Tax neutrality and European State Aid Law

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I. State Aid Law as a part of European Union Law

- Harmonization of laws on EU level (Art. 114 et seq. TFEU)
- EU State Aid Law in the area of taxation (44% of state aid via tax measures)
- EU Competition Law
- Fight against harmful tax competition (EU Code of Conduct for Business Taxation)
- Internal sovereignty vs. EU competence

Art. 107(1) TFEU: “…any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”

II. Interpretation of Art. 107 TFEU with respect to taxation

- "Discriminatory taxation" approach/"Ad-hoc"-method
- Art. 107 TFEU requires scrutiny of equal treatment

- Selection: group of undertakings treated differently from others in a comparable legal or factual situation in the light of the objective pursued by the measure
- "Justification": measure is not justified by nature or general scheme of tax system
- "Favouring certain undertakings": includes tax measures granting an advantage; derogation from general tax system
- "Aid in any form whatsoever": does both conditions really change in substance?

III. Tax neutrality? – The differing taxation of legal forms in German business taxation

- Tax regime for corporations
  - Corporate tax
  - Income tax (withholding tax) on dividends
- Tax regime for cooperatives
  - Tax exemptions from corporate tax
  - Deduction from taxable income
  - Tax allowance
  - Nil or lower tax burden
- Taxation of KGaA

- Tax regime for partnerships
  - Taxation of GmbH & Co KG
  - Effective tax burden after distribution of retained (or EUR) profits

Is the overall tax burden a suitable criteria for the comparison between corporations and partnerships?

IV. Differing taxation of legal forms under the scrutiny of Art. 107 TFEU

- Advantage: Derogation from the general tax system
  - Derogation from the nature or general scheme of the tax system
  - Formal derogation not enough; derogation in substance required

- Selectivity: Which is the general tax system?
- Which principles form part of the nature or general scheme of the tax system?
- Which are the criteria for the determination of the general tax system and its nature and general scheme?
- Can the general system be selective sufficiently?
- Is the selection of principles of civil law part of the nature of the tax system?

- ECG Gibraltar: a tax system as a whole can be selective
- Commission Notice/EU Point Graph: list of cooperatives which can be part of the general tax system provided that all profits are distributed and taxed at the level of the individual members
- Commission Decision 113/2009: tax exemption from corporate tax for Finnish REITs is part of the general scheme of the tax system
- Which is the objective pursued by the measures?
- Which are the criteria of the comparison?
- Can characteristics in civil law be a criterion?
- Can undertakings of one legal form be a group of certain undertakings in the sense of Art. 107 TFEU?
- Are different legal forms in a comparable legal and factual situation?

Poster Session
EATLP Congress, Lisbon 2013