

# Discriminatory Taxation

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A legal comparison of the Dormant Commerce Clause of the United States of America and the state aid provisions of the European Union

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A legal comparison of the Dormant Commerce Clause of the United States of America and the state aid provisions of the European Union

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Abstract:

This thesis compares the Dormant Commerce Clause of the United States and the state aid provisions of the European Union as applied to taxation. Differences can be found in the allocation of taxing rights, governmental system, substance of dormant commerce clause and state aid provisions, effects of these systems and supervision. Similarities can be found in the purpose, legal system, effects of these systems and the achievement and transcendence of their purpose.

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## Paragraph 1: Introduction

### 1.1 Motivation of study

The state aid provisions have been around for quite some time in EU law.<sup>1</sup> It has been implemented to make sure national governments wouldn't undermine further economic integration in the EU by implementing competition distorting policies.<sup>2</sup> The state aid prohibition is only one approach, yet it has gained importance over the last years.<sup>3</sup> The purpose of the EU state aid provisions is to ensure undistorted competition in the internal market.<sup>4</sup>

Although there are barely any similar provisions to be found in the world, the US Constitution's Dormant Commerce Clause comes closest.<sup>5</sup> The purpose of the Dormant Commerce Clause is to prohibit local economic protectionism, as that would lead to jeopardizing the welfare of the United States as a whole.<sup>6</sup>

One cannot deny that these purposes are very similar, as prohibiting economic protectionism is essentially the same as ensuring undistorted competition. These systems can be compared in light of their similar purpose. With taxation in mind, the main relevant distortion of competition is discrimination against interstate or foreign economic activity and in favor of in-state or domestic economic activity.<sup>789</sup> This thesis intends to compare and contrast these systems as applied to taxation.

There has not been a lot of research on this subject.<sup>10</sup> Even though there are stringent rules in the EU on (fiscal) state aid, it should not be assumed that they reach their purpose. This thesis tries to find arguments to support such assumptions through its research question.

### 1.2 Research question

Considering the above, the research question shall be:

*"What are the differences and similarities of the EU state aid provisions and the US Dormant Commerce Clause as applied to taxation in light of their purpose of ensuring elimination of discrimination against interstate or foreign economic activity?"*

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<sup>1</sup> As such, since the Treaty of Rome (1957)

<sup>2</sup> Richard Baldwin, Charles Wyplosz. 'The Economics of European Integration,' Third Edition, McGraw-Hill Higher Education, p. 426

<sup>3</sup> Ben J.M. Terra, Peter J. Wattel, 'European Tax Law,' Sixth edition, Kluwer: Deventer 2012, p. 149-157

<sup>4</sup> Article 3 paragraph 3, Treaty on European Union

<sup>5</sup> Raymond H.C. Luja, 'Tax related difficulties of State Aid Rules,' in: Michael Lang and Frans Vanistendael (eds.), 'Accounting and Taxation & Assessment of ECJ Case Law,' proceedings of the 2007 EATLP Congress

<sup>6</sup> C&A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383 (1994)

<sup>7</sup> Ruth Mason, Michael S. Knoll, 'What is Tax Discrimination,' Vol. 121 Yale Law Journal (2011-2012), p. 1014

<sup>8</sup> Philip M. Tatarowicz, Rebecca F. Mims-Velarde, 'An Analytical Approach to State Tax Discrimination Under the Commerce Clause,' Vol. 39 Vanderbilt Law Review (1986), p. 879

<sup>9</sup> Michael J. Graetz, Alvin C. Warren jr., 'Income Tax Discrimination and the Political and Economic Integration of Europe,' Vol. 115 Yale Law Journal (2006), p. 1186

<sup>10</sup> There is some though, a.o. Christian Buelens, Gaëlle Garnier, Roderick Meiklejohn, 'The economic analysis of state aid: Some open questions' European Commission Directorate-General for Economic and Financial Affairs Publications 2007

### **1.3 Delimitation**

As stated in the research question itself, the question shall be limited to the effects on taxation. To keep the comparison as simple and pure as possible only the relationship between federal and state governments in the US and supranational and national governments in the EU shall be taken into account. Furthermore, the systems will be approached as a whole and as they are now, including both the substance and the procedural aspects.

The systems shall be tested in light of their purpose by determining to what extent it is theoretically legally possible to have tax induced discrimination against interstate or foreign economic activities.

### **1.4 Methodology**

To answer the research question this thesis shall start with discussing how and out of what necessity the Dormant Commerce Clause and the state aid provisions came to be in the second paragraph. The third and fourth paragraph shall respectively deal with the substance and procedures of each of these systems. After dealing with the substance and procedures the purpose will be defined and tested against in the fifth paragraph. In the sixth paragraph this thesis shall evaluate the differences and similarities of everything discussed in chapters two to five. This thesis shall end with a conclusion.

