sound in principle, it would appear potentially to justify a very broad range of restrictions under the MEOP that would not apply to private operators, leaving little substance left of the principle of neutrality that could have interpretative potential.[512] This is further confirmed by an examination of the relevant jurisprudence itself. The neutrality principle does not appear to have ever been drawn on by the EU Courts to inform concretely the application of the MEOP. In fact, the neutrality principle only initially arose in the jurisprudence in the context of Member States arguing before the Court of Justice that the MEOP as applied by the Commission was contrary to this principle,[513] which led to the formulation of the Court of Justice referred to above.[514] This seems to confirm that while the neutrality principle may provide a general basis for the position that the State aid rules cannot exclude Member States from engaging in transactions, it cannot shed any further light on how the MEOP *should actually be applied*.

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509 Joined Cases T-228/99 and T-233/99 *WestLB*.

510 *Ibid*., paragraph 265.

511 *Ibid*., paragraphs 271-272.

512 See also in this regard De Cecco, *State aid and the European Economic Constitution*, at 70, who argues, based on the *WestLB* case, that the emphasis in Article 345 TFEU does not lie on safeguarding the role of the State as market participant in light of the EU State aid rules but rather on preventing an abuse of economic power by the State.

513 See Case C-303/88 *Italy v Commission (Lanerossi)*, paragraphs 16-18; Case C-261/89 *Italy v Commission*, paragraph 7; and Case C-305/89 *Italy v Commission (Alfa Romeo)* EU:C:1991:142, paragraphs 17 and 24.

514 See page 141 above.

Finally, it may also be noted that the neutrality principle would ultimately render the MEOP as being, in reality, an "exception" to the concept of State aid, in other words, something external that effectively overrides the concept of State aid. This seems peculiar and somewhat unsatisfactory given the clear centrality of the MEOP to the assessment of selective advantage and therefore State aid. In contrast, it is this thesis' contention that the MEOP is a fundamental part of the concept of selective advantage and State aid, and in line with that centrality, serves to ascertain whether the object of the State measure in question is to create inequality of opportunity in favour of the counterparty to the transaction or in fact represents entirely commercial or economically rational conduct and is therefore consistent with equality of opportunity.

In the sections that follow, it is demonstrated how conceiving of the MEOP in this way provides a basis for rationalising the seemingly irreconcilable distinctions drawn in the case-law. Section II begins by exploring the origins of the MEOP in the early *Meura* and *Boch* cases which first endorsed the MEOP,[515] focusing in particular, on the influential opinion of Advocate General Lenz,[516] in which it is argued that the essence of the MEOP in seeking to determine the object of the State intervention at issue, was already apparent.

Sections III and IV then critically examine the key jurisprudence of the EU Courts in relation to the MEOP, addressing the two main analytical areas, the applicability of the MEOP and its application, illustrating how the nature of the MEOP as an object assessment concerned with equality of opportunity drives both of these analytical stages and can rationalise the apparently difficult cases raised above. In particular, the applicability stage is examined with reference to the seminal *EDF* case, which first established a more systematic approach to this issue, and the *ING*, *Frucona* and *Areoporti di Sardegna* cases, which represent the key cases in which this issue was addressed.

The application stage is then examined with reference to three issues that recurrently feature in applying the MEOP: (a) the relevant characteristics of the private operator with which the conduct of the State is to be compared; (b) the point

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515 Case C-234/84 *Belgium v Commission (Meura)* EU:C:1986:151 and Case C-40/85 *Belgium v Commission (Boch)* EU:C:1986:305.

516 Opinions of Advocate General Lenz in Case C-234/84 *Belgium v Commission (Meura)* and Case C-40/85 *Belgium v Commission (Boch)* EU:C:1986:152.

in time with reference to which the assessment is to be made; and (c) the relevant background and contextual factors to be taken into account as part of the assessment. Significant cases in each of these areas that provide important insight into the nature of the assessment are analysed, such as the *Chronopost* and the *BAI* case, as well as the more apparently difficult *FIH* and *Hungarian PPA* cases. Finally, section V concludes.

II. Inception of the MEOP – the *Meura* and *Boch* cases

As with the derogation framework examined in the previous chapter, it is submitted that the origins of the MEOP in the jurisprudence are instructive as to the nature of the MEOP assessment. Initially developed by the Commission and the Council[517] and applied by the Commission in a number of decisions,[518] the MEOP was explicitly endorsed by the Court of Justice for the first time in 1986 in the parallel *Meura*[519] and *Boch*[520] cases.[521] Both cases, for which Advocate General Lenz and the Court of Justice issued largely identical opinions and judgments respectively, concerned capital injections by the Belgian State into struggling companies in which the State was the existing owner of all or nearly all the share capital.

In both cases, the Commission had made a finding of State aid on the basis that the companies would not have been able to raise the relevant finance on the private capital markets given their financial difficulties. The Belgian State contested the approach of the Commission before the Court of Justice, arguing that it was contrary

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517 See in particular, the Commission's 1981 steel industry code, Commission Decision No 2320/81/ECSC of 7 August 1981 establishing Community rules for aids to the steel industry, OJ L 228/14 13.8.81, Article 1(2); the Council's 1981 shipbuilding code, Council Directive No 81/363/EEC of 28 April 1981 on aid to shipbuilding, OJ L 137/39 23.5.81, Article 1(e); and the Commission's 1984 Communication on the application of Articles 92 and 93 of the EEC Treaty to public authorities' holdings, Bulletin EC 9-1984, section 5.

518 Including the decisions at issue in the *Meura* and *Boch* cases themselves – Commission Decision 84/496/EEC of 17 April 1984 on aid which the Belgian Government has granted to an undertaking at Tournai manufacturing equipment for the food industry, OJ L 276/34 19.10.1984 and Commission Decision 85/153/EEC of 24 October 1984 concerning aid which the Belgian Government granted in 1983 to a ceramic sanitary ware and crockery manufacturer, OJ L 59/21 27.2/1985.

519 Case C-234/84 *Belgium v Commission (Meura)*.

520 Case C-40/85 *Belgium v Commission (Boch)*.

521 The Court of Justice in fact encountered the MEOP as applied by the Commission in two earlier cases, Case C-323/82 *Intermills v Commission* EU:C:1984:345 and Joined Cases C-296/82 and C-318/82 *Netherlands and Leeuwarder Papierwarenfabriek v Commission* EU:C:1985:113. In both cases however, the Court of Justice's examination was limited to assessing the sufficiency of reasoning and did not address in any detail the specific point of principle.

to the neutrality principle between public and private ownership on the basis that it would be quite normal for a private shareholder to support its company experiencing temporary difficulties by subscribing to additional capital, in particular, where as in the present cases, the subscription of capital was part of a restructuring plan.[522]

The approach of the Advocate General and the Court in addressing the issues was nuanced and it is worth quoting from the opinion and the judgment in order to trace their reasoning. The Advocate General first began with the proposition that: "*At least, support constitutes aid where the recipient undertaking obtains an advantage which it would not normally have obtained, for example, where capital is made available in circumstances which do not correspond to the normal conditions of the capital market*."[523] According to the Advocate General, the starting point for the MEOP was therefore in line with the "counterfactual" approach referred to in section I above. On this basis, where the beneficiary obtains capital from the State in circumstances in which it would not normally be able to do so from the private capital markets, that could constitute State aid.

However, the Advocate General continued to explain that this assessment was insufficient, by itself, to make a finding of State aid, in particular, in light of the neutrality principle. Rather, according to the Advocate General, the "*central legal question*" was to "*distinguish between action taken by the public authorities for entrepreneurial reasons in their capacity as private operators and State measures having political objectives and serving to promote the public good*" and "*[in] the case of a financial transaction between a Member State and a public undertaking special criteria must be used in order to try to differentiate between entrepreneurial conduct and State conduct in the granting of aid*."[524]

In other words, in the case of a public undertaking which was owned by the State, simply assessing the possibilities for the counterparty to obtain the capital from the private markets in the absence of the State intervention alone was insufficient. In this regard, the Advocate General suggested that, "*the test for State aid might be whether, in comparable circumstances, a private businessman acting on the basis of relevant economic considerations would not support the undertaking concerned*

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522 Case C-234/84 *Belgium v Commission (Meura)*, paragraph 9.
523 Opinion of Advocate General Lenz in Case C-234/84 *Belgium v Commission (Meura)*, page 2269.
524 *Ibid*., pages 2270-2271.

in such a manner." Notably, the Advocate General added that, "*According to the case-law of the Court, in ascertaining whether a measure of State intervention constitutes aid reference is to be made, not to the causes or aims of the measure, but to its effects; however, in order to differentiate between State aid and grants to public undertakings by the State in its capacity as a private operator, the aims of the action must be taken into consideration, at least as evidence*."[525]

For the Advocate General, the crux of the MEOP assessment was therefore to distinguish between the State's entrepreneurial activities as a private operator, and the State's activities as a public authority (and therefore the granting of subsidies), in the context of what others have referred to as the "split personality" of the State.[526] In other words, the purpose of the MEOP assessment is to determine the nature or object of the measure, and that in making this assessment, the aim of the measure in question was a relevant consideration.

As for the Court of Justice, while its judgments were somewhat terse, its formulation of the MEOP effectively mirrored the Advocate General's two-tiered approach. The formulation by the Court of the MEOP started by stating that an appropriate way of assessing State aid is to determine "*to what extent the undertaking would be able to obtain the sums in question on the private capital markets*".[527] However, the Court then continued to explain that, "*In the case of an undertaking whose capital is held by the public authorities, the test is, in particular, whether in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question*," and that, "*a private shareholder may reasonably subscribe the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganization*."[528]

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525 *Ibid*., page 2271.

526 See the opinion of Advocate General Mischo in Case C-118/85 *Commission v Italy* EU:C:1986:413, page 2612.

527 Case C-234/84 *Belgium v Commission (Meura)*, paragraph 14.

528 *Ibid*., paragraphs 14-15. In the *Boch* judgment, the Court used an equivalent formula, save that it referred to the case, "*of an undertaking whose capital is almost held entirely by the public authorities*," (emphasis added) which reflected the specific ownership situation in that case (see Case C-40/85 *Belgium v Commission (Boch)*, paragraphs 13-14).

The Court therefore effectively supported Belgium's position that merely assessing the possibilities for the beneficiary to obtain the same capital on the private markets alone was insufficient as it did not take into account the Belgian State's existing situation as the owner of the beneficiary and therefore its propensity to provide additional capital in circumstances going beyond the private capital markets as part of a restructuring operation. However, on the facts, the Court concluded that even those considerations could not prevent the classification of the capital injections as State aid in the circumstances. In the *Meura* case for instance, the Court pointed out that the beneficiary had been making substantial losses for several years and its financial condition had already necessitated a number of capital injections by the Belgian State in order to prolong its survival. In addition, while Belgium had argued that the capital injection was linked to the implementation of a restructuring plan, that plan had not been provided to the Commission and therefore could not be taken into account in assessing the Commission decision.[529]

As encapsulated by Advocate General Lenz and the Court of Justice in these cases, the MEOP would therefore be composed of two elements: (i) an assessment effectively from the beneficiary's perspective which looks at the extent to which the beneficiary could have obtained the same benefit from other private operators in the absence of the State's intervention; and also (ii) an assessment going beyond this that is made from the perspective of the granting State and which requires taking into account the specific position of the State.

As further elucidated by the Advocate General, the essential question would be whether the measure represents commercially or economically rational conduct that would be undertaken by a private operator in the position of the State and is therefore in line with the market mechanism and equality of opportunity, or whether the measure represents conduct that is of a public authority nature. In the case of the latter, i.e. where the conduct is shown ultimately to be of a public authority nature, we would submit that in light of the derogation framework expounded in Chapter 3, the object of the measure must then be considered as being to create inequality of opportunity in favour of the beneficiary. This is because the measure applies only to an individually identified undertaking or undertakings i.e. the counterparty or counterparties to the transaction, and therefore evidently cannot be assimilated to a

[529] Case C-234/84 *Belgium v Commission (Meura)*, paragraphs 15-16.

measure of general economic or regulatory policy in line with the principles deriving from the *Orange* case-law addressed above.[530] The assessment of whether the State is effectively acting as a private operator or as a public authority with respect to the measure in question therefore serves to determine whether the object of the measure is to create inequality of opportunity in favour of the counterparty undertaking to the transaction. As explained by Advocate General Tizzano in *P&O European Ferries (Vizcaya)*, the MEOP thereby, "*makes it possible to determine whether public intervention can be ascribed purely to the logic of the market and is not designed to favour certain undertakings, with resultant distortion of the common market*."[531]

In our view, both of the two elements to the MEOP assessment, the beneficiary perspective and the State perspective, are geared towards this same object assessment and therefore the case-law which emphasises these different perspectives is not contradictory. Where the counterparty to a State transaction would evidently be able to obtain the same terms on the private markets in any event in the absence of the State intervention, the object of the measure cannot be considered as being to create inequality of opportunity in favour of that counterparty. Furthermore, as the General Court itself has explained, the State would have to take into account the beneficiary's position including its possibilities for obtaining alternative contributions on the private markets as part of commercial and arm's length negotiations over the terms of a transaction,[532] i.e. in a context where there is no favouring.

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530 Case T-385/12 *Orange v Commission* and Case C-211/15 P *Orange v Commission*, addressed at pages 119-121 above.

531 Opinion of Advocate General Tizzano in Case C-442/03 P *P&O European Ferries (Vizcaya) v Commission* EU:C:2006:356, paragraph 86. In a similar vein, see Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy', at 44, who states that, "*the constitutional significance of the Market Investor Principle lies in the fact that if such a test is satisfied there are no protectionist policies to be sanctioned, as the market place is functioning properly; thus, there is no barrier to trade imposed by the behaviour of the Member State as the State is acting as a normal economic operator*."

532 See Joined Cases T-228/99 and T-233/99 *WestLB*, which concerned the transfer of the assets of WfA, a State Land-owned housing promotion vehicle to WestLB. The General Court explained that the illiquidity of the assets transferred had to be taken into account in terms of the level of remuneration on the basis that in the course of *"negotiations under normal conditions of a market economy*", a private investor in the same situation as the Land would have had to take WestLB's point of view into consideration and the fact that for WestLB, the capital of WFA was of a restricted utility and therefore could not have required the same return as for liquid capital (see paragraphs 323-328).

Similarly, where notwithstanding the non-availability of the same terms on the private market, the transaction is nonetheless commercially justified from the perspective of the State in light of certain attributes or circumstances which are specific to it, again, the object of the measure cannot be considered as being to create inequality of opportunity in favour of that counterparty. Taking into account the specific attributes and circumstances of the State that are relevant to the commercial justification of the transaction is also itself a product of the principle of equality of opportunity and the related criterion of fairness which requires that the interests of the State when directly participating in the competitive process are also taken into account, as explained in Chapter 2 above.[533] We would argue that this is also the context in which the references in the judgments of the EU Courts to the "neutrality principle" under Article 345 TFEU must be understood.

Typically, these two elements to the MEOP assessment, the beneficiary perspective and the State perspective, are not explicitly contemplated separately in the jurisprudence and the MEOP assessment is simply framed as and undertaken from the perspective of the Member State only, with reference being made to whether, "*the measure would have been adopted in normal market conditions by a private investor in a situation as close as possible to that of the State*" as explained above. This will also always be the more expansive perspective, as it potentially might have been in the *Meura* and *Boch* cases, given that it admits more relevant factors on which basis the measure may be found as MEOP-compliant, and therefore it makes sense for the assessment to be conducted from this perspective.[534]

However, there are certain cases where only the first element has been assessed explicitly, as mentioned above. In those cases where the EU Courts expressed the MEOP assessment as simply being the extent to which the beneficiary would have been able to obtain the same terms on the private markets, this is attributable to the fact that in these cases, there were no relevant additional factors that arose from the State's perspective for assessing the measure,[535] meaning that the beneficiary

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533 See pages 70-73 above.

534 In this regard, we would disagree with commentators who assert that the choice of perspective is of little significance given that they lead to the same result (see e.g. Khan and Borchardt, 'The Private Market Investor Principle: Reality Check or Distorting Mirror', at 121). The formulation of the test above and the numerous examples mentioned in this chapter and in particular, section IV:a, where the specific situation of the State played a determinative role, point to a contrary conclusion.

535 Returning to the cases referred to in note 481 above: Case C-301/87 *France v Commission (Boussac*); Case T-16/96 *Cityflyer Express v Commission*; Joined Cases

perspective was the only relevant test, or because this test was sufficient in itself to rule out the alleged ground of State aid, as in the *BDB* cases, referred to above.

What is clear however, and in particular in light of the centrality of the assessment from the perspective of the State, is that the MEOP assessment is not concerned with actual or potential competitive effects as such, but amounts to an assessment of the object of the measure, i.e. whether it represents commercially or economically rational conduct that would be undertaken by a private operator in the position of the State or conduct which has the object of creating inequality of opportunity in favour of the beneficiary. This will be further demonstrated in the remaining parts of this chapter with reference to the two main analytical areas arising in relation to the MEOP, its applicability and application, illustrating how the nature of the MEOP as an object assessment concerned with equality of opportunity drives both of these stages.

III. The applicability of the MEOP

In most cases, the applicability of the MEOP is not a question that would be considered in any detail. The Commission and the EU Courts would simply apply the MEOP where the measure takes the form of a commercial transaction. There have been cases, however, where the relevant Member State or beneficiary has claimed that the MEOP was applicable beyond this context, i.e. to measures which did not clearly take the form of a transaction, or where the particular circumstances of the transaction were such that the Commission sought to deny that the MEOP was applicable.

This led the EU Courts ultimately to develop a more systematic approach to determining the applicability of the MEOP in the *EDF* case,[536] an approach which

T-267/08 and T-279/08 *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis v Commission*; and Case C-288/96 *Germany v Commission* – these cases all concerned measures in favour of beneficiaries in which the State did not have any existing holding or relevant connection.

536 Case T-156/04 *EDF v Commission* before the General Court and Case C-124/10 P *Commission v EDF* before the Court of Justice. For commentary in relation to the judgments, see A Bartosch, 'The EDF Ruling – an electrifying Enlightening' (2010) European State Aid Law Quarterly 267, A Bartosch, 'Case Note on EDF v Commission (T-156/04) – under Appeal' (2010) European State Aid Law Quarterly 679 and A Sanchez Graells, 'Bringing the "Market Economy Agent" Principle to Full Power' (2012) European Competition Law Review 470, which all welcome the judgment broadly for its apparent focus on substance over form. For a more critical account, see Piernas López, *The Concept of State Aid under EU Law*, at 90-96. Prior to the *EDF* case, the only time

we submit, is revealing as to the essence of the MEOP as an object assessment. As mentioned above, the case concerned the waiving of a tax claim by the French State that was owed by EDF, then a fully State-owned undertaking, in the context of a broader restructuring of its balance sheet and recapitalisation. In the administrative procedure before the Commission, France had claimed that the waiving of the tax claim represented a capital injection and was therefore a commercial investment rather than an aid measure, but this was dismissed by the Commission, essentially on the basis of the form of the measure. According to the Commission, the MEOP could be applied only in the context of the pursuit of an economic activity and not in the context of the exercise of regulatory powers, here the French State's prerogatives as a tax authority. France's role as a State wielding public power could not be combined with its role as a shareholder, and therefore the waiving of the tax claim represented State aid.[537]

On appeal, the General Court held that the specific form of the measure was not determinative. The General Court explained that EU State aid law distinguished between two categories of State intervention, those forming part of the exercise of public powers and those of an "economic nature", with the MEOP being applicable only in the case of the latter.[538] To determine what category the measure fell into, according to the General Court, it was, "*important to look not at the form of those measures, but at their nature, their subject-matter and the rules to which they are subject, while taking into account the objective pursued*".[539] In particular, it had to be established whether the measure "*had an economic objective that might also be pursued by a private investor and is thus undertaken by the State in its role as an economic operator in the same way as a private operator, or whether, on the other hand, it is justified by the pursuit of a public interest objective and must be regarded*

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the EU Courts had considered explicitly the applicability of the MEOP was in Case T-196/04 *Ryanair v Commission* EU:T:2008:585. Foreshadowing the approach ultimately taken in the *EDF* Court of Justice judgment, the General Court underlined the importance of distinguishing between situations where the State undertook "economic activities" to which the MEOP would apply and the exercise of public authority functions, drawing on the definition of "undertaking" under general EU competition law to make this assessment (see paragraphs 84-94). This was also the same approach that had been proposed by Advocate General Léger in his second opinion in Case C-280/00 *Altmark*, at footnote 29.

537 Commission Decision of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries, recitals 95-97.

538 Case T-156/04 *EDF v Commission*, paragraphs 223-225.

539 *Ibid*., paragraph 229.

as action taken by the State in the exercise of its authority as a State".[540] Considering this assessment, and placing significant emphasis on the broader objective of the State measure in restructuring EDF's balance sheet and increasing its level of capital,[541] the General Court concluded that the Commission could not have excluded the applicability of the MEOP and consequently it annulled the decision.

On further appeal to the Court of Justice, Advocate General Mazák disagreed with the General Court. Recommending that the judgment be overturned, the Advocate General took issue, in particular, with what he considered as "*the paramount importance which the General Court attaches to the objective of the measure*" inconsistently with the "effects-based approach"[542] and the blurring of the distinction between the State's exercise of its public power and its role as an investor, which could lead to tax privileges being granted in an untransparent manner to State-owned undertakings.[543]

The Court of Justice however declined to follow its Advocate General and upheld the judgment of the General Court. The Court of Justice explained that the applicability of the MEOP depended on the capacity in which the Member State was acting, as a shareholder i.e. a private operator, or as a public authority.[544] Where the Member State provided sufficient evidence that it was acting in a private operator capacity, the Commission would then need to undertake a "*global assessment*", taking into account all "*relevant evidence*" including, in particular "*the nature and subject-matter of the measure in question, its context, the objective pursued and the rules to which the measure is subject*" in order to determine whether this was the

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540 *Ibid*., paragraph 233.

541 *Ibid*., paragraphs 243-247 and 259.

542 Opinion of Advocate General Mazák in Case C-124/10 P *Commission v EDF* EU:C:2011:676, paragraphs 55-56. While our views in relation to the limited only scope of the "effects-based approach" in relation to the role of objectives are expressed at the end of Chapter 2, Cyndecka defends the *EDF* judgments' admission of the objective as not contradicting the "effects-based approach" on the basis that the judgments only concern the *applicability* of the MEOP as opposed to its *application* (Cyndecka, *The Market Economy Investor Test in EU State Aid Law*, at 107). The significance of this distinction is not entirely clear however – if the applicability of the MEOP is materially impacted by the objective pursued, it is difficult to see how it could be maintained that the concept of State aid is not concerned with objectives.

543 *Ibid*., paragraphs 91-95. For similar criticism, see Piernas López, *The Concept of State Aid under EU Law*, at 94.

