Law Department

National Tax Law and the Transnational Control of State Aids

On the Need for a Further Reconciliation of Economic and Social Policy Concerns in Transnational Law

HANNO E. KUBE

LAW No. 2001/9

EUI WORKING PAPERS

EUROPEAN UNIVERSITY INSTITUTE

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

European University Institute
3 0001 0034 6720 8

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

WP Fa9
EUR
ISTITUTO UNIVERSITARIO EUROPEO
BIBLIOTECA

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF LAW

EUI Working Paper **LAW** No. 2001/9

National Tax Law and the Transnational Control of State Aids

On the Need for a Further Reconciliation of Economic and Social Policy Concerns in Transnational Law

HANNO E. KUBE

Assistant Professor at the University of Heidelberg,
currently Jean Monnet Fellow, EUI

BADIA FIESOLANA, SAN DOMENICO (FI)

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

All rights reserved.
No part of this paper may be reproduced in any form
without permission of the author.

© 2001 Hanno E. Kube
Printed in Italy in August 2001
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

CONTENTS

I. Confronting national tax sovereignty with transnational restrictions 1

II. Tax arrangements and tax subsidies in national tax law 3
1. Taxation in proportion to „respective abilities" 3
a. Historical roots 3
b. The „Leistungsfähigkeitsprinzip" as an element of German constitutional law 5
2. Arranging the system – Privileging within the system 7
a. Tax exemptions in conformity with the principle of „ability to pay" 7
b. Tax exemptions in violation of the principle of „ability to pay": Tax subsidies 8
3. Tax subsidies in the constitutional framework: Limited admissibility 8
4. The conceptual distinction between tax arrangements and tax subsidies – Social policy concerns as an integral part 9

III. EC and WTO control of state aids 10
1. EC law 10
a. Overview 10
b. State aid control, art. 87-89 (ex-art. 92-94) EC 13
aa. The applicability of state aid control to tax exemptions – General development 13
bb. The notion of a state aid according to art. 87 I (ex-art. 92 I) EC in tax exemption cases 15
aaa. General 15
bbb. The Commission notice from December 1998 17
cc. The admissibility of tax subsidies as state aids/The regime of exceptions 20
dd. Procedural aspects 21
c. Conclusion: An incomplete distinction between tax arrangements and tax subsidies 21
2. WTO law 22
a. Overview 23
b. The system of subsidy control according to „track I" and „track II" 23
aa. Art. VI GATT 1994 and art. 10 ff. SCM Agreement („track I") 23
bb. Art. 3 ff. SCM Agreement („track II") 24
cc. Procedural rules 24
dd. The notion of a subsidy according to part I SCM Agreement in tax exemption cases 25
c. Conclusion: Another incomplete distinction between tax arrangements and tax subsidies 27
3. The impact of transnational state aid control on the national law on tax exemptions 27

IV. Coordinating national and transnational law on tax exemptions 29
1. „Hidden" restrictions of national tax sovereignty and the importance of coordination 29
2. A common understanding of tax subsidies as a central prerequisite of coordination 30
3. Opening up transnational law for the tax principle of „ability to pay" – Reconciling economic and social policy concerns on the transnational level 31
4. A central key to the further harmonisation within the multi-layered legal system 32

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

I. Confronting national tax sovereignty with transnational restrictions

Tax sovereignty is still considered to be a particularly sensitive area of authority retained by the nation states[1], to be the foundation of a „sound fiscal federalism"[2]; accordingly, the regimes based on transnational law[3] have hardly any powers to impose taxes themselves[4] and also largely abstain from regulating national taxation directly[5]. However, tax law only appears to be one of the enclaves in which the national legislators still dominate. The transnational regimes impose significant indirect restrictions on national tax sovereignty[6]. This generally shows in two situations:

First, national taxing power proves to be curtailed by transnational law, whenever states attempt to tax domestic and foreign persons, goods, services and capital differently. In this case, the principle of non-discrimination as a central element of transnational law becomes relevant. While it is potentially applicable to all kinds of taxation, the principle of non-discrimination has until now mainly been invoked in constellations of indirect taxation.

Secondly, national tax sovereignty also proves to be restricted, whenever states seek to support persons, goods, services or capital by means of privileging tax exemptions[7], which shall – in view of their financial effects – subsequently be referred to as tax subsidies. Here, the transnational state aid and subsidy controlling regimes define borderlines of permissible support. As tax subsidies do not necessarily discriminate against foreign entities (often the exact opposite is the case), the transnational curtailments of state power can be particularly far-reaching in this area; even more so, when considering that the definition of what constitutes a tax subsidy in the first place can be highly controversial. This becomes clear as soon as one realizes that a legislator may not only subsidize, but also technically arrange a just tax system by exempting certain cases from taxation. Insofar, the pivotal question is how to distinguish between substantively „advantageous", „normal" and „disadvantageous" tax

---

1 C. Waldhoff, in: C. Calliess/M. Ruffert (eds.), EUV/EGV, 1999, art. 90, par. 2 with further references.

2 W. Schön, Taxation and state aid law in the European Union, in: CMLR 1999, p. 911 (915); on the topic of fiscal federalism and taxation already W. E. Oates, Fiscal Federalism, 1972, p. 119 ff.; see also R. Ackrill, Fiscal Federalism and the European Union: the need for a new paradigm, Discussion Papers in European Economic Studies, No. 97/6, University of Leicester, November 1997.

3 The term „transnational law" is meant to comprise the European law as well as the international law.

4 In the EU, however, there appears to be an increasing number of proponents of direct EU taxation; on the suggestion by the President of the European Commission, Romano Prodi, see The EU's future: Dreams and discord, in: The Economist, 2.-8. 6. 2001, p. 14; on the – somewhat surprising – similar approach by the German Minister of Finance, Hans Eichel, see Widerspruch gegen Eichels Äußerung zu EU-Steuer, in: Frankfurter Allgemeine Zeitung, 16. 6. 2001, p. 1.

5 Direct taxes as well as the great majority of indirect taxes are not directly regulated by transnational law. An important exception are the EC rules on Value Added Tax (VAT); the Member States are bound to levy VAT within a certain corridor of tax rates in order to achieve a „level playing field" for goods and services and in order to guarantee sufficient funding of the Community's budget, which partly consists of a fraction of the VAT revenues of the Member States.

6 In a recent decision, the ECJ stated that „it must be observed first of all that, although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law"; ECJ, 28. 10. 1999, Case C 55/98 (par. 15) – Skatteministeriet/Bent Vestergaard. Also ECJ, 14. 2. 1995, ECR 1995, I-225 (par. 21) – Schumacker; ECJ, 28. 4. 1998, ECR 1998, I-1897 (par. 21) – Safir.

7 Within the European Union, about a quarter of all state aid is allocated by means of tax exemptions; see Commission, Eighth Survey on State Aid in the European Union, COM (2000) 205, p. 29 (on the internet: http://europa.eu.int/comm/competition/state_aid/survey/8_en.pdf).

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

treatments[8]. While – just as the principle of non-discrimination – also the transnational law on state aid control is potentially applicable to all areas of taxation, state aid control has until now primarily manifested its impact in the field of direct taxation

The following paper is dedicated to confronting the national law on tax exemptions with the transnational regimes of state aid control in this field of direct taxation. The aim of this confrontation is to shed light on the fundamental differences in the notions, scopes and motives of the respective legal frameworks, in particular regarding the pivotal question just outlined above, and to thereby provide some hints as to how national and transnational law on tax subsidies and its understanding could be improved. In a more general perspective, the paper is also intended to show that the classical notion of taxation as being within the exclusive competence of the nation states cannot be upheld anymore. As the example of tax subsidies will illustrate, national tax law and transnational competition law are intricately intertwined. Any further progress in the development of a multi-layered legal system will depend on taking account of interlinkages of this sort and on enhancing the cooperation between the different layers of the system.

To guarantee sufficient concreteness, the investigation will start off from the example of German law. The analysis will thus begin by briefly sketching out the German law on tax subsidies (II.). As the German tax system is founded on the principle of „Leistungsfähigkeit" („ability to pay") (II.1.), the boundary between the just arrangement of the tax system and an individual privilege within this system is defined along the lines of this principle (II.2.). Having identified a tax subsidy in this way, its constitutional limits can be demarcated (II.3.). The section will finish by summarizing the nature of the conceptual distinction between a tax arrangement and a tax subsidy in German law (II.4.). The transnational regulations on state aid control will be set against this background (III.). In regard to their predominance, the investigation can be confined to the EC (III.1.) and the WTO (III.2.) regulations, that will turn out to generally operate with incomplete distinctions between tax arrangements and tax subsidies that practically result in a rather one-sided focus on economic equality. A summary of the impact of the transnational regulations on national tax law (III.3.) will lead on to the – shorter, somewhat visionary – last part of the paper, in which an attempt is being made to offer some guidance as to how the national and transnational frameworks on tax subsidies and their understanding could be better coordinated in the longer run (IV.). After dismissing the critique of infringements into national tax sovereignty as substantive, but not constructive regarding the motives of this analysis and after underlining the central importance of coordination (IV.1.), the focus of the remaining considerations will lie on one of the most important prerequisites of such coordination, a common understanding of legal terms, here of the notion of a tax subsidy (IV.2.). This common understanding is mainly to be attained by transferring the tax concept of „Leistungsfähigkeit" („ability to pay") to the transnational level, which implies a further reconciliation of economic and social policy concerns on this level (IV.3.). Such reconciliation appears to be a central key to any further harmonization within the multi-layered legal system, in tax subsidy control as well as beyond (IV.4.).

[8] W. Schön, Taxation and state aid law in the European Union, in: CMLR 1999, p. 911 (922).

Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.
© The Author(s). European University Institute.

II. Tax arrangements and tax subsidies in national tax law

1. Taxation in proportion to „respective abilities"

a. Historical roots

In his study on the Wealth of Nations, Adam Smith defined four maxims of taxation[9]. According to the first of these maxims, all citizens should participate to the public expenses „in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state". Even though this maxim became very influencial in the scientific discourse of later times, Smith was not the first protagonist of principles of taxation[10]. A „justa et rationabilis causa" for every single tax was already advocated by Caspar Klock in 1634[11] (as Lorenz v. Stein noticed in an article from 1884[12]), maybe even earlier by others[13]. While Pufendorf in 1672 rooted this „causa" in the idea of equivalence, i. e. the fair exchange of state protection and support for money[14], the German financial experts of the 18th century, in particular v. Justi[15], argued for the general obligation of every citizen to contribute to the state by making use of his working capacity and personal wealth independently of any direct reward. This dissolution of the individual obligation to contribute from any relationship of exchange required the application of another measure of the just amount of taxation but the extent of services provided by the state. This measure was subsequently based on the tradition of individual freedom and equality[16], which is well illustrated by passages within the „political wills" of Friedrich II. of Prussia of 1768, who thought it just that every individual should participate in carrying the public expenses, but only to an extent that leaves him free to use the greater part of his income for himself[17]. This approach, which comes close to the first maxim of taxation by Adam Smith, found its way

---

[9] A. Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, 1776, book V, chap. II, part II (ed. by K. Sutherland, Oxford, 1993, p. 451).

[10] This was already noticed by A. Wagner, Finanzwissenschaft, Zweiter Theil, 2nd ed., 1890, p. 292.

[11] C. Klock, Tractatus Nomico Politicus De Contributionibus In Romano-Germanico-Imperio Et Aliis Regnis Ut Primum Usitatis, 1634, chap. VII, § 3.

[12] L. v. Stein, Zur Geschichte der deutschen Finanzwissenschaft im 17. Jahrhundert, in: Finanzarchiv Vol. 1 (1884), p. 1 (35).

[13] L. v. Stein was critizised for not having noticed that C. Klock had founded his writings on older sources; for these sources and the critique see Dieter Pohmer/Gisela Jurke, Zur Geschichte und Bedeutung des Leistungsfähigkeitsprinzips, in: Finanzarchiv N. F. Vol. 42 (1984), p. 445 (446 footnote 5).

[14] S. Pufendorf, De iure naturae et gentium, 1672, liber VII, chap. 4, § 7; liber VIII, chap. 5, §§ 4 f.; as a general foundation for the justification of taxation, the principle of equivalence lost its significance with the rise of the principle of the „ability to pay"; in the specific area of fees (Gebühren) and contributions (Beiträge), however, the idea of equivalence is still predominant.

[15] J. H. G. v. Justi, Ausführliche Abhandlung von denen Steuern und Abgaben nach ächten, aus dem Endzweck der bürgerlichen Gesellschaft abfließenden Grundsätzen, und zur Wohlfarth der Völker dienlichen Maaßregeln, 1762; also already J. H. G. v. Justi, Staatswissenschaft oder systematische Abhandlung aller Ökonomischen und Cameral-Wissenschaften, die zur Regierung eines Landes erfordert werden, Vol. 1, 1758, p. 403. Another important author of the time, going into the same direction, was J. v. Sonnenfels, Grundsätze der Polizey, Handlung und Finanz, 3. Theil: Die Finanzwissenschaft, 6th ed., 1798.

[16] The tradition of being able to assert freedom and equality rights against the imposition of taxes dates back – at least – to the Magna Charta Libertatum of 1215, which explicitly stated the purposes that could justify taxes. This enumerative method was also generally applied in the practice of the Holy Roman Empire. Of course, the parties to these rights and obligations were not the state and the individual citizens, but the crown and the nobility.

[17] Second „political will" of Friedrich II.; see R. Dietrich, Die politischen Testamente der Hohenzollern, 1986, p. 499.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

into the codifications and practices of the Enlightened states. Art. 13 of the Declaration of Human Rights preceding the French constitution of 1791 states that the public expenses „doit être également répartie entre tous les citoyens, en raison de leurs facultés"; according to paragraph 2 of the basic rights of this constitution, the distribution should take place „en proportion de leurs facultés"[18]. Similarly, many constitutions of the German states of the Constitutionalist era guaranteed the equal taxation of every citizen. Title IV, art. 13 of the Bavarian constitution of 1818, for example, states: „The participation in carrying the financial charges of the state is common to all inhabitants of the state, without exception of any class and without regard to prior privileges" („Die Theilnahme an den Staats-Lasten ist für alle Einwohner des Reiches allgemein, ohne Ausnahme irgendeines Standes und ohne Rücksicht auf vormals bestandene besondere Befreiungen.")[19]. Art. 134 of the Weimarer Reichsverfassung of 1919 stands in this line when it codifies: „All citizens equally contribute to the public expenses in relation to their means and according to the laws" („Alle Staatsbürger ohne Unterschied tragen im Verhältnis ihrer Mittel zu allen öffentlichen Lasten nach Maßgabe der Gesetze bei.").