## Paragraph 2: Background on general US and EU legal and taxation systems

It can be said that the United States of America and the European Union are very different. Not only are differences to be found in geographic location, demography or history, there are many legal and fiscal differences as well. To understand differences and similarities of the Dormant Commerce Clause and the prohibition of state aid, one has to acknowledge that these systems originated in different territories and under different circumstances. Therefore, for any comparison to be meaningful, a background of general legal and taxation systems is necessary. These systems shall only be touched upon concisely as it is not the core of this thesis.

### 2.1 Background on general US legal and taxation systems

#### 2.1.1 General US legal system

The Constitution of the United States is the leading document vesting the powers of the federal government of the US. The US Constitution came into force in 1789 and has been amended twenty-seven times. Ever since coming into force, it has been the supreme law of the United States of America. The US Constitution divides the federal government into three branches: the legislative, executive and judicial branches.

The legislative branch consists of the Congress, which is the Senate and the House of Representatives combined.<sup>11</sup> All of the senators and representatives are chosen through direct election by the people of the States.<sup>12</sup> Congress has many powers, as described in Article 1, Section 8 of the US Constitution. Among others, Congress has the power to lay and collect taxes, duties, imposts and excises, provide for the common defense and general welfare of the United States, but all duties, imposts and excises shall be uniform throughout the United States. Furthermore, Congress has the power to regulate commerce with foreign nations and among the several States. It's important to note that the Tenth Amendment states that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people. This amendment clarifies the relationship of the authority to draft legislation between the federal and state governments, namely that the federal government has the authority to legislate all matters attributed to it by the Constitution and that the state government has the authority to legislate every other matter.

The executive branch consists of the President of the United States.<sup>13</sup> Part of its power is often delegated to the Cabinet members and other officials. The President is not directly elected by the citizens of the US. Instead, citizens elect representatives, apportioned to each of the 50 states and the District of Columbia, who then vote for the President and Vice President.<sup>14</sup> Furthermore, a person may not be elected to be President more than twice, which means, combined with the length of a single term of 4 years, that a person can be a President for a maximum of 8 years. Besides being the head of the executive branch, the President has the power to appoint judges of the Supreme Court if

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<sup>11</sup> Article 1, Section 1, US Constitution

<sup>12</sup> Article 1, Section 2 and 3, US Constitution

<sup>13</sup> Article 2, Section 1, US Constitution

<sup>14</sup> 12<sup>th</sup> Amendment, US Constitution



there is a vacancy during his term of service. This appointment does have to be approved by Congress.<sup>15</sup>

The judicial branch consists of several federal courts, of which the Supreme Court is the most superior court.<sup>16</sup> The Supreme Court rules on matters involving the federal government and disputes between states. Furthermore, it interprets the US Constitution. This last power is not explicitly mentioned in the Constitution, yet the power to declare a law unconstitutional was asserted by Chief Justice Marshall in the case *Marbury v. Madison*.<sup>17</sup> The legal system in the United States can generally be classified as common law.<sup>18</sup> This means case law has a precedential effect on future cases according to the *stare decisis* principle, which states that cases should be decided on the basis of principled rules so that similar facts will lead to similar results. The Supreme Court, however, held that there is no “general federal common law.”<sup>19</sup> This limited the judicial power of the federal courts, including the Supreme Court, to the interpretation of law originating elsewhere, most notably the Constitution.

### 2.1.2 General US taxation system

There are several federal and several state taxes in the United States. The federal taxes are codified in the Internal Revenue Code (IRC) of 1986. As with any federal law this code has been enacted by Congress. Federal taxes most notably include personal and corporate income tax, payroll tax, estate tax, gift tax and excise tax. The state taxes are codified in state legislation of the various States. Though differing in subject, object and rate throughout the country, generally speaking these state taxes can most notably include personal and corporate income tax, property tax, sales tax and use tax.

## 2.2 Background on general EU legal and taxation systems

### 2.2.1 General EU legal system

The European Union is an economic and political union between 28 countries. The 28 Member States have transferred part of their sovereignty to EU institutions, with many decisions made at the European level. The legal basis consists of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The most notable institutions are the European Parliament, the European Council, the Council, the European Commission and the Court of Justice of the European Union.<sup>20</sup>

The legislative branch consists of the European Parliament, the Council and national parliaments. The European Parliament is composed of representatives of the Union’s citizens.<sup>21</sup> The Council is composed of the national ministers.<sup>22</sup> The citizens of the separate countries elect their national parliaments according to domestic law. The European Parliament and the Council together act as the European legislative power.

