

State Aid and Taxation: Can an Anti-avoidance Provision be Selective?

Annotation on the Judgment of the Court of Justice of 18 July 2013 in Case C-6/12, *P Oy*

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*It is established case law that the prohibition of State aid does not only apply to aid in the form of direct subsidies, but also covers more indirect forms of aid, such as relief from fiscal and para-fiscal levies.¹ However, four decades after the famous Italian textile case,² uncertainties remain as to the criteria to be used to determine whether an apparently favourable tax regime effectively constitutes State aid, i.e. has a selective nature. In recent years, the ECJ has issued several controversial judgments – sometimes spectacularly reversing decisions of the Court of First Instance – concerning selectivity in tax aid, such as *British Aggregates*,³ *Gibraltar*⁴ and *Azores*.⁵ The commented case, although not raising as many critiques as those landmark cases,⁶ presents some interesting aspects, which have led Advocate General Sharpston to qualify it as “curious”. It shows how difficult it can sometimes be for national courts not only to correctly apply the selectivity criterion, in particular as regards the determination of the relevant reference framework, but more generally to exactly understand the extent of their mission in the application of the State aid rules. Moreover, it offers interesting – if not worrisome – insights about the application of the State aid rules to domestic anti-avoidance tax provisions and their implementation by the tax administrations.*

I. Facts of the case

The factual and domestic legal background of the case is rather simple, if compared with many other ECJ cases dealing with taxation. Under the Finnish income tax law, companies are allowed to carry for-

ward losses incurred from business activity during the taxable period to later taxable periods. As a consequence, for the purposes of determining the tax base, it is possible to offset carried-forward losses against taxable income realized in the following 10 years. However, this right to deduct losses from

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1 See the founding case *Italian Textile Case C-173/73, Italy v Commission*, [1974] ECR 709. See also Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I8365. On State aid and taxation in general, see *Rust/Micheau (eds.)*, *State aid and Tax Law*, 2013; *Micheau*, *Droit des aides d'État et des subventions en fiscalité*, 2013; *Kube*, *Nationales Steuerrecht und europäisches Beihilfenrecht*, in *Becker/Schoen (eds.)*, *Steuer- und Sozialstaat im europäischen Systemwettbewerb*, 2005, p. 99-117; *Panayi*, *State aid and tax: the third way?*, *Intertax*, 6-7/2004, p. 283; *Waelbroeck*, *La compatibilité des systèmes fiscaux généraux avec les règles en matière d'aides d'État dans le Traité CE*, *Mélanges John Kirkpatrick*, 2004, p. 1023; *Luja*, *Assessment and Recovery of Tax Incentives in the EC and the WTO: A View on State Aids, Trade Subsidies and Direct Taxation*, 2003; *Wouters/Van Hees*, *Les règles communau-*

taires en matière d'aides d'État et la fiscalité directe: quelques observations critiques, C.D.E., 2001, p. 655; *Schön*, *Taxation and State aid in the European Union*, CMLR., 1999, pp. 927-928.

2 Case C-173/73, *Italy v Commission*, [1974] ECR 709.

3 Case T-210/02, *British Aggregates*, [2006] ECR II-2789; Case C-487/06, *British Aggregates Association v Commission*, [2008] ECR I-10505 and Judgment of 7 March 2012, Case T-210/02 RENV, *British Aggregates*, n.y.r.

4 Cases T-211/04 and T-215/04. *Commission and Spain v Government of Gibraltar and UK*, 2008 II-03745; Joined cases C-106/09 P and 107/09 P, *Commission and Spain v Govt of Gibraltar and UK*, 2011 I-11113. See the comment of *Rossi-Maccanico*, *Beyond the Pillars of Hercules of Selectivity*, *EStAL*, 2012, p. 443.

5 Case C-88/03, *Portugal v Commission*, [2006] ECR I-7115. On this judgment and regional selectivity in tax aid, see *Zatschler*, *Review of the Judgment in Case C-88/03, Portugal v Commission (Azores Tax Regime)*, *EStAL* 2006, p. 779; *Nicolaides*, *Developments in Fiscal Aid: New Interpretations and New Problems with the Concept of Selectivity*, *EStAL* 2007, p. 44 f.; *Gonzales*, *Re-*

present and future profits is denied in the event of the company's ownership changes. This measure aims to counteract the situations where profitable companies would aim to acquire loss-making companies with the only purpose of reducing their tax base.