By the end of the 19th century, the concept of defining the amount of the legitimate and just taxation on the basis of individual freedom and equality was then widely called a taxation according to the principle of „Leistungsfähigkeit"[20], „ability to pay", „faculté". Already in 1874, Friedrich Julius Neumann pronounced that this principle is explicitly recognized in a number of constitutions and tax laws[21]. While the idea of „ability to pay" has again and again been discussed and critizised[22], often as too vague and meaningless[23], it thus nevertheless became dominant in theory and practice. In the course of time, several schools developed, refining the principle in slightly differing ways and using it in slightly differing contexts. Some authors refer to it within broader theories on the right distribution of financial burdens[24]; others concretise the „ability to pay" through conceptions that base the individual burden on the so-called theory of equal sacrifice[25]. The firm foundation of the principle on the fundamental rights of freedom and equality, however, remained untouched, which is confirmed by contemporary German law and legal discourse.

---

[18] Later French constitutions confirm this principle; see art. 16 of the constitution of 1795 („en raison de leurs facultés"); art. 2 of the constitutions of 1814 and 1830 („dans la proportion de leur fortune").

[19] Verfassungs-Urkunde des Königreichs Bayern (1818); equally: § 8 of the Badische Verfassung (1818) and art. 101 of the Preußische Verfassung (1850).

[20] See, for example, A. Trendelenburg, Naturrecht, Auf dem Grunde der Ethik, 1860, p. 316 ff.; G. Schmoller, Die Lehre vom Einkommen in ihrem Zusammenhang mit den Grundprincipien der Steuerlehre, in: Zeitschrift für die gesamte Staatswissenschaft, Vol. 19 (1863), p. 1 (57).

[21] F. J. Neumann, Die progressive Einkommensteuer im Staats- und Gemeinde-Haushalt, Schriften des Vereins für Socialpolitik, Vol. VIII, 1874, p. 63.

[22] For a detailled account see D. Pohmer/G. Jurke, Zu Geschichte und Bedeutung des Leistungsfähigkeitsprinzips, in: Finanzarchiv N. F. Vol. 42 (1984), p. 445 (454 ff.)

[23] See in particular the critical discussion from the beginning of the 1970s; for example K. Littmann, Ein Valet dem Leistungsfähigkeitsprinzip, in: H. Haller/L. Kullmer et al. (eds.), Theorie und Praxis des finanzpolitischen Interventionismus, 1970, p. 113 ff. (commented on by O. Gandenberger, Theorie und Praxis des finanzpolitischen Interventionismus, in: Finanzarchiv N. F. Vol. 31 (1972/73), p. 354 (355)); R. L. Frey, Finanzpolitik und Verteilungsgerechtigkeit, in: Finanzarchiv N. F. Vol. 31 (1972/73), p. 1 (6).

[24] For example F. Neumark, Grundsätze gerechter und ökonomisch rationaler Steuerpolitik, 1970, p. 134 ff.

[25] This theory goes back to John Stuart Mill. The literature in this field is extensive; see H. Haller, Gedanken zur Vermögensbesteuerung, in: Finanzarchiv N.F. Vol. 36 (1977/78), p. 222 ff.; D. Pohmer/G. Jurke, Zu Geschichte und Bedeutung des Leistungsfähigkeitsprinzips, in: Finanzarchiv N. F. Vol. 42 (1984), p. 445 (477 ff.); W. F. Richter, From Ability to Pay to Concepts of Equal Sacrifice, in: The Journal of Public Economics, Vol. 20 (1983), p. 211 ff.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

b. The „Leistungsfähigkeitsprinzip" as an element of German constitutional law

Certainly, some critics still consider the principle as being nothing more than an argument in tax politics[26], particularly for redistributive purposes[27], or as a description of the mere factuality that more can be demanded, where more has been accumulated[28]. The majority of authors, however, rightly draw upon the long tradition of constitutional rootedness of the principle and upon the constitutional law in force to support the constitutionality of the requirement of a taxation according to the individual „ability to pay"[29].

Even though the German Basic Law (subsequently: Grundgesetz; GG) does not explicitly mention the principle of „ability to pay", it is – first – clearly located in art. 3 GG, the guarantee of equality before the law, as also the Federal Constitutional Court holds[30]. Everybody has to be taxed according to his or her personal „Leistungsfähigkeit", „ability", „faculté", which guarantees equal treatment in the sense envisaged by art. 3 GG. However, as equality is only sensitive to individual burdens in their relative relationship to each other, the „Leistungsfähigkeitsprinzip" is also founded on the constitutional freedom rights which require the justification of any infringement into individual liberty and give rise to the application of the principle of proportionality in the direct relationship between individual and state. Every taxation of a citizen is an infringement into his liberties and may therefore only go as far as can be justified as a proportional curtailment of his freedom rights – disregarding how much protection and support he requires or demands from the state. Out of the bundle of these freedom rights, art. 14 GG, the constitutional protection of property, plays a predominant role in tax law[31]. However, as taxation can also burden the freedom to exercise a profession, the freedom to have a family, to exercise beliefs etc., all corresponding freedom rights also supports the „Leistungsfähigkeitsprinzip"[32]. These basic rights do not only set outer limits to legislative and administrative measures[33]. As they contain substantive value-judgments[34], the provisions also supply normative standards guiding the public authorities in their decision-making within these outer limits. Against this background, the „Leistungsfähigkeitsprinzip" defines the task of the state of establishing a tax system that

---

[26] S. Franke, Zur politischen Funktion konsensmobilisierender Formeln in der parlamentarischen Demokratie: Das Beispiel des Leistungsfähigkeitsprinzips, in: StuW 1984, p. 32 (37).

[27] W. Leisner, Von der Leistung zur Leistungsfähigkeit – die soziale Nivellierung – Ein Beitrag wider das Leistungsfähigkeitsprinzip –, in: StuW 1983, p. 97 ff.

[28] H. W. Arndt, Steuerliche Leistungsfähigkeit und Verfassungsrecht, in: J. Damrau et al. (eds.), Festschrift für O. Mühl, 1981, p. 17 (29).

[29] P. Kirchhof, Besteuerung im Verfassungsstaat, 2000, p. 17 ff.; K. Tipke/J. Lang, Steuerrecht, 16th ed., 1998, p. 85 ff.; in great detail D. Birk, Das Leistungsfähigkeitsprinzip als Maßstab der Steuernormen, 1983. Only for the area of indirect taxation, the „Leistungsfähigkeitsprinzip" is controversially discussed: For the applicability of the principle K. Tipke/J. Lang, Steuerrecht, 16th ed., 1998, p. 87; against the applicability P. Kirchhof, Besteuerung im Verfassungsstaat, 2000, p. 25 ff. („indirekte Steuern nach vermuteter Nachfragekraft").

[30] The Federal Constitutional Court calls the taxation according to the „wirtschaftliche Leistungsfähigkeit", the „ability to pay", a „grundsätzliches Gebot der Steuergerechtigkeit", a fundamental requirement of tax justice; BVerfGE 66, 214 (223); see also BVerfGE 67, 290 (297).

[31] P. Kirchhof, Besteuerung im Verfassungsstaat, 2000, p. 23. The question, if and to what extent property and wealth have to be distinguished in the context of art. 14 GG cannot be dealt with here. For the area of taxation, the applicability of art. 14 GG is today widely recognized, though not uncontested; see BVerfGE 93, 121 (137).

[32] P. Kirchhof, Besteuerung im Verfassungsstaat, 2000, p. 24.

[33] In this direction D. G. Bodenheim, Der Zweck der Steuer, 1979, p. 234 f.

[34] In German constitutional law, the basic rights are generally considered to comprise individual (subjective) freedoms as well as objective guarantees which only bind the state and require the public authorities to take account of the underlying value-judgments in any kind of activity.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

preserves individual freedom and equality in a wide sense. Because one element of freedom is always the freedom „not to do something“[35], it should be noted that the „ability to pay“, as rooted in the Grundgesetz, does not measure the theoretical potential to be successful, the capacity to accumulate wealth, but only the financial „ability" according to the wealth actually accumulated[36].

Besides the basic rights, the principle of a form of taxation according to the „ability to pay“ can, finally, also be founded in the constitutionally guarantueed distinction between the input and output sides of public financing, according to which there is a clear and strict boundary between taxing on the one hand and spending on the other. Up to the 18th century, every tax in the Holy Roman Empire was from the outset dedicated to serve certain public purposes[37]. With the unification of state budgets in absolutistic times[38], however, this relationship was abolished. Since this period, all taxes are collected in a general fund, which is then, in a second step, divided up into the amounts needed to serve the different public purposes. This separation of the input from the output implies the renunciation of any tax-based definition of public tasks and – at least conceptually – the independence of the level of taxation from the concrete financial needs of the state. On the individual level, the separation between input and output leads to a distance between the citizen in his role as a tax payer and the financial potential of the state, which guarantees the impartiality of the legislator and the administration in regard to the citizens, whether they are large contributors or not[39]. This distance constitutes another confirmation of the principle of „ability to pay“, which provides for a form of taxation according to the individual ability to contribute and prohibits any taxation according to the value of public services received by the individual or any specific treatment according to the amount of taxes paid[40].

---

[35] Constitutional law only offers to protect the practice of a religion, the expression of an opinion, the foundation of a family, the choice and exercise of a profession, the strive for property, but it does not require these activities; on the contrary, it also protects the decision against them; in this sense, the Grundgesetz can be called a „Angebotsverfassung“. This distinction should not be confused with the classical, somewhat different distinction between the „right to be left alone“ (status negativus) and the right to obtain active protection and support from the state (status positivus), which goes back to G. Jellinek, System der subjektiven öffentlichen Rechte, 2nd ed., 1919, p. 87; comp. R. Alexy, Theorie der Grundrechte, 3rd ed., 1996, p. 233 ff.

[36] P. Kirchhof, Besteuerung im Verfassungsstaat, 2000, p. 27 („Zahlungsfähigkeit“). This does not a priori prohibit a tax according to the theoretical personal potential, but requires their special justification.

[37] Simply put, taxes were considered to be founded on contracts between the crown and the nobility. While the nobility had the obligation to support the crown (going back to medieval times), the crown had to give the reasons why there was need for money and stick to these reasons in the moment of spending; see R. Mußgnug, Der Haushaltsplan als Gesetz, 1976, p. 48 ff.; K. H. Friauf, Der Staatshaushaltsplan im Spannungsfeld zwischen Parlament und Regierung, 1968, p. 28 ff.

[38] Starting in the beginning of the 18th century, the old system of a large number of different funds was substituted by unified state budgets, particularly in the Absolute states of France, Prussia and Austria; see R. Mußgnug, Der Haushaltsplan als Gesetz, 1976, p. 65 ff; W. Heun, Staatshaushalt und Staatsleitung, 1989, p. 50 f.

[39] P. Kirchhof, Besteuerung und Eigentum, in: VVDStRL Vol. 39 (1981), p. 213 (250 f.). Another dimension of this distance between citizen and state is illustrated by the fact that the citizen, who pays his taxes according to his „ability to pay“ is also free from any obligations to contribute to the public weal in other forms; see J. Isensee, Steuerstaat als Staatsform, in: R. Stödter/W. Thieme (eds.), Festschrift für H. P. Ipsen, 1977, p. 409 (423).

[40] This stands in line with the observation that the question, whether or not there exists a constitutionally implicit restriction on the provision of public services according to the financial ability of the state to provide such services („Vorbehalt der finanziellen Leistungsfähigkeit“), is generally not discussed with reference to the individual tax payers' contributions; see A. Leisner, Die Leistungsfähigkeit des Staates. Verfassungsrechtliche Grenze der Staatsleistungen?, 1998; K.-A. Schwarz, Der Gleichheitssatz, die gesetzgeberische Gestaltungsfreiheit und das Geld der öffentlichen Hand, in: JZ 2001, p. 319 (323) with further references.

Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.
© The Author(s). European University Institute.

The concept of „ability to pay" is open to interpretation; there is no doubt about that. The individual's „ability" can be measured by means of a host of indicators, such as income, wealth, consumption etc.[41]. Furthermore, the overall level of the tax burden is not predetermined by the idea of „ability". Nevertheless, on an abstract level the principle is constitutionally rooted in German law and its concretisation is firmly guided by the constitutional provisions, in particular by the freedom and equality rights and the value-judgments underlying them.

As the principle of taxation according to the taxpayer's „ability" is founded on a long and strong constitutional tradition transgressing national borders, this should be added, it is – beyond German law – today generally accepted at least among all Member States of the European Union[42].

2. Arranging the system – Privileging within the system

a. Tax exemptions in conformity with the principle of „ability to pay"

The structure of tax law is not predetermined by nature. It is up to the legislator to establish the concrete tax system. He has to decide for direct and/or indirect taxes, for the personal and material constellations he wants to attach the taxation to, for the level of the rates etc. In his arrangement, the legislator has a wide discretion[43]. As we have seen, however, he is centrally guided by the constitutionally rooted principle of „ability to pay", therefore by the constitution itself. The higher or lower taxation of a person or enterprise compared to another person or enterprise in absolute terms will thus regularly be a function of the application of the principle of „ability to pay". Technically, the legislator may focus the tax regulation on the right cases from the outset, but he may also promulgate a formally wider norm first and then define tax exemptions for all cases of a lower „ability to pay". It is up to him to decide for the most practicable arrangement. This kind of arrangement, whether it contains tax exemptions or not, is sometimes also called the „fine print of the general decision", the „structural component" of the promulgation[44] or the definition of „parameters" according to „objective conditions inherent within a general system"[45].

In practice, tax payers encounter financial burdens of many sorts. Somebody might be burdened, because he has to finance the equipment he needs to exercise the job that generates the income to be taxed, because he has dependent children, because he invests – especially as a corporation – a great part of his income for future production or because he made a large donation to a charitable institution. The decisions, whether or not these respective financial burdens do actually constitute a normatively recognisable decrease in the „ability to pay", require value-judgments. This, however, is exactly, where constitutional law plays a decisive role in Germany, in particular the basic rights and their interpretation. When arranging the system by introducing tax exemptions to take account of lower „abilities to pay", the legislator is guided by and has to conform to these value-judgments. Hence, the taxation of

[41] The choice of these indicators depends on how a state justifies its taxation and which sort of incentives it wants to concentrate on.

[42] See the overview in K. Tipke, Die Steuerrechtsordnung, vol. 1, 1993, p. 473 ff. with further references.

[43] P. Kirchhof, Besteuerung im Verfassungsstaat, 2000, p. 31 f.

[44] W. Schön, Taxation and state aid law in the European Union, in: CMLR 1999, p. 911 (926).

[45] K. Bacon, State Aids and General Measures, in: YEL 1997, p. 269 (301).

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

the markets and the corresponding control of the market forces not only according to principles of formal equality, but also according to value-judgments of social justice is typical for constitutional legal systems as the German system, which have a constitution that encompasses economic and social rights and that stands at the top of the domestic normative hierarchy[46].

b. Tax exemptions in violation of the principle of „ability to pay": Tax subsidies

Against the background of a constitutional arrangement of the tax system, effective tax privileges are clearly distinguishable. While the lower taxation of a person in comparison to the rest of the regulated group is – from the outset – constitutional, if this lower taxation reflects a lower financial „ability", the lower taxation violates the system and constitutes an effective privilege, if the respective individual is financially as „able" as the others[47].

