Department of Law
Summer Term 2017

Master’s Thesis in Tax Law
30 ECTS

Tax Treaties: The EU Tax Dilemma

The relationship between EU State Aid and Tax Treaties

Author: Malin Nettestad

Supervisor: Docent Jérôme Monsenego
# Table of Content

1 Introduction .................................................................................................................. 7  
1.1 Introduction ............................................................................................................... 7  
1.2 Main thesis .................................................................................................................. 8  
1.3 Structure .................................................................................................................... 8  
1.4 Method ....................................................................................................................... 9  
1.4 Limitations ................................................................................................................ 11  

2 International Tax Law .................................................................................................. 13  
2.1 Introduction ............................................................................................................... 13  
2.2 The Vienna Convention, OECD Convention and International Law .................... 14  
2.3 International Tax Law and the Model Tax Convention ........................................... 15  
  2.3.1 The position of the OECD Convention in relation to the Vienna Convention ...... 15  
  2.3.2 Interpretation problems ....................................................................................... 16  
  2.3.3 EU and International Tax Law ........................................................................... 18  
  2.3.4 The CJEU and double tax treaties ..................................................................... 20  
2.4 Summary .................................................................................................................. 21  

3 State Aid ....................................................................................................................... 23  
3.1 Introduction ............................................................................................................... 23  
3.2 Application of Article 107(1) TFEU ....................................................................... 24  
  3.2.1 Introduction ........................................................................................................ 24  
  3.2.2 State resources ................................................................................................. 24  
  3.2.3 Effecting trade and distorting the internal market .......................................... 25  
  3.2.4 Favouring of certain undertakings ................................................................... 26  
3.3 Double tax treaties and state aid ............................................................................. 29  
3.4 Principles of procedure ............................................................................................ 29  
3.5 Summary .................................................................................................................. 30  

4 The Luxembourg tax rulings – McDonald’s ................................................................. 32  
4.1 Introduction ............................................................................................................... 32  
4.2 The McDonald’s tax rulings ..................................................................................... 32  
4.3 The Commission’s examination and argumentation ............................................... 34  
  4.3.1 Existence of selectivity .................................................................................... 34  
  4.3.2 Complementary reflections ............................................................................ 36  
4.4 Interpretation of the double tax treaty .................................................................... 37  
  4.4.1 Methods .......................................................................................................... 37  
  4.4.2 Permanent establishment ................................................................................ 38  
  4.4.3 the 2000 update to the Commentaries ............................................................ 39  
  4.4.4 Consequences ................................................................................................. 39  
4.5 Summary .................................................................................................................. 40  

5 OECD instruments and State Aid ................................................................................ 42  
5.1 Introduction ............................................................................................................... 42  
5.2 OECD guidelines in State Aid decisions to this point ............................................. 43  
5.3 The existence of an equal taxation principle ............................................................ 44  
5.4 Implications for the McDonald’s investigation ......................................................... 46  
5.5 Summary .................................................................................................................. 47  

6 Consequences for EU Member States ....................................................................... 48  
6.1 Introduction ............................................................................................................... 48  
6.2 Competencies in EU law ......................................................................................... 48
6.3 Potential effects of the Commission’s approach ........................................... 49
   6.3.1 The position of double tax treaties ......................................................... 49
   6.3.2 Determination of selectivity ..................................................................... 50
   6.3.3 Possible outcomes for Member State’s fiscal sovereignty ....................... 51
   6.3.4 Administrative Consequences .................................................................. 52
6.4 Summary ....................................................................... 54

7 Conclusion ..................................................................... 55
   7.1 Summary ...................................................................................... 55
   7.2 OECD influence in EU state aid law ....................................................... 56

List of references ......................................................................... 58
   Table of authorities ........................................................................ 58
   Cases ................................................................................. 58
   Decisions ............................................................................ 59
   Bibliography ........................................................................ 61
   Books ............................................................................. 61
   Journal articles .................................................................... 62
   Webpages .......................................................................... 62
   Other print sources .................................................................. 63
### Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
</tr>
<tr>
<td>EU; the Union</td>
<td>European Union</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty of the European Union</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td>CJEU; the Court</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>Model Tax Convention</td>
<td>OECD Model Tax Convention on Income and on Capital 2014</td>
</tr>
<tr>
<td>The Commission</td>
<td>the European Commission</td>
</tr>
<tr>
<td>CCTB</td>
<td>Common Consolidated Tax Base</td>
</tr>
<tr>
<td>BEPS</td>
<td>Base Erosion and Profit Shifting</td>
</tr>
<tr>
<td>Treaty Freedoms</td>
<td>Freedom of establishment and to provide services, Free movement of workers, Free movement of capital, Free movement of goods</td>
</tr>
<tr>
<td>the 2016 Notice;</td>
<td></td>
</tr>
<tr>
<td>the Notice</td>
<td>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</td>
</tr>
</tbody>
</table>
1 Introduction

1.1 Introduction

One of the essential objectives of the European Union has been the foundation of the internal market and to increase the ability of cross-border transactions between the Member States. With freedom of establishment and non-discrimination, opportunities and incentives have arisen for enterprises to lower their tax burden by locating businesses to locations with favourable tax rates. For EU Member States, incentives to attract large multinational businesses consists of work and investment opportunities, as well as income generated from taxes. Tax competition is a competitive behaviour between states concerning favourable tax conditions. In 2014, the LuxLeaks scandal revealed a practice of secret tax rulings where the tax burden of certain companies were structured towards taxation in Luxembourg, on behalf of other countries. In the arrangement, income had been received by Luxembourg undertakings who had limited Luxembourg presence.¹

The OECD was founded in 1961 and currently consists of 35 Member States.² The organisation is responsible for the publication of the Model Tax Convention on Income and on Capital, which has the objective to prevent international double taxation. The first Model Convention was published in 1928, but it was not until 1963 that a convention aiming to be accepted internationally was recommended by the OECD Council. International double taxation occurs when a taxpayer is liable to taxation for the same income in different states. The Model Tax Convention has become the foundation for tax treaties for OECD members as well as for non-OECD states. Non-member states can register their position regarding the Model Tax Convention and the Commentary with the OECD Council.³

State aid is an enforcement mechanism within EU law to prevent the interference of the on the market. This procedure requires a Member State who has been granting illegal aid to restore the position by request the aid from the benefited party back to the state. Since 2013, the European Commission has investigated tax rulings from a state aid

perspective.\textsuperscript{4} The state aid investigations concerning tax rulings in different Member States, covered about 1000 tax rulings taken by the European Member States.\textsuperscript{5} The approach adopted by the Commission has led to discussions about the state aid concept and whether state aid is suitable to prevent tax planning practices. Seeing as the question of state aid and double taxation treaties has not yet been tried in the Court of Justice of the European Union, the position of state aid and double taxation treaties is particularly interesting at this point.

1.2 Main thesis
This essay seeks to concretize the relationship between state aid and double tax treaties, regarding direct business taxation within the European Union. An underlying aim is also to establish which role, if any, the OECD Model Tax Convention can have for EU state aid law. To concretise the relationship between double tax treaties and state aid, the essay will provide these perspectives:

- The position of double tax treaties and the OECD Model Tax Convention in international law
- The concept of fiscal state aid and the application of double tax treaties in state aid investigations
- The influence of OECD Model Tax Convention and surrounding instruments in recent state aid law
- The effect of recent state aid law on EU Member States sovereignty.

An ongoing state aid investigation by the Commission, will be used as an example of the Commission’s position on state aid and double tax treaties. The example will also provide a basis for the evaluation of possible consequences for Member States’ sovereignty.

1.3 Structure
The essay is divided into chapters, each of which have been structured in a similar way to provide clarity. In order to facilitate reading and understanding of the essay, commentaries and analyses will be provided continuously. The essay begins by establishing a foundation of international law and state aid. Subsequently, the essay will focus on practical examples concerning state aid law and double tax treaties. Finally, the

\textsuperscript{4} ibid.
essay recommends an approach to the relationship between double tax treaties and state aid by discussing possible consequences of the Commission’s position. Each chapter contains a summary of important points raised therein, in order to facilitate understanding.

In chapter 2, the essay outlines the position of double tax treaties and the OECD Model Tax Convention in international law. This is done by evaluating the position in relation to both the Vienna Convention and current EU tax law. Chapter 3 provides a foundation of the concept of fiscal state aid and the applicability of state aid on double tax treaties. An ongoing investigation will be analysed in chapter 4, which establishes the Commission’s current position concerning tax treaties and state aid. The OECD’s position in EU state aid law is evaluated in chapter 5. Chapter 6 will focus on the effects of the Commission’s current position will have on EU Member States’ sovereignty. The chapter will also recommend an approach to the relationship between state aid and double tax treaties.

1.4 Method
This thesis is written primarily with a European legal method, as the focus of the essay is EU state aid law and the application of double tax treaties. The method was chosen to evaluate how far the current EU case law permits the interpretation of OECD instruments as well as the possible consequences for Member States fiscal sovereignty. Concerning the sources of EU law, there is a distinction between primary law (treaties), secondary law (directives, regulations and institutional acts) and supplementary law (case law and international agreements). Furthermore, the EU perspective was chosen due to the exclusive EU competence concerning competition law and the essay’s main purpose. A legal doctrinal method has also had an influence, concerning the treatment of legal sources. Primary legal sources have had priority over legal doctrine.

The focus of the thesis is European tax- and competition law, therefore, the most central legislation is the Treaties of the European Union, especially Article 107(1) TFEU. The Treaties are complemented by the case law of the CJEU to describe the current application of fiscal state aid. The selection of state aid case law was based on the relevance towards the aim of the essay, which is to provide an understanding of the

---

fiscal perspective of state aid, and was founded on the content and effect. Investigations and decisions by the Commission have been selected from the Commission’s website concerning state and tax rulings. Even here a selection has been made, with the aim to provide an illustration of the Commission’s approach and arguments. Concerning literature a selection was made on basis of the relevance for the objective of the essay. As far as possible recently published literature has had precedence. Because the discussion is recent, its presence is currently predominantly restricted to journals. Due to its international influence, the OECD Model Tax Convention is used to illustrate double taxation treaties. Because the Model Tax Convention is not binding international law, the position of the Convention and its relevance for the interpretation of double tax treaties between states is subject to discussion in the essay.

Documents published by EU institutions are regarded as secondary law within the Union and can be used to illustrate the position or a point of view of the institutions. These documents have limited value in relation to other Union acts because they have a limited legal value. An example is the Commission Notice on State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, which illustrates the Commission’s position on the application of state aid. The Notice is referred to when it has provided extra information or a specific description. According to the European legal method, legal writing has an inferior value compared to other legal sources, but has mostly been used to illustrate ongoing discussions or specific information.

Two exceptions to the traditional use of sources has been made. Concerning the McDonalds analysis, language restrictions prevented a reference to the Commission’s published decision of the opening of an investigation.7 Instead, the Commission’s letter to the Member State has been used as a reference. In addition, language restrictions prevented any interpretation of Luxembourg tax legislation. Therefore, a decision was taken to restrict the analysis to information provided by the Commission. Concerning the OECD Model Tax Convention’s position in international law, references are made to legal doctrine. The discussion of the OECD material’s position in international law

---

serves to illustrate the practical influence of the OECD material in the application of double tax treaties.

1.4 Limitations
The focus of this essay is European state aid law and direct international taxation. Even if there are possible side notes to this subject, the aim is to keep a clear focus on this point. Therefore, it has been necessary to limit some topics, such as the OECD BEPS project, that will affect international tax law and the Model Tax Convention, and should be enacted at both EU and Member State levels. In the moment of writing, the 2017 Model Tax Convention has not been published, therefore, the relevant Model Tax Convention is the 2014 Model Tax Convention. In addition, the 2014 Model Tax Convention was in force at the time of the Commission’s decisions. Another significant boundary has been drawn in regard to transfer pricing decisions taken by the Commission. The decisions will be briefly summarised and referred to, but the McDonald’s decision was considered a better example because the investigation directly applies to the aim of the essay.

Member States’ domestic legislation is not applied, as the essay’s focus is international tax law and EU state aid law. In the examination of McDonald’s, the national law was of particular importance but was disregarded due to language barriers. Concerning the transfer pricing decisions, the consideration of OECD guidelines and national legislation was not deemed relevant as the section is supplementary and based on the Commission’s decision practice. Likewise, the actual position of the OECD Model Convention and the Commentaries was more pertinent to the aim of the essay than the legal position according to the Vienna Convention.

