Anti-avoidance Measures and State Aid in a Post-BEPS Context: An Attempt at Reconciliation

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Abstract

From an EU law perspective, anti-avoidance measures adopted by Member States have long been subject of scrutiny of the CJEU under EU fundamental freedoms (See also the judgment in Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue, Case C-524/04, ECLI:EU:C:2007:161, paragraph 25; judgment in Lankhost-Hohorst, C-324/00, ECLI:EU:C:2002:749; judgment in Lasertec, C-492/04, ECLI:EU:C:2007:273; judgment in NV Lammers & Van Cleeff, C-105/07, ECLI:EU:C:2008:24; judgment in Itelcar—Automóveis, C-282/12, ECLI:EU:C:2013:629). This article focuses on the treatment of anti-tax avoidance measures under EU State aid law in the light of current international developments as regards fight against base erosion and profit shifting. Anti-tax avoidance measures indeed often contain rather open-ended notions and entail distinctions based on criteria relating to economic substance, which leads to a wide margin of appreciation by tax authorities. Therefore, they are likely to be caught by the prohibition of State aid. After a brief introduction on the principles guiding the application of State aid rules to fiscal measures, a typology of anti-avoidance measures adopted by the EU and its Member States according to their source, scope and their effects is provided. Then, the article discusses the most significant case-law on the topic, i.e. the Finnish P Oy and German Sanierungsklausel cases and their consequence on the current approach taken by EU institutions in the fight against purely tax driven arrangements. Finally, it proposes interpretative tools to reconcile state aid enforcement with substance-based anti-

avoidance measures, in particular as regards the definition of the reference framework, the selection of the main objective of the tax measure at stake and the assessment of the genuine character of economic activities.

1. Introduction

Within the European Union, direct taxation remains within the scope of exclusive competence of Member States, leaving them the freedom to devise tax systems as they see fit based on their own preferences. However, Member States' tax sovereignty is subject to certain limitations, among others European State aid rules. Those rules are designed to provide a framework to streamline support granted by Member States to certain market players or sectors of their national economy notably to prevent a detrimental subsidy race among European Member States. This objective is not foreign to the idea of including anti-avoidance tax measures in national tax legislation which are designed to set limits to the possibility to structure their economic activity so as to maximize the enjoyment of tax advantages and therefore to a certain extent contribute to restrict (harmful) tax competition, whether on a domestic or more often on a cross-border basis.[1]

The concept of State aid defined in Article 107 of the Treaty on the functioning of the European Union ("TFEU") entails four cumulative features, consisting of (1) an advantage being granted by the State and through State resources, (2) favouring certain undertakings or the production of certain goods, (3) distorting or threatening to distort competition and (4) affecting trade between Member States. This concept does not carve out tax measures: the prohibition of State aid applies 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.[2] Such advantage is granted by the State to the beneficiaries under the form of reduction of the amount of, e.g. corporate income tax collected by the State, it thereby foregoes State resources by relieving the beneficiary of the corresponding amount.

Concerning the selectivity of a measure, the European Court of Justice ("CJEU") has developed a specific three-step analysis in cases involving fiscal state aid.[3] First, the normal/ordinary tax regime (the reference framework) in the Member States concerned has to be identified, in order to serve as a benchmark for establishing whether the measure under scrutiny is selective. Due to the complexity of national corporate tax systems, the identification of the reference framework often proves very difficult.[4] National 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 (relatively) high nominal tax rate with a (relative) narrow taxable base. The latter is as a rule obtained through several deductions, exemptions and credits (each with different scope and effects), which lead to a considerably lower effective tax rate. Both from a policy 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 simple reason: those elements of corporate tax systems are inextricably linked. 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.[5] 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 situation[6] similar to the Treaty fundamental freedoms (which latter scope is however limited to the cross-border context).[7] It is therefore not surprising that the CJEU in assessing the existence of an aid in tax matters adopts a practical approach, acknowledging that the assessment of the reference framework requires both familiarity with the provisions under scrutiny and an analysis of their administrative and judicial application as well as of their scope *ratione personae*.[8]

Once the reference framework is identified, it is then necessary to assess whether the measure constitutes a *prima facie* derogation by differentiating between economic operators that are in a comparable factual and legal situation in light of the objective assigned to the tax system of the Member State concerned.[9] Assuming this is the case, the CJEU considers that it is still possible to escape the qualification of State aid by ascertaining whether this derogative measure is justified by the nature and general scheme of the reference framework. To that end, the CJEU verifies whether the "measure results directly from the basis or guiding principle of its tax system."[10] and "[ensures] that those [measures] are consistent with the principle of proportionality and do not go beyond what is necessary, in that the legitimate objective being pursued could not be attained by less far-reaching measures".[11] This reference to the nature or general scheme of the tax system, acknowledged in the Italian textile case *Italy v Commission* and later included in the 1998 Commission Notice on the application of the State aid rules to measures relating to direct business taxation (hereafter the "1998 Commission Notice")[12] proves to be quite challenging to apply because it is not always clear how those "inherent principles" may be identified in relation to a particular tax system or to a specific aid measure such as a fiscal measure.[13]

Therefore, according to article 107 TFEU, as interpreted by the case-law of the CJEU, no tax measure could a priori be excluded from the qualification of (prohibited) state aid. The selective character does not have to result directly from the wording of the domestic provision but could originate from the administrative implementing practice.[14] Many domestic tax provisions require an authorisation procedure designed to provide undertakings with legal certainty as to the future application of a tax provision to their situation or to secure an agreement from the tax authorities on a given interpretation of a tax provision (rulings).[15] The Court of Justice considers that, in principle, the existence of an authorisation procedure does not preclude in itself such justification.[16] This analysis is refined based the actual scope of the examination of tax authorities in the course of the authorisation procedure.