544 Case C-124/10 P *Commission v EDF*, paragraph 81.

case.[545] The General Court was therefore correct to hold that the objective pursued by the French State could be taken into account, in the context of the requisite global assessment, for the purposes of determining whether the State had acted in its capacity as a private operator and therefore whether the MEOP would be applicable.[546]

As for the significance of the fiscal means employed by the State, the Court of Justice agreed with the General Court that this could not be determinative. Notably, the Court justified this position on the basis of reasoning that appears to draw on the notion of fair micro-economic competition as between undertakings, which forms part of the equality of opportunity principle that we argue lies at the heart of the notion of State aid. The Court explained that: "*The intention underlying Article [107(1) TFEU] and the private investor test is thus to prevent the recipient public undertaking from being placed, by means of State resources, in a more favourable position than that of its competitors*" and that, "*the financial situation of the recipient public undertaking depends not on the means used to place it at an advantage, however that may have been effected, but on the amount that the undertaking ultimately received*."[547]

Ultimately, the EU Courts' approach in the *EDF* case strongly echoed the thrust of the opinions of Advocate General Lenz in the *Meura* and *Boch* cases, based on the importance of identifying the capacity in which the State may be acting and therefore the nature or object of the measure as potentially commercially or economically rational conduct. The *EDF* judgments further confirmed, in line with the opinions of Advocate General Lenz, the significance of the objective pursued as part of this determination.[548]

The applicability test as conceived by the EU Courts in *EDF* is therefore essentially, we submit, a "first-order assessment" of the possible object of the measure in borderline cases i.e. cases in which there is cause to consider from the outset that

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545 *Ibid*., paragraph 86.
546 *Ibid*., paragraph 87.
547 *Ibid*., paragraphs 90-91.
548 See also in this regard Piernas López, *The Concept of State Aid under EU Law*, at 91-92 and Cyndecka, *The Market Economy Investor Test in EU State Aid Law*, at 94 and 129 et seq., which make a similar link, with the latter going so far as to refer to an "*objective-based approach to the applicability of the MEOP*".

the State is not acting in the capacity of a private market operator,[549] and it follows that the specific objective pursued by the measure is an important part of this assessment. What is important to emphasise however, is that the EU Courts in *EDF* did not require the Commission simply to accept the Member State's claimed objective, i.e. that is was acting in an economic capacity. Rather, they required that the Commission tests this claimed objective and the actual nature or object of the measure, by then actually applying the MEOP. The same principle is ultimately true of any typical MEOP assessment where the MEOP is applied simply because the measure takes the form of an economic transaction. What is being tested, is effectively the State's implicit claimed objective that it is undertaking a commercially or economically rational operation.[550] In this sense, and like the derogation framework, the MEOP can be conceived of as a type of "consistency assessment", which tests whether the object of the measure is consistent with the State's claimed objectives, asking whether the measure is, in reality, a commercially or economically rational transaction as it is presented to be?

The question as to the applicability of the MEOP has since featured notably in three further cases, the *ING*, *Frucona* and *Areoporti di Sardegna* cases, which also provide additional insight into the nature of the MEOP as this kind of object assessment.

The *ING* case[551] concerned one of the major bank bailouts which occurred at the onset of the 2008 financial crisis, the recapitalisation of ING by the Netherlands State

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549 See in this regard the opinion of Advocate General Wahl in Case C-300/16 P *Commission v Frucona Košice*, paragraph 87, in which he explains that the applicability test can only be meaningful in cases "*where the nature of the Member State's action gives rise to doubt*", such as in the *EDF* case.

550 In this regard, see also Khan and Borchardt, 'The Private Market Investor Principle: Reality Check or Distorting Mirror', at 110, who argue that, "*If a measure does not constitute 'aid' because it satisfies the market investor test, the underlying aim of the State in seeking to make a return on its investment ceases to be of any relevance, since this is subsumed within the objective standard of the market investor test*."

551 Case T-29/10 *Netherlands and ING Groep v Commission* EU:T:2012:98 before the General Court and Case C-224/12 P *Commission v Netherlands and ING Groep* EU:C:2014:213 before the Court of Justice. For commentary, see G Marco Galletti, 'A further step towards a "proceduralisation" of the market economy investor test: Annotation on the judgment of the Court of Justice (Grand Chamber) of April 3, 2014 in European Commission v Netherlands (C-224/12 P)' (2014) European Competition Law Review 509; and A Sanchez Graells, 'CJEU further pushes for a universal application of the 'market economy private investor test' (C-224/12)', entry published on the "How to Crack a Nut" blog, 18 April 2014, which both broadly welcome the judgment as a further application of the Court's approach in the *EDF* case.

in the sum of EUR 10 billion. The recapitalisation had been classified by the Commission as State aid, but approved under Article 107(3)(b) TFEU as compatible aid to remedy a serious disturbance in the economy. Under the original recapitalisation terms, the Netherlands subscribed to a EUR 10 billion issue of securities in ING, which ING could choose to redeem at EUR 15, representing a 50 per cent. premium over the issue price, within three years or, thereafter, to convert them into ordinary shares. Several months after the recapitalisation, the Netherlands proposed amending the early redemption terms to allow ING to redeem up to half of the securities at their issue price, plus interest on an annual coupon and a premium if ING's shares traded above EUR 10. In other words, the change to the redemption terms effectively lowered the early redemption premium that would be faced by ING, but made it more likely that ING would opt for redemption to the benefit of the Netherlands State if its shares were trading at significantly less than EUR 15, which they were at that current time.

In assessing this new measure, the Commission had simply considered that the amended repayment terms constituted additional State aid in favour of ING (albeit, again compatible State aid) seeing that they would result in a lower early redemption payment being faced by ING and therefore a further advantage.[552] The Commission had declined to apply the MEOP pursuant to the so-called "pollution principle" that it had adopted in relation to State measures during the financial crisis. According to this principle, once an undertaking had already received bailout State aid, any further State intervention in relation to that undertaking could not be assessed under the MEOP but would be classified as aid essentially on the basis that no private operator could have found itself in the same position having granted the bailout aid.[553]

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552 Commission Decision of 18 November 2009 on State aid C 10/09 (ex N 138/09) implemented by the Netherlands for ING's Illiquid Assets Back Facility and Restructuring Plan, OJ L 274/39 19.10.2010, recital 98.

553 Before the Court of Justice, the Commission argued that, "*it is appropriate to apply the private investor test to the behaviour of public authorities only where they are in a position comparable to that in which private operators may find themselves. In this case, a private investor could never find itself in a situation in which it had provided State aid to ING*" – see Case C-224/12 P *Commission v Netherlands and ING Groep*, at paragraph 27. Arguably, this kind of "pollution principle" was already inconsistent with the established case-law, under which different measures of State intervention could in principle be assessed as separate measures depending on the specific circumstances – see in particular, Case T-11/95 *BP Chemicals v Commission* EU:T:1998:199, covered in section IV:c below. Consideration of this line of case-law was also absent in the ultimate judgments of the General Court and the Court of Justice – for critique of the judgments on this basis, see M Cyndecka, 'Once an Aid Recipient,

The EU Courts however disagreed, with the Court of Justice referring back to the applicability test as formulated in the *EDF* case and explaining that "*the applicability of the private investor test to a public intervention depends, not on the way in which the advantage was conferred, but on the classification of the intervention as a decision adopted by a shareholder of the undertaking in question.*"[554] In this regard, the Court of Justice noted that any holder of securities, in whatever amount and of whatever nature, may wish or agree to renegotiate the conditions of their redemption and therefore it was meaningful to compare the behaviour of the State with that of a hypothetical private investor in a comparable position.[555]

The application of the MEOP therefore could not be compromised just because the measure at issue was an amendment to the redemption terms for a capital injection that was itself State aid. What was decisive in the context of that comparison was "*whether the amendment to the repayment terms of the capital injection has satisfied an economic rationality test, so that a private investor might also be in a position to accept such an amendment, in particular by increasing the prospects of obtaining the repayment of that injection.*"[556]

The Court of Justice therefore again, as in the *EDF* case, formulated the MEOP as being concerned with the capacity in which the State is acting, as a private operator or public authority and therefore the possible nature or object of the measure. Revealingly, it also explicitly expressed the test as assessing the "economic rationality" of the measure[557] and therefore ultimately from the perspective of the

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Always an Aid Recipient? The Post-Crisis State Interventions in the Banking Sector and Beyond' (2018) European State Aid Law Quarterly 192.

554 Case C-224/12 P *Commission v Netherlands and ING Groep*, paragraphs 30-31.

555 Advocate General Sharpston further explained in her opinion in the case that there was obviously no meaningful comparison between the State's behaviour and that of a private investor insofar as the original capital injection itself was concerned because, "*In 'saving' a systemic national bank in the context of the serious financial crisis which broke in 2008, the Netherlands State was acting entirely in its capacity as supreme public authority concerned with the stability of the national economy as a whole. That is simply not a capacity in which any private investor would or could act […] However, by its initial grant, the State became a holder of securities to be redeemed on specified terms. A private investor could also be in such a position*." See the opinion of Advocate General Sharpston in Case C-224/12 P *Commission v Netherlands and ING Groep* EU:C:2013:870, paragraphs 37 and 41.

556 Case C-224/12 P *Commission v Netherlands and ING Groep*, paragraphs 35-36.

557 Which was also the case in the General Court judgment Case T-29/10 *Netherlands and ING Groep v Commission*, at paragraphs 97-99. Prior to the *ING* judgments, the EU Courts had only once referred to the MEOP explicitly in terms of "economic rationality" in Case C-482/99 *France v Commission (Stardust Marine)*, at paragraph 71. References are now more commonplace however – see e.g. Case T-305/13 *SACE and*

State in light of its own position, and consequently as being concerned with the measure's object as opposed to its actual or potential competitive effects as such.

Moving finally to the *Frucona* case[558] and the *Areoporti di Sardegna* cases,[559] while the objective pursued by the State was accorded a significant role in the framework for assessing the applicability of the MEOP laid down in the *EDF* judgments, these cases demonstrate the limitations of objectives and reinforce our conception of the MEOP as being concerned with the measure's object or nature.

Beginning with *Frucona*, this case, which concerned the partial write-off by the Slovak State of a tax debt, raised the peculiar scenario where the Member State itself had not sought to invoke the MEOP in justifying the measure. During the Commission's investigation, the State had conceded that the measure may be State aid, explaining that the question of State aid compliance had simply not been considered at the time of the operation, and requesting that the measure should be considered as compatible rescue aid under Article 107(3)(c) TFEU.[560] Instead it was the beneficiary that had raised the MEOP.[561]

While the Commission had in fact gone on to examine compliance with the MEOP, taking into account the evidence submitted by the beneficiary and concluding ultimately that it was not satisfied, the applicability of the MEOP altogether in these circumstances became an important point of principle in the appeals before the EU Courts. In particular, before the Court of Justice, the Commission argued that the MEOP "*aims to reveal the 'subjective state of mind' of the Member State granting the alleged aid*" and therefore, the expressed view of the Member State that it was not applicable should be the end of the matter, meaning that it cannot be invoked separately by the beneficiary.[562] The Court of Justice however disagreed, explaining that, "*the starting point for determining whether the private operator test is to be*

Sace BT v Commission EU:T:2015:435, paragraph 93 et seq.; and Case T-186/13 *Netherlands and Others v Commission* EU:T:2015:447, paragraph 126 et seq.

558 Case T-103/14 *Frucona Košice v Commission* before the General Court and Case C-300/16 P *Commission v Frucona Košice* before the Court of Justice.

559 Case T-607/17 *Volotea v Commission* and Case T-8/18 *easyJet v Commission* before the General Court and Joined Cases C-331/20 P and C-343/20 P *Volotea and easyJet v Commission* EU:C:2022:886.

560 See Commission Decision of 16 October 2013 on State aid No SA.18211 (C 25/2005) (ex NN 21/2005) granted by the Slovak Republic for Frucona Košice a.s., OJ L 176/38 14.6.2014 ("Frucona Decision"), recital 83.

561 *Ibid*. recital 84.

562 See the opinion of Advocate General Wahl in Case C-300/16 P *Commission v Frucona Košice*, paragraph 52 and the Court of Justice judgment, paragraph 11.

applied must be the economic nature of the Member State's action, not how that Member State, subjectively speaking, thought it was acting or which alternative courses of action it considered before adopting the measure in question."[563]

The Court therefore very clearly construes the MEOP in terms of an object assessment which aims at assessing the objective nature of the measure, meaning that subjective claims cannot be determinative. This is ultimately consistent with the framework set out by the Court of Justice in the *EDF* case. While objectives are of significance, they are only one of a number of factors that are to be taken into account in the "global assessment" envisaged in that judgment, and may be trumped by the other factors. In this regard, a parallel may be drawn to the position under EU competition law when it comes to establishing the existence of an abuse of dominance under Article 102 TFEU,[564] where exclusionary intent is not a necessary requirement for the finding of an abuse, but may nonetheless be highly relevant in certain circumstances.[565]

This notwithstanding, the end result in *Frucona* may, at first sight, seem like a curious finding. It is one thing for the Commission to be required to second-guess claims by the Member State to be acting in a commercially or economically rational manner, which is ultimately what we consider that the MEOP assessment boils down to. But it is quite another for the Commission to be required to second-guess what effectively appears to be an "admission of guilt" by the Member State concerned, here that the write-off was intended as rescue aid and therefore ultimately to favour the beneficiary. Ultimately however, the particular circumstances of *Frucona* themselves serve as a good illustration of why subjective claims made by the State authorities, irrespective of the direction in which they point, might be of only limited value, as the precise objective of State action when it is acting in an executive context and through a sub-agency may not always be straight-forward to discern. In the *Frucona* case, the measure in question was undertaken by the relevant local tax authority, which according to the Slovak authorities, simply "*did not take the State aid aspect into account*" and "*did not consider the arrangement as a form of State*

563 Case C-300/16 P *Commission v Frucona Košice,* paragraph 27.

564 Which, like the notion of State aid, has always been expressed as being an "*objective concept*" – see e.g. Case C-85/76 *Hoffmann-La Roche v Commission* EU:C:1979:36, paragraph 91; Case C-62/86 *AKZO v Commission*, paragraph 69; and C-165/19 P *Slovak Telekom v Commission* EU:C:2021:239, paragraph 41.

565 See e.g. Case C-549/10 P *Tomra and Others v Commission*, paragraphs 17-21.

aid",[566] meaning that there was simply no real clarity as to what the relevant tax authority's intention was, only the Slovak State's own *ex post* claims as to how the measure could be treated. In these circumstances, it was perhaps less surprising that the Court of Justice gave these claims only limited credence.

An over-reliance on objectives was similarly a key issue in the *Areoporti di Sardegna* cases, which as explained in Chapter 2 above,[567] concerned payments made by the region of Sardinia to local airports for the purpose of financing commercial agreements with airlines in order to improve the island's air service and promote it as a touristic destination. Upholding the decision of the Commission finding that these payments constituted State aid to the airlines, the General Court had considered the MEOP to be inapplicable, including on account of the very clear public policy objectives underlying the measures. This was criticised by the Court of Justice, explaining that, "*[t]he pursuit of public policy objectives is in fact inherent in most of the State measures that may be classified as 'State aid' and examined to that end, in the light of that principle [the MEOP]. The consequence of applying that principle, however, is that those measures must be examined while leaving aside such objectives and the benefits linked to the State's situation as a public authority which the implementation of those objectives is liable to generate.*"[568]

As the Court of Justice recognised, given their very constitution, the actions of public authorities will tend inevitably to be linked to public policy objectives, even where they take the form of transactions that are in line with market benchmarks. The procurement of goods and services, which was ultimately what was at issue in the case, is a prime example, as public authorities generally procure goods and services for use in activities fulfilling their public authority functions, and not with a view of re-selling or using as inputs for other goods / services that are to be sold for a profit. But it is established principle that the procurement of goods and services does not give rise to a selective advantage and State aid if the prices and terms conform to the market and the general rule is that a selective advantage can normally be ruled

566 Frucona Decision, recital 58.
567 Chapter 2, section VI:a.
568 Joined Cases C-331/20 P and C-343/20 P *Volotea and easyJet v Commission*, paragraph 120.

out where goods and services are procured by the State using a competitive tender in line with the public procurement rules.[569]

The mere existence of public policy objectives therefore cannot in itself disqualify the applicability of the MEOP. Rather, the objectives pursued need to be considered in the broader context of the measure in question to assess whether they are such that they may taint the measure, i.e. do they shape the measure in a way that may be inconsistent with the principle of equality of opportunity. In the case of the procurement of goods and services, the fact that those goods and services are to be used in activities that fulfil public policy functions as opposed to purely commercial needs, does not mean that they are not being procured in an economically rational manner, and therefore in accordance with the principle of equality of opportunity.

The position in these judgments finds an echo in the earlier judgment of the Court of Justice in *Belgium v Commission (Gasunie)*,[570] which concerned litigation over the offering by the Netherlands State-owned Gasunie of a preferential gas tariff to certain users, namely Dutch nitrate fertiliser producers. The Commission had concluded that there was no State aid as the offering of the preferential tariff was justified on commercial grounds by reference to Gasunie's interest in withstanding competition from imports. Among Belgium's grounds of challenge was the argument that this notwithstanding, the preferential tariff should still be considered as State aid on the basis that it was also motivated by the political objective of supporting Dutch producers, i.e. it was a political decision, even if it was perhaps also in Gasunie's commercial interests.

This argument was rejected by the Court of Justice on the basis that, "*Where a practice is objectively justified on commercial grounds, the fact that it also furthers a political aim does not mean to say that it constitutes State aid*."[571] In other words, evidence in relation to objectives cannot itself be determinative, as the balance of the assessment may indicate that the object of the measure corresponds to economically rational conduct that is consistent with the principle of equality of opportunity.

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569 Commission Notice on the notion of State aid, paragraph 89, referring *inter alia*, to Case C-214/12 P *Land Burgenland and Others v Commission*, paragraphs 92-95.

570 Case C-56/93 *Belgium v Commission* EU:C:1996:64.

571 *Ibid*., paragraph 79.

IV. The application of the MEOP

As explained in section II above, the guiding principle underlying the practical application of the MEOP is essentially that the conduct of the State in undertaking the transaction at issue must be compared with that of a private market operator in similar circumstances. This is inevitably a fact-specific assessment which, depending on the complexity of the transaction at issue, may be the subject of significant economic analysis[572] involving a variety of technical tools.[573]

In this section we do not seek to address the application of the MEOP and this kind of complex analysis in individual cases, but instead, focus on the relevant factors and issues which feature recurrently in these cases and which provide important insight into the MEOP assessment: (a) the relevant characteristics of the private operator with which the conduct of the State is to be compared; (b) the point in time with reference to which the assessment is to be made; and (c) the relevant background and contextual factors to be taken into account as part of the assessment.

a. Relevant characteristics of the comparator private operator

As explained in section II above, already in the *Meura* and *Boch* cases in which the Court of Justice applied the MEOP explicitly for the first time, the Court confirmed that the specific position of the State as the existing owner of the beneficiary had to be taken into account in the assessment. The MEOP is now commonly formulated

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572 Indeed, the MEOP is one aspect of the definition of State aid where even advocates of the "internal market approach" acknowledge the accretion of greater economic analysis – see Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy', at 44 and Buendia-Sierra and Smulders, The Limited Role of the "Refined Economic Approach" in Achieving the Objectives of State Aid Control', at 13.

573 By way of a recent example of relatively complex economic analysis, see Commission Decision (EU) 2017/2112 of 6 March 2017 on the measure/aid scheme/State aid SA.38454 — 2015/C (ex 2015/N) which Hungary is planning to implement for supporting the development of two new nuclear reactors at Paks II nuclear power station, OJ L 317/45 1.12.2017, in which the Commission assessed the compatibility under the MEOP of a capital injection by the Hungarian State to finance the construction of the Paks II nuclear power station. The Commission's assessment involved calculating the expected IRR of the Paks II project based, *inter alia,* on forecasts of prices for the power to be produced and load factor and comparing this against a computed market-based benchmark WACC for a project with a similar risk profile, using two methodologies – a "bottom-up approach" that built up the WACC by estimating all its components and a benchmarking analysis that drew upon reference projects that could be comparable to the Paks II project (see recitals 197-262).

as having to be applied with reference to a comparable private operator "*in a situation as close as possible to that of the State*".[574]

The incorporation of the specific characteristics of the State actor into the MEOP assessment, we would argue, is a reflection of the nature of the assessment in seeking to ascertain whether, from the State's perspective, the object of the measure is to create inequality of opportunity in favour of the counterparty undertaking, or whether it represents commercially or economically justified conduct. This can only be determined by taking into account all the relevant attributes of the State actor that could affect its appreciation of the transaction. As explained above, taking into account these relevant attributes itself flows from the principle of equality of opportunity and the related criterion of fairness which requires that the interests of the State when directly participating in the competitive process itself are also taken into account. However, and as also noted above, not all of these attributes are admitted, and the distinctions drawn by the EU Courts in this regard provide further illumination in relation to the meaning of the MEOP.

In terms of those characteristics which are routinely admitted, in particular, and in line with the *Meura* and *Boch* cases, the fact of State ownership of the beneficiary in question, has featured repeatedly as a relevant consideration. In the landmark *Lanerossi* and *Alfa Romeo* cases,[575] which concerned capital injections by Italian public companies into their subsidiaries, the Court of Justice held that the private operator with which the State must be compared need not simply be an ordinary private investor, but can be that of a "*private holding company or a private group of undertakings pursuing a structural policy*".[576] In those circumstances, and building upon its findings in the *Meura* and *Boch* cases, the Court of Justice accepted that such a comparator parent company, may not only "*reasonably subscribe the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganization*" but may also, "*for a limited period, bear the losses of one of its subsidiaries in order to enable the latter to close down its operations under the best possible conditions. Such decisions may be motivated not solely by the likelihood*

574 See the references at note 486 above.

575 Case C-303/88 *Italy v Commission (Lanerossi)* and Case C-305/89 *Italy v Commission (Alfa Romeo)*.

576 See Case C-305/89 *Italy v Commission (Alfa Romeo)*, at paragraph 20 and Case C-303/88 *Italy v Commission (Lanerossi)*, at paragraph 20 for a similar formulation.

of an indirect material profit but also by other considerations, such as a desire to protect the group's image or to redirect its activities."[577]

While these cases show that the pre-existing relationship between the State and the beneficiary is to be taken into account insofar as it may be relevant to the transaction at issue, the case-law also demonstrates that requirement of comparability goes further still to incorporate any key attributes applying to the State actor itself to the extent that they are relevant to the economic rationality of the transaction.

Therefore, in the *Linde* case,[578] the General Court held that in the circumstances, a direct grant made by a State-owned company to Linde for the construction of a production facility for carbon monoxide, which was essentially a subsidy, would nevertheless not constitute State aid, in light of the State-owned entity's specific situation. The Commission had argued that the concept of State aid had to be applied with a view to the effects on the beneficiary and its competitors, and here, Linde had been advantaged by having a new production facility without bearing the full costs of that facility.[579] But the General Court held that the subsidy was commercially justified in light of the State-owned company's existing contractual obligations arising during the context of a related privatisation, pursuant to which it was required to supply carbon monoxide for a period of ten years at the market price to UCB, the firm which had taken over the privatised assets. Because the carbon monoxide facility operated by the State-owned company for that purpose was obsolete, it had made considerable losses on the supply contract. The subsidy was granted to Linde in return for the supply by it of carbon monoxide to UCB on terms no less favourable in accordance with the State-owned company's obligations and was therefore economically justified from the State-owned company's perspective on the basis that it would ultimately save it money.[580]

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577 Case C-303/88 *Italy v Commission (Lanerossi),* paragraph 21. The EU Courts will however subject such arguments to detailed scrutiny as demonstrated by the detailed examination and ultimate rejection of broader group / brand image arguments in Case T-565/08 *Corsica Ferries France v Commission* EU:T:2012:415 and Joined Cases C-533/12 and C-556/12 P *SNCM and France v Corsica Ferries France*.

578 Case T-98/00 *Linde v Commission* EU:T:2002:248.

579 *Ibid*., paragraphs 33-34.

580 *Ibid*., paragraphs 41-46. The General Court further emphasised that the choice of Linde as the beneficiary was economically rational as it already had a hydrogen production plant in the same town into which a carbon monoxide production facility could be incorporated, thereby enabling a significant reduction in investment costs (see paragraph 45).

The *Linde* case demonstrates that the imperative of taking the specific attributes of the State actor into account and therefore the economic rationality of the measure, persists even where the measure would be likely to have a competitive impact by placing the beneficiary at an advantage over its competitors.

This is also what we would submit lies at the heart of the *Chronopost* saga.[581] As mentioned above, the main measure at issue in the *Chronopost* cases, involved the grant by the State-owned La Poste of access to its postal network to its subsidiary operating in the express sector which was open to competition, SFMI Chronopost. In assessing the market level remuneration for these services from a State aid perspective, the Commission applied a methodology focused on cost-coverage, concluding that there was no aid provided the remuneration covered La Poste's total costs in delivering the services plus a mark-up to remunerate equity capital investment.[582]

The General Court, however, initially annulled the decision, on the basis that La Poste's position as the sole undertaking in a reserved sector i.e. the legal monopoly granted to La Poste over the general postal sector in order to enable it to provide a universal service, meant that La Poste may have been able to provide the services at a lower cost than a private undertaking not enjoying the same rights. Instead, according to the General Court, the comparison should have been with what payment would have been required by a *private group of undertakings not operating in a reserved sector* and therefore without the significant advantages that La Poste enjoyed on account of its status,[583] which would have resulted in a higher remuneration.