Most probably in order to avoid undesired effects of this anti-avoidance provision, Finnish domestic law provides for an escape clause allowing tax authorities to authorize the loss offset even in the situations where the company ownership has changed. This can be taken into consideration "special circumstances". Such discretionary power of the Finnish tax authorities is clarified by administrative guidelines available to the public (a guidance letter and a circular). The guidance letter lists as special reasons, *inter alia* "transfers from one generation to another; the sale of an undertaking to its employees; the purchase of a new undertaking not yet active; changes of ownership within a group of companies; changes of ownership related to a rescue programme; particular impact on employment; and changes in ownership of listed companies".⁷

The case pending before the referring Court (Supreme administrative Court of Finland) concerns the company which was denied the authorization to deduct previous losses because of a change of ownership, because it could not demonstrate any special circumstances which would have enabled the tax administration to make use of the power conferred by the domestic income tax legislation. In its request, the Supreme Administrative Court first expressed doubts as to the determination of the reference framework. It considered that this framework could be either the general rule according to which losses can be carried forward or in the alternative the specific exclusion of the carry-forward in the case of a change of ownership. Then, the referring court asked whether the contested measure could be justified as a mechanism inherent to the tax system aiming at the prevention of abuse or evasion. Finally, it asked to what extent relevance has to be given to the margin of discretion granted to administrative authorities by the domestic legislation.

II. Reasoning of the Court

Although the Advocate General refused to address the issue of the qualification of the contested measures as State aid on the ground that it would not be

relevant for the solution of the case before the referring court,⁸ the ECJ made several interesting observations in that regard. However, due to the lack of the information submitted, it did not go as far as ruling on the classification of the tax measure as a State aid.

The ECJ first reminded that favourable tax measures can be considered as an aid, provided that they are not generally applicable to all economic operators. Then, it recalled the analysis to be followed to classify a State measure as selective. Firstly, the common or normal tax regime applicable in the Member State concerned has to be identified. Secondly, it has to be evidenced that "the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in the light of the objective assigned to the tax system of the member states concerned, are in comparable factual and legal situation (*ref. omitted*)".⁹ Later in the judgment, the ECJ adopts a narrow approach about the reference system (common or normal system), by considering – without much justification – that it consists in "the prohibition on the deduction of losses in the case of change of ownership".¹⁰

The ECJ went on by saying that the measure conferring an advantage to its recipient could be justified by the nature or general scheme of the system of which it is part. In the area of taxation, this is the case when the measure "directly results from the basic or guiding principle of its tax system".¹¹

gional Fiscal Autonomy from a State aid Perspective: The ECJ's judgment in *Portugal v Commission*, ET 2007, p. 328; *Sutter*, The Influence of the European State aid Rules on National Tax Policy, in *Andersson/Eberhartinger/Oxelheim* (Hrsg) National Tax Policy in the EU – To Be or Not to Be (2007) p. 130 f.; *Traversa*, Is it still room left in EU law for tax autonomy of Member States' regional and local authorities?, EC Tax Review, 1/2011 pp. 4-15; *Traversa*, The Selectivity Test: The Concept of 'Regional Aid', in *Rust/Micheau* (eds.), State aid and Tax Law, 2013, p. 119-135.

6 *Biondi*, State aid is falling down, falling down, falling down: an analysis of the notion of aid, CMLR, 2013, p. 1719-1744; *Lang*, State aid and Taxation: Recent Trends in the Case Law of the ECJ, EStAL 2012, p. 412.

7 Case C-6/12, *P Oy* [2013] ECR n.y.r., para. 8.

8 See Opinion, para. 34. According to the Advocate general, since the measures at stake were already into force in the moment of Finland's accession to the EU, even if they would constitute State aid, had to be considered as existing aid and for applied by the national judge as long as the Commission would not have intervened on the ground of Art. 108(2) TFUE.

9 Case C-6/12, *P Oy* [2013] ECR n.y.r., para. 19.

10 Case C-6/12, *P Oy* [2013] ECR n.y.r., para. 32.

11 Case C-6/12, *P Oy* [2013] ECR n.y.r., para. 22. See also Case C-78/08, *Paint Graphos and Others* [2011] I-07611, para. 65.

As regards the administrative discretion in the granting of the authorization to offset losses, the ECJ did not consider it as an element which would necessarily preclude a justification on the ground of the nature or general scheme of the system. Further, the Court labelled a particular criterion mentioned in the administrative guidelines detailing the special circumstances under which deduction could be granted, in particular maintaining the employment as “unrelated to the tax system” and therefore as potentially selective. Nonetheless, after noting that those guidelines were not legally binding, the ECJ did not analyze whether selectivity could be justified or whether the other constituting criteria of the notion of State aid were met due to the lack of information.