On the one hand, the CJEU considers that justification is possible if, under the authorisation procedure, the competent authorities enjoy a degree of latitude limited to verifying the conditions laid down in order to pursue an identifiable tax objective and the criteria to be applied by those authorities are inherent in the nature of the tax regime.[17] On the other hand, if the discretion left to the tax authorities enables them to directly determine the beneficiaries or the conditions of application of a tax measure, resulting in an advantage for certain taxpayers, the measure cannot be considered as general.[18]

2. Anti-avoidance Rules: Typology and Scope

2.1. Origin and State of Play

Based on the above-mentioned analytical framework, anti-avoidance provisions therefore potentially constitute state aid. According to the OECD, "avoidance refers to the arrangement of the affairs of a taxpayer set up in order to reduce tax liability and despite the fact that the arrangement could be legal from a strict point of view, it runs typically against the intent of the law it purports to follow".[19] In order to combat those practices, most countries have enacted so-called anti-avoidance (or anti-abuse) tax measures designed to counter schemes set up by taxpayers at both domestic and international levels. International organizations such as the OECD and EU have played a major role in raising the awareness of the public opinion on those schemes and have pushed for the adoption of anti-avoidance measures by States, often proposing model provisions.

In 2013, the OECD, on request by the G20, adopted a 15-point Action Plan to tackle base erosion and profit shifting (BEPS). The BEPS project ultimately aim at realigning taxation with economic substance and value creation via a comprehensive package of measures designed to better coordinate domestic tax systems and promote transparency and exchange of information. It targets harmful international tax arrangements taking advantage of the differences between several states legislation (two or more). The outcome of the BEPS action plan, contained in final reports published in October 2015, consists in measures of soft law nature,[20] taking the form of "minimum standards," "best practices" or "recommendations".[21] The European Union has supported this initiative from the beginning and promotes the implementation of the BEPS recommendation into hard law rules, both at the domestic and European level. On 28 January 2016, the European Commission issued proposals and recommendations forming the EU Anti-Tax Evasion Package,[22] which aims at ensuring a uniform and EU law compliant[23] application of some of the BEPS recommendations by Member States.

Although listing exhaustively all the anti-avoidance measures adopted by EU member States in their domestic legislation would be an impossible task, it is nevertheless possible to classify them according to their source, their scope and their effects.

2.2. International, European and Domestic Anti-avoidance Measures

As for the source, anti-avoidance measures exist in the domestic legislation, in EU law or in international tax treaties. An example of anti-avoidance measure in EU law is contained in the Merger Directive,[24] according to which "a Member State may refuse to apply or withdraw the benefit of [the Directive] where it appears that one of the operations referred to in Article 1 (…) has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that the operation is not carried out for valid commercial reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives" (Article 15, a).

Typical anti-avoidance rules contained in tax treaties are the Limitation of Benefits rules ("LOB"). The LOB provisions have the purpose of countering the practice of structuring a business to benefit from more favorable tax treaty networks available in certain jurisdictions.[25] These provisions consist of a series of tests designed to limit treaty benefits to qualified persons based on legal form, ownership and activities. The OECD in its Final report on Action 6[26] recommends the adoption of such clauses, together with the inclusion of a "derivative benefits" provision that would enter into play when a payee would fail to qualify under the LOB provision.[27]

Other well-known measures contained in double taxation treaties, whose effect is to counter avoidance strategies by taxpayers are the transfer pricing rules.[28] Specific issues arise regarding tax avoidance in the framework of cross-border transactions entered into between entities belonging to the same multinational group. The difference between such transactions and those concluded between independent parties (at arm's length) is that the price set for the latter is in principle the result of the free play of supply and demand while the former is not subject to these market constraints. Therefore, for transactions between entities of the same group located in jurisdictions applying different levels of taxation, it is possible to set a "transfer price" which results in profits being shifted to the jurisdiction applying the lowest level of taxation.[29] Transfer pricing rules aim at enabling tax administrations to review the pricing of intragroup transactions within multinational groups, by applying specific methods of determination of the market (arm's length) value.[30]

Beside legislative or conventional rules, anti-abuse doctrines have been developed in European or domestic case-law, such as the principle of the prohibition of abuse of rights developed by the CJEU,[31] or the "substance over form", *fraus legis* or sham doctrines developed in several domestic jurisdictions.[32]

2.3. Scope of Anti-avoidance Measures

The scope of anti-avoidance measures can be either general (sometimes within one single tax) or specific. The European Commission has recommended since 2012 to Member States to adopt General Anti-Abuse Rules (GAARs) in EU Directives, domestic tax systems and, more recently in tax treaties.[33] For example, a "general" anti-avoidance rule is contained in the Parent-Subsidiary Directive,[34] according to which:

(…) Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.

An arrangement may comprise more than one step or part.

(…) For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality. (…)

The GAAR proposed by the Commission in the Proposal for a Directive against tax avoidance practices of 28 January 2016 follows the same pattern in broader terms, with some differences: the "main" purpose is replaced by the "essential" purpose, as the Commission had proposed in its 2012 Communication[35] and the "object and purpose" refers to the applicable domestic provisions.

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An example of a specific anti-avoidance provision is the limitation of deductible interests. According to the OECD, excessive interest deduction leads to profit shifting and base erosion. This is why OECD BEPS Action 4[36] focuses on these uses of debt to obtain a favorable tax result such as to "*achieve excessive interest deductions* [to reduce taxable profits] *or to finance the production of exempt or deferred income* [so as to obtain a deduction for interest expense while the related income is taxed later]."[37] The advantage for taxpayers to use interest payments for profit shifting are a consequence of the difference in the level of taxation of corporate profits, but also by mismatches in the characterization of the payment in the state of the payer and in the state of the payee resulting in the absence of taxation (hybrids).[38]

There is therefore an incentive to finance subsidiaries in high tax jurisdiction through that instead of equity. If interest rates are determined outside market conditions, States may apply general transfer pricing rules to limit the extent of the deduction.[39] However, in most of the cases, specific anti-avoidance rules are needed and international tax practice shows many differences in the approaches taken by states, which mainly take the form of thin capitalization, earnings stripping and interest barrier rules.[40] The OECD in its Final report on Action 4 recommends to deny the deduction, when interest paid to a nonresident related party exceeds a certain threshold. Such threshold is based on a fixed ratio rule that may be adapted to specific country or group situations and which connects the amount of interest deductions and the level of taxable economic activity measured through the company's earnings before interest, taxes, depreciation and amortization ("EBITDA"). As a result, no deduction is granted to interest (and payments economically equivalent to interest) in excess of this defined threshold.[41] In its Proposal for a Directive against tax avoidance practices of 28 January 2016, the European commission endorses the OECD approach by proposing a ratio for deductibility of "borrowing costs" limited to the highest of the following: 30 % of a taxpayers' EBITDA or EUR 1 million.[42] Similar rules are currently applied by several EU Member States, among which Germany, Italy and Spain.[43]

