A REVIEW OF THE PRE AND POST COVID–19 STATE AID RULES IN THE AREA OF R&D&I

Elizabeth Gil García (*)
Profesor Ayudante Doctor
Departamento de Disciplinas Económicas y Financieras
Universidad de Alicante

Recibido: Mayo, 2020
Aceptado: Junio, 2020.

https://dx.doi.org/10.47092/CT.20.2.3

ABSTRACT

This contribution aims to bring clarity about the existing R&D&I State aid rules, being focused on R&D&I tax incentives as a form of State aid. Even if they may fall into the scope of art. 107(1) of the Treaty on the Functioning of the European Union (TFEU), a justification for their compatibility with the internal market can be found on art. 107(3) TFEU. Thus, the author explores both the GBER and the R&D&I Framework to determine the criteria for the compatibility of R&D&I tax incentives. Finally, as the Commission has approved temporary State aid rules for R&D related to COVID–19, a special reference to the temporary measures and its relationship with the existing State aid rules in the area of R&D&I will be made.

Keywords: State aids, tax incentives, R&D&I, COVID–19.

(*) The author would like to thank Prof. María Teresa Soler, Prof. Amparo Navarro and Prof. Begoña Pérez for their support in the writing process. The author would like also to extend her gratitude to the anonymous reviewers. The author can be contacted at: elizabeth@ua.es

UNA REVISIÓN DE LAS NORMAS PRE Y POST COVID–19 EN MATERIA DE AYUDAS DE ESTADO A LA I+D+i

Elizabeth Gil García

RESUMEN

Este trabajo trata de aportar claridad sobre las actuales normas de ayudas de Estado a la I+D+i, centrándose en los incentivos fiscales como una forma de ayuda pública. Si bien éstos entran en el ámbito del art.107.1 TFUE, pueden resultar compatibles con el mercado interior en base al art. 107.3 TFUE. En consecuencia, se aborda el estudio del GBER y del Marco I+D+i para determinar los criterios de compatibilidad de los incentivos fiscales a la I+D+i. Finalmente, dado que la Comisión Europea ha aprobado medidas temporales para la I+D+i relacionada con la COVID–19, se hace una especial referencia a las mismas y a su relación con las existentes normas de ayudas de Estado a la I+D+i.

Palabras clave: Ayudas de Estado, incentivos fiscales, I+D+i, COVID–19.

SUMMARY

1. Introduction. 2. State aid rules and taxation. 2.1. Tax incentives as a form of State aid. 2.2. The selectivity criterion. 3. The compatibility of R&D&I aids with the internal market. 3.1. The compatibility criteria for R&D&I tax schemes. 3.2. A reference to R&D State aids related to COVID–19. 4. Conclusions. References.

1. INTRODUCTION

The Organization for Economic Co–operation and Development (OECD) considers research, development and innovation (R&D&I) key to productivity and growth performance (1). It is indeed commonly held that R&D&I may play an important role in the economic development, contributing to the social welfare and technological progress. In the European Union, art.179 (1) of the Treaty on the Functioning of the European Union (TFEU) hails R&D&I promotion as a common objective in the EU, and the Europe 2020 strategy puts R&D&I at its heart with the objective of achieving an overall R&D&I spending of 3% of the Gross Domestic Product (GDP) (2).

There is a tendency among jurisdictions to directly fund the research carried out by the public sector, e.g. granting subsidies to public research centres and universities. However, a higher business investment in research and innovation may help to build a sustainable, productive and wealthy economic system.

It is generally understood that market incentives alone are not enough to produce an adequate supply of R&D&I and if there is not an opportunity for profit, R&D&I will not be undertaken by firms. As a result, it is essential state intervention in order to stimulate private R&D&I spending and influence the generation of research and knowledge for a sustainable economic growth. Precisely, this serves also as a justification because "there is a broad agreement that without such intervention undertakings will tend to underinvest" in R&D&I (3).

Among the different options governments have to encourage firms to invest in R&D&I, e.g. subsidies, tax reliefs, repayable advances or soft loans, this paper will mainly focus on tax incentives. Tax incentives may influence firms to carry out R&D&I activities and then contribute to reach general interests, such as the encouragement of scientific research, which is regarded as a social or public value. In Brokelind and Hansson view, for instance, the advantages of tax incentives are that the market rather than the government decides which projects are worthwhile. Companies are then free to choose the financing that suits them best and what projects to undertake (4).

(1) OECD (2013).
(2) Commission (2010).
(3) Danon (2015: 19). Also in Brokelind and Hansson (2014: 175).
(4) Brokelind and Hansson (2014: 177).

While this is true, it should be reminded that R&D&I tax incentives are *per se* selective because they imply a deviation from the general tax treatment and put undertakings in a better position. Therefore, Member States should consider the criteria listed in art.107(1) TFEU (specially, the selectivity of the measure granted) when implementing a tax incentive to R&D&I.

State aid rules in the area of R&D&I are currently based on the General Block Exemption Regulation (GBER) (5) and on the Framework for State aid for Research, Development and Innovation (R&D&I Framework) (6). Both instruments entered into force on 1 July 2014. While the GBER applies until 31 December 2020, the Commission may review or amend the R&D&I Framework at any time should it be necessary. For instance, the European Commission reviewed in 2012 the State aid rules for R&D&I –being the result of such review the current GBER and R&D&I Framework– with the aim to discourage aids that do not bring real added–value and distort competition (7). In fact, State aid rules are aimed to avoid public aids that distort competition (i.e. "bad aids"), but they are in favour of public means to encourage research (i.e. "good aids") (8). A well–designed State aid policy can contribute to the Europe 2020 objectives by facilitating access to public support for investment, risk capital and funding for R&D&I (9).

Moreover, in the present situation, the COVID–19 outbreak has evinced the need of public aids to R&D&I. For this reason, the Commission adopted, in March 2020, a Temporary Framework to support Member States' economies (10), being amended in April 2020 to identify additional temporary State aid measures, such as aids for COVID–19 relevant R&D (11).

Therefore, the aim of this contribution is to bring clarity about the application and the interaction between the GBER and the R&D&I Framework as well as to determine the criteria for the compatibility with the internal market of the R&D&I tax incentives (as a form of State aid).

The article is organised in 4 sections. After setting the concept of State aid enshrined in art. 107(1) TFEU, section 2 refers, first, to the relationship between State aid and taxation (subs. 2.1.). Secondly, and on the assumption that tax incentives are selective measures, an analysis of the selectivity criterion based on some cases will be carried out (subs. 2.2.). In connection with such idea, tax incentives to R&D&I may fall into the scope of art. 107(1) TFEU. However, a justification for the compatibility for R&D&I aids can be found on letters (b) and (c) of art. 107(3) TFEU. Thus, section 3 refers to such compatibility by the study of both the GBER and the R&D&I Framework (subs. 3.1.). On the other hand, the Commission has approved temporary State aid rules for R&D re-

---

(5) Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

(6) Commission (2014a).

(7) Commission (2012: 2).

(8) *Idem*: 4.

(9) Commission (2010: 21).

(10) Commission (2020a).

(11) Commission (2020b).

lated to COVID–19. A special reference to the temporary measures and its relationship with the existing State aid rules in the area of R&D&I will be made in subs. 3.2. Finally, section 4 summaries the main ideas of this article and provides some conclusions.