Finally, the ECJ took a position on what, in the Advocate’s General opinion, should have been the only issue raised by this case, i.e. the characterization of the measure as existing aid. On the basis of the information submitted, the ECJ noted that the Finnish regime at stake existed before the entry into force of the Agreement on the European Economic Area in 1994 and the accession of Finland to the European Union on 1 January 1995. Therefore, it had to be considered as existing aid, with the result that the national court did not have the power to enforce under the Treaty the prohibition of the existing aid. The ECJ nevertheless reminded that “amendment of the detailed arrangements for the implementation of an aid regime may lead, in some circumstances, to classifying such a regime as new aid”.¹²

III. Critique of the ECJ’s Approach

As a preliminary remark, it is worth emphasizing that the reasons behind the reference by the domestic court for the preliminary ruling remain unclear. It is indeed difficult to understand what type of consequences a classification of the measure as prohibited State aid could have on the taxpayer’s position in the domestic procedure. As the Advocate General pointed out, in the – arguably unlikely – event that

the ECJ would consider the measure as prohibited aid, it “will not benefit P Oy. Rather, the company would be denied the very tax advantage that it is seeking. It would not be able to obtain the authorization to carry forward and offset losses sustained in 2004 against profits arising in later years”.¹³ This peculiar factual background probably also motivated the Advocate General to avoid the discussion about the very existence of an aid, focusing instead on timing issues related to the adoption of the scheme.

On the contrary, the ECJ considered the question of the characterization of the measure in question as State aid-relevant and worth answering. Although at first sight the Advocate General’s approach could appear more sensible and efficiency-driven, the author tends to agree with that of the ECJ’s. Leaving aside the apparent lack of relevance of the issue of compatibility with the EU State aid regime for the resolution of the case pending before the referring court, it appears indeed logical, in order to allow the national court to consider a measure as existing aid, to first enquire whether the measure effectively amounts to State aid. Moreover, it gave the possibility to the ECJ to offer to the referring court (and the parties) some – apparently needed – free extra-training in EU law.

1. Establishing the Proper Reference Framework in Tax Matters

According to the traditional test applied by the ECJ, the first step consists of determining the common or normal tax regime applicable in the Member States concerned, to use it as benchmark for establishing whether the measure at stake is selective. As several authors have pointed out, identifying this “normal” tax regime is often a “mission impossible”.¹⁴ National corporate taxes tend to be complex systems, where to a certain degree, coherence may nevertheless be found in the simultaneous application of apparently distinct tax provisions, which for this reason should not be treated in an isolated perspective. For example, it is not uncommon to find in the Member States corporate tax systems combining a (relative) high nominal tax rate with a (relative) narrow taxable base. The latter is as a rule obtained through several deductions, exemptions and deferrals (each with different scope and effects), which lead to a considerably lower effective tax rate. Both from a policy

12 Case C-6/12, *P Oy* [2013] ECR n.y.r., para. 45.

13 Opinion of Advocate General Sharpston, Case C-6/12, *P Oy* [2013] ECR n.y.r., para. 19.

14 Schön, *Taxation and State aid Law in the European Union*, CMLR 1999, p. 29 f.; Lang, *ÖJT* 2009, p. 25; Sutter, *EG-Beihilfenverbot*, p. 112

and legal perspective, it would be simplistic, if not ill-advised, to consider that the high nominal tax rate is the normal regime and that the provisions narrowing the taxable base are derogations. And this is for a very simply reason: those elements of corporate tax systems are inextricably intertwined. In other cases, even when a general (normal) tax regime can apparently be identified, it can happen that it coexists with another general (normal) tax regime, making it very hard to establish which one of the two is the “common” one and which of them constitutes an exception.¹⁵ In the light of the existing case-law, it is therefore not unreasonable to consider that in tax matters (at least), the prohibition of State aid amounts to a prohibition of discrimination between taxpayers in a comparable legal and factual situation¹⁶ similar to the Treaty fundamental freedoms (which latter scope is however limited to the cross-border context).¹⁷