Anti-avoidance measures can also be categorized according to their effects, which greatly vary across jurisdictions. Some measures aim at excluding from the scope of tax provisions somehow favourable to the taxpayer, situations that are considered—at least potentially—as not falling within the purpose of the measure at stake. They can limit the benefit of tax incentives, such as tax credits for research and development or investment credits, or restrict the application of otherwise general rules, such as the deduction of business expenses or losses, the exemption of foreign income or the deferral of capital gains in case of corporate reorganisation. Some other anti-avoidance measures cause more radical effects, since they introduce fictions with significant tax consequences, such as recharacterization of transactions or reattribution of income. An example of such far-reaching provisions are the Controlled Foreign Corporations (CFC) rules. Those rules are anti-avoidance mechanisms aiming at preventing the loss of tax revenue via the shift of income to a low-tax jurisdiction where the CFC is established or their long-term deferral.[44] CFC rules aim at reincorporating in the tax base of a taxpayer of jurisdiction profits of a corporate entity controlled by the resident located in another country, which would otherwise not be taxable in the country of the controlling entity, in the absence of distribution. The BEPS report on Action 3 provides recommendations for the design of domestic CFC rules.[45] CFC rules are also contained in the European Commission's the Proposal for a Directive against tax avoidance practices.[46] The proposal provides for the inclusion of CFC income in the profits of an EU company if three conditions are met. First, the company must hold more than 50 % of voting rights, capital or entitlement to profits in the foreign controlled company. Second, the general tax regime of the country of the CFC has to be lower than 40 % of the effective tax rate of the residence country. Thirdly, more than 50 % of the total income of the CFC has to be composed of financial income or intragroup services (except for financial institutions). Moreover, to comply with the requirements imposed by the case-law of the CJEU, if the CFC is located in EU or EEA Member States, those rules shall apply only if the establishment of the entity is considered wholly artificial or the entity engages, in the course of its activity, in non-genuine arrangements.

The above-mentioned examples show that the distinction between "genuine" and "abusive" transactions can be based on rigid criteria, such as turnover, shareholding or balance sheet data, but also often rely on more vague notions, such as "genuine economic activity", "valid commercial reasons" or even "arm's length value". The application of such undetermined concepts requires a higher degree of scrutiny—and consequently a wider margin for discretion—by tax authorities. In certain cases, anti-avoidance measures combine both techniques, by establishing a safe harbour rules based on fixed criteria and leaving the taxpayer which does not comply with those rules free to demonstrate that the carried out transaction still satisfies a substance-based test.[47]

Those substance-based test are likely to be more and more used by tax administration of EU Member States. The idea to establish a clearer link between taxation and value creation is indeed one of the three pillars of the BEPS Action Plan and is one of the leading lines of actions of the EU. Besides the fact that those tests tend to leave more discretion to tax authorities, they also imply to weigh the importance of non-fiscal motives, rendering the application of more favourable tax rules dependent upon economic considerations.

In such a context, The analysis of the compatibility of anti-avoidance rules with State aid provisions[48] raises important legal issues concerning the application of the traditional three-step test, in particular the determination of the framework of reference and the justification by the nature or economy of the system. From a policy perspective, the Court's case-law could significantly influence the design of substance requirements in future anti-avoidance measures.

3. The Application of State Aid Rules to Anti-avoidance Measures: The *P Oy* and *Sanierungsklausel* Cases

3.1. Facts and Legal Background

Three Court decisions, both concerning the limitation to the deduction of corporate losses, are of particular interest in this context: the *P Oy* case, concerning Finland, decided by the CJEU in 2013,[49] and the twin *Heitkamp* and *GFKL Financial Services AG* cases, decided in early 2016,[50] where the General Court confirmed a negative decision of the Commission against Germany in 2011.[51]

Those cases deal with the issue of the commoditization of loss-making or empty-shell companies, although with noteworthy differences in the approaches taken by the Finnish and German legislators. While the Finnish measure was relatively general, the German provision at stake was specific to the restructuring of undertakings in difficulty, an area where the Commission had already established specific guidance on that matter under the form of a Temporary Framework.[52] An additional difference lies in the fact that *P Oy* also displays an supplementary leg of selectivity assessment due to the fact that the Finnish legislator had set up an authorization system. Therefore, this case offers some guidance as to the impact of the margin of discretion of the national authorities on the likelihood that a finding of selectivity would materialize. Those cases address however the fundamental issue of the determination of the reference framework of exceptions to anti-avoidance measures motivated by (apparently) non-fiscal considerations.

The facts are the following. In the *P Oy* case, under the Finnish income tax law, companies are allowed to carry forward 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 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.

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 is can be done taken into consideration "special circumstances". Administrative guidelines available to the public (a guidance letter and a circular) clarified the conditions of exercise of such discretionary power of the Finnish tax authorities. The guidance letter list 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".[53]

The *Heitkamp* and *GFKL Financial Services AG* cases concern the German *Sanierungsklausel*, a provision allowing companies in difficulty acquired for restructuring to benefit from loss carry-forward. This provision was devised as an exception to the limitation on tax loss carry-forwards in case of change in control. According to the German Income Tax Act, losses incurred in a tax year are allowed to be carried forward so that taxable income in future tax years may be reduced by setting off the losses up to a maximum of EUR 1 million each year. This possibility to carry forward losses is also available to entities subject to corporate income tax pursuant to §8(1) of the Corporate Income Tax Act (*Körperschaftsteuergesetz*, hereafter the "KStG").