2. STATE AID RULES AND TAXATION

Article 107(1) TFEU pronounces a general prohibition of State aid, but measures can be declared compatible with the internal market if paras (2) or (3) of art.107 TFEU apply (*see* s. 3). In particular, art. 107(1) TFEU establishes the criteria that should be met to consider an aid as an unlawful State aid, i.e. a non–compatible State aid with the internal market. Accordingly,

> "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".

This article sets up a broad concept for State aids, but no clear definition is included (12). It could even be said that, rather than setting a definition, this provision establishes the criteria whose fulfilment implies the existence of a State aid, being the selectivity the most relevant one. Otherwise, the measure granted will not be subject to the State aid rules.

Irrespective of whether a regime qualifies as State aid, Zammit considers that art. 107 TFEU exclusively applies to "undertakings". This means that the aid granted to any person that is not an active undertaking is not State aid (13). For instance, research organisations and research infrastructures are recipients of State aids when all the conditions of art. 107(1) TFEU are met. However, where the same entity carries out activities of both economic and non–economic nature, the public funding of the non–economic activities will not fall under art. 107(1) TFEU if the two kinds of activities and their costs, funding and revenues can be clearly separated so that cross–subsidisation of the economic activity is effectively avoided (14). The Commission considers that primary activities of universities and research organisations fall outside the scope of the State aid rules, i.e. the conduct of independent R&D for more knowledge and better understanding, including collaborative R&D (15).

The Commission is in charge of ensuring effective competition and free trade among Member States. Both of them could be affected by the indiscriminate use of selective measures –such as R&D&I tax incentives– addressed to protect certain domestic businesses beyond EU common interests and fundamental freedoms (16).

---

(12) Pérez Bernabeu (2008: 35).
(13) Zammit (2015: 546). This is also stated by the Commission (2016, para 6).
(14) Commission (2014a, paras 17 and 18).
(15) Commission (2014a, para. 31).
(16) Ortega Guío (2012: 103).

2.1. Tax incentives as a form of State aid

Member States, in the exercise of their tax jurisdiction (as an expression of the state tax sovereignty), may not only impose taxes, but grant a preferential tax treatment with the aim (i) to foster certain activities, (ii) to develop some geographical areas, or (iii) to promote certain type of companies.

Having said that, Member States are not fully free to grant tax incentives for attracting R&D&I investments as State aid rules and the provisions of the Code of Conduct (17) impose relevant limitations (18). In other words, the use of the regulatory function of taxation, as a tool for achieving objectives of economic and social policy, is conditional on the requirements and goals of the EU policy. Thus, it is not possible to introduce discriminatory measures between residents and non–residents, measures against fundamental freedoms or distorting the competition in the internal market.

State aid rules are aimed to ensure that government interventions do not distort competition and trade inside the EU, that is to say, they seek to provide a balance between activities that are anti–competitive with the need to support activities, which contribute towards a well–functioning and equitable economy (19).

As above–mentioned (s. 2), art. 107(1) TFEU refers to the economic advantage on a selective basis conferred to certain undertakings. Even if State aid rules are rules on competition and are not explicitly referring to taxation, the economic advantage granted in the form of a tax incentive cannot be ignored. Moreover, it should not be forgotten that tax incentives are per se selective (*see* subs. 2.2.), so they may fall into the scope of art. 107(1) TFEU.

In recent times, there has been a significant increase in the use of State aid rules in regard of direct tax issues (20). For instance, the Commission opened formal investigations of whether rulings granting a tax advantage to certain undertakings might fall into the scope of art.107 TFEU (e.g. *FIAT case* (21), *Starbucks case* (22), *McDonald's case* (23), among others). Even if this could seem a broad interpretation of the meaning of State aid, it should be considered, on the one hand, that art. 107(1) TFEU refers to "any aid granted by a Member State or through State resources in any form"; and, on

(17) The qualification of a tax measure as harmful under the Code of Conduct does not affect its possible qualification as a State aid. However, the assessment of the compatibility of fiscal aid with the common market will have to be made, taking into account, *inter alia,* the effects of aid that are brought to light in the application of the Code of Conduct [Commission (1998, para. 30)].

(18) Zalasinski (2014: 63–64).

(19) Pérez Bernabeu (2014: 182).

(20) In the opinion of certain authors, State aids seem to be used as a sort of harmonization of direct tax issues. In this regard, *see* Martín Jiménez (2018) and Soler Roch (2018).

(21) Commission Decision (EU) 2016/2326 of 21 October 2015 on State aid SA. 38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat.

(22) Commission Decision (EU) 2017/502 of 21 October 2015 on State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks.

(23) Commission Decision (EU) 2019/1252 of 19 September 2018 on tax rulings SA.38945 (2015/C) (ex 2015/NN) (ex 2014/CP) granted by Luxembourg in favour of McDonald's Europe.

the other hand, that "the concept of State aid has a very wide scope" according to settled case–law (24). Thus, the aid conferring an economic advantage may take different forms, i.e. from traditional direct grants to tax incentives or even tax rulings (25).

The state support may be provided just as much through tax provisions of a legislative (e.g. a tax relief), regulatory or administrative nature as through the practices of the tax authorities (e.g. a tax ruling) (26). According to the Court of Justice of the European Union (CJEU), the State aid concept embraces not only positive benefits (e.g. subsidies), but also measures (in various forms) that mitigate the charges which are normally included in the budget of an undertaking and which are similar in character and have the same effect than subsidies (27). In particular, the Court stated in 1994 that,

> "a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers" (28).

In the same vein, according to the Judgment of the Court of 19 May 1999 (*Italy v Commission*) (29) any form of an economic and financial advantage may (in principle) fall into the scope of State aid rules. In such a way, financial transfers that constitute State aid in the sense of art. 107 TFEU may take different forms such as capital injections, loan guarantees or tax reliefs, among others. Moreover, as explained in sub. 2.2., a public aid (whatever its form) will fall into the prohibition of art.107 TFEU when certain criteria are met.

2.2. The selectivity criterion

As already said, art.107(1) TFUE lists the criteria that turn a public aid into an unlawful State aid. First, the aid must be granted by the State or through state resources, being a tax incentive a form of State aid (subs. 2.1.). Moreover, the measure should confer an economic advantage that the undertaking would not have received in the normal course of business economic; and, such aid must distort or have the potential to distort competition. The last and most relevant criterion is the selectivity of the measure granted, on which subs. 2.2. focuses since tax incentives are granted on a selective basis.

A measure is selective when it only favours certain undertakings. Thus, the identification of State aids requires fixing a normal level of tax burden with respect to which it can be said that special tax treatment of certain transactions or enterprises must be la-

(24) *UFEX and Others v Commission* (T–613/97) EU:T:2006:150, at [158].

(25) Tax rulings are no *per se* an issue under State aid rules if they only confirm the application of the law, but if they grant a tax advantage to specific undertakings (e.g. a tax relief) they may severely distort competition within the internal market and contravene State aid rules.

(26) Commission (1998, para. 10).

(27) *Adria–Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C–143/99) EU:C:2001:598; *Paint Graphos and Others* (C–78/08) EU:C:2011:550; among others.

(28) *Banco Exterior de España v Ayuntamiento de Valencia* (C–387/92) EU:C:1994:100, at [14].

(29) *Italy v Commission* (C–6/97) EU:C:1999:251.

belled advantageous. In other words, the Commission should prove that a State granted an advantage to a company, while denying such advantage to other, similarly situated, companies (30). That is to say, it is addressed to particular businesses, locations or types of firms.

