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STATE AIDS CONNECTION WITH TAX COMPETITION REGARDING THE PRINCIPLE OF SUBSIDIARITY IN THE EUROPEAN TAX LAW

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ABSTRACT: *This study examines the connection between the State aids and tax competition and what functions in this link: the prevalence or the subsidiarity of the EU? We analyse the incompatible State aids, the elements of the definition with introducing the newest notice of the Commission (2016) and the case of the Court of Justice of the EU. This Study analyses the condition of the harmful tax competition. The State aids and harmful tax measures are closely related to each other, but the problem is, that the regulation of State Aids is in the primary competence of the EU, while the tax measures are under the competence of the Member States, and in this case the EU' competence is based on the principle of subsidiarity. The Commission's Notice 2016 helps in order to terminate the tax measures and State aid with collection of Court cases of the EU and with the interpretation of concepts relating to tax measures and Sate aid.*

KEYWORDS: *State aids, (harmful) tax competition, subsidiarity of the EU, tax measure, tax preferences, tax advantage,*
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1. CONNECTION BETWEEN THE STATE AIDS AND TAX MEASURES

At first sight it is not clear what the connection between the State aids and tax measures is, namely tax preferences, tax advantages, but they are closely related to each other, despite the fact that the State aid law is part of the competition law and the tax measures are subjects of the tax law in the European Union. The State aids and tax measures – including the issue and the regulation of tax advantage raise the question of competence between the EU and the Member States. The reason of the main question is that the Commission has the right to intervene freely in the regulation of State aids, because the competition law is primary EU competence, it falls into the EU's exclusive competence, but the tax measures are under the competence of the Member States and in

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this case the EU' competence is based on the principle of subsidiarity.[1] („Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.")

This conflict raises in many cases interpretation and legislative harmonisation problems and, in order to solve this problem, the Commission published the Commission Notice[2] and the decisions of the Court of Justice of the European Union in individual cases [3] also contribute to resolve contradictions and conflicts as well as interpretations.

In the European Union, the State aids, which have effect on the competition, must be regarded as distorting competition, so it is incompatible with the European common and integrated internal market, because these aids hinder the operation of the internal common market. Certain types of the State aids could favour the undertaking of companies, so it could mean positive discrimination. Namely this could have the effect of the distinctive tax advantages, which are discriminatory and could cause harmful tax competition. According to the provisions of the EU's competition law, the Member States are not allowed to introduce such State aids, which were not subject of the preliminary examination of the Commission. The introduction of such State aids is not allowed by the Commission as they are incompatible with the common, integrated internal market. It is clear that it is very important to set out in which case the State aid is incompatible with the EU's competition law and, in this case, it is an illegal state aid, and in which case it is compatible. The problem was further aggravated by the fact that the illegal state aids could affect harmful tax competition, so it is important to see in which case the State aid can be considered as tax advantage. According to the Treaty on the Functioning of the European Union (TFEU) Article 107 (1) it is not allowed to provide state aids, which can affect the competition and trade between the Member States.

TFEU Article 107(1): "Save as otherwise provided in the Treaties, 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, is incompatible with the internal market."

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[1]Treaty on European Union Article 5. (3) Exclusive EU' competences for example: customs union, monetary policy in the eurozone…(EU's competences: a.) exclusive competence, b.) shared competence, c.) support, coordinate or supplement competence, see TFEU Articles 2-6).
So it is clear that taxation does not fall into the exclusive competence of the EU, the taxation is under the principle of subsidiarity. To the separation between the EU's and Member States' competences see the TFEU Article 4 (1) and Article 5 (2): „ *In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States*." Pursuant to the principle of sincere cooperation"*„the Member States shall refrain from any measure which could jeopardise the attainment of the Union's objectives*."

[2] The first Notice on State aids was published in 1998 and was part of the tax package against harmful tax competition, see: Commission notice on the application of the State aid rules to measures relating to direct business, *HL 1998 C 38 0003 – 0009* (Notice)

[3] See as an example Case C-148/04. of the European Court of Justice: Reference for a preliminary ruling in case of between the Commissione tributaria provinciale di Genova – Italy and Unicredito Italiano SpA and Agenzia delle Entrate. (EBHT 2005. I-11137.)