Successive changes were brought to the restriction for those entities to deduct or carry-forward corporate losses, in order to avoid trade in companies which had ceased any economic activity but whose value consisted only in the amount of losses they could carry forward (empty-shell companies—*Mantelgesellschaften*). The German legislator introduced in 1997 the shell acquisition rule (*Mantelkaufregelung*)[54] to restrict the possibility of carrying forward losses for corporate entities that were legally and economically identical to the entity that incurred the losses. While the rule did not contain a definition of the 'economically identical' feature, it provided first that *a corporate entity is not economically identical if more than half of its shares are transferred and if the entity then continues its economic activity or starts it again with predominantly new assets*. The rule also mentioned two situations, also commonly referred to as the "*Sanierungsklausel*" (clause allowing for restructuring of companies in difficulty), under which a corporate entity was deemed economically identical. This was namely the case (1) *if the injection of new assets is solely for the purpose of restructuring the loss-making entity and if the activity which gave rise to the unrelieved loss carry-forward continues on a comparable scale for the following five years* and (2) if, *rather than injecting new assets, the acquiring entity covers the losses that have accrued at the loss-making entity*.

On 1 January 2008, the provision was repealed and loss carry-forward restricted in the case of changes in the shareholding of a corporate entity. While the aim was to simplify the legislation and better target abuses, it also meant in the case of a restructuring of an undertaking in difficulty which implied a change in ownership, that carry-forward of losses would no longer be possible. However, the tax authorities could waive tax debts in such a situation based on considerations of equity, even without specific legislative provision. In June 2009, the KStG was amended again in order to allow loss carry-forward when a company in difficulty is acquired for the purpose of restructuring, under certain conditions.[55]

3.2. The 2011 Commission Decision as Regards the *Sanierungsklausel* and the 2016 Judgments of the General Court

In its 2011 decision, the European Commission drew a comparison between the new §8c(1a) KStG and the repealed §8(4) KStG concluding that under the former the general rule is the forfeiture of loss carry-forwards on significant changes in ownership, unless the exception available under the *Sanierungsklausel* applies. Under the latter, the general rule was to allow loss carry-forwards in the case of significant changes in ownership, provided that the company was economically identical in order to prevent abusive trading in shell companies.[56]

After a reminder of the three-step test applicable to fiscal measures, the Commission first established as the system of reference not the whole German corporate income tax system, but the rules on tax loss carry-forward for companies subject to change in their shareholding, which are laid down in §8c(1) KStG.[57]

Second, after refusing to consider the argument of the German Government based on the fact that a measure applicable to all undertakings in difficulty and which does not leave any discretion to the public authorities is not selective, the Commission concluded to the *prima facie* selectivity of the measure based on the fact that §8c(1a) KStG differentiated between loss-making companies that were otherwise healthy and those that were insolvent or over-indebted.

Third, the Commission assessed whether the measure could be justified by the nature or general scheme of the tax system of which it forms part, relying on the distinction made by the case law between the extrinsic objectives to a particular tax scheme and the mechanisms inherent in the tax system itself which are necessary to achieve such objectives and considering only the latter to qualify for a justification by the nature or the general scheme of the tax system of which it is part.[58]

On that basis, the Commission made a distinction between on the one hand the objective of §8c(1) KStG, acknowledged by Germany as constituted by the need to prevent abuse of the loss carry-forward allowed by the German tax system in the form of purchases of empty shell companies and, on the other hand, the much broader objective of tackling the global financial and economic crisis of §8c(1a) KStG by introducing support to ailing companies as evidenced by the explanatory memorandum to the new *Sanierungsklausel*. The Commission concluded that the latter is not an anti-abuse measure and pursues an extrinsic objective to the tax system which cannot be relied upon as a justification at this stage but may be analysed in the compatibility assessment.[59]

As to the compatibility assessment, the Commission indeed considered whether the measure could be declared compatible under Article 107(3)(b) TFEU, as interpreted by the Temporary Framework applicable at that time, but quickly came to the—obvious—conclusion that, as a tax break for companies in difficulty, it did neither fall under any of the measures set out in the Temporary Framework, nor partially under a previously approved German aid scheme.[60]

The negative decision ordering recovery was challenged by Heitkamp BauHolding Gmbh (hereafter "Heitkamp"), supported by Germany, before the General Court.[61] Heitkamp was an undertaking at risk of insolvency and needed restructuring. In February 2009, Heitkamp KG, its mother company had acquired all outstanding shares in order to merge the two companies. The transaction was eligible under the new *Sanierungsklausel* pursuant to §8c(1a) KStG as confirmed by the communication received in April 2010 from the German tax authorities confirming that losses carried forward had been taken into account. Upon the decision of the Commission to open the formal procedure, the German Finance minister ordered the tax administration not to apply the *Sanierungsklausel* anymore. On that basis, in December 2010, a new communication discarding the possibility to carry losses forward was addressed to Heitkamp and changed its situation so that it was then later prevented to use the *Sanierungsklausel.*

Heitkamp raised two pleas including first its arguments regarding the absence of selectivity of the measure based on (1) an error made by the Commission in the definition of the reference framework and (2) an error in the assessment of the legal and factual situation of the undertakings requiring restructuring and the qualification of the *Sanierungsklausel* as a general measure.[62] Second, Heitkamp argued that (3) the measure was justified by the nature or economics of the system.[63]

As to the definition of the reference framework, Heitcamp claimed that the system of reference is actually the indefinite carry-forward of losses to which the loss of carry-forwards provided for in §8c KStG constitutes an exception, whilst the *Sanierungsklausel* in §8c(1a) KStG, reinstates the general rule by constituting an exception to the exception. Heitkamp alleged that the *Sanierungsklausel*, which treats economically sound undertakings and those in need of restructuring unequally, is not a selective measure, but the concretisation of the principle that taxable persons should contribute to State financing in accordance with their ability-to-pay (the *Leistungsfähigkeitsprinzip*), which is a constitutional principle that has always been recognised by the German Basic Law (Grundgesetz).[64]

The Court considered that the Commission did not err by considering that the reference framework was constituted by the forfeiture of losses even if it had acknowledged the presence of more general rule allowing the carry forward of corporate losses.[65]