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<sup>15</sup> Article 2, Section 2, US Constitution

<sup>16</sup> Article 3, Section 1, US Constitution

<sup>17</sup> *Marbury v. Madison*, 5 U.S. 137 (1803)

<sup>18</sup> Lawrence M. Friedman, ‘A History of American Law,’ 3rd ed. New York: Touchstone 2005, p. 67-69

<sup>19</sup> *Erie Railroad Co. v. Tompkins* 304 U.S. 64, 78 (1938)

<sup>20</sup> Article 13, TEU

<sup>21</sup> Article 14, TEU

<sup>22</sup> Article 16, TEU

The executive branch consists of the European Commission, the European Council and national governments. The European Commission consists of 28 members operating as a European cabinet government.<sup>23</sup> The European commission's president is proposed by the European Council and elected by the European Parliament. The European Council consists of the heads of state of the member states along with the president of the European Council and the President of the European Commission.<sup>24</sup> The European Commission holds the daily executive power of the European Union.

The judicial branch consists of the European Court of Justice and national courts. The European Court of justice consists of the Court of Justice, the General Court and the Civil Service Tribunal.<sup>25</sup> The Court of Justice is the most superior court in the European Union. It rules on actions brought by a Member State, institution, natural or legal person and give preliminary rulings at the request of courts of the Member States on the interpretation of Union law or the validity of acts adopted by the institutions.<sup>26</sup> The European Union's countries and supranational government mostly apply the legal system of civil law.<sup>27</sup> This means the primary source of law consists of codified principles. Case law is secondary and subordinate to statutory law, meaning that it is limited to the interpretation of said statutory law. Furthermore, when there is a conflict between national law and European law, primacy of European Union law dictates that European law takes precedence over national law.<sup>28</sup>

### 2.2.2 General EU taxation system

The authority to tax in the European Union is left to the national governments. This means that there is no supranational tax. To large extent harmonized through the use of EU Directives and Regulations though is the Value Added Tax, an indirect tax on goods and services.<sup>29</sup> The subjects and objects are largely the same throughout the EU, yet the rate remains of national competence and thus differs. Any other tax in the EU remains under the authority of the national, or even more local, governments, although many taxes throughout the Member States of the EU are subject to coordination. As with any national law, see paragraph 2.2.1, national tax laws must also be in coherence with European Union law according to the primacy of European Union law.

### 2.3 Conclusion

The US is one country consisting of many states. Federal legislative power is vested in Congress. Executive power is held by the President. The Supreme Court is the most superior court. As Congress holds the legislative power, it can lay and collect taxes, duties, imposts and excises, provide for the common defense and general welfare of the United States, and regulate commerce with foreign nations and among the several States. The federal government has the authority to legislate all matters attributed to it by the Constitution and the state government has the authority to legislate every other matter. The Supreme Court interprets the law, including the Constitution. It is limited to interpreting as there is no general federal common law.

The US levies several taxes on a federal level and several taxes on a state level. Federal taxes most notably include personal and corporate income tax, payroll tax, estate tax, gift tax and excise tax. The

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<sup>23</sup> Article 17, TEU

<sup>24</sup> Article 15, TEU

<sup>25</sup> Article 19, TEU

<sup>26</sup> Article 19, paragraph 3, TEU

<sup>27</sup> Article 19, paragraph 3, part (b), TEU

<sup>28</sup> Costa v. ENEL (C-6/64)

<sup>29</sup> Council Directive 2006/112/EC of 28 November 2006

state taxes vary across the different states. Though differing in subject, object and rate, generally speaking these state taxes can most notably include personal and corporate income tax, property tax, sales tax and use tax.

The European Union is an economic and political union between 28 countries. The 28 Member States have transferred part of their sovereignty to EU institutions, with many decisions made at the European level. The European Parliament and the Council together act as the European legislative power. The European Commission holds the daily executive power of the European Union. The Court of Justice is the most superior court in the European Union. Case law is secondary and subordinate to statutory law, meaning that it is limited to the interpretation of said statutory law. When there is a conflict between national law and European law, primacy of European Union law dictates that European law takes precedence over national law.

The competence to levy tax lies with national governments. The EU does not levy any tax on supranational level. The system of Value Added Tax is largely harmonized though. As with any national law, national tax laws must also be in coherence with European Union law according to the primacy of European Union law.

## Paragraph 3: The Dormant Commerce Clause

### 3.1 Background of the Dormant Commerce Clause

There is no provision called 'The Dormant Commerce Clause' in the law of the United States of America. Its origin can be traced back to the Constitution of the United States. The Dormant Commerce Clause revolves around one single clause in the US Constitution, named the Commerce Clause. Article 1, Section 8, Clause 3 states:

*"The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."*

The Constitution hereby vests in Congress, the federal legislative branch of the US, the power to regulate commerce among the states. This sentence leaves much open for interpretation. As the Supreme Court has also noted<sup>30</sup>, the Constitution does not define what 'commerce' entails. Neither does it define when commerce is considered to be between two or more states. It also doesn't state what the consequences are in case Congress does or did not act. This vagueness, deliberate or not, does have an impact on the balance of legislative power between federal and state governments. This has led to a large amount of cases brought to courts all over the US.<sup>31</sup> The Supreme Court has consistently ruled that this grant of power to Congress, the federal legislative body, implies a restriction on states from passing legislation which burdens or discriminates against interstate commerce.<sup>32</sup> Therefore, the separate states are limited in their ability, by the Constitution, to exercise their legislative powers.