The limitation of the State aids affects the sovereignty of the Member States; the Commission is entitled to prohibit Member States from adopting such regulations, which benefit, contrary to the common interest, any company or economic sector, whether in the form of State aid or in the form of tax advantages. This is the reason why the legal situation of the State aids and the EU's conformity is a central issue in every Member State. The State aid is qualified as a positive financial form, generating advantage to a company compared to the others, so it can be discriminatory and this fall into the competence of the EU's competition law. But the State aids can cause harmful tax competition, have impact on the competition, so the application of them is limited and subject to authorisation. Common factors of the State aids that are available from the public finances, the terms of accession and the utilization are usually not set out in acts but the utilization of them is strictly assigned. The terms of the utilization in case of tendering are determined by the public sector body funding the State aid.

The aids can be recoverable, non-recoverable and mixed. The regulation on the State aids is controlled by EU bodies, mainly by the Commission and its control covers not just individual governmental measures but acts, in particular on the tax laws.

The prohibition or the allowance of the aids depends on exceptions (Tóth, 2007)(Várnay, 2004)(Osztovits, 2012). Article 107 of TFEU has a double filter for the State aids: firstly the concept of incompatibility and secondly there are provisions for automatic or discretionary exceptions. At the same time the rule of prohibition is strengthened by the procedural rules. According to these procedural rules the Member States have to notify the Commission about the planned State aid and have to wait until the Commission's decision. Consequently to this fact, the EU does not prohibit all types of the State aids, just limits them. According to this, only the State aids, which have been approved by the EU, which not cause harmful tax competition and are not against the EU' goal, are awarded.

2. THE PRINCIPLE OF THE INCOMPATIBLE STATE AID

According to the TFEU, the State aid has to fulfil the following conditions (Nyikos, 2009)(Kende, 2007) in order to be subject to Article 107 of the aforementioned treaty, namely that the aid should be considered as incompatible State aid:(Erdős, 2012)

a.) The aid should be granted by a Member State or should come from state resources. Under the concept of state public bodies, governmental bodies and any other public bodies have to be understood too. The tax advantage should be acknowledged as State aid, too.

The aid has to provide advantage to the concerned company: such unrequited advantage, which is not available for the company on the market under the same conditions. There are several forms of this advantage like cash support, tax advantage, exemption from tax, waiver of tax etc.[4]

In this case (C-156/98) the German State has renounced its rights on income tax income for such companies, which made investments in Berlin or in the new German lands. According to the German State, the Act does not mean automatic advantage for the companies, so it can not recognized as state aid, because the requisition of the advantage

[4] Case of the European Court of Justice: C-156/98. Germany v. Commission, ECR (2000) I-6857.

depends on the choice of the investor. But the opinion of the Court of Justice was quite opposite, because the waiver of the tax income made it possible for the investors that contrary to other companies they could invest their money under preferential tax conditions. Although the requisition of the advantage depended on the investor choice, the connection between the advantage and the provision of the act was concluded.

b.) Advantages are also recognised as aids in cases when the concerned company makes financial commitment in order to get State aid and when the company may receive State aid on the basis of rationalization of the production capacity.[5]

c.) The aid aims only a range of companies, products or services, i.e. the measures have to selective.

d.) The aim should have distortive impact on the competition. According to the case-law of the European Court of Justice the distorting effects on trade and competition should be in place[6] and the extent of these distorting aims can be determined by taking the following factors into consideration:

- the extent of the aim correlated to the financed activity should be absolute,
- the extent of the selectivity of the aim should be determinant, this means the way of getting the aim: is it available for some companies or for the majority of the companies that can get it,
- how does the aim contribute to the maintenance of cost of the concerned company, in a direct or indirect way?
- is it one-time or repetitive aid?

