

# State aid and tax policy

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# I. EU vs. Member State tax policy : objectives and instruments

# Objectives of EU tax law and policy (I)

## Achievement of the Internal market

- Optimal allocation of economic factors and resources through free and fair competition
- Freedoms of movement and non discrimination
- Approximation of domestic tax systems : Coordination/Harmonization
- Prevention of international double taxation: VAT and direct tax directives but not in general

## Fight against fraud and abuse

- Limitation of the benefits of EU law to genuine economic activities
- Recognition of the right of the Member States to fight fraudulent and abusive practices
  - obligation to do so if EU financial interests are at stake
- EU coordination of anti-fraud and avoidance measures

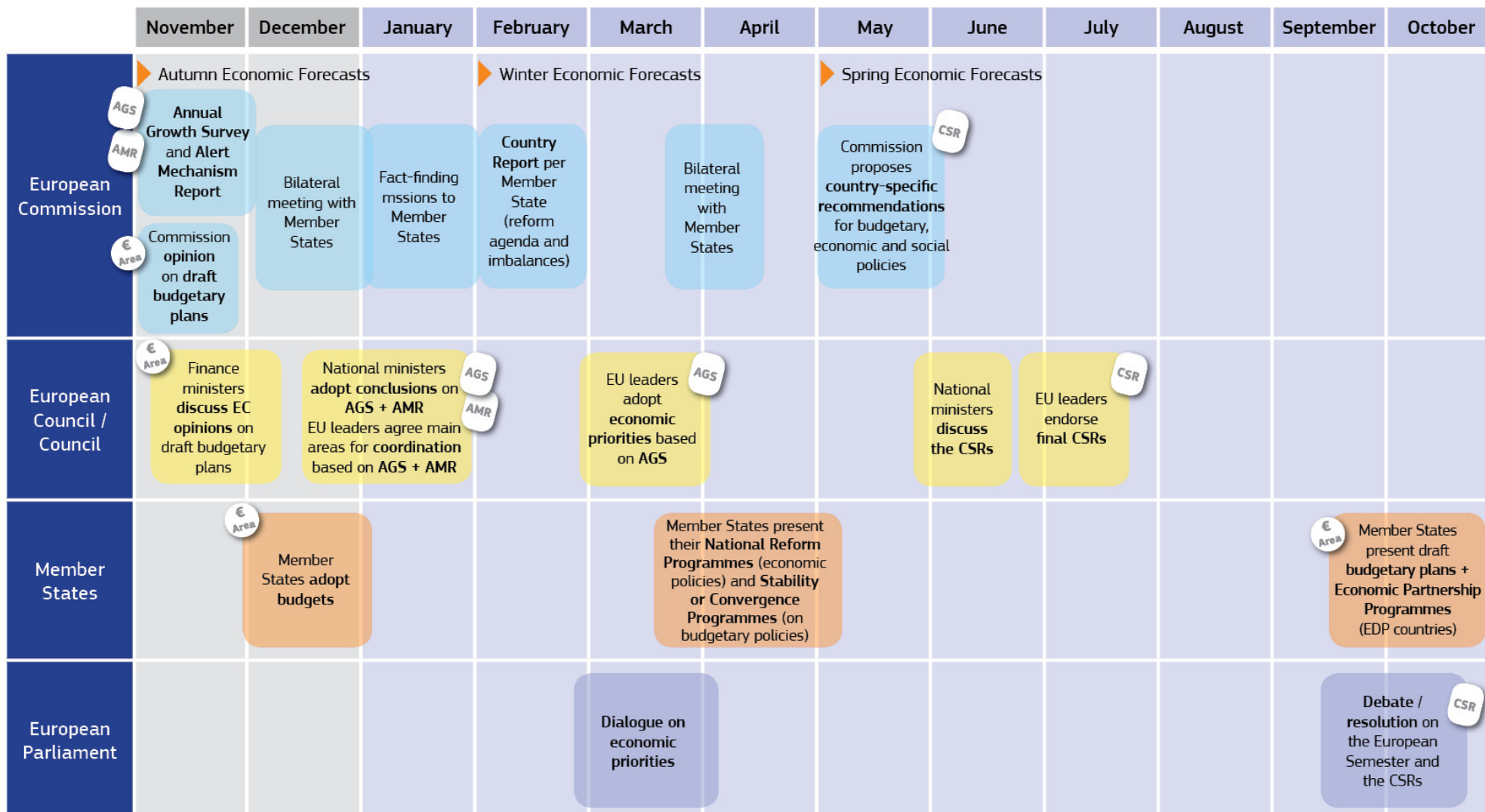
## Instruments of EU direct tax integration

- Internal market, tax competition and national tax sovereignty
  - Efficiency of the EU market and freedoms of movement
  - Ambiguous position towards tax competition
- Tax harmonization/coordination instruments in the achievement of the Internal Market
  - EU corporate tax directives, EU Arbitration convention
  - Exchange of information and administrative cooperation
  - CCCTB proposal (2011)
- Using EU instruments to address tax competition issues (since 1997)
  - EU State Aid
  - EU Code of conduct (soft law)