The tendency of the ECJ to focus more on justifying the difference in treatment between taxpayers made in domestic law, than on distinguishing between common and derogatory tax regimes is partially confirmed in the *P Oy* case. In the first step of the reasoning leading to characterize a tax measure as State aid, the ECJ cited the landmark *Gibraltar* case. In discussing the apparently neutral criteria used by the Gibraltar government to reform its corporate tax system (composed of three taxes independent from each other), the ECJ tended to move away from a relatively formal analysis of the tax measures at stake to examine the effects resulting from their

combined application, even at the cost of taking as a benchmark a hypothetical comprehensive corporate tax system.¹⁸ The ECJ also gave specific attention to the broader context and in particular the intention of the legislature, as it materialized in the effects of the disputed measures, i.e. the fact that it led to a very low effective taxation of off-shore companies.¹⁹ Moreover, the circumstance that the reform was the consequence of a need to replace the measures, which had been considered both prohibited under the EU State aid regime and harmful under the Code of Conduct, very likely contributed to shape the ECJ’s opinion.²⁰

In the commented case, the question of defining the normal tax system was essentially a matter of determining which domestic provision had to serve as a basis for the analysis. The ECJ chose not to analyse the measure at stake in the broader framework of the regime allowing the deductibility of business losses. It rather preferred to narrow the scope of its review and to focus on the specific provision excluding the deduction of losses in the case of change of ownership. At first sight, such decision may seem questionable because the very essence of this latter provision can only be understood in the light of the more general regime concerning the tax treatment of losses. Apparently, as a general rule, the Finnish system allows the deduction of losses.²¹ Disallowing the deduction for businesses after a change of ownership can indeed be regarded as an “exceptional” measure aiming at avoiding tax-saving practices consisting of taking advantage of the rule generally allowing the

15 See on this issue, *Lang*, EStAL, 2012, p. 418.

16 See *Lang*, EStAL 2012, p. 418 ; *Rossi-Maccanico*, Fiscal Aid review and cross-border tax distortions, Intertax, 2012, p. 98; *Bousin/Piernas*, EStAL 2008, p. 643; *Kube*, Die Gleichheitsdogmatik des europäischen Wettbewerbsrechts – zur Beihilfenkontrolle staatlicher Ausgleichszahlungen, EuR 2004, p. 244.

17 For a case of concurring application of State aid rules and Treaty Freedoms, see Case C-169/08 *Presidente del consiglio dei Ministri v Regione Sardegna*, [2009] ECR I-10821. For a critical comment, *Traversa/Vintras*, The Territoriality of Tax Incentives within the Single Market in Richelle/Schoen/Traversa, Allocating Taxing Powers within the European Union, 2013, p. 184. See also *Engelen*, State aid and Restrictions on Free Movement: Two Sides of the Same Coin?, 52 Eur. Taxn. 5 (2012), Journals IBFD (accessed 24 Feb. 2014); *C. Micheau*, Fundamental Freedoms and State aid Rules under EU Law: The Example of Taxation, 52 Eur. Taxn. 5 (2012), Journals IBFD (accessed 24 Feb. 2014).

18 AG Jaaskinen criticized such approach, which “would be tantamount to triggering a methodological revolution in the application of the rules relating to State aid (...)”. See Conclusions Jaaskinen, C106/09 P and C107/09 P, para. 202.

19 Joined cases C-106/09 P and C-107/09 P, *Gibraltar*, paras. 106-107. On this case, *Haslehner*, Materielle Selektivität von Steuerbeihilfen im Lichte des Gibraltar-Urteils des EuGH, *Jahrbuch Beihilferecht* 2012, p. 310.

20 Report of the Code of conduct Group of 23 November 1999 (Primarolo report), SN 4901/99, on measures A017, B012 and B017, available at http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf, last accessed 24 February 2014; Commission decision of 19 January 2005, OJ 2005 C 228, p. 9; Decision 2005/77/EC of 30 March 2004 on the aid scheme implemented by the United Kingdom in favour of Gibraltar Qualifying Companies, OJ 2005 L 29, p. 24.

21 This is the case in most, if not all, EU Member States. It can be seen as a measure implementing the principle according to which each taxpayer asked to be taxed according to the ability to pay principle. See *Michelsen*, General Report on Treatment of Corporate Losses, in the IFA Cahiers de droit fiscal international, Volume LXXXIIIa, 1998, p. 21-69; *Ault/Arnold*, Comparative Income Taxation, 3rd ed., 2010, p. 393-397 and from the German perspective, *Brodersen/Mückl*, The German Restructuring Privilege (Section 8c(1a) of the Corporate Income Tax Act) and the EU State aid Rules (Article 107(1) of the TFEU), *European Taxation*, N. 2-3, 2014, Journals IBFD (accessed 12 Feb. 2014).

deduction of losses. The consequence of this approach would be to treat the “exception to the exception”, allowing the tax administration to allow deduction under special circumstances as a mere application of the general rule, therefore excluding the qualification of selective aid. It could indeed be assumed that the discretionary powers conferred to tax administration aimed at verifying on a case-by-case basis whether the change of control was motivated by genuine economic considerations or is simply tax-driven. The ECJ, however, did not follow this line of reasoning.