### 3.2 The substance of the Dormant Commerce Clause

#### 3.2.1 General substance of the Dormant Commerce Clause

As any federal legislation would by nature not discriminate in application between the several States, the Dormant Commerce Clause can only be applicable to laws of lower levels of government, most notably state law. This is confirmed by the Supreme Court in, among others, the case *Pike v. Bruce Church, Inc.*<sup>33</sup>

The first question which has to be asked is whether the law regulates interstate commerce. The power to regulate interstate commerce has been attributed to the federal government by the Constitution.<sup>34</sup> Therefore, if a state law regulates interstate commerce in itself, it shall be struck down by the Supreme Court. If the state law does not regulate interstate commerce in itself, the question is whether interstate commerce is discriminated against.<sup>35</sup> Discrimination here *"simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."*<sup>36</sup>

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<sup>30</sup> H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949)

<sup>31</sup> See the cases addressed paragraphs 2 and 3

<sup>32</sup> See the Supreme Court cases as referred to in this paragraph

<sup>33</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)

<sup>34</sup> Article 1, Section 8, Clause 3, US Constitution

<sup>35</sup> *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994)

<sup>36</sup> *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981)

If there is no discrimination against interstate commerce to be found on its face or in its effect, the law will generally be upheld.<sup>37</sup> If the law does discriminate against interstate commerce, the issue is whether the discrimination is regarded as incidental or as intentional.<sup>38</sup>

If the discrimination is incidental, the Supreme Court generally upholds the state law. There are exceptions possible; in these cases the Supreme Court tested the state law against the Pike test, which will be explained further in this paragraph, even though the discrimination was found to be incidental.<sup>39</sup> If the discrimination is intentional, the question rises whether the measure constitutes the least discriminatory means available.<sup>40</sup> If it is not, the state law will be struck down. If it is, the question rises whether the burdens on interstate commerce outweigh the local benefits. This is referred to as the Pike test, because it originates from the case *Pike v. Bruce Church, Inc.*<sup>41</sup> If the local interests are found to outweigh its discriminatory effects, the state law will be upheld. If the local interests are not found to outweigh its discriminatory effects, the state law will be struck down.

Going through all of the steps above, the Supreme Court forbids a state law under the Dormant Commerce Clause in the following cases:

1. The state law regulates interstate commerce as such.
2. The state law intentionally discriminates against interstate commerce disproportionately, meaning not using the least discriminatory means available.
3. The state law intentionally discriminates against interstate commerce through the least discriminatory means, but the burdens on interstate commerce outweigh the local benefits.
4. The state law incidentally discriminates against interstate commerce and the burdens on interstate commerce outweigh the local benefits.

In other cases the state law will be upheld.

There are two notable exceptions to these rules. The first one is when Congress has legislated on the matter.<sup>42</sup> This would change the case to a Commerce Clause case and therefore rendering a Dormant Commerce Clause challenge obsolete. The second is if the state acts as a market participant instead of as a market regulator.<sup>43</sup> This would change the position of the state to a position similar to that of any other business.

### **3.2.2 The Dormant Commerce Clause applied to taxation**

The Supreme Court has consistently applied the Dormant Commerce Clause to the field of taxation.<sup>44</sup> In coherence with application of the Dormant Commerce Clause on other fields, it can only be applicable to laws of lower levels of government, most notably state law. The Supreme Court ruling *Complete Auto Transit, Inc. v. Brady* is a landmark case in the field of the current application of the

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<sup>37</sup> *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978)

<sup>38</sup> *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007)

<sup>39</sup> *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981)

<sup>40</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)

<sup>41</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)

<sup>42</sup> *Western & Southern Life Ins. v. State Board of California*, 451 U.S. 648 (1981)

<sup>43</sup> *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)

<sup>44</sup> For example, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949)

Dormant Commerce Clause as applied to taxation.<sup>45</sup> The Supreme Court ruled that, for a state tax to be found compatible with the Dormant Commerce Clause, four criteria need to be fulfilled.