e.) The aid affects the trade between the Member States. If a Member State provides State aid to a company, it can increase the domestic production and this could affect the other Member States, which would have fewer chances to export their goods to the concerned Member State. The risk of distorted competition still holds when the distortive State aid is allocated within the Member State, because the concerned company has a direct advantage and the others on the market have not. The case-law of the European Court of Justice has a broader interpretation in case of the distortive effect of the State aid, because a company, which has aid received on third market has more advantages than the other companies, not having benefited and thus, without additional financial funding they cannot access the third market.[7]

In the case SFEI v. La Poste (C-39/94.)[8] the Court of Justice has interpreted the Article 87 of the EC Treaty and according to its standpoint the aim of this article is „to hinder such advantages, given by state bodies, which can affect the trade between the Member States. So the concept of aid embraces not only positive benefits, such as subsidies, but such interventions, which can reduce the expenditure costs in the budget of a company."[9]

In the formulation of the Court of Justice the main definition elements of the incompatible State aid can also be found, as follows:

[5] See as an example: C-323/82.SA Intermills v Comission ECR (1984) 3809. It is referred by: Várnay-Papp (2004), p. 553.
[6] To the definition of aid see C-39/94. SFEI v. La Postein: Tóth (2007) p. 540.
To the distortion of competition see C-256/97. Déménagements - Manutention Transport SA (DMT) (1999) ECR I-3913.p. in Tóth (2007) p. 541.
[7] Nyikos (2009), p. 154.
[8] C-39/94. referred in Tóth T (2007) p. 340.
[9] Tóth (2007), p. 340.

- the advantage granted by a state body
- which is selective, so it only concerns specific companies and products,
- the advantage affects the trade and
- it distorts competition.

However, according to the interpretation of the Court of Justice, the concept is completed with another element, namely the advantage can have several forms, so it could be such an intervention, which reduces the expenditure costs in the budget of the company. The separation of the concept of the aid has a huge importance during the approval process; according to this the Member State shall request prior authorisation for the aid and not just for the aids that can affect commerce and competition. This means that the scope of aids that must be notified is broader than the scope of aids affecting commerce and competition.[10]

3. SEPARATION BETWEEN TAX MEASURES AND STATE AIDS: STATE AIDS GRANTED IN THE FORM OF TAX MEASURES IN THE PRACTICE OF THE COMMISSION AND THE COURT OF JUSTICE – TAKING THE EXAMPLE OF A COOPERATIVE

According to Article 107 (1) of the TFEU the interpretation of the illegal state aid requires the examination of three cumulative criteria: first the aid has to come from the state, second the aid has to benefit the companies selectively, third the aid has to be distortive.

The aforementioned criteria system applies in case when the advantage is given in the form of tax advantages, so the distinctive tax measures, tax advantages for the foreigners fall into the category of State aid. The first Notice of the Commission regarding the application of the State aid rules to measures relating to direct business was released in 1998.[11] Because of the several disputes over the conceptual interpretation of the State aid the European Commission published on 19 May 2016 a new Notice about the concept of the State aid and a summary about the case-law and Commission’s position on this topic.[12] The point 4. of the fifth chapter of the Commission Notice[13] deals with specific issues concerning tax measures like cooperative societies, undertakings for collective investment, tax amnesties, tax rulings and settlements, anti-abuse rules and excise rules.

In relation with the cooperative societies the Commission’s position is that the operation of the cooperative societies distinguishes from the other economic operators and so the preferential tax treatment for cooperatives may fall outside the scope of the State aid rules. If the cooperative society under examination is found to be comparable to commercial companies, it should be included in the same reference framework as a commercial company and undergo the three-step analysis. Firstly the system of reference

[10] See Tóth (2007), p. 540. and p. 586.-600.

[11] On 10 December 1998 the Commission released its Notice: Commission notice on the application of the State aid rules to measures relating to direct business *HL 1998 C 38 0003*
Hungarian Special Edition Chapter 8. Volume 1., p. 277.

[12] Commission Notice on the notion of State aid as referred to in Article 107 (1) of the TFEU (2016/C 262/01) (Commission Notice)
OJ.C. 262,19.7.2016., p.1-50.