On appeal to the Court of Justice, SFMI Chronopost argued, *inter alia*, that the General Court had erred in basing its comparison on an undertaking that was structurally different from La Poste instead of comparing it with an undertaking in the

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581 Referred to as thus given the length of the litigation proceedings, which involved five judgments of the EU Courts, spanning over 13 years. The main judgments addressed in this section are Case T-613/97 *Ufex and Others v Commission* EU:T:2000:304 before the General Court and Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost v Ufex and Others* before the Court of Justice.

582 Commission Decision 98/365/EC of 1 October 1997 concerning alleged State aid granted by France to SFMI-Chronopost, OJ L 164/37 9.6.98 ("Chronopost Decision"), at 45.

583 Case T-613/97 *Ufex and Others v Commission*, paragraphs 74-75.

same situation,[584] and the Court of Justice ultimately reversed the judgment of the General Court on this basis. The Court of Justice explained that the ruling of the General Court failed to take into account the fact that La Poste was in a situation which was very different to that of a private undertaking acting under normal market conditions owing to its public service mission, on which basis it had been afforded its national postal network that the specific services in question were based on. This postal network would never have been constructed by a private undertaking not operating in a reserved sector.[585] The Court of Justice concluded that as the situation of La Poste could not be compared with any private undertakings not operating in a reserved sector, normal market conditions, which here, were "*necessarily hypothetical*", would need to be assessed "*by reference to the objective and verifiable elements which are available*" and which could be based on La Poste's own costs.[586]

As suggested in some of the commentary,[587] the dispute between the two EU Courts can be seen as being about the function of the MEOP, with the General Court advocating that the MEOP should be interpreted in a manner that more fully redressed the possible advantage ultimately for SFMI Chronopost deriving from the lower costs enjoyed by its parent La Poste as a result of its legal monopoly over the general postal sector, and therefore the effects of the intervention on competition. Ultimately however, we would argue that the solution favoured by the Court of Justice reflected the imperative of taking the position of the State entity as it was, including the possible cost advantages that it may have enjoyed from its legal monopoly. This is in line with our conception of the MEOP as an object assessment of economic rationality from the perspective of the State entity, as opposed to the actual or potential competitive effects of the measure as such.

The above cases demonstrate that the requirement to take into account the specific attributes of the State that may have a bearing on the transaction and therefore the assessment of its commercial or economic rationality is wide-ranging. What is of note however, is that the acceptance of the State's specific situation and translating

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584 Joined cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost v Ufex and Others*, paragraph 19.

585 *Ibid*., paragraphs 34-37.

586 *Ibid*., paragraphs 38-40.

587 See in particular, De Cecco, *State aid and the European Economic Constitution*, at 84 and Piernas López, *The Concept of State Aid under EU Law*, at 82.

across its characteristics and obligations is not absolute, as the case-law has insisted that *public sector obligations and interests* (as opposed to private sector obligations and interests) must be excluded when applying the MEOP.

Already in the inaugural *Meura* and *Boch* cases, the Court of Justice had emphasised that the comparator private operator had to be drawn "*leaving aside all social, regional-policy and sector considerations*".[588] This more restrictive conception of the comparator private investor was initially met with some resistance. In particular, in the subsequent *Lanerossi* and *Alfa Romeo* cases, Advocate General Van Gerven argued that this part of the formulation should not be taken literally as even a private holding company would need to take into account employment and economic development in the area in which it operates.[589] The Advocate General instead proposed taking into account a "prudent",[590] "stable" or "reasonable" private investor.[591]

This appeared to have a certain amount of impact with the Court of Justice, which seemed to expand the bar somewhat in these cases, but ultimately kept the assessment hinged to the requirement of ensuring profitability in the long-term, explaining that, "*although the conduct of a private investor with which the intervention of the public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realizing a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy - whether general or sectorial – and guided by prospects of profitability in the longer term*."[592]

The ultimate focus on profitability and therefore economic benefit to the State shareholder to the exclusion of public sector interests in the *Lanerossi* and *Alfa Romeo* cases, follows, it is submitted, from the nature of the MEOP as seeking to determine whether the State's action has a commercial or economic object as opposed to upsetting equality of opportunity. Public sector concerns cannot be

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588 Case C-234/84 *Belgium v Commission (Meura)*, paragraph 14 and Case C-40/85 *Belgium v Commission (Boch)*, paragraph 13.

589 Opinion of Advocate General Van Gerven in Case C-303/88 *Italy v Commission (Lanerossi)* EU:C:1990:352, point 14.

590 *Ibid*.

591 Opinion of Advocate General Van Gerven in Case C-305/89 *Italy v Commission (Alfa Romeo)*, points 11-12.

592 Case C-305/89 *Italy v Commission (Alfa Romeo),* paragraph 20.

admitted as such interests constitute the motivations for the State in granting State aid (and therefore in deviating from equality of opportunity) in the first place.

This distinction further explains the exclusion of the costs of public sector obligations from the MEOP calculus, such as the redundancy costs and unemployment benefit payments arising in the *Hytasa* case[593] mentioned above, even if measures taken to avoid or reduce these costs would be economically rational from the perspective of the State. As explained by Advocate General Kokott writing in the later *Lenzing* case,[594] such costs are ultimately bound up with those public sector interests that constitute the motivation for granting State aid, meaning that if they were to be taken into account that would effectively enable the State to grant State aid on the basis of those interests. To take a blunt example drawn upon by the Advocate General, if the State burden of redundancy costs and unemployment benefit payments could be taken into account, public authorities would be able to justify a capital injection on the ground that it secures jobs, which is typically the reason why Governments bail-out struggling companies. The same consideration also applies in relation to the State's interest in receiving increased taxation which was rejected in the *WestLB* case[595] referred to above, as boosting taxation is of course part and parcel of any State intervention to promote domestic industry.

What appears more difficult at first sight to justify however, is the application of the private sector vs public sector distinction to exclude from the MEOP assessment financial exposures for the State resulting from the past grant of State aid, which the EU Courts have confirmed on a number of occasions, cannot be taken into account. Thus in the *Gröditzer* case,[596] which concerned the application of the MEOP to a State privatisation at a negative sale price, in considering whether it would have been more costly to the German State simply to wind up the company, the Court of Justice ruled that the State's exposures resulting from previous State aid granted to the publicly-owned company in the form of State guarantees and loans could not be taken into account.[597] Similarly in the *Land Burgenland* case,[598] which also

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593 Joined Cases C-278/92 to C-280/92 *Spain v Commission (Hytasa)*.

594 Opinion of Advocate General Kokott in Case C-525/04 P *Spain v Lenzing* EU:C:2007:73, at paragraphs 88-89.

595 Joined Cases T-228/99 and T-233/99 *WestLB*.

596 Case C-334/99 *Germany v Commission (Gröditzer)*.

597 *Ibid*., paragraphs 133-141.

598 Case T-268/08 *Land Burgenland and Austria v Commission* EU:T:2012:90 before the General Court and Case C-214/12 P *Land Burgenland and Others v Commission* before the Court of Justice.

concerned the application of the MEOP to a State privatisation, that of an Austrian State-owned bank by way of a competitive tender process, the EU Courts ruled that in assessing the competing tenders, the State could not take into account their respective creditworthiness and consequent likelihood of having to draw on the "Ausfallhaftung", an existing State aid guarantee system for all public credit institutions from which the bank benefitted, and therefore the resulting risk of exposure to the State.[599]

The negation of such exposures resulting from prior State aid cannot be justified on the basis of the reasoning above, including that put forward by Advocate General Kokott. Measures which take into account these exposures are not necessarily motivated by the same interests which motivated the grant of State aid in the first place, as demonstrated by the circumstances of the *Gröditzer* and *Land Burgenland* cases themselves.

In addition, it was not entirely clear how this approach could be reconciled with the judgments of the EU Courts in the *ING* case. As explained in section III above, in the *ING* case, the EU Courts specifically required the Commission to apply the MEOP to the amendment of the repayment terms of a State recapitalisation which constituted State aid, which appeared to demonstrate that previous State aid measures ought to be taken into account when assessing the economic rationality of further measures. While this potential inconsistency was raised before the Court of Justice in the *Land Burgenland* case itself, in which judgment was handed down after the *ING* General Court judgment, the response of the Court was merely to state that "*the factual and legal circumstances*" of that case were "*substantially different*", without offering any further explanation.[600]

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599 Case T-268/08 *Land Burgenland and Austria v Commission*, paragraphs 149-159; and Case C-214/12 P *Land Burgenland and Others v Commission*, paragraphs 46-64.

600 Case C-214/12 P *Land Burgenland and Others v Commission*, paragraph 62. For attempts to reconcile the judgments, see Cyndecka, *The Market Economy Investor Test in EU State Aid Law*, at 80-81 (the *ING* case concerned the *applicability* of the MEOP whereas the *Land Burgenland* case concerned the *application* of the MEOP and the economic rationality calculation would have been impossible in the case of the "Ausfallhaftung"); and B Haslinger, 'Tender Procedures in State Aid Law: The Bank Burgenland Case Before the General Court – Annotation on the Judgment of the General (Sixth Chamber) of the 28 February 2012 in Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria v European Commission*' (2013) European State Aid Law Quarterly 589, at 596 (that the *ING* case concerned a modification to one and the same measure, while the *Land Burgenland* case concerned the question of whether one can take into account a different State aid measure in the assessment of a new measure).

The matter came to a head in the *FIH* case,[601] in which the General Court and the Court of Justice took diametrically opposed positions. The *FIH* case concerned two packages of measures taken by the Danish State in relation to the Danish bank FIH in the context of the financial crisis. First, a capital injection and State guarantee granted in 2009 under State aid schemes approved by the Commission and second, in 2012, essentially a transfer of FIH's "toxic assets" to a newly-created bad bank owned and provided with funding by the State. In its assessment of the second package of measures, the Commission considered them under the MEOP without reference to the first package, and consequently found that they were State aid as they would likely result in a loss for the State meaning that a private investor would not have committed the funds.

On appeal, the General Court held that the Commission had erred in its application of the MEOP, as properly taking into account the State's existing exposure to FIH in the form of the first package of measures, the State's position was akin to a *private creditor* seeking to minimise its losses, rather than a *private investor* seeking to maximise the profitability of the funds that it might invest where it so wishes. It could conceivably have been economically rational for the Danish State to have adopted the second package of measures at a loss where they could substantially reduce the risk of losing their existing capital and the enforcement of the guarantee, which would have resulted in greater losses. The Commission therefore should have applied the "private creditor principle" instead of the "private investor principle".[602]

According to the General Court, this result moreover followed from the *ING* judgment of the Court of Justice, which showed that the effect of a previous measure, even though it was State aid, had to be taken into account in assessing a subsequent measure, and emphasised that what was decisive was simply whether the conduct of the State satisfied an economic rationality test. The Commission, however, had failed to apply an appropriate economic rationality test to the conduct at hand here.[603]

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601 Case T-386/14 *FIH Holding and FIH Erhversbank v Commission* EU:T:2016:474 before the General Court and Case C-579/16 P *Commission v FIH Holding and FIH Erhversbank* EU:C:2018:159 before the Court of Justice.

602 Case T-386/14 *FIH Holding and FIH Erhversbank v Commission*, paragraphs 64-69.

603 *Ibid*., paragraphs 74-75. The General Court further attempted to reconcile its position with the *Gröditzer* and *Land Burgenland* line of case-law by arguing, essentially that those cases concerned the specific application of what was the correct test and the elements to be taken into account as part of that application – see paragraphs 79-81.

On further appeal, the Court of Justice disagreed and restored the Commission's decision.[604] In a somewhat terse judgment, the Court reasserted the *Gröditzer* and *Land Burgenland* line of case-law and explained that taking into account liabilities arising from previous State aid measures would be liable to prevent subsequent measures being classified as State aid "*even though they do not satisfy market conditions*" and "*would compromise the objective of ensuring undistorted competition*" of Article 107(1) TFEU.[605] Consequently, the General Court erred in requiring the Commission to apply the "private creditor principle" instead of the "private investor principle".

As for the *ING* judgment, the Court explained that this concerned the *applicability* of the MEOP altogether as a matter of principle, rather than its concrete *application* as here. The question in the *ING* case, was whether the amendments to the repayment terms of State aid were themselves economically justified insofar as they might have *improved* upon the original repayment terms when viewed from the State's perspective, and not as in the *FIH* case, where the General Court had advocated taking into account the financial risks of the earlier State aid in order to justify a later intervention. Finally, the Court explained that ING was not in financial difficulties at the time the amendments were contemplated, and those amendments did not involve a further bail-out by means of significant public investment, as in the *FIH* case.[606]

Further elucidation of the judgment of the Court is available in light of the opinion of its Advocate General Szpunar, which the Court referred to and appeared largely to follow. The Advocate General explained that economic rationality arguments based on reducing the risk of losses stemming from previous State aid measures could not be admitted, as to do so would result in the aid beneficiary being treated more favourably than other undertakings which have not received State aid. This would run counter to what the Advocate General considered to be the rationale underlying

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604 For criticism of the Court of Justice's judgment on the basis that it takes a formalistic approach, see J Bonhage, 'Previous State aid and Subsequent Financial Assistance – The FIH Judgment and the Future of the MEOP' (2019) European State Aid Law Quarterly 29.

605 Case C-579/16 P *Commission v FIH Holding and FIH Erhversbank,* paragraphs 55-59. According to the Court of Justice, the economic rationality of the State's desire to protect its economic interests (arising from the grant of past aid) could be taken into account as part of the compatibility assessment by the Commission, but not as part of the definition as State aid under Article 107(1) TFEU – see paragraphs 74-75.

606 *Ibid*., paragraphs 65-70.

Article 107(1) TFEU, "*which is to achieve a level playing field in terms of competition for all undertakings operating in the internal market*".[607]

Reading the judgment of the Court and the opinion of its Advocate General together, it is submitted that the explanation for the position of the EU Courts in relation to the discounting of financial exposures resulting from the past grant of State aid is concerned with the principle of equality of opportunity, which we consider to be encapsulated by the Court's reference to the measure compromising "*the objective of ensuring undistorted competition*" in the *FIH* judgment. The financial risks of previous State aid cannot be used to justify further interventions that would otherwise obviously be considered as selective advantages and therefore State aid, as this would place aid recipients at an advantage to non-aided undertakings, in which similar measures of intervention would remain subject to EU State aid control. This concern did not arise in the *ING* judgment however, as changes to the repayment terms could not in any way be considered as a further bail-out involving significant outlay as in the *FIH* case, but might have themselves presented an improvement over the original terms.

Ultimately, the position of the EU Courts reflects a wariness of Member States acting to continue supporting favoured undertakings, perpetuating the inequality of opportunity that they had created by means of the first measure of intervention and therefore undermining fair micro-economic competition. The approach of the EU Courts in this regard also bears some similarities to the assessment of distortions as part of the compatibility stage, where once it has been established that the measure is State aid as its object is to create inequality of opportunity, the effects of that aid on affected product markets, including input markets and therefore whether direct or not, are assessed more systemically, and remedies may be required in order to limit the competitive impact of the aid. If the financial risks of previous State aid were to be admitted, that would effectively extend the distortions arising from that aid.

b. Point in time for the assessment

The nature of the MEOP as a test of economic rationality from the perspective of the State is further apparent from the EU Courts increasingly seeking to recreate the

[607] Opinion of Advocate General Szpunar in Case C-579/16 P *Commission v FIH Holding and FIH Erhversbank*, paragraphs 53-58.

decision-making undertaken by the State *at the time of actually contemplating entering into the transaction*. Summarising the approach in the *Stardust Marine* case,[608] the Court of Justice explained that, "*it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation*" and that this assessment should be made, "*taking account of the available information and foreseeable developments at the time [the measures] were actually granted*".[609]

This point of time for the assessment has played a determinative role in a number of cases, including the *Stardust Marine* case itself, in which the Court of Justice overturned the decision of the Commission applying the MEOP to the grant of loans and guarantees as the Commission had ultimately based its assessment on the financial situation of the beneficiary *after the transactions had been entered into* as opposed to the beneficiary's position at the point at which those transactions had been entered into.[610]

In terms of the "available information" in which light the assessment must be made, the EU Courts have focused on the specific knowledge that was actually in the hands of the State at the time of the decision to enter into the transaction in question. Therefore in the *Verlipack* case,[611] which concerned loans made by the Walloon Region to support the restructuring of the Verlipack group, while Belgium had argued that the group had favourable prospects following restructuring, the Court of Justice focused heavily on the existence of an internal note that had been produced for the relevant Walloon entity's board of management in the months just prior to the grant of the loans. The internal note contradicted Belgium's position and demonstrated the extent of Verlipack's poor prospects, indicating, *inter alia*, that the grant of the loans "*bore very substantial risks*" and that despite significant investment, the existing owner had not managed to achieve better results "*which would allow for*

608 Case C-482/99 *France v Commission (Stardust Marine)*.
609 *Ibid*., paragraphs 70-71.
610 *Ibid*., paragraphs 76-81. For other examples in which the point in time issue has proven significant, see Case T-16/96 *Cityflyer Express v Commission*, paragraphs 76-80; Case T-301/01 *Alitalia v Commission* EU:T:2008:262, paragraph 146; Case C-486/15 P *Commission v France and Orange* EU:C:2016:912, paragraphs 138-144; and Case C-385/18 *Arriva Italia*, paragraph 72.
611 Case C-457/00 *Belgium v Commission (Verlipack*).

some hope for the future of Verlipack",[612] on which basis that Court concluded that there was State aid.

Tellingly, the Court of Justice has further limited the notion of "constructive knowledge" in making this assessment. Therefore, in the *Larko* case,[613] which concerned guarantees granted by the Greek State, the Court of Justice overturned the General Court's finding that the State essentially should have been aware of the financial difficulties of the beneficiary, which would have militated against the granting of one of the guarantees in question. The General Court had held that a "prudent operator" would have informed itself about the beneficiary's current economic and financial situation before providing the guarantee and therefore that the State may be presumed to have been aware of its difficulties.[614] The Court of Justice however, considered that this amounted to finding the existence of aid on the basis of a negative presumption and thereby failed adequately to consider the actual context in which the measure was adopted.[615]

The effect of the approach in these cases is clearly to recreate so far as possible the actual decision-making process of the State at the time and therefore the object of the measure. This exclusion of constructive knowledge and the focus on the actual knowledge in the hands of the State also flows, we would argue, from the notion of fairness and the requirement to take into account the State's particular situation as part of the assessment of equality of opportunity.[616] The MEOP assessment is therefore an object assessment, but crucially is one that must be undertaken from the perspective of the State in accordance with the requirement of fairness.

This point in time for the assessment has also been extended to the documentary evidence and the analysis that may be put forward to support compliance with the MEOP. In the *EDF* case,[617] which as explained above concerned the *applicability* of the MEOP, the Court of Justice explained that the Member State could not rely on "*economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was*

612 *Ibid*., paragraphs 47-48.
613 Case T-423/14 *Larko v Commission* EU:T:2018:57 before the General Court and Case C-244/18 P *Larko v Commission* EU:C:2020:238 before the Court of Justice.
614 Case T-423/14 *Larko v Commission*, paragraphs 83-90.
615 Case C-244/18 P *Larko v Commission*, paragraphs 53-71.
616 See page 150 above.
617 Case C-124/10 P *Commission v EDF*.

actually profitable, or on subsequent justifications of the course of action actually chosen".[618] A similar principle has been confirmed in relation to the *application* of the MEOP as well, with the Court of Justice explaining in the *Commune di Milano* case[619] that the absence of such adequate contemporaneous documents assessing the economic rationality of a transaction may in certain circumstances, "*constitute an essential factor*" that a private operator would not have entered into the transaction in question.[620]

In taking this line, the case-law has therefore eschewed an *ex post* approach to assessing the existence of selective advantage, which would otherwise be consistent with a more effects-based standard as observed in EU competition law,[621] in favour of an *ex ante* only approach. While this *ex ante* approach was originally established in the context of the MEOP, it has been recently generalised by the EU Courts to apply to the assessment of selective advantage more generally. In particular, in the *Fútbol Club Barcelona* case,[622] which concerned the application of a special tax regime to certain football clubs in Spain, the Court of Justice held that the existence of a selective advantage had to be assessed with reference to the nominally preferential tax rate under that regime, without taking into account the potential tax deductions under the generally applicable regime, which could not be calculated *ex ante*. In our assessment, the broad application of an *ex ante* approach to assessing selective advantage based on the actual information available to the State at the time of the measure is a reflection of the essence of the assessment as an object-based assessment which seeks to determine objectively, the nature of the State intervention.[623]

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618 *Ibid*. paragraph 85.

619 Case C-160/19 P *Commune di Milano v Commission*.

620 *Ibid*., paragraph 117. The EU Courts have held in a number of cases, that the absence of such contemporaneous documentation called into question compliance with the MEOP – see e.g. Case T-100/17 *BTB Holding Investments and Duferco Participations Holding v Commission* EU:T:2018:900, paragraphs 96-107; upheld by the Court of Justice in Case C-148/19 P *BTB Holding Investments and Duferco Participations Holding v Commission* EU:C:2020:354; and Case T-121/15 *Fortischem v Commission* EU:T:2019:684, paragraph 91.

621 Which considers, as part of the assessment of a practice that has been implemented, whether the practice has had anti-competitive effects – see for instance, Case C-209/10 *Post Danmark I* EU:C:2012:172, paragraphs 39 and 44; and the judgment of the English High Court in *Streetmap.Eu Ltd v Google Inc.* [2016] EWHC 253, paragraph 90.

622 Case C-363/19 P *Commission v Fútbol Club Barcelona* EU:C:2021:169.

623 The point is also made that the application of an *ex ante* approach is justified by the system of *ex ante* EU State aid enforcement to avoid potentially favouring Member States that do not notify – see in this regard, the opinion of Advocate General Van

While this *ex ante* approach is well-established in State aid definition practice, the discussion cannot be complete without addressing the line of case-law in which this principle was challenged, the Hungarian power purchasing agreement ("PPA") cases.[624] These cases concerned PPAs between the State power company responsible for supplying Hungary's electricity and generators that were signed during 1995-1996 before Hungary's accession to the EU, as part of Hungary's privatisation of its power plants. The application of the EU State aid rules to pre-accession State measures was governed by Hungary's EU accession treaty, from which it appeared clear that essentially, any still-applicable measures that could not be considered as "existing aid" under the specific terms of the accession treaty, would need to be considered as "new aid" and assessed as such specifically *as at the time of accession* as it was only then that the EU State aid acquis became effective. On this basis, and notwithstanding the generators' arguments that the terms of the PPAs were commercially justified as at 1995-1996 in light of the State power company's objective to ensure adequate private investment in its power sector and therefore ultimately security of its supply, the Commission took the point of Hungary's EU accession as the relevant time of assessment, and classified them as State aid as they did not reflect market terms judged as at that time period.[625]

On appeal before the General Court,[626] notwithstanding arguments from the generators that this mode of analysis conflicted with the general approach under the

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Gerven in Case C-261/89 *Italy v Commission*, point 9. The argument seems to be essentially that the exclusion of *ex post* information is required in order to remove possible incentives for Member States to refrain from notifying. However, while this position evidently carries some weight (and it was invoked in Case C-363/19 P *Commission v Fútbol Club Barcelona* itself, at paragraphs 90-93) it also has evident limitations – a Member State would only have cause to believe this if such factors demonstrating market consistency were already foreseeable, in which case they would already be admitted in the assessment as part of the "*available information and foreseeable developments*".