As we have seen, the constitutional requirement of a taxation according to financial „ability" can, among others, be deduced from the constitutional distinction between the input and output sides of the financial state. Any departure from this „ability" in favour of the tax payer therefore transgresses the boundary between taxing and spending. Accordingly, tax exemptions that lead to a real tax privilege for the taxpayer may and shall be called tax subsidies[48], hinting to their „spending effect".

3. Tax subsidies in the constitutional framework: Limited admissibility

As tax subsidies violate the constitutional principle of „ability to pay", they are generally unconstitutional. There can be exceptions, however, as violations of constitutional principles may under certain circumstances be justified by conflicting constitutional principles[49].

In this regard, it has to be noted that tax subsidies can be an effective instrument for reaching particular steering effects, because the individual citizen will – if he accepts the offer

---

[46] Such a system can be contrasted with a system, where the constitution does not facilitate this degree of control, e. g. the system of the United States of America. Consequently, the American tax law is on the whole more oriented towards an economic „level playing field".

[47] As the concept of „Leistungsfähigkeit" lies at the root of the taxing competence of the state and at the root of the reconcilability of taxation with the basic rights, this distinction is the only theoretically sound distinction to draw the constitutional borderline between arranging the system and privileging within the system. Some authors, on the contrary, primarily use the criterion of the steering motives underlying tax norms or their material effects (going beyond direct fiscal effects) to identify tax privileges (see, for example, C. Trzaskalik, Inwieweit ist die Verfolgung ökonomischer, ökologischer und anderer öffentlicher Zwecke durch Instrumente des Abgabenrechts zu empfehlen?, in: Ständige Deputation des deutschen Juristentages (ed.), Verhandlungen des dreiundsechzigsten deutschen Juristentages, Vol. 1, 2000, E 1 (66 ff.)). Undoubtedly, most tax privileges are in fact motivated by steering intentions; this, however, is not decisive from the point of view of the tax system (in support of a general separation between the „Leistungsfähigkeitsprinzip" and further steering effects of taxation also P. Kirchhof, Besteuerung im Verfassungsstaat, 2000, p. 29 f.; D. Birk, Das Leistungsfähigkeitsprinzip, 1983, p. 194; K. Tipke/J. Lang, Steuerrecht, 16th ed., 1998, p. 87.). Even a taxation according to the „Leistungsfähigkeit" can have steering effects that might actually be foreseen by the legislator. From the perspective of the tax system the central question is, whether or not a norm appears to depart from the constitutionally rooted main systemic principle, the „Leistungsfähigkeitsprinzip".

[48] Doubtful M. Schröder, Subventionen als staatliche Handlungsmittel, in: ZHR 152 (1988), p. 391 (393), who emphasizes the different regulatory environments of direct and indirect subsidies. This difference, however, does not affect the qualification according to the financial effects.

[49] For the useful distinction between a rule and a principle see R. Alexy, Theorie der Grundrechte, 3rd ed., 1996, p. 117 ff.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

of the subsidy – voluntarily and without any further administrative procedure comply with the requirements of the subsidy. This can save money and may foster a cooperative relationship between state and society. Accepting the principle of an economic and efficient government as a constitutional principle, the violation of the principle of „ability to pay" thus seems to be well justifiable at a first glance.

However, looking closer at the violation of the principle of „ability to pay", it becomes obvious that tax subsidies do actually give rise to very serious constitutional problems, which cannot be compensated by the argument of efficiency in a nonchalant way; this is only logical, when one considers that the tax principle of „ability to pay" is rooted in important constitutional provisions. The underlying problems can only be sketched out here very briefly. First, democracy demands meaningful decision-making by parliament; decisions on pubilc spending are primarily taken when promulgating the budget law; tax subsidies, however, are not considered in the parliamenary budgetary consultations, as they formally do not enter the budget; hence, their spending effects are not parliamentarily supervised and cannot even be ascertained in absolute numbers; tax subsidies therefore generate a strong tension to the principle of democracy. Another problem is caused by the steering effects of tax subsidies; whenever tax subsidies are used to regulate, the fiscal authority of the state effectively transgresses into other areas of state authority; this is particularly problematic in federal states that have a vertical separation of powers. Regarding the relationship between state and citizen, tax subsidies appear to offer an additional benefit; effectively, however, the citizen may only choose either to pay the tax or to behave according to the requirements for being granted the subsidy. This situation may be described as a situation of „alternative obligations"[50] and leads on to the question, whether the offer of the tax subsidy might as such be an infringement into constitutionally protected freedom rights. Once accepted by fulfilling the conditions of the tax subsidy norm, the grant of the subsidy does not follow a specific procedural framework; in this regard, tax subsidies differ from any other kind of state subsidy; this again challenges the principle of the rule of law as a principle of procedural justice. Grave problems also arise regarding the right to equality before the law, in particular, when the concrete taxing scheme is of a progressive nature. Finally, tax subsidies are difficult to control from the point of view of state efficiency; this might conflict with the constitutionally required auditing of state action.

4. The conceptual distinction between tax arrangements and tax subsidies – Social policy concerns as an integral part

This brief analysis of the German legal framework on tax arrangements and tax subsidies, which is – nota bene – not codified in any specific statute, can be summarized as follows: When arranging the tax system, the legislator is guided by the constitutionally rooted principle of taxation according to the individual „ability to pay". Whenever a tax payer is typically[51] less „able" in this sense, the constitution requires the introduction of corresponding tax exemptions. This applies to individual citizens as well as to corporations[52]. The decision on which financial burdens have to be considered as lowering the „ability to pay" is guided by

[50] In the context of German civil law this situation is referred to as a situation of a „Wahlschuld".

[51] In the framework of art. 3 GG, the legislator has the competence to regulate by means of summarizing „typical" cases.

[52] It has to be admitted that the „ability to pay" of corporations is more difficult to discern than the „ability to pay" of individual persons. However, the principle of „ability to pay" is generally accepted as the primary guideline also of corporate taxation in Germany.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

constitutional law, primarily by the fundamental rights to equality and freedom and the value-judgments underlying them. Besides economic rights (the freedom to choose an occupation and the guarantee of property), other rights can play a significant role in this context, as the right of personality, the right to religious freedom and the rights of the family. Against the background of this spectrum of values, a considerable number of tax exemptions, also – and even in particular – exemptions motivated by social policy concerns, are not considered as violating the tax principle of „ability to pay" and are therefore already conceptually, not only on the level of exceptions, qualified as tax arrangements, not tax subsidies. If a tax exemption does, however, qualify as a tax subsidy, it is not a priori unconstitutional, as it will, besides violating the constitutional principle of „ability to pay", regularly foster other principles supported by the constitution, in particular the principle of efficiency. A closer look nevertheless reveals that the violation of the principle of „ability to pay" is of a constitutionally serious nature. As a result, tax subsidies are only admissible to a very limited degree. This is equally held by the Federal Constitutional Court[53]. In its latest decisions on the matter, the Court additionally confirmed that – if exceptionally admissible – tax subsidies must explicitly state the steering purposes motivating them[54]; besides, these steering purposes may not conflict with other regulations of administrative law[55]. This very limited admissibility of tax subsidies, however, has to be seen in light of the fact that many tax exemptions in Germany will be considered to reflect cases of lower „abilities to pay" and will therefore already conceptually not be considered as tax subsidies in the first place. This can also and particularly apply – and this shall once more be emphasized, due to its importance in the framework of this paper – to tax exemptions motivated by social policy concerns, as the „ability to pay" is concretised by the value-judgments underlying the whole range of constitutional rights, among them the rights protecting personality, religious belief, the family etc.

III. EC and WTO control of state aids

Having sketched out the distinction between tax arrangements and tax subsidies in German law, with particular attention to the principle of „ability to pay" as a foundation of – at least direct – taxation, the transnational regimes of subsidy control shall be investigated in view of their impact on national tax sovereignty. While not explicitly regulating taxation, these regimes contain – as will be shown – significant indirect restrictions on national tax law, which is primarily due to their specific approach to the distinction between tax arrangements and tax subsidies. Regarding their predominant role, the analysis can be confined to the EC and WTO regimes.

1. EC law

a. Overview

EC control of national subsidies is concentrated in the provisions on state aids, art. 87 ff. (ex-art. 92 ff.) EC, on which this article will focus. However, as tax subsidies affect or at least tend to affect competition inside the common market, and as this competition is protected by a

[53] BVerfGE 93, 121 (146 f.); see also BVerfGE 38, 61 (79 ff.); 84, 239 (274).

[54] BVerfGE 93, 121 (148); 99, 280 (296 f.).

[55] BVerfGE 98, 83 (97 f.); 98, 106 (118 f.); this requirement of a normative harmony („Widerspruchsfreiheit") is mainly rooted in the principle of the rule of law.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

range of further EC Treaty provisions, these further provisions can also be relevant to national tax subsidising. They shall only very briefly be outlined here, in particular regarding their relationship to the state aid rules.

First, the Treaty provisions on the fundamental freedoms can be applicable to national tax subsidies: On the basis of the *Dassonville*[56] definition, the grant of a tax subsidy favouring specific goods can, in certain cases, be qualifyable as a restriction of the free movement of goods (quantitative restriction) according to art. 28 ff. (ex-art. 30 ff.) EC. Against this background, the relationship between the state aid rules and art. 28 ff. (ex-art. 30 ff.) EC requires clarification[57]. The jurisdiction of the European Court of Justice (ECJ) on this matter has undergone a number of modifications that shall not be presented here[58]. As a general rule, art. 87 ff. (ex-art. 92 ff.) EC should normally be considered as lex specialis in this case, as not only the distribution of competences according to art. 87 ff. (ex-art. 92 ff.) EC, but also the regime of exceptions according to art. 87 II-III (ex-art. 92 II-III) EC would otherwise substantially lose in normative significance[59, 60]. The same should hold for the relationship between art. 87 ff. (ex-art. 92 ff.) EC and the Treaty provisions on the freedom to provide services, art. 49 ff. (ex-art. 59 ff.) EC; this freedom can under certain circumstances also be restricted by tax subsidies[61]. The provisions on the freedom of establishment, art. 43 ff. (ex-art. 52 ff.) EC, on the other hand contain a special clause concerning state aids in art. 44 II h (ex-art. 54 III h) EC that is lex specialis in regard to art. 87 ff. (ex-art. 92 ff.) EC[62].

Whether the general prohibition of discrimination on the basis of nationality, art. 12 (ex-art. 6) EC, is applicable besides art. 87 ff. (ex-art. 92 ff.) EC, is controversially discussed. As state aids are normally restricted to persons (or enterprises) located in a certain Member State and not to the citizens of a Member State (discrimination in the sense envisaged by art. 12 (ex-art. 6) EC)[63], and as it is also clear that a state aid violating art. 12 (ex-art. 6) EC is under

---

[56] ECJ, 11. 7. 1974, ECR 1974, 837 (par. 5) – Dassonville („All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."; the restriction of the reach of the Dassonville-formula following ECJ, 24. 11. 1993, ECR 1993, I-6097 (par. 16) – Keck, is of no significance in this respect.

[57] See the detailled analyses by W. Cremer, Das Verhältnis der Beihilferegeln gem. Art. 92 f. EGV zur Warenverkehrsfreiheit, in: EuR 1996, p. 225 ff., and by W. Schön, Taxation and state aid law in the European Union, in: CMLR 1999, p. 911 (916 ff.).

[58] The first case on the issue of this relationship was ECJ, 22. 3. 1977, ECR 1977, 557 – Iannelli/Meroni; see also ECJ, 24. 11. 1982, ECR 1982, 4005 (par. 16 ff.) – Commission/Ireland; ECJ, 7. 5. 1985, ECR 1985, 1339 (par. 13) – Commission/France; ECJ, 5. 6. 1986, ECR 1986, 1759 (par. 19 ff.) – Commission/Italy; ECJ, 16. 5. 1991, ECR 1991, I-2457 – Commission/Italy.

[59] See W. Cremer, in: C. Calliess/M. Ruffert (eds.), EUV/EGV, 1999, art. 87, par. 47, with further references on the jurisdiction of the ECJ.

[60] In some cases, however, it can be necessary to differentiate between the grant of the state aid as such and the effects caused by the modalities of this grant; see W. Mederer, in: H. v. d. Groeben/J. Thiesing/C.-D. Ehlermann (eds.), Kommentar zum EU-/EG-Vertrag, 5th ed., 1999, vol. 2/II, Vorbemerkungen zu den Artikeln 92 bis 94, par. 10, with further references.

[61] Also W. Cremer, in: C. Calliess/M. Ruffert (eds.), EUV/EGV, 1999, art. 87, par. 48.

[62] W. Mederer, in: H. v. d. Groeben/J. Thiesing/C.-D. Ehlermann (eds.), Kommentar zum EU-/EG-Vertrag, 5th ed., 1999, vol. 2/II, Vorbemerkungen zu den Artikeln 92 bis 94, par. 10, also on the applicable procedures. Comp. ECJ, 21. 9. 1999, ECR 1999, Case C-307/97 – Compagnie de Saint-Gobain.

[63] This is also noted by W. Mederer, in: H. v. d. Groeben/J. Thiesing/C.-D. Ehlermann (eds.), Kommentar zum EU-/EG-Vertrag, 5th ed., 1999, vol. 2/II, Vorbemerkungen zu den Artikeln 92 bis 94, par. 10. Because of this reason, the impact of the principle of non-discrimination on direct taxation should be much smaller than the impact of this principle on indirect taxation; regarding this kind of an indirect restriction of national tax

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

no circumstances justifiable on the grounds of art. 87 II-III (ex-art. 92 II-III) EC[64], the controversy has no real practical significance[65]. Because of the distribution of competences according to the Treaty provisions on state aids, however, art. 87 ff. (ex-art. 92 ff.) EC should nevertheless also here be considered lex specialis.

If a tax subsidy is motivated by and based on national regulations on economic policies in the sense of art. 99 (ex-art. 103) EC, this does not prevent the subsidy from being subjected to the regime of art. 87 ff. (ex-art. 92 ff.) EC, as the state aid rules only take account of the effects, not the motives of national measures[66]. The same holds for tax subsidies for exports to third countries as regulated by art. 132 (ex-art. 112) EC, as also in this case the aids can have effects on intra-community trade[67].

Furthermore, national tax subsidy regulations can fall under EC Treaty provisions aimed at harmonization. Some Member States' regulations on tax subsidies may affect the establishment or the functioning of the common market; in this case, the EC Treaty provides for the possibility of approximating these regulations on the basis of art. 94 (ex-art. 100) EC. If existing or planned national tax subsidy regulations distort competition, they might need to be eliminated according to art. 96 and 97 (ex-art. 101 and 102) EC; such elimination, however, is permissible only after having gone through the procedures of art. 87 ff. (ex-art. 92 ff.) EC[68], which are insofar lex specialis. The EC approaches to a specific harmonization of taxation, finally, are currently restricted to the harmonisation of indirect taxation (turnover taxes, excise duties and other forms of indirect taxation) according to art. 93 (ex-art. 99) EC[69]; beginning in the 1990s, the Commission has adopted a policy of postponing any further attempts to harmonize the direct taxation of corporations and of counting on a competition between the tax systems of the Member States in this respect, refering to the principle of subsidiarity.