[13] Soft law, not binding measure

must be identified. Secondly, it should be determined whether a given measure constitutes a derogation from that system. If it does not constitute a derogation from the reference system, it is not selective, so it is not within the scope of Article 107 (1) of the TFEU.[14] The third step of the analysis is to determine whether the derogation is justified by the nature or the general scheme of the reference system.[15] The Court of Justice passed several judgements in connection with tax measures and illegal State aids. In Paint Graphos soc. coop. and Others C-78/08 and C-80/08. cases[16] the subject of the judgement was the issue of tax exemption in the Italian local and income taxes, the tax authority denied the right for tax exemption for the aforementioned cooperative society. In its reference for the preliminary ruling the referring court expected answers from the Court of Justice that the provisions of the domestic law on tax advantages for the cooperative societies are compatible with the EU law and if this constitutes State aid within the meaning of Article 87 (1) of EC.

The Court of Justice has examined the conditions of the State aid, if this aid is financed out of State resources and the Court has been very clear, that the concept of the aid is much more general than the concept of subsidy, because the aid does not cover only positive allocation, like subsidies, but it also covers such state intervention, which in various forms mitigate the charges which are normally included in the budget of undertaking[17] and are similar in character and have the same affect, but in the strict sense of the word it is not a subsidy. In regard to the foregoing the tax authority ensures tax exemption to some undertakings. This measure does not include transfer of state resources, but it places the beneficiaries in a better financial situation and according to the Article 87 (1) of EC (currently Article 107 (1) of TFEU) it constitutes State aid.[18] Likewise measures, affecting tax reduction or postponing outstanding payments of tax, could also constitute State aid.

The next question in the case was the examination of selectivity. The Court ruled that in order to constitute state measures as selective, it is important to examine at first the tax system in the concerned Member State. In order to rate and determine that the tax measure is selective or not, it is important to examine the tax system. For that it is necessary to prove that the measure varies from the common tax system and makes distinctions between undertakings, which are in similar legal and factual situation.[19] The next point to be considered is whether the tax measure is a State aid or not, or if it affects the trade and distorts the competition. In order to decide about that, it is not important that resulting distortion of competition and effects on trade between Member States would actually occur, it is sufficient, according to the concept of State aid, that the measure could have this ability. This happens in particular in cases, when the aid strengthens the position of undertakings in relation to other competitors within the EU, and in this case the

[14]Commission Notice (2016) 128.points. C/262/29. p.
[15]Commission Notice (2016) 159.points C/262/34. p.
[16] Judgement of the Court of Justice was delivered on 8 September 2011 in Paint Graphos soc.coop. and Others C-78/08 and C-80/08. cases, ECLI: EU: C:2011:550)
[17] See the 131 point of the judgement in case of Cassa di Risparmio di Firenze and Others,
C-222/04. [EBHT 2006., I-289. o.]
[18] 132 point of case C-222/04.
[19] See judgement (6. September 2006) in case C-88/03. Portugal v Commission , [EBHT 2006., I-7115. o.] 56. point

measure shall be deemed as such measures, which affect the trade. [20] Within the meaning of the judgement it is not essential whether the recipient undertaking participates in the EU's trade or not. Because if one Member State grants aid to an undertaking, the level of the domestic production could persist or increase and this could decrease the chances of accessing the market of this Member State for companies established in the territory of other Member States. On the other hand, the strengthening of such companies, which do not participate in the EU’s trade, could have such effects that with this kind of measures these companies will be able to access the market of other Member States. Therefore the Court of Justice noted that the aforementioned tax advantage within the meaning of Article 87 (1) EC could affect the trade between the Member States and distort the competition, so it constitutes prohibited State aid. The Court ruled in its judgement referred above, that tax exemptions, such as those at issue in the main proceedings, granted to producers’ and workers’ cooperative societies, constitute State aid within the meaning of Article 87 (1) EC only in so far as all the requirements for the application of that provision are met. But the domestic court has to make the decision whether the tax advantage is selective or not, whether they may be justified by the nature or general scheme of the national tax system of which they form part, by establishing in particular whether the cooperative societies at issue in the main proceedings are in fact in a comparable situation to that of other operators in the form of profit making legal entities and, if that is indeed the case, whether the more advantageous tax treatment enjoyed by those cooperative societies, first, forms an inherent part of the essential principles of the tax system applicable in the Member State concerned and, second, complies with the principles of consistency and proportionality. According to the case-law of the Court, it is also appropriate to specify whether tax advantages, like in this case, may be justified by the nature or general scheme of the national tax system, which they are part of. However, a measure introducing an exception of the general tax system may be justified if the Member State concerned can prove that this measure results directly from the founding principles or policy of this system. A distinction should be drawn between the objectives assigned to a particular scheme and which are external to it and the mechanisms inherent to the scheme itself which are necessary for the achievement of such objectives [21]Therefore such tax advantages, which are results of external objectives of the tax system, cannot be exempted from the consequences of Article 87 (1) EC .