The selectivity criterion, whose presence (especially in complex cases) can be determined by a three–stage analysis, allows the distinction between selective measures, which may qualify as State aid, and general measures, which do not fall into the scope of art.107 TFEU (31). Even if general and selective measures may produce distortions in the internal market, only selective measures fall into the scope of State aid rules (32). Even if all criteria should be met, the criterion of selectivity is decisive to qualify a measure as State aid. Thus, the measure qualifies as State aid in regard of the conferment of a preferential tax treatment to certain undertakings, which implies a deviation from the general scheme (33).

The selectivity requirement implies, as mentioned, a three–stage analysis (34). The common system applicable should first be determined. For this purpose, it should be taken into account the tax system of the relevant Member State as European institutions cannot elaborate a general description of a normal tax system (35). Otherwise, there would be an interference with the state sovereignty in the field of taxation (36). Thus, the national tax system is the reference framework to analyse State aids. In particular, the reference system could be based on the tax elements such as the tax base, the taxable persons, the tax event and the tax rates (37). In the case of tax incentives related to R&D&I granted to firms, the corporate income tax system could be identified as the reference system.

Secondly, it should be examined whether there is an exception to the system, i.e. a deviation from the system. In this case, the measure will be regarded as *prima facie* selective because of the advantages exclusively granted to certain undertakings or certain economic sectors. This is precisely the case of tax incentives as most of them are selective in nature as they offer a preferential treatment to certain types of investment, e.g. research activities (38).

Notwithstanding this, there might be cases where the measure can be characterised as a general measure. Tax measures can be regarded as general measures if they are

(30) Mason (2019: 495).

(31) Easson (2001: 366); Luja (2015: 381); Sánchez Rydelski (2010: 149–155).

(32) Pérez Bernabeu (2008: 57–58).

(33) Moreno González (2010: 545); Schön (1999: 927).

(34) Obviously, this assessment of the selectivity criterion is not required when its identification is easy, e.g. when a Member State grants an ad hoc positive advantage to a reduced number of undertakings (Binder, 2020). Also in Sánchez Rydelski (2010: 149–155).

(35) According to Luja (2015: 381), State aid rules cannot serve as a tool to impose Member States “good practices” (which have not been implemented).

(36) Schön (1999: 922–924).

(37) Commission (2016, para. 134).

(38) Bal (2014: 63).

open to all economic agents operating within a Member State (39). This means measures that apply to all economic sectors and have a broad scope. In this regard, in 2008, the Commission assessed whether the tax reduction granted in Spain to the income arising from certain intangible assets (i.e. an intellectual property (IP) regime) constituted a State aid within the meaning of art. 107(1) TFEU (*ex* art. 87(1) TEC). The preferential treatment granted by the regime implies indeed the derogation from the ordinary corporate taxation rules. However, the scheme is open to any undertaking subject to corporate income taxation in Spain (i.e. corporate taxable persons), independently from its size, legal structure and sector in which it operates. As a result, the Commission concluded that the regime was a non–selective measure (40).

Thus, if R&D&I tax incentives and IP (or patent box) regimes are open to all kind of undertakings, they may be regarded as general measures and, consequently, they would not fall into the scope of the State aid prohibition. On the contrary, measures addressed to favour specific industrial sectors, geographic areas or certain groups of companies (e.g. based on their size) will be, *a priori*, regarded as selective measures (41).

The fact that, as Perez Bernabeu says, some firms or sectors benefit more than others from certain tax benefits depends on the intensity with which they avail themselves of such factors. This does not (at all) mean that such incentives constitute a State aid if they are effectively open to all undertakings on an equal access basis (42). That is, tax advantages available to all potential undertakings (without distinction on an equal access basis) do not meet the selectivity requirement, even if some undertakings benefit more than others do (43). Nevertheless, this approach arises a further issue: the possibility that a measure that is in principle open to any person is selective in its effects or consequences.

The CJEU tackles this issue in the *Gibraltar case* (44). The government of Gibraltar operated a tax reform, which consisted in the introduction of three taxes levied to companies located in Gibraltar, being excluded non–resident entities. The CJEU admitted that the new regime was not selective in nature, but, in practice, the regime excluded a high number of firms, when resident and non–resident enterprises where in a comparable scenario (45).Thus, a specific group of firms received selective advantages.

(39) Commission (1998, para. 13).

(40) Commission, "State aid N 480/2007 – Spain – The reduction of tax from intangible assets", C(2008) 467 final.

(41) These possibilities taken into account when designing a tax incentive are in line with the three forms of selectivity described by the Commission: (i) sectorial selectivity; (ii) horizontal selectivity; and, (iii) regional selectivity.

(42) Pérez Bernabeu (2014: 187).

(43) Brokelind and Hansson (2014: 182).

(44) *Commission and Spain v Government of Gibraltar and United Kingdom* (Joined Cases C–106/09 P and C–107/09 P) EU:C:2011:732.

(45) According to Zammit (2015: 546), the Court arrived at a contradictory conclusion in this case. For a scheme to be selective, the scheme does not need to be expressly drafted as derogation from another provision. It follows from this that business activities, such as the licensing of IP, should be taxed at the same rate as other business activities. Following this reasoning, all patent box regimes would be considered to be selective.

On the other side, in the *Santander case*, the CJEU rejected the selectivity because there was no preferential tax treatment to certain companies,

> "the measure at issue applies to all shareholdings of at least 5% in foreign companies which are held for an uninterrupted period of at least one year. It is therefore aimed not at any particular category of undertakings or production, but at a category of economic transactions" (46).

It is true that, in certain cases "undertakings can effectively be excluded from the scope of a measure which is none the less presented as a general measure" (47). Following this decision of the CJEU, it could be said that although tax incentives for R&D&I are not granting an advantageous (tax) treatment to certain companies when they are open to all entities, they are de facto excluding certain firms from the scope of the incentive (i.e. companies not involved in R&D&I but performing similar business activities). That is to say, tax incentives related to R&D&I benefit only those undertakings meeting certain conditions. However, this cannot in itself make the tax relief into a selective measure as the Court stated in 2012 (48). This "factual" exclusion might be regarded as an exclusion from a general measure if this is available for all potential undertakings. In other words, not all measures that favour economic operators fall into the scope of art. 107(1) TFEU, but only those that grant "an advantage in a selective way to certain undertakings or categories of undertakings or to certain economic sectors" (49).

Finally, the analysis refers to the justification (if there is any) to such exception. That is, even if a measure is regarded as prima facie selective because it produces an advantage restricted to certain undertakings, it will not fall inside the prohibition of art. 107(1) TFEU if such advantage is justified. According to the Opinion of the Advocate General Mengozzi in the *British Aggregates v Commission case*,

> "even measures which are selective, in that they differentiate between undertakings, may escape being classified as aid, if that differentiation is justified by the nature or structure of the tax regime of which they form part" (50).

This means whether such exception derives directly from the basic or guiding principles of the tax system in the Member State concerned (51). The term "basic principles of the tax system" does not mean tax principles, i.e. ability to pay, equality, etc. In consequence, it should be considered that the relevant measure is justified when the tax system allows the use of the regulatory function in order to reach objectives of social and economic policy grounded on constitutional values or other public interests (extra fiscal goals), e.g. research and innovation. Therefore, even if tax incentives are selective *per se*, a favourable position to R&D&I aids can be taken if they are within an area of justi-

(46) *Banco Santander and Santusa v Commission* (T–399/11) EU:T:2014:938, at [57].

(47) *Idem*, at [58].

(48) *3M Italia* (C–417/10) EU:C:2012:184, at [42].