In defence of the ECJ’s approach, it can be said that the objective of contrasting tax avoidance is taken into consideration later in the judgment to justify the difference in treatment. Moreover, the ECJ seems to show a – legitimate – concern about the fact that the margin of discretion given to tax authorities could be exercised in a manner inconsistent with State aid rules. And, had it not adopted a narrow reference framework, the ECJ would have had more difficulties to rule on this aspect. A definitive analysis is nonetheless difficult to give, since as the ECJ rightly pointed out, it “presupposes not only familiarity with the content of the provisions of relevant law but also requires examination of their scope on the basis of administrative and judicial practice and of information relating to the ambit *ratione personae* of those provisions”.²²

It should also be taken into consideration that the Court may also be influenced by the precedent of another domestic measure concerning an exception to the restriction of the deduction of corporate losses. A German provision allowing companies in difficulty acquired for the purpose of restructuring to benefit from loss carry-forward, as an exception to the limitation on tax loss carry-forwards in case of change in control, was considered a prohibited State aid by the Commission in 2011.²³ This Commission decision was abundantly discussed in the German literature.²⁴ Despite the fact that there are significant differences between the Finnish and the German measures, some of the statements made by the ECJ in the case at stake seem to support the Commission’s approach, especially in respect to the determination of the reference framework.

2. Taking into Account the Objective of the Tax System to Justify the Measure: Extrinsic versus Intrinsic Objectives

The ECJ makes also reference to another recent important decision concerning State aid and taxation, the *Paint Graphos* case, regarding the tax regime of Italian cooperative societies, which tends to give a rather broad meaning to the expressions “objective assigned to the tax system”. Although it is settled case law that “Article [107(1) TFEU] does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects”,²⁵ the determination of the purposes of the tax system, or of the tax measure at stake, plays an important role in the analysis of the selectivity. In the commented case, the discussion of the objectives of the measure intervenes at two levels (which are respectively second and third steps in the ECJ reasoning mentioned above).²⁶ First, the determination whether the undertakings are in the comparable factual and legal situation must be done “in the light of the objective assigned to the tax system of the Member State concerned”. Secondly, a tax measure conferring an advantage on its recipient shall not be considered selective if it can be justified “by the nature of general scheme of the system of which it is part”²⁷ or in other words if “that measure results directly from the basic or guiding principles of its tax system”.²⁸

Interestingly enough, the Court does not seem to consider in *P Oy* that the determination of the objec-

22 Case C-6/12, *P Oy* [2013] ECR n.y.r., para. 20.

23 Decision of the European Commission of 26 January 2011, OJ 2011 L 235/26.

24 See *Schön*, § 8c KStG und Europäisches Beihilfenrecht, JbFSt 2011, p. 127; *Arhold*, The German Scheme on the Fiscal Carry forward of Losses – a ‘Selected Case’, EStAL 2011, p. 71 at p. 75; *Brodersen/Mückl*, The German Restructuring Privilege (Section 8c(1a) of the Corporate Income Tax Act) and the EU State aid Rules (Article 107(1) of the TFEU), European Taxation, N. 2-3, 2014, Journals IBFD (accessed 12 Feb. 2014), in particular the literature quoted at fn. 26 and 28.

25 Case C56/93, *Belgium v Commission* [1996] ECR I723, para. 79; Case C-241/94, *France v Commission* [1996] ECR I-04551, para. 20; Case C-75/97, *Belgium v Commission* [1999] ECR I-03671, para. 25; and Case C409/00, *Spain v Commission*, [2003] ECR I01487, para. 46.

26 See in particular Case C-487/06 P, *British Aggregates v Commission* [2014] ECR n.y.r., paras. 86-92; joined cases C-106/09 P and C-107/09 P, *Cibraltar*, paras. 90-91.

27 The justification by the nature of general scheme of the system, although mentioned by the Court already in *Commission v Italy* (Italian Textile), para. 13, has been developed by the Court mostly in relatively recent case-law. AG Geelhoed considered it “amorphous”. See also Opinion of Advocate General Geelhoed, Case C-88/03, *Portugal v Commission* [2006] ECR I-07115, para. 62.