1. There must be a 'substantial nexus'. Nexus is defined in later case law as a physical presence in a state.<sup>46</sup> This means that the connection between a state and a (potential) tax subject must be clear enough to impose a tax. That is to say, if a state law would tax a subject without a sufficiently clear connection, for example a business with no link whatsoever to that state, it would overstep its jurisdiction and be regulating interstate commerce as such. Therefore it is found to be incompatible with the Dormant Commerce Clause. As a tax on interstate commerce without an intrastate presence would by definition only tax interstate commerce, it is by definition discriminating against interstate commerce.
2. There must be nondiscrimination. This means that intrastate and interstate taxes may not favor one above the other. This is actually a stricter criterion of nondiscrimination than used in the formulated purpose of not discriminating against interstate economic activity. In addition to not discriminating against interstate economic activity, a state tax may also not discriminate against intrastate economic activity. This criterion coincides with and is stricter than the three criteria on general substance of the Dormant Commerce Clause which forbid discrimination against interstate commerce. In that sense, the application of the Dormant Commerce Clause to taxation can be seen as a deviation from the general substance of the Dormant Commerce Clause.
3. There must be a fair apportionment. This criterion states that only the apportionment of activity that occurs within the taxing jurisdiction of that state may be taxed. A tight connection can be seen between this criterion and the substantial nexus criterion. As the nexus criterion dictates that a state *may* only tax a subject if there is a substantial nexus, this criterion dictates *how much* a state may tax, namely up to a fair apportionment. If the state would tax more than a fair apportionment, it would both discriminate against and lay a burden on interstate commerce, quite possibly outweighing the local benefits.
4. There must be a fair relationship to services provided by the state. This criterion states that an undertaking subject to tax must have the right to enjoy state services, for example police protection, while in said state. The Supreme Court has further explained that this criterion is closely connected to the first criterion, and merely adds the *"limitation that the measure of the tax must be reasonably related to the extent of the contact."*<sup>47</sup>

As well as in the general application of the Dormant Commerce Clause, there are two notable exceptions. The first one is when Congress has legislated on the matter.<sup>48</sup> Leading to the same result as with a general application, it would change the case to a Commerce Clause case and therefore rendering a Dormant Commerce Clause challenge obsolete. The second exception is if the state acts as a market participant instead of as a market regulator.<sup>49</sup> This however, cannot be the case regarding taxation. As a definition, only a legislator has the authority of taxation. A state tax can therefore never constitute an act as a market participant. Market participants do not have the power

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<sup>45</sup> Complete Auto Transit, Inc. v. Brady, 430 US 274 (1977)

<sup>46</sup> Quill Corp v North Dakota, 504 US 298 (1992)

<sup>47</sup> Commonwealth Edison Co. v Montana 453 U.S. 609 (1981)

<sup>48</sup> Western & Southern Life Ins. v. State Board of California, 451 U.S. 648 (1981)

<sup>49</sup> Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)

to tax. Only a market regulator does. The market participant exception is therefore not applicable to state tax cases.

Essentially, the four criteria overlap each other. It has been argued in literature that the essence of these four criteria can be caught by only two:<sup>50</sup>

1. Avoidance of multiple taxation on interstate commerce.
2. Avoidance of direct commercial advantage to local businesses at the expense of multistate enterprises.

Although this is an interesting thought experiment, the focus of this thesis lies on the application as the Supreme Court sees fit. Therefore this thesis shall be limited to the application of the four criteria of Complete Auto Transit. In the end, it is the Supreme Court that rules on this subject.

### 3.3 Procedures of the Dormant Commerce Clause

As the Dormant Commerce Clause is a legal doctrine interpreted by the Supreme Court and not legislature in itself, the only procedural aspect available is challenging state legislature in the court of law.<sup>51</sup> There is no preventive supervision at hand.

The outcome of a state tax law challenged by the Dormant Commerce Clause essentially consists of one out of two possibilities. Either the state law will be upheld, or it will be struck down. The Supreme Court, as described in the previous paragraph, forbids a state law regarding taxation under the Dormant Commerce Clause in the following cases:

1. If there is no substantial connection between a state and a tax subject, a substantial nexus.
2. If the state tax discriminates between intrastate and interstate commerce.
3. If the state tax taxes more than a fair apportionment.
4. If the state tax does not constitute a fair relationship to services provided by the state.

Only if none of these criteria apply, the state tax will be upheld by the Supreme Court. As noted in the above criteria, the effect of the Dormant Commerce Clause would in theory be the abolishment of state induced discrimination against intrastate and interstate commerce. That is, unless Congress has acted and approved discriminatory legislation. This would be hard to achieve though, since Congress' legislation applies to the whole country and can therefore by definition not be discriminatory against intrastate or interstate commerce.

### 3.4 Conclusion

The Dormant Commerce Clause is a legal doctrine inferred from the Constitution by the Supreme Court. For a state tax to be found compatible with the Dormant Commerce Clause, four criteria need to be fulfilled:

1. There must to be a 'substantial nexus'
2. There must be nondiscrimination.
3. There must be a fair apportionment.
4. There must be a fair relationship to services provided by the state.