According to the standpoint of the Commission[22] with regard to the justification by the nature and general scheme of the tax system it can be validly stated that it may also be justified by the nature of the tax system that cooperatives which distribute all their profits to their members are not taxed at the level of the cooperative when tax is levied at the level of their members. A measure taken by a Member State cannot be validly justified on the basis of nature or general scheme of the national tax system, in case when there is tax exemption on the income, which results from trade activity outside of the cooperative. The concerned Member State has to ensure adequate control and supervisory procedures and to apply them in order to ensure the coherence of the specific tax measures to the

[20] 44 point of judgement in case C-372/97. Italy v Commission, 54 point of judgement in case C-148/04. and 140 point of judgement in case of Unicredito Italiano
[21]See 81 point of Judgement (6. September 2006) in case C-88/03. Portugal v Commission
[22] 25 point of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (1998)

cooperatives with the nature and logic of the tax system and to prevent economic operators from considering choosing the cooperation as form of company just because of the tax advantages. It is for the referring court to determine that these conditions are met in the main proceedings.[23]

The Commission's Notice 2016 on the concept of the State aid is contained in the Commission's standpoint about the compatibility of the set-tax system with the regulation on the State aid.[24]

According to this the set-tax, which does not contain discretionary elements and is available to specific sectors and so it is compatible with the rules of the State aid, this kind of provision is not selective.

However, all the following conditions must be met:

- The reason of the set-tax system is to relieve certain undertakings because of their sizes or the area of their activity (like agricultural or fisheries sector) from unnecessary administrative burden,
- The set-tax system can not mean lower tax burden and can not grant advantages for the recipient undertakings of the system in comparison with those undertakings, which are not recipient of the system.

The Commission's notice 2016 announced the concept of anti-abuse measures in connection with State Aids. With respect to the anti-abuse measures, the Commission prescribes that the anti-abuse measures can be justified because of prevention of tax avoidance, so it does not conflict the EU's law on the State aid.[25] But such measures can be selective, where it is evident that the measures provide derogation, which derogation is against the essential logic of the anti-abuse measures, so if such selectivity is perceptible than the regulation can preclude the EU's aid policy. So the Commission's Notice 2016 helps in order to terminate the tax measures and State aid with collection of court cases of the EU and with the interpretation of concepts relating to tax measures and Sate aid.

4. RELATION BETWEEN STATE AID AND HARMFUL TAX COMPETITION

The first regulation on harmful tax competition was adopted by the OECD in 1998. (Anon., 1998) The report has no binding force, no sanction, but the Member States and external States apply its rules on the basis of voluntary compliance. The OECD report contains recommendations for the national legislation, such as how to avoid undue tax competition. According to the report tax system with harmful tax incentives fall mainly into three categories: (Kakuk, 2002/8)

a) When a given country does not apply taxes on incomes or applies, but on a very limited rate.

b) The given country has significant incomes from the taxation of the undertakings' income, but its tax system applies such measures in which the undertakings' income from the financial activity, which has no specific link with the geographical area, are taxed on a very low rate.