624 See Joined Cases T-80/06 and T-182/09 *Budapesti Erőmű v Commission*; Case T-468/08 *Tisza Erőmű v Commission* EU:T:2014:235; Case T-179/09 *Dunamenti Erőmű v Commission* EU:T:2014:236; and Case C-357/14 P *Electrabel and Dunamenti Erőmű v Commission* EU:C:2015:642.

625 Commission Decision 2009/609/EC of 4 June 2008 on the State aid C 41/05 awarded by Hungary through Power Purchase Agreements, OJ L 225/53 27.8.2009.

626 See the General Court judgments referred to in note 543 above. For criticism of the General Court's approach specifically in relation to this issue in light of the established case-law on the MEOP, see C Arhold, 'The Relevant Time of Assessment of Pre-Accession Measures, Annotation on the Judgment of the General Court (Sixth Chamber of 13 February 2012 in joined cases T-80/06 and T-182/09 *Budapesti Erőmű Zrt v European Commission*' (2013) European State Aid Law Quarterly 408.

MEOP, the Commission's decision was upheld in light of the specific terms of Hungary's EU accession treaty.

The decision was further appealed to the Court of Justice in the *Electrabel and Dunamenti Erőmű* case,[627] which resulted in a somewhat more nuanced consideration of the issues. Attempting to reconcile the established case-law in relation to the MEOP with the specific terms of the EU accession treaty, Advocate General Wathelet argued that, "*the proper application of the private investor test involves asking what a hypothetical market operator, in the same economic circumstances as those which prevailed in 1995, in a market that was about to be liberalised, would have done on 1 May 2004 in order to sell [the generator] at the highest possible price while at the same time pursuing the same economic and commercial objectives as the Hungarian State was pursuing in 1995, that is to say, security of supply at the lowest possible cost, modernisation of the infrastructure, with particular regard to the prevailing standards of environmental protection, and the necessary restructuring of the power sector.*"[628] Accordingly, the Commission should have taken into account the economic and commercial objectives that the State power company was pursuing by granting the PPA.[629]

The Court itself however, took a less strong line, stating that "*the Commission was obliged to assess that agreement in its context, on the date of the accession of Hungary to the European Union, taking into account all the information available on that date which proved to be relevant, including, where appropriate, information relating to events prior to that date*".[630] On this basis, the Court considered whether the privatisation and sale of the generator before accession in that case had the effect of discontinuing any State aid, but did not take into account the economic and commercial justifications for the State power company as at 1995-1996 in entering into the PPAs.

While the *Hungarian PPA* cases on their face appear to deviate from the general principle that the compliance of a measure with the MEOP must be assessed in light of the circumstances at the time, it is submitted that the result in these cases is

627 Case C-357/14 P *Electrabel and Dunamenti Erőmű v Commission*.
628 Opinion of Advocate General Wathelet in Case C-357/14 P *Electrabel and Dunamenti Erőmű v Commission* EU:C:2015:435, paragraph 122.
629 *Ibid*., paragraph 123.
630 Case C-357/14 P *Electrabel and Dunamenti Erőmű v Commission*, paragraph 106.

attributable to the specific terms of Hungary's EU accession treaty. Indeed, the EU Courts in their judgments even explicitly distinguished between the established case-law in relation to the MEOP and the definition of State aid in the case of pre-accession measures,[631] which was governed by the specific terms of the accession treaty. From a conceptual point of view however, there would seem to be no relevant ground of distinction that could justify a different approach in the case of pre-accession measures, and the opinion of the Advocate General and the judgment of the Court of Justice are notable in their attempt to reconcile the accession treaty with the established case-law.

c. Background and contextual factors

When applying the MEOP, the EU Courts have emphasised that the measure must be assessed in light of its background and context, and at times, these factors can be decisive to the MEOP assessment. In our view, these background and contextual factors reinforce the MEOP as being an assessment in relation to the object of the State measure in question and this can be demonstrated by how the EU Courts have drawn upon these factors in the case-law.

In particular, one specific recurring issue, is the question of whether successive State measures should be assessed together or separately, which has arisen in the case of capital injections in national or State-owned companies that are often the subject of State intervention. The approach of the EU Courts to this issue was established by the General Court in the *BP Chemicals* case,[632] which concerned the assessment of a fresh capital injection in a company in circumstances where a State public company had already made two capital injections in the same subsidiary during the past two years which were considered to be State aid. The question arising was whether the third capital injection could be severed from the first two and classified as an independent investment for the purposes of applying the MEOP.

For the General Court, this was to be determined on the basis of "*the chronology of the capital injections in question, their purpose, and the subsidiary's situation at the time when each decision to make an injection was made*."[633] Applying these factors

631 See in particular, Case T-468/08 *Tisza Erőmű v Commission*, paragraph 87; Case T-179/09 *Dunamenti Erőmű v Commission*, paragraph 78; and Case C-357/14 P *Electrabel and Dunamenti Erőmű v Commission*, paragraph 67.
632 Case T-11/95 *BP Chemicals v Commission*.
633 *Ibid*., paragraph 171.

to the facts, the General Court concluded that the three capital injections had to be considered, "*as in reality, a series of related capital contributions, granted as part of a continuing restructuring process begun in 1992, the common purpose of which was to finance the restructuring measures necessary and to restore [the subsidiary's] capital base which had been eroded by losses.*"[634]

The factors in the assessment framework put forward by the General Court bear similarities to those that feature in the "global assessment" established by the Court of Justice in the later *EDF* case for assessing the applicability of the MEOP, including in particular, the emphasis on the objectives of the measures in question. Like that case, it seems clear that the General Court's assessment, in line with the central claim in this thesis, was geared towards working out what was the possible object or nature of the third capital injection and on this basis, whether it should be subject to individual examination under the MEOP.

Taking another commonly recurring issue, in cases of State funding of publicly-owned companies that are facing difficulties, a key factor in the EU Courts' assessment has been whether the funding is linked to a satisfactory restructuring programme.[635] Thus, in the *BFM* case,[636] which concerned significant State funding of a perennially loss-making subsidiary undertaking, the General Court rejected the argument that such funding could be considered as commercially justified as part of the reorganisation of the undertaking on the basis that a private operator investing in these circumstances would have required an adequate restructuring plan capable of restoring the company to viability. While an investment plan had been produced, this was dismissed by the General Court as it did not contain any particular measures to remedy the specific problems experienced by the company, a *sine qua non* of a genuine restructuring programme.[637]

Similarly, in the *Merco* case,[638] which concerned a capital injection by Spain in a publicly-owned company, the claim made by the State was that the funding was intended to facilitate the closure of its loss-making oil business division and therefore

634 *Ibid*., paragraph 179.
635 By way of example, see Case C-42/93 *Spain v Commission (Merco)* EU:C:1994:326; Joined Cases T-126/96 and T-127/96 *BFM and EFIM v Commission* EU:T:1998:207; Case T-152/99 *HAMSA v Commission* EU:T:2002:188; and Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission*, paragraphs 42-48.
636 Joined Cases T-126/96 and T-127/96 *BFM and EFIM v Commission*.
637 *Ibid*., paragraphs 86-88.
638 Case C-42/93 *Spain v Commission (Merco)*.

represented commercially rational conduct. This was dismissed by the Court of Justice on the basis that the company's other business divisions (save one) were also loss-making and the capital injection would not be sufficient to restore the company to viability. Consequently, the investment was not in fact linked to an adequate restructuring programme.[639] Advocate General Jacobs went further in his opinion,[640] explicitly calling into question the purpose averred by Spain for the capital injection, noting that the decision to close down the oil division was only made 1-2 years after the capital injection and had not been mentioned by Spain during the Commission's investigation.[641]

In these cases, the existence of an adequate restructuring programme serves as the factor that tests the State's claimed purpose for intervening and therefore the consistency of the measure with its claimed objective. The question is whether the State's intervention has a commercially rational objective to restructure and restore its subsidiary to viability as is claimed, or is in fact to create inequality of opportunity in favour of the beneficiary undertaking and in the words of Advocate General Jacobs in the *Merco* case, simply, "*to maintain [the company] in operation for a further period and put off the evil day of liquidation*."[642] The common factor in all cases, is to draw on the contextual factors in order to ascertain the object and therefore the true nature of the State intervention.

The clearest and most severe example of the background and contextual factors proving determinative in establishing the true nature of a transaction is perhaps the *BAI* case,[643] which concerned the purchase by the Spanish State of ferry services. Notwithstanding that the actual price for the services ultimately agreed by the State may have been reflective of the market price for such services, the General Court concluded that the State had no genuine need for the services in question and therefore that the purchase was not "*in the nature of a normal commercial transaction*",[644] i.e. it was essentially a sham transaction, designed to provide the ferry provider with a selective advantage.

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639 *Ibid*., paragraph 15.
640 Opinion of Advocate General Jacobs in Case C-42/93 *Spain v Commission (Merco)* EU:C:1994:113.
641 *Ibid*., paragraph 19.
642 *Ibid*.
643 Case T-14/96 *BAI v Commission*.
644 *Ibid*., paragraph 75.

This was apparent to the General Court because of the relevant background and context. The Commission had initially intervened on State aid grounds in relation to an earlier version of the contract because the State was to pay what the Commission considered to be an inflated price for the services. The State addressed the Commission's concerns, *inter alia*, by reducing the ticket price that it would pay to what was considered as the market price. But it also simultaneously increased the number of tickets purchased such that the ferry provider would receive the same amount of revenue under the contract. There did not seem to be any credible evidence demonstrating that the State's actual requirements had increased and the increase in tickets for an unchanged financial benefit would not have negated the extent of any advantage for the beneficiary deriving from the measure given that the tickets could only be used in the low season, meaning that servicing the increased tickets would not involve any significant additional costs to the ferry operator beneficiary.[645]

The *BAI* case represents a clear instance where the EU Courts have looked behind what appeared to be a transaction at market-price and deduced the true nature of the measure from objective factors relating to the background and context of the measure. Ultimately, the General Court concluded that the State did not have a genuine need for the services it was paying for, meaning that the object of the measure was not consistent with its presentation by the State as a commercially rational transaction, and that the real purpose of the measure was to provide a selective advantage.

Although such extreme cases remain uncommon in practice,[646] the question of whether there is a genuine need for goods and services procured by the State is something that we would argue informs the rule under EU State aid law that a selective advantage can normally be ruled out where goods and services are procured by the State using a competitive tender in line with the public procurement rules. Indeed, the *Spanish Ferries* cases planted the seeds for this rule in the sequel

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645 *Ibid*., paragraphs 74-80. The General Court also noted that the sums paid under the original agreement, which had been suspended following the Commission's initial intervention, remained available to the beneficiary until the conclusion of the new agreement enabled it to set off its debts against the State authority, which further reinforced this reading of the situation.

646 An attempted application of this reasoning was recently overturned by the Court of Justice in Joined Cases C-331/20 P and C-343/20 P *Volotea and easyJet v Commission* on the ground essentially that it had not been adequately proven.

case to the *BAI* case, *P & O European Ferries (Vizcaya)*,[647] when commenting on the issue of whether or not the State had a genuine need for the services in question, the General Court stated that, "*It is all the more necessary for a Member State to demonstrate that its purchase of goods or services constitutes a normal commercial transaction where, as in the present instance, selection of the operator has not been preceded by a sufficiently advertised open tender procedure. In accordance with the Commission's settled practice, the fact that such a tender procedure is conducted before a Member State makes a purchase is normally considered sufficient for the possibility that the Member State is seeking to grant an advantage to a given undertaking to be ruled out.*"[648] In the case of a competitive tender there can normally be no question of the State creating artificial demand in order to provide a selective advantage to a particular operator, as there can be no guarantee that its favoured operator would prevail in the tender.

V. Conclusion

In this chapter, it has been demonstrated how the MEOP is ultimately an assessment of whether a State measure in the form of a transaction, genuinely represents commercially or economically rational conduct in line with the market mechanism and therefore the principle of equality of opportunity, or has the object of creating inequality of opportunity and favouring the counterparty undertaking or undertakings.

In particular, this chapter has shown how the MEOP applicability assessment undertaken by the EU Courts seeks to determine the possible capacity in which the State is acting, as a private operator and therefore potentially in an economic or commercial capacity, or as a public authority, and is therefore a "first-order assessment" of the possible object of the measure. In terms of the application of the MEOP, the analysis has demonstrated how the relevant factors drawn upon by the EU Courts, including the specific attributes of the State's position that could be relevant to a private operator (as opposed to the public sector attributes), the specific knowledge and information in the hands of the State at the time it took a decision in relation to the measure (as opposed to any *ex post* analysis) and other case-specific relevant factors, such as the existence of a viable restructuring plan when it comes

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647 Joined Cases T-116/01 and T-118/01 *P & O European Ferries (Vizcaya) and Disputación Foral de Vizcaya v Commission*.

648 *Ibid*., paragraph 118.

to capital injections in struggling companies, are all geared towards assessing the object of the measure and assessing its economic rationality ultimately from the perspective of the State. Therefore, while the MEOP may be the State aid definition methodology that has been amenable to the greatest degree of economic analysis, like the derogation framework applied in the case of State measures in the exercise of public authority functions, it is not concerned with assessing the competitive effects of the measure as such.

Similarly, while the MEOP is inherently a more flexible tool than the derogation framework, we have shown that the Courts are also prepared to move beyond the normal approach to the MEOP in order to address apparent inequality of opportunity arising in particular cases, and challenge transactions apparently at market prices where the specific circumstances indicate that the State had no genuine need to enter into the transaction, save to benefit the counterparty concerned. Like the derogation framework, the MEOP is therefore also ultimately only a proxy for assessing equality of opportunity in its micro-economic and macro-economic competition dimensions, which shapes how the MEOP must be applied.

It has also been shown that objectives play an important role under the MEOP as they do under the derogation framework. They are accorded particular, albeit not decisive, significance in the applicability stage relevant to borderline cases where it is not clear from the outset whether the State may be acting in the capacity of a private market operator. At the application stage, once it is accepted that the State may be feasibly acting in a private operator capacity, which is typically assumed in most cases on account simply of the form of a measure as an economic transaction, the effectively claimed objective in this regard, i.e. that it is acting in an economically or commercially rational manner in the circumstances of the case, is precisely what is being tested through applying the MEOP. In this sense, like the derogation test, the MEOP can also be conceived of as a type of "consistency assessment", which tests whether the object of the measure is consistent with the State's claimed objective. Therefore, while objectives are of significance, the objective nature of the measure ultimately trumps subjective claims.

Chapter 5

SGEI Funding and the Compensation Principle

I. Introduction

The previous two chapters examined the assessment of selective advantage in two diametrically opposed contexts: where the State is taking measures in the exercise of public authority functions; and where the State is acting in the private sphere, undertaking transactions. Chapter 3 demonstrated that the assessment of State activity in the public authority context amounts to a determination of whether the object of a measure, which applies only to certain undertakings or sectors, is to create inequality of opportunity in favour of those undertakings / sectors, or in fact, represents a measure of general economic or regulatory policy. Chapter 4, which addressed State activity in the private sphere, showed that the selective advantage assessment in this context was to determine whether the object of the economic transaction in question is to create inequality of opportunity in favour of the counterparty undertaking(s) or represents economically rational conduct in line with the market mechanism.

In this chapter, we examine the third main area of State activity which falls in between these two situations, where the State is funding SGEI, which broadly speaking, encompass economic activities which deliver outcomes in the overall public good which would not be supplied (or would be supplied under less than satisfactory conditions) by the market in the absence of public intervention.[649] Typical examples of SGEI include the provision of universal postal services, transport services in remote areas and broadband services in rural areas. While there are certain commonalities between the State's activity in this context and an economic-transaction based framework, as the State is procuring services from the market, it is self-evidently acting pursuant to public authority concerns, namely to ensure the provision of certain services to the public which are in the general interest.

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649 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, 'A Quality Framework for Services of General Interest in Europe', COM(2011) 990 final, 20.12.2011, page 3, which serves as a commonly-accepted description of the concept of SGEI.

The funding of SGEI is therefore a special area, as reflected by the inclusion of specific legal basis in the EU Treaties to adopt regulations for the operation of SGEI,[650] a limited exemption from the EU Treaty rules under Article 106(2) TFEU, including the rules on competition,[651] and a specific protocol to the EU Treaties.[652] In the specific EU State aid context, this is reflected in the development of a special framework for the assessment of selective advantage, the so-called "*Altmark* criteria" or the "compensation principle" that is the subject of this chapter. It is also reflected in the development of a special framework for the compatibility assessment based on Article 106(2) TFEU,[653] under which operating aid, i.e. aid that covers an undertaking's usual operating expenditure in the course of its normal business, may be granted, even though such aid would normally be prohibited under the standard Article 107(3)(c) TFEU compatibility basis.[654]

Notwithstanding the special character of the State's activity in this area, the present chapter will show that the *Altmark* framework is effectively aligned with the assessment of State activity in the private sphere, and essentially represents an attempt to apply an MEOP-orientated framework to the particular context of State funding of SGEI. The assessment applied by the EU Courts ultimately serves to determine whether the object of the funding in question is to create inequality of opportunity in favour of the specific recipient undertaking or undertakings, or represents market-orientated remuneration necessary for discharging an SGEI and therefore justifiable compensation for the additional public service obligations imposed, meaning that the funding would be in line with equality of opportunity.

The present chapter seeks to demonstrate this by offering a critical re-interpretation of the *Altmark* judgment framework in light of the jurisprudential debate leading to

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650 Article 14 TFEU.

651 Article 106(2) TFEU.

652 Protocol No 26 on Services on General Interest. See also Protocol No 29 on the System of Public Broadcasting in the Member States in this regard.

653 This is currently in the form of the so-called "Almunia Package" adopted by the Commission in 2012, comprising the following compatibility instruments: Communication from the Commission, European Union framework for State aid in the form of public service compensation (2011), OJ C 8/15 11.1.2012 ("Commission SGEI Framework"); and Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7/3 11.1.2012.

654 As it would not be considered as "facilitating the development of an economic activity", within the meaning of that provision – see Case C-594/18 P *Austria v Commission (Hinkley Point C)*, paragraph 119.

the judgment and the subsequent case-law of the Court of Justice applying the judgment.

Section II begins by tracing the development of the two contrasting approaches to the State aid assessment of SGEI funding prior to the *Altmark* judgment, the so-called “no-aid” approach and the “State aid” approach, and explains that the debate in large part, was focused on the dichotomy between objectives and effects and ultimately, the relevance of the object of the measure.

Section III then introduces the *Altmark* judgment and its four criteria for assessing the State aid character of SGEI State funding, which ended the debate between the no-aid and State aid approaches, but which left the purpose and meaning of its specific criteria largely unexplained. We however, analyse the criteria in light of how they have been applied by the EU Courts in cases following *Altmark*. Through this exercise, we show how the *Altmark* criteria amount to an attempt to apply an MEOP-orientated framework to the State funding of SGEI, while taking into account the specific peculiarity of SGEI, the fact that SGEI by definition would not be funded by private operators, meaning that comparable market benchmarks for assessing the level of compensation are generally not available.

Section IV then focuses in greater detail on what appears to be the main differentiating factor between the selective advantage assessment under the *Altmark* judgment and the MEOP as applied to economic transactions, the first *Altmark* criterion which requires that there are genuine SGEI obligations. Analysing how this criterion has been applied in the case-law following the *Altmark* judgment, we explain how it ultimately tests whether there is a genuine need for the State to intervene in funding the relevant activities due to insufficient provision by the market, or whether the operation is effectively a sham arrangement, with the object of benefitting the funding recipient, and it therefore has parallels to the MEOP's "genuine need" test in this context.

Section V then addresses the important and controversial *BUPA* case, which effectively disapplied certain of the *Altmark* criteria and appeared to some commentators as heralding a retreat from the rigour of the *Altmark* framework. Finally, in section VI, the chapter moves beyond the State funding of SGEI to consider other areas where a similar compensation principle has also been advanced to assess the existence of selective advantage, namely where the State

is acting to alleviate losses the State itself has caused or a competitive disadvantage suffered by the beneficiary, and explains how the distinctions drawn by the EU Courts in this area shed further light on the principle of equality of opportunity that underlies the notion of selective advantage and the *Altmark* framework. Section VII then concludes.

II. The debate in the jurisprudence leading up to the *Altmark* judgment

As is well known, the State aid treatment of public funding of SGEI was settled in the landmark *Altmark* case, in which the Court of Justice established that such funding can escape classification as State aid provided various conditions were met with respect to the nature of the obligations imposed on the beneficiary and the calculation of the funding. The resolution in *Altmark* was ultimately reached following the development of two lines of irreconcilable jurisprudence in the EU Courts and significant debate between Advocates General in the lead-up to the *Altmark* ruling. Those lines of jurisprudence and debate touched upon issues fundamental to the notion of selective advantage and State aid, including the significance of objectives, and the framework ultimately settled upon in the *Altmark* judgment amounts to an assessment of what is the object of the measure, as will be demonstrated below.

The starting point for the debate was the *ADBHU* case[655] in 1985, which did not directly concern the State aid assessment of State funding of SGEI, but the validity of a piece of EU legislation, Council Directive No 75/439/EEC on the disposal of waste oils,[656] which, *inter alia*, provided for undertakings collecting or disposing of waste oils to be granted State-financed indemnities. These provisions were challenged as being inconsistent with the competition principles in EU law, and in particular, the State aid rules.

The Advocate General assigned to the case, Advocate General Lenz, dismissed this argument on the basis that such indemnities would not be considered as subsidies, as "*in fact, they are intended as a quid pro quo for obligations imposed on certain undertakings in the public interest*".[657] In this regard, the Advocate General also

655 Case C-240/83 *Procureur de la République v ADBHU* EU:C:1985:59.

656 Council Directive No 75/439/EEC of 16 June 1975 on the disposal of waste oils, OJ L 194/23, 25.7.1975.

657 Opinion of Advocate General Lenz in Case C-240/83 *Procureur de la République v ADBHU* EU:C:1984:357, at page 536.

considered it significant that the indemnities could not exceed the annual unrecovered costs recorded by the relevant undertakings, taking into account a reasonable profit.[658] The Court of Justice in its judgment, echoed the Advocate General's opinion, explaining that the indemnities would not constitute aid, "*but rather consideration for the services performed by the collection or disposal undertakings*", while also referring favourably from a competition perspective to the safeguards in relation to the amount of the indemnities.[659] The Advocate General and the Court therefore considered the indemnities as effectively constituting remuneration for discharging public service obligations, which was further supported by the State funding being limited to the costs incurred by the undertakings plus a reasonable profit.

It may be noted that the opinion of Advocate General Lenz and the judgment of the Court of Justice in *ADBHU* shortly preceded the landmark opinions of the same Advocate General and the judgments of a largely similarly constituted Court of Justice in *Meura* and *Boch*,[660] which as explained in Chapter 4 above, first properly introduced the MEOP. *ADBHU* can be seen already as an attempt to transplant a similar market-orientated construct within the context of funding for public service obligations, in terms of assessing whether the object of the operation is such that it represents essentially consideration for services provided, or rather to create inequality of opportunity in favour of the beneficiary, with the limitation of the funding to costs plus profit serving as a relevant indicator.[661]

The next cases to clearly address the issue were a series of General Court judgments in *FFSA*[662] and *SIC*,[663] which concerned State funding in relation to the

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658 *Ibid*.

659 Case C-240/83 *Procureur de la République v ADBHU*, paragraphs 18-19.

660 The opinion of Advocate General Lenz in *ADBHU* was delivered on 22 November 1984 and the judgment of the Court was delivered on 7 February 1985, while the opinions in *Meura* and *Boch* were delivered on 16 April 1986 and the judgments were delivered on 10 July 1986.

661 For a very different reading of *ADBHU*, see De Cecco, *State aid and the European Economic Constitution*, at 142, who emphasises that the case concerned the judicial review of a piece of EU legislation rather than a State aid matter in the proper sense, and argues that, "*the Court had simply confirmed that the balance struck by the [EU] legislature between State aid and environmental protection was the appropriate one*".