As for the assessment of the legal and factual situation of the undertakings requiring restructuring and the qualification of the *Sanierungsklausel* as a general measure, the General Court endorsed the view of the Commission on the fact that the German provision is intended to prevent undertakings which change ownership from carrying forward their losses. Therefore, all undertakings which change ownership are in a comparable legal and factual situation, irrespective of the question whether they are in difficulty within the meaning of the *Sanierungsklausel*. However, the measure under scrutiny does not apply to all undertakings which change ownership but it only applies to those which, according to the wording of the *Sanierungsklausel*, at the time of the transaction, are "facing insolvency, are indebted or likely to be". That is why the Court considers that this category does not include all undertakings which are in a similar factual and legal situation in light of the objective of the tax regime at stake.[66]

Regarding the argument brought by Heitkamp concerning the fact that the measure is general because it is potentially available to all undertakings within the meaning of the *Autogrill Espagna/Commission* case, the Court discarded the argument and took the view that the measure under scrutiny actually included a definition of its scope of application *ratione personae,* i.e. undertakings in difficulty.[67] The Court also dismissed Heitkamps's argument that the measure was general in nature because it could benefit to any undertaking in difficulty.[68]

Finally, the General Court did not admit any justification of the measure on the basis of the nature and economy of the system. The Court noted that the Commission had made a distinction between on the one hand the objective of the rule of forfeiture of losses and on the other hand the objective of the *Sanierungsklausel*.[69] Regarding the former, German authorities had invoked the objective to exclude transactions aiming at abusing the possibility to carry forward losses but the Commission had considered, on the basis of the amendments to the previous rules that the objective was to finance a reduction of the corporate tax rate shifting from 25 % to 15 %. As to the objective of the latter, the Commission took the view that the objective was to tackle issues resulting from the economic and financial crisis and to help undertakings in difficulty in that context, which it deemed to be extrinsic to the tax system. The General Court endorsed that view based notably on the analysis on the wording of the rule.[70]

Therefore, the Court took the view that there was no need to go further and analyse whether the measure is proportionate to its objective. Similarly, according to the Court, the ability to pay principle, as a general principle underlying the possibility to carry losses forward, cannot serve as a justification notably because, under the measure under scrutiny, it would allow an undertaking in difficulty to carry losses forward while an healthy undertaking would be barred from doing it, although it would fulfil the other conditions of the *Sanierungsklausel*.[71]

3.3. The P Oy Case

The case pending before the Supreme Administrative Court of Finland in *P Oy* was brought by a 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.

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,[72] the CJEU 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 CJEU 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. The CJEU 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".[73]

As regards the administrative discretion in the granting of the authorization to offset losses, the CJEU 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 CJEU did not analyse 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.

In a broader context, the CJEU's judgment confirms the Commission practice—in particular the 2006 decision on the French depreciation rules applicable to Economic Interest Groupings—according to which anti-avoidance measures are selective if they contain exceptions based on criteria not entirely consistent with the objective of combating tax avoidance.[74]

In *P Oy*, the CJEU did not take an explicit stance on the selectivity of the Finnish measure, due to the lack of information it had received from the referring Court.[75] However, the Court appeared 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, instead of analysing it in the broader framework of the general rule of the Finnish system which allows the deduction of losses.[76] As a comparison, in *Heitkamp*, the General Court chose more explicitly to consider a reference framework constituted by the forfeiture of losses even though it had acknowledged the presence of more general rule of the possibility to carrying forward losses.[77]

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. 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 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. One can assume 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 CJEU, however, did not appear to follow this line of reasoning.

In defence of the CJEU's approach in the *P Oy* case, the objective of contrasting tax avoidance is taken into consideration later in the judgment to justify the difference in treatment. Moreover, the

CJEU seems to show a—legitimate—concern about the fact that tax authorities could exercise their margin of discretion in a manner inconsistent with State aid rules. And, had it not adopted a narrow reference framework, the CJEU would have had more difficulties to rule on this aspect. A definitive analysis is nonetheless difficult to give, since as the CJEU 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".[78]

The Court's approach is likely to lead to an increased likelihood to meet the selectivity condition of an aid. Exceptions to an anti-avoidance rule are indeed per definition limited to an even smaller category of undertakings than the one to which the anti-avoidance rule apply. In addition, while the exception to the exception may theoretically lead to reinstating the normal tax regime, the respective underlying objectives of the general system and of that exception to the exception may differ. This difference however should not necessarily lead to the conclusion that the objective of the latter rule should not qualify in order to justify the provision under State aid rules.

4. Fighting Against Purely Tax Driven Arrangements: An Objective Inherent to the Tax System?

The approach taken by EU institutions would gain in predictability if some fundamental characteristic of anti-avoidance rules in domestic tax systems were better taken into account.

The objective to fight against avoidance or abusive practices has to be regarded as consubstantial to the objective of "[collecting] revenue to finance State expenditure", recognized in the 1998 Commission Notice as the main purpose of the tax system.[79] The objective of counteracting abuses, i.e. legal and fiscal engineering designed solely for the purpose of enjoying a tax benefit without any other valid justification of commercial nature, should be considered to be inherent to the tax system, both at the level of comparability and justification.

Therefore, the recognition of the fight against tax avoidance and abuse as an objective inherent to the tax system implies that undertakings in abusive situations can never be compared to undertakings, which are in similar tax positions or enter into similar transactions, but for motives that are not purely tax driven. The non-application of anti-avoidance rules to undertakings conducting genuine economic activities should therefore not be considered as a selective advantage. This should be the case even if the drafting technique chosen by the domestic tax legislature would take the form of an exclusion of these undertakings from the scope of an anti-avoidance measures.

However, it should also be taken into consideration that the same tax measure may actually display various objectives, which have to be weighed against each other and tested against the proportionality principle. From this perspective, the German *Sanierungsklausel* case offers a good illustration of a measure part of the scheme that pursued at the same time budgetary objectives, anti-avoidance purposes and motivations aimed at helping undertakings in financial difficulties. Successive modifications of the scheme did not help to render that legislation more coherent and there was legitimate doubt as to the fact that the exclusion of restructuring undertakings as such was proportionate to the objective of fighting against abusive transactions.

