

# Is there any *modus interpretandi* employed by the ECJ on tax matters? The critical case concerning competition within the internal market

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# Agenda

1. The internal market
2. Competition within the EU
3. State Aid and taxation
4. The ECJ and competition: State Aid
5. Antitrust law
6. The ECJ and competition: Antitrust law
7. Is there any *modus interpretandi* employed by the ECJ on tax matters?

# 1. The internal market

The EU

1. shall establish an internal market, intended as a highly competitive social market economy (Article 3(3) TEU)
2. and it shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital (article 26(2) TFEU)

## 2. Competition within the EU

Competition is regulated by

1. Antitrust rules (Articles 101 et seq. TFEU)
2. State Aid rules (Articles 107 et seq. TFEU)

Accordingly,

1. EU enterprises compete on equal terms and conditions
2. MS should not provide unlawful tax aids that can distort the internal market

### 3. State Aid and taxation

According to Article 107 TFUE, **MS** should not grant any

1. tax **aid** that
2. by favouring **certain undertakings** or the **production** of certain goods
3. **distorts** or **threatens** to distort competition
4. in so far as it **affects trade** between MS

## 4. The ECJ and competition: State Aid

The ECJ interprets Article 107 TFEU as follows:

- when aid strengthens the position of an undertaking compared with others in intra-community trade, the aid is **likely to affect trade between MS** (*Philip Morris*, par. 11 et seq.)
- as far as an Aid distorts competition, then trade is affected (*Azienda Napoletana Mobilità SpA*, par. 25)
- an Aid necessarily affects trade between the Member States (*Italy v. Commission*, par 19)

## 5. Antitrust law

According to Article 101 TFUE:

1. agreements between undertakings
  2. which have as their object or effect the prevention, restriction or distortion of competition within the internal market
  3. and which **may affect trade** between Member States
- shall be prohibited

## 6. The ECJ and competition: Antitrust Law

The ECJ stated that:

- not necessary to demonstrate the actual effects, but that there is **sufficient degree of probability** that the agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (*Schenker*, par. 151)
- it is not necessary to demonstrate that the conduct actually affected trade between MS in a discernible way; it is sufficient to establish that the conduct is **capable of having that effect** (*Irish Sugar*, par. 170)

## 7. Is there any *modus interpretandi* employed by the ECJ on tax matters?

With reference to competition within the internal market, the ECJ:

- does not interpret Article 107 TFUE following the wording, unlike for Article 101 TFUE
- thus, State Aid law has given a broader scope of application, to the detriment (also) of tax incentives
- raising uncertainty as to the criteria of interpretation of primary law

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Thank you!

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