Further EC regulations potentially relevant to national tax subsidies are the regulations on the customs union and the prohibition of import duties, art. 23 ff. (ex-art. 9 ff.) EC, on state monopolies of a commercial character, art. 31 (ex-art. 37) EC, on the internal market for agricultural products, art. 32 ff. (ex-art. 38 ff.) EC, as well as the tax provisions, art. 90 ff. (ex-art. 95 ff.) EC. For the purposes of this paper, it is not necessary to analyse the relationship of these further areas of regulation to art. 87 ff. (ex-art. 92 ff.) EC in depth[70].

---

sovereignty see supra I. and J. H. H. Weiler, National sovereignty in the age of transnational economic regulation: The prohibition on discriminatory taxation, lecture presented at the Law Department of the European University Institute, Florence, on the 29. 3. 2001.

[64] W. Cremer, in: C. Calliess/M. Ruffert (eds.), EUV/EGV, 1999, art. 87, par. 49.

[65] Exactly differentiating according to the contents of the specific tax subsidy provision W. Schön, Taxation and state aid law in the European Union, in: CMLR 1999, p. 911 (916 ff.).

[66] W. Mederer, in: H. v. d. Groeben/J. Thiesing/C.-D. Ehlermann (eds.), Kommentar zum EU-/EG-Vertrag, 5th ed., 1999, vol. 2/II, Vorbemerkungen zu den Artikeln 92 bis 94, par. 10.

[67] ECJ, 21. 3. 1990, ECR 1990, I-959 (par. 32) – Belgium/Commission.

[68] W. Mederer, in: H. v. d. Groeben/J. Thiesing/C.-D. Ehlermann (eds.), Kommentar zum EU-/EG-Vertrag, 5th ed., 1999, vol. 2/II, Vorbemerkungen zu den Artikeln 92 bis 94, par. 10.

[69] It should be noted that art. 293 (ex-art. 220) EC additionally requires the Member States to abolish any forms of double taxation in the Community; this, however, is not to be achieved by forms of supranational law.

[70] Comp. the detailed overview by W. Mederer, in: H. v. d. Groeben/J. Thiesing/C.-D. Ehlermann (eds.), Kommentar zum EU-/EG-Vertrag, 5th ed., 1999, vol. 2/II, Vorbemerkungen zu den Artikeln 92 bis 94, par. 10.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

While this broad range of regulations potentially applicable to certain constellations of national tax subsidizing can and does – despite the lex specialis-rules – lead to difficulties in practice, this paper will – as already stated – concentrate on the state aid provisions, which are of predominant importance to the EC control of tax subsidies.

b. State aid control, art. 87-89 (ex-art. 92-94) EC

aa. The applicability of state aid control to tax exemptions – General development

Already in the early 1960s, the Commission of the European Economic Community considered tax subsidies to primarily fall under the regulations of state aid control, art. 87 ff. (ex-art. 92 ff.) EC[71]. As the aim of art. 87 ff. (ex-art. 92 ff.) EC is to prevent trade between Member States from being affected by benefits granted by the public authorities, which distort or threaten to distort efficient[72] competition by favouring certain enterprises or the production of certain goods, and as this aim has ever since been considered to be central for the interpretation of the regulations, the forms and reasons of state aid have ever since been neglected when subsuming under art. 87 ff. (ex-art. 92 ff.) EC, as long as the aid affects the trade between Member States[73]. While the scope of state aid control in its application to tax subsidies was, however, very narrowly defined up to the end of the 1960s[74], things changed with a 1971 decision of the Commission directed towards Germany, which demanded the abolition of preferential tax treatments in a law on the road transportation of goods[75]. Since that time a continuous practice of application of art. 87 ff. (ex-art. 92 ff.) EC to tax subsidies has developed [76]. This practice has been particularly extended, after the Commission had – in the early 1990s, as already mentioned – decided for a policy of postponing any further harmonisation of direct taxation. This postponement policy is explicitly supplemented by a pro-active approach in taking legal action where Member States' national tax rules or practices do not comply with the Treaty, as restated by a Commission communication from May 2001[77]. Legal action in this sense has from the beginning been understood to comprise the strict application of the regulations on state aid control to tax subsidies[78]. As the postponement of any further harmonisation of direct taxation is generally founded on the idea of a competition between the tax systems, the concentration on art. 87 ff. (ex-art. 92 ff.) EC in this respect is considered to be an important element of „fighting harmful tax competition"[79].

---

[71] See the Response to Burgbacher; OJ 1963, p. 2235. The great majority of authors in the literature on the topic joins the Commission in this opinion.

[72] On the efficiency of the EC state aid controlling regime see P. Nicolaides/S. Bilal, An Appraisal of the State Aid Rules of the European Community. Do they Promote Efficiency, in: JWT 33 (2/1999), p. 97 ff.

[73] See ECJ, 2. 7. 1974, ECR 1974, 709 (par. 13) – Italy/Commission; W. Mederer, in: H. v. d. Groeben/J. Thiesing/C.-D. Ehlermann (eds.), Kommentar zum EU-/EG-Vertrag, 5th ed., 1999, vol. 2/II, art. 92, par. 2.

[74] The provisions were mainly invoked to eliminate the direct discrimination of imported products through tax subsidies; V. Götz, Steuervergünstigungen als Gegenstand der europäischen Beihilfenaufsicht, in: P. Kirchhof et al. (eds.), Festschrift für K. Vogel, 2000, p. 579, gives the example of a 6-months tax freedom for Italian cars.

[75] OJ 1971, L 179/37; see P. Selmer, Steuerinterventionismus und Verfassungsrecht, 1972, p. 376.

[76] For a detailled account see M. Koschyk, Steuervergünstigungen als Beihilfen nach Artikel 92 EG-Vertrag, 1999; also K. A. Frick, Einkommensteuerliche Steuervergünstigungen und Beihilfeverbot nach dem EG-Vertrag, 1994.

[77] See COM (2001) 260.

[78] V. Götz, Steuervergünstigungen als Gegenstand der europäischen Beihilfenaufsicht, in: P. Kirchhof et al. (eds.), Festschrift für K. Vogel, 2000, p. 579 (581).

[79] W. Schön, Taxation and state aid law in the European Union, in: CMLR 1999, p. 911 (911 f.) with further references, also regarding the OECD contributions in this area; also V. Götz, Steuervergünstigungen als

Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository. © The Author(s). European University Institute.

In the communication from May 2001, the Commission further announced that it would soon present options for co-ordinated action to tackle tax obstacles and inefficiences in the company tax field. Art. 87 ff. (ex-art. 92 ff.) EC will again play an important role in this context.

Major steps in the direction of institutionalizing the application of state aid law to control national tax exemption policies were also taken by recent ECOFIN-Council meetings: In December 1997, the Council promulgated a Code of Conduct for business taxation, established a group to assess the tax measures that may fall within the scope of this Code and called on the Commission to „take forward its work on taxation"[80]; the Commission subsequently worked out guidelines regarding the application of art. 87 ff. (ex-art. 92 ff.) EC to measures relating to business taxation; these important guidelines were adopted in December 1998[81]. An ECOFIN-Council meeting of October 2000 „confirmed the Code of Conduct group's mandate to continue its proceedings with determination on a framework for freezing and dismantling national measures held to be damaging to competition". The same holds for a Council meeting from November 2000, which restated the goal of reaching a final agreement on a tax package in the form of a directive no later than the end of 2002. In June 2001, the Council approved of the work done by the Code of Conduct group and asked it to report on further progress by the end of the year. Regarding the tax package as a whole, it was agreed that a parallel timetable for the various parts of the package should be established in July 2001[82].

Equally, the ECJ has never hesitated to apply the EC regulations on state aids to preferential treatments within the frameworks of national contributory systems. Already in a decision on mining premiums from 1961, the Court held that the notion of state aids encompasses mitigations from the financial charges imposed by the state that a corporation would normally have to carry[83]. After this line of jurisdiction was sustained in cases of preferential treatments in the frameworks of welfare contributions[84] and other parafiscal contributions[85], the Court in 1994 explicitly decided that the regime of art. 87 ff. (ex-art. 92 ff.) EC is also applicable in the case of national tax subsidies[86]. This was confirmed in recent decisions of the ECJ[87] as well as of the European Court of First Instance (CFI)[88].

Gegenstand der europäischen Beihilfenaufsicht, in: P. Kirchhof et al. (eds.), Festschrift für K. Vogel, 2000, p. 579.

[80] OJ 1998, C 2/1.

[81] Commission notice on the application of the State aid rules to measures relating to direct business taxation; OJ 1998, C 384/3. See also the commentary by K.-J. Visser, Commission expresses its view on the relation between state aid and tax measures, in: EC Tax Review 1999, p. 224 ff.

[82] For a documentation of the Council meetings see http://ue.eu.int/newsroom/main.cfm?LANG=1.

[83] ECJ, 23. 2. 1961, ECR 1961, 1 – Steenkolenmijnen (in the framework of art. 4 lit. c and art. 67 ECSC).

[84] ECJ, 2. 7. 1974, ECR 1974, 709 – Italy/Commission; ECJ, 17. 6. 1999, ECR 1999, I-3671 (par. 23) – Belgium/Commission.

[85] ECJ, 16. 12. 1992, ECR 1992, I-6523 (par. 27 ff.).

[86] ECJ, 15. 3. 1994, ECR 1994, I-877 – Banco Exterior de Espana; comp. already ECJ, 12. 7. 1973, ECR 1973, 813 - Commission/Germany; on this decision, see C. Quigley, The notion of a State aid in the EEC, in: ELR 1988, p. 242 (253 ff.).

[87] ECJ, 25. 3. 1998, ECR 1998, I-1303 – FFSA/Commission; ECJ, 1. 12. 1998, ECR 1998, I-7907 (par. 35 ff.) – Ecotrade; ECJ, 19. 5. 1999, ECR 1999, I-2981 – Italy/Commission; ECJ, 19. 9. 2000, Case C-156/98 (par. 25 ff.) – Germany/Commission.

[88] CFI, 27. 2. 1997, ECR 1997, II-229 – FFSA/Commission; CFI, 27. 1. 1998, ECR 1998, II-1 – Ladbroke Racing Ltd./Commission.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

bb. The notion of a state aid according to art. 87 I (ex-art. 92 I) EC in tax exemption cases

aaa. General

As the EC institutions generally and often primarily judge upon the admissibility of national tax subsidies by means of the Treaty regulations on state aids, it is necessary to take a closer look at these regulations in their application to national tax law. According to art. 87 I (ex-art. 92 I) EC, „any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market".

Art. 87 I (ex-art. 92 I) EC is thus – first of all – only applicable, if a state measure passes the threshold requirement of being qualifyable as an „aid"[89]. While neither the Commission nor the Courts employ a fixed definition of „aid", its main components are on the whole not controversial. An „aid" is ascertainable, where a corporation or a sector of industry[90] has been granted a financial „advantage". This advantage can generally be described as any „price reduction" in comparison to the market conditions a corporation would normally face[91]. In the context of tax subsidies, however, there exists no market in the first place. Here, the ECJ identifies the „advantage" with „the renunciation by the Member State of tax revenue which it would normally have received"[92]. What a „normal" tax treatment represents, however, is difficult to ascertain[93]. In this respect, one might take account of the motives and aims of a certain tax exemption, or – as the EC institutions generally do – employ a more objective criterion: While missing competences in the area of taxation prevent the Commission and the Courts from developing a completely autonomous, normative measure of what a „normal" tax treatment (including categories of taxation and exact tax rates) constitutes, the EC institutions – on an abstract level – refer to the benchmark of the „nature and general scheme", the „basic or guiding principles" of the respective national systems in order to decide upon the „normality" of a specific tax treatment and therefore upon the existence of an advantage in tax cases. However, in the concrete application the Commission and the Courts largely refrain from further investigating into possible contents of those „general schemes" and „guiding principles" and instead resort a differentiation along the lines of a formally understood „rule" and „exception" test. This central point will be illustrated in more detail below, when investigating into the content of the Commission notice from 1998. Furthermore, the advantage has to be individually attributable (which can be difficult in the case of tax subsidies in view of their diffuse effects[94]) and may not be compensated by corresponding

[89] The distinction between the existence of a state aid and the control of its admissibility is generally respected by the Commission.

[90] Only state aids to corporations or sectors of industry are considered, as the European state aid law is part of the competition law and aimed at controlling subsidies of the economy; regarding the exclusion of non-corporate adressees M. Rodi, Die Subventionsrechtsordnung, 2000, p. 160 ff. with further references.

[91] C. Koenig/J. Kühling, Reform des EG-Beihilfenrechts aus der Perspektive des mitgliedstaatlichen Systemwettbewerbs, in: EuZW 1999, p. 517 (520).

[92] ECJ, 19. 9. 2000, Case C-156/98 (par. 26) – Germany/Commission.

[93] Regarding the following see W. Schön, Taxation and state aid law in the European Union, in: CMLR 1999, p. 911 (922 f.) with further references.

[94] W. Schön, Taxation and state aid law in the European Union, in: CMLR 1999, p. 911 (931), with examples from the EC practice.

Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.
© The Author(s). European University Institute.

burdens that privileged enterprises have to carry[95]. Finally, the advantage has to be sufficiently linked to the state, in that it is „granted by a Member State or through State resources"; in this regard, it is being discussed, whether private financial transactions based on cogent law can be qualified as state aids[96] and whether the advantage has to directly burden the state budget[97, 98]. These last elements of the definition of aid should never cause problems in regard to tax subsidies.

Besides being an aid, the measure has to favour „certain undertakings or the production of certain goods". In other words, the measure has to be „specific" or „selective"[99]. „According to its conception", the measure must not extend to all corporations or sectors of industry, which might be covered „generally" and „in principle"[100]. Until now, the EC institutions do not use any coherent concept in order to differentiate between general and „specific" regulations and often base their decisions on rather crude distinctions along the lines of sectors of industries[101]. There is some – though not compelling – evidence, however, that the idea of „relevant markets" gains in importance[102], according to which only such regulations are specific that do not cover all products within a relevant market. The „relevance", in turn, is often identified by the „substitutability" of products[103] – which again is a vague criterion.

Finally, the measure has to „distort or threaten to distort competition" and thereby „affect trade between Member States". While this requirement has up to now largely been considered to be a criterion for qualifying a measure as generally not permissible under European law[104],

---

[95] On the question, whether voluntary financial commitments by the industry in the context of the new German energy taxation can be considered as such „compensations", W. Frenz, Energiesteuer und Beihilfenverbot, in: EuZW 1999, p. 616 (617).

[96] See ECJ, 13. 3. 2001, Case C-379/98 (par. 58 ff.) – PreussenElektra; also ECJ, 17. 3. 1993, ECR 1993, I-887 (par. 20 f.) – Sloman Neptun.