The relationship between state aid and Treaty freedoms was deemed interesting, but not relevant to the aim of the essay. Therefore, Treaty freedoms are only used to gain an insight into the established case law concerning the OECD Model Tax Convention. The focus of the essay is direct business taxation, therefore, VAT legislation has not been considered, even if this is a part of EU tax law. The structure of aggressive tax planning practices, was found to be relevant but did not have a direct connection to the main objective, and did not contribute towards the conclusion. The essay concerns
international juridical double taxation and, therefore, the question of economic double taxation is presumed to be a question for the national tax legislators.

Because the legislative area of this essay is evolving, material published after 31st May 2017 has been disregarded.
2 International Tax Law

2.1 Introduction

Double tax treaties are part of international law and are, therefore, a distinct area compared to domestic tax legislation.\(^8\) Tax treaties act as bridges between different domestic legislations, in the sense that they are allocating the applicability of domestic tax claims between countries of source and of residence when two states are exercising taxation power.\(^9\) Double tax treaties have an international as well as a domestic role, which can result in interpretation or qualification problems.\(^10\) A consequence of a divergent interpretation is double taxation, which can arise if both states consider that full tax authority exists.\(^11\) Double taxation or double non-taxation effect businesses since double tax impositions can be a heavy financial burden (however temporary) or influence companies to construct strategies to reduce their fiscal burden.\(^12\) This chapter aims to provide an understanding of double tax treaties in an international perspective.

The OECD Model Tax Convention is structured to allocate taxation rights upon the type of income and the state of residence.\(^13\) Occasionally, both states are assigned the taxation power of an income. In that case, one state is given the obligation to reduce the total amount of taxation.\(^14\) Avoidance of double taxation can, according to the Model Tax Convention, be accomplished by either exempting or discounting the amount of tax due in the other state.\(^15\) Furthermore, the Convention can only assign jurisdiction for states to collect tax and cannot create taxation rights.\(^16\) Consequently, income might be exempted from tax in both states.\(^17\) The Model Tax Convention is accompanied by a Commentary, aimed at providing guidance for tax administrations in specific situations.\(^18\)


\(^9\) Oats and Miller (n 8) p 145 and 147.

\(^10\) Vogel and Rust (n 8) m.no 73,75, 90 and 127; See also Oats and Miller (n 8) p 38.

\(^11\) Oats and Miller (n 8) p 38.

\(^12\) ibid, p 32 and 38.

\(^13\) OECD, *Introduction* (n 3) para 18 and 19; Oats and Miller (n 8) p 146.

\(^14\) Article 23 in the OECD Model Tax Convention; OECD, *Introduction* (n 3) para 19.

\(^15\) Article 23 A and 23 B in the OECD Model Tax Convention; OECD, *Introduction* (n 3) para 19.

\(^16\) Vogel and Rust (n 8) m.no. 30; Oats and Miller (n 8) p 148.

\(^17\) cf OECD, *Commentaries* (n 3) para 3.

\(^18\) OECD, *Introduction* (n 3) para 27-29.
2.2 The Vienna Convention, OECD Convention and International Law

Two foundational principles in international tax law are the principles of source and residence. The principles are reflected in the OECD Model Tax Convention, where they limit states’ tax jurisdiction unless a sufficient relationship exist to the taxpayer.\textsuperscript{19} According to the principle of residence, the jurisdiction of taxation is based upon the individual’s residence within that state. The principle of source establishes tax jurisdiction upon the income’s origin.\textsuperscript{20} In the opinion of OECD, the objective of the Model Tax Convention is to create an international practice for the allocation of taxes between the members of the OECD. Thereby, avoiding taxation of the same income in two states.\textsuperscript{21} International cooperation in the collection of taxes has been facilitated by the exchange of information and assistance in tax collection on both an OECD and a EU level.\textsuperscript{22}

International taxation treaties are international agreements that allocate the states’ right to impose a tax on individuals. The treaties are a part of international law. The \textit{Vienna Convention on the law of treaties} is the basis for interpretation of tax treaties.\textsuperscript{23} Articles 31 and 32 of the Vienna Convention, should be regarded as customary law. Therefore, the Vienna Convention can also be applied when the parties are not signatories.\textsuperscript{24} However, there is a lack of certainty to which extent the OECD Model Convention and its Commentary can affect the interpretation of tax treaties, in the light of the Vienna Convention.\textsuperscript{25}

According to Article 31 of the Vienna Convention, the interpretation of treaties should be made with reference to the context and aim of the treaty, ‘(...) in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.\textsuperscript{26} According to Article 32(2) of the Vienna Convention, the context of the treaty should be determined by the aim and other

\textsuperscript{19} ibid, para 19; Vogel and Rust (n 8) m.no 2, 3 and 8; Oates and Miller (n 8) p 27.
\textsuperscript{20} Vogel and Rust (n 8) m.no 2; Oats and Miller (n 8) p 26 and 27.
\textsuperscript{21} OECD, Introduction (n 3) para. 1-3.
\textsuperscript{23} Vienna Convention on the Law of Treaties of May 23, 1969; Vogel and Rust (n 8) m.no 30 and 32; Oats and Miller (n 8) p 145 and 147.
\textsuperscript{24} Vogel and Rust (n 8) m.no 32.
\textsuperscript{25} Victor Uckmar, ‘Double Taxation Conventions’ in Andrea Amatucci (eds) \textit{International tax law} (2\textsuperscript{nd} edn, Kluwer Law International 2012) p 170; Vogel and Rust (n 8) m.no 100; Oats and Miller (n 8) p 198.
\textsuperscript{26} Article 31(1) Vienna Convention on the Law of Treaties (n 23).
relevant agreements between the parties. Reference should also be taken to successive agreements, custom, or defined terms to determine the will of the parties.\textsuperscript{27}

Interpretation of tax treaties should be made both with international and domestic methods because the treaty has to be applied somewhat consistent in both contracting states.\textsuperscript{28} Furthermore, an account of how the other state applies the treaty as well as the importance of the OECD Commentaries can act as a reference point for a common interpretation.\textsuperscript{29} The definition of the term ‘intention’ in Article 31 of the Vienna Convention, should according to international principles of interpretation consist of the expressed intention.\textsuperscript{30} In the interpretation of tax treaties the ordinary meaning of words is presumed, but this can also mean that certain internationally accepted technical definitions affect the terms in the interpretation of tax treaties.\textsuperscript{31} Which terminologies that are regarded as customary in international taxation law are unclear, but Vogel and Rust suggests that some expressions from the OECD Model Convention might belong to this category.\textsuperscript{32}

2.3 International Tax Law and the Model Tax Convention

2.3.1 The position of the OECD Convention in relation to the Vienna Convention

The potential influence of the Model Tax Convention and the Commentaries as a reference point for interpretation of tax treaties and the potential effects, have been a subject of substantive discussion.\textsuperscript{33} An OECD recommendation (such as the OECD Model Tax Convention and its accompanying Commentaries) cannot legally bind states. Therefore, the OECD Model Tax Convention should not be regarded as a tax treaty or an international agreement.\textsuperscript{34} An international taxation agreement between two states is part of international law and should, therefore, be interpreted in the light of the Vienna Convention.\textsuperscript{35} The OECD Model Tax Convention is a recommendation and is not legally binding according to international law. However, it can be perceived as a form

\begin{footnotes}
\small
\textsuperscript{27} ibid Article 31(3) -(4).
\textsuperscript{28} Vogel and Rust (n 8) m.no.75 and 90.
\textsuperscript{29} ibid m.no. 94-95.
\textsuperscript{30} ibid m.no. 82, 83 and 85.
\textsuperscript{31} ibid m.no. 84, 85.
\textsuperscript{32} ibid m.no. 84 and 101, note 133 and 172, which refers to High Court of Australia of 22 August 1990 in Thiel v FCT 21 ATR 531,537 (1990) concerning the term enterprise in the OECD Model Tax Convention.
\textsuperscript{33} Ibid m.no 100; Uckmar (n 25) p 170; Oats and Miller (n 8) p 198.
\textsuperscript{35} Articles 1 and 2, Vienna Convention on the Law of Treaties (n 23).
\end{footnotes}
of soft law or as a point of reference for negotiations. The Commentaries are developed by experts in the field of international taxation and are meant to act as a common point of view by the contracting states in their application and interpretation of the Model Tax Convention. However, extra materials should not be used as a basis for interpretation according to the Vienna Convention, which can limit the value of the Model Tax Convention and its Commentaries.

Whether the Model Tax Convention can legally bind states despite its non-binding nature, have been subject to discussion in legal literature. On one hand, the Model Tax Convention is not a Convention or customary law, therefore, states are not bound and cannot use the Commentaries as an interpretation instrument. On the other hand, there are arguments supporting the view that the Vienna Convention can allow the use of the Model Tax Convention or its Commentaries in certain situations. These situations mainly concern the conflict between two OECD Member States. In a conflict of interpretation between two OECD members, the Commentaries should be regarded as part of the context of the tax treaty in question. This application of the Model Tax Convention and its Commentary, would be dependent on the circumstance that neither state has made any reservations against the article in question. Furthermore, this approach would be supported by the mutual agreement procedure in Article 25 of the Model Tax Convention, which requires states to reach a common interpretation. In practice, the OECD Commentaries are used as a supplement in the interpretation of the Model Tax Convention.

2.3.2 Interpretation problems
To gain full effect, the double tax treaty should be incorporated into the domestic international tax legislation. As double tax treaties are bilateral, every treaty should be interpreted independently. In the interpretation of a tax treaty, states can qualify definitions or articles differently. Thereby, the Model Tax Convention and Commentary

---

36 Vogel and Rust (n 8) m.no 90.
37 OECD, Introduction (n 3) para 2-3.
38 Article 32, Vienna Convention on the Law of Treaties (n 23); Vogel and Rust (n 8) m.no. 198.
39 Vega (n 34) p 24 and 27.
41 Holmes (n 40) p 80 - 81.
42 Oats and Miller (n 8) p 147.
43 Uckmar (n 25) p 161, 165 and 167.
can be applied differently in separate treaties.\textsuperscript{44} If a treaty contains an article equivalent to Article 3(2) of the OECD Model Tax Convention, qualification is made in the light of domestic tax legislation if the expression is not defined by the context in the treaty.\textsuperscript{45}

Concerning the problem of qualification, Vogel and Rust suggests three possible methods: the state qualifies ambiguous definitions according to the national legislation, or reach an agreement upon a separate definition, or an interpretation is made of the term according to the source state’s qualification.\textsuperscript{46} Arguments have been made in literature in favour of an agreement upon a common interpretation between states, to resolve tax treaty interpretation problems.\textsuperscript{47} This could take the form of a shared international tax language.\textsuperscript{48} An international tax language would be compatible with the Vienna Convention. However, the formation of an international tax language would require the support of a common definition acceptable to all states, which is part of the aim of the Model Tax Convention and its Commentary.

Another discussion under Article 3(2) of the Model Tax Convention, consists of whether the interpretation of national law should be made with an ambulatory or static approach.\textsuperscript{49} This consideration can also be made concerning the Commentaries, as they are updated continuously and can change the interpretation of existing tax treaties. Changes to national legislation or the Commentaries are considered in an ambulatory interpretation of treaties. Alternatively, the classification could be made with reference to domestic legislation as it was when the treaty was concluded (a static approach).\textsuperscript{50} According to the OECD, the ambulatory meaning of the convention should prevail, as long as there are no major changes to the article or its commentary.\textsuperscript{51} Regarding articles that have been added or significantly changed the OECD recommends a static approach.\textsuperscript{52}

An ambulatory approach can conflict with the Vienna Convention, as only subsequent agreements between the parties can influence the development of the intention between

\begin{flushleft}
\textsuperscript{44} Vogel and Rust (n 8) m.no. 119 and 120; Oats and Miller (n 8) p 145 - 147. \\
\textsuperscript{45} Article 3(2) in the OECD Model Tax Convention on Income and on Capital (n 3); Uckmar (n 25) p 173. \\
\textsuperscript{46} Vogel and Rust (n 8) m.no. 124. \\
\textsuperscript{47} Oats and Miller (n 8) p 200 - 201. \\
\textsuperscript{48} Vogel and Rust (n 8) m.no. 134-135. \\
\textsuperscript{49} Uckmar (n 25) p 173. \\
\textsuperscript{50} Holmes (n 40) p 82. \\
\textsuperscript{51} OECD, Introduction (n 3) para 34. \\
\textsuperscript{52} ibid para 35.
\end{flushleft}
the parties.\(^{53}\) The result may be that the parties continually must revise the agreement and change the definitions of expressions. The interpretation of definitions in national tax legislation could develop over time regarding the harmony within the national taxation system. While there are both a domestic and international development within tax law, the advantages of an ambulatory approach lessen the need to update the treaty. An ambulatory approach can also reduce the possibilities of fiscal evasion due to gaps between practice and the agreement. In practice, many states use the ambulatory approach.\(^{54}\)

However, the ambulatory interpretation and application should be consistent between the two states, as a foundational principle of the law of treaties is *pacta sunt servanda*.\(^{55}\) According to this principle, states should give importance to the spirit of the convention and not act contrary to the expectations of the other state. The mutual agreement procedure in Article 25 of the OECD Model Tax Convention, can be used as a means to resolve conflicts based upon the taxation agreement between the states.\(^{56}\) In line with the principle of *pacta sunt servanda* and the mutual agreement procedure, states are required find solutions that are internationally accepted, and the OECD recommendations could act as a possible instrument for a common interpretation.\(^{57}\)

### 2.3.3 EU and International Tax Law

The EU has competence to regulate areas that according to Article 5 TEU, the Member States have left to the Union. Regarding direct taxation, the EU’s competence is limited to implemented directives. Within the European Union taxation is mainly a competence that belongs with the Member States, subject to exceptions consisting of tax directives, VAT legislation and fiscal state aid.\(^{58}\) Directives that restrict the direct taxation jurisdiction of the Member States are the Parent-Subsidy Directive, the Interest and Royalties Directive, the Mergers directive and the Mutual Assistance directive. In addition, a directive against fiscal evasion will be effective from 2019, as part of the

\(^{53}\) See Article 31(3)(b) in Vienna Convention on the Law of Treaties (n 23).