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[23] 64-75. points of Joined cases C-78/08.-80/08.: Paint Graphos soc.coop and Others

[24] Commission's Notice (2016) Chapter 5.4.6. points 181-182

[25] See 65 point of the Judgement in GIL Insurance case, C-308/01. (ECLI: EU: C:2004:252)

c) The given country has significant incomes from the taxation of the individuals' incomes, but its general tax rate is lower than in other countries. Implicitly the third category does not effect in all cases harmful tax competition, because the given country applies tax in connection with the taxpayers' income, so it does not target a specific activity. But the report considers the tax heaven, the establishment of off-shore companies and those tax systems, which belong to the abovementioned, second category as harmful.

Why can the tax competition be regarded as harmful? The tax competition, the tax advantages are harmful from the point of view of the competition, because they distract and distort the competition in the market with tax discrimination, therefore in particular with positive tax advantages for the foreign investors. The tax competition is harmful, if:

- it distracts the international investments,
- it discourages the tax payers from voluntary compliance,
- it redesigns the desirable balance between the public expenditures and taxes,
- other countries have to raise tax burden because of the foregone incomes,
- the measures raise the costs of tax administration for other countries.

According to the OECD report the tax competition can cause harm if it distorts the competition and the financial and investment process. Thereby undermining the justice of the tax structure, worsens the tax compliance, changes the balance between the public expenditures and taxes. (OECD, 1998) In tax competition both positive and negative elements appear. The European Union proclaims the free movement of capital, but the tax collectors do not like the freer movement of capital, because it can provide opportunities for minimising the amount of tax or for tax evasion or for tax avoidance. But the free movement of capital could not lead to discrimination between the foreign and resident tax payers.

One of the key areas of distortive State aids [26] is the harmful tax competition, which can distract and distort the competition like investment tax allowances. (The first key area is the positive tax discrimination of foreign investors, the second is tax heaven and the third one is the negative perception attached to State aids. Transferring the registered office creates new problems on the field of harmful tax competition and in the solving of this new kind of problems the court of Justice has been at the forefront.) In the sense of the Commission's Notice 1998 (Erdős, G, Dr. Őry, T, 2002/4) tax advantages constitute State aid and are prohibited, if they:

- grant favourable treatment to the participants- favourable treatment is granted by the state,
- distort the competition within the Community,
- are concrete or selective,
- affect positive discrimination and result the reduction of tax burden.

The selective advantage can be the result of the exemption of the tax authority, can arise from tax exemption or from the application of unreasonably low tax rates. According to the standpoint of the European Commission the investment tax allowances and the low

[26] See more about harmful tax competition in: Erdős (2012) p. 121.-207.

tax rates for off-shore undertakings raise concerns. [27] The allowance of the off-shore regulation in a Member State is mainly dangerous because it distracts the international capital flows and have negative impact on them. The off-shore undertakings do not maintain their activity in the country of incorporation, but in the State in which the activity is pursued, they do not contribute to the costs of public services. However the Commission ruled that, the tax advantages for small-enterprises cannot be considered as prohibited State aid.

The aforementioned OECD report, the Code of Conduct for Business Taxation and the Commission's notice have several followers, not only the Member States, then candidate countries but external countries too. The signatory countries adopted these rules and follow them. The Member States undertake that they will not introduce such rules, which can affect harmful tax competition (stand-still rules) and the existing rules will be dissolved (roll-back).

5. CONCLUSIONS

In connection with the harmful tax competition it can be concluded that distortive or selective State aids and tax benefits which are given for the foreign investors, are prohibited within the EU and they are compatible with the EU's policy under certain conditions only. So in the the fight against harmful tax competition the conceptual restriction of State aid, the criteria and saving clauses have a huge role. An important instrument in the fight against harmful tax competition is the prohibition of incompatible State aids, the control and supervisory activity of the Commission and the work of the European Court in interpreting the law.

The Member States are free to decide what they deem the most appropriate in accordance with economic policy and to split tax between production factors, but the Member States shall exercise their power in accordance with the EU's law. In particular, the Member States must not introduce and hold up such rules, which are incompatible with EU's law, rules contain provisions contrary to fundamental freedom. Such provisions are the State aids, which

reflect the distinction between foreign and domestic taxpayers, rules on offshore-activity or State aids, which distort or affect trade in a manner contrary to the common interest.