[97] See U. Soltész, Die „Belastung des Staatshaushalts" als Tatbestandsmerkmal einer Beihilfe i. S. des Art. 92 EGV, in: EuZW 1998, p. 747 ff.

[98] For further cases see W. Schön, Taxation and state aid law in the European Union, in: CMLR 1999, p. 911 (921).

[99] The notion of „selectivity" is generally used as an equivalent to the notion of „specificity" and has not yet been applied with a distinctive meaning of its own; C. Koenig/J. Kühling, Mitgliedstaatliche Kulturförderung und gemeinschaftliche Beihilfenkontrolle durch die EG-Kommission, in: EuZW 2000, p. 197 (199). With an attempt to differentiate with regard to „relevant markets", see C. Koenig/J. Kühling, Reform des EG-Beihilfenrechts aus der Perspektive des mitgliedstaatlichen Systemwettbewerbs, in: EuZW 1999, p. 517 (520).

[100] On the paramount importance of the distinction between general and specific measures in the area of state aid law see K. Bacon, State Aids and General Measures, in: YEL 1997, p. 269 ff. (emphasizing the „derogation test"); C. Quigley, The notion of a State aid in the EEC, in: ELR 1988, p. 242 (244 f.); C. Koenig/J. Kühling, Reform des EG-Beihilfenrechts aus der Perspektive des mitgliedstaatlichen Systemwettbewerbs, in: EuZW 1999, p. 517 (520) (translation by the author); also M. Slotboom, State Aid in Community Law: A Broader or Narrow Definition?, in: ELR 20 (1995), p. 289 (297).

[101] C. Koenig/J. Kühling, Reform des EG-Beihilfenrechts aus der Perspektive des mitgliedstaatlichen Systemwettbewerbs, in: EuZW 1999, p. 517 (520).

[102] See the Commission notice on the definition of relevant market for the purpose of Community competition law, OJ 1997, C 372/5, footnote 1; in strong support C. Koenig/J. Kühling, Reform des EG-Beihilfenrechts aus der Perspektive des mitgliedstaatlichen Systemwettbewerbs, in: EuZW 1999, p. 517 ff.

[103] See the Commission notice on the definition of relevant market for the purpose of Community competition law, OJ 1997, C 372/5, par. 7 with further references; also Fingleton, On market definition in state aid control, in: C. D. Ehlermann/M. Everson (eds.), European Competition Law Annual 1999: Selected Issues of State Aid Control (forthcoming).

[104] V. Götz, Steuervergünstigungen als Gegenstand der europäischen Beihilfenaufsicht, in: P. Kirchhof et al. (eds.), Festschrift für K. Vogel, 2000, p. 579 (586) („von Haus aus").

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

but not as an element of the definition of the prohibited measure in the first place, it appears, that the requirement is increasingly being understood as part of the definition itself[105].

bbb. The Commission notice from December 1998

In the 1998 Commission guidelines on the application of art. 87 ff. (ex-art. 92 ff.) EC to measures relating to direct business taxation (which are certainly compatible with the prior and also the most recent jurisdiction of the European Courts[106]), the requirements just outlined were to some extent further concretised for the area of tax subsidies. As this concretisation, which has been waited for, will be of great importance in practice, it deserves particular attention. Before having a closer look at the concretisation itself, however, it is interesting to note that in these guidelines, the Commission gives evidence of its awareness of a particular consequence that the application of art. 87 ff. (ex-art. 92 ff.) EC to national tax subsidies has: „Account must also be taken, in the common interest, of the major repercussions which some aid granted through tax systems may have on the revenue of other Member States."[107] From a legal point of view, these rightly observed repercussions should, of course, not influence the interpretation of the reach of art. 87 ff. (ex-art. 92 ff.) EC, which then follows.

According to the Commission notice, an „aid" in the area of direct business taxation can be ascertained, where a measure „confers on recipients an advantage which relieves them of charges that are normally borne from their budgets". Insofar, the Commission notice repeats the commonly used prior formulations of the EC institutions on this point. Technically, the „reduction in the firm's tax burden" may be provided in many ways, in particular through „a reduction in the tax base ..., a total or partial reduction in the amount of tax..., deferment, cancellation or even special rescheduling of tax debt"[108]. The guidelines also confirm that any advantage conferred through tax subsidies is sufficiently linked to the state, as „a loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure"[109].

In order to substantiate which charges are „normally borne" by enterprises, the Commission notice first refers to the distinction between „state aid and general measures"[110], implying that the sum of all relevant rules of general applicability constitutes the height of the „normal" tax burden. „General" are „tax measures which are open to all economic agents operating within a Member State"[111]. Hence, tax rules that apply without distinction to all

[105] The Commission increasingly seems to support this latter understanding; see Commission, XXVIth Report on Competition Policy (1996), p. 74 („the last condition that must be met if a measure is to be considered aid"); see also Commission, XXVIIth Report (1997), p. 81; comp. also Commission, XXVIIIth Report (1998), p. 88, and Commission, XXIXth Report (1999), p. 89 f.; see also the Commission notice on the application of the State aid rules to measures relating to direct business taxation; OJ 1998, C 384/3, par. 11.

[106] Equally V. Götz, Steuervergünstigungen als Gegenstand der europäischen Beihilfenaufsicht, in: P. Kirchhof et al. (eds.), Festschrift für K. Vogel, 2000, p. 579 (586 f.).

[107] Commission notice on the application of the State aid rules to measures relating to direct business taxation; OJ 1998, C 384/3, par. 3.

[108] Commission notice on the application of the State aid rules to measures relating to direct business taxation; OJ 1998, C 384/3, par. 9.

[109] Commission notice on the application of the State aid rules to measures relating to direct business taxation; OJ 1998, C 384/3, par. 10.

[110] Commission notice on the application of the State aid rules to measures relating to direct business taxation; OJ 1998, C 384/3, par. 13 ff.

[111] Commission notice on the application of the State aid rules to measures relating to direct business taxation; OJ 1998, C 384/3, par. 13.

Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.
© The Author(s). European University Institute.

firms and to the production of all goods will not be considered as granting aids. This does not only hold for „measures of a purely technical nature", but also for „measures pursuing general economic policy objectives through a reduction of the tax burden related to certain production costs (research and development (R&D), the environment, training, employment)". The mere fact that some firms benefit more than others from a measure does not necessarily exclude the qualification of this measure as a general measure. Any discretionary power of public authorities regarding the application as well as any formal restriction of the advantageous measure to certain firms or sectors of industry, however, lead to their automatic qualification as state aid.

Besides the differentiation between „state aid and general measures", the Commission mentions a second criterion for concretising, which charges are „normally borne" by enterprises. Some advantageous tax measures, it is stated, can be „justified by the nature or general scheme of the tax system"[112]; hence, if they „derive directly from the basic or guiding principles of the tax system in the Member State concerned", measures are (also) not to be considered as state aid[113]. In this alternative, „normality" is not deduced from general applicability, but from the „nature" and „general scheme", from the „principles" of the system.

The Commission notice therefore proposes two different standards in order to define a „normal" tax treatment and to thereby ascertain, whether the tax rule in question constitutes state aid. This reflects the practice of the Commission and the Courts outlined above, which employ the criterion of the „nature and general scheme" on an abstract level, but the criterion of „general" and „specific" in concreto.

These two criteria are, if scrutinized closely, to a certain extent incoherent[114]: If the „general scheme" of a tax regime is conceived of to be founded not on formalistic generality rules[115], but on a substantive rule about the right amount of individual taxation (like the principle of taxation according to „ability to pay"), then tax provisions can be imagined that depart from the „general scheme", but at the same time apply to all taxpayers concerned (if, for example, all taxpayers are charged below their actual „ability to pay"). Such provisions would have to be qualified as granting an aid according to the „general scheme" criterion, but not according to the „general measure" criterion[116].

---

[112] Comp. also Commission, XXVIIth Report on Competition Policy (1997), p. 81 („justified by the nature or purpose of the levy system").

[113] Commission notice on the application of the State aid rules to measures relating to direct business taxation; OJ 1998, C 384/3, par. 16.

[114] This incoherence might, of course, be due to tactics, in which case it appears coherent again.

[115] Whenever this is done, the further question arises, whether a certain tax rule constitutes either an exception within a given „general scheme" or a „general scheme" in its own right; comp. W. Schön, Taxation and state aid law in the European Union, in: CMLR 1999, p. 911 (925 f.).

[116] This incoherence was first criticized by W. Schön, Taxation and state aid law in the European Union, in: CMLR 1999, p. 911 (927 f.). If – as will be proposed later in this paper – the criterion of the „general scheme" of the tax system is actually concretised by the principle of „ability to pay", then the „general measure" criterion concentrating on the relationship between enterprises is in fact obsolete in the context of the definition of state aid. The reason for this is that a taxation according to the „ability to pay" guarantees the right taxation not only in absolute terms (relationship between enterprise and state), but also in relative terms (relationship between enterprises, i. e. equality, generality).

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

This incoherence has not yet been dealt with by the Commission, because the Commission has not yet investigated into the exact content of the „general schemes" of the Member States' tax systems, neither in concrete cases nor in the framework of the guidelines. As the competences of the Commission necessarily have to extend to this investigation, if EC state aid law is to be applied to national tax subsidies at all, it does not seem improbable that the Commission has until now refrained from this investigation not for reasons of missing competences, but for the tactical reason of remaining vague in competition law.

In fact, much of what the Commission notice contains to concretise its „general measure" criterion in the context of defining „aid" is repeated for purposes of defining the second requirement of art. 87 I (ex-art. 92 I) EC, the „specificity" of the aid. (On the whole, the definitions of „aid" and of „specificity" are hard to separate in the Commission notice.) The „specific" or „selective" nature of a measure, the Commission states, may „derive from an exception to the tax provisions of a legislative, regulatory or administrative nature or from a discretionary practice on the part of the tax authorities"[117]. Evaluating its own prior practice, the Commission finds „that only measures whose scope extends to the entire territory of the State escape the specificity criterion laid down in Article 92 (1). Measures which are regional or local in scope may favour certain undertakings"[118], which entails their „specificity". Equally, the restriction of an aid to certain sectors of production, to the production of goods that are exported, to sectors that are subject to international competition or to undertakings with a certain legal status may be specific[119]. The specificity does, of course, not have to be explicit; „disguised" specificity is also covered by the Commission's understanding of the requirement[120]. Eventually, also „ad hoc" operations as opposed to measures with an „ongoing character" can lead to the qualification as specific[121]. When the Commission states that „the selective nature of a measure may be justified by ‚the nature or general scheme of the system'"[122], this again shows that the definitions of „aid" and „specificity" are not accurately separated – as a coherence with the „nature" or „general scheme" of the system is at the same time used as an indication of the measure as not constituting „aid" (see above).

Finally, the guidelines further concretise the requirement that the state measure in question has to „affect competition". In this regard, it is considered to be sufficient that the recipient firm, the position of which is strengthened, exercises an economic activity (regardless of the firm's legal status) and that this activity involves trade between Member States[123].

On the whole, the Commission notice from December 1998 confirms the practice of the EC institutions in regard to the application of state aid law to national tax exemptions. While

[117] Commission notice on the application of the State aid rules to measures relating to direct business taxation; OJ 1998, C 384/3, par. 12.

[118] Commission notice on the application of the State aid rules to measures relating to direct business taxation; OJ 1998, C 384/3, par. 17.

[119] Commission notice on the application of the State aid rules to measures relating to direct business taxation; OJ 1998, C 384/3, par. 18 ff.

[120] See W. Schön, Taxation and state aid law in the European Union, in: CMLR 1999, p. 911 (933) with examples.

[121] The measure may not be intended to finance an „ad hoc operation"; CFI, 27. 1. 1998, ECR 1998, II-1 (par. 51, 56) – Ladbroke Racing Ltd./Commission.

[122] Commission notice on the application of the State aid rules to measures relating to direct business taxation; OJ 1998, C 384/3, par. 12.

[123] Commission notice on the application of the State aid rules to measures relating to direct business taxation; OJ 1998, C 384/3, par. 11.

Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.
© The Author(s). European University Institute.

an aid is – on an abstract level – defined as an advantage resulting from the departure from the „nature and general scheme", the „guiding principle" of the tax system, there is no further investigation into the content of this „nature", „scheme", „principle"; instead, the institutions in the next and decisive step concentrate on a mere distinction according to the criteria of „general" and „specific" tax measures, i. e. between tax rules and exceptions, with regard to – and this is important – primarily economic equality. In the end, any formally lower taxation of an enterprise compared to other enterprises within a sector of industry, across sectors of industry or even within the territory may be considered to be an exception and therefore state aid. Thereby, in effect, the institutions confine themselves to the requirement of the „specificity" of the aid, without solving the problem of what the „nature" of the tax system as such entails[124].

cc. The admissibility of tax subsidies as state aids/The regime of exceptions

Once qualified as a state aid fulfilling the requirements of art. 87 I (ex-art. 92 I) EC, a national tax subsidy is generally prohibited. It is only according to art. 87 II-III (ex-art. 92 II-III) EC that the Commission can decide, whether the national measure is – despite its being a state aid – compatible with the common market. Making use of its wide discretion in this respect[125], the Commission effectively pursues an own competition policy[126]. As already a brief look at art. 87 II and III (ex-art. 92 II and III) EC shows, these exceptions to the general prohibition of national tax subsidies are the primary normative gates, through which social policy concerns[127] can enter the arena. Thus, social policy concerns are – in the practice of the institutions – not part of the conceptual distinction between tax arrangement and tax subsidy, which is – as we have seen – mainly restricted to economic equality concerns, but they are enumeratively taken account of in the framework of a regime of exceptions.

This regime of exceptions has just been extended through the promulgation of regulations that are – as opposed to guidelines that are binding only in the context of discretionary decision-making by the Commission[128] – legal norms. Based on art. 89 (ex-art. 94) EC, the Council on the 7. 5. 1998 adopted a regulation, which gives power to the Commission to promulgate regulations on group exemptions for certain categories of aid, according to which the respective aids shall be compatible with the common market and shall not be subject to the notification requirements. Those categories of aid represent aid for small and medium-sized enterprises, for research and development, for environmental protection, for

[124] It should be noted that – besides the 1998 guidelines – there exists a number of further Commission notices on state aid law relevant to the area of tax subsidies, the most important ones of which are the Community guidelines on state aid for environmental protection (OJ 1994, C 72/3), the Community guidelines on state aid for small and medium-sized enterprises (OJ 1996, C 213/4) and the guidelines on national regional aid (OJ 1998, C 74/9).

[125] ECJ, 17. 9. 1980, ECR 1980, 2671 (par. 24) – Philip Morris; ECJ, 24. 2. 1987, ECR 1987, 901 (par. 18) – Deufil/Commission; ECJ, 8. 3. 1988, ECR 1988, 1573 (par. 34) – Exécutif Régional Wallon/Commission; ECJ, 14. 2. 1990, ECR 1990, I-307 (par. 49) – France/Commission; CFI, 6. 10. 1999, ECR 1999 II-2925 (par. 47) – Salomon/Commission.