\(^{54}\) Uckmar (n 25) p 173.

\(^{55}\) Articles 26, 31 and the preamble in the Vienna Convention on the Law of Treaties (n 23).

\(^{56}\) Uckmar (n 25) p 189; Oats and Miller (n 8) p 198.

\(^{57}\) See Holmes (n 40) p 80-81.

EU’s actions against BEPS.59 The EU has full participation ability within the work of the OECD, without budgetary contributions or voting power.60

Measures to harmonise direct taxation between EU countries are taken both on a legislative and an advisory level. To counter tax competition between Member States, the Council of Europe and the Member States concluded a resolution consisting of a code of conduct for business taxation in 1997. The resolution was accompanied by a guidance published by the Commission, on the application of state aid in business taxation. The guidance was replaced in 2016, with a notice on the application of state aid. These instruments have no direct legal effect but can act as recommendations.61

Concerning competition, the Union has exclusive competence and the Commission can reduce a distortion in the internal market. Articles 116 and 117 TFEU, can reduce a distortion in the internal market by recommendations or consultations with the member state responsible. The Commission can use Articles 116 and 117 TFEU to reduce the large differences in the general tax rate.62 Furthermore, the state aid rules in Articles 107 to 109 TFEU, would be considered as lex specialis. This measure could be applied when the selectivity criteria are missing, but a state action is creating a distortion.63 In the case of Belgium and Forum 187 ASBL, the Court stated that the Code of Conduct concerning harmful tax competition did not have any legal effect and existed only as a political goal, and could not be relied upon before the Court.64

60 OECD, Supplementary Protocol No. 1 to the Convention on the OECD of 14 December 1960.
62 Quigley (n 58) p 149.
63 ibid.
64 Joined cases C-182/03 and C-217/03 Kingdom of Belgium and Forum 187 ASBL v Commission of the European Communities ECLI:EU:C:2006:416 para 151.
2.3.4 The CJEU and double tax treaties

According to article 263 TFEU, the CJEU has the competence to interpret EU legislation but not national legislation. The CJEU can use international interpretation principles and international agreements as inspiration, especially if they are a part of a standard approach within the Member States.\(^65\) Regarding Treaty freedoms the CJEU has expressed that the Court does not have the competence to interpret double taxation treaties.\(^66\) Because the Court consider double taxation treaties as national legislation, it is currently only the effects of the tax treaty that can be considered.\(^67\) A comparison can be made with the Court’s view on international taxation to explore what importance double taxation treaties have vis-à-vis state aid.

EU tax directives have borrowed expressions from the OECD Model Tax Convention and Commentary.\(^68\) The influence of OECD instruments in the interpretation of EU expressions can, however, be limited. In the interpretation of a modified expression, the OECD instruments can at most function as a foundation or inspiration.\(^69\) However, reservations or observations made towards the Model Tax Convention or its Commentary will have little value in the interpretation of EU tax legislation. An autonomous interpretation of EU legislation is necessary for the credibility of the CJEU because the interpretation will apply to all EU Member States. In addition, the interpretation must have a foundation in EU law rather than a recommendation from the OECD.\(^70\) Lang suggests, that the EU Member States agree upon a mutual agreement procedure that can be referred to the CJEU, who would make an independent interpretation.\(^71\)

---


\(^66\) Case C-298/05 Columbus Container Services BVBA & Co. v Finanzamt Bielefeld-Innenstadt ECLI:EU:C:2007:754 para 46.

\(^67\) Case C-307/97 Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt EU:C:1999:438 para 58; Columbus Container Services (n 66) para 53.

\(^68\) Wattel, Relevance of (Deviations from) the OECD Model and Commentary in ECJ Income Tax Case Law (n 65) p 101.


\(^70\) Wattel, Relevance of (Deviations from) the OECD Model and Commentary in ECJ Income Tax Case Law (n 65) p 102-104; Lang (n 69) p 76.

\(^71\) Lang (n 69) p 90-94.
With the aim of determining the OECD Model Tax Convention’s status in EU law, consideration can be taken of the Court’s judgement and reasoning concerning the application of Treaty freedoms. In *Test Claimants in the Thin Cap Group Litigation*, the CJEU affirmed that Member States have the competence to conclude taxation agreements and should use allocation principles that are international standard e.g. OECD methods.\(^{72}\) The use of double taxation treaties will not preclude duties under EU law or the freedom of establishment.\(^{73}\) According to CJEU, the court does not have the competence to interpret specific tax treaties because double tax treaties are considered national law. However, the Court can compare the outcome of double tax treaties with EU law.\(^{74}\) This conclusion gives the Member States more freedom concerning the domestic fiscal policy.

An agreement on a standard of interpretation between EU states, would be beneficial to assure tax payers how a transaction would be perceived in several member states, thereby facilitating cross-border transactions. For tax authorities, the application of several tax treaties would be simplified as the number of different interpretations and treaties would be reduced. Besides, it would be beneficial for the purposes of the internal market for Member States to agree on broad points of interpretation or application.\(^{75}\) A shared interpretation of double tax treaties would give Member States greater fiscal sovereignty than the proposed Common Consolidated Tax Base (CCTB), consisting of a common calculation of businesses’ tax base.\(^{76}\)

### 2.4 Summary

This chapter has described the position of double tax treaties in in international law and in the current state of EU tax law. Currently, there is no uniform interpretation of double tax treaties. Every tax treaty concluded by a state has its own context and will, therefore, in accordance with the Vienna Convention require an independent interpretation. The OECD Model Tax Convention is not binding according to international law. However,

---

\(^{72}\) Case 524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* ECLI:EU:C:2007:161 para 49. 

\(^{73}\) Case 270/83 Commission of the European Communities v French Republic (Avoir Fiscal) ECLI:EU:C:1986:37 para 26; *Test Claimants in the Thin Cap Group Litigation* (n 72) para 52. 

\(^{74}\) *Columbus Container Service* (n 66) para 46-47,51 and 53; Case C-128/08 *Jacques Damseaux v Belgian State* ECLI:EU:C:2009:471 para 22, 26-27. 

\(^{75}\) See as an example, Lang (n 69) p 90-95. 

it is argued that the Model Tax Convention can be used as an instrument in the interpretation of a treaty between two OECD Member States. The EU and its Member States share competence over tax legislation, which means that Member States are free to conclude tax treaties and interpret them if the effects comply with EU law.
3 State Aid

3.1 Introduction

State aid is defined and regulated in Articles 107 to 109 TFEU. The enforcement mechanism aims to promote equal competition conditions within the Union. In comparison to the rest of the competition rules in the EU Treaties, state aid prevents the unjustified interference by the state.\(^7^7\) Direct taxation competence belongs with the Member States and should be exercised in line with EU law. The Commission has the main responsibility for the application and interpretation of the concept of state aid, which is subject to judicial review by the Court.\(^7^8\) In the field of taxation, a beneficial measure can take the form of e.g. beneficial taxation rates or derogations from the normal taxation base.\(^7^9\) This chapter aims to provide an understanding of the fiscal concept of state aid, as well as the applicability of state aid regarding double tax treaties.

According to Article 107(1) TFEU, prohibited state aid consist of a benefit, from state resources, that favours certain undertakings or sectors, threatens to affect trade and disrupt competition within the Union.\(^8^0\) Article 107(2) TFEU, specifies situations where state aid is not prohibited (where Article 107(1) is not applicable). Primarily, the exempted situations consist of direct support to consumers and support after catastrophes. Situations that can be considered consistent with the internal market are defined in Article 107(3) TFEU. These conditions mostly comprise actions that might be in the Union’s interest.\(^8^1\) According to Articles 108 and 109 TFEU, the Council and the Commission can adopt regulations defining the compatibility of aids within the internal market. National courts do not have the competence to rule on state aid comparability with the internal market, but should interpret the concept of aid in cooperation with the Commission.\(^8^2\)

---

77 Title VII Chapter 1 TFEU, cf articles 101-105 TFEU.
79 Case C-148/04 Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova I ECLI:EU:C:2005:774 para 46; Case C-222/04 Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA. ECLI:EU:C:2006:8 para 137; Belgium and Forum 187 ASBL (n 64) para 123.
80 Article 107(1) TFEU.
81 ibid, article 107(3), especially subsections a)-d).
The Commission has the authority to investigate measures taken by the Member States, according to Article 108 TFEU. The surveillance of national measures consists of Member States duty to register actions that are not compatible with the internal market, and the Commission’s right to investigate national measures. The Commission should open an investigation if it finds that a measure could constitute state aid according to Article 107(1) TFEU. The Member State should be notified of the decision to initiate a formal inquiry, and the announcement should contain a summary of the Commission’s legal position. Decisions taken by the Commission regarding the compatibility of state aid are binding on the Member State according to Article 288 TFEU, but are subject to review by the CJEU. If a Member State does not follow a decision it can result in a referral to the Court. According to Article 260(1) TFEU, Member States are obliged to comply with the Court’s judgements.

3.2 Application of Article 107(1) TFEU

3.2.1 Introduction

Article 107(1) TFEU, consists of cumulative requirements and should be interpreted with respect to the effects of a state action. The emphasis upon the selectivity criteria is greater in assessments of taxes compared to positive aid, because the taxation assessments often concern negative measures. An example can be the situation where a derogation from a general application establishes an advantage for selected companies.