662 Case T-106/95 *FFSA and Others v Commission* EU:T:1997:23. The General Court's judgment was upheld by the Court of Justice on appeal in Case C-174/97 P *FFSA and Others v Commission* EU:C:1998:130. While this might be seen as an implicit endorsement of the "State aid approach" followed by the General Court, this particular point was not among the issues raised in the appeal.

663 Case T-46/97 *SIC v Commission* EU:T:2000:123.

public service obligations carried on by La Poste in the postal sector in France and RTP in the audiovisual sector in Portugal, respectively. In both cases, and contrary to the approach in *ADBHU* which was not referred to in the judgments, the General Court took what can be described as a "State aid approach", deciding that the funding was to be characterised as State aid, although it was capable of being declared as compatible under Article 106(2) TFEU, provided the conditions under that provision were met. In terms of its reasoning, the General Court was clear, in particular in the *SIC* case, that to do otherwise, i.e. to allow the measure to escape classification as State aid in the circumstances, would be to contravene the "effects-based approach" under which Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects. Consequently, the purpose of the funding in offsetting the costs of public service obligations imposed on RTP could not be taken into account in the definition stage but could only be taken into account in the compatibility assessment stage.[664]

The *FFSA* and *SIC* cases were followed next by the *Ferring* case[665] at the Court of Justice. The *Ferring* case concerned the imposition by France of an additional tax on pharmaceutical laboratories but not on wholesale distributors, in order to reflect the public service obligations applying to the latter in terms of the requirements to ensure adequate supply of medicines. In its judgment, the Court of Justice referred favourably to *ADBHU*, explaining that similarly in this case, "*not assessing wholesale distributors to the tax may be regarded as compensation for the services they provide and hence not State aid*".[666] But, and seemingly in order also to address the argument of the General Court in *SIC* in relation to the "effects-based approach", the Court added that, "*provided there is the necessary equivalence between the exemption and the additional costs incurred, wholesale distributors will not be enjoying any real advantage for the purposes of Article [107(1)] of the Treaty because the only effect of the tax will be to put distributors and laboratories on an equal competitive footing*."[667]

The Court therefore introduced the notion that there ought to be no aid in circumstances where the measure would equalise the position of the beneficiary

664 *Ibid*., paragraphs 82-84.
665 Case C-53/00 *Ferring* EU:C:2001:627.
666 *Ibid*., paragraph 27.
667 *Ibid*.

with that of its competitors in light of the additional public service obligations imposed on the former by the State.[668] This is, it is submitted, essentially an equality of opportunity approach. The Court effectively proposed that State funding in these circumstances would not upset equality of opportunity, but would rather restore it in light of the additional burdens resulting from the public service obligations imposed, provided there was equivalence between the funding and the additional costs incurred.

The *Ferring* approach was subjected to significant criticism in the academic commentary on various bases,[669] including in particular, that it would render Article 106(2) TFEU effectively redundant, as funding that exceeded the costs incurred in delivering the SGEI, and would therefore be classified as State aid under *Ferring*, could not in any event be considered as proportionate pursuant to that provision. It was also argued that the *Ferring* approach could distort competition due to a lack of a requirement for the SGEI provider's costs to be efficiently incurred. It therefore seemed probable that *Ferring* would not be the final word on the State aid definition of SGEI funding and this key point of principle was raised in a number of preliminary references before the Court of Justice, namely, the *Altmark*, *GEMO* and *Enirisorse* cases,[670] leading to an intense judicial debate between the Advocates General assigned to these cases.[671]

The Advocate General assigned to *Altmark*, Advocate General Léger, strongly urged the Court of Justice to reverse *Ferring*. According to the Advocate General, the Court had erred in *Ferring* because it had ultimately assessed the existence of State

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668 In a similar vein, in his opinion in *Ferring*, Advocate General Tizzano also explained that: "*if the State imposes certain public service obligations on an undertaking, then covering the additional costs arising from the performance of those obligations confers no advantage on the undertaking in question, but serves, if anything, to ensure that it is not unjustly disadvantaged vis-à-vis its competitors*." See the opinion of Advocate General Tizzano in Case C-53/00 *Ferring* EU:C:2001:253, at paragraph 61.

669 See for instance, C Rizza, 'The Financial Assistance Granted by Member States to Undertakings Entrusted with the Operation of a Service of General Economic Interest' in Biondi, Eeckhout and Flynn (eds), *The Law of State Aid in the European Union*, 67-84; Rubini, *The Definition of Subsidy and State Aid*, at 325; and P Nicolaides, 'Distortive effects of compensatory aid measures: a note on the economics of the Ferring judgment' (2002) European Competition Law Review 313; and P Nicolaides, 'Compensation for public service obligations: the floodgates of state aid?' (2003) European Competition Law Review 561.

670 Case C-280/00 *Altmark*; Case C-126/01 *GEMO*; and Case C-34/01 *Enirisorse*.

671 Indeed, the oral procedure in the *Altmark* case was re-opened in order to allow the parties to comment on developments, leading the Advocate General assigned to the *Altmark* case, Advocate General Léger, to issue a second opinion.

aid on the basis of the objectives of the measure and had therefore confused the definition of State aid with its justification.[672] As for the Court's position in *Ferring* that there would be no "real advantage" provided there was an equivalence between the compensation and the additional costs of the public service obligations, the Advocate General argued that this amounted to taking a "gross" approach to defining State aid, as opposed to a "net" approach, which is how the concept of State aid is traditionally applied, with the contributions made by aid beneficiaries only taken into account in the compatibility stage.[673]

In contrast, the Advocate General assigned to *GEMO*, Advocate General Jacobs, suggested a “third way” between the total application of a “State aid approach” or the *Ferring* “compensation approach” – a “*quid pro quo* approach", which would determine whether the “State aid approach” or the “compensation approach” would be applied to a given case.[674] Advocate General Jacobs proposed that where there was a "direct and manifest link" between the State financing and "clearly defined" public service obligations such that the State financing was clearly intended as a *quid pro quo* for the discharge of the public service obligations, the “compensation approach” may be applied, as the financing would not constitute State aid but consideration for the public service obligations. The Advocate General argued that such a result would be in line with the normal State aid assessment of any State transaction involving mutual rights and obligations, such as where the State itself purchases goods or services from an undertaking, where there will be aid only if and to the extent that the price paid exceeds the market price.[675]

Advocate General Jacob’s *quid pro quo* approach was also supported by Advocate General Stix-Hackl, assigned to *Enirisorse*,[676] but was opposed by Advocate General Léger in *Altmark* on the basis that such an approach would introduce elements into the definition of State aid that go beyond the effects of the measure,

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672 First opinion of Advocate General Léger in Case C-280/00 *Altmark trans* EU:C:2002:188, paragraphs 76-78.

673 Second opinion of Advocate General Léger in Case C-280/00 *Altmark*, paragraphs 30-52.

674 Opinion of Advocate General Jacobs in Case C-126/01 *GEMO* EU:C:2002:273, paragraphs 117-132.

675 *Ibid*., paragraph 122.

676 Opinion of Advocate General Stix-Hackl in Case C-34/01 *Enirisorse* EU:C:2002:643, paragraphs 153-161.

including in particular, the reasons for and the objectives of the measure.[677] Advocate General Léger further rejected the argument that MEOP-like reasoning could be applied in the SGEI context on the basis that the funding of SGEI was not of an "economic nature" that would or could be adopted by a private undertaking, but on the contrary, was something that fell within the exercise of public powers, as it was concerned with the provision of services to be made available to the collectivity.[678]

Taking stock of the above, it is clear that the state of the debate leading up to the *Altmark* judgment was focused on the dichotomy between objectives and effects and ultimately, the relevance of the object of the measure. On the one hand, proponents of a "no-aid" or "compensation" approach gave credence to the object and therefore as part of this, the objectives of the measure, while also explaining that such funding should not give rise to any real advantage provided the compensation was limited to the additional costs of the public service obligations as this would only equalise the position of the beneficiary with that of its competitors, i.e. an equality of opportunity approach. On the other hand, proponents of a "State aid approach" criticised this approach on the basis that it prioritised the objectives of the measure over its effects, while improperly elevating the assessment of a beneficiary's contribution from the compatibility assessment, to the State aid definitional stage.

III. The *Altmark* judgment and its interpretation

a. The four Altmark criteria

In the *Altmark* case, as mentioned above, the Court of Justice, acting in a Grand Chamber formation, settled on a "no-aid" or "compensation" approach. Referring favourably to its previous rulings in *ADBHU* and *Ferring*, the Court began by explaining that, "*where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public services obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position that the undertakings competing with them, such a measure is*

677 Second opinion of Advocate General Léger in Case C-280/00 *Altmark*, paragraphs 75-92.

678 Second opinion of Advocate General Léger in Case C-280/00 *Altmark*, paragraphs 15-27.

not caught by Article [107(1)] of the Treaty."[679] In our interpretation, the Court therefore effectively adopted a remuneration for services assessment approach, in line with the *ADBHU* and *Ferring* judgments, and explained effectively that where the object of the funding can be considered in this way, i.e. as appropriate remuneration for the SGEI provided by the recipient, the measure can be considered as equalising the beneficiary's position with that of its competitors and therefore the measure would be consistent with the notion of equality of opportunity.

The Court then proceeded to set out four criteria that would need to be fulfilled in order for such funding to avoid classification as State aid in this way – the so-called *Altmark* criteria:

- The recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined;
- The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner – according to the Court, this was required to avoid that the Member State simply funds losses where it turns out after the event that the operation of the SGEI is not economically viable;
- The compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations – according to the Court, this was to avoid that the beneficiary is given an advantage that distorts competition by strengthening that undertaking's competitive position; and
- The recipient undertaking is either chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, or if not, the level of compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.[680]

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679 Case C-280/00 *Altmark*, paragraph 87.
680 *Ibid*., paragraphs 89-93.

b. Interpretation of the Altmark criteria and their application in subsequent case-law

Notwithstanding the gravity of its judgment in *Altmark*, the Court did not provide very much detailed explanation of the individual criteria it was laying out as the assessment framework in this area. From the way in which the Court framed the criteria and the background to the judgment however, in our interpretation, the Court was building on the remuneration for services assessment approach by incorporating aspects of the "*quid pro quo*" approach expounded by Advocate General Jacobs and introducing further market-orientation into the assessment, which is in line with significant elements of the commentary.[681]

In a similar vein, writing shortly after the *Altmark* judgment, Advocate General Kokott explained that the judgment was, "*merely an expression of the general principle that the law on aids does not apply to legal relationships in which a normal market consideration corresponds to a service because a person who provides a service and obtains a normal market consideration in return is not a recipient of aid but rather operates on the market under conditions of normal competition*."[682] This view was later echoed by Advocate General Wathelet writing in 2017 that, "*The purpose of the Altmark conditions is to establish the price which could have been obtained on a general market (the market price) for providing the public service concerned, so as to determine whether that service could have been provided (under the same conditions without state intervention*).[683]

In our interpretation, the Court of Justice in *Altmark* therefore implicitly rejected the position of Advocate General Léger that MEOP-like reasoning cannot be applied to

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681 See Rubini, *The Definition of Subsidy and State Aid*, at 324-326 and Piernas López, *The Concept of State Aid under EU Law*, at 88-89. Certain commentators even consider the *Altmark* framework as being a subset of the MEOP – see M Hansen, A Van Ysendyck and S Zuhlke, 'The coming of age of EC state aid law: a review of the principal developments in 2002 and 2003' (2004) European Competition Law Review 202; and Hancher, Ottervanger and Slot, *EU State Aids*, at 3-259 to 3-261. Other elements in the commentary refer to *Altmark* as representing a "third way" between the "State aid approach" and the "no-State aid approach" or "compensation approach" – see e.g. Buendia Sierra, 'Finding the Right Balance: State Aid and Services of General Economic Interest', at 198 and De Cecco, *State aid and the European Economic Constitution*, at 143.

682 Opinion of Advocate General Kokott in Case C-283/03 *Kuipers* EU:C:2004:820, paragraphs 78-79.

683 Opinion of Advocate General Wathelet in Case C-649/15 P *TV2/Danmark v Commission* EU:C:2017:403, paragraph 38.

State funding of SGEI on the basis that this is something that by definition, would never be carried out by private operators, but only public authorities.[684] Just as under the MEOP, a transaction that is in line with normal market conditions and therefore the market mechanism can be considered as being consistent with equality of opportunity, State funding of SGEI that is in line with *constructed* normal market conditions as reflected in the *Altmark* criteria and therefore represents funding that is *economically rational*,[685] can also be considered as consistent with equality of opportunity as it would represent appropriate remuneration for providing the SGEI. The MEOP logic inherent in the *Altmark* criteria is therefore essentially used as a tool for testing the central issue identified by the Court, whether the object of the State funding is genuinely, as the State claims, to provide appropriate remuneration necessary for discharging the public service obligations imposed and thereby restore equality of opportunity, or is in fact to create inequality of opportunity in favour of the specific beneficiary undertaking. In other words, like the derogation test and the MEOP more generally, the *Altmark* framework serves to test the consistency of the measure with the State's claimed objective.

Therefore, while the MEOP is not directly applicable to the funding of SGEI, as the State is formally speaking, exercising public authority functions (as Advocate General Léger argued), its essential logic can still be applied to assess the existence of a selective advantage. In this context, the *Altmark* criteria represent an attempt to adapt the MEOP framework taking into account the specific SGEI context and in particular, the distinguishing factor identified by Advocate General Léger, the fact that SGEI would not be funded by private operators, which means that comparable market benchmarks for assessing the level of compensation would not be available.[686]

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684 The goal of distinguishing between whether the State is acting in the capacity of a private operator or as a public authority as part of the MEOP assessment is therefore not an applicable proxy for determining whether there is inequality of opportunity and favouring in the SGEI funding context.

685 Noting that under the *Altmark* framework, the assessment of the economic rationality of the compensation accepts the public authority role of State authorities in seeking to fund the SGEI in the first place.

686 In this vein, Advocate General Wahl has stated that the *Altmark* criteria: "*attempt to answer the hypothetical and counterfactual question whether the undertaking concerned would have obtained the compensation at issue under normal market conditions, that is to say, the conditions which apply to a given market absent Member State intervention*," see the opinion of Advocate General Wahl in Case C-660/15 P *Viasat Broadcasting UK v Commission* EU:C:2016:854, paragraph 37.

When viewed through this lens and taking into account how they have been applied by the EU Courts in subsequent case-law, each of the four *Altmark* criteria can be understood as embodying the MEOP logic.

The first and second *Altmark* criteria, the requirement that the public service obligations are clearly defined and the requirement for the compensation parameters to be established in advance in an objective and transparent manner, represent an attempt effectively to "contractualise" the funding arrangement in line with typical commercial agreements for the provision of services. As with contractual obligations, SGEI obligations must be clearly defined in order to satisfy the MEOP logic and assessing whether SGEI funding is market-orientated will only be possible where those obligations are sufficiently clearly-defined such that the appropriate remuneration for discharging them can be determined with sufficient precision.[687]

This approach is further reinforced by the subsequent case-law of the Court of Justice, which explained in the *Spanish Digital TV* cases that the first *Altmark* criterion requires the existence of, "*one or more acts of public authority defining, in a sufficiently precise manner, at least the nature, duration and scope of the public service obligations imposed on the undertakings entrusted with the performance of those obligations*."[688] Similarly, the requirement for compensation parameters to be established in advance as part of the second *Altmark* criterion, reflects the basic commercial reality that market operators procuring services do not agree to a "blank cheque", but require at least that agreement is reached in relation to the method for determining the remuneration, even in the case of very complex services projects. This is encapsulated in the Court's statement in the *Altmark* judgment that establishing the compensation parameters in advance is required to avoid that the Member State simply funds losses where it turns out that the operation of the SGEI is not economically viable.[689]

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687 *C.f.* the opinion of Advocate General Stix-Hackl in Case C-34/01 *Enirisorse*, paragraph 155.

688 See Joined Cases C-66/16 P to C-69/16 P *Comunidad Autónoma del País Vasco and Itelazpi v Commission*, paragraphs 73 and Case C-114/17 P *Spain v Commission* EU:C:2018:753, paragraph 86. Similar requirements had already advanced for some time by the Commission in its practice concerning the first *Altmark* criterion – see Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8/4 11.1.2012 ("Commission 2012 SGEI Communication"), paragraph 52.

689 Case C-280/00 *Altmark*, paragraph 91.

The third *Altmark* criterion, the requirement for an equivalence between the funding and the additional costs incurred by the beneficiary in discharging the SGEI plus reasonable profit, serves as an approximation of what should be appropriate remuneration in circumstances, where, as explained above, owning to the particular status of SGEI, comparable market benchmarks for assessing the level of compensation would not be available. Resort to the objective criterion of costs in the absence of suitable market benchmarks is consistent with what the Court of Justice had decided in the landmark *Chronopost* case,[690] where, as discussed in Chapter 4, the Court explained that, "*in the absence of any possibility of comparing the situation of La Poste with that of a private group of undertakings not operating in a reserved sector, 'normal market conditions', which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements which are available,*" namely, La Poste's costs plus an adequate return.[691]

The fourth *Altmark* criterion, that the SGEI provider is either chosen pursuant to a public procurement procedure designed to select the provider capable of discharging those obligations at the least cost or that the funding is determined on the basis of the costs of an efficient undertaking, is known as the "efficiency requirement". This additional requirement serves to incorporate further market-orientation and economic rationality into the funding,[692] on the basis that a market operator procuring and paying for services would require cost-effectiveness and therefore that the provider is efficient and the remuneration is limited to the lowest amount necessary.

This reading is reinforced by the EU Courts' subsequent case-law in relation to the Article 106(2) TFEU compatibility framework for SGEI compensation, which has identified the fourth *Altmark* criterion as the main point of distinction between the *Altmark* definition and the Article 106(2) TFEU compatibility frameworks. Indeed, in *Viasat Broadcasting v Commission*,[693] the General Court explained that the difference between the *Altmark* test and Article 106(2) TFEU and the reason why the fourth *Altmark* criterion is not applicable under the latter, is that the *Altmark* test

690 Joined Cases C-83/01, C-93/01 and C-94/01 P *Chronopost and Others*.
691 *Ibid*., paragraphs 38-40.
692 See Buendia Sierra, 'Finding the Right Balance: State Aid and Services of General Economic Interest', at 199, who explains that the purpose of this requirement is to "*aim at achieving a level of compensation limited to the most efficient solution that the market may offer*".
693 Case T-125/12 *Viasat Broadcasting UK v Commission* EU:T:2015:687.

seeks to assess whether the SGEI is provided under "*normal market conditions*", whereas this is not the case under the Article 106(2) TFEU compatibility assessment.[694] The question of whether an undertaking responsible for discharging an SGEI may fulfil its public service obligations at a lower cost is therefore irrelevant under Article 106(2) TFEU.[695]

The manner in which the EU Courts have interpreted and applied the fourth *Altmark* criterion further supports the equality of opportunity approach that is advanced in this thesis. It is well-known that the Commission and the EU Courts, have been very exacting in relation to the application of the *Altmark* framework, and in particular, the efficiency requirement of the fourth criterion, with the result that there are very few cases in which SGEI compensation has been classified as non-aid.[696] The cases that have been successful, however, have tended to be those in which a public procurement procedure was used to select the SGEI provider.[697] On the other hand, the fourth *Altmark* criterion has seldom been satisfied in circumstances where a public procurement procedure was not used but the State instead claimed that the funding was determined on the basis of the costs of an efficient undertaking. Indeed, the General Court has even gone so far as to state explicitly in the *TV2/Danmark* judgment[698] that where a public procurement procedure is not used, "*application of the fourth Altmark condition is likely to present difficulties in practice*".[699]

The strict approach taken to assessing the second alternative of benchmarking against efficient undertakings is typified by the General Court's judgment in the *STIF-IDF* case,[700] which concerned compensation to cover the investment costs of undertakings performing public transport services in Île-de-France Region. The

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694 *Ibid*., paragraphs 83-90. To similar effect, see Case T-561/18 *ITD and Danske Fragtmænd v Commission* EU:T:2021:24, paragraph 164.

695 *Ibid*. Although this approach is not entirely shared by the Commission in its decision-practice in relation to compatibility under Article 106(2) TFEU, which requires the use of efficiency incentives and compliance with the competitive tendering requirements of the applicable EU public procurement rules – see Commission SGEI Framework, at paragraphs 39-43 and 19.

696 Indeed, less than 10 by some estimates – see P Nicolaides, '*Altmark*: Developments in the Case Law 2018-2021', in Buts and Buendia-Sierra (eds), *Milestones in State Aid Case Law* (2022), 69-90, at 70.

697 By way of recent example, see Commission Decision (EU) 2020/1412 of 2 March 2020 on the measures SA.32014, SA.32015, SA.32016 (11/C) (ex 11/NN) implemented by Italy for Tirrenia di Navigazione and its acquirer Compagnia Italiana di Navigazione, OJ L 332/45 12.10.2020.

698 Case T-674/11 *TV2/Danmark v Commission* EU:T:2015:684.

699 *Ibid*., paragraph 114.

700 Case T-738/17 *STIF-IDF v Commission* EU:T:2019:526.

Region had not selected the operators through a competitive tender process but had undertaken a comparative costs analysis against the costs incurred by other transport undertakings performing similar public service tasks, which had been selected through a competitive tender. This exercise, however, was rejected by the General Court on the basis that the Region had not provided sufficient information on how the competitive tender procedure followed to select those comparator undertakings was sufficiently akin in terms of competitive tendering to a procurement procedure for public contracts.[701] The General Court also rejected a market study produced by the Region, which showed that the average cost per kilometre of the beneficiary undertakings was comparable to other transport operators, on the basis that this study did not distinguish between investment costs (which were covered by the compensation) and other costs.[702]

By favouring the public procurement approach over the benchmarking analysis approach, the Commission and the EU Courts have therefore applied the fourth *Altmark* criterion in a manner that provides for greater equality of opportunity as the former approach generally provides for a competition in order to select the SGEI provider in the first place. This is reinforced by the EU Courts' interpretation of what the public procurement approach requires. In particular, in *SNCM v Commission*,[703] the General Court confirmed that the use of a so-called "negotiated procedure with publication", one of the main tender procedures provided for in the EU public procurement rules, would generally not be adequate to meet the fourth *Altmark* criterion. This is because it confers broad discretion on the contracting authority and may restrict the participation of interested operators, with the result that it would not result in an effective and open competition sufficient to select the operator capable of providing the SGEI at the least cost.[704]

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701 *Ibid*., paragraphs 57-61.

702 *Ibid*., paragraphs 62-63.

703 Case T-454/13 *SNCM v Commission* EU:T:2017:134.

704 *Ibid*., paragraphs 240-241. The General Court thereby upheld the approach in the Commission 2012 SGEI Communication, that in principle, only the use of the "open" or "restricted" procedures would suffice (see paragraph 66).

Finally, it should be noted that the *Altmark* criteria are composed of a mix of not only substantive requirements[705] but also formal or procedural requirements,[706] which again demonstrates how the assessment of selective advantage is not in fact based on the effects of the measure. As pointed out in the commentary, a failure to meet certain of these requirements may not necessarily give rise to a different substantive outcome in terms of the ultimate level of State funding, yet any such failure would always lead the remuneration to be categorised as State aid.[707] Such an outcome is however consistent with the notion of selective advantage put forward in this thesis, which is not an inquiry as to the actual or potential effects of the measure strictly speaking, but rather its object.

This object-based approach also provides a response to the important criticism raised in the commentary that the focus on the equivalence between the funding and the additional costs in discharging the SGEI obligations is based on the assumption that the only advantage gained by the beneficiary is the financial advantage from the funding. It is argued that this assumption is incorrect, as it ignores the broader, intangible benefits that may accrue to the beneficiary from taking on the SGEI obligations, such as the potential ability to cross-subsidise other activities sharing common costs, the attainment of economies of scale, leverage / first-mover advantage and more generally the enhancement of their commercial position by association with the SGEI.[708] Whereas these kinds of intangible benefits would be taken into account in applying the proportionality criterion under Article 106(2) TFEU as part of the "net avoided costs methodology" devised by the

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705 Namely, the requirement for equivalence between the funding and additional costs plus profit under the third criterion and the alternative benchmarking requirement against the costs of an efficient undertaking under the fourth criterion.