[126] C. Koenig/J. Kühling, Reform des EG-Beihilfenrechts aus der Perspektive des mitgliedstaatlichen Systemwettbewerbs, in: EuZW 1999, p. 517 (519).

[127] On the position of social policy within EC law in general see S. Leibfried/P. Pierson, European Social Policy, Universität Bremen, Zentrum für Sozialpolitik, ZeS-Arbeitspapiere, 15/99, 1999.

[128] CFI, 12. 12. 1996, ECR 1996, II-2172 (par. 57) – AIUFFASS AND AKT/Commission; CFI, 5. 11. 1997, ECR 1997, II-2031 (par. 61) – Ducros/Commission.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

employment and training, for specific regions as well as very small aids („de minimis")[129]. On the 12. 1. 2001, the Commission adopted three regulations on this basis, which exempt certain state aids for small and medium-sized enterprises[130] and training[131] as well as „de minimis" aids[132] from the control of the Commission[133].

These regulations will certainly add some transparence to the consideration of social policy concerns by the Commission. They will not, however, diminish the dominant role of the Commission in this respect. This is not only due to the limited scope of these regulations[134], but it is also and mainly due to the vague character of much of EC state aid law in its application to tax subsidies[135].

dd. Procedural aspects

Member States are obliged to inform the Commission of any plans to grant or alter aid, art. 88 III (ex-art. 93 III) EC. If the Commission considers that any such plan is not compatible with the common market, it will initiate a procedure according to art. 88 II (ex-art. 93 II) EC and eventually, if necessary, prohibit the state measure in question. This procedure as such is good evidence of the central and dominant role of the Commission in state aid law[136].

c. Conclusion: An incomplete distinction between tax arrangements and tax subsidies

The EC law controlling national tax subsidies is concentrated in the regulations on state aids, art. 87 ff. (ex-art. 92 ff.) EC. In this framework, a national tax measure is treated as a generally prohibited state aid, if – essentially speaking – the measure results in an „advantage", which is „specific" to certain enterprises or sectors of production and affects intra-Community trade. An „advantage" is seen in any reduction from the tax burden that is „normally" borne by an enterprise. What is „normally" borne, is – on an abstract level – defined by all rules, which are „justified by the nature or general scheme of the tax system" or which adhere to its „basic or guiding principles". In concreto, however, the „normality" of the treatment is ascertained by the mere distinction between „rule" and „exception" in regard to

[129] Council Regulation (EC) No. 994/1998, OJ 1998, L 142/1.

[130] Council Regulation (EC) No. 70/2001, OJ 2001, L 10/33.

[131] Council Regulation (EC) No. 68/2001, OJ 2001, L 10/20.

[132] Council Regulation (EC) No. 69/2001, OJ 2001, L 10/30.

[133] See A. Sinnaeve, Die ersten Gruppenfreistellungen: Dezentralisierung der Beihilfenkontrolle?, in: EuZW 2001, p. 69 ff.; A. Bartosch, Die neuen Gruppenfreistellungsverordnungen im EG-Recht, in: NJW 2001, p. 921 ff.; R. Bechtold, EG-Gruppenfreistellungsverordnungen – eine Zwischenbilanz, in: EWS 2001, p. 49 ff.

[134] In the area of state aids for environmental protection, for example, the Commission has adopted new guidelines in January 2001; OJ 2001, C 37/3. As they will stay in force until the 31. 12. 2007 (see par. 81 of the guidelines), it appears improbable that the Commission will adopt a regulation in this area before that date.

[135] On the vagueness of EC competition law in general see R. Wesseling, The modernisation of EC competition law, 2000. The vagueness of state aid law in particular is also reflected in the number and nature of pending cases, like – for example – the pending German cases regarding the tax exemptions for certain forms of energy consumption in the framework of the „ecological reform" (W. Frenz, Energiesteuer und Beihilfenverbot, in: EuZW 1999, p. 616 (617)), the tax exemption for diesel fuel bought by road transportation companies (Frankfurter Allgemeine Zeitung, 17. 4. 2001, p. 30) or the tax exemption for the assets of German atomic power plants.

[136] The procedural framework has been subject to a recent regulation by the Council, dating from March 1999, which - however - is of no direct interest for the purposes of this analysis; see Council Regulation (EC) No. 659/1999, OJ 1999, L 83/1; A. Sinnaeve/P. J. Slot, The new regulations on state aid procedures, in: CMLR 1999, p. 1153 ff.

Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.
© The Author(s). European University Institute.

mainly economic equality. This latter criterion for ascertaining „aid" is, in effect, very similar to the further requirement of „specificity": A measure is „specific", if it can be considered as an exception to the tax provisions of a legislative, regulatory or administrative nature, particularly due to regional or sectoral limitations of the aid or due to a discretion of the public authorities. Social policy concerns are only taken account of on the level of exceptions to the general prohibition of state aids, through art. 87 II-III (ex-art. 92 II-III) EC and through the new regulations on group exemptions. Social policy concerns do thus – in practice – not enter the conceptual distinction between tax arrangements and tax subsidies.

Reflecting upon this normative situation, the EC state aid law distinction between tax arrangements and tax subsidies not only appears to be as vague as most of EC competition law, but also appears to be incomplete. The notions of the „nature" and „general scheme" of the tax system, mentioned on an abstract level, are as opaque as the notion of its „basic or guiding principles". When the Commission and the Courts then, in concreto, resort to the formalistic criterion of „general measures" and „exceptions" in order to ascertain tax subsidies without concretising the „nature" and „general schemes" of national taxation, they show that EC state aid law, rooted in a narrow understanding of commercial non-discrimination, which is typical for EC competition law, is still missing a sophisticated concept of taxation, especially tax equality, which is at the same time indispensable for establishing a coherent distinction between tax arrangements and tax subsidies. The EC institutions themselves give evidence for this indispensability, by referring to the „nature" and „general schemes" of tax law at all.

This lack of an adequate criterion for judging upon the nature of national tax exemptions in EC state aid law is particularly problematic, if one considers that by ruling on tax regulations the very dominant and central role of the (only indirectly legitimized and accountable) Commission in competition matters is extended to an area which has traditionally been understood to be an exclusive enclave of national sovereignty.

On the whole, it can be concluded that EC law on national tax subsidies is therefore conceptually concentrated on economic equality. Social policy concerns that might potentially become part of the conceptual distinction between tax arrangements and tax subsidies through the criterion of the „nature and general scheme" of the tax system, in practice only enter the analysis on the level of exceptions, according to art. 87 II-III (ex-art. 92 II-III) EC and according to the new regulations on group exemptions.

2. WTO law

Besides EC law, WTO law contains important provisions governing the admissibility of national subsidies that shall be analysed in view of their impact on national tax sovereignty. Again, this impact mainly stems from the specific way, in which WTO law distinguishes between tax arrangements and tax subsidies.

While the relationship of the WTO subsidy provisions to the corresponding EC provisions is not without tensions[137], the WTO regime generally supplements the EC regime, in

[137] These tensions cannot be analysed in the framework of this paper; see R. Luja, W.T.O. Agreements versus the EC Fiscal Aid Regime: Impact on Direct Taxation, in: Intertax 1999, p. 207 ff.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

consequence of the implementation of the WTO rules through EC regulations[138]. This, however, shall not be investigated in depth in the context of this paper, which focuses on a comparison between the respective substantive regulatory frameworks as such.

a. Overview

For as long as the GATT system has existed, subsidies have been conceived of as potential obstacles to international trade. Hence, subsidy control has always been an element of the GATT regulations[139] – just as subsidies have always been an important source of trade disputes brought before the GATT[140]. For a long time, the GATT subsidy controlling regime was essentially limited to imposing obligations of notification and consultation (art. XVI.1. GATT) and to regulating the levying of countervailing duties aimed at offsetting subsidies by a Member State for the export of products that cause or threaten material injury to an established industry in the territory of another Member State or materially retard the establishment of a domestic industry („track I"). In the framework of the Uruguay Round, which led to the foundation of the WTO, this regime was in 1994 – for the area of the trade in goods – supplemented by a (revised[141]) Agreement on Subsidies and Countervailing Measures 1994 (SCM Agreement)[142]. The SCM Agreement concretises the older GATT regulations and installs a new, additional regime of substantive tax subsidy control („track II"). For the area of agriculture, a special Agreement on Agriculture (also promulgated in 1994) provides for some particular subsidy regulations, which shall not be looked at here[143]. Finally, it deserves mentioning that the General Agreement on Trade in Services (GATS) does currently not contain any substantive regulations regarding national subsidies[144].

b. The system of subsidy control according to „track I" and „track II"

aa. Art. VI GATT 1994 and art. 10 ff. SCM Agreement („track I")

As far as the SCM Agreement concretises the older GATT regulations on subsidy control („track I"), it concentrates on specifying the initiation and procedures of the investigation (art.

---

[138] See the Council Regulations (EC) No. 3283/1994, OJ 1994, L 349/1 (no longer in force) and No. 384/1996, OJ 1996, L 56/1 with further amendments; for the most recent amendment procedure see COM (2000) 363.

[139] See T. Collins-Williams/G. Salembier, International Disciplines on Subsidies. The GATT, the WTO, and the Future Agenda, in: JWT 30 (1/1996), p. 5 ff.

[140] The so-called „Leutwiler report" already in 1985 states that subsidies are „at the root of the most serious and intractable trade disputes that have been brought before the GATT"; GATT (ed.), Trade Policies for a Better Future. Proposals for action, 1985, p. 39. For an overview of recent WTO settlements on subsidy cases in general see H. Hohmann, Die WTO-Streitbeilegung in den Jahren 1998-1999, in: EuZW 2000, p. 421 (422 f., 425 f.).

[141] There existed an older Subsidies Agreement dating from 1979 that only contained (few) substantive regulations, which more or less repeated the provisions of art. XVI GATT.

[142] According to art. II of the Agreement Establishing the World Trade Organisation, the GATT as well as the multilateral agreements (as the SCM Agreement, the Agreement on Agriculture and the GATS) are part of the WTO Agreement and therefore binding on all Member states.

[143] According to art. 9 of the Agreement, export subsidy regulations in the area of agriculture are not generally prohibited, but are subject to a regime that is aimed at leading to a step-by-step reduction of such subsidies („reduction commitments"). For a detailled account see M. G. Desta, Agricultural Export Subsidies under the WTO „Agricultural Package": A legal analysis, in: Revue Belge de Droit International 1997, p. 635 ff.; also C. Pitschas, Ausfuhrsubventionen nach dem WTO-Übereinkommen über die Landwirtschaft – gegenwärtiger Stand und zukünftige Perspektive, in: RIW 2001, p. 205 ff.

[144] Comp. art. XV GATS and the corresponding footnote 8 to the Agreement („enter into negotiations").

Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository. © The Author(s). European University Institute.

10 ff. SCM Agreement). Regarding substantive law, the Agreement insofar merely refers to art. VI GATT 1994 (art. 10 SCM Agreement)[145].

bb. Art. 3 ff. SCM Agreement („track II")

As far as the SCM Agreement installs a wholly new, second regime of substantive subsidy control, it subdivides state subsidies into three categories[146]. According to part II of the SCM Agreement, subsidies contingent in law or in fact upon export performance or upon the use of domestic over imported products, are per se prohibited (art. 3 SCM Agreement). According to part III of the Agreement, some types of subsidies are, although not prohibited, actionable, if they have adverse effects to the interests of another Member State (art. 5 SCM Agreement); an adverse effect is ascertainable, if the subsidy injures the domestic industry of another Member State, if the subsidy results in the nullification or impairment of benefits accruing directly or indirectly to other Member States under GATT 1994 or if serious prejudice in the sense of art. 6 of the SCM Agreement can be deemed to exist. According to part IV of the Agreement, subsidies are permitted („non-actionable"), if they are not „specific" in the sense of art. 2.1. SCM Agreement (art. 8.1.(a) SCM Agreement) or if they fall into one of the categories enumerated in art. 8.1. (b) and 8.2.(a) and (b) SCM Agreement. These categories cover subsidies that give assistance for research activities, support disadvantaged regions or promote the adaptation of existing facilities to new environmental requirements imposed by law.

cc. Procedural rules

Whenever a Member State has reason to believe that another Member State violates substantive provisions of the SCM Agreement („track II") by granting prohibited or actionable subsidies, the Member State may – after (fruitless) consultation – refer the matter to the Dispute Settlement Body for the establishment of a Panel and further action (art. 4 and art. 7 SCM Agreement). This procedure can, following certain deadlines, lead to the publication of a Panel or Appellate Body report and eventually to the authorization of the complaining Member State to take countermeasures; it can also lead to an arbitration according to the regulations of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

Instead of embarking upon a dispute settlement procedure, the Member State may – as had already been the case prior to the Uruguay Round – also impose countervailing duties based on art. VI GATT, now supplemented by art. 10 ff. SCM Agreement („track I")[147]. This procedure, which has – until now – been predominant in state practice[148], has been criticized as unilaterally taking account of the interests of the complaining import state and as structurally not suited for balancing interests[149]. It will have to be observed, in which way the

[145] See in this regard also the Agreement on the Implementation of Article VI of GATT 1994.

[146] For an overview see M. Rodi, Die Subventionsrechtsordnung, 2000, p. 130 ff.

[147] See S. Ohlhoff, Verbotene Beihilfen nach dem Subventionsabkommen der WTO im Lichte aktueller Rechtsprechung, in: EuZW 2000, p. 645 (646).

[148] S. Langer, Grundlagen einer internationalen Wirtschaftsverfassung, 1995, p. 264 ff.

[149] M. Rodi, Die Subventionsrechtsordnung, 2000, p. 124.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

remaining „track I" will affect the further development of the new, more sophisticated „track II" of WTO subsidy control[150].

dd. The notion of a subsidy according to part I SCM Agreement in tax exemption cases

While the relationship between „track I" and „track II" raises a lot of questions that are partly just beginning to be addressed by the Panels and the Appellate Body, the following analysis shall – with regard to the purposes of this paper – only concentrate on the underlying understanding of a subsidy, in view of tax exemption cases. The definition of a subsidy relevant to both „tracks" is to be found in part I of the SCM Agreement. It contains three main constitutive elements: first, a „financial contribution" by a public body (or any form of income or price support in the sense of art. XVI GATT 1994[151]) (art. 1.1.(a) SCM Agreement); second, a corresponding „benefit" thereby conferred (art. 1.1.(b) SCM Agreement); third, the „specificity" of the subsidy (art. 1.2. and art. 2 SCM Agreement).

The first requirement of a „financial contribution" is illustrated by a number of examples in art. 1.1.(a)(1) SCM Agreement. In regard to our analysis, point (ii) of these examples is of particular importance: A „financial contribution" is ascertainable, where „government revenue that is otherwise due, is foregone or not collected (e. g., fiscal incentives such as tax credits)". While the notion of a „financial contribution" is, given the number of examples in art. 1.1.(a)(1) SCM Agreement, generally very wide and only meaningfully restricted through the further requirement of the conferral of a „benefit"[152], the example of „government revenue ... otherwise due" and „foregone or not collected" is particularly vague. According to footnote 1 to the SCM Agreement, „the exemption of an exported product from duties or taxes borne by the like product when destined for domestic comsumption, or the remission of such duties or taxes in amount not in excess of those which have accrued, shall not be deemed to be a subsidy". Despite this clarification, the clause of „government revenue ... otherwise due" and „foregone or not collected" has already led to considerable problems in the practice of the WTO bodies.