3.2.2 State resources

The requirement of state resources, includes both indirect and direct measures notwithstanding the methods used. The criteria consist of two assessments: if the

84 ibid, articles 4(4) and 6.
85 Articles 288, 263 TFEU.
86 ibid, article 108(2).
87 Case 173/73 Italian Republic v Commission of the European Communities ECLI:EU:C:1974:71 para 27; Belgium and Forum 187 ASBL (n 64) para 84; Case C-279/08 European Commission v Kingdom of the Netherlands ECLI:EU:C:2011:551 para 51.
88 Quigley (n 58) p 99.
89 Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH (n 78) para 16.
measure can be attributed to the state, and if state finances have been used.\textsuperscript{91} The evaluation of state finances consist of measures affecting the budget by derogating charges that normally would be applicable, or depriving the state of income that normally would be received.\textsuperscript{92} Funds of state authorities and public companies are capable of being attributed to the state.\textsuperscript{93}

The analysis of state measures includes actions by both central and regional authorities, when they use state finances.\textsuperscript{94} If a regional authority has a certain degree of independence, it will affect the reference area in the evaluation of the selectivity criteria. Another consequence is that the measure might not be attributable to the state.\textsuperscript{95} This is conditional upon the fact that the regional authority has both institutional and administrative independence where they do not receive compensation from the central government.\textsuperscript{96} Actions by public companies are not automatically considered to be attributable to the state. The classification of state measures towards public enterprises is dependent upon the relationship between the parties and to which degree the state has influenced the decision.\textsuperscript{97}

3.2.3 Effecting trade and distorting the internal market

Normally, the Court consider the effect on trade between the Member States and the distortion of the internal market at the same time.\textsuperscript{98} In the case of Unicredito Italiano SpA, which concerned the subsidisation of taxes for certain bank foundations, the Court found that the actual effect on the market or on the trade between Member States was irrelevant. The main question is whether the measure constitutes a risk of influencing trade and disrupting competition in that market.\textsuperscript{99} An effect on the trade within the internal market exists when the aid measure influences the national position of the

\textsuperscript{91} Stardust Marine (n 90) para 24.
\textsuperscript{92} Banco Exterior de España S.A (n 89) para. 14; Stardust Marine (n 90) para 36; Belgium and Forum 178 ASBL (n 64) para 129.
\textsuperscript{93} Stardust Marine (n 90) para 37-38.
\textsuperscript{94} Case 248/84 Federal republic of Germany v Commission ECLI:EU:C:1987:437 para 17; Case C-88/03 Portuguese Republic v Commission of the European Communities ECLI:EU:C:2006:511 para 55.
\textsuperscript{95} Portuguese Republic v Commission (n 94) para 55.
\textsuperscript{96} ibid para 66 and 67.
\textsuperscript{97} 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 [2016] OJ C 262/1 (the 2016 Notice) para 40 and 41.
\textsuperscript{98} See for examples Unicredito Italiano SpA (n 79) para 50-51; Cassa di Risparmio di Firenze (n 79) para 139-144; Joined cases C-78/08 to C-80/08 Ministero dell’Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl, Adige Carni Soc. coop. arl, in liquidation v Agenzia delle Entrate and Ministero dell’Economia e delle Finanze and Ministero delle Finanze v Michele Franchetto ECLI:EU:C:2011:550 para 77-81; see also the 2016 Notice, (n 97) para 186.
\textsuperscript{99} Unicredito Italiano SpA (n 79) para 54-55.
business, or enables an expansion to another member state. According to the Court’s judgement in Cassa di Risparmio di Firenze SpA and others, conditions such as EU regulation of the market and the type of aid, affect the assessment of whether the criteria of trade and competition is fulfilled.

3.2.4 Favouring of certain undertakings

The term benefit involves direct aid but could also consist of measures that affect the budget of an undertaking. In the state aid assessment, the conditions of an advantage and selectivity are separate but the assessments are closely combined. The nature of an advantage entails that the measure is not generally available. Even if the advantage and selective condition could be the same component, the Commission must show that both conditions are satisfied. The determination of selectivity is done by a three-step examination, which consists of a reference system (first step), a determination of selective treatment (second step) and a justification of the measure in relation to the tax structure (third step). The use of a reference system, aims to provide a method to determine whether an undertaking is in a position where it receives beneficial treatment.

The determination of selectivity entails a comparison between the measure and its effect towards other enterprises that are in a ‘comparable factual and legal situation’.

According to the Commission, the determination of the reference system should be

---

100 ibid para 58.
102 Cassa di Risparmio di Firenze SpA and others (n 79) para 145.
104 cf Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH (n 78) para 36, see also para 40; Case C-15/14 Commission v MOL ECLI:EU:C:2015:362 para 59.
105 MOL (n 104) para 59-60.
106 Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland (n 103) para 90; Case T-210/02 RENV British Aggregates Association v European Commission ECLI:EU:T:2012:110 para 52; the 2016 Notice (n 97) para 133- 134.
107 Case C-20/15 European Commission v World Duty Free Group SA and Others ECLI:EU:C:2016:981 para 54.
made against legislation that has a similar context and aim.\textsuperscript{108} Statements by the Court indicate that the correct determination of the reference system is of greater importance concerning taxation since the derogations should be compared to the inherent character and aim of the legislation.\textsuperscript{109} Because the outcome of the reference assessment determines whether there is a benefit which may constitute selectivity, it is important that the evaluation focus on the appropriate part of the legislation. In \textit{Unicredito}, a tax reduction which was only available for a particular form of banking businesses, was compared against the tax legislation for the bank sector.\textsuperscript{110} A tax advantage resulting from an international investment was deemed selective compared to the outcome of a domestic investment in the cases of \textit{World Duty Free Group SA and Others}.\textsuperscript{111}

Depending on the structure of the tax system and the competence of the authorities, conditions for the application of a provision can be deemed selective.\textsuperscript{112} In the case of \textit{P OY}, the Court stated that an advantage can be inherent in an authorization procedure. The case concerned a requirement of authorization to regard specific financial losses as tax reductions. The validation procedure is compatible with the selectivity criteria, if, the conditions that determines the authorization are objective and justifiable in relation to the taxation scheme. The evaluation of the tax authority is limited to an impartial application of relevant criteria. Finally, two conditions concern the process: the interpretation of the authorization criteria and the determination of tax authorities’ discretion.\textsuperscript{113} A measure can be considered selective by separating applicable regimes due to legal conditions (juridical differentiation) or by differentiating between undertakings that are in a comparable situation (selectivity by fact).\textsuperscript{114}

Measures that are general in their applicability (selective by fact) can be selective if the separation is based on established characteristics. In that situation, the Commission should demonstrate the preferential treatment for certain undertakings.\textsuperscript{115} In \textit{Gibraltar}, the taxation base was found de facto selective since it distinguished between domestic

\begin{thebibliography}{11}
\bibitem{108} the 2016 Notice (n 97) para 133 – 134; see also \textit{British Aggregates Association} (n 106) para 49.
\bibitem{109} \textit{Portuguese Republic v Commission} (n 94) para 56; \textit{Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland} (n 103) para 90.
\bibitem{110} \textit{Unicredito Italiano SpA} (n 79) para 48-50.
\bibitem{111} \textit{World Duty Free Group SA and Others} (n 107) para 119.
\bibitem{112} Case C-6 /12 \textit{P OY} ECLI:EU:C:2013:525 para 24–25.
\bibitem{113} ibid para 8 and 23–28.
\bibitem{114} the 2016 Notice (n 97) para 120–122.
\bibitem{115} \textit{World Duty Free Group SA and Others} (n 107) para 55.
\end{thebibliography}
and off-shore companies. The Court affirmed that selectivity exists if the specific features of an enterprise confers a preferential treatment. Measures that are dependent on the condition of specific legal forms, activity within specific sectors, conditions of capital reserves and turn-over are selective by the required conditions (if not justified by the specific objective or aim).

Even if undertakings in comparable situations are treated differently, the distinction can avoid the selectivity criteria if the measure can be justified (third step). The action is warranted due to the nature or objective of the reference system that the derogation is compared against. According to the Court, the justification argument should be focused on the aim of the reference system, not whether it is justified according to the internal market. It is not a sufficient argument that the arrangement is available to various undertakings or within all sectors. Member States are required to show why the difference exists, as well as why it is motivated. The Court’s statement in Belgium and Forum 187 ASBL, suggests that the prevention of double taxation can be a sufficient explanation. However, in that situation the connection to the specific advantages was not sufficiently justified. According to P OY, prevention of the commerce with setbacks would be a possible justification argument. Furthermore, the conditions for authorization must be objective and relevant for the legislation in question.

---

116 Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland (n 103) para 106.
117 ibid para 103–104; See also World Duty Free Group SA and Others (n 107) para 72–74; MOL (n 104) para 53.
118 Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH (n 78) para 40; Unicredito Italiano SpA (n 79) para 48; Cassa di Risparmio di Firenze and Others (n 79) para 136; Paint Graphos Soc (n 98) para 51, 52; Belgium and Forum 187 ASBL (n 64) para 123.
119 Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH (n 78) para 42; Paint Graphos Soc (n 98) para 64, 65.
120 Case C-409/00 Kingdom of Spain v Commission of the European Communities ECLI:EU:C:2003:92 para 46 and 53; Portuguese Republic v Commission (n 94) para 81–82.
121 Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH (n 78) para 48; Kingdom of Spain v Commission (n 120) para 48.
122 Paint Graphos Soc (n 98) para 64; Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland (n 103) para 146; World Duty Free Group SA and Others (n 107) para 58.
123 Belgium and Forum 187 ASBL (n 64) para 125; See also Commission Decision of 17 January 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium [2003] OJ L 282/25 para 111.
124 P OY (n 112) para 26-27.
3.3 Double tax treaties and state aid

The right to conclude double tax treaties is an exclusive competence of EU Member States. As the aim of Article 107(1) TFEU is the effects of national legislation, the article could be applied on double tax treaties if the conditions for state aid are present. Double tax treaties belong to Member States’ general tax competence, and does not constitute state aid. Luja argues, that in some situations state aid can exist, arising from selective treatment. Examples can consist of situations when the exemption method is applied only regarding certain incomes, instead of the general application of the deduction method, or where income taxed at 0% in the other state would be exempted.

According to Luja, a double tax treaty can result in state aid since most of the criteria usually are fulfilled. The selectivity criteria is, however, connected to the Member States general tax competence, and therefore not fulfilled in regard to general measures. The negotiation of a double tax treaty is a general act, and different outcomes between treaties would therefore be a natural consequence (and thereby justified) of the tax system. To avoid the reach of the state aid concept, double taxation agreements should be detailed and not leave possibilities of greater interpretation to national authorities. The limitations of the national authorities’ competence, would be analogically applicable towards double tax treaties because the principles concern the same issue.

3.4 Principles of procedure

The Commission has ten years to investigate aid measures. The time limit has received criticism since it can be difficult for businesses to anticipate whether a measure will constitute state aid according to a future application. However, the Commission is precluded from ordering a Member State to recover the aid if the recovery would be

125 Test Claimants in the Thin Cap Group Litigation (n 72) para 49.
127 ibid p 235.
128 ibid p 235-236.
129 ibid p 235.
130 See P OY (n 112) para 27 and 30.
131 Article 17, Council Regulation (EU) 2015/1589 (n 83).
inconsistent with Community values, such as the principle of legitimate expectations.\(^{133}\) In case of prohibited state aid, the aim is to restore the market conditions to the situation prior to the beneficial treatment.\(^{134}\) Aided undertakings have to repay the aid and interest, for a period up to ten years to the Member State.\(^{135}\)

The principle of legitimate expectations applies where an individual, ‘(…) has been given precise assurances by the administration’.\(^{136}\) The principle is not applicable in relation to the Notice, since the document does not have a legal value. However, the Court found in *Gibraltar* that the Commission is obliged to state adequate reasons as to why it derogates from the Notice.\(^{137}\) The Commission is not bound by previous decisions concerning the concept of state aid.\(^{138}\) This can produce problems concerning the ten-year limit regarding the future compliance with Union law. Concerning recent transfer pricing decisions, the US Treasury Department criticised the Commission for applying a definition of state aid that was not foreseeable for tax payers.\(^{139}\) However, by its nature, state aid is based upon the effect, and consists of objective factors.\(^{140}\) Thus, measures aligning to free market and general tax principles as far as possible, should be consistent with the state aid concept.

### 3.5 Summary

This section has concretised the concept of fiscal state aid and the connection to double tax treaties. The aim of state aid is to prevent injustices on the internal market due to state interference. The state aid concept consists of several assessments: whether the measure is financed by state resources (direct or indirect), whether the measure consists of a benefit only available to certain undertakings, and whether the measure disrupts the competition and affect the trade between Member States. The enforcement of state aid does not take into account the division of competences between the Member States and the Union.

---

\(^{133}\) Articles 16 and 17, Council Regulation (EU) 2015/1589 (n 83).

\(^{134}\) Luja, *Do State Aid Rules Still allow European Union Member State to Claim Fiscal Sovereignty?* (n 132) p 321.


\(^{136}\) Belgium and Forum 187 ASBL (n 64) para 147.

\(^{137}\) Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland (n 103) para 128.

\(^{138}\) ibid para 136.


It is possible that double taxation treaties can be subject to state aid investigations, examples would be different treatment of types of incomes or sectors. Differences between outcomes of different treaties should, however, be a consequence of the negotiations between states, therefore, not constitute state aid. Member States should make sure that international and domestic businesses are not discriminated. Even if the Commission must regard procedural principles in the state aid evaluation, the Commission is not bound by previous decisions.
4 The Luxembourg tax rulings – McDonald’s

4.1 Introduction

According to the Commission, advance tax rulings produce legal certainty and do not usually constitute state aid.141 When tax authorities depart from normal tax rules and grant beneficial treatment to selected businesses, this behaviour creates unjust effects on the European market. In 2013, the Commission began investigations into the practice of tax rulings within the Member States especially focused on transfer pricing rulings.142 Concerning McDonalds Europe, this led to a formal opening of an investigation about two tax rulings obtained in Luxembourg. This chapter aims to provide an insight to interpretation problems concerning tax treaties and the importance of the selectivity assessment.