Nevertheless, European institutions, whether the Commission or the Courts, should be very careful in determining the objective of domestic tax measures. In the *P Oy* case, the CJEU pointed out the fact that the Finnish scheme at stake—under which tax authorities could allow the deduction of losses in case of change of control for special reasons, such as the maintain of employment—could pursue employment policy goals—extrinsic to the tax system—and was therefore likely to be selective. However even if admitting 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 CJEU'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".[80] 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 authors' view, be put on the same footing as what undoubtedly appears to be the primary objective of the legislation at stake. The non-exhaustive list of the Finnish tax administration appears to indicate a list of motives that are considered as non-tax driven and therefore able to justify the non-application of a measure whose objective is to counteract abusive schemes. From this perspective, it seems to be perfectly proportionate to the objective of the scheme as such.

5. State Aid Rules in a BEPS Context: Putting Substance-Based Anti-avoidance Measures at Risk?

State aid rules should not restrict the possibility for Member States to limit the application of general or specific tax measures to genuine, non-abusive economic activities. The Court of justice has indeed recognized that "preventing possible tax evasion, avoidance and abuse is an objective recognised [by European Law]", whether in harmonized[81] as well as in unharmonized[82] areas. Moreover, several amendments to existing EU directives in the area of direct taxation have been adopted recently to that end,[83] and, as reflected in the 2016 proposal for an Anti-tax avoidance Directive,[84] further anti-avoidance measures are likely to be incorporated in EU law in the future. Those legislative changes at the EU level are directly connected to the work of the OECD in the framework of the BEPS action plan.[85] Among other objectives, that plan aims at strengthening anti-avoidance rules in order to limit the room for manoeuvre of taxpayers to set up entities and transactions, which are deprived of economic substance.

It is therefore important to interpret the prohibition of state aid in the light of those developments. Of course, this should not go as far as excluding certain well-defined category of undertakings from the scope of anti-avoidance measures. This is for example the case of the interest barrier rule contained in 2016 Commission's proposal for an anti-tax avoidance directive, which provides for an exclusion in favour of financial undertakings.[86] However, considering that if the directive were to be adopted and implemented by Member States, the exclusion would not be imputable to the Member States but to the EU, characterization as State aid should be excluded.[87] Moreover, the carve-out of financial institutions seem to be in the Commission intentions purely temporary. Indeed, according to the Proposal, "(…) *it is however necessary to clarify that despite the temporary exclusion of these financial undertakings, the intention is to ultimately conclude an interest limitation rule of broad scope which is not subject to exceptions"*.[88]

However, as regards the implementation of anti-avoidance measures using rather undetermined concepts such as valid commercial reasons or genuine economic activities, State aid control should be exercised with a certain degree of restraint. Indeed, the application of those measures depends on a case-by-case analysis of the facts and circumstances under which a transaction has taken place. By nature, economic objectives—which, according to a narrow view of the existing Commission's practice and courts case law, could be considered as extrinsic to the tax system and therefore irrelevant from a State aid perspective—play a decisive role. There is therefore a risk that each individual decision of a domestic tax administration that would put aside an otherwise applicable anti-avoidance measures on the ground that the transactions at stake pursues non tax objectives could be considered as selective State aid, on the grounds that those objectives are similar to economic, social or environmental policies, that would be considered extrinsic to the tax system of the Member States concerned. Such an interpretation would severely hinder the effectiveness of the efforts of tax authorities to sanction purely tax-driven operations, while at the same time either unduly favoring abusive transactions or unnecessarily targeting genuine activities.

In conclusion, in order to avoid such a clash between State aid and Tax policies, it appears necessary to define first the reference framework as broadly as possible. Isolating an anti-avoidance measures from the broader tax system whose integrity it aims to protect does not indeed favour a clear understanding of the effects of the system as a whole. Then, comparability should be established in the light the main objective of the tax measure of scheme at stake, after having identified the different objectives pursued by the same measure. Finally, it should be admitted that identification of the genuine activities that are not targeted by anti-avoidance measures might require from tax authorities to use criteria based on the economic rationale of the transactions at stake, even if those criteria could lead outside the specific context of the application of anti-avoidance measures to the qualification of selective aid.

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[1] Schön (2003), in particular p. 18 et seq.

[2] See the founding Italian textile case, judgment in *Italy v Commission*, C-173/73, EU:C:1974:71. See also judgment in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, EU:C:2001:598; judgment of 13 September 2006, *British Aggregates v Commission*, T-210/02, EU:T:2006:253; judgment in *British Aggregates v Commission*, C-487/06, EU:C:2008:757 and judgment of 7 March 2012, *British Aggregates v Commission*, T-210/02 RENV, EU:T:2012:110;judgment in *GIL Insurance and Others*, C-308/01, EU:C:2004:252 ; judgment in *Commission and Spain v Government of Gibraltar and UK*, C-106/09 P and C-107/09 P, EU:C:2011:732; judgment of 7 November 2014, *Autogrill Espana v Commission*, T-219/10, EU:T:2014:939; judgment of 7 November 2014, *Banco Santander, SA and Santusa Holding, SL v European Commission*, T-399/11, EU:T:2014:938. On State aid and taxation in general, see Quigley (2015), pp. 97–152; Rust and Micheau (2013); Micheau (2013); Hancher et al. (2012), pp. 321–362; Kube (2005), pp. 99–117; Panayi (2004), p. 283; Waelbroeck (2004), p. 1023; Luja (2003); Wouters and Van Hees (2001), p. 655; Schön (1999), pp. 927–928.

[3] Judgment in *Italy v Commission*, EU:C:1974:71, paragraph 15.

[4] Schön (1999), pp. 29 f.; Lang (2009), p. 25; Sutter (2005), p. 112.

[5] See on this issue, *Lang* (2012), p. 418.

[6] See Lang (2012), p. 418; Rossi-Maccanico (2012), p. 98; Bousin and Piernas (2008), pp. 640–642; Kube (2004), p. 244.

[7] 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 and Vintras (2013), p. 184. See also Engelen (2012) and Micheau (2012).

[8] Judgment in *P Oy*, C-6/12, EU:C:2013:525, paragraphs 19–20.

[9] Judgment in *Paint Graphos and others*, EU:C:2011:550, paragraph 49 and cited case-law.

[10] Judgment in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, EU:C:2001:598, paragraph 42.

