

Selectivity and the Arm's Length Principle in EU State Aid Law

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Starting point: EU Commission's main arguments in the transfer pricing ruling cases

- The **ALP is inherent** in Art 107 (1) TFEU
- The **ALP and its application is required** in national corporate income tax systems due to the principle of equal treatment **even if it is not part of the national tax system**
- Tax rulings are selective if the tax authorities endorse transfer prices that deviate from the ALP and do not lead to a **reliable approximation of market-based outcomes** → the compliance with the OECD TP Guidelines will unlikely give rise to State aid

Research Question

Does the selectivity criterion of Art 107 (1) TFEU require the inclusion and application of the ALP for the determination of integrated companies' profits in national corporate income tax systems?

Analysis of Four Main Issues

- Selectivity and dimension of **principle of equal treatment under Art 107 (1) TFEU**
- **Comparability analysis** in terms of the determination and assessment of the corporate tax base
- Selectivity through **inclusion/non-inclusion of national transfer pricing provisions based on the ALP** in national tax systems
- Selectivity of **transfer pricing rulings**

Preliminary Conclusions

- The principle of equal treatment under Art 107 (1) TFEU **neither incorporates the ALP** for the purposes of taxation, **nor does the requirement of equal treatment mandate the inclusion of ALP-based provisions** in national corporate income tax systems
- **Even** national transfer pricing legislation that is based on the ALP as well as the OECD TP Guidelines **can be selective**
- There is **no selective misapplication** by tax authorities if the tax rulings endorsed do not comply with a standardized ALP-understanding