When the Commission opens a formal state aid investigation, the Member State concerned must be informed.143 The opening of an investigation is only an indication of the possible distribution of state aid. The Commission presents the conclusions of whether illegal state aid exists or not in a final decision.144 According to Article 288 TFEU, final decisions adopted by the Commission are legally binding for the state concerned.

4.2 The McDonald’s tax rulings

According to the Commission, Luxemburg authorities had issued two tax rulings, both of which concerned the taxable status of McDonald’s Europe.145 The Commission’s main argument is that the second ruling granted a selective advantage to McDonald’s Europe. The selective treatment consists of a departure from the basic corporate taxation principle in Luxembourg. According to the Commission, the interpretation made by the Luxembourg authorities concerning the application of the double tax treaty does not correspond with the OECD Model Tax Convention nor the Commentaries. In addition, the measure was not justified in relation to the internal market.146

141 Working Paper on state aid and tax rulings (n 5) para 5.
142 ibid para 5 and 6.
143 Article 4 and 6, Council Regulation (EU) 2015/1589 (n 83).
144 ibid, article 9.
145 Alleged aid to McDonald’s (n 7) para 26.
146 ibid para 79,80 and 90.
The first ruling concerned the structure and residence status of McDonald’s Europe. McDonald’s Europe wished to confirm that the company was resident in Luxembourg and the tax implications of the reorganisation of the European business structure.147 McDonald’s Europe was controlled by McDonald’s Corporation and had ‘beneficial ownership’ of specific license-rights from the parent company.148 These license-rights (including obligations and financial risks) were allocated to a US branch of McDonald’s Europe, and a Swiss-branch was administering the license-rights as well as the know-how to European restaurants.149 Royalty payments from the European restaurants were received by the Swiss branch and later paid to the US branch after a deduction of the Swiss branch’s costs.150

According to the first ruling, McDonald’s Europe was resident for taxation purposes in Luxembourg, and the branches in both the US and Switzerland constituted permanent establishments.151 The ruling also confirmed that the taxation of McDonald’s Europe was subjected to Luxembourg’s double taxation treaties with the US and Switzerland. Taxation of the US branch under the double tax treaty between Luxembourg and the United States was according to the ruling exempted from tax in Luxembourg if the income was subject to tax in the US.152 According to the double tax treaty, foreign income is included in the tax calculation but exempted from Luxembourg taxation.153

The second ruling examined whether the US branch constituted a permanent establishment.154 According to McDonald’s Europe’s tax advisor, the branch would not be considered a permanent establishment under US law. Consequently, income from the US branch would not be subjected to taxation in the US.155 McDonald’s claimed that the definition of ‘business’ would fall under Article 3(2) of the double tax treaty, and consequently, be interpreted according to national law. According to the tax advisor, this would result in that profits from the US branch were to be exempted from

---

147 ibid para 28.
148 ibid para 12,16 and 29.
149 ibid para 28, 29,30 and 32.
150 ibid para 28, see also table 1 p 8.
151 ibid para 28, see also table 1 p 8.
152 ibid para 28, see also table 1 p 8.
153 ibid para 28, see also table 1 p 8.
154 Alleged aid to McDonald’s (n 7) para 45,48-50.
155 ibid para 46 - 47.
Luxembourg taxation. Luxembourg tax authorities confirmed the tax adviser’s view.

4.3 The Commission’s examination and argumentation

4.3.1 Existence of selectivity

According to the Commission, the Luxembourg authorities knew that the US branch was not regarded as a permanent establishment in the US. Consequently, income would be exempted from US taxation and taxable in Luxembourg. Besides, the Commission questioned whether the US branch was a permanent establishment according to Luxembourgish law. The second ruling was according to the Commission, inconsistent with the principle of taxation on worldwide profits and a derogation from the normal taxation system. The Commission argues that the practice can constitute prohibited state aid. According to Luxembourg, the US and the Swiss branches were permanent establishments under Luxembourg tax legislation, and the profits were therefore rightly exempted according to the tax treaties.

To establish the existence of state aid, the Commission evaluates the criteria’s set out in 107(1) TFEU. Concerning the criteria of state resources the Commission found that since the Luxembourg tax authorities delivered the ruling, the measure should be imputable to the state. The fact that the ruling concerns a bilateral treaty is irrelevant, as it is the outcome that is the focus of the Commission’s investigation. State resources were used since the second ruling resulted in a decreased amount of corporation tax. According to the Commission, the fact that McDonald’s is a business that operates in various Member States is sufficient to for there to be an effect on the trade between the Member States and a disturbance of the Common market.

---

156 ibid para 45, 48 and 49.
157 ibid para 51.
158 ibid para 55.
159 ibid para 70, cf para 90.
160 ibid para 92.
161 ibid para 57.
162 ibid para 61–65.
163 ibid para 63.
164 ibid para 64.
According to the Commission, the second ruling is selective because it confers a selective advantage on McDonalds Europe in form of a reduced tax burden.\textsuperscript{165} The corporation tax legislation in Luxembourg is used as a reference point, since the tax system is objective and aims towards taxation of all Luxembourg companies. According to the Commission, the Luxembourg taxation of resident companies is calculated in relation to worldwide profits unless a tax treaty applies. Double taxation treaties are a part of the national tax legislation. The second ruling is assessed in comparison with other resident companies, notwithstanding if they are subject to a tax treaty or not. In other words, the application of a tax treaty is insignificant for the determination of a reference system.\textsuperscript{166}

According to the Commission, the same characteristic can constitute both the derogation and the advantage in the examination of state aid. Furthermore, an individual economic benefit produces a presumption of selectiveness.\textsuperscript{167} Concerning the national legislation, McDonald’s Europe should be subject to worldwide taxation of its profits under Luxembourg law. The Commission argues, that the second ruling confers a selective advantage by reducing the amount of tax payable, compared to companies that are in a comparable factual and legal position (taxed on their worldwide profits in Luxembourg).\textsuperscript{168}

The double taxation treaty between Luxembourg and the United States applies to McDonald’s Europe and its subdivision. Article 25 of the treaty declares that Luxembourg should exempt income that ‘may be taxed in the United States’.\textsuperscript{169} According to McDonald’s interpretation of Article 25, Luxembourg should not impose taxation on income, independent of whether it was subject to tax in the US or not. By supporting that view, there is no taxation of the US branch. However, the Commission argues that this is inconsistent with the treaty’s aim or wording. In contrast to the interpretation made by McDonald’s, the Commission interprets Article 25(2) in context with Article 7 of the double tax treaty (concerning business profits).\textsuperscript{170} According to the interpretation made by the Commission, Luxembourg should only tax the US income to

\textsuperscript{165} ibid para 65 and 92.
\textsuperscript{166} ibid para 69, 70, 72 and 76.
\textsuperscript{167} ibid para 75; \textit{MOL} (n 104) para 60.
\textsuperscript{168} \textit{Alleged aid to McDonald’s} (n 7) para 79, 80, 82.
\textsuperscript{169} Article 25(2)(a) in the Double Tax Treaty between Luxembourg and the United States (n 153); \textit{Alleged aid to McDonald’s} (n 7) para 83.
\textsuperscript{170} \textit{Alleged aid to McDonald’s} (n 7) para 88.
the extent that the income is not subject to taxation in the US. Furthermore, the decisive point of the treaty is whether the US has the right to exercise taxation and not whether it is exercised.\footnote{ibid para 88-89.} In support of this interpretation, the Commission refers to Article 23 of the OECD Model Tax Convention.\footnote{ibid para 90.}

In the Commission’s argumentation reference is made to Article 23 A of the OECD Commentaries. Article 25(2) in the double tax treaty between Luxembourg and the United States, is comparable to Article 23 A in the OECD Model Tax Convention.\footnote{cf Article 23 A in the OECD Model Tax Convention (n 3) and Article 25 in the Double Tax Treaty between Luxembourg and the United States (n 153).} In the 2014 or the 1996 versions of the OECD Model Convention and its Commentaries, neither Luxemburg or US had filed reservations or observations regarding Article 23.\footnote{OECD, Commentaries (n 3) p C(23)-33.} However, the current explanation in the OECD Commentary was added to the Model Convention in 2000. The section was subsequently changed to clarify the problem where one state might not recognise the competence to exercise taxation.\footnote{ibid p C(23)-49.} However, while the 2008 update differentiates in the wording, the main intention remains.\footnote{cf ibid p C(23) – 13 and C(23)-48 and 49.} The 2000 update might hinder the possibility to interpret Article 25 of the double tax treaty, in accordance with the explanation provided in the OECD Commentaries since it did not exist when the double taxation treaty was concluded and transpired into Luxembourg law. The possibility of considering the update of the Commentaries in the Luxembourg decision, depends on the interpretative status of the 2000 update of the Commentaries.

4.3.2 Complementary reflections
The Commission argues, that an individual ruling might confer a presumption of selectivity. In the case of MOL, the Court held that the Commission must specify if the measure confers a selective advantage against businesses in a similar position.\footnote{MOL (n 104) para 59.} Concerning general measures, there must be a different treatment of undertakings in comparison to the contested treatment.\footnote{ibid para 60.} An example could be a different treatment of McDonald’s permanent establishments compared to the permanent establishments of other companies. The construction of the reference system will, therefore, affect the
determination of selectivity. Subsequently, the Luxembourg practice can be considered as a general measure if the reference system consists of a narrower set of rules.

If the reference system comprises the application of double tax treaties, the difference between the agreements will be too unreliable to find a derogation. However, the different methods to reduce or relieve double taxation will constitute a part of the taxation system. According to the Court’s analysis in the Gibraltar or World Duty Free cases, there must be a differencing treatment of similar companies. Where the reference system consists of the application of the double taxation treaties (e.g. the classification of a permanent establishment) selectivity depends on how Luxemburg normally applies tax conventions and the qualification of permanent establishment. If the ruling is a qualification for granting the tax reduction and the definition of permanent establishments depends on whether a ruling is obtained, selectivity could arise due to the differencing treatment of the expression permanent establishment.

4.4 Interpretation of the double tax treaty
4.4.1 Methods
The Commission argues that the Luxembourg authorities founded the decision on an incorrect interpretation of the double tax agreement and national law. In contrast to the interpretation made by Luxembourg, the interpretation made by the Commission have a contextual approach and considers the article in correlation to other provisions. To support the interpretation the Commission refers to the OECD Commentaries. However, when the double taxation agreement between Luxembourg and the United States was concluded and incorporated into Luxembourgish law in 1999, the section in question (32.6) was not a part of the Commentaries. When the contested ruling took place in 2009, the Commentaries had been updated with the current definition. If the Commission’s decision (or the succeeding judgement by the CJEU) is based upon the ambulatory interpretation of the double tax agreement, this will set a precedent for the interpretation of all the Member States double tax agreements.

179 Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland (n 103) para 92-93, 101 and 145; World Duty Free and Others (n 107) para 87-88.
180 OECD, Commentaries (n 3) p C(23)-48.
In the double tax treaty between the United States and Luxembourg, Article 3(2) has the same meaning as the equivalent article in the Model Tax Convention.\(^\text{181}\) McDonald’s and Luxemburg interprets Article 25(2) in the treaty, and qualify the term ‘business’ in regard to national legislations.\(^\text{182}\) The interpretation made by McDonald’s of Article 25(2) give the impression of being a restrictive literal approach. The expression ‘may be taxed’ is regarded as a restriction for taxation by Luxembourg, even if there were a permanent establishment that was not taxed according to US legislation. The different qualification of permanent establishment between the national legislations, results in a mismatch of the classification between Luxemburg and the US. Consequently, double non-taxation occurs.