706 Namely, the requirement for there to be genuine SGEI obligations which are sufficiently clearly defined under the first criterion, the requirement for compensation parameters to be established in advance under the second criterion and arguably the alternative competitive tender requirement under the fourth criterion.

707 See S Santamato and N Peraresi, 'Compensation for services of general economic interest: some thoughts on the Altmark ruling' (2004) EC Competition Policy Newsletter 1(17), who refer at 18-19 to "*the paradox of the non-tendered minimum compensation*".

708 See E Szyszczak, 'Financing Services of General Economic Interest' (2004) Modern Law Review 982, at 987-988. While this criticism was made originally in relation to the *Ferring* judgment, it is also applicable in relation to the third *Altmark* criterion.

Commission,[709] they are not considered as part of the assessment under the third *Altmark* criterion.[710]

The approach to selective advantage advanced in this thesis, however, addresses this issue, as the relevant point is the object of the measure, as opposed to the actual or potential effects it may have. In common with the approach of the case-law to assessing the existence of an indirect advantage addressed in Chapter 2,[711] these kinds of broader or secondary economic effects are the kinds of effects that are inherent in the public funding of SGEI, as opposed to effects stemming from the particular design of an SGEI and therefore are not to be considered as part of the object of the measure. Consequently, they can be excluded from the assessment of selective advantage. It is only once the object of the measure is found to be inconsistent with the principle of equality of opportunity that as part of the compatibility assessment, the comprehensive effects of the measure, including these kinds of broader effects, are also taken into account.

To conclude, in light of the above, the *Altmark* criteria are to be understood as embodying the MEOP logic applicable where the State is acting as a market operator, as adapted in the specific context of SGEI funding, and are designed to assess whether the State funding has the object of creating inequality of opportunity in favour of the beneficiary, or rather, represents market-orientated and therefore economically rational funding necessary for the discharge of the SGEI. Where this is the case, the object of the State funding may be considered as providing appropriate remuneration for the public service obligations that equalises the beneficiary's position with that of others and is therefore consistent with equality of opportunity.

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709 SGEI Framework, paragraphs 25-26. For an example of an assessment of these kinds of benefits in practice, see Commission Decision of 28 May 2018 in SA.47707 (2018/N) – State compensations granted to PostNord for the provision of the universal postal service – Denmark, recitals 157-159 and on appeal, Case T-561/18 *ITD and Danske Fragtmænd v Commission*, paragraphs 131-159 and Case C-442/21 P *ITD and Danske Fragtmænd v Commission* EU:C:2022:872, paragraphs 61-84.

710 See in this regard, Commission Decision (EU) 2019/115 of 10 July 2018 on the measures SA.37977 (2016/C) (ex 2016/NN) implemented by Spain for Sociedad Estatal de Correos y Telégrafos, S.A., OJ L23/41 15.1.2019, recitals 171-173, in which the Commission rejected that the net avoided costs methodology could be used to verify whether the third *Altmark* criterion is fulfilled.

711 See pages 78-80.

While the assessment of selective advantage and therefore the classification of State aid in this area is therefore aligned with the construct of the market, that of course, is not the end of the story insofar as the overall State aid assessment is concerned, as funding that does not meet the *Altmark* criteria may still be justified by the Member State as compatible aid under Article 106(2) TFEU. Indeed, and as explained above, the EU Courts have even explicitly explained that the difference between State aid definition and compatibility in this context is that while the market logic is an inherent part of the assessment in the former, it is not in the latter. In this sense, the approach to assessing selective advantage in the context of SGEI funding advanced in this thesis should not be seen as subordinating the funding of SGEI to the parameters of the market, but rather in terms of the question of the scope of the Commission's supervisory jurisdiction.

IV. The SGEI dimension – the requirement for genuine SGEI obligations and insufficient provision of the service by the market

One aspect which we have not covered in the above analysis is the scope of application of the *Altmark* framework, namely that it may only be applied in the case of a genuine SGEI, which is also encapsulated within the first *Altmark* criterion. This requirement obviously plays a fundamental role in the *Altmark* framework, as it serves as the effective gatekeeper, defining the *Altmark* test's scope of application. Where the State funds the provision of services that cannot be defined as an SGEI, the compensation will constitute State aid, even if the remaining *Altmark* criteria are satisfied, and in particular, the third and the fourth criteria in relation to the required equivalence with costs and the efficiency of those costs, which would otherwise ensure that the compensation was market-based.

In our view, the paramountcy of this requirement can be explained in light of the nature of an SGEI and its consequent significance to assessing whether the object of the measure is to create inequality of opportunity in favour of the beneficiary.

The designation of activities as SGEI has traditionally been viewed as an area of significant Member State discretion,[712] and the EU Courts for some time steered clear of laying down any clear prerequisites that any activity must fulfil to be capable

[712] The EU Courts took the position that Member States' choices in this regard could be subject to review on the basis of "manifest error" only – see Case T-17/02 *Olsen v Commission* EU:T:2005:218, paragraph 216; and Case T-289/03 *BUPA and Others v Commission* EU:T:2008:29, paragraph 166.

of being designated as an SGEI,[713] beyond offering the somewhat vague criterion that the services had to exhibit “special characteristics” as compared with those of other economic activities.[714]

The notion of "market failure" however, has long been associated with SGEI and the Commission at a very early stage had taken the view that the concept of an SGEI was restricted to instances where there is not sufficient provision of the service by the market.[715] This position was explicitly adopted by the EU Courts in their post-*Altmark* jurisprudence, beginning with the *Hauts-de-Seine broadband* cases in 2013. In those cases the General Court affirmed that, “*the assessment of the existence of a market failure constitutes a prerequisite for the classification of an activity as an SGEI and thus for the finding of the absence of State aid*” under the *Altmark* framework.[716] In *SNCM v Commission*,[717] the General Court further held that the scope of the SGEI had to be proportionate to the need and therefore to the extent of the under-provision of the service.[718]

What precisely is meant by a "market failure" in this context has not been specifically defined by the EU Courts.[719] Advocate General Sharpston, however, has explained

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713 That is, prerequisites for the activity itself to qualify as an SGEI, as opposed to the “minimum criteria” for the first *Altmark* criterion as referred to above.

714 Case C-179/90 *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli* EU:C:1991:464, paragraph 27; Case C-242/95 *GT-Link v De Danske Statsbaner* EU:C:1997:376, paragraph 53; and Case C-266/96 *Corsica Ferries France v Gruppo Antichi Ormeggiatori del porto di Genova and Others* EU:C:1998:306, paragraph 45. In Case T-289/03 *BUPA and Others v Commission*, the General Court also referred to the “universal” nature of the SGEI mission, but this criterion does not appear to have been taken forward in further judgments.

715 See e.g. the Communication from the Commission, 'Services of general interest in Europe', OJ C 17/14 19.1.2001, paragraph 22, paragraph 14.

716 Case T-79/10 *Colt Télécommunications France v Commission* EU:T:2013:463, paragraph 154; Case T-258/10 *Orange v Commission* EU:T:2013:471, paragraph 153; and Case T-325/10 *Iliad v Commission* EU:T:2013:472, paragraph 164 (translation from original French version).

717 Case T-454/13 *SNCM v Commission*.

718 *Ibid*., paragraphs 124 and 172. According to Nicolaides and Paolini, this judgment "*is the first time in the case law that the public need and the remit of the provider are explicitly linked*" – see P Nicolaides and G Paolini, '*Altmark:* The Mount Everest of State Aid' in Buts and Buendia-Sierra (eds), *Milestones in State Aid Case Law* (2017), 96-112, at 103.

719 And indeed, seems to be a source of some confusion leading to a degree of ambiguity in certain of the case-law. In particular, in one case concerning public service contracts for passenger transport services, Case T-92/11 RENV *Andersen v Commission* EU:T:2017:14, the General Court considered that *"the finding of 'market failure'"* was not an essential condition for designating public service obligations in this area – the interest of improving access to the territory concerned was sufficient (see paragraphs 69-70).

that: "*The essential characteristic of an undertaking providing an SGEI is that something is supplied whose provision serves the public good but which would not be supplied (or would only be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the free market in the absence of public intervention*".[720] In other words, and as explained by certain commentators, "market failure" for these purposes would cover situations in which the market does not provide services at desirable levels not only from a narrow efficiency perspective but also broadly from an equity or social perspective,[721] and therefore, insufficient provision by the market broadly speaking.

When viewed in this light, the requirement for a genuine SGEI in the first *Altmark* criterion, mirrors the "genuine need" criterion applicable under the MEOP deriving from the *Spanish Ferries* cases identified in Chapter 4, as it guards against the apparent procurement of SGEI being used as a means to favour particular undertakings.[722] On this basis, if there is not insufficient provision by the market and therefore in reality, no genuine need for the State to intervene in funding the relevant activities, then the measure is effectively a sham which has the object of benefitting certain beneficiaries. This means that irrespective of whether the remaining *Altmark* requirements are fulfilled, the measure must be defined as State aid. Like the "genuine need" criterion under the MEOP, the requirement for a genuine SGEI therefore forms an important part of the assessment of consistency with claimed objectives that underlies both the MEOP and *Altmark* frameworks.

This logic is apparent in the *Albertis* case,[723] which concerned support measures by the Spanish authorities in relation to the transition from analogue to digital broadcasting that the Commission had classified as State aid, including on the basis that the *Altmark* criteria were not met and in particular, the first *Altmark* criterion due to the lack of an entrustment act specifying an SGEI. Contracts for the necessary

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720 Which the Advocate General referred to as the "*so-called 'market failure test'*" – see the Opinion of Advocate General Sharpston in Case C-413/15 *Farrell* EU:C:2017:492, paragraph 90.

721 A Collins and MM Navarro, 'Economic Activity, Market Failure and Services of General Economic Interest: It Takes Two to Tango' (2021) Journal of European Competition Law & Practice 380, at 384.

722 Piernas López refers to this as an instance of the "*more refined economic approach*" to the compatibility analysis as permeating the EU Courts' case-law on the notion of State aid (see Piernas López, *The Concept of State Aid under EU Law*, at 233). But in our view, this requirement is linked with the "genuine need" requirement, as explained.

723 Case T-37/15 *Albertis Telecom v Commission* EU:T:2016:743.

equipment and services were awarded via procedures in accordance with the Spanish public procurement rules and the applicant therefore argued that there could be no State aid as the contracts had been awarded at "market prices" and that an advantage for State aid purposes would in any event only exist with respect to the amount which exceeds the market price. This was rejected by the General Court on the basis that where the *Altmark* criteria are not satisfied, "*the advantage does not consist only in the amount exceeding the level of the market price*", rather "*the economic advantage consisted in the transfer of funds for the exercise of an activity which would not have been entrusted to the applicants without the contested measures*."[724]

The parallel with the MEOP assessment in this regard is further apparent from the point in time in which the existence of insufficient provision by the market and therefore the genuine need for the SGEI funding must be carried out. As with the MEOP, the case-law has confirmed that this assessment must be made as at the point of time when the SGEI is actually instituted, and while it must include a prospective analysis covering the duration of the SGEI, it can only be based on the contemporaneous evidence available at the time the decision is taken.[725] Therefore, as with the MEOP, the idea is effectively to recreate the Member State's decision-making at the relevant time, i.e. an *ex ante* approach, in order to test whether the object of the intervention from the State's perspective was to favour, as opposed to assessing the actual effects of the intervention.

The scope of the genuine need test embodied in the first *Altmark* criterion, however, is not identical with that under the MEOP but has a wider scope, as indicated by the fact that even where the fourth *Altmark* criterion is satisfied and the beneficiary has been selected by way of a competitive tender, a selective advantage is still present in circumstances where there is no genuine SGEI. As explained in Chapter 4, the use of a competitive tender is generally sufficient to rule out a selective advantage where the State is acting as a market operator under the MEOP. This is because there can normally be no question of the State creating artificial demand in order to benefit *a particular undertaking*, raising micro-economic competition concerns, given

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724 Case T-37/15 *Albertis Telecom v Commission*, paragraph 76 (translation from original French version), upheld in Joined Cases C-91/17 P and C-92/17 P *Cellnex Telecom SA and Telecom Castilla-La Mancha v Commission*.

725 Case T-258/10 *Orange v Commission*, paragraph 163.

there can be no guarantee that the State's favoured operator would prevail in the tender.

In the SGEI context however, there is also a greater degree of concern in relation to creating artificial demand in order to benefit *particular sectors or activities*, i.e. the fair macro-economic competition dimension. This concern does not arise in the same way under the MEOP where the State is acting as a market operator and therefore in a context and mode in which other market operators can and do also act, procuring similar services. But it does in the SGEI area, where the State is acting as a public authority and therefore not in a context and mode in which other market operators would act and procure such services, consequently altering the allocation of resources in the market.[726] Accordingly, the use of a competitive tender to select the SGEI provider cannot be sufficient as and of itself to dispel selective advantage concerns. The genuine SGEI requirement in the first *Altmark* criterion is therefore intended not only to avoid interventions designed to create inequality of opportunity in favour of particular undertakings, but also in favour of particular sectors.

V. The *BUPA* case – a retreat from *Altmark*?

No discussion of the *Altmark* framework is complete without addressing the landmark *BUPA* judgment of the General Court[727] in which the Court controversially, effectively disapplied certain of the *Altmark* criteria. While the *BUPA* judgment appeared to some as heralding a retreat from the rigour of the *Altmark* framework, in our view, the judgment represents an example of the Court prioritising the essential question of whether the object of the measure in question was to create inequality of opportunity in favour of certain undertakings or sectors, over the particularities of the normal assessment framework which would not have adequately determined this, in view of the particular circumstances of the case.

The *BUPA* case concerned the private medical insurance ("PMI") market in Ireland, and more specifically, the Irish State's system of risk equalisation ("RES") which was intended to maintain stability on the market. Under the RES, PMI operators with a risk profile below the market average would pay a levy to the Irish Health Insurance

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726 See in this regard, Santamato and Peraresi, 'Compensation for services of general economic interest: some thoughts on the Altmark ruling' (2004) EC Competition Policy Newsletter 1(17), at 20.

727 Case T-289/03 *BUPA and Others v Commission*.

Authority, which would in turn make payments to the PMI operators with a risk profile higher than the average, thereby providing for an appropriate distribution of risks on the market. The circumstances of the case were peculiar, as it related to an appeal of a Commission decision which pre-dated the *Altmark* judgment, and therefore did not specifically apply the *Altmark* framework.[728] This notwithstanding, the General Court considered the *Altmark* framework to be applicable as the Court of Justice did not specify any particular temporal limitation and therefore went on to apply the *Altmark* criteria in reviewing the Commission's decision.[729]

The Court considered that the RES represented compensation for a genuine SGEI mission and SGEI obligations, namely, the provision of PMI services in compliance with the PMI obligations imposed by Ireland on all operators regarding open enrolment, community rating,[730] lifetime cover and minimum benefits, and therefore, that the first *Altmark* criterion was satisfied.[731] The Court further considered that the second *Altmark* criterion, that the parameters for calculating the SGEI compensation are established in an objective and transparent manner, was satisfied, in light of the detailed methodology set out in the applicable Irish legislation.[732] What is of particular interest for present purposes, however, is how the General Court approached the third and the fourth *Altmark* criteria: the requirement that there be equivalence between additional costs plus an appropriate profit margin and the level of compensation; and the efficiency requirement.

In essence, the General Court effectively concluded that these criteria could not be applied in light of the specific features of the RES compensation scheme established by Ireland. In terms of the third *Altmark* criterion, the Court recognised that there was no direct relationship between the amounts actually paid by a PMI operator following insurance claims and the amount of compensation awarded by means of

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728 Commission Decision of 13 May 2003 in State Aid N 46/2003 – Ireland: Risk equalisation scheme in the Irish health insurance market, C(2003)1322 fin. In its decision, the Commission concluded that the RES did not constitute State aid as it could be considered as compensation for SGEI obligations, in accordance with the earlier *Ferring* judgment. In the alternative, the Commission also considered that if the RES were to be classified as State aid, it would be compatible aid under Article [106(2) TFEU].

729 Case T-289/03 *BUPA and Others v Commission*, paragraph 158.

730 That is, the obligation to apply the same premium to all policy-holders for the same type of product irrespective of their health status, age or sex.

731 Case T-289/03 *BUPA and Others v Commission*, paragraphs 161 to 208 and in particular, paragraph 182.

732 *Ibid*., paragraphs 209 to 219.

the PMI payments as the payments did not compensate for the additional costs associated with specific supplies of certain PMI services, but rather were to equalise the competitive burdens which were supposed to result where a PMI operator has a negative risk profile differential by comparison with the average market risk profile.[733] This meant that the RES compensation system was "wholly independent" of the actual receipts and profits achieved by the PMI operators.[734] In the words of the General Court, the RES compensation system was therefore "*radically different*" from the compensation systems that were the subject of the *Altmark* and *Ferring* judgments and requiring a "*strict application*" of the third *Altmark* criterion "*would amount to calling into question as such Ireland's choice to establish such a system*".[735]

Similarly, in terms of the fourth *Altmark* criterion, the General Court effectively dismissed the requirement, concluding that in light of the specific features of the RES, there was no need for the Commission to draw a comparison between the potential recipients of the RES payments and an efficient operator. This was on the basis that, *inter alia*, the RES compensation system established by Ireland was neutral with reference to the actual receipts and profits of the PMI operators and due to the way that the system operated and the potential for changes in the risk profiles, it was not possible to identify precisely the beneficiaries of RES payments going forward and therefore make a specific comparison of their situation with an efficient operator.[736]

The lax approach of the General Court in the *BUPA* case and its effective disapplication of the third and fourth *Altmark* criteria were widely noted and commented upon at the time.[737] Some commentators suggested that the *BUPA* judgment may indicate a possible retreat from the full rigour of the *Altmark* criteria in

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733 *Ibid*., paragraph 235.
734 *Ibid*., paragraph 240.
735 *Ibid*., paragraphs 237 and 241.
736 *Ibid*., paragraphs 246-248.
737 See in particular, Buendia Sierra, 'Finding the Right Balance: State Aid and Services of General Economic Interest', at 200; De Cecco, *State aid and the European Economic Constitution*, at 145-149; Rubini, *The Definition of Subsidy and State Aid*, at 321; A Biondi, 'BUPA v Commission, Case T-289/03 British United Provident Association Ltd (BUPA) and Others v Commission of the European Communities, Judgment of the 12 of February 2008, nyr', (2008) European State Aid Law Quarterly 401; and W Sauter, 'Case T-289/03, British United Provident Association Ltd (BUPA), BUPA Insurance Ltd, BUPA Ireland Ltd v Commission of the European Communities, Judgment of the Court of First Instance of 12 of February 2008, nyr' (2009) Common Market Law Review 269.

recognition of the discretion enjoyed by Member States in organising public services.[738] Others, however, attributed the judgment to the very particular circumstances of the case, including the specificities of the compensation system at issue, which rendered it incomparable with the traditional compensation scheme typified by the *Altmark* judgment.[739] The second interpretation appears to have been more supported in light of the case-law following the *BUPA* judgment, which has not adopted a significantly relaxed approach to the *Altmark* criteria and in particular, its so-called efficiency requirement, as explained above. Indeed, the General Court itself in its *TV2/Danmark* judgment has portrayed *BUPA* as an exceptional case that was justified in light of the very specific features of the RES.[740] One commentator writing recently has gone so far as to remark that "*If anything, the margin of manoeuvre recognized to Member States in BUPA seems more of an outlier now than it seemed back then*."[741]

The particular context and subject-matter of the *BUPA* judgment – the organisation of public health services – may also be raised as a relevant factor that motivated the General Court's approach. Indeed, in its judgment, the General Court specifically referred to the restrictions on the EU's competence in the healthcare sector under the Treaties.[742] Furthermore, in its later judgment in the *Belgian Hospitals* case,[743] the General Court noted that whereas the *Altmark* criteria were established in a case concerning the transport sector, which was "*unquestionably an economic and competitive activity*" they "*cannot be applied as strictly to the hospital sector, which does not necessarily have such a competitive and commercial dimension*".[744] On this reading, the approach in the *BUPA* judgment can be seen as part of a broader trend within the case-law towards the shielding of healthcare and social security from the application of the EU State aid rules, as also represented by the *Dôvera* and

738 See De Cecco, above note, who describes this case under the heading, "*A Retreat from Altmark?*" and ultimately explains that the judgment may reflect the recognition that "*EU interference in the way in which compensation is determined is inevitably an intrusion in the way in which Member States choose to structure their public services*," and also Sauter, above note.

739 Buendia Sierra, 'Finding the Right Balance: State Aid and Services of General Economic Interest', at 200.

740 Case T-674/11 *TV2/Danmark v Commission*, paragraphs 57-59.

741 A Lamadrid de Pablo, '*BUPA*: The Illusion of Flexibility That Strengthened *Altmark*', in Buts and Buendia-Sierra (eds), *Milestones in State Aid Case Law* (2022), 159-166, at 165.

742 Case T-289/03 *BUPA and Others v Commission*, paragraph 167.

743 Case T-137/10 *CBI v Commission* EU:T:2012:584.

744 *Ibid*., paragraph 89.

Italian National Health Service cases on the notion of an "undertaking" addressed in Chapter 2 above.[745]

In our view however, while the specificities of the RES and the particular healthcare context and subject-matter undoubtedly played a role in the General Court's assessment, what also underpinned the General Court's approach was the implicit consideration that the RES did not have the object of creating inequality of opportunity and favouring any particular operators. This is clear from a number of places in the judgment, where the General Court recognised the RES as "*a general system, that is to say, a system based on a number of provisions of general application, the implementation of which is indeed predetermined, to a certain extent, by objective and transparent criteria*"[746] and that the SGEI obligations concerned applied to all the operators on the market.[747] Furthermore, as explained above, the General Court emphasised that because of the way that the system operated and the potential for changes in the risk profiles, it was not possible to identify precisely the beneficiaries of RES payments going forward[748] and it also highlighted the fact that new entrants benefitted from a temporary exemption from the application of the RES during the first three years of activity, which was apt to lower any alleged barriers to entry.[749]

In our view, the *BUPA* case is representative of the same theme already observed in the previous two chapters in relation to the State acting in the public authority context and the private market operator sphere. While the EU Courts have established legal constructs and frameworks to assess the existence of a selective advantage in each of these contexts, the EU Courts have also been prepared to override them to address apparent inequality of opportunity or the absence thereof in the particular circumstances of the case, reflecting the ultimate purpose of these frameworks in assessing whether the object of the measure is to create inequality of opportunity in favour of particular undertakings or sectors. Similarly, in the *BUPA* judgment, as the General Court did not detect the particular mischief that the EU

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745 See pages 39-40 above.

746 Case T-289/03 *BUPA and Others v Commission*, paragraph 265. See in this regard, Biondi, 'BUPA v Commission', at 406, who thereby explains, "*Thus from the perspective of state aid control, neutral welfare mechanisms applying to all operators involved should not be presumed to be aid."*

747 Case T-289/03 *BUPA and Others v Commission*, paragraphs 179-180.

748 *Ibid*., paragraph 248.

749 *Ibid*., paragraph 301.

State aid rules aim to address, it was prepared to creatively re-interpret the *Altmark* criteria in order to avoid a finding of State aid.

VI. Broader application of a compensation-type principle – damage caused by the State and competitive disadvantages

Beyond the State funding of SGEI, there are two other main areas in which the application of a compensation-type principle has been raised before the EU Courts to argue that the intervention at issue should not give rise to a selective advantage: (a) where the State is acting to alleviate losses that the State itself had caused; or (b) to alleviate a competitive disadvantage that is suffered by the beneficiary.