In the case of United States – Foreign Sales Corporations, the most important tax subsidy case decided under the new regime up to now, the Appellate Body in February 2000 held that regarding the requirement of a „financial contribution", „there must ... be some defined, normative benchmark against which a comparison can be made between the revenue actually raised and the revenue that would have been raised 'otherwise'"[153]. This benchmark, the Appellate Body further held, has to stem from the respective national tax law. This is due to the fact that „a Member, in principle, has the sovereign authority to tax any particular categories of revenues it wishes. It is also free not to tax any particular categories of revenues. But, in both instances, the Member must respect its WTO obligations. What is 'otherwise due', therefore, depends on the rules of taxation that each Member, by its own choice,

[150] In this respect, it is interesting to note the Ministerial Statement on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures 1994, which states that „Ministers recognize the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures".

[151] This alternative has up to now remained irrelevant in the practice of the WTO institutions.

[152] S. Ohlhoff, Verbotene Beihilfen nach dem Subventionsabkommen der WTO im Lichte aktueller Rechtsprechung, in: EuZW 2000, p. 645 (647).

[153] Appellate Body Report, EuZW 2000, p. 659 (661). For a detailled account of the case and its history see S. Ohlhoff, Verbotene Beihilfen nach dem Subventionsabkommen der WTO im Lichte aktueller Rechtsprechung, in: EuZW 2000, p. 645 (650 f.).

Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.
© The Author(s). European University Institute.

establishes for itself."[154] The similarity between this criterion of a „normative benchmark" and the corresponding EC law criterion of the „nature and general scheme" of the national tax system is apparent. Just as the EC Commission has not yet investigated into the content of the „nature and general scheme" of national tax law, however, the Appellate Body has not yet hinted as to how „normative benchmarks" could be found. Instead, in United States - Foreign Sales Corporations, the Appellate Body accepted the method applied by the Panel of the first instance. This Panel had stated that „in accordance with its ordinary meaning, we took the term 'otherwise due' to refer to the situation that would prevail but for the measures in question. It is thus a matter of determining whether, absent such measures, there would be a higher tax liability."[155] Hence, the panel compared the normative situation in question with the situation that would prevail, if a subsidiary general tax rule was applied and it then analysed whether the situation in question leads to an advantage for the enterprise. Just like in the concrete practice of the EC institutions, this again effectively is a simple and formalistic, economically oriented „rule" and „exception" test, according to which a tax measure is an exception and therefore a subsidy, if it treats an enterprise formally better than another enterprise. The case of Canada – Automotive Industry, which concerned financial contributions other than taxes, was solved on the same grounds[156]. The „but-for"-test, the Appellate Body added, leads to reliable results only in cases, in which there exists a relationship of „rule" and „exception" in the first place. However, no alternative test has yet been proposed for cases, in which there is no such relationship of „rule" and „exception"; also, no reliable formula has yet been proposed in order to decide, what counts as a „rule" at all. It therefore appears as a major future task of the WTO institutions to ascertain the applicable „normative benchmarks" in the tax law of the state alleged to have granted a tax subsidy that violates the SCM Agreement[157].

The conferral of a „benefit", the second constitutive requirement according to art. 1.1.(b) of the SCM Agreement, has to be ascertained from the perspective of the individual addressee; collateral costs for the state do not enter the calculations[158]. The central element in this context is generally considered to be a comparison of the result of the application of the regulation with the result in circumstances of normal market conditions (just as in EC law); according to the Appellate Body in Canada – Automotive Industry, the benefit can thus be identified by determining whether the recipient has received the financial contribution „on terms more favorable than those available to the recipient in the market". No account has yet been taken of the fact that such a market does – also here – not exist from the outset in the area of taxation.

The third element of the definition of a subsidy, the „specificity" of the financial contribution, is fulfilled, if the contribution is directed only to certain enterprises or industries or groups of enterprises or industries. According to art. 2 SCM Agreement, a subsidy is deemed to be specific, if the granting authority explicitly limits access to the subsidy to

[154] Appellate Body Report, EuZW 2000, p. 659 (661).

[155] Panel Report, 8. 10. 1999 – WT/DS108/R – par. 7.45 (on file with: http://www.wto.org).

[156] Appellate Body Report, EuZW 2000, p. 664. For an account of the case see S. Ohlhoff, Verbotene Beihilfen nach dem Subventionsabkommen der WTO im Lichte aktueller Rechtsprechung, in: EuZW 2000, p. 645 (651).

[157] S. Ohlhoff, Verbotene Beihilfen nach dem Subventionsabkommen der WTO im Lichte aktueller Rechtsprechung, in: EuZW 2000, p. 645 (647).

[158] See the Appellate Body Reports in the cases of Canada – Civilian Aircraft, 2. 8. 1999 – WT/DS70/AB/R – par. 149 f.; comp. also United States – Hot Rolled Lead and Bismuth Carbon Steel, 10. 5. 2000 – WT/DS 138/AB/R – par. 57 (on file with: http://www.wto.org).

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

certain enterprises, if the subsidy is de jure or de facto bound to subjective requirements or if the subsidy is reserved for enterprises in designated geographical regions within the jurisdiction of the granting authority. Subsidies contingent in law or in fact upon export performance or upon the use of domestic over imported products, i. e. prohibited subsidies in the sense of art. 3 SCM Agreement, are – already – by definition „specific" (art. 2.3. SCM Agreement). Again, like in EC law, the requirement of „specificity" very much resembles the „rule" and „exception" test effectively used in order to ascertain the existence of a „financial contribution"; this inaccuracy is due to the fact that the substantive criterion of „normative benchmarks" of national tax law proposed on an abstract level to discern „financial contributions" has not yet been sufficiently developed.

c. Conclusion: Another incomplete distinction between tax arrangements and tax subsidies

On the WTO level, the older regime of subsidy control according to art. XVI and VI GATT („track I") has been supplemented by the comprehensive substantive regulations of the Agreement on Subsidies and Countervailing Measures 1994 (SCM Agreement) („track II"). For both „tracks", the relevant definition of a subsidy is to be found in the provisions of part I of the SCM Agreement. These provisions define a subsidy by the elements of a „financial contribution", which confers a „benefit" to a „specific" circle of enterprises or industries. A „financial contribution" is – among others – ascertainable, where „government revenue that is otherwise due is foregone or not collected (e. g. fiscal incentives such as tax credits)". Already in the first applications of the SCM Agreement to preferential tax regulations, it was recognized that the finding of government revenue „otherwise due" requires a „normative benchmark", against which a comparison can be made. While the prerogative of the national tax authorities to define such benchmarks was confirmed, the WTO bodies nevertheless refrained from further inquiring into the content of possibly existing benchmarks and instead resorted to an unsophisticated concept of „rule" and „exception" in order to decide upon the existence of government revenue „foregone".

Just as the EC institutions, the WTO institutions have thus realised that any search for national tax subsidies, which can then be subjected to the transnational regime of state aid or subsidy control, unavoidably requires taking reference to a principle of right or just taxation. This is the „normative benchmark", against which the logically indispensable comparison can be made. Just as the EC institutions, however, the WTO institutions have not yet taken the necessary step of effectively adopting any concept of just taxation. By plainly refering to the idea of „rule" and „exception", and by insofar leaving the definition of what constitutes a „rule" completely open, the WTO regime has remained with a rather archaic, formalistic notion of a tax subsidy, which is focused on economic equality in a narrow sense. This formalistic notion of economic equality lies at the heart of the conceptual distinction between tax arrangements and tax subsidies. Social policy concerns – that might enter this conceptual distinction after a further development of the criterion of „normative benchmarks" of national tax law – remain conceptually invisible; they only come in as enumerated exceptions, i. e. as tax subsidies that are permitted for (few) exceptional reasons.

3. The impact of transnational state aid control on the national law on tax exemptions

Regardless of the question, whether the EC and the WTO regimes of state aid and subsidy control are directly or only indirectly applicable (this question shall not be discussed in this

Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.
© The Author(s). European University Institute.

paper[159, 160]), EC and WTO law contain powerful tools for controlling and substantively restricting the use of tax exemptions in national law. The definitions of a state aid or a subsidy, which are the threshold requirements for activating the EC and the WTO controlling mechanisms, are very similar. While EC law defines a state aid as an „advantage", which is „specific" to certain addressees, WTO law defines a subsidy as a „financial contribution", which confers a „benefit" to „specific" addressees. The fundamental problem of distinguishing between a just arrangement of the tax system and a subsidy within the tax system is recognized and discussed in the framework of both transnational regimes. EC law as well as WTO law primarily locate this problem in the discussion of whether an „advantage" or a „financial contribution" exists in the first place. Despite the recognition and discussion of the problem, however, the transnational regimes have not yet developed a sufficiently sophisticated approach to differentiating between tax arrangements and tax subsidies. While introducing criteria as the „nature and general scheme" of the tax system and „normative benchmarks" for this purpose on an abstract level, the regimes have not yet made any real use of the potential of these criteria. Instead, they generally resort to the formalistic distinction between „rule" and „exception", which is interpreted in a way that mainly gives effect to a narrowly understood economic equality. The decision on what counts as a „rule" remains arcane.

Against the background of these generally quite unsophisticated and overly formalistic concepts of tax equality in the transnational regimes of state aid and subsidy control, it is easy to predict that the transnational regimes will tend to qualify a number of national tax exemptions as tax subsidies that – at the same time – appear as conceptually coherent with the principle of „ability to pay", therefore as just tax arrangements from the perspective of constitutional law[161]. This is due to the fact that the „thick" understanding of equality according to the principle of „ability to pay" encompasses a host of constitutionally rooted value-judgments, that the „thinner" versions of equality employed by the transnational regimes are not capable of accounting for; they are, in principle, solely capable of guaranteeing an equality in view of economic market conditions. Considering that once qualified as a tax subsidy, a regulation is – according to national as well as transnational law – generally not permissible, the EC and WTO regimes thus – disregarding the enumerated exceptions – define the range of permissible national tax laws more narrowly than national constitutional law does.

---

[159] The regime of art. 87 ff. (ex-art. 92 ff.) EC is – on the whole – not directly applicable, as particularly art. 88 (ex-art. 93) EC illustrates; see ECJ, 22. 3. 1977, ECR 1977, 595 (par. 5 ff.) – Steinike und Weinlig; ECJ, 11. 6. 1992, ECR 1992, I-3899 (par. 25 f.) – Sanders; ECJ, 9. 8. 1994, ECR 1994, I-3829 (par. 10 ff.) – Namur; also ECJ, 15. 3. 1994, ECR 1994, I-902 (par. 16) – Banco Exterior de Espana. Directly applicable, however, is art. 88 III 3 (ex-art. 93 III 3) EC, the prohibition to put proposed measures into effect until the procedure has resulted in a final decision; see ECJ, 22. 3. 1977, ECR 1977, 595 (par. 5 ff.) – Steinike und Weinlig; ECJ, 16. 12. 1992, ECR 1992, I-6523 (par. 30) – Lornoy; ECJ, 30. 11. 1993, ECR 1993, I-6185 (par. 14) – Kirsammer-Hack; ECJ, 11. 7. 1996, ECR 1996, I-3547 (par. 38 f.) – SFEI/La Poste. Comp. R. Geiger, EG-Vertrag, Kommentar, 2nd ed., 1995, art. 92, par. 2 and 6; W. Cremer, in: C. Calliess/M. Ruffert (eds.), EUV/EGV, 1999, art. 87, par. 5 f.

[160] Concerning the applicability of the WTO regime of subsidy control in the EC see M. Rodi, Die Subventionsrechtsordnung, 2000, p. 136 ff., with further references; for the restrictive position of the ECJ in particular see ECJ, 12. 12. 1972, ECR 1972, 1219 (par. 19 ff.) – International Fruit Company; ECJ, 5. 10. 1994, ECR 1994, I-4973 (par. 103 ff.) – Germany/Council (Bananas); ECJ, 12. 12. 1995, ECR 1995, I-4533 (par. 24 ff.) – Chiquita Italia.

[161] Certainly, quite a number of preferential treatments qualified as tax subsidies in the transnational law will also be qualified as such in constitutional law. (The tempting effect of the regulatory power of taxation may not be underestimated!).

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

IV. Coordinating national and transnational law on tax exemptions

1. „Hidden" restrictions of national tax sovereignty and the importance of coordination

Supra- and international law largely refrain from imposing direct restrictions on taxation as taxation. As the analysis has shown, however, the transnational instruments of state aid control have significant indirect effects on the national taxing power. In other words: Transnational law is not primarily aimed at restricting or reshaping national tax law; but because there is always the possibility of subsidizing by means of taxing, the normative spheres of transnational state aid control and national tax law are closely interlinked. Already this interlinkage as such leads to factual restrictions of national tax sovereignty. Having concluded our investigation we furthermore see, that the particular intensity of these restrictions stems from the fact that the EC and WTO regimes have – due their specific approaches to differentiating between tax arrangements and tax subsidies – a much broader understanding of what is to be qualified as a (generally prohibited) tax subsidy than constitutional law. For the EC regime, it must be added that the EC Commission exercises a very wide discretion in the realm of art. 87 ff. (ex-art. 92 ff.) EC[162]; it is thus not exaggerated to assert that the regulations of art. 87 ff. (ex-art. 92 ff.) EC lead to a „tax legislation under the prerogative of supranational approval"[163]. Against this background, tax law cannot be considered to be an exclusive enclave of national sovereignty anymore. As neither the EC nor the WTO have been endowed with any explicit competences to restrict national tax sovereignty in the ways described, these restrictions can well be called „hidden"[164].

It is certainly important to point to these somewhat „hidden" restrictions of the national taxing power. However, these restrictions at the same time illustrate the plain fact that different areas of law, which belong to the competences of different national and transnational authorities respectively, and which have very different and unrelated aims, are nevertheless often intricately intertwined. Instead of insisting on national sovereignty too strictly, it therefore seems wiser to accept the indispensability of a distribution of powers within the multi-layered legal system as such and at the same time to try to optimize coordination between the different layers. An effective coordination may not only diminish unwanted side effects of regulations[165], but also foster the further development of the system in a way as to ensure an efficient allocation of tasks to the different operative levels and to guarantee an efficient interlinkage of the contributions on these different levels. As more and more sectors of governance require and function on the basis of such contributions on several levels[166], an efficient allocation and interlinkage will be of ever-increasing importance.

---

[162] Vigorously V. Götz, Steuervergünstigungen als Gegenstand der europäischen Beihilfenaufsicht, in: P. Kirchhof et al. (eds.), Festschrift für K. Vogel, 2000, p. 579 (582 f.).