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<sup>50</sup> Jesse H. Choper, Tung Yin, 'State Taxation and the Dormant Commerce Clause: The Object-Measure Approach,' 1998, p. 199-205

<sup>51</sup> Complete Auto Transit, Inc. v. Brady, 430 US 274 (1977)

There is no preventive supervision at hand, the only procedural aspect available is challenging state legislature in the court of law. The outcome of a state tax law challenged by the Dormant Commerce Clause essentially consists of one out of two possibilities. Either the state law will be upheld, or it will be struck down. The Supreme Court forbids a state law regarding taxation under the Dormant Commerce Clause in the following cases:

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3. If the state tax taxes more than a fair apportionment.
4. If the state tax does not constitute a fair relationship to services provided by the state.

In other cases the state law will be upheld.



## Paragraph 4: The prohibition of State Aid in the European Union

### 4.1 Background of the prohibition of State Aid

The European Court of Justice has a long line of jurisprudence which states that competition between Member States is fundamental to the European Union. This also applies to tax competition.<sup>52</sup> However, any legislation must be consistent with the Treaty on the Functioning of the European Union. In that way, the rules in the Treaty on the Functioning of the European Union form a framework which Member States may not exceed. Central to this thesis are articles 107 – 109 of this Treaty which govern aids granted by states, these are the so called State Aid provisions. The substance of these provisions is laid down in article 107 TFEU. Articles 108 and 109 contain the procedural aspects of the prohibition of State Aid.

### 4.2 The substance of the State Aid provisions

#### 4.2.1 General substance of the State Aid provisions

The structure of article 107 TFEU is as follows:

- Paragraph 1 states which aid is incompatible with the internal market
- Paragraph 2 states which aid, which would be found incompatible under paragraph 1, is automatically deemed to be compatible with the internal market
- Paragraph 3 states which aid, which would be found incompatible under paragraph 1, can be deemed to be compatible with the internal market by the European Commission.

Article 107 paragraph 1 TFEU states illegal State Aid as follows:

*“Save as otherwise provided in the Treaties, 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.”*

Four criteria can be distinguished in this sentence.

1. There has to be an advantage in any form whatsoever.
2. This advantage is granted by a Member State or through State resources, thus from State-originated resources.
3. This advantage only applies to certain undertakings or the production of certain goods, otherwise known as the selectivity criterion. Both de jure and de facto selectivity qualify. Selectivity occurs when a measure constitutes a derogation from an identified system of reference without there being a justification by the nature or general scheme of the reference system.
4. This advantage distorts or threatens to distort competition between Member States.

Article 107 paragraph 2 TFEU states the next categories as automatically to be deemed compatible state aid as follows:

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<sup>52</sup> For example, Gilly (C-336/96), Eurowings (C-294/97) and Danner (C-136/00)

1. Aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
2. Aid to make good the damage caused by natural disasters or exceptional occurrences;
3. Aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

Article 107 paragraph 3 TFEU states the next categories, which would be found incompatible under paragraph 1, may be deemed to be compatible with the internal market as follows:

1. Aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
2. Aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
3. Aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
4. Aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
5. Such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

According to article 107 TFEU, regarding the general substance of illegal state aid, illegal state aid exists if there is an advantage granted through state-orientated resources, where this advantage is selective and distorts or threatens to distort competition between Member States. There are automatic exceptions which relate to aid having a social character, aid to make good damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of Germany. There are possible exceptions which relate to aid to promote the economic development of underdeveloped areas, aid to promote an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, aid to facilitate the development of certain economic activities or of certain economic areas under circumstances, aid to promote culture and heritage conservation and other categories of aid as may be specified by the Council or the Commission.

#### **4.2.2 The State Aid provisions applied to taxation**

The general rules to determine illegal state aid apply to Member States' taxes. This means, to constitute illegal state aid, the first check would be to see if the tax fits the conditions of article 107 paragraph 1 TFEU.

1. There has to be an advantage in any form whatsoever. As far as tax is concerned, any relief of charges that would normally be due constitutes an advantage. For example, a reduction of the tax rate or tax base would be an advantage. The existence of an advantage cannot automatically be considered to discriminate against foreign economic activity.