In both of these areas, the basic argument underpinning the claim that there was no State aid was that the intervention had a compensatory and therefore apparently legitimate object. It will be shown, however, that while the EU Courts have broadly admitted the compensation principle in the first case, i.e. to compensation in respect of loss caused by the State, they have significantly curtailed application of the compensation principle in the second case to only those instances where the source of the disadvantage derives from action taken by the Member State itself in deviation from the normally applicable legal and regulatory framework. This distinction in turn, between the losses and disadvantages that the State may alleviate without giving rise to State aid, and those that it may not, provides further insight into the nature of the equality of opportunity principle which underpins the criterion of selective advantage and State aid, as will be explained below.

a. Compensation in respect of losses caused by the State

The starting point for the application of a compensation-type principle in these circumstances is the early *Asteris* case in 1988.[750] The case concerned an action for damages brought by tomato concentrate producers against the Greek State with respect to losses incurred due to the State's failure to pay them funds owed under the EU's Common Agricultural Policy. On the question of whether any compensation to be paid by Greece now would constitute State aid, the Court of Justice explained that, "*State aid, that is to say measures of the public authorities favouring certain undertakings or certain products, is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to*

[750] Case C-106/87 *Asteris and Others v Greece and the EEC* EU:C:1988:457.

individuals in compensation for the damage they have caused to those individuals."[751] While the reasoning of the Court was only brief, the basic message was that compensation for losses caused would not constitute State aid as its object is not to create inequality of opportunity and favour the undertakings concerned.

This compensation principle was further applied by the General Court in the *Terni* cases,[752] a series of cases concerning the temporal extension by Italy of the so-called "Terni tariff", a preferential tariff for the supply of electricity to Terni that had been granted as compensation in relation to the nationalisation of the hydroelectric branch of that company in 1962. Referring both to *Asteris* as well as *Altmark*, the General Court explained that, "*it is common ground that certain forms of compensation granted to undertakings do not constitute aid*,"[753] and then proceeded to consider whether the extension could be properly considered as being part of that compensation for expropriation. The Italian authorities had argued that the duration of the preferential tariff had been initially set to align with the duration of the hydroelectric concessions held by self-producers whose assets had *not* been expropriated and that the preferential tariff was now being extended in order to reflect the fact that those hydroelectric concessions had also been extended.

However, examining the provisions of the legal acts initially establishing the Terni tariff, as well as those legal acts extending it and the extensions of the hydroelectric concessions, the General Court considered that the durations of the Terni tariff and the hydroelectric concessions were not, in fact, inextricably linked, and that in reality, the extension of the preferential Terni tariff was linked to a wide-ranging programme of investments that one of the parent undertakings, ThyssenKrupp, was carrying out in the industrial area.[754] The General Court therefore assessed the object of the measure, and drawing on relevant materials evidencing its apparent objective, concluded that it was not in fact compensatory in nature but had the object of creating inequality of opportunity and favouring the Terni group, with the aim of

751 *Ibid*., paragraph 23.
752 Case T-53/08 *Italy v Commission* EU:T:2010:267; Case T-62/08 *ThyssenKrupp Acciai Speciali Terni v Commission* EU:T:2010:268; Case T-63/08 *Cementir Italia v Commission* EU:T:2010:269; and Case T-64/08 *Nuova Terni Industrie Chimiche v Commission* EU:T:2010:270.
753 Case T-53/08 *Italy v Commission*, paragraphs 51-52.
754 *Ibid*., paragraphs 55-86.

drawing in investment, engaging the fair macro-economic competition dimension of the State aid rules.

The above cases show that the EU Courts have in essence accepted that State compensation for losses that were themselves caused by the State has a legitimate object consistent with the notion of equality of opportunity. While the EU Courts have not yet expressed a view on the precise scope of application of the compensation principle in this context, the Commission for its part has limited it to cases where the payment of compensation is based on a *general rule of compensation* applicable in the legal system of the Member State concerned.[755] This seems entirely in line with our understanding of the compensation principle in these circumstances, as to do otherwise would subvert the otherwise legitimate object. Where the State provides for a *special* right of compensation for particular undertakings or sectors only, the object of the measure can no longer be considered as being consistent with the principle of equality of opportunity.

b. Compensation to alleviate competitive disadvantages

Beyond the more straight-forward paradigm of compensation for damage caused by the State, a compensation-type principle has also been raised to justify support for the purpose of relieving undertakings of certain disadvantages they specifically faced relative to other undertakings.

The evolution of the position of the EU Courts in this area is not something that has been addressed in any detail in the literature,[756] but the case-law appears to have gone through something of a journey, initially putting forward what could be seen as a potentially expansive approach, before reversing course and restricting the application of the compensation principle in this area considerably.

The first case along these lines was the *Combus* case in 2004,[757] which concerned the payment by Denmark of funds to Combus to finance its employees' substituting their costly public official status for ordinary contract employment upon the

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755 See e.g. Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013, OJ L 232/43 4.9.2015, recitals 101-102.

756 There are only a few case-notes which address some of the individual cases in isolation and which do not in any event address the application of the compensation principle in any detail.

757 Case T-157/01 *Danske Busvognmænd v Commission (Combus)* EU:T:2004:76.

privatisation of Combus. The General Court held that the payment would not amount to State aid on the basis that, "*the intention was thus to free Combus from a structural disadvantage it had in relation to its private-sector competitors*", whereas the concept of State aid only covers measures which lighten the burdens normally assumed in an undertaking's budget.[758] On this basis, the General Court appeared to be taking the position that the measure would not constitute State aid as its object was not to favour Combus, but rather to equalise its competitive situation with private sector undertakings. In other words, the General Court considered that the object of the measure was consistent with equality of opportunity.

The Court of Justice also took a decision along similar lines in the *Enirisorse* case,[759] which concerned an Italian law which dispensed a particular public limited company, Sotabarbo, from the obligation to redeem the shares of members exercising their right of withdrawal in certain circumstances. The Court of Justice concluded that there was no selective advantage and therefore no aid as this dispensation itself only applied where the members were exercising an *exceptional* right of withdrawal which had been granted by Italian law with respect to Sotabarbo only, but not with respect to all other companies, for which the right to withdrawal was limited only to members opposing company resolutions in relation to various specific matters of significant importance. Accordingly, rather than constituting an advantage for State aid purposes, the Italian law simply addressed an exceptional burden on the company.[760]

However, following these earlier cases, the EU Courts subsequently took a more restrictive approach to the application of a compensation-type principle to alleviating structural disadvantages and ultimately, appear to have overruled at least the *Combus* case.[761]

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758 *Ibid*., paragraph 57.

759 Case C-237/04 *Enirisorse* EU:C:2006:197.

760 *Ibid*., paragraphs 40-49.

761 One notable exception is Case T-143/12 *Germany v Commission* EU:T:2016:406 in 2016, which explicitly applied *Combus* to the circumstances at issue, the public funding of the additional pension costs that Deutsche Post bore in comparison to private undertakings given its employees' civil servant status. The case was not appealed and therefore was not considered by the Court of Justice.

The shift was notable in the *Hotel Cipriani* case,[762] which concerned reductions in social security charges for undertakings established in Venice and Chioggia intended to compensate for the additional costs stemming from being established in the lagoon area and the *BT* case[763] which concerned exemptions from the UK pensions guarantee levy intended to compensate BT in relation to the additional pension costs it faced as an ex-public undertaking. In both of these cases, the EU Courts rejected *Combus*-type arguments on the basis of the specific circumstances of the case – a sufficient connection between the funding provided and the disadvantage for which the funding was allegedly to compensate had not been proven. However the judgments also questioned altogether the application of the compensation principle in this way, with the Court of Justice in the *Hotel Cipriani* case emphasising in particular, by analogy with the case-law in relation to distortion of competition, that the objective of seeking to approximate the conditions of competition with respect to a particular area in a Member State cannot allow a measure to escape classification as State aid.[764]

The EU Courts finally more decisively rejected the application of this kind of compensation-type principle in the *Orange* case,[765] which again concerned reductions in payments relating to pension liability associated with the public official status of Orange's employees. At first instance, the General Court once again dismissed a compensation for structural disadvantage argument emphasising that compensation in the SGEI context was the only instance where the compensatory nature of the measure can allow it to escape classification as State aid.[766] The General Court also distinguished the *Enirisorse* judgment, arguing that this case-law was only applicable in cases involving "dual-derogation" situations, i.e., arrangements whereby provision is made for a derogation intended to neutralise a previous derogation from the general system in place, whereas this was not the case here as the arrangements for the pensions of the public officials were legally distinct

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762 Case T-254/00 *Hotel Cipriani v Commission* EU:T:2008:537 and on appeal, Joined Cases C-71/09, C-73/09 P and C-76/09 P *Comitato "Venezia vuole vivere" and Others v Commission* EU:C:2011:368.

763 Case T-226/09 *BT v Commission* EU:T:2013:466.

764 Joined Cases C-71/09, C-73/09 P and C-76/09 P *Comitato "Venezia vuole vivere" and Others v Commission*, paragraphs 92-97.

765 Case T-135/12 *France v Commission* EU:T:2015:116 and Case T-385/12 *Orange v Commission* EU:T:2015:117; and on appeal, Case C-211/15 *Orange v Commission* EU:C:2016:798.

766 Case T-135/12 *France v Commission*, paragraphs 33-45.

from those applicable to ordinary employees.[767] The General Court's judgment, including its grounds for distinguishing *Enirisorse*, was fully upheld by the Court of Justice which further remarked that compensation for an SGEI was "*the only situation recognised by the Court's case-law in which the finding that an economic advantage has been granted does not lead to the measure at issue being categorised as State aid within the meaning of Article 107(1) TFEU*."[768]

The Court of Justice's judgment in *Orange* therefore appeared to rule out the broad application of a compensation-type principle to structural disadvantages[769] and this has been confirmed in subsequent judgments which have rejected such arguments.[770] What remains possible however, is for compensation to be granted with respect to an existing derogation from the normally applicable legal or regulatory framework enacted by the State, in line with the *Enirisorse* case, which continues to merit consideration from the EU Courts.

In this vein, in the *France Télécom* case,[771] the EU Courts admitted the possibility that a preferential taxation regime for France Télécom could escape classification as State aid if it could be shown that it offset the additional charges arising under another tax regime that had been specifically applicable to France Télécom during previous years (the so-called "fixed levy" regime) and which was ultimately more onerous than the normal taxation regime. For the EU Courts, the critical question was whether there was an adequate connection between the two, which, "*depends on the analysis of the objective characteristics,"* of the measure,[772] which the EU Courts found not to exist in that case.[773] In other words, when properly examined,

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767 *Ibid*.

768 Case C-211/15 P *Orange v Commission*, paragraphs 40-45.

769 Or as A Giraud and S Petit put it in the title of their article on the judgment, 'The French Pension Case: The Defence Based on Compensation of Structural Disadvantages Consigned to Oblivion' (2017) European State Aid Law Quarterly 82.

770 See e.g. Case C-606/14 *Portovesme v Commission* EU:C:2017:75, paragraphs 88-93; and Case T-314/15 *Greece v Commission*, paragraphs 48-50.

771 Joined Cases T-427/04 and T-17/05 *France and France Télécom v Commission* EU:T:2009:474 and Case C-81/10 P *France Télécom v Commission* EU:C:2011:811.

772 Case C-81/10 P *France Télécom v Commission*, paragraph 44; and Joined Cases T-427/04 and T-17/05 *France and France Télécom v Commission*, paragraph 208.

773 In particular, the Court of Justice emphasised that the two regimes were based on different parameters and the preferential tax regime at its inception had been applicable for an indefinite period without any mechanism for determining the point at which the "over-taxation" under the fixed levy regime should have been offset. See Case C-81/10 P *France Télécom v Commission*, paragraphs 45-50.

the object of the preferential tax regime was not to offset the additional charges under the previously applicable regime, as had been claimed.

c. The compensation principle and equality of opportunity

Taking a step back, there is a common theme that runs through the application of a compensation principle in the *Enirisorse* and *France Télécom* cases concerning dual-derogation situations and the *Asteris* and *Terni* cases concerning traditional compensation for State-caused losses. In both sets of cases, the purpose of the State compensatory measure was to offset the negative effects of another State measure applicable to that undertaking alone, which had itself constituted a selective derogation from normality, either in a regulatory / taxation sense, or in a broader practical sense insofar as compensation for State caused damage is concerned.

The distinction in treatment between these two sets of measures is revealing as to the principle of equality of opportunity that this thesis argues underlies the notion of selective advantage and State aid. The level playing field that is embodied in the equality of opportunity principle takes the competitive situation as it is, i.e. the prevailing situation based on the conditions of competition resulting from the interaction of the market mechanism and rules of general economic and regulatory policy that are consistent with EU law, which themselves secure equality of opportunity at the broader level in the internal market, as opposed to some kind of hypothetical level-playing field in which perfect conditions of equality of opportunity exist.

This is necessary, as if it were otherwise, State aid control in terms of its safeguarding of both fair micro-economic competition and fair macro-economic competition, would be rendered nugatory. Even within the EU's significantly integrated internal market, conditions of competition between undertakings from different Member States and indeed within different Member States, may be wildly divergent due to a variety of legal, regulatory, geographic and historical reasons. The application of a wide-ranging compensation principle would therefore enable Member States to confer benefits to individual undertakings or sectors without meaningful restraint, under the purported guise of equalising the competitive situation. This is precisely why the EU Courts have consistently held, since the very early case-law, that the objective of seeking to approximate conditions of competition in a particular sector to those prevailing in other Member States cannot

deprive them of their character as State aid,[774] which as explained above, was also drawn upon by the Court of Justice in rejecting the application of the compensation principle in the *Hotel Cipriani* case.[775]

Put another way, a measure which has the object of addressing a structural disadvantage for a particular undertaking or sector which itself results from prevailing normal conditions of competition, cannot be consistent with equality of opportunity, because there will be myriads of undertakings or sectors that face such disadvantages, meaning that any measure that addresses one or some of these but not others, can only give rise to a selective advantage. The compensation principle is therefore restricted to cases where the funding is designed to compensate for an earlier specific State measure that itself essentially derogated from the principle of equality of opportunity. In other words, where the funding restores the level-playing field that the State had itself distorted through the earlier measure.

The same logic also applies to the *Altmark* framework addressed in the earlier sections of this chapter. By imposing SGEI obligations on particular undertakings, the State itself disturbs the normal conditions of competition on which equality of opportunity in the internal market is based, meaning that funding that is economically rational and therefore constitutes appropriate remuneration for discharging those obligations can be seen as having the object of restoring equality of opportunity. The *Altmark* framework and the acceptance of a compensation-type principle in the dual-derogation and compensation for State-caused losses cases are therefore an embodiment of the same notion. Appropriate compensation for additional burdens imposed by the State which themselves derogate from normal conditions of competition have an object that is consistent with equality of opportunity.[776]

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774 Case C-173/73 *Italy v Commission*, paragraph 17. In the words of Advocate General Warner in his opinion in this case: "*many industries in many of the Member States are subject to special handicaps of one kind or another. If measures taken to meet those handicaps were not to be regarded as aids, Article [107] would soon be a dead letter*" – see the opinion of Advocate General Warner in Case C-173/73 *Italy v Commission* EU:C:1974:52, at page 727.

775 Joined Cases C-71/09, C-73/09 P and C-76/09 P *Comitato "Venezia vuole vivere" and Others v Commission*, paragraphs 95-96.

776 The *BUPA* case, although atypical, can also be explained in this way. While the SGEI obligations in question in that case – the provision of private medical insurance in compliance with the PMI obligations – were imposed by Ireland on all operators, those obligations resulted in very different costs being imposed upon different operators, depending on the risk profile of their customers, and therefore resulted in a significant competitive imbalance for reasons unconnected to the purpose of the regulations, in contrast to most ordinary generally-applicable sectoral regulation. The SGEI obligations

This approach to the *Altmark* framework and the compensation principle also provides a basis for explaining one of the key difficulties in this area of the jurisprudence: distinguishing SGEI compensation from compensation provided to cover the costs of complying with generally-applicable regulatory obligations. Whereas the former can escape definition as State aid, provided the *Altmark* criteria are fulfilled, the latter is classified as State aid under the established case-law on the ground that the costs of complying with generally-applicable regulatory obligations are considered within undertakings' normal costs which they are to bear under normal market conditions.[777]

The basis for this difference in assessment is something that has routinely troubled commentators,[778] who have sought to justify it by arguing that the entrusting of SGEI obligations is distinct from normal regulation and is more akin to a "quasi-private" or "quid pro quo" relationship.[779] While the question of to what extent the relationship between the State and the undertakings subject to the relevant obligations can be assimilated to a quasi-market operator relationship to which the MEOP logic may be applied, appears a relevant consideration, the dual-derogation approach provides a compelling rationalisation. As explained above, SGEI obligations imposed by the State on certain undertakings derogate from the normal conditions of competition represented by the interaction of the market mechanism with generally applicable regulatory obligations consistent with EU law, and therefore, from equality of opportunity. Consequently, SGEI compensation may be granted without giving rise to a selective advantage, as it restores the equality of opportunity that the State disturbed by imposing those SGEI obligations. On the other hand, providing compensation for the costs of generally-applicable regulatory obligations does not meet any derogation from normal conditions of competition and therefore, its object can only be to benefit those undertakings and sectors compared to others.

in *BUPA* could therefore be considered as giving rise to a derogation from normality, notwithstanding their application to all market operators.

777 See Case C-270/15 P *Belgium v Commission*, paragraph 36.

778 See Rubini, *The Definition of Subsidy and State Aid*, at 327; De Cecco, *State aid and the European Economic Constitution*, at 163; and Nicolaides, 'Compensation for public service obligations: the floodgates of state aid?', at 566.

779 See Rubini, above note and De Cecco, above note.

VII. Conclusion

In this chapter, it has been demonstrated how the *Altmark* framework effectively amounts to the application of the MEOP logic to the particular context of State funding of SGEI. The *Altmark* framework therefore ultimately serves to assess whether the object of the funding in question is to create inequality of opportunity and favour the specific undertakings providing the SGEI and / or the relevant sector concerned, or represents market-orientated remuneration necessary for the discharge of an SGEI in line with the market mechanism and therefore justifiable compensation for the additional public service obligations imposed, meaning that the funding would be in line with equality of opportunity.

The four *Altmark* criteria represent an attempt to adapt the MEOP framework taking into account the specific SGEI context and in particular, the factor that distinguishes SGEI funding from normal market procurement of services, the fact that SGEI would not be funded by private operators, meaning that comparable market benchmarks for assessing the level of compensation would not be available. In addition, we have demonstrated how the criterion of a genuine SGEI and therefore the requirement of insufficient provision of the service by the market, plays a fundamental role in serving to delineate the scope of application of the *Altmark* framework, as it essentially tests whether there is a genuine need for the SGEI funding, or whether the operation is effectively a sham arrangement, with the object of benefitting the funding recipient. Ultimately, and like the derogation and MEOP frameworks applied in the other main areas of State activity that fall to be assessed under the EU State aid rules, the *Altmark* criteria can be conceived of as an assessment of the consistency of the measure's object with the State's claimed objective. Is the object of the State funding is in fact, as the State claims, to provide appropriate remuneration necessary for discharging a genuine SGEI and therefore equalise the beneficiary's position with that of others?

We have also shown that, in common with the other main areas of State activity, the EU Courts have been prepared effectively to override the framework established by the *Altmark* criteria, in order to address apparent inequality of opportunity or the lack thereof, in the particular circumstances of the case, consistent with our conception of the various methodologies and frameworks as proxies only in making this key assessment.

Finally, we have demonstrated how the distinctions drawn by the EU Courts in cases concerning the broader application of the compensation principle shed further light on the equality of opportunity principle underlying the notion of selective advantage as being based on the prevailing situation deriving from normal conditions of competition as opposed to some kind of hypothetical perfect level-playing field. Accordingly, measures that have a compensatory purpose, can only be considered as consistent with equality of opportunity where they are designed to offset an earlier specific State measure that itself derogated from normal conditions of competition. The same logic also applies to the *Altmark* framework, where State funding, if market-orientated and therefore representing appropriate remuneration for the public service obligations, can be considered as restoring the equality of opportunity which the State itself disturbs through the imposition of additional burdens on the particular undertaking(s) entrusted with the SGEI.

Chapter 6
Conclusions

I. Equality of opportunity and its proxies / heuristics

As explained in Chapter 1, the analysis of State aid definition has come to be dominated by a focus on individual components and a series of apparently disparate frameworks and methodologies, leading to the development of case-law and literature that largely operates in fragmented silos and fails to provide a coherent, broader conceptual account.

The first main innovation of this thesis is to conceive of these constructs not as ends in and of themselves, but rather as means or proxies / heuristics to assess something else more fundamental that underpins the concept of State aid. The thesis' argument is that this "something" is the principle of equality of opportunity, which derives from the essence of the EU's internal market as an area of undistorted competition and which, in line with the "internal market approach", represents the specific liberalisation commitment which the EU State aid rules are designed to protect. This principle requires equality of opportunity both as between undertakings and sectors in order to provide for a total level playing field in the EU internal market that safeguards what we have shown are the two main pre-occupations of EU State aid control, fair *micro-economic* competition between undertakings as well as fair *macro-economic* competition between EU Member States.

On this approach, the main frameworks and methodologies devised by the EU Courts for assessing the criterion of selective advantage, though very different on the surface, are in fact all concerned with the same central assessment of determining whether the State measure under consideration is consistent with equality of opportunity. More specifically, the question is whether the measure creates inequality of opportunity between undertakings or sectors or rather is consistent with the constituents of the broader framework entrenched in the EU Treaties that themselves secure equality of opportunity at the broader level in the internal market, essentially based on the conditions of competition resulting from the interaction of the market mechanism and rules of general economic and regulatory policy which are consistent with EU law.

Therefore, in the case of State measures taken in the exercise of public authority functions where the derogation test and similar frameworks are applied, the assessment is ultimately whether the measure in question, which applies only to certain undertakings or sectors, could nonetheless be considered as forming part of general economic and regulatory policy which would be in accordance with equality of opportunity. Similarly, in the case of measures which take the form of economic transactions where the MEOP is applied, the assessment is whether the measure in question, which applies only to the counterparty or counterparties to the transaction, represents commercially or economically rational conduct in line with the market mechanism and therefore again, with equality of opportunity. Finally, where the State is seeking to fund SGEI or compensate for other disadvantages and the compensation principle is applied, the assessment is ultimately whether the funding, which is only conferred to an individual undertaking or certain undertakings, could be considered as appropriate remuneration or justifiable compensation for the additional burdens imposed that themselves derogated from the normal conditions of competition, which is thus in line with equality of opportunity.

The thesis therefore brings clarity and unity to the case-law. Judgments spanning across the full spectrum of the EU Courts' assessment of selective advantage, as apparently diverse as *Paint Graphos,*[780] *Azores*,[781] *ING*,[782] *Chronopost*,[783] *Altmark*[784] and *France Télécom,*[785] can therefore all be rationalised straight-forwardly in the same way, as representing different variations of the same essential assessment.

In *Paint Graphos*, which is seen as a paradigm example of the derogation framework in the area of "material selectivity", the relevant question being addressed through the application of this assessment was ultimately whether the tax exemptions for cooperative societies at issue could be considered as an appropriate adaptation of the broader corporation tax regime in light of the particularities of cooperative societies and could therefore be considered as part of the general tax policy and as

780 Cases C-78/08 to 80/08 *Paint Graphos*, addressed at pages 88-89 and 95-96 above.
781 Case C-88/03 *Portugal v Commission (Azores)*, addressed at pages 97-99 above.
782 Case T-29/10 *Netherlands and ING Groep v Commission* and Case C-224/12 P *Commission v Netherlands and ING Groep*, addressed at pages 155-158 above.
783 Joined cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost v Ufex and Others*, addressed at pages 165-166 above.
784 Case C-280/00 *Altmark*, addressed throughout Chapter 5 above.
785 Joined Cases T-427/04 and T-17/05 *France and France Télécom v Commission* and Case C-81/10 P *France Télécom v Commission*, addressed at pages 216-217 above.

consistent with equality of opportunity. Similarly in the *Azores* case, which established the framework for assessing so-called "geographic selectivity", the question was ultimately the same – could the regional tax reductions be approximated to the general tax policy and therefore be considered as consistent with equality of opportunity – which required first to establish whether the regional authorities or the central authorities should be considered as the relevant protagonists in relation to the measure.