### 4.4.2 Permanent establishment

The definition of a permanent establishment in the double tax treaty between Luxembourg and United States is consistent with the OECD Model Tax Convention.\(^\text{183}\) Accordingly, guidance to the interpretation of the double tax treaty can be found in the OECD Commentaries, as neither Luxembourg or the US have made reservations or observations concerning the relevant parts of Articles 3 (definitions), 5 (permanent establishment), or 23 (method for double taxation relief).\(^\text{184}\) According to the Commentaries, a permanent establishment exist if there is a fixed place of business that contributes to the performance of the company. The Commentaries asserts further, that the letting of intangible property, in general, constitutes a place of business.\(^\text{185}\) Based on the information provided in the letter to Luxemburg, the US-branch appears to have an office constituting a place of business. However, according to the information provided by Luxembour it is questionable whether there is a person who is dependent on the company. Branch staff is provided by the McDonald’s Corporation (it is the US parent company that directs the staff). According to the Commission, under US law the branch is disregarded.\(^\text{186}\) Should a permanent establishment exist in the United States, according to an ambulatory interpretation of the OECD Commentaries, Luxembourg

\(181\) Article 3(2) in the Double tax treaty between Luxembourg and the United States (n 153); Article 3(2) in the OECD Model Tax Convention (n 3).
\(182\) Alleged aid to McDonald’s (n 7) para 83 and 84.
\(183\) cf Article 5 in the Double Tax Treaty between Luxembourg and US (n 153) and Article 5 in the OECD Model Tax Convention (n 3).
\(184\) OECD, Commentaries (n 3) Article 2(3) p C(2)-3, Article 5 p C(5) -41-47, Article 23 p C(23)-33.
\(185\) ibid, C(5) para 2,4 and 8.
\(186\) See Alleged aid to McDonald’s (n 7) para 30-31, 81, n 47; OECD, Commentaries (n 3) C(5) para 4.3.
can impose taxation if the source state disregards the existence of a permanent establishment.\textsuperscript{187}

\textbf{4.4.3 the 2000 update to the Commentaries}

Presupposing that the OECD Model Tax Convention and its Commentaries constitute soft law and, thereby, can act as an inspiration to the interpretation of EU law and the application of national law, the Commission appears to regard the 2000 update as a clarification.\textsuperscript{188} An ambulatory approach towards the interpretation of the Luxembourg treaty can be justified, on the basis that the 2000 change was meant to act as a clarification of the application of the Model Tax Convention. However, an expressed scope for the prevention of mismatches before the 2000 update did not exist in the Commentaries. The enforcement of taxation regarding cases of mismatches between the different qualifications would be on the discretion of tax authorities. A reason to justify the imposition of taxation in that case would be the protection of the domestic tax base. Authorities that did not fully enforce taxation, in this case, would hardly be met with a complaint by the tax payer, whose tax liability concerning the cross-border income would be non-existent in both states. Since the application of paragraph 32.6 of the Commentaries does not change the main application of Article 23 of the Model Tax Convention, the paragraph can from the OECD’s perspective be considered a minor modification.\textsuperscript{189} From the viewpoint of the tax payer, the 2000 update can constitute an exemption to the application of Article 23 which would involve a static interpretation. This interpretation would be consistent with the rule of law, as the exemption did not exist at the time when the tax treaty between Luxembourg and the United States was signed.

\textbf{4.4.4 Consequences}

If the CJEU confirms the Commission’s current line of reasoning, Member States would have to evaluate the possibility of state aid when applying double taxation treaties. In the present situation, it is possible to make the argument that the EU principle of loyalty required the Luxembourg authorities to interpret the taxation agreement in conformity with EU law. Consequently, Luxembourg authorities would have to assess whether the result was comparable with state aid principles. The concept of state aid is effect centred

\textsuperscript{187} OECD, Commentaries (n 3) C(23) para. 32.6.
\textsuperscript{188} See Alleged aid to McDonald’s (n 7) para 80,81,90 and 91.
\textsuperscript{189} See OECD, Commentaries (n 3) C-(23) para. 34 and 35.
and excludes consideration of national resources, which can be considered a natural outcome of the principle of loyalty. However, this consequence has been questioned in doctrine as it will reduce the Member States competence in tax areas.\textsuperscript{190} The development would not be unnatural, however, as the Member States are required to interpret their legislation in harmony with EU law.

The fact that the Commission refer to the OECD Commentaries in the McDonald’s investigation, poses the question of which level of compliance with the Commentaries that can be required by a Member State. Concerning transfer pricing, the Commission states in the Notice that application following with the OECD guidelines would be acceptable.\textsuperscript{191} A requirement of compliance with OECD instruments in the application of domestic international taxation would give the Commission indirect control of the Member States double tax treaties and taxation law. Member States would, then, be at risk of state aid investigations for all treaty exceptions to the Model Tax Convention and would have to interpret all their tax treaties in a uniform style. If the Commission seeks to establish a common interpretation of the OECD Convention, a legislative approach would be preferable. A condition of compliance with EU law could follow from the CJEU’s current approach of double taxation treaties concerning Treaty freedoms. To avoid state aid investigations, Member States should make sure the result of double taxation rulings conforms to EU law.\textsuperscript{192}

4.5 Summary

This chapter has illustrated the relationship between state aid and double tax treaties. Questions of interpretation and selectivity have arisen in connection to the Commission’s investigation. The Commission argues in the McDonald’s investigation, that a selective advantage is conferred to McDonald’s by omitting the income from a branch in the United States. The argumentation provided by the Commission is of importance as it offers a preliminary view of how application and interpretation of double tax treaties can be affected of state aid legislation. Double tax treaties are regarded as national legislation. In the final decision, the argumentation concerning the

\textsuperscript{190} Rossi, ‘A New Framework for State Aid Review of Tax Rulings’, EStAL 3 (2015) 371-381, p 378; Luja, Do State Aid Rules Still allow European Union Member State to Claim Fiscal Sovereignty? (n 132) p 344.\textsuperscript{191} the 2016 Notice (n 97) para 173; See also Luja, Do State Aid Rules Still allow European Union Member State to Claim Fiscal Sovereignty? (n 132) n 12.\textsuperscript{192} Test Claimants in Thin Cap Group Litigation (n 72) para 53; Columbus Contain Servcies (n 66) para 53.
reference system and the status of the OECD Commentaries will be of importance for Member States interpretation of double tax treaties. Currently, this investigation has shown that Member States must be aware that double tax treaties can produce questions of state aid.

Consequences of the Commission’s current argumentation and interpretation has been briefly discussed. The Commission’s ambulatory interpretation of the OECD Commentaries pose the question whether Member States will have to comply with the OECD instruments. Should Member States be required to interpret all tax treaties in line with the OECD Model, common interpretation principles should be agreed upon. The principles could be introduced in form of a directive, however, this would reduce fiscal sovereignty.
5 OECD instruments and State Aid

5.1 Introduction

The Commission’s arguments regarding the McDonald’s tax rulings and the relationship between state aid and tax treaty interpretation are preliminary. However, the Commission has published final decisions concerning the taxation of intra-group transactions and the requirement of arm’s length in the OECD Model Tax Convention. The published decisions concern the taxation of Fiat, Starbucks and Apple. Article 9 of the OECD Model Tax Convention, is considered the basis for the arm’s length principle, which requires transactions between associated companies to be conducted as though the companies were independent actors. This chapter aims to establish the current position of the OECD material in relation to state aid, and the effects for the final McDonald’s decision.

The focus of the transfer pricing decisions is the establishment of a company’s tax base by transfer pricing methods. In comparison, the McDonald’s investigation focused on the application of a double tax treaty and whether an ambulatory interpretation is required. Furthermore, McDonald’s concerns the situation where the income is associated with a permanent establishment in the US instead of group transactions between two undertakings. However, both decision groups concern the distribution of profits between international group-subsidiaries. To assess whether the transfer pricing rulings in question confer a selective advantage, the Commission refers to a principle of arm’s length or equal taxation within Article 107(1) TFEU.

Article 9 of the OECD Model Tax Convention and Article 107(1) in the TFEU are similar as they both aim towards the creation of independency between group companies. However, the two expressions of arm’s length are based on separate foundations. The fiscal arm’s length principle is established by the OECD Model Tax

---


194 Article 9 in the OECD Model Double Tax Convention (n 3); OECD, Commentaries (n 3) C(9) para 2: Fiat (n 193) para 86; Apple (n 193) para 371, 373; Starbucks (n 193) para 64.

195 Fiat (n 193) para 220, 222, 225, 228–229; Starbucks (n 193) para 264.

196 Peter J. Wattel, ‘Stateless Income, State Aid and the (which?) Arm’s Length Principle’, Intertax 44
Convention and the transfer pricing guidelines. The competition based principle originates from Article 107(1) TFEU, and is used to describe fiscal selectivity in competition terms.\textsuperscript{197} Even if the two techniques have a similar aim or result, which consists of the perception of group transactions as if between single operators, it does not necessarily mean that they are exchangeable. The Commission’s approach is designed to prevent states from facilitating favourable conditions for undertakings in a competition context. Whereas, the OECD approach creates methods for the calculation of tax within a jurisdiction.

5.2 OECD guidelines in State Aid decisions to this point

The Commission explains in each investigation that the OECD guidelines are used to describe the expert opinion and to take advantage of the expression of the international consensus on transfer pricing. In addition, the Commission explains that the OECD fiscal arm’s length should be separated from the equal treatment principle that the Commission endorses. In the decisions, it appears the Commission has used the OECD guidelines as an international standard and compares the hypothetical outcome of the different methods.\textsuperscript{198}

The Commission’s argumentation received criticism in doctrine. Arguments involved the assertion of the OECD material as soft law and questioned the Commission’s use of the selectivity assessment as unsuitable for transfer pricing.\textsuperscript{199} The use of an international standard to calculate the tax base could, however, be justified. An argument can consist of the need to compare the performed calculation against a common standard, i.e. the normal tax base for group transactions. Furthermore, transfer pricing rules can produce different results.\textsuperscript{200} Therefore, the Commission must ask itself whether a margin of error should be applicable in the evaluation of transfer pricing rulings. If the conclusion of a domestic transfer pricing ruling is within reasonable limits in relation to the applicable tax rate, the ruling could be justified in a state aid perspective. Thereby, a margin of error would be a possible justification of the taxation

\textsuperscript{197}ibid.
\textsuperscript{198}Starbucks (n 193) para 66, 279-283; Apple para 76 and 82; Raymond H.C Luja, \textit{Will the EU’s State Aid Regime Survive BEPS?} BTR 3 (2015) 379-390, p 385, who reach a similar conclusion.
\textsuperscript{200}Luja, \textit{Will the EU’s State Aid Regime Survive BEPS?} (n 198) p 385.
system (the third step of the selectivity analysis). A margin of error would also allow taxpayers more security against possible mistakes made by the tax authorities.

However, it is possible that the Commission has developed the arm’s length principle inspired of, or based upon the OECD arm’s length principle. Since the OECD material is used as a foundation and guidance when developing the autonomous EU expression. An autonomous EU phrase would have to account for the difference between tax law and competition law. The rulings are addressed through state aid, which indicates that the focus of the decisions is an assessment of equal treatment within the domestic corporate taxation system. An indication of this approach is the emphasis of OECD guidelines as an international consensus.

5.3 The existence of an equal taxation principle
According to the Commission, the determination of a free-market principle and its assessment should be made against the position of unconnected companies. In the decisions in question, the Commission evaluates the methods that have been used in the domestic tax rulings. State aid have been found present by a lowering of taxable income through transfer pricing decisions. Because the Commission refers to the OECD arm’s length principle as well as a state aid principle, a confusion arises of what principle the Commission actually applies. The advance transfer pricing rulings aim to confer a security for the taxpayer of how the property will be taxed. According to Rossi, it is clear that the Commission does not question the ruling practice nor the Member States competence to do this. The issue is that Member State authorities have issued these rulings, irrespective of a comparison with the position of two independent companies, and thereby overstepping their competence.

According to the Commission, the principle of a free-market assessment within Article 107(1) TFEU, can be derived from the Court’s judgment in Belgium and Forum 187

201 See Fiat (193) para 228, 229, 230; Starbucks (n 193) para 262, 264 -266;
202 See Wattel, Relevance of (Deviations from) the OECD Model and Commentaries in ECJ Income Tax Case Law (n 65) p 103-105.
203 See Fiat (n 193) para 87; Starbucks (n 193) para 66.
204 Fiat (n 193) para 215 and 228; Starbucks (n 193) para 236 and 262–264.
205 Starbucks (n 193) para 235-237; Fiat (n 193) para 225, 227-228.
206 See as an example Starbucks section 9.2.3.4(n 193), especially para 363-366.
207 Rossi (n 190) p 373.
208 ibid p 375.
ASBL. In the present case, the cost-plus method for calculation of intra-company transactions was normally applied. For eligible companies, the system allowed exceptions from the cost items that would form a part of the assessment of the total cost base. The Court argued, that the system resulted in an advantage as the exceptions would lead to a lower cost base for eligible companies and thereby a lower taxation (compared to ineligible businesses, where all cost items would be present). As Rossi rightfully points out, the above conclusions of the Court concerned the presence of an advantage and not whether the advantage was selective. However, by pointing out that exceptions from a tax base constitute an advantage, the Court also implies that there is a discriminating treatment between the two groups of undertakings (step two in the selectivity assessment).