2. This advantage is granted by a Member State or through State resources, thus from State-originated resources. Foregoing tax revenue which would normally have been collected constitutes a grant through state resources.<sup>53</sup> Applied to taxation, this criterion is therefore easily met. Conceptually, this and the previous criterion go together in tax cases. If there is an advantage, it is automatically from state-originated resources as it is a tax advantage and tax is by its nature a state resource. The other way around may apply as well, if there is a less than usual tax claim, it constitutes an advantage. Still, just because a state-originated advantage is given, that does not mean it constitutes discrimination against foreign economic activity, as foreign economic activity might be the receiver of this advantage.
3. This advantage only applies to certain undertakings or the production of certain goods, otherwise known as the selectivity criterion. The selectivity criterion is usually the most debated one.<sup>54</sup> Selectivity can occur both de jure as well as de facto.<sup>55</sup> The Court of Justice generally applies a system consisting of three steps.<sup>56</sup> First the system of reference has to be identified. Secondly it must be assessed whether the measure differentiates between economic operators who, in light of objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure is considered to be differentiating, the third and final step would be to assess whether the measure is not justified by the nature or the general scheme of the reference system. A selective measure is by nature distortive, since it gives some an advantage over others. Yet to determine whether there is discrimination against foreign economic activity, this selective measure would have to be improving the position of domestic activity or weaken the position of foreign activity. The selectivity criterion is much broader than that, as it also applies to many other forms of selectivity.
4. This advantage distorts or threatens to distort competition between Member States. The application of this criterion by the Court of Justice is very broad. If the measure potentially affects the position of the addressee of the advantage in comparison to competitors who may be engaged in cross-border trade, this criterion is met.<sup>57</sup> Applied to taxation, this criterion is therefore easily met. If an advantage distorts competition between Member States, it is also discriminating against either domestic or foreign economic activity. Which one it is, depends on the substance of the tax measure in question.

If all of the criteria above are met, article 107 paragraphs 2 and 3 TFEU might still apply. In taxation matters, article 107 paragraph 2 TFEU is of next to zero importance. Since the exceptions deal with social aid to individual consumers and natural disasters and taxation has little to do with those matters. The exceptions in article 107 paragraph 3 TFEU however, can realistically be applied in taxation matters. It is not unthinkable for a tax measure to promote economic development of underdeveloped areas or to promote culture and heritage conservation, not to mention the authority of the Council to add categories of aid.<sup>58</sup> To note, all of these exceptions do depend on the material substance of the tax measure in question.

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<sup>53</sup> Germany v. Commission (C-156/98)

<sup>54</sup> For example, Commission and Spain v. Gibraltar and UK (C-106/09 and C-107/09P)

<sup>55</sup> Adria Wien (C-143/99)

<sup>56</sup> For instance, Portugal v Commission of the European Communities (Azores) (C-88/03)

<sup>57</sup> Germany v. Commission (C-156/98)

<sup>58</sup> Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (codification)

Taken together, a selective advantage granted through state-originated resources which (threatens to) distort competition between Member States can discriminate against foreign economic activity. The state aid provisions do not only take discrimination against foreign economic activity into account, the application of the selectivity criterion goes far beyond that purpose, as it also applies to many other forms of selectivity. Still, it can be said that the state aid provisions capture the purpose of prohibiting discrimination against foreign economic activity through its application on tax measures.

#### 4.3 Procedures of the State Aid provisions

To discuss the procedures of the state aid provisions, one has to address article 108 TFEU. This article makes a distinction between new and existing aid, which are to be treated differently. New aid is under preventive supervision, meaning the Commission obliges national governments to notify the Commission if that government intends to grant or alter aid.<sup>59</sup> Existing aid is under repressive supervision.<sup>60</sup> This means the Commission shall decide that the Member State shall abolish or amend the existing state aid. The Commission can also decide, under circumstances, to recover the granted amounts including interest, to restore effective competition.<sup>61</sup>

Regarding new aid, as it is under preventive supervision, the Commission will have to agree on the implementation of new aid. Therefore, aid which the Commission deems to be incompatible with the internal market, otherwise said aid which is discriminatory against foreign economic activity, will either never be implemented or will be amended until found satisfactory.

Regarding existing aid, as it is under repressive supervision, the Commission shall decide that the aid must be abolished or amended until found satisfactory. The Commission can even recover the granted amounts including interest to restore effective competition. This ensures that existing state aid will cease to exist.

#### 4.4 Conclusion

A measure constitutes forbidden state aid if the following four criteria hold true:

1. There is an advantage in any form whatsoever.
2. This advantage is granted by a Member State or through State resources, thus from State-originated resources.
3. This advantage only applies to certain undertakings or the production of certain goods. Both de jure and de facto selectivity qualify
4. This advantage distorts or threatens to distort competition between Member States.

The consequences of a tax measure which constitutes illegal state aid will be the amendment or abolishment of this measure. The granted amounts of existing state aid can even be recovered including interest to restore effective taxation. Furthermore, because of the preventive supervision on new aid, potentially discriminatory state aid would, in theory, never be implemented at all.