[11] Judgment in Paint Graphos and others, joined cases C-78/08 and 80/08, paragraphs 73–75.

[12] European Commission (1998), paragraph 12.

[13] The examples provided at the 1998 Commission Notice, such as the progressive nature of an income tax scale or profit tax scale, the calculation of asset depreciation and stock valuation methods or the arrangements for the collection of fiscal debt, instead of clarifying this concept appear to add further uncertainty. See European Commission (1998), paragraphs 23–27. See also recent guidance provided in the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (C/2016/2946, OJ C 262, 19.7.2016, p. 36 - 40) and in the DG Competition – Internal Working Paper – Background to the High Level Forum on State Aid of 3 June 2016 (available at http://ec.europa.eu/competition/state_aid/legislation/working_paper_tax_rulings.pdf, last accessed on 10 August 2016).

[14] See European Commission (1998), paragraphs 10, 12, 21–22 and judgment in *Déménagements-Manutention Transport SA (DMT)*, C-256/97, EU:C:1999:332, paragraph 30; Judgment in *P Oy*, C-6/12, EU:C:2013:525, paragraph 27.

[15] See European Commission (2014d); European Commission (2014a); European Commission (2014b); European Commission (2014c); European Commission (2015c); European Commission (2015a); European Commission (2015b).

[16] Judgment in *P Oy*, EU:C:2013:525, paragraph 24.

[17] Judgment in *Déménagements-Manutention Transport SA (DMT)*, EU:C:1999:332, paragraph 27 and the case-law cited.

[18] Judgment in *Commission and Spain v Government of Gibraltar and UK*, EU:C:2011:732, paragraph 75.

[19] OECD (2016a).

[20] The measures, by their nature, are not legally binding, but it is expected that they will be applied according to the consensus.

[21] OECD (2015f), p. 6.

[22] Among others, see European Commission (2016c); European Commission (2016a). See the recently adopted Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ L 193, 19.7.2016, p. 1–14.)

[23] In respect of the obligation of MS to abide by EU law, the CJEU in several cases made it clear that "*it should be recalled that, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law*". See judgment in *Wielockx v Inspecteur der directe belastingen*, Case C-80/94, ECLI:EU:C:1995:271, paragraph 16; judgment in *Imperial Chemical Industries v Colmer*, C-264/96, ECLI:EU:C:1998:370, paragraph 19; judgment in *De Baeck*, C-268/03, ECLI:EU:C:2004:342, paragraph 19. See Kemmeren (2014), p. 190.

[24] Council of the European Union (2009), pp. 34–46.

[25] These structuring practices are referred as to treaty shopping. For a definition of treaty shopping, see De Broe (2008), pp. 5–20.

[26] OECD (2015a), pp. 20 seq.

[27] OECD (2015a), pp. 42 seq.

[28] However, transfer pricing rules can also be considered as a system aiming at establishing a fair(er) allocation income between jurisdictions. This does not appear to be the original intent of the first transfer pricing legislations. See Schoueri (2015), p. 690.

[29] See OECD (2015b), at Article 9 and OECD (2016b); OECD (2015c).

[30] See Luja (2015), pp. 12–13.

[31] Judgment in *Hans Markus Kofoed v Skatteministeriet*, C-321/05, ECLI:EU:C:2007:408, paragraph 38. The principle of non-application of EU law to abusive practices was applied for the first time in the area of VAT in the Halifax and University of Huddersfield cases (judgment in *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v HMRC*, C-*255/02*, ECLI:EU:C:2006:121, and judgment in *University of Huddersfield Higher Education Corporation v Commissioners of Customs & Excise*, C-223/03, ECLI:EU:C:2006:124. On the prohibition of abuse in EU direct tax law, see in particular the judgment in *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544; judgment in *Test Claimants in the Thin Cap Group Litigation*, C-524/04, EU:C:2007:161 and judgment in *Glaxo Wellcome*, C-182/08, EU:C:2009:559. On the principle of abuse of rights in EU tax law, see O'Shea (2011), p. 77; De la Feria (2008); De Broe (2008), pp. 755 et seq. For a critical comment, see Arnull (2009), pp. 18–23; and Sørensen (2006), p. 423.

[32] See Zimmer (2002); De Broe (2008), pp. 71–72.

[33] European Commission (2012b) and European Commission (2012a); European Commission (2016b).

34 Council of the European Union (2015), pp. 1–3.

35 "*An artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored*." See European Commission (2012a). The distinction between main purpose and essential purpose or even sole purpose in also to be found in the VAT case of the CJEU on abuse of rights. See Case C-653/11, Newey, [2013], ECLI:EU:C:2013:409, paragraph 46 and the case-law quoted). For an analysis of the GAAR recommended by the Commission in 2012 and the relationship with BEPS, see Dourado (2015a), pp. 42–57.

36 OECD (2015d).

37 OECD (2015d), p. 17.

38 OECD (2015e).

39 See OECD (2010).

40 For a description, see Traversa (2013), p. 611.

41 OECD (2015d), pp. 13 and 17 et seq.

42 European Commission (2016a), Article 4.

43 First Germany (2008), followed by Italy (2008), Spain (2012), Portugal (2013) and Finland (2014) and Greece.

44 See Dourado (2015b), p. 353: "*CFC legislation can either be seen as restoring the original right of a jurisdiction to tax its residents on a worldwide tax principle or an exception to the international tax rule that recognises deferral of taxation of profits accrued by foreign entities*."

45 It notably discusses the definition of a CFC and recommends the adoption of a broad definition applicable to corporate entities including transparent entities (partnerships and trusts) and permanent establishments. The recommendation also concerns the required type and level of control to qualify. It proposes to apply both a legal test and an economic test and to establish a threshold at minimum 50 % control, whether direct or indirect.

46 European Commission (2016a), Articles 8 and 9.

47 For a global overview, see Van Weeghel (2010), pp. 18 et seq.

48 See OECD (2015d), p. 20 and Annex A, p. 85.

49 Judgment in *P Oy*, C-6/12, EU:C:2013:525. See Traversa (2014).

50 Judgment of 4 February 2016 in *Heitkamp BauHolding GmbH v European Commission*, T-287/11, ECR, EU:T:2016:60, and judgment of 4 February 2016 in *GFKL Financial Services AG v European Commission*, T-620/11, ECR, EU:T:2016:59.