There appears to be a discussion in legal doctrine, whether the principle proposed by the Commission is based upon the OECD term or not. Wattel points out, that the Commission’s principle focuses on equal treatment and is part of the enforcement of state aid. Consequently, it should be a part of competition law rather than EU tax law. Even if the Commission’s current view is that the OECD guidelines are used to describe international consensus, the guidelines can still have a significant influence. In the decisions, the Commission argues that the assessment in question is not focused on the use of OECD guidelines. However, by the comparison of different methods the Commission would be able to influence Member States interpretation of the OECD guidelines. Interpretation of transfer pricing principles would be subjected to the Commission’s control in certain situations and reduce fiscal sovereignty. The combination of the two principles, creates an uncertainty to what reference system that should be applied. This situation requires a clear line between the Commission competences of state aid and taxation, if the OECD Guidelines should concretise the new market-based principle. A clear line would also provide legal certainty for tax payers.

209 See as an example, Fiat (n 193) para 225.
210 Belgium and Forum 187 ASBL (n 64) para 94- 97.
211 ibid para 97; Rossi (n 190) p 376.
212 Wattel, Stateless Income, State Aid and the (which?) Arm’s Length Principle (n 196) p 792 and 794.
213 ibid.
214 See for a similar argument, Luja, Will the EU’s State Aid Regime Survive BEPS? (n 198) p 385 and 386.
215 See for a similar reasoning: ibid p 388; Rossi (n 190) p 378.
The Commission is restricted in its application of state aid, by the wording of Article 107(1) TFEU. As seen above, a possible selective measure must be compared against the differences in the national legislation. A principle of equal taxation can follow from Article 107(1) TFEU in the calculation of tax. The Commission should still construct the reference system towards the aim of the domestic legislation, which might concur with international opinion. From a national point of view, multinational companies can be considered to consist of single entities and the aim of business income taxation would, therefore, not be different from standalone companies. However, a certain margin of error can be justified due to the nature of the tax system. The justification is necessary as there are difficulties to find exact counterparts or safe methods to determine the correct taxation in transfer pricing.

5.4 Implications for the McDonald’s investigation

In comparison to the transfer pricing decisions, the McDonald’s case concerns whether the authorities made a correct interpretation of a tax treaty. The conditions are similar to the transfer pricing decisions, in the sense that the cases relate to the attribution of profits. An equal taxation principle (if applicable) would have limited scope concerning the McDonald’s decision. In the McDonald’s investigation, the allocation of the royalty payments has an impact on the taxable base in Luxembourg, but it is the interpretation of the treaty and its comparability with Luxembourg tax law that is the main subject.

The equal taxation principle can confer a duty for states to assess results of tax ruling in a second stage to make sure that they comply with EU law (in this case an assessment of whether the ruling might cause a selective advantage). Wattel questions, if the fact that the applicable paragraph in the OECD Commentary was adopted after the tax treaty was concluded can result in state aid. An alternative approach concerning McDonald’s would be to disregard the Commentary and ensuing questions regarding the Commission’s competence to correct interpretations of tax treaties. An alternative focus could be the probable principle of equal taxation. In this case, equal taxation would be a consideration whether the result complies with equal taxation (in a national perspective) between multinational and purely domestic companies. The equal taxation principle as a

216 See chapter 3.
217 See Alleged aid to McDonald’s (n 7) para 92; Wattel, Stateless Income, State Aid and the (which?) Arm’s Length Principle (n 196) p 797.
218 Wattel, Stateless Income, State Aid and the (which?) Arm’s Length Principle (n 196) p 797.
step in the national decision practice would also be consistent with the principle of primacy of EU law and the state aid focus on effects. The national authorities would then have to ensure that the consequences from a ruling (the tax proportion) would be consistent with EU law.

The Commission’s interpretation regarding paragraph 32.6 of the OECD Commentaries, could create uncertainty concerning the OECD’s role in the application of state aid. The reference in the opening decision presupposes two things if used in the final decision: (1) the possible requirement of an OECD conformity in state aid law, and (2) an ambulatory approach regarding the 2000 update. These requirements create an uncertainty in the way Member States should conform to the OECD instruments. Threatening Member States not conforming with the Commission’s interpretation would affect tax payers. The proceeds of state aid will be paid to the state in question and tax payers will, therefore, be affected by uncertainty. In genuine cases of state aid, it is the domestic selectivity and advantage that would be crucial for the assessment.

5.5 Summary
This chapter has evaluated the importance of the OECD instruments in state aid law. As mentioned in previous chapters, the OECD Model Tax Convention and its Commentaries can have an influence on the interpretation of double tax treaties. Focus has been the use of the OECD transfer pricing guidelines and the importance of the arm’s length principle in recent decisions and what effect these can have for the outcome of the McDonald’s investigation.

The Commission has argued that there is a principle of equal taxation in Article 107(1) TFEU. However, the Commission’s use of the OECD arm’s length and principle of equal taxation create an uncertainty about the applicable standard in a selectivity assessment. This chapter has found that it is possible that an equal taxation principle in Article 107(1) TFEU exists, but the content is not comparable with the fiscal arm’s length principle. The equal taxation principle is competition based, whereas the OECD principle provides different methods for the calculation of tax. In the decisions, the OECD instruments appears to be used in secondary regard, as a justification of international equal taxation. However, the CJEU should confirm the existence and content of an equal taxation principle.
6 Consequences for EU Member States

6.1 Introduction
There is currently an uncertainty concerning the application of Article 107(1) TFEU in cases of international taxation. The published decisions are subject to appeal to the CJEU by concerned Member States and affected parties.\footnote{See as examples Cases T-759/15 (Fiat), T-636/16 (Starbucks), T-892/16 (Apple).} Several questions have arisen in connection to the application of international tax law: whether the Commission has competence to interpret a tax treaty and apply international standards that are not binding international law; where are the limits of Article 107(1) TFEU concerning international taxation, and does it include an equal taxation principle. The aim of the chapter is to evaluate possible consequences of the Commission’s current practice for the EU Member States’ fiscal sovereignty. In this chapter, it is presumed that the OECD documents do not constitute international law but merely consists of a recommendation from an international organisation.

6.2 Competencies in EU law
The Union and the Commission have exclusive competence over competition and state aid legislation. Although, the requirements in Article 107(1) TFEU restricts the Commission’s enforcement capacity, the Commission has a legal duty to motivate why a measure is selective, and show the existence of selective circumstances.\footnote{Article 3(1)(b) and 107(1) TFEU; See chapter 3.} It can be questioned whether a confirmation by the Court will reduce the Member States tax sovereignty and go beyond state aid. Technically, taxation is already subject to state aid scrutiny. The scope of state aid is independent of the measures used, which would mean that even advance rulings are included. The aim of transfer pricing or other advance decisions is to provide certainty. Tax legislation or other tax judgements have the same objective (to provide certainty) and are still subjected to fiscal state aid review. However, the concept that the Commission has introduced will have implications for the domestic tax legislation of the Member States if confirmed by the CJEU.

The Commission’s approach has indirect fiscal consequences, by setting a threshold for Member States’ sovereignty in the application of double tax treaties and transfer pricing rulings. It can be argued from a Member State’s perspective, that the current approach
restrains Member States’ tax allocation by restricting the interpretation of tax treaties and states’ taxation powers. Boundaries of tax jurisdiction would not be something that has been transferred to EU legislation and which would impose limitations on Member States’ fiscal sovereignty.221

6.3 Potential effects of the Commission’s approach

6.3.1 The position of double tax treaties

The Court’s position of double tax treaties regarding Treaty freedoms does not have to limit the ability to interpret double tax treaties in a state aid context. State aid and Treaty freedoms are different legal instruments and, therefore, have different consequences. Even if both mechanisms prevent discrimination, they are applicable in different situations concerning international double taxation. Therefore, the Court might consider a tax treaty interpretable if the requirements of state aid are fulfilled. In a tax competition perspective, where Treaty freedoms would allow preferential treatment of foreign businesses, state aid counteracts beneficial treatment of foreign subsidies. Consequently, both perspectives are necessary to achieve a balance of non-discrimination.

Double tax treaties have an international as well as a domestic aspect.222 The conclusion and interpretation of an agreement are examples of the international influence on double taxation treaties, since international principles govern the interpretation of the treaties.223 The Union does not have a common multilateral tax treaty and the power to conclude double tax treaties belongs with the Member States.224 The international influence might impede the Court to interpret double tax treaties in a state aid related case. On the other hand, the domestic aspect of a double tax treaty entails that a double tax treaty act as a limitation on the national tax law (because it reduces the tax jurisdiction a state can exercise). Consequently, the domestic aspect of a double tax treaty establishes the correct amount of tax due. In addition, the treaty requires interpretation by state authorities.

222 Vogel and Rust (n 8) m.no. 73,75, 90 and 127.
223 Article 6 in the Vienna Convention on the Law of Treaties (n 23).
224 Test Claimants in the Thin Cap Group Litigation (n 72) para 49.
The result of the domestic application of a tax treaty would be subject to state aid review, as a state aid examination (and particularly the selectivity criteria) concentrate on the result of domestic activities. In other words, a tax treaty would be subject to a state aid evaluation, regardless of the division of competences. The focus of a state aid review is the ruling or calculation of tax. If administration of tax treaties were exempt from state aid review, this could result in tax competition by beneficial interpretation compared to domestic undertakings, or the other way around. Interpretation of double tax treaties made by the domestic authorities and tax rulings should be subject to the rules on state aid, notwithstanding different competence capacities between the EU and the Member States.

6.3.2 Determination of selectivity

The analysis of state aid is limited to domestic situations. Depending on the situation, undertakings that are subject to a double tax treaty might not be in comparable situations to undertakings only operating in one country. Nevertheless, if the company is a permanent establishment or a domestic business, the domestic tax claim is (at least) focused on income that develops within that state. The proportional tax claim (allowing for tax deduction according to the exemption or credit method) reflects the state’s intention, which is to tax income acquired in the state. Therefore, it does not matter if the selective advantage has arisen from an application of international tax law or domestic tax legislation.

A tax payer who operates in one country is subject to that state’s tax jurisdiction, whereas, an international tax payer most likely is subject to several tax jurisdictions. Therefore, there is a difference between the situation in the cases of World Duty Free (which mainly concerned the foreign investment) and the situation where an undertaking has a taxable business practice in several jurisdictions. However, when the tax treaty has been applied and limited the domestic tax claim, can the domestic and international undertaking be in a comparable situation? The Court’s reasoning in the case of Gibraltar, would indicate that this is possible. If a selective treatment would be aimed at multinational undertakings, the multinational trait could be regarded as a

---

225 Italian Republic (n 87) para 27; British Aggregates Association (n 106) para 52 and 78; Alleged aid to McDonald’s (n 7) para 63; Working paper on State Aid and Tax Rulings (n 5) para 24.
226 See by analogy, P OY (n 112) para 25–27.
characteristic.\textsuperscript{228} Notwithstanding if the company is a permanent establishment or a residential undertaking, the domestic tax claim is (at least) focused upon income that develops within that state. Allowing for the application of the exemption or credit method, the objective from the state perspective would be the same, which is to tax the income acquired in the state.

Furthermore, the limitations are dependent on an actual divergence in treatment between similar companies. A tax treaty does not limit domestic principles governing business taxation. The main objective for the double tax treaty is to limit the domestic tax claim that a double taxation treaty can assign a company, i.e. the income of a permanent establishment or a residential business is still subject to taxation regarding the income arising in that state. The reference system applied in the McDonald’s case so far, therefore corresponds to what the Member States currently should apply.\textsuperscript{229}

6.3.3 Possible outcomes for Member State’s fiscal sovereignty

The result of the Commission’s reference to the OECD instruments will lead to an impact of EU competition law on Member States application of international tax law. The OECD instruments and Article 107(1) TFEU, are similar in aim but have different perspectives. The latter focuses on the equality between undertakings and the prevention of Member State’s unjustified involvement. The Commission’s approach can, however, have several outcomes for Member States fiscal sovereignty. A negative integration of OECD norms would refine the whole state aid concept, as it would result in an international standard instead of a domestic reference system. By referring to, and compare international instruments to the approach taken by the states (the second step in the selectivity analysis), the selective treatment would be determined by international norms.

The legal uncertainty and possible negative integration of OECD norms can create more incentive to realise the CCTB directive, something that depends on the Member States willingness to relinquish more fiscal competences to the EU. However, the threat of uncertainty could be resolved with less impact to Member State’s fiscal sovereignty

\textsuperscript{228} Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland (n 103) para 104; World Duty Free and Others (n 107) para 76.