[163] V. Götz, Steuervergünstigungen als Gegenstand der europäischen Beihilfenaufsicht, in: P. Kirchhof et al. (eds.), Festschrift für K. Vogel, 2000, p. 579 (583) (translation by the author).

[164] It should be interesting to inquire into the tax-related considerations underlying the adoption of art. 87-89 (ex-art. 92-94) EC, particularly in regard to the narrow competences of the Community according to art. 90-93 (ex-art. 95-99) EC.

[165] The question of who is the final arbiter regarding the qualification of a regulatory effect as unwanted or unauthorized in such contexts of cooperation, as well as the question of whether the conventional perspective on the issue of the final arbiter itself can still hold in contexts of cooperation, shall not be discussed here.

[166] For an account of the development towards vertically structured sectors of governance see C. Walter, Die Folgen der Globalisierung für die europäische Verfassungsdiskussion, in: DVBl. 2000, p. 1 ff.

Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository. © The Author(s). European University Institute.

2. A common understanding of tax subsidies as a central prerequisite of coordination

Coordination can be achieved – and this shall be advocated here – by the cultivation of a common understanding of legal terms employed by interacting institutions. Such a common understanding of terms can have various forms (that are not always accurately distinguishable).

First, a common understanding may be restricted to the recognition of a certain interpretation of a legal norm or concept through the institutions on one level by the institutions on a different level. In this case, these latter institutions would not adopt the interpretation as their own, i. e. they would not attempt to found the interpretation on own competences in order to make it part of their own regime (relative approach).

Secondly, a common understanding of legal norms or concepts may go as far as to develop a shared interpretation that is then adopted and made operable on all levels of the system (universal approach). This extensive kind of common understanding can particularly foster the subjective acceptance of the distribution of competences and of their exercise as legitimate, in particular as being coherent with underlying treaty provisions. A good example for this is the interaction between the constitutional courts of the EC Member States and the ECJ regarding the protection of fundamental rights through EC institutions[167]. Certainly, such interaction is largely based on the mutual respect of the institutions for the respective competences of legislation and interpretation[168]; in the end on a sensitivity for a more functional understanding of sovereignty[169]. But even if there is a general readiness to mutual respect and a general willingness to live with functional differentiation, the institutions will often only be prepared to fully cooperate, if there exists a certain commonality „in the substance". The German Federal Constitutional Court (effectively) waived the prerogative to apply the standards of protection of the German fundamental rights only after the Court saw a sufficient substantive standard of fundamental rights protection guaranteed through the application of EC principles by the ECJ, i. e. after the German court was able to ascertain a sufficient substantive closeness between the EC principles on the protection of fundamental rights and the fundamental rights as protected by the German constitution[170].

Looking at the definitions and interpretations of the notion of a tax subsidy in the national and transnational regimes analysed above, it is apparent that these definitions and interpretations differ quite significantly from each other. If a common understanding of terms is the foundation of a fruitful and lasting coordination, it is necessary to work on reducing these differences.

---

[167] The German Federal Constitutional Court labeled the relationship a „Kooperationsverhältnis"; see BVerfGE 89, 155 (175).

[168] Comp. R. A. Lorz, Interorganrespekt im Verfassungsrecht, 2001.

[169] N. Walker, Sovereignty and Differentiated Integration in the European Union, in: European Law Journal 4 (1998), p. 355 ff.

[170] For the development see BVerfGE 37, 271 (280) and BVerfGE 73, 339 (387) in comparison. The Court still claims the prerogative to apply the German standards in extreme cases; after the most recent decisions, however, it appears that this claim is of a rather theoretical nature; see BVerfG NJW 2000, 3124 and BVerfG EuZW 2001, 255; also H. Kube, Einmal mehr: Verfassungsbeschwerde gegen Gemeinschaftsrecht und Vorlagepflicht des BVerwG nach Art. 234 Abs. 3 EGV, in: JuS 2001 (forthcoming). It seems fair to say that here doubts about formal legitimacy were effectively resolved by resorting to the existence of a sufficient substantive legitimacy.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

3. Opening up transnational law for the tax principle of „ability to pay"– Reconciling economic and social policy concerns on the transnational level

In regard to an approximation of the different definitions and interpretations of a tax subsidy in national and transnational law that could improve coordination within the multi-layered legal system, attention has to be drawn to the fact that the notions of á tax subsidy in EC as well as in WTO law were summarized as incomplete, as missing a normative base line.

In national law, the normative base line for distinguishing between tax arrangements and tax subsidies is – as we have seen – determined by the principle of a taxation according to „ability to pay". By transferring this principle to the transnational level[171], the EC and WTO definitions of a tax subsidy could therefore – in this sense – be completed. This completion would, first, render the transnational regimes as such more coherent; as we could observe, they are aware of the conceptual need for criteria such as the „nature and general scheme" of a tax system or its „normative benchmarks". Secondly, this completion would lead to a better interlinkage and coordination between national and transnational law; this would reduce the tensions between the regimes and facilitate an efficient allocation of regulatory tasks to the levels of the system best suited for the individual task. The underlying reason, of course, why this completion would improve interlinkage and coordination is that by recognizing or adopting the principle of a taxation according to „ability to pay", the transnational state aid controlling regimes would – in their conceptual approach, not only on the level of exceptions[172] – be explicitly opened up to social policy concerns[173], which the nation states legitimately take account of in their tax laws[174].

Certainly, the transnational regimes do not have broad competences in the area of social policy and taxation. This should, generally speaking, prevent them from developing and enforcing a tax principle of „ability to pay" as part of their own regime, in the second sense of a common understanding of legal terms (universal approach, see above). However, the mere recognition of this principle, in the first sense of a common understanding (relative approach, see above), should be covered by the transnational competences to state aid control, if state aid control is to be applied to tax subsidizing at all, because this recognition is – as we have seen – an indispensable requirement of a coherent application of state aid control to tax exemptions. As the transnational regimes exercise their control over a number of different tax systems, which concretise the „ability to pay" in different ways, it could – of course – become necessary to establish a transnational interpretation of „ability to pay", which takes account of

[171] Also W. Schön, Taxation and State Aid Law in the European Union, in: CMLR 1999, p. 911 (925 ff.); sceptical, however, J.-P. Keppenne, Politiques fiscales nationales et controle communautaire des aides d'Etat, in: Journal des Tribunaux. Droit Européen, No. 66, 8th year, Feb. 2000, p. 25/2000 (29/2000); V. Götz, Steuervergünstigungen als Gegenstand der europäischen Beihilfenaufsicht, in: P. Kirchhof et al. (eds.), Festschrift für K. Vogel, 2000, p. 579 (588).

[172] On the level of exceptions, the increasing openness of the transnational regimes of state aid control to social policy concerns is easy to discern, as can be shown by the new EC regulations on group exemptions. What is still missing, however, is a – qualitatively new – openness to social policy concerns on the conceptual level.

[173] Instead of insisting on the notion of „social policy concerns", it can – if one wants – also be argued that, in fact, the transnational recognition of the principle of „ability to pay" can be accounted for in the framework of economic thinking itself, as economic prosperity does not rest on equality in commerce (in a narrow sense) alone, but also on a broader societal well-being today and in the future.

[174] Another question is, of course, who pays for the globalisation of social policy concerns. This question, however, is of a secondary nature and can – in the long run – be solved by rearranging financial structures (comp. the system of taxation and redistribution (Länderfinanzausgleich) between the states of the Federal Republic of Germany).

Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.
© The Author(s). European University Institute.

all these different concretisations; a phenomenon, which is often observable, when a transnational regime is confronted with areas of competence retained by different member states. While the mere recognition of the principle of „ability to pay" by the transnational regimes has just been called a relative approach to a common understanding of legal terms (in view of the relationship between the transnational and the nation state level), this recognition therefore at the same time fosters the development of universal notions, with regard to the content of the principle of „ability to pay" as recognized by the respective transnational regime.

While the current focus of discussion in the field of transnational state aid control undoubtedly lies on an increasing decentralisation and proceduralisation[175], it thus nevertheless appears indispensable for the transnational regimes to complete their definitions of tax subsidies by recognizing the tax principle of „ability to pay" in order to guarantee an efficient coordination within the multi-layered legal system.

4. A central key to the further harmonisation within the multi-layered legal system

The definition of a tax subsidy in the regulatory context of direct taxation is only one of countless cases illustrating the necessity of a more holistic approach by the transnational regimes. Many other areas of regulation could be added that are suffering from a lacking coordination between national and transnational law due to a deficient, unilaterally economic approach on the transnational level. One of the most important of these other areas is – to conclude by only hinting to it and to thereby link the ending to the beginning of this article, where it was presented as the second important area of indirect restrictions to national tax sovereignty[176] – the area of indirect taxation with regard to the transnational principle of non-discrimination in trade. Trade discrimination has in transnational law traditionally been ascertained with reference to economically substitutable – and insofar „like"[177] – goods. Particularly J. H. H. Weiler, however, challenges this reference by pointing to the fact that the question of whether two goods are, in this sense, alike or not, can just as well or even better be answered on grounds of ecological impact or other criteria beyond economic substitutability[178]; a finding, which also reflects the need for a higher and – most importantly – conceptual transnational sensitivity to social policy concerns.

To finish with a strategic remark, one aspect should not be underestimated: The more the transnational regimes recognize the relevance of social policy concerns, the more the nation states will be willing to accept transnational measures and their impacts as lying within

[175] Schmidt, The Control of State Aids – A Proposal for a Co-Ordinated Approach, in: C. D. Ehlermann/M. Everson (eds.), European Competition Law Annual 1999: Selected Issues of State Aid Control (forthcoming); A. Sinnaeve, Die ersten Gruppenfreistellungen: Dezentralisierung der Beihilfenkontrolle?, in: EuZW 2001, p. 69 ff.; U. Soltész, Der Rechtsschutz des Konkurrenten gegen gemeinschaftsrechtswidrige Beihilfen vor nationalen Gerichten, in: EuZW 2001, p. 202 ff.

[176] See supra I.

[177] On the „like product" definition in WTO law in general comp. G. C. Berg, An Economic Interpretation of „Like-Product", in: JWT 30 (2/1996), p. 195 ff.; M. Bronckers/N. McNelis, Rethinking the „Like Product" definition in GATT 1994: Anti-dumping and environmental protection, in: M. Bronckers (ed.), A cross-section of WTO law, 2000, p. 15 ff.; also A. v. Bogdandy, Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship, in: Max Planck UNYB 5 (2001) (forthcoming).

[178] J. H. H. Weiler, National sovereignty in the age of transnational economic regulation: The prohibition on discriminatory taxation, lecture presented at the Law Department of the European University Institute, Florence, on the 29. 3. 2001.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

transnational competences, and the more they will be willing to endow the transnational regimes with further competences.

The future coordination within the multi-layered legal system will be accomplished in relationships of horizontally and vertically balanced powers and will substantially rest on a common understanding of legal terms, whether in a relative or a universal sense; a common understanding based on a model of social justice, on an integrated perspective on the economic and social aspects of life; an integrated perspective that lies at the heart of the European legal tradition.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

EUI WORKING PAPERS

EUI Working Papers are published and distributed by the
European University Institute, Florence

Copies can be obtained free of charge
- depending on the availability of stocks - from:

The Publications Officer
European University Instiute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI)
Italy

Please use order form overleaf

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

Publications of the European University Institute

To The Publications Officer
European University Institute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI) - Italy
Fax: +39-055-4685 636
e-mail: publish@iue.it
http://www.iue.it/

From Name .....

Address .....

.....

.....

.....

.....

❑ Please send me a list of EUI Working Papers
❑ Please send me a list of EUI book publications
❑ Please send me the EUI brochure Academic Year 2002/2003

Please send me the following EUI Working Paper(s):

Dept, n°, author .....
Title: .....
Dept, n°, author .....
Title: .....
Dept, n°, author .....
Title: .....
Dept, n°, author .....
Title: .....

Date .....

Signature .....

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

Working Papers in Law

Published since 2000

LAW 2000/1
Agustín José MENÉNDEZ
In Redistributive Taxation We Trust - Some Elements for a Democratic Theory of Tax Law

LAW 2000/2
Y. KRAVARITOU/P. FITZPATRICK/ E. PULCINI/ J. L. SCHROEDER/ N. LACEY/ T. PITCH/M. VIRGILIO/ L. FERRAJOLI
Droit et Amour en Europe: relations complexes
Love and Law in Europe: Complex Interrelations

LAW 2000/3
Sonja FEIDEN/Kristina RIEDL (eds)
Towards a Europeanised Judiciary? Practitioner's Experiences of National Judges with the Europeanisation of Private Law

LAW 2000/4
Jean-Victor LOUIS (Project Director)
Euro Spectator: Implementing the Euro - 1999 - Introductory Report/Summary of the National Reports

LAW 2000/5
Jean-Victor LOUIS (Project Director)
Euro Spectator: Implementing the Euro - 1999 - National Reports: Austrian Report/ Belgian Report

LAW 2000/6
Jean-Victor LOUIS (Project Director)
Euro Spectator: Implementing the Euro - 1999 - National Reports: French Report/ German Report

LAW 2000/7
Jean-Victor LOUIS (Project Director)
Euro Spectator: Implementing the Euro - 1999 - National Reports: Greek Report/ Italian Report

LAW 2000/8
Jean-Victor LOUIS (Project Director)
Euro Spectator: Implementing the Euro - 1999 - National Reports: Portuguese Report/Spanish Report

LAW 2000/9
Jean-Victor LOUIS (Project Director)
Euro Spectator: Implementing the Euro - 1999 - National Reports: Swedish Report/UK Report/Synthesis Report

* * *

LAW 2001/1
Luke NOTTAGE
Convergence, Divergence, and the Middle Way in Unifying or Harmonising Private Law

LAW 2001/2
Marie-Jeanne CAMPANA (ed.)
Étude comparée sur la propriété utilisée comme sûreté

LAW 2001/3
Marie-Jeanne CAMPANA (ed.)
L'État, les entreprises en difficulté et l'Europe

LAW 2001/4
Kristin NEMETH
European Insurance Law: A Single Insurance Market?

LAW 2001/5
Christoph U. SCHMID
A Theoretical Reconstruction of WTO Constitutionalism and its Implications for the Relationship with the EU

LAW 2001/6
Christian JOERGES
Das Recht im Prozeß der Konstitutionalisierung Europas

*out of print

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

LAW 2001/7
Luke NOTTAGE
Japanese Corporate Governance at a Crossroads: Variation in 'Varieties of Capitalism'?

LAW 2001/8
Alexandra GEORGE
Property in the Human Body & Its Parts. Reflexions on Self-Determination in Liberal Society

LAW 2001/9
Hanno E. KUBE
National Tax Law and the Transnational Control of State Aids - On the Need for a Further Reconciliation of Economic and Social Policy Concerns in Transnational Law

*out of print

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.

© The Author(s). European University Institute.
Digitised version produced by the EUI Library in 2020. Available Open Access on Cadmus, European University Institute Research Repository.