(49) Commission (2016, para. 117).

(50) *British Aggregates v Commission* (C–487/06 P), Opinion of Advocate General Mengozzi, 17 July 2008 (EU:C:2008:419). This "principle" was for the first time mentioned in the *Italy v Commission* (C–173/73) EU:C:1974:71, at [15].

(51) *See* Commission (1998).

fication. As explained in s. 3, the justification for R&D&I tax incentives (as an exception from the system) can be also grounded on art. 107(3) TFEU.

3. THE COMPATIBILITY OF R&D&I AIDS WITH THE INTERNAL MARKET

Tax incentives are selective in nature because they grant a preferential tax treatment to those undertakings meeting certain conditions. Nonetheless, they will not fall under the prohibition of State aids if they are accessible to all potential undertakings (i.e. they may be compatible with the internal market if they are not granted on a selective basis). Moreover, as mentioned (subs. 2.2.), tax incentives as an exception from the general tax treatment can be justified on the social and economic objectives that they may pursue.

In this vein, it should be taken into account that R&D&I aids may be compatible with the internal market grounded on letters (b) and (c) of art. 107(3) TFEU (52). On the one hand, aids to promote an important project of common European interest (art.107(3)(b) TFEU). The promotion of R&D&I is indeed an objective of the EU according to art.179(1) TFEU. On the other hand, aids to facilitate the development of certain economic activities or certain economic areas (art.107(3)(c) TFEU).

These categories of aid that may be considered to be compatible with the internal market require the Commission's preliminary analysis. Article 108 TFEU provides a procedure to determine such compatibility. With the aim to avoid the application of illegal measures by Member States, there is an ex ante control based on a reporting system. Accordingly, Member States notify the Commission about measures that may fall into the scope of State aids before their entry into force, including measures (which may be regarded as compatible) of art.107(3) TFEU and measures which are, according to art. 107(2) TFEU, *ipso iure* compatible with the internal market (53).

Even if the general rule is that any State aid is subject to the duty of notification, in case of *ipso iure* measures of art. 107(2) TFEU, the Commission should automatically authorise its conferment. Moreover, the notification requirement is excluded in regard of de minimis aid (54) as well as in those cases where it is easy to determine the compatibility with internal market, based on the General Block Exemption Regulation (GBER).

In this vein, it could be declared that certain categories of aid should be compatible with the internal market and should not be subject to the notification requirement (art.

(52) State aids covered by art. 107(3) TFEU may be classified into three groups based on rules of secondary legislation. First, horizontal rules, which apply to all business sectors and the Commission's position is defined in regard of categories of specific aids such as R&D&I aids. Secondly, sectorial rules, which apply to specific sectors such as agricultural and forestry sectors as well as to general sectors such as the shipbuilding or the steel industry. Finally, the Commission has released communications with the so–called specific aid instruments, e.g. aids in the form of state loans and guarantees.

(53) Ortega Guío (2012: 105).

(54) The de *minimis* rule fixes a threshold (EUR 200 000 by company during three fiscal years) under which the disruption of the market is not enough to qualify it as State aid.

108 TFEU). In this regard, it was approved, in 2008, the Regulation 800/2008 (GBER), applicable from 29 August 2008 to 31 December 2013, and extended (later) until 30 June 2014 (55). This Regulation consolidated into a single text rules contained in five different regulations. The Regulation 800/2008 was repealed by the Regulation 651/2014 (56), which applies since 1 July 2014 until 31 December 2020.

The inclusion of R&D&I aids in the GBER pursues the promotion of European industry competitiveness through encouraging R&D&I [art. 1(1)(d) GBER]. In this regard, it should be also taken into consideration the R&D&I Framework, which sets up several principles that are considered for the compatibility assessment of the aid with the internal market made on the basis of art. 107(3)(c) TFEU (57).

For the aid to be compatible with the internal market, based on art. 107(3) TFEU, and to be also excluded from the notification requirement of art. 108(3) TFEU, it should be met general and specific (in regard of the relevant aid category) conditions.

From the undertakings' perspective, it is not always clear the application and interaction between the GBER and the R&D&I Framework. This is revealed in a study prepared for the DG Competition where the survey respondents were not clear about if their R&D&I aid applications had been made under the GBER or under the R&D&I Framework (58).

It is assumed that R&D&I aid measures that respect the conditions laid down in the GBER are in line with the common principles set up in the R&D&I Framework. For other measures, the fulfilment of the common principles has to be demonstrated when the assessment compatibility under the R&D&I Framework is carried out (59). This means that Member States can grant aids to firms to carry out R&D&I under the rules set up in the R&D&I Framework.

On the other side, the measures covered by the GBER are excluded from the notification requirement –i.e. Member States should not notify the aid scheme to the Commission for its prior approval–. It should be noted that the GBER does not apply to R&D&I State aids "if the average annual State aid budget exceeds EUR 150 million, from six months after their entry into force". That is to say, R&D&I aid schemes over such threshold are exempted from the notification obligation only for a 6–month period after their entry into force. However, the exemption can be extended for a longer period if the Commission authorises it after the assessment of the evaluation plan notified by the Member State (60). For instance, in 2015, the United Kingdom notified the Commission about the evaluation plan related to the R&D tax credit granted to SMEs as its

(55) Commission Regulation (EU) No. 1224/2013 of 29 November 2013 amending Regulation (EC) No. 800/2008 as regards its period of application.

(56) Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

(57) Commission (2014a).

(58) Commission and ECORYS (2019: 70).

(59) Tenreiro and Inakiew (2016: 559).

(60) The evaluation plan should include the objectives of the aid scheme, the result indicators, the data collection requirements, among others [art. 2(16) GBER].

annual budget exceeded EUR 150 million. The Commission –following its assessment– decided the application of the GBER to the R&D scheme until 31 March 2020 (61).

Therefore, it could be said that State aid rules in the area of R&D&I (i.e. the GBER and the R&D&I Framework) are aimed to facilitate Member States grant aids compatible with the internal market, while at the same time such aids alleviate a market failure and promote projects that are of the interest of the EU. Precisely, the lack of financial means to carry out a project or to conclude a project is one of the main motivations for firms to apply for R&D&I State aid (62). It is quite frequent that firms do not undertake certain projects because of the risks and costs that R&D&I may imply. Thus, when great social benefits might be expected, public means appear as the way to finance. Ideally, projects where the social but not the corporate return exceeds the total cost should be funded in order for them to be carried out. On the contrary, projects where the corporate profitability is enough to cover costs should not be subsidised. Hence, publicly funding R&D&I projects that would have been undertaken without financial help may be a waste of resources as there is no new R&D&I, only a cost (63).

Among the common provisions, the GBER highlights the transparency of the aid, i.e. an aid in respect of which it is possible to calculate exactly the gross grant equivalent of the aid ex ante without any need to undertake a risk assessment (art. 5 GBER); and, the incentive effect of the aid, i.e. the aid has to motivate a change in the behaviour of the undertaking (art. 6 GBER). In particular, measures in the form of tax advantages should be deemed to have an incentive effect if: (i) the measure establishes a right to aid in accordance with objective criteria and without further exercise of discretion by the Member State; and, (ii) the measure has been adopted and is in force before work on the aided project or activity has started [art.6(4) GBER] (64). Hence, the R&D&I activity should be increased in size, scope, amount spent or speed. Indeed, this is what justifies the need of the aid.