In *ING* and *Chronopost*, the question was whether, notwithstanding the privileged positions of the State actors in these circumstances as having bailed out a financial institution during the financial crisis in *ING* and as enjoying a monopoly position with respect to the provision of the universal post service in *Chronopost*, meaning that that no private actor could have been in the same position, the further transactions undertaken flowing from these positions could be considered as economically rational and therefore in line with the market mechanism and equality of opportunity.

In the *Altmark* case, the assessment came down to whether the funding for local transport services could be conceived of as market-orientated remuneration necessary for the discharge of a genuine SGEI and therefore appropriate compensation for the additional public service obligations imposed which themselves derogated from normal conditions of competition, meaning that the funding would be in line with equality of opportunity. Finally, in *France Télécom*, the question was ultimately whether the preferential tax regime for the company was sufficiently closely connected to the previously company-specific applicable disadvantageous tax regime such that the new tax benefits could be considered as compensation for the previous regime which itself derogated from normal conditions of competition, and therefore would be consistent with equality of opportunity.

At the same time, in conceiving of the various methodologies and frameworks as proxies only, the thesis provides a rationalisation of the most apparently difficult cases, namely, those cases in which the EU Courts have either taken what may be considered as a very flexible approach to applying these methodologies, or indeed have disregarded them altogether. Cases like *Orange*,[786] *Gibraltar*,[787] *Spanish*

[786] Case T-385/12 *Orange v Commission* and Case C-211/15 P *Orange v Commission*, addressed at pages 119-121 above.

[787] Joined Cases C-106/09 P and C-107/09 P *Commission v Gibraltar and UK*, addressed at pages 121-124 above.

Ferries[788] and *BUPA*[789] therefore all represent instances where a different approach was required in order to address apparent inequality of opportunity or the lack thereof in the particular circumstances of the case.

Accordingly, in the *Orange* case, the derogation framework was disregarded as a measure applicable to a single undertaking only clearly could not be considered as a measure of general economic and regulatory policy that could be consistent with equality of opportunity, while in the *Gibraltar* case, the derogation framework was disapplied as the Court of Justice considered that the tax system reform at issue, in light of its background and practical application, privileged offshore companies and therefore was not consistent with equality of opportunity.

Similarly in the *Spanish Ferries* cases, the General Court identified State aid notwithstanding that the terms of the purchase at issue may have approximated to market benchmarks in accordance with normal practice under the MEOP, because the sequence of events led the Court to conclude that the State had no need for the amount of tickets purchased and therefore that the transaction was a sham, but had the objective purpose of conferring a benefit on the ferry services provider. Finally, in the *BUPA* case, the General Court effectively disapplied the third and fourth *Altmark* criteria in order to avoid categorising Ireland's system of risk equalisation as State aid in circumstances where, due to the general and neutral nature of the system, the Court considered that there was no object to benefit particular undertakings and therefore no inequality of opportunity.

The thesis' approach also provides a lodestar as to how the EU Courts may approach novel forms of intervention and situations which fall beyond the kinds of situations that the existing frameworks and methodologies address, such as the *Tax Ruling* cases,[790] where we have shown that the approach of the Commission and the EU Courts to the ALP was driven by the equality of opportunity principle (albeit,

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788 Case T-14/96 *BAI v Commission* and Joined Cases T-116/01 and T-118/01 *P & O European Ferries (Vizcaya) and Disputación Foral de Vizcaya v Commission*, addressed at pages 180-182 above.

789 Case T-289/03 *BUPA and Others v Commission*, addressed at pages 206-211 above.

790 Joined Cases T-755/15 and T-759/15 *Luxembourg and Fiat v Commission*; Joined Cases T-760/15 and T-636/16 *Netherlands and Starbucks v Commission*; Joined Cases T-778/16 and T-892/16 *Ireland and Apple v Commission*; Joined Cases T-816/17 and T-318/18 *Luxembourg and Amazon v Commission* and Joined Cases C-885/19 P and C-898/19 P *Fiat and Ireland v Commission*, addressed at pages 128-133 above.

with the Court of Justice ultimately taking a more stringent approach to the overriding of Member States' reference systems in accordance with the *Gibraltar* judgment).

Furthermore, in encapsulating fair competition at two levels, both in terms of micro-economic rivalry between undertakings and macro-economic rivalry between States, the equality of opportunity principle put forward in this thesis provides a complete answer to the assessment of selective advantage and enables rationalisation of some of the more difficult cases and problems.

This includes the *FIH* case,[791] where the Court's disqualification of exposures resulting from previous grant of State aid in assessing the economic rationality of further transactions stemmed from the imperative of equality of opportunity between undertakings which had received State aid and those that did not and therefore fair micro-economic competition, and the *World Duty Free* case,[792] where the Court's finding that tax benefits incentivising certain types of investments constituted State aid was ultimately motivated by concerns in relation to their impact on macro-economic competition between Member States with respect to investment flows.

It also accounts for the differing significance accorded to the holding of a competitive tender under the MEOP where a competitive tender is normally sufficient to rule out selective advantage, and under the *Altmark* framework, where even if a competitive tender is held, a selective advantage would still be present if there is no genuine SGEI. While a competitive tender generally precludes the State from creating artificial demand in order to benefit a particular undertaking and therefore unfair micro-economic competition as there can be no guarantee that the State's favoured operator would prevail in the tender, in the SGEI context, there is also a greater degree of concern in relation to creating artificial demand in order to benefit *particular sectors or activities*, i.e. fair macro-economic competition, given that the State is acting to procure services in a context and mode in which other private operators would not act. Both the fair micro-economic competition and fair macro-economic competition dimensions are therefore critical to a proper appreciation of the concept of selective advantage and shape how the equality of opportunity principle must be applied.

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791 Case C-579/16 P *Commission v FIH Holding and FIH Erhversbank*, addressed at pages 170-172 above.

792 Joined Cases C-20/15 P and 21/15 P *European Commission v World Duty Free and Others*, addressed at pages 112-116 above.

Finally, and to conclude this section, while this thesis puts forward an equality of opportunity approach to assessing selective advantage and therefore the classification of State aid, that of course, is not the end of the story insofar as the overall State aid assessment is concerned, as measures constituting "State aid" may still be justified as compatible aid. Indeed, as the thesis explains, the compatibility assessment examines whether the breach of equality of opportunity can be justified with reference to the State's policy objectives in seeking to favour those undertakings / sectors. Here, and in recognition of the State's role in pursuing important public policy objectives, the compatibility framework provided for in Articles 107(2)-(3) and 106(2) TFEU, leaves space for these to be achieved, while seeking to limit distortions of competition and trade in the EU internal market, as represented by the balance drawn out by the *Hinkley Point C* judgment.[793]

Indeed, the space for action afforded to Member States under these provisions reflects the important public duties of the State in seeking to address market failures, providing the basis of the welfare state, and responding and reacting to crises. This is most starkly represented by the significant additional flexibility granted to Member States in the form of the temporary frameworks adopted by the Commission in relation to State aid to address the financial crises, the Covid-19 pandemic and the economic impact of Russia's invasion of Ukraine.

The equality of opportunity approach put forward in this thesis is therefore limited to the assessment of selective advantage and the definition of State aid. It should not be seen as overriding Member States' ability to pursue important public policy objectives, as it is the compatibility stage, rather than the definition stage, which is the final word. In this regard, whereas the assessment of selective advantage and the definition of State aid is based on Member States' "special responsibility" not to disturb equality of opportunity in the internal market, the compatibility assessment recognises Member States' "special responsibility" to fulfil their public State duties.

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[793] Case C-594/18 P *Austria v Commission (Hinkley Point C)*, addressed at pages 45-46 above.

II. Selective advantage as an object assessment and the interplay between objectives and effects

The other main insight of this thesis is to conceive of the selective advantage assessment as an *object* assessment, which examines whether the objective purpose of the State measure is consistent with the principle of equality of opportunity.

The thesis demonstrated how the nature of the assessment as an object assessment derives from the scheme of State aid control under the TFEU as elucidated in the case-law. The alternative starting point, a more absolute effects-based approach which would consider whether a State measure may have the effect of benefitting certain undertakings or sectors more than others, would have no natural limits given the inevitable divergent impacts of most State measures and would therefore diminish the selective advantage requirement altogether. It would also create a disconnect with the State aid compatibility assessment stage, because if State measures would typically be defined as State aid just based on the fact that they had a disparate impact, where favouring those undertakings / sectors was not the means of achieving the policy aims pursued, it would not then make any sense to approve aid based on those policy aims. An object approach however, is capable of giving the selective advantage requirement more practical meaning and also allows for coherence between State aid definition and compatibility. It is only where the object of the measure is to create inequality of opportunity and favour particular undertakings or sectors as a means itself of achieving particular policy goals that we can then assess, as part of the compatibility stage, the State's policy justification in seeking to favour those undertakings / sectors.

Conceiving of the selective advantage assessment as an examination of the State measure's object has enabled the thesis to address what is perhaps the most challenging aspect of State aid definition – the interplay between objectives and effects. On the one hand, and contrary to what may otherwise appear from the EU Courts' rhetoric, objectives are integral and play a key role across all main areas of selective advantage assessment. Where the State is exercising public authority functions and the derogation framework is applied, the objective of the relevant reference system forms a critical part of the benchmark against which the differentiations produced by the measure are assessed. Where the State may be acting in a private operator capacity, the objective pursued plays an important role

in determining whether the MEOP may be applied. This is both in the case of borderline situations, such as the *EDF* case[794] where the EU Courts accorded particular significance to the objective pursued as part of the required "*global assessment*", but more generally, as applying the MEOP to assess State measures simply because they take the form of an economic transaction, in essence, gives weight to the State's implicit claimed objective that it is undertaking a commercially or economically rational operation.

Similarly, in the SGEI area, it is the State's objective, namely, providing appropriate compensation necessary to secure the provision of a genuine SGEI, that triggers the application of the *Altmark* framework. The same is also true of the broader application of the compensation principle, where the State's objective in providing compensation for damage, or addressing specific disadvantages faced by the undertaking or sector concerned, is the starting point for determining whether the compensation principle could allow the measure to avoid classification as State aid.

But claimed objectives, whether explicit or implicit, are not simply to be accepted unquestionably. On the contrary, it is effectively the claimed objective that is ultimately being tested through the application of the selective advantage assessment.

In this regard, the thesis has shown how the assessment of selective advantage in each of the three main areas essentially amounts to a kind of "consistency test" – is the object of the measure, taking into account all the relevant circumstances, consistent with the claimed objective? Where the State is exercising public authority functions and the derogation framework is applied, the question is ultimately whether the measure is consistent with the objective of the relevant reference system to which it purports to pertain. In the case of economic transactions assessed under the MEOP, the question is whether the measure is in reality a commercially or economically rational transaction as it is presented to be. In the area of SGEI funding and the *Altmark* framework, the question is whether the funding is ultimately economically rational remuneration for the provision of a genuine SGEI and therefore appropriate compensation for the additional public service obligations imposed, as is claimed. Similarly, in the case of broader application of the

[794] Case T-156/04 *EDF v Commission* and Case C-124/10 P *Commission v EDF*, addressed at pages 151-155 above.

compensation principle, the question is whether the advantage provided is sufficiently linked to the earlier damage or departure from normal conditions of competition caused by the State, such that it is appropriate compensation for this earlier damage or departure, as is maintained. In the words of Advocate General Kokott, "*inconsistency ultimately indicates abuse*",[795] as where the substance of the measure does not in fact match-up to what is effectively claimed, then it may be assumed that the object of the measure is simply to benefit the undertaking(s) or sectors(s) concerned and create inequality of opportunity.

The subjective claims made by the State are therefore subordinated to the objective nature of the measure. While this normally operates to test the claim by the State that its measure is consistent with equality of opportunity, it also works the other way around as demonstrated by the *Frucona* case,[796] where the EU Courts maintained that arguments in relation to compliance with the MEOP raised by the counterparty to the relevant transaction could not simply be dismissed on account of the fact that the Member State had conceded that the measure should be considered as rescue aid.

The objectives pursued by the State, which are political, are therefore relevant as part of the State aid definition exercise, as they are relevant to the determination of the object of the measure. However, as the thesis has shown, they do not override the object. By way of example, and with reference to *Belgium v Commission (Gasunie*),[797] if a transaction is commercially justified, the political objective to support particular undertakings does not transform that transaction into State aid.[798] The same would be true even if the objective underlying the measure is nakedly political, such as seeking to benefit political allies or constituents.[799]

In the event, however, that the measure is classified as State aid, the objective pursued is again relevant as part of the compatibility stage, which as explained

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795 Opinion of Advocate General Kokott in Case C-233/16 *ANGED*, paragraph 82.

796 Case T-103/14 *Frucona Košice v Commission* and Case C-300/16 P *Commission v Frucona Košice*, referred to at pages 158-160 above.

797 Case C-56/93 *Belgium v Commission*, referred to at page 161 above.

798 Similarly, and with reference to the *British Sugar* case mentioned at note 423 above, even if the objective of a measure is to ensure the viability of a particular undertaking, it will not give rise to a selective advantage and State aid if the measure, in principle, is also open to any other undertaking to benefit, such that it can be seen as a measure of general economic and regulatory policy.

799 Albeit we are not aware of any cases where the existence of such an objective has been confirmed by the Courts.

above, assesses the State's justification in seeking to favour the undertakings / sectors that benefit from the measure. In this regard, the seminal *Hinkley Point C* judgment,[800] by disavowing that State aid needed to be aimed specifically at a so-called "objective of common interest", in theory broadens the admissible policy justifications that could be pursued, reflecting a greater sensitivity to the politics of State aid. That said, even adopting the most liberal reading of the *Hinkley Point C* judgment, State aid must still be aimed at "*the development of certain economic activities or areas*" within the meaning of Article 107(3)(c) TFEU, which must restrict to a certain extent the most nakedly political measures of support.

In terms of the role of effects in State aid definition and the so-called "effects-based" approach, it is clear that the substance of the measure and therefore its object must triumph over its form. This is demonstrated by the *Gibraltar* and *EDF* cases, where the EU Courts emphatically denied that the techniques employed by the State authorities – a reform of the broader tax regime and the waiving of a tax claim, respectively – can be considered as determinative. However, beyond this, insistence upon an "effects-based" approach seems misleading, as the thesis has shown that the assessment does not look to the actual or potential competitive effects of the State measure, but rather to the object from the State's perspective.

This is apparent from all of the main areas of selective advantage assessment. Where the State is exercising public authority functions and the derogation framework is applied, the discrimination assessment that is at the heart of this framework is entirely focused on the consistency of the measure in light of the relevant objective, independent of the actual or potential competitive effects, as the EU Courts ultimately made clear in the *Eventech* case.[801]

In the case of economic transactions assessed under the MEOP, the relevant position and attributes of the State must be taken into account in order to consider whether the transaction is commercially or economically rational. This means that the assessment is undertaken from the perspective of the State as opposed to the perspective of the beneficiary and its competitors, even though that may lead to measures which could have a significant impact upon competition escaping State

800 Case C-594/18 P *Austria v Commission (Hinkley Point C)*, addressed at pages 45-46 above.

801 Case C-518/13 *Eventech*, addressed at pages 105-107 above.

aid control, as demonstrated in the *Linde* case.[802] In a similar vein, the assessment must be based on an *ex ante* evaluation in light of the knowledge that was then available to the State actor, as opposed to any *ex post* analysis that could take into account the actual effects of the measure, as illustrated by the *Stardust Marine* case.[803]

The same approach is also reflected in the *Altmark* framework in the SGEI area and its gateway requirement that there is a genuine SGEI, which adopts an *ex ante* standpoint based on the contemporaneous evidence available at the time in assessing whether there is insufficient provision of the service by the market for the purposes of determining whether there is a genuine SGEI and therefore whether there is a genuine need for the State to intervene by funding the service in question. The negation of actual or potential effects is further embodied in in the first and second *Altmark* criteria, that the SGEI obligations are sufficiently clearly defined and that the compensation parameters are established in advance, which are formal rather than substantive, and would not necessarily give rise to a different substantive outcome in terms of the ultimate level of State funding.

In this sense, the assessment of selective advantage bears certain similarities to the approach of the EU Courts in considering whether an agreement between undertakings may have the object of restricting competition for the purposes of Article 101(1) TFEU, which is based on: "*the content of its provisions, its objectives and the economic and legal context of which it forms a part*",[804] and if established, allows one to dispense with the requirement to prove the existence of actual negative effects on competition.[805] But just as under competition law where even an agreement that is restrictive of competition by object could still, in principle, be justified on the basis of efficiencies under Article 101(3) TFEU,[806] similarly, a State measure involving State resources which has the object of creating inequality of

802 Case T-98/00 *Linde v Commission*, addressed at pages 164-165 above.

803 Case C-482/99 *France v Commission (Stardust Marine)*, addressed at page 173 above.

804 Case C-67/13 P *Cartes Bancaires v Commission*, paragraph 53; Case C-32/11 *Allianz Hungária Biztosító and Others* EU:C:2013:160, paragraph 36; and Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* EU:C:2009:610, paragraph 58.

805 All that is required to be shown is that the agreement has the *potential* to have a negative impact on competition – see Case C-32/11 *Allianz Hungária Biztosító and Others* EU:C:2013:160, paragraph 38; and Case C-8/08 *T-Mobile Netherlands and Others* EU:C:2009:343, paragraph 31.

806 See e.g. Case T-460/13 *Sun Pharmaceutical Industries and Ranbaxy (UK) v Commission* EU:T:2016:453, paragraph 228.

opportunity may nonetheless be justified on the basis of the public policy aim pursued through such favouring under the compatibility stage, provided the overall balance of the measure is positive.

It is at this stage that the measure's effects, properly speaking, in terms of distortions of competition and trade are assessed more systematically and weighed up against the positive effects of the policy justification pursued by the measure. Thus if the examination of selective advantage in the definition of State aid is an assessment of the object of the measure, the compatibility stage is more of an assessment of its effects.

III. A more principled account

The challenge set at the beginning of this thesis was to develop a more principled account of the case-law of the EU Courts in relation to the notion of selective advantage that could give meaning to the methodologies and distinctions drawn by the EU Courts without having to resort to pragmatism. The equality of opportunity approach advanced in this thesis, based on assessing whether the object of the measure is consistent with equality of opportunity, addresses this challenge and provides a positive account of the case-law with greater explanatory power that should enable one to better anticipate how the EU Courts will approach the assessment going forward.

The thesis has shown how this approach is, at the very least, consistently implicit in the case-law of the EU Courts. Yet there remain sizeable discrepancies between what the Courts do and what they say they are doing, with the insistence upon an "effects-based approach", and the repeated statement that Article 107(1) TFEU, "*does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects*",[807] as one of the most notable examples. This has the regrettable consequence of sowing unnecessary confusion in relation to the notion of selective advantage, as can be seen from the reaction in the commentary to the judgments in the *British Aggregates Association* cases,[808] where the language of the Courts was seen by some as giving

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807 Case C-173/73 *Italy v Commission*, paragraph 13, which is repeated throughout the case-law.

808 Case C-487/06 P *British Aggregates Association v Commission* and Case T-210/02 RENV *British Aggregates Association v Commission*, addressed at pages 103-105 above.

greater emphasis to the competitive effects of the measure, even though the actual framework set out by the Courts was entirely focused on the consistency of the measure in light of the relevant objective.

At the same time, the more implicit nature of the approach of the EU Courts may also have the unfortunate consequence of masking to an extent, the specific factors that inform how they tackle a particular case. This can be seen, for instance, in the cases where the reference system set by the Member State itself comes under challenge. Whereas in the *Gibraltar* case,[809] the Court of Justice effectively decided that inequality of opportunity was inherent in the new tax system devised by the Gibraltar authorities and defined it as State aid, the EU Courts declined to make such a finding in relation to the levies that were at issue in the *Progressive Turnover Tax* cases.[810] Yet, the specific factors that led to these conclusions are not fully articulated and therefore the rationale for the difference in approach is not fully clear.

This inevitably and unfortunately has an impact on the clarity of the notion of selective advantage. The Courts' failure to express what they are actually doing more explicitly and indeed in certain cases, more accurately, is not necessarily a phenomenon that is exclusive to EU State aid control,[811] and the Courts' possible reasons for doing so is an area that would benefit from further study and is beyond the scope of this thesis. But for the equality of opportunity approach that we have set out in this thesis to achieve its full potential in clarifying the notion of selective advantage and State aid, it is important that the Courts do not only "walk the walk" but also "talk the walk".

This, of course, need not require any dramatic, *Keck*-type reversal comparable to that which occurred in the case-law in relation to the free movement of goods,[812] as the equality of opportunity approach is already embodied in the case-law as this

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809 Joined Cases C-106/09 P and C-107/09 P *Commission v Gibraltar and UK*, addressed at pages 121-124 above.

810 Case T-20/17 *Hungary v Commission* and Joined Cases T-836/16 and T-624/17 *Poland v Commission* and Case C-596/19 P *Commission v Hungary* and Case C-562/19 P *Commission v Poland*, which are addressed at pages 124-128 above.

811 See P Ibáñez Colomo and A Lamadrid, 'On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know', in D Gerard, M Merola and B Meyring (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Brussels, Bruylant: 2017) 333-374, for certain examples in the EU competition law sphere.

812 Case C-267/91 *Keck and Mithouard* EU:C:1993:905, where the Court of Justice famously explicitly overruled certain of the earlier case-law and established a new legal framework for "certain selling arrangements".

thesis has demonstrated. Instead, what is required is simply a refining of the case-law and in particular, a movement away from formulations and terminology that do not correspond to the reality of the analysis that is being undertaken by the Court, and towards vocabulary that better reflects the approach which this thesis has expounded.

At the same time, the call for the EU Courts to be more explicit about the relevant factors that are driving their assessment is not a plea for them to start doing something entirely new, but simply to develop into a more consistent practice what they have already done in certain cases, such as in the *EDF* case,[813] where the Court of Justice enumerated certain factors that would need to be taken into account as part of the "global assessment" to determine whether the MEOP may be applicable and the *Spanish Ferries* cases,[814] where the General Court clearly laid out the indicia that led it to conclude that the State had no need for the tickets purchased and that the transaction was a sham. This is something that has become more normalised in the EU competition law sphere, where the EU Courts are more explicit in spelling out the relevant factors that are to be taken into account in assessing whether an agreement or conduct restricts competition,[815] and a similar practice could also be generalised in the area of State aid definition.

What is therefore required is simply an evolution in presentation by the EU Courts, that in line with the equality of opportunity approach expounded in this thesis, would provide greater clarity in relation to the notion of selective advantage and therefore State aid, befitting the significance of this discipline within EU competition law and policy and its role as the inspiration for new and developing subsidy control regimes further beyond.

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813 Case C-124/10 P *Commission v EDF*, addressed at pages 153-154 above.

814 Case T-14/96 *BAI v Commission* and Joined Cases T-116/01 and T-118/01 *P & O European Ferries (Vizcaya) and Disputación Foral de Vizcaya v Commission*, addressed at pages 180-182 above.

815 By way of recent examples, see Case C-525/16 *MEO – Serviços de Comunicações e Multimédia* EU:C:2018:270, paragraphs 28-31, in relation to price discrimination by a dominant undertaking under Article 102 TFEU; Case C-23/14 *Post Danmark II*, paragraph 68; Case C-413/14 P *Intel v Commission*, paragraph 139 in relation to rebate schemes applied by a dominant undertaking under Article 102 TFEU; Case C-234/89 *Delimitis v Henninger Bräu* EU:C:1991:91, paragraphs 19-26 and Case C-345/14 *Maxima Latvijaparagraphs* EU:C:2015:784, paragraphs 25-30, in relation to agreements under Article 101 TFEU.

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