28 Case C-6/12, *P Oy* [2013] ECR n.y.r., para. 22.

tive²⁹ could play a role in the establishment of the reference framework (first step).³⁰ However, other cases in the area of taxation show that the objective of the measure can even be relevant to establish the reference framework, i.e. the tax regime of reference.³¹ In *P Oy*, the issues of comparability and justification tend to be addressed simultaneously by the ECJ in discussing the objective of the measure at stake. This is not unsurprising, considering that the Court has often acted so in its previous case law, not only in the area of State aid but also concerning the application of the fundamental freedoms.³² Moreover, although these issues can theoretically be distinguished,³³ there are good reasons to view the third step of the ECJ's reasoning as an integral part of the discrimination analysis, aiming at establishing whether the tax measure at stake arbitrarily distinguishes between taxpayers or whether the difference in treatment is coherent.³⁴

In the commented case, the ECJ seems to confirm the distinction between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it (e.g. social or regional objectives) and, on the other hand, the mechanisms inherent in the tax system itself, which are necessary for the achievement of these objectives.³⁵ Indeed, in the *P Oy* case, the Court considers that the objective of avoiding trade in losses is "not unrelated to the tax system",³⁶ unlike the one of "maintaining employment". This

distinction tends to overlap with the well-known distinction between revenue-raising measures and tax subsidies.³⁷ As Advocate General Colomer pointed out:

"I recognise that the dividing line between measures which may constitute public subsidies, on the one hand, and measures forming part of a State's general system of taxation, on the other, may sometimes be difficult to draw. However, any system of fiscal bonuses has the effect of exempting a group or sector of taxable persons from the tax system generally applicable. Such exemptions (...) often pursue objectives different from what might be called primary taxation requirements. (...) They serve to meet social aims, industrial or regional development aims and other similar objectives. In terms of their function, they are so similar to direct aid granted by States that, for the purposes of Article [107] of the Treaty, they must in principle be treated as such. Where that is the case, it will be for the State which introduces them 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 (...)"³⁸

29 In the case discussed, the objective of system in general and not of the tax advantage as such.

30 This differs from the selectivity test used by the court in the *Adria Wien* judgment.

31 Cases C-78/08 to C-80/08, *Paint Graphos* [2011] ECR I-n.y.r., paras. 54-62; Joined cases C-106/09 P and C-107/09 P, *Gibraltar* [2011] ECR I-n.y.r., para. 101; Case C-487/06 P, *British Aggregates Association v Commission* [2008] ECR I-10505, para. 86. Quigley distinguishes between the policy objective of the tax system as a whole and the objective of the favorable tax measure (see Quigley, *Direct Taxation and State Aid: Recent Developments Concerning the Notion of Selectivity*, Intertax, 2012, p. 115).

32 For a good illustration of how the similarity of the Court's approach between State aid and freedoms of movements, see Case C-169/08, *Presidente del Consiglio dei Ministri v Regione Sardegna* [2009] ECR 2009 I-10821. See on this issue, Wattel, Forum: Interaction of State Aid, Free Movement, Policy Competition and Abuse Control in Direct Tax Matters, 5 *World Tax J.* (2013), Journals IBFD (accessed 24 Feb. 2014).

33 On the comparability and justification in establishing selectivity, see Kurcz/Vallindas, Can General Measures Be... Selective? Some thoughts on the interpretation of a State aid definition CMLR, 2008, p. 159-182.

34 See Biondi, State aid is falling down, falling down, falling down: an analysis of the notion of aid, CMLR, 2013, p. 1719-1744,

2013, esp. p. 1730-1731; Prek/Lefevre, The requirement of selectivity in the recent case law of the court, 2 *European State aid Law Quarterly* (2012), p. 335 et seq.

35 See case *P Oy*, para. 30. This distinction is also to be found in the Commission Notice on the application of State aid rules to measures relating to direct business taxation, 1998 C 384/03, of 11 November 1998, para. 27 and in the Commission Report of 9 February 2004 on the implementation of the Commission notice on the application of the State aid rules to measures relating to direct business taxation, C (2004) 434, para. 36.

36 Case C-6/12, *P Oy* [2013] ECR n.y.r., para. 26. See also Case C-308/01 *Gil Insurance and Others v Commissioners of Customs & Excise* [2004] ECR I-4777, paras. 74 and seq.