51 European Commission (2011). This Commission decision was abundantly discussed in the German literature. See Schön (2011) p. 127; Arhold (2011), pp. 71 and at 75; Brodersen and Mückl (2014).

52 European Commission (2009), p. 1.

53 Judgment in *P Oy*, EU:C:2013:525, para. 8.

54 KStG §8(4).

55 The conditions to benefit from the new *Sanierungsklausel* were the following:

a) the acquisition serves the purpose of restructuring the corporate entity

b) the company is, or is likely to be, insolvent or over-indebted at the time of the acquisition

c) the company's fundamental business structures are preserved, which requires:

– the corporate entity to honour an agreement between management and works council (*Betriebsvereinbarung*) on the preservation of jobs, or

– preservation of 80 % of the jobs (in terms of the average annual wage bill) for the first five years following the acquisition, or

– injections of significant business assets or write-off of debts which still have an economic value within 12 months; business assets are significant if they represent at least 25 % of the assets of the previous financial year; any transfer back to the acquiring entity within the first three years are deducted;

– the company does not change sector of activity during the five years following the acquisition;

– the company had not ceased operation at the time of the acquisition.

56 European Commission (2011), paragraph 21–23.

57 European Commission (2011), paragraph 66.

58 European Commission (2011), paragraphs 80–83.

59 European Commission (2011), paragraphs 83–89.

60 European Commission (2011), paragraphs 109–113.

61 Judgment of 4 February 2016 in *Heitkamp BauHolding GmbH v European* Commission, T-287/11, EU:T:2016:60.

62 Heitkamp had also invoked the protection of legitimate expectation in a plea which was deemed inadmissible, see judgment in *Heitkamp BauHolding GmbH v European* Commission, paragraphs 146–150.

63 Judgment in *Heitkamp BauHolding GmbH v European* Commission, EU:T:2016:60, paragraphs 151–174.

64 Judgment in *Heitkamp BauHolding GmbH v European* Commission, EU:T:2016:60, paragraph 99.

65 Judgment in *Heitkamp BauHolding GmbH v European* Commission, EU:T:2016:60, paragraph 107.

66 Judgment in *Heitkamp BauHolding GmbH v European* Commission, EU:T:2016:60, paragraphs 123–138.

67 Judgment in *Heitkamp BauHolding GmbH v European* Commission, EU:T:2016:60, paragraph 141 and cited judgment of 7 November 2014 in Autogrill Espagna/Commission, T-219/10, EU:T:2014:939, paragraphs 44–45.

68 Judgment in *Heitkamp BauHolding GmbH v European* Commission, EU:T:2016:60, paragraph 140.

69 Judgment in *Heitkamp BauHolding GmbH v European* Commission, EU:T:2016:60, paragraph 161.

70 Judgment of 4 February 2016 in *Heitkamp BauHolding GmbH v European Commission*, EU:T:2016:60, paragraphs 162–164.

71 Judgment of 4 February 2016 in *Heitkamp BauHolding GmbH v European* Commission, EU:T:2016:60, paragraph 170.

72 See Opinion AG Sharpston, 7 February 2013, C-6/12, EU:C:2013:69, paragraph 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.

73 Judgment in *P Oy*, EU:C:2013:525, paragraph 22. See also judgment in *Paint Graphos and others*, EU:C:2011:550, paragraph 65.

74 European Commission (2006), recital 133 and seq. This decision illustrates the high standard to meet for a Member State to prove the existence of a justification based on the internal logic of the tax system. Although in that case the Commission had found at paragraphs 134–135 that "*by limiting the amount of deductible depreciation [the legal provision] does in fact seek to combat abusive recourse to tax-transparent structures with a view to achieving a tax saving as part of operations to finance assets leased out or otherwise made available. That objective is clearly necessary and rational for purposes of ensuring the effectiveness of the scheme of tax-deductible depreciation of assets leased out or otherwise made available and must therefore be considered to form an inherent part of the said scheme*". However, after acknowledging that a derogation was admissible, the Commission emphasized at paragraph 136 that "*although derogations […] are admissible, they should be based only on criteria the fulfilment of which would be capable of preventing recourse, for tax optimisation purposes, to the financing […] by means of tax-transparent structures such as EIGs*" and concluded to the absence of any valid justification.

75 Judgment in *P Oy*, EU:C:2013:525, paragraph 21.

76 Judgment in *P Oy*, EU:C:2013:525, paragraph 32. 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 (1998), pp. 21–69; Ault and Arnold (2010), pp. 393–397 and from the German prospective, Brodersen and Mückl (2014).

77 Ibid, Judgment of 4 February 2016 in *Heitkamp BauHolding GmbH v European* Commission, EU:T:2016:60, paragraphs 107.

78 Judgment in *P Oy*, EU:C:2013:525, paragraph 20.

79 European Commission (1998), paragraph 26.

80 Judgment in *P Oy*, EU:C:2013:525, paragraph 8.

81 Judgement in *Gemeente Leusden and Holin Groep BV vs Staatssecretaris van Financien*, joined Cases C-487/01, EU:C:2004:263 and judgment in *Holin Groep*, C-7/02, EU:C:2004:263, paragraph 76; judgment in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 71; judgment in *Mahagében and Dávid*, Cases C-80/11 and C-142/11, EU:C:2012:373, paragraph 41; judgment in *Bonik*, C-285/11, EU:C:2012:774, paragraphs 35 and 36; judgment *LVK 56,* C-643/11, EU:C:2013:55, paragraph 58.

82 Judgment in *Cadbury Schweppes*, EU:C:2006:544, and the case-law and literature quoted at footnote 34.

83 Council of the European Union (2014), pp. 40–41; and Council of the European Union (2015), pp. 1–3.

84 See European Commission (2016a).

85 European Commission (2016a), Explanatory memorandum, at 3.

86 See European Commission (2016a), Articles 4 and 6.

87 See judgment of 5 April 2006 in *Deutsche Bahn v Commission*, T-351/02, EU:T:2006:104.

88 See European Commission (2016a), Explanatory memorandum, at 7.