The transparency and the incentive effect are also common principles established by the R&D&I Framework that serve the Commission to assess whether a notified aid scheme is compatible with the internal market. For those measures meeting the requirements of the GBER, the compatibility assessment under the R&D&I Framework will not be carried out as the aid is not notified to the Commission for its prior approval. This implies that R&D&I State aids implemented following the GBER conditions will be compatible with the internal market –and Member States would not be obliged to notify the aid scheme–. In the case such requirements are not met (i.e. the measure is not under the GBER), the aid should be notified and the Commission will assess on the basis of the principles set up in the R&D&I Framework whether the aid notified is compatible with

(61) Commission, "State Aid nº SA.41386 (2015/B) – United Kingdom. Research & Development Tax Credits – SME Scheme", C(2015) 6595 final.

(62) Commission and ECORYS (2019:70).

(63) Brokelind and Hansson (2014: 176). It should be noted that some of the survey respondents affirmed that, even if the R&D&I State aid application was rejected, they continued with the project [Commission and ECORYS (2019: 76)].

(64) The former R&D&I Framework (2006) stated that R&D&I fiscal aids have an incentive effect by stimulating higher R&D&I–spending by undertakings [Commission (2006, section 5.1.6)].

the internal market. Accordingly, if Member States design R&D&I State aids in line with the principles set up in the R&D&I Framework, they will be declared as compatible aids with the internal market.

In that vein, for the Commission, R&D&I State aids can be compatible with the internal market when it can be expected to alleviate a market failure in promoting the execution of an important project of common interest, or when facilitates the development of certain economic activities (65). Regarding this, it should be noted that, even if for the Commission the justification of R&D&I aids is based on letters (b) and (c) of art.107(3) TFEU, the compatibility assessment (i.e. the aid measures covered by the R&D&I Framework) is made on the basis of art.107(3)(c) TFEU (66). Thus, R&D&I aids are seen as means to facilitate the development of certain economic areas, and this is where its compatibility might be based.

The following subs. focuses on the criteria that Member States should take into account when designing R&D&I tax incentives to be compatible with the internal market. Member States should particularly consider the GBER and the R&D&I Framework as well as the Commission notice on the application of the State aid rules to measures relating to direct business taxation (67).

3.1. The compatibility criteria for R&D&I tax schemes

R&D&I State aids should be in line with the so–called "common assessment principles" set up in the R&D&I Framework to be declared compatible with the internal market, being such principles also applicable to tax incentives as a form of State aid. In particular, the state intervention should be necessary and imply a contribution to a well–defined objective of common interest. The aid should be appropriate, proportional and transparent, having an incentive effect. Finally, undue negative effects on competition and trade should be avoided. Together with this, the specific conditions laid down in the GBER for aid schemes should also be considered.

In such vein, the R&D&I Framework comprises 5 categories of R&D&I aids (i.e. its scope of application), being three of them (aid for R&D projects; aid for research infrastructures; and, aid for innovation clusters) also included in the GBER. Therefore, the conditions laid down in the GBER for those aids should be considered for the compatibility assessment made under the R&D&I Framework. On the other hand, art.28 GBER declares the compatibility of innovation aids granted to small and medium–sized enterprises (SMEs) provided that certain conditions are met; and, the R&D&I Framework applies to aid for innovation activities, where SMEs are included. Thus, it can be said that the conditions provided by art.28 GBER will be also considered in such a case.

The fact that certain categories of R&D&I State aids are at the same time included in the application scope of both the GBER and the R&D&I Framework might lead to

(65) Commission (2014a, para 5).

(66) *Idem*, paras 14 and 40.

(67) Commission (1998).

certain confusion. That is to say, the compatibility assessment under the R&D&I Framework should consider the common principles and the conditions laid down in the GBER for certain aid categories. Thus, this means that if the aid scheme has been actually designed according to the GBER requirements, the compatibility assessment is not necessary because there will not be notification. Consequently, it seems more logical that the R&D&I Framework would be limited to R&D&I State aids that are not covered by the GBER. For instance, other R&D&I categories or R&D&I aids that, even do not meet the specific conditions set up in the GBER categories (arts. 25–30 GBER), can be justified (in the sense of "good aids") by the common assessment principles (e.g. transparency, incentive effect, among others).

Otherwise, as it has been happening since 2014, the major part of R&D&I schemes are granted under the GBER, while the Commission receives few individual notifications (68). This is because, first, if Member States design R&D&I aids according to the specific conditions laid down in the GBER, they are regarded as compatible with the internal market without the need of any ex ante control; and, secondly, no assessment under the R&D&I Framework is required due to the assumption that R&D&I aids under the GBER are in line with the common principles (69).

Be that as it may, all R&D&I State aids (either under the GBER or assessed under the R&D&I Framework) should be necessary, appropriate, proportional, transparent and should have a well–defined objective of common interest and an incentive effect (as explained in detailed below). In other words, they should be "good aids" that promote R&D&I without generating undue negative effects on competition and trade.

First, the contribution to a well–defined objective of common interest implies that the R&D&I aid should contribute to the achievement of the Europe 2020 strategy of delivering smart, sustainable and inclusive growth (70). Hence, the objective pursued should be precisely defined (71). For instance, the aim of the IP box regime introduced in Spain in 2007 was to encourage scientific and technological development in the business sector by granting a preferential tax treatment to income arising from certain IP assets. On the other side, the R&D tax credit introduced by the United Kingdom in 2015 was aimed to incentivise additional R&D investments by allowing SMEs the deduction of an extra percentage of their qualifying R&D expenditure (72). Thus, the objective of the tax measure should be clear and, in our view, it should be designed in a manner that contributes to achieve the objective set up. That is to say, the purpose to promote R&D&I should appear clearly in the structure of the tax measure, i.e. the tax elements should be desig-

(68) Commission and ECORYS (2019: 70). In particular, R&D&I GBER schemes have been mainly used in 2018 by the United Kingdom, Germany, France, Austria, Italy and the Netherlands (Commission, "State aid Scoreboard 2019": 33).

(69) Of course, the correct application of the GBER is the responsibility of Member States.

(70) Commission (2010).

(71) However, in practice, State aid measures are often mutually complementary and some of the objectives might overlap (Commission, "State aid Scoreboard 2019": 13).

(72) Tax incentives granted to SMEs are commonly regarded as more effective, so it would be recommendable that tax measures take into consideration the particularities of this type of entities. In this regard, *see* Commission (2014b: 85).

ned according to the aim pursued. Indeed, how useful, and at what cost, depends on how well the tax incentive is designed, implemented and monitored (73).

Secondly, State aid may be necessary to increase R&D&I in the EU in a situation where the market, on its own, fails to deliver an efficient outcome. That is to say, need (and justification) for state intervention. As mentioned in s. 1, market incentives alone are not enough to produce an adequate supply of R&D&I and this may justify state intervention. The appropriateness of the measure is closely linked to this idea. It should be considered whether other instruments are better placed to reach the aim pursued (74).

In our opinion, the argument to be in favour of tax incentives (i.e. of its appropriateness) should be based on criteria of efficiency and economy in the achievement of the objective pursued (i.e. public expenditure should satisfy public needs at the lowest possible cost). These criteria would imply that the incentive funds R&D&I that is socially desirable and that would not be otherwise undertaken. On the contrary, there will be a cost in terms of revenue loss but without creating new R&D&I.