37 On tax expenditures, see for example Surrey/McDaniel, *Tax Expenditures*, Harvard University Press, 1985, esp. p. 99-117; McDaniel/Surrey, *International Aspects of Tax Expenditures: A Comparative Study*, Kluwer, Dordrecht 1985; Thuronyi, "Tax Expenditures: A Reassessment", *Duke Law Journal*, 1988, p. 1156. On the distinction between Fiskalzwecknormen and Lenkungsnormen in German tax law, see Birk, *Steuernrecht*, 13. ed., 2010, para. 204 seq.

38 Opinion of Advocate General Colomer, Case C-6/97, *Commission v Italy*, [1999] ECR I-02981, para. 27. See also Opinion of Advocate General Jacobs, Case C-52/97 *Viscido and Others v Ente Poste Italiane*, [1998] ECR I-2629, para. 15; Opinion of Advocate General La Pergola, Case C-75/97 *Belgium v Commission*, [1998] ECR I-03671, para. 18.

This approach taken by the Court in the commented case seems however to slightly contradict the view taken by the Commission in its 1998 Notice on the difference between general and selective measures in the area of direct business taxation. According to the Commission:

“Tax measures which are open to all economic agents operating within a Member State are in principle general measures (...) provided that they apply without distinction to all firms and to the production of all goods, the following measures do not constitute State aid: (...) – measures pursuing general economic policy objectives through a reduction of the tax burden related to certain production costs (research and development (R&D), the environment, training, employment). The fact that some firms or some sectors benefit more than others from some of these tax measures does not necessarily mean that they are caught by the competition rules governing State aid (...) Similarly, tax incentives for environmental, R&D or training investment favour only the firms which undertake such investment, but again do not necessarily constitute State aid.”³⁹

This seems to imply that differences in treatment may be justified under policy objectives that are clearly extrinsic to the tax system (adopting a tax expenditures approach). However, one should avoid jumping into too hasty conclusions and see a fundamental inconsistency between the Commission and the ECJ. The paragraph quoted concerns the distinction between general and selective measure. In discussing the justification according to the economy or nature of the general tax system, the Commission also relies on this distinction between extrinsic and intrinsic goals assigned to the tax system in its 1998 Communication.⁴⁰ This leads to think that extra-fiscal policy objectives could play a role in the determination of the reference framework but not subsequently at the

level of the justification. As always, much, if not everything, depends from the determination of the reference framework.

However, even if we admit that employment policy objectives fall outside the goals normally assigned to taxation, it remains unclear to what extent the discretion of the Finnish tax authorities to authorize the deduction of losses in the case of special circumstances was exercised on the basis of “objective unrelated to the tax system”. According to domestic administrative guidelines referred to in the ECJ’s judgment, “the purpose of the Paragraph 122 of the TVL to prevent loss-making companies from being converted into a commodity. If an undertaking’s change of ownership does not have the characteristics described, the authorisation for loss deduction may be granted”. The same guidelines also state that “authorisation for loss deduction may be granted where deduction is necessary for a [company] to continue its activities. An absolute condition may be that the [company] continues its activities after the change in ownership. If, in practice, the [company] has ceased activities and its value is essentially based on the established losses, authorisation to derogate should not be granted”.⁴¹

This seems to indicate that the power granted to the tax administration is exclusively exercised in order to avoid trade of loss-making company. The reference to employment considerations in a non-exhaustive list of special reasons, also containing circumstances such as transfers from one generation to another or changes in the ownership of listed companies, appears in this context rather casual and should not, in the author’s view, be put on the same footing as what undoubtedly appears to be the primary objective of the legislation at stake. It is understandable that the ECJ did not want to validate the compatibility of a domestic provision in the absence of sufficient elements. However, trying to prevent that an anti-avoidance measure of this nature becomes in the hands of the tax administration a weapon aimed at carrying on protectionist employment policy was maybe an unnecessary preoccupation in this case. In a broader context, the ECJ’s judgment confirms the Commission practice according to which anti-avoidance measures might be selective if they provide for derogation (non-application of the anti-abuse rules) to specific undertakings or transactions, which would not be consistent with the logic underlying the anti-abuse rules in question.⁴²

39 Commission Notice on the application of State aid rules to measures relating to direct business taxation, OJ 1998 C 384/3, para. 13.

40 Commission Notice (fn. 39), para. 26.

41 Case C-6/12, *P Oy* [2013] ECR n.y.r., para. 8.

42 Decision 2007/256/EC of 20 December 2006 on the aid scheme implemented by France under Article 39CA of the General Tax Code, OJ 2007 L112/41, recital 133 and seq.