"The principle of incompatibility with the common market and the derogations from that principle apply to aid 'in any form whatsoever', including certain tax measures."[28]

The Commission views the less positively form of potential State aids the tax measure, because such measures are considered as an operating aid, which is prohibited according to the provisions on the State aid.[29]"

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[27] Article 4. paragraph (28) of The Hungarian Act LXXXI of 1996 on Corporate Tax defined the concept of off-shore firm. According to the Article 19. paragraph (2) such companies were obligated to pay 3% corporate tax instead of 18 %, but from 1 January 2003 the right for reduced rate was demolished.

[28] Commission notice on the application of the State aid rules to measures relating to direct business taxation (98/C 384/03),HL 1998 C 38 0003 – 0009 referred in: Bartha, I.; 2008, *Az adóintézkedések formájában megvalósuló állami támogatások megítélése a közösségi jogban*, Collectio Iuridica Universitatis Debreceniensis, p. 57.-60.

[29] Remetei Filep, Zs.; *Adózás és állami támogatás*, In:Tóth T. (2005) p. 98. - 99 and in Bartha (2008), p. 59.

According to the Member States' sovereignty and principle of subsidiarity, the Member States are free to decide on tax-issues, so the tax-measures fall within Member States' competence. But the regulation of State aid is specified by the competition policy, which falls within the Commission's competence. In circumstances where the tax measures meet the definition of the distortive State aid, the investigation of the Commission is legitimate.

The conclusion is that the Commission is entitled to review due to the primacy of Union law such tax measures or tax measures constituting State aids, which fall within the Member States' competence. But the distorted sharing of the powers could lead to exceedance of power or to the restriction of the Member State's competence. The principle of subsidiarity in tax policy operates unless the tax measure represents an illegal State aid, because in this case the sovereignty of the Member State is restricted and the Commission can interfere. So the competences can conflict with each other, because it is questionable whether the Commission is entitled to review the tax competition or not. Deciding whether the concerned State aid or tax measure is distortive or not, is not an easy issue. That is why it is very important that the separation should be clear and this is facilitated by the Notices of the Commission. The aforementioned contradiction shall be dissolved by the conceptual interpretation of the Commission and the judgements of the Court of Justice.

REFERENCES

Fazekas, J.; 2012. *A szubszidiaritás elv jelentése* In: Osztovits A. (edt.): 2012. EU – jog, HVG Orac Lap és Könyvkiadó Kft. Budapest, p. 207.-208.

Tóth, T.; 2007. *Az Európai Unió versenyjoga*, Complex Kiadó Budapest, p. 529- 610

Várnay, E. and Papp, M.; 2004 *Az Európai Unió joga,* KJK-KERSZÖV Jogi és Üzleti Kiadó, Budapest, p. 550.- 575.,

Osztovits, A.; *EU-JOG,In: Osztovits A. (edt.): 2012.*) HVG Orac Lap –és Könyvkiadó Kft., Budapest, p. 538. -546.,

Nyikos, Gy.; 2009., *A PPP finanszírozási technika és az EU fejlesztési támogatásai a közcélú beruházások megvalósításában.* PhD. értekezés, Corvinus Egyetem, Budapest, p. 151-153.

Kende, T. and Fazekas, O., 2007, *A közszolgáltatási kötelezettségek állami támogatása*, Európa Jog 2007/1. p. 5.

Erdős, É., 2012. *A beruházásösztönzés adójoga* Miskolci Egyetem, p. 137.- 164.

Kakuk, J.; *Legújabb eredmények a nemzetközi adózás területén*. Pénzügyi Szemle, 2002. /8. p. 736.

Harmful tax competition: An Emerging Global Issue, OECD, Paris, 1998,

Erdős, G. and Dr. Őry, T.; *Néhány jogharmonizációs és alkotmányossági kérdés a jelenlegi adókedvezményekkel kapcsolatban, Európai Jog 2002/4.* , p. 27.

Commission notice on the application of the State aid rules to measures relating to direct business, *HL 1998 C 38 0003 – 0009*