On the other hand, any R&D&I aid should be proportional, which means that its amount is limited to the minimum needed for carrying out the aided activity. This implies that the level aid should be proportionate to the market failure (which is intended to be addressed), and that the eligible costs (as well as the proportionate part covered) should be determined (75). Both the GBER and the R&D&I Framework establish a higher ceiling for fundamental research (as the 100% of eligible costs are covered) than for industrial research and experimental development. Precisely, R&D&I projects related to experimental development are quite frequently carried out by firms (76). However, it is not clear that market failures that occur at the stages of experimental development are addressed, because State aid rules in the R&D&I area focus more on fundamental research. Thus, as fundamental research is far from the market, manufacturing challenges are not addressed. Because of the lack of financing at a critical moment (i.e. the market failure), "the introduction of an innovation to the market may fail, with the unintended result that public support granted at earlier stages is entirely lost" (77). Hence, it is as important to fund the earlier stages of the R&D&I project as it is to fund the final stages.

Tax incentives are justified if they are in line with the proportionality principle and, in any case, they cannot be based on arbitrary decisions (78). For instance, a volume–based tax credit, which is the simplest form of granting R&D&I tax credits, is based on the R&D&I expenditure incurred in a fiscal year, being calculated as a percentage of such

(73) Easson and Zolt (2002: 34). Other authors highlight the importance of the design and the implementation of tax incentives in order to be more efficient than other options: Brokelind and Hansson (2014: 176); Traversa (2014: 320).

(74) In this regard, Easson and Zolt (2002: 10) consider that it could be much easier to provide tax benefits than to correct deficiencies in the legal system.

(75) Commission (2014a, para. 73).

(76) In particular, the type of R&D&I projects envisaged by the survey respondents were mainly experimental development and innovation clusters [Commission and ECORYS (2019: 70)].

(77) Commission and Bird&Bird (2017: 715).

(78) Gutiérrez Bengoechea (2014: 153).

expenditure. Thus, the tax credit will be proportional (79). So, in our view, a tax measure will be proportional when it keeps a fair balance between the efficiency in achieving the objective (e.g. the increase of R&D&I investment) and the impact of the measure on the public resources (e.g. the introduction of maximum aid intensities may contribute to this).

In addition, the aid should have an incentive effect, i.e. the aid has to motivate a change in the behaviour of the undertaking. Precisely, the incentive effect in case of tax measures for R&D&I may determine the lack (to some extent) of neutrality. A tax as such, or a particular tax provision, can be neutral if it does not exercise any influence on the decision of a person to act in a specific manner (80). As mentioned, tax incentives should influence the behaviour of companies to perform R&D&I. Hence, the implementation of tax incentives implies a clear deviation from the principle of neutrality –which is closely linked to the equality principle–. However, deviations from neutrality may be motivated if substantial externalities justify them (81). Therefore, the fact that tax incentives are based on the regulatory function of taxation serves as a legitimate justification to a departure from the neutrality principle when the extra–fiscal goal pursued is covered by constitutional values or other public interests.

The R&D&I Framework refers also to transparency. Since July 2016, "Member States must publish on a comprehensive State aid website, at national or regional level" certain information on State aid measures (with the exception of individual aid awards below EUR 500 000) (82). Also in this vein, the Commission publishes annually the State aid Scoreboard based on the expenditure reports provided by Member States with the aim to offer a transparent and publicly accessible source of information on State aids. According to the 2019 Scoreboard, R&D&I is one of the four biggest policy objectives in terms of the total State aid spending in 2018, i.e. 11.3 billion EUR corresponding to less than the 0.10% of EU GDP (83).

Finally, the R&D&I scheme should avoid negative effects on competition and trade, which means that Member States should ensure that the aid is awarded in the form that is likely to generate the least distortions of competition and trade. As above–mentioned, IP box regimes have been introduced by several Member States with the aim to stimulate innovation and investments in new technologies. Moreover, the Commission concluded, after the review of the IP box introduced in Spain, that this scheme is not a selective measure and therefore does not constitute a State aid of art.107(1) TFEU. Nevertheless, the Commission received certain indications that these regimes seemed "to mainly benefit highly mobile businesses and do not trigger significant additional" R&D. Thus, in March 2014, the Commission sent information requests to several Member States (such as Luxembourg) to assess the compliance of IP box regimes with State aid rules because it was not clear whether these regimes granted a selective advantage to

(79) Abdellatif (2009: 141).
(80) Schön (2015: 272).
(81) Brokelind and Hansson (2014: 172).
(82) Commission (2014a, para. 119).
(83) Commission, "State aid Scoreboard 2019": 13 and 16.

a particular group of entities (84). Further investigations in such regard were stopped after the agreement on the (modified) nexus approach by the Code of Conduct for Business Taxation Group (85). Accordingly, only income that arises from IP where the actual R&D&I activities were undertaken by the taxpayer should benefit from an IP box regime, thereby excluding its considerations as a harmful preferential tax regime. In other words, the risk of base erosion and profit shifting (BEPS) is dissipated in the case of IP box regimes based on the (modified) nexus approach. However, this does not mean, in our view, that IP box regimes are automatically a good tax practice (86).

Even if the compatibility assessment may take into account the effects of the aid scheme in the light of the Code of Conduct (87), the fact that the IP box regime (or other tax measure) is regarded as not harmful for the purposes of the Code, it does not mean it cannot be a selective measure. Thus, we agree with Wittman that the compliance of IP regimes with the (modified) nexus approach should "not have an effect on a potential State aid investigation" (88).

With all this in mind, in practice, the Commission has a favourable position in the assessment of tax incentives for R&D&I (in comparison with other kinds of measures) (89). This favourable position is grounded on (i) the aim pursued by R&D&I State aids; (ii) the need of finance and the risks associated with R&D&I projects; and, (iii) the improbability that projects that are far away from the market distort the competition and trade (90). In our opinion, the latter could be debatable due to the fact that R&D&I is both a scientific and economic activity which allows companies to improve their position in the market (in terms of competitiveness) and the research results (such as a patent) can be easily shifted to low (or non–) tax jurisdictions.

3.2. A reference to R&D State aids related to COVID–19

The COVID–19 outbreak has reminded us how valuable research is. The need of developing accurate detection methods, efficient treatments, and a safe vaccine to cope with the severe public health emergency has evinced the importance of the R&D&I investment. For this reason, the Commission adopted, in March 2020, a Temporary Framework for State aid measures to support Member States' economies, being extended in April 2020 to other temporary State aid measures, such as R&D State aids related to COVID–19.

(84) Press Release, IP/14/309 (24 March 2014).

(85) OECD (2015); *Report from de Code of Conduct Group (Business Taxation) to the Council of the European Union*, Brussels, 11 December 2014.

(86) For that purpose, design is crucial "not only to achieve maximum effectiveness but also to minimise their fiscal cost and possible unintended consequences" [OECD (2013: 98)].

(87) Commission (1998, para. 30).

(88) Wittman (2017: 439).

(89) Moreno González (2010: 579).

(90) Serrano Antón (2000: 33).

The temporary measures included in the amended Temporary Framework are regarded as compatible with the internal market in accordance with art.107(3) TFEU. In particular, the Commission considers that

> "beyond aid measures allowed under Article 107(3)(b) TFEU (91) and existing possibilities under Article 107(3)(c) TFEU, it is also essential to accelerate COVID–19 relevant research and development, to support testing and upscaling infrastructures that contribute to develop COVID–19 relevant products, as well as to support the production of products needed to respond to the outbreak" (92).