3. The Prevention of Abuse or Tax Avoidance as an Obstacle to Selectivity: Impact of Administrative Discretion in State Aid Control

The last interesting aspect of this decision consists in the ECJ showing concern for the margin of discretion left to the tax administration in the application of tax provisions. There are indeed a wide variety of mechanisms through which seemingly general rules can be applied in a selective manner.⁴³ This is partly due to the complexity of domestic tax regimes, in particular in the area of corporate taxation (see for example the transfer pricing rules aiming at establishing the value of the goods and services exchanged between associated companies).⁴⁴ To improve legal certainty, several Member States have introduced the possibility for the taxpayers to ask for a binding decision (commonly known as tax rulings)⁴⁵ from the tax administration in respect to the tax treatment of planned transactions. However, these rulings can be powerful tools in the hands of the tax administration to favour certain types of undertakings, in particular with a view of fostering foreign investment. According to the Commission 1998 Notice, “every decision of the administration that departs from the general tax rules to the benefit of individual undertakings in principle leads to a presumption of State aid and must be analysed in detail.”⁴⁶ This is therefore not a surprise that some regimes, allowed by the rulings on the basis of wide administrative discretion, have been considered as harmful tax practices under the

Code of Conduct for Business Taxation⁴⁷ and that some others have been subjects to the Commission’s scrutiny as – potential or actual – prohibited State aid.⁴⁸ In this perspective, the commented case constitutes a confirmation that the Court shares the Commission’s view in respect to the potential selective character of administrative discretionary practices in tax matters.

IV. Conclusion

In conclusion, even though the ECJ has certainly made *oeuvre utile* in diligently reminding the essentials of its case-law on State aid and taxation to the domestic court, this case has not put an end to the conceptual difficulties raised by the Court’s case-law on the interaction between State aid control and tax provisions.⁴⁹ Moreover, by pointing out that anti-abuse provisions could also be considered as prohibited State aid, it could lead to additional uncertainty. The Draft Notice on the notion of State aid pursuant to Article 107(1) TFEU, submitted for consultation in January 2014 and containing a large part on issues related to tax aid, will hopefully contribute to offer reliable guidance to Member States and taxpayers in what becomes judgment after judgment an increasingly complex matter.

43 Judgments of the Court of Justice in Cases C-241/94 *France v Commission* [1996] ECR I-4551 and C-200/97 *Ecotrade v Altiforni e Ferriere di Servola* [1998] ECR I-7907, and judgment of the Court of First Instance in Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava v Commission* [2002] ECR II-1385.

44 OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, 2010.

45 On Tax rulings and European Law, see *Romano*, *Advance Tax Rulings and Principles of Law*, Amsterdam, 2002.

46 Commission Notice (fn. 40), para. 22.

47 See Report of the Code of conduct Group of 23 November 1999 (Primarolo report), SN 4901/99, available at [www.http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf) in particular the measures A008, A009, E001, E002, E003, E004, Z003 (mainly concerning the Netherlands, but also Belgium).

48 Commission Decision 2004/76/EC of 13 May 2003, *French Headquarters and Logistic Centres*, OJ 2004 L 23/1, recitals 50 and 53; Commission Decision of 24 June 2003 on the tax ruling system for US foreign sales corporations, OJ 2004 L 23/14; Commission Decision 2003/755/EC of 17 February 2003, *Belgian*

Coordination centres, OJ 2003 L 282/55, recitals 89 to 95 and the related Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, paras. 96 and 97; Commission Decision 2003/438/EC of 16 October 2002 on State aid C 50/2001, *Luxembourg Finance Companies*, OJ 2003 L 153/40, recitals 43 and 44; Commission Decision 2003/501/EC of 16 October 2002 on State aid C 49/2001, *Luxembourg Coordination centres*, OJ 2003 L 170/20, recitals 46-47 and 50. The European Commission has sent request of information to several Member States about their tax rulings’ practices, namely – according to different media sources – Ireland, the Netherlands, Luxembourg (in September 2013) and Belgium (in January 2014). See Reuters, *EU examining Member States’ corporate tax arrangements*, reuters.com; 12 September 2013, available on the Internet at <www.reuters.com> (last accessed on 25 February 2014); *De Tijd* (Belgium), *Europaviseert Belgische Fiscal deals met multinationals*, 31 January 2014.

49 *Jaeger*, *Fehlstellungen im Verhältnis von Steuer- und Beihilferecht: Ein Plädoyer für mehr Ausgewogenheit* EuZW 2012, p. 92; *Quingley*, *Direct Taxation and State Aid: Recent Developments Concerning the Notion of Selectivity*, *Intertax*, Volume 40, Issue 2, 2012, p. 112.