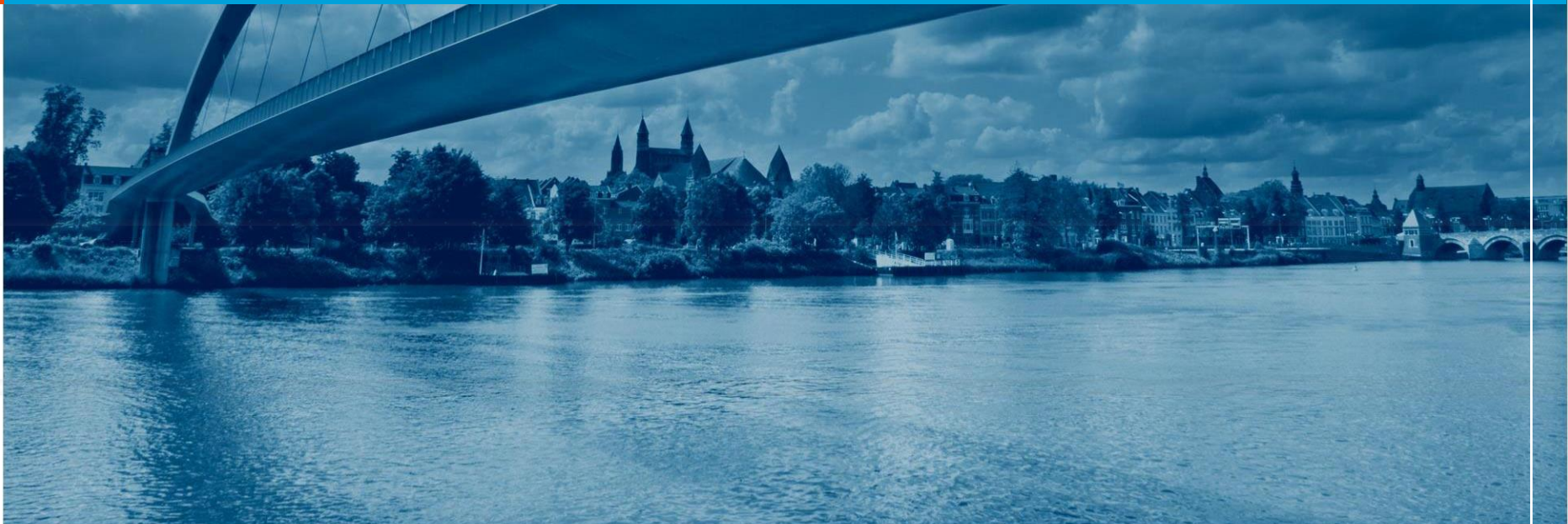


REITs and State Aid

ACTL conference

Prof. Raymond Luja

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Notion of State Aid

Article 107 (1) TFEU:

- Presence of a benefit
 - Aid granted by a Member State or through state resources, to the extent attributable to the Member State
 - Aid that distorts or threatens to distort competition and affects trade between Member States
 - Aid that favours certain undertakings or the production of certain goods (selectivity)
- *No* special definition for tax purposes
- *All* elements have to be fulfilled: risk of recovery?

FINECO (CFI T-445/05, 2009)

- Special tax treatment to encourage investment in small and medium sized enterprises listed on a stock exchange

“[As] fees are paid in proportion to the volumes concerned where investments are made in shares and/or funds managed, even though the details may vary, **the increase in shares purchased will inevitably lead to an increase in the management and entry fees** charged by those vehicles or by the undertakings managing them.”

FINECO

“It should be noted that aid may be selective [...] even if it concerns a **whole economic sector** [...].”

“Within [the financial] sector, it benefits only the undertakings carrying out the operations covered by that measure. As it does **not apply to all economic operators**, it cannot be regarded as a general measure of fiscal or economic policy.”

“The beneficiary managing undertakings derive an **indirect benefit** from advantages [...] **to which undertakings in the financial sector which do not perform management operations for specialised investment vehicles have no right**. [...] The measure at issue is thus also selective in respect of managing undertakings of specialised investment vehicles.”

FINECO

- May we use a separate regime for investment funds (a sector in itself)?

Not sure...

- May we use a more favourable regime for specialised investment next to a general fund regime?

Essentially: no

- But...

Finish REITs decision (EC, 2010)

- Exempting REITs from corporate income tax in Finland *prima facie* selective benefit
- Justification:
fiscal treatment will be the same vis-à-vis
 - direct investment by an investor;
 - other tax transparent investment vehicles
- $\geq 90\%$ of profits distributed (after amendment)

Paint Graphos (ECJ C-78/08, 2011)

- When cooperative entities are used in investment structures, all members should be actively involved
- Possibilities to use co-ops for transparency purposes are limited
- No co-op regime allowed in case of *de facto* single investor structure

but *only if* individual investor (private person or legal entity) would have been subject to a higher tax or be taxed sooner in case of direct investment

Draft Communication on the Notion of Aid (2014)

“Tax measures aimed at **ensuring tax neutrality** for investments in collective investment funds/companies should **not be viewed as selective** where those measures do not have the effect of favouring certain collective investment undertakings or certain types of investments, but rather of **reducing or eliminating double economic taxation** in accordance with the overall principles inherent to the tax system in question. “

“tax neutrality means that taxpayers are **treated the same** whether they invest **directly** in assets, such as government securities and the shares of joint-stock companies, or **indirectly** in such assets through investment funds.”

Draft Communication on the Notion of Aid (2014)

“However, **tax neutrality does not mean** that such investment vehicles should be **entirely exempt** from any tax or that the fund managers should be exempt from tax on the fees charged by them for managing the underlying assets being invested into by the funds. Nor it justifies a more **beneficial tax treatment** of a **collective investment** than of an individual investment for the tax regimes in question.”

“**preferential tax treatment** limited to well-defined investment vehicles which fulfil specific conditions **to the detriment of other investment vehicles** that are in a comparable legal and factual situation should be viewed as selective.”

So?

- Transparency = OK
- Transparency = the limit
- No timing difference:
no pre-tax reinvestment allowed

but *only if* individual investor would have been taxed on any capital income prior to reinvestment (in domestic PIT/CIT)