Therefore, the Commission envisages new possibilities (apart from the exiting options under art. 107(3)(c) TFEU) of granting public aids to facilitate R&D related to COVID–19. That is to say, the justification of R&D&I State aids is grounded on art. 107(3)(c) TFEU, so Member States can already design support measures. Additionally, the Commission considers compatible under art. 107(3)(b) TFEU certain State aid measures, "which can be approved very rapidly upon notification by the Member State concerned" (93).

Accordingly, it has been set up the compatibility with the internal market of (i) aid for COVID–19 relevant R&D; (ii) investment aid for testing and upscaling infrastructures; and, (iii) investment aid for the production of COVID–19 relevant products (among others). Even if the different State aid measures set up in the amended Temporary Framework can be cumulated with each other, these three aid categories cannot be cumulated if the aid concerns the same eligible costs (94).

This subs. focuses on the temporary State aid for COVID–19 relevant R&D. This refers to R&D projects carrying out COVID–19 and other antiviral relevant research (including projects having received a COVID–19–specific Seal of Excellence quality label under the Horizon 2020 SME–instrument) (95). Thus, the aid scheme is limited to fundamental research, industrial research and experimental development.

The temporary measures should meet certain conditions to be approved under the amended Temporary Framework. Several Member States, such as Belgium, Czechia, Germany, Luxembourg, Malta, Portugal, or Spain, have already notified R&D State aids related to COVID–19, which have been approved under the amended Temporary Framework due to their compliance with the following conditions.

First, the aid should be granted in the form of direct grants, repayable advances, or tax incentives by 31 December 2020. Among the different types of R&D State aids (e.g. guarantees, soft loans, etc.), the Commission has limited the aid instrument to

(91) As the COVID–19 outbreak affects all Member States, the Commission (2020a, para. 18) considers that State aid is justified and can be declared compatible with the internal market on the basis of art. 107(3)(b) TFEU, i.e. "aid to remedy a serious disturbance in the economy of a Member State".

(92) Commission (2020b, para. 10).

(93) Commission (2020a, para. 16).

(94) Commission (2020b, para. 11).

(95) *Idem*, para. 35.

be implemented. Most Member States have notified aid schemes in the form of direct grants except Germany and Spain that have also notified aids in the form of repayable advances and tax benefits. Precisely, these three forms are the most common R&D&I instruments to be applied by firms according to the study prepared in 2018 for the DG Competition (96).

In this vein, the aid will have an incentive effect if it has been granted for R&D projects started as of 1 February 2020 or for projects with the COVID–19–specific Seal of Excellence. In the case of projects that started before that date, the incentive effect will depend on whether the aid is necessary to accelerate or widen the scope of the project. For instance, in Belgium, for projects that started before 1 February 2020, only the additional costs incurred after that date in relation to the acceleration efforts or the widened scope will be eligible for the aid scheme notified on 16 April 2020 (97).

On the other hand, eligible costs may refer to all the costs necessary for the R&D project during its duration. The detailed list of eligible costs should not be regarded as an exhaustive but as an illustrative list. Among the eligible costs it has been included "costs for obtaining, validating and defending patents and other intangible assets", which is not regarded as an eligible cost for aids to R&D projects (art. 25 GBER) but as an eligible cost for innovation aids related to SMEs (art. 28 GBER). In fact, such type of cost is more likely connected to innovation activities (98). Thus, even if the temporary measure has been limited to R&D, it seems some innovation costs might be covered by the aid scheme (being the case of the aid measures notified by countries such as Portugal or Spain, among others).

In regard of the aid intensity (which is connected to the proportionality of the aid), as art. 25 GBER does, a distinction is made between fundamental research, industrial research and experimental development (99). The amended Temporary Framework increases the percentage of eligible costs that may cover regarding industrial research (from the 50% to the 80%) and experimental development (from the 25% to the 80%). In addition, the percentage can be increased up to the 15% if more than one Member State support the research project, or if it is carried out in a cross–border collaboration manner.

Thus, the aid intensity for coronavirus related R&D projects is significantly increased in relation to what art. 25(5) GBER establishes. Even if the GBER increases the percentage of eligible costs for industrial research and experimental development in certain cases, in no case will reach the 95% of the eligible costs. As mentioned in subs. 3.1., the proportionality of a tax measure depends on the balance between the objective pursued

(96) Commission and ECORYS (2019: 71).

(97) Commission, "State Aid SA.57057 (2020/N) – Belgium R&D scheme of Brussels Capital Region "R&D Projects – COVID–19" under the Temporary Framework for State aid measures to support the economy in the current COVID–19 outbreak", COM(2020) 2804 final.

(98) Innovation activities include all developmental, financial, and commercial activities undertaken by a firm that are intended to result in an innovation for the firm [OECD/Eurostat (2019: 20)].

(99) Article 25(2) GBER also refers to feasibility studies.

and the impact on public resources. Thus, the implementation of R&D tax incentives related to COVID–19 should keep this balance too.

Also in regard of the aid intensity, it should be taken into account that the aid scheme granted might be combined with support from other sources for the same eligible costs provided. Ideally, public means should fund projects that would not have been undertaken without financial help. However, the ongoing health situation justifies the combination of different funding sources to reach the objective of developing detection methods, medical treatments, and vaccines. In any case, because of the proportionality principle, the maximum aid intensities should not be exceeded.

Another issue to be highlighted is the fact that the undertaking should grant non–exclusive licences under non–discriminatory market conditions to third parties in the EEA. In such a way, the research results may be exploited not only by the owner but also by other persons.

Finally, those undertakings that were already in difficulty on 31 December 2019 cannot benefit from an aid granted under the amended Temporary Framework, which are also excluded from the GBER scope.

Therefore, the inclusion of R&D State aids in the Temporary Framework implies granting temporary measures (i.e. until 31 December 2020) in the form of direct grants, repayable advances and tax incentives, which may cover 100% of eligible costs for fundamental research and up to 80% of eligible costs for industrial research and experimental development.

With the aim to take a decision in regard of the different aid schemes notified by Member States, the Commission has assessed not only the compliance with the above–mentioned conditions but also the compliance with the common assessment principles. For instance, Belgium notified an R&D State aid in the form of a direct grant to support coronavirus related R&D projects in the Brussels–Capital region. The Commission has concluded that the aid is necessary, appropriate, and proportionate to fight the health crisis. The Commission has arrived to the same conclusion in regard of the scheme notified by Germany on 21 April 2020 to support R&D, testing and production of coronavirus relevant products (100).

4. CONCLUSIONS

State aid rules might be regarded as a legal constraint for tax incentives because the use of the regulatory function of taxation should be in line with the requirements and goals of the State aid policy.

Tax incentives are *per se* selective because they imply a deviation from the general tax treatment and put undertakings in a better position. However, the better position

(100) Commission, "State aid SA.57100 (2020/N) – Germany – COVID–19 – Federal Framework Scheme Aid for COVID–19 related R&D, investments in testing infrastructures and production facilities", C(2020) 2871 final.

depends on the intensity used by the undertaking to obtain the tax relief. Moreover, if all potential undertakings can apply the measure, the measure would miss the feature of selectivity. Of course, there will be a "factual" exclusion of those undertakings not carrying out R&D&I activities.

As a result, R&D&I tax incentives may fall into the scope of art. 107(1) TFEU. Notwithstanding this, R&D&I aid schemes can be justified and compatible with the internal market on the basis of art. 107(3) TFEU. In particular, the favourable position to R&D&I aids will be grounded on their incentive effect, the aim of public interest pursued and, especially, on the proportionality of the measure. Therefore, the area of justification of the measure (even if aids are selective in nature) is based on these three elements. In other words, the compliance with the "common principles" will justify an R&D&I State aid, being compatible with the internal market.