# Member States' tax policy Objectives and Instruments

- Budgetary purpose
  - Generating resources to allocate to State activities
  - Curbing deficits and coping with EU requirements (European Semester)
  - Fighting against fraud and evasion
- Redistribution
- Steering economic policy at the domestic and international level
  - Tax incentives (domestic and foreign investment, R&D, qualified workforce, ...)
  - Other measures (reducing labour taxation, corporate tax rates, ...)
- Pursuing specific social and environmental goals
  - Housing policy
  - Vehicle taxation
  - Non profit (charitable) activities
  - ...

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## II. Evolution of the EU policy in the area of fiscal State aid



## The original EU policy in the area of fiscal State aid

- Tax measures may constitute prohibited State aid
- The existence of an aid in taxation is assessed according to the four traditional criteria
  - Financing by the State or from state resources
  - Advantage
  - Selectivity (effect-based approach >< intention)
  - Effect on trade and distortion of competition
    - To be assessed independently from the selectivity criteria (T-219/10, para. 76)

## The original EU policy in the area of fiscal State aid

- The classical three-steps approach to selectivity
  - Determination of the reference framework (“*normal taxation*”) on a domestic, and not cross-border basis
  - Derogation from the system « insofar as it differentiates between economic operators who in light of the objectives intrinsic to the system are in a comparable factual and legal situation »
  - Justification by the nature of the general scheme of the reference system

## The evolution of EU case-law in the area of fiscal State aid

- *Normal taxation* as a benchmark is often very difficult to determine and can be just a matter of drafting technique
- The rule-exception approach is still presented as valid in the CJEU case-law but appears in practice to be more conceived as a discrimination test where comparability plays a fundamental role
- Clarifications to the three(?) -step test
  - Consistency of the reference framework (Gibraltar, C-106-107/09)
  - Taxpayers benefitting from the measure have to be identifiable (T-399/11, Banco Santander, para. 45)
  - Linking a tax measure to certain conditions does not make it selective (3M, C-417/10, para. 42)

## The evolution of EU Commission policy in the area of fiscal State aid

- Fiscal State aid and harmful tax competition
  - Competition policy as a stick to enforce soft law (Code of conduct)
    - See in particular Notice on the application of the State aid rules to measures relating to direct business taxation (OJ 1998 C 384) and ECJ, 22 June 2006 joined cases C-182/03 and C-217/03 (Belgian coordination centers)
- Fiscal State aid and tax rulings
  - Rulings as State aid
    - Publicity and nature
  - Administrative discretion
    - Only as regards beneficiaries (T-513/13 and T-719/13, 17 December 2015)
  - Transfer pricing rules as state aid
    - Choice of the method

### III. The place of state aid control in the future of EU tax policy

## 2015 EU Commission Tax Action Plan

- Common Consolidated Corporate Tax Base
  - Changes to 2011 proposal and postponement of the work on consolidation
  - First legislative step focusing on international anti-BEPS aspects
- Ensuring effective taxation where profits are generated
  - Bringing taxation closer to where profits are generated and ensuring effective taxation of profits
    - Coherent EU approach to implementing new BEPS standards (CFC, PE)
    - Recast of the Interest and Royalties Directive
  - Improving the Transfer pricing framework
  - Linking preferential regimes to where value is generated : implementation of the “modified nexus approach”

# 2015 EU Commission Tax Action Plan

- Tax transparency
  - Third countries : revision of the savings agreements and adoption of the global (OECD) standard (Switzerland, Andorra, Liechtenstein, Monaco and San Marino)
  - Country-by-country reporting
  - Exchange of tax rulings
- EU tools for tax governance
  - Reforming the Code of Conduct for Business Taxation and the Platform on Tax Good Governance
    - ensure through ‘general guidance’ a coordinated implementation of the OECD BEPS conclusions

*See Communication of 17 June 2015 on a Fair and Efficient Corporate Tax System in the European Union, COM(2015) 302*

# State aid policy as the ultimate anti-BEPS deterrent?

- Role of the arm's length principle
  - Comparability of stand-alone and group companies
  - TP corrections as anti-avoidance measure or allocation rule?
  - Within or beyond its application in domestic law?
- What resources have been foregone?
  - Impact of double non taxation on the existence of an aid : responsibility of “correcting” disparities/mismatches
  - Inevitable cross-border dimension >< assessment of advantage on a single State basis
- Competition policy as a parallel track to counter base erosion and profit shifting in the EU?
  - What will be the position of the EU Courts?
  - What impact on the international tax position of EU Member States if BEPS does not bring all its promises? (Comp. 2004 Community Guidelines on State aid to maritime transport)



Thank you for your attention!

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