\textsuperscript{229} See Wattel, Stateless Income, State Aid and the (which?) Arm’s Length Principle (n 196) p 797, who reach the same conclusion.
with an EU wide double tax treaty. An EU wide double taxation treaty, or an outline of shared values, conceivably in a directive, would create more certainty for cross-border transactions and would allow a more consistent approach double taxation issues within the Union. In addition, this would allow the CJEU to develop EU concepts in line with already adopted directives.\textsuperscript{230}

Another possible outcome of the Commission’s current approach is that Member States would have to consider EU competition law in their advance tax rulings. The Member States would be required to ascertain that the outcome is compatible with the Commission’s principle of equal taxation. The equal taxation principle would bridge the gap between the competition and fiscal approaches in the recent decisions. Primarily, this is an administrative effect but it would be consistent with the division between the Union’s exclusive competence of competition law and shared fiscal competence. It can be questioned whether the administrative effect is not already a part of the nature of state aid, due to the loyalty principle.\textsuperscript{231}

\textbf{6.3.4 Administrative Consequences}

An administrative consideration of competition law would act as a reminder of compliance with EU competition law but could be inspired by OECD instruments. The effect of OECD instruments would be restricted to the international consensus. An equal taxation principle as an administrative effect would have the least effect on Member States fiscal sovereignty, as the state aid analysis would be focused on domestic conditions. As mentioned above, an equal taxation principle would be consistent with state aid case law and the primacy of EU law.\textsuperscript{232}

OECD instruments could inspire the characterization of the equal taxation principle (or the Commission’s arm’s length concept). Assessment of selectivity is made in comparison to similar domestic undertakings, and the OECD arm’s length would then act as a reminder that group entities are separate and, therefore, should be treated as such. The CJEU would have to declare an applicable standard concerning international taxation. The Commission’s justification for references to the OECD Guidelines would then be a justification of the reference system. Future legislation that seeks to

\textsuperscript{230} See Lang (n 69) p 86, who argues for a Common Mutual Agreement Procedure between EU members.  
\textsuperscript{231} See section 4.4.  
\textsuperscript{232} See section 5.3.
undermine this effect and treat group transactions more favourably than single entities would, therefore, be regarded as selective to the extent that differences are due to the characteristics. This approach would be consistent with both the *World Duty Free* and *Gibraltar* judgements.

The possible influence of the current approach on Member States administrative sovereignty, may be limited. The Court has found that allocation of taxes is within the Member States’ control, but the effect must be consistent with EU law. Assuming, that the Court approach double tax treaties a state aid context similarly to the approach concerning Treaty freedoms. It is possible that the Court can extend that reasoning to the transfer pricing cases. The Commission’s approach could create a standard in the calculation of tax bases (if the equal taxation principle is recognised as a natural effect). The effect on the application of double tax treaties would be more limited as the Member States would not be required to interpret treaties in a specific way, but would have to apply a consistent interpretation in all their tax treaties. This approach would be a domestic effect of the application of the tax legislation if multinationals should be comparable with purely domestic companies.\(^{233}\)

In conclusion, a preferable effect of the Commission’s equal taxation principle is that Member States should be aware that domestic international taxation is subject to state aid. The content of an equal taxation principle could be inspired by the OECD instruments because the two concepts have a similar construction. The OECD instruments cannot, however, replace an equal taxation principle. The two concepts have different aims and focus, because the equal taxation principle focus on the result instead of forming a calculation method. Therefore, due to the nature of state aid, the Court’s focus should be the on the effects of a measure, which would limit the possibility of OECD influence. This approach would be consistent with the division of competences between the union and the Member States and allow greater fiscal sovereignty.

\(^{233}\) See section 5.2.
6.4 Summary

This chapter has discussed which consequences the equal taxation principle will have for Member States’ sovereignty. Interpretation of double tax treaties is not part of EU tax law. However, the domestic aspect of a tax treaties requires Member States to consider whether the result of a treaty is contrary to EU law. The Union’s exclusive competence regarding competition, requires an interpretation consistent with state aid law. This should not mean that the Commission automatically can set a specific standard. On the contrary, the current state aid assessment is made against the aim of the domestic legislation. The equal taxation principle could balance the potential gap between the Commission’s state aid competence and Member State’s fiscal sovereignty, by confirming that international and domestic companies are treated similarly.

A negative integration of the OECD instruments would require a redefinition of the state aid concept. The arm’s length principle provides a method for the calculation of tax, whereas a state aid assessment compares the result of different tax treatment. The integration of OECD expressions would create more uncertainty and affect Member States internal tax legislation. A preferable consequence would be an administrative consideration of competition law, which is consistent with current EU law.
7 Conclusion

7.1 Summary

Within international law the OECD Member States are not obliged to follow the OECD Model Tax Convention on Income and on Capital. The instrument is, however, one of the most influential even beyond application by OECD Member States. There appears to be a support for the establishment of specific terms of the Model Tax Convention, as technical terms within Article 31 of the Vienna Convention. Within EU tax law inspiration has been taken from concepts from the OECD Model, that can be used as a starting point for interpretation of EU tax law. State aid is the EU’s tool to prevent interference from Member States on the internal market. The focus of the state aid assessment is on the effect that the interference creates on the market. According to case law, the enforcement instrument is applicable notwithstanding the division of competence between the Member States and the Union. The division of competences is a foundation of the Union’s authority since the EU’s institutions only can act within areas that have been transferred by the Member States. The focus of this essay has been to position the effects of the OECD Model Convention within EU state aid law.

The European Commission has since 2013 investigated tax planning practices that could constitute state aid. In the initiating and final decisions that has been published the Commission has (to a certain extent) referred to the OECD instruments to support the existence of state aid. Even if the use of OECD materials appears to be supplementary, the Commission may affect the status of the instruments in the Member States domestic application. The fiscal sovereignty of Member States could be affected because a subsequent confirmation of the Commission’s argument can result in a negative approach to state aid by Member States. If only the determination of tax rates and collection of tax is within Member States powers, this might inspire tax competition between Member States in order to attract a taxable income. Member States with a negative approach could be less inclined to cooperate on fiscal or competition matters due to the Union’s greater powers.

Due to the nature of the state aid concept, the comparison of beneficial treatment between companies is made in a domestic perspective. For international tax law this means that international companies should be treated in the same way as domestic
companies. The equal treatment is consistent with Treaty freedoms as well as the non-discrimination principle in the OECD’s Model Tax Convention. However, state aid has another objective because it aims to prevent preferential treatment that multinationals might receive due to their size and taxable income.

7.2 OECD influence in EU state aid law

This essay has discussed the position of the OECD Model Tax Convention in international law as well as in EU state aid law. In conclusion, the OECD instruments are not part of international customary law nor the EU Treaties. According to doctrine, expressions in the Model Tax Convention and the Commentaries could at most act as a source of inspiration. Furthermore, the possible influence of OECD instruments under EU state aid law has been considered. The Commission has used the OECD guidelines as evidence of selectivity in recent state aid investigations, to demonstrate the appearance of selective treatment compared to domestic businesses. A possible outcome of the Commissions use of the OECD instruments, is a obligation for Member States to justify in what way an application of international tax law conforms to the treatment of domestic undertakings.

The essay has analyzed possible consequences of the Commission’s argumentation concerning tax rulings regarding McDonald’s. In conclusion, the essay suggests that a possible consequence of the Commission’s current approach is a requirement of an administrative assessment in a tax ruling. This approach would be consistent with the aim of state aid, which is to equalize the effects of possible state interferences. In addition, the effect would be consistent with Article 4 TEU. Member States would retain their fiscal competence to apply double tax treaties and transfer pricing methods. A competition standard would not be a new consequence under EU law because fiscal effects previously have been subject to state aid review, and Member States must act in accordance with EU law.\textsuperscript{234} The approach will place an additional burden of proof on Member States, as it must be shown that the judgement or decision in question conforms to an EU competition standard.

\textsuperscript{234} Examples could be the calculation of tax in the cases of Gibraltar (n 103) or the different treatment of domestic and international investments in the cases of World Duty Free and others (n 107); see section 3.2.4.
OECD influence of this rule depends on the approach taken by the Court. According to the Commissions current approach in state aid decisions, the OECD material appears to be used as an inspiration to a state aid principle. A state aid standard could consist of a conformity with OECD instruments. This standard would, however, not be consistent with the current state aid case law, since the current evaluation of selectivity is focused upon a domestic reference system. In that case, the evaluation of whether a measure is selective would then be made against international standard, which would reduce the power that the Member States have over the domestic taxation system. Currently a definitive interpretation of the OECD instruments does not exist, therefore, a comparison of selective measure against an international standard result in a risk of interpretation problems.
List of references

Table of authorities

Cases

*Court of Justice of the European Union*

Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten (Case C-143/99) ECLI:EU:C:2001:598

Banco de Crédito Industrial SA, now Banco Exterior de España SA v Ayuntamiento de Valencia (Case C-387/92) ECLI:EU:C:1994:100

British Aggregates Association v European Commission (Case T-210/02 RENV) ECLI:EU:T:2012:110

Columbus Container Services BVBA & Co. v Finanzamt Bielefeld-Innenstadt (Case C-298/05) ECLI:EU:C:2007:754

Commission v MOL (Case C-15/14) ECLI:EU:C:2015:362

Commission of the European Communities v French Republic (Avoir Fiscal) (Case 270/83) ECLI:EU:C:1986:37

Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt (Case C-307/97) ECLI:EU:C:1999:438

European Commission v Kingdom of the Netherlands (Case C-279/08) ECLI:EU:C:2011:551

European Commission v World Duty Free Group SA and Others (Case C-20/15) ECLI:EU:C:2016:981

European Commission and Kingdom of Spain v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland (Joined cases C-106/09 and 107/09) ECLI:EU:C:2011:732

Federal Republic of Germany v Commission (Case 248/84) ECLI:EU:C:1987:437

French Republic v Commission of the European Communities (Stardust Marine) (Case C-482/99) ECLI:EU:C:2002:294

French Republic v Ladbroke Racing Ltd and Commission of the European Communities (Case C-83/98 P) ECLI:EU:C:2000:248

Italian Republic v Commission of the European Communities (Case 173/73) ECLI:EU:C:1974:71

Jacques Damseaux v Belgian State (C-128/08) ECLI:EU:C:2009:471
Kingdom of Belgium and Forum 187 ASBL v Commission of the European Communities (Joined cases C-182/03 and C-217/03) ECLI:EU:C:2006:416

Kingdom of Spain v Commission of the European Communities (Case C-409/00) ECLI:EU:C:2003:92

Ministero dell’Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA (Case C-222/04) ECLI:EU:C:2006:8

Ministero dell’Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl, Adige Carni Soc. coop. arl, in liquidation v Agenzia delle Entrate and Ministero dell’Economia e delle Finanze and Ministero delle Finanze v Michele Franchetto (Joined cases C-78/08 to C-80/08) ECLI:EU:C:2011:550

POY (Case C-6/12) ECLI:EU:C:2013:525

Philip Morris Holland BV v Commission of the European Communities (Case 730/79) ECLI:EU:C:1980:209

Portuguese Republic v Commission of the European Communities (Case C-88/03) ECLI:EU:C:2006:511

Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue (Case C-524/04) ECLI:EU:C:2007:161

Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1 (Case C-148/04) ECLI:EU:C:2005:774

Australia

High Court of Australia of 22 August 1990 in Thiel v FCT 21 ATR 531

Decisions


**Statutes**

*International law*

Convention between the Government of the United States and the Government of the Grand Duchy of Luxembourg for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital, signed at Luxembourg April 3, 1996

Vienna Convention on the Law of Treaties of May 23, 1969

*OECD*


*Supplementary Protocol No.1 to the Convention on the OECD of 14 December 1960*

*European Union*

- **Primary law**
  
  

- **Secondary law**
  
  
  Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States [2009] OJ L 310/34
  
  
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 [2016] OJ L 193/1

Other statutory instruments
European Commission, Commission notice on the enforcement of State aid law by national courts (2009/C 85/01) [2009] C 85/1
European Parliament, Resolution of 25 November 2015 on tax rulings and other measures similar in nature or effect (2015/2066(INI))
European Commission, 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) [2016] C 262/1

Bibliography
Books
Miller M, Oats L, Principles of international taxation, (5th ed, Bloomsbury Professional, 2016)


Wattel P, ‘Relevance of (Deviations from) the OECD Model and Commentary in ECJ Income Tax Case Law’ in Guglielmo Maisto (eds) *Departures from the OECD Model and Commentaries* (IFBD Publications, 2014)

**Journal articles**


--“Will the EU’s State Aid Regime Survive BEPS” BTR 3 (2015) 379-390


**Webpages**


Other print sources