The common principles are set up in the R&D&I Framework; and precisely these principles will be considered by the Commission in the compatibility assessment. Nevertheless, these principles are automatically met in the case of aid schemes designed under the GBER. Since 2014, there is a significant increase of the GBER schemes implemented by Member States. In such a way, R&D&I State aids are compatible with the internal market while Member States have the certainty that aid schemes will not be declared as unlawful State aids. It could then be affirmed that the R&D&I Framework has somehow a lower weight in practice.

Beyond the aim to facilitate Member States grant aids compatible with the internal market, State aid rules in the area of R&D&I are aimed to alleviate a market failure. This means they pretend that undertakings can access to public means for carrying out those projects that otherwise would not have been undertaken. The lack of financing to move ahead a project is indeed a market failure that can occur at any stage of the lifetime of the project. Thus, State aid rules should consider all the stages of the R&D&I process in terms of addressing market failures because this is what actually justifies the state intervention.

In this vein, the R&D State aids related to COVID–19 will cover a higher percentage of the eligible costs for experimental development, i.e. the final stages of the R&D project. This can be justified because it is not only necessary the research in the new coronavirus but also the development of relevant medical products resulting from the scientific research.

REFERENCES

Abdellatif, M. (2009): "Looking for Efficient Tax Incentives to Stimulate Research and Development and Economic Growth", *New Zealand Journal of Taxation and Policy*, Vol. 15, No. 2.

Bal, A. (2014): "Tax Incentives: III–Advised Tax Policy or Growth Catalaysts?", *European Taxation*, No. 2/3.

Binder, T. (2020): "The EU Concept of State Aid", *European Taxation*, Vol. 60, No. 5.

Brokelind, C. and Hansson, A. (2014): "Tax Incentives, Tax Expenditures Theories in R&D: The Case of Sweden", *World Tax Journal*, Vol. 6, No. 2.

Commission (1998): *Commission notice on the application of the State aid rules to measures relating to direct business taxation* (98/C 384/03), 10 December 1998.

Commission (2006): *Community Framework for State aid for research and development and innovation,* 30 December 2006.

Commission (2010): *Europe 2020 – A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020.

Commission (2012): *Revision of the state aid rules for research and development and innovation* (Competition DG), Brussels, 12 December 2012.

Commission (2014a): *Framework for State aid for research and development and innovation* (2014/C 198/01), 27 June 2014.

Commission (2014b): *A study on R&D Tax Incentives. Final Report*, Taxation Papers, Working Paper, No. 52.

Commission (2016): *Commission in its Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union* (2016/C 262/01), 19 July 2016.

Commission and Bird&Bird (2017): *State aid support schemes for RDI in the EU's international competitors in the fields of Science, Research and Innovation.*

Commission and ECORYS (2019): *Study on the practical impact of RDI State aid rules*, Publications Office of the European Union.

Commission (2020a): *Temporary Framework for State aid measures to support the economy in the current COVID–19 outbreak*, C(2020) 1863 final.

Commission (2020b): *Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID–19 outbreak*, C(2020) 2215 final.

Danon, R. J. (2015): "Tax Incentives on Research and Development (R&D). General Report", in *Cahiers de Droit Fiscal International*, Vol. 100a, Sdu Uitgevers, The Netherlands.

Easson, A. (2001): "Tax Incentives for Foreign Direct Investment – Part II: Design Considerations", *Bulletin for International Taxation*, Vol. 55, No. 8.

Easson, A. and Zolt, E. M. (2002): "Tax Incentives", *World Bank Institute.*

Gutiérrez Bengoechea, M. A. (2014): "Algunas notas sobre la extrafiscalidad y su desarrollo en el derecho tributario", *Revista Técnica Tributaria,* No. 107.

Luja, R. H. C. (2015): "Will the EU's State Aid Regime Survive BEPS?", *British Tax Review*, Vol. 3.

Martín Jiménez, A. J. (2018): "Level Playing Field versus Member States' Direct Tax Policies: The State Aid (R)evolution", in P. Pistone (ed.): *European Tax Integration: Law, Policy and Politics*, IBFD, The Netherlands.

Mason, R. (2019): "Identifying illegal subsidies", *American University Law Review*, Vol. 69.

Moreno González, S. (2010): "Incentivos fiscales a la I+D+i y régimen comunitario de ayudas de Estado", in M. Lucas Durán (ed.): *Derecho de la I+D+i – Investigación, desarrollo e innovación,* Bosch, Spain.

OECD (2013): *Supporting Investment in Knowledge Capital, Growth and Innovation*, OECD Publishing, Paris.

OECD (2015): *Action 5: Agreement on Modified Nexus Approach for IP Regimes*, OECD/G20 Base Erosion and Profit Shifting Project.

OECD/Eurostat (2019): *Oslo Manual 2018: Guidelines for Collecting, Reporting and Using Data on Innovation*, 4th ed., OECD Publishing, Paris/Eurostat, Luxembourg.

Ortega Guío, A. (2012): "La problemática de las ayudas de Estado en la fiscalidad: revisión de algunas disposiciones de la Comisión Europea contra España", *Cuadernos de Formación* (IEF), Vol. 15.

Pérez Bernabeu, B. (2008): *Ayudas de Estado en la jurisprudencia comunitaria. Concepto y tratamiento*, Tirant Lo Blanch, Spain.

Pérez Bernabeu, B. (2014): "*R&D&I Tax Incentives in the European Union and State Aid Rules*", *European Taxation*, Vol. 54, No. 5.

Sánchez Rydelski, M. (2010): "Distinction between State Aid and General Tax Measures", *EC Tax Review*, Vol. 19, No. 4.

Schön, W. (1999): "Taxation and State Aid Law in the European Union", *Common Market Law Review*, Vol. 36.

Schön, W. (2015): "Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?", *Bulletin for International Taxation*, Vol. 69, No. 4/5.

Serrano Antón, F. (2000): "Los incentivos fiscales por actividades de Investigación y Desarrollo e Innovación Tecnológica", in J. Martín Fernández (ed.): *Régimen tributario de las actividades de Investigación y Desarrollo e Innovación Tecnológica*, La Ley, Spain.

Soler Roch, M. T. (2018): "State Aid (R)evolution and Harmonization through the Back Door", in P. Pistone (ed.): *European Tax Integration: Law, Policy and Politics*, IBFD, The Netherlands.

Tenreiro, C. and Inakiew, G. (2016): "Research, development and innovation", in L. Flynn *et al.* (eds.), *EU Competition Law, Volume 4: State Aid*, Claeys & Casteels Law Publishing, The Netherlands.

Traversa, E. (2014): "Tax Incentives and Territoriality within the European Union: Balancing the Internal Market with the Tax Sovereignty of Member States" (2014) 6 *World Tax Journal*, Vol. 6, No. 3.

Wittman, J. M. (2017): "Patent Boxes and Their Compatibility with European Union State Aid Rules", in I. Kerschner and M. Somare (eds.): *Taxation in a Global Digital Economy*, Linde, Austria.

Zalasinski, A. (2014): "General Report – Tax aspects of Research and Development within the European Union", in W. Nykiel and A. Zalasinski (eds.): *Tax aspects of Research and Development within the European Union*, LEX – Wolters Kluwer business, The Netherlands.

Zammit, I. (2015): "Centralized Intellectual Property Business Models – Tax Implications of EU Patent Box Regimes", *Bulletin for International Taxation*, Vol. 69, No. 9.