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<sup>59</sup> Article 108 paragraph 3 TFEU

<sup>60</sup> Article 108 paragraph 1 and 2 TFEU

<sup>61</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty

## Paragraph 5: The purpose of the Dormant Commerce Clause and the prohibition of State Aid

Defining the purpose of the Dormant Commerce Clause and the prohibition of state aid has two functions. The first function is to explain the rationale behind the choice of comparing the Dormant Commerce Clause and the prohibition of state aid. The second function is to use this purpose as a framework to test against.

### 5.1 The purpose of the Dormant Commerce Clause

The original purpose would have to be asked to the Founding Fathers, the individuals who drafted the Constitution, yet this is complicated since the Constitution has been created in 1787. There are several surviving documents regarding the drafting of the Constitution where the power to regulate interstate commerce was discussed. This mostly concerned the ability to lay duties of tonnage without Congressional interference. One of the Framers of the Constitution, James Madison, was *"more and more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority."*<sup>62</sup> Others, such as Roger Sherman, saw the commerce power more as a concurrent one. Even though there was a discussion, there is no mention of any definite purpose of the commerce clause, let alone the dormant part of it.

The 'dormant'<sup>63</sup> aspect of the Commerce Clause lies in the implication that this clause not only grants Congress authority over commerce, but also prohibits the States to discriminate against interstate commerce. The Supreme Court has confirmed this theory consistently.<sup>64</sup> The purpose of the Dormant Commerce Clause has been put, among others, by Justice Anthony Kennedy in the case *C&A Carbone*:

*"The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."*<sup>65</sup>

Here Justice Anthony Kennedy argues that discriminatory state legislation would result in retaliation by other states, which would then lead to a deadlock of interstate commerce. The result of that would be that the wealth and prosperity of the United States as a whole would be diminished, nulling the effect of the Constitution.

Perhaps this is illustrated more effectively by Justice Joseph McKenna in the case *West v. Kansas Natural Gas Co.*:

*"The statute of Oklahoma recognizes [gas] to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. . . If the States have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one*

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<sup>62</sup> M. Farrand, 'Records of the Federal Convention of 1787,' 1937 p. 625

<sup>63</sup> The word 'dormant' stems from Chief Justice John Marshall in the case *Gibbons v. Ogden*, 22 U.S. 1 (1824)

<sup>64</sup> See the cases as referred to in paragraph 3

<sup>65</sup> *C&A Carbone Inc. v. Town of Clarkstown*, NY 511 U.S. 383 (1994)

*State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that, 'in matters of foreign and interstate commerce, there are no state lines.' In such commerce, instead of the States, a new power appears, and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States, and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court."*<sup>66</sup>

As read above, Justice Joseph McKenna is more vocal about assigning a purpose to the (Dormant) Commerce Clause. For the States to have the power to freely discriminate against interstate commerce would be to undermine the welfare of all of the states, as it would undermine the Constitution itself. For the United States to prosper as a whole, it cannot be allowed that States are able to exercise such power. The greater purpose can therefore be put as the welfare of all of the States, the whole country, the United States. Promoting the general Welfare is even stated in the Preamble of the Constitution. The Dormant Commerce Clause achieves part of that purpose by eliminating discrimination against interstate commerce, since this would encourage, or at least not discourage, trade between the States, leading to the spread of wealth of all of the States. In that sense, it can be said that elimination of discrimination against interstate commerce is the purpose of the Dormant Commerce Clause.

## 5.2 The purpose of the prohibition of State Aid

The main reason why the European Union itself has been founded is to make sure countries will not invade each other by making the costs of such behavior higher than the gains.<sup>67</sup> This is achieved by making countries economically dependent on each other by integrating their economies, thus creating an internal market. The founders of the European Union must have realized, however, that every country is still different in culture and legislature. To create a so-called level playing field there had to be put certain rules in place to ensure that competition would not be heavily distorted. Title VII of the Treaty on the Functioning of the European Union (TFEU) concerns these competition rules. The prohibition of state aid is one out of several of this set of rules. Therefore the purpose of regulating competition can already be established because of the mere fact that the state aid provisions are placed in this part of the TFEU. What sets the state aid provisions apart from the other rules in Title VII TFEU is the fact that it concerns the relationship between a national government, the Member State, and undertakings in that Member State. Other rules on competition generally concern the relationship between companies themselves.<sup>68</sup> This means battling unfair competition caused by national governments is the purpose of the prohibition of state aid. This purpose is also stated in the preamble of the TFEU, namely that balanced trade and fair competition should be strived for.

From an economical perspective, aiding undertakings by national governments distorts competition and thus market efficiency.<sup>69</sup> Market efficiency is a key point in integrating economies, as it supposes creation of wealth and welfare. Therefore distorting competition, including distortions caused by

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<sup>66</sup> West v. Kansas Natural Gas Co., 221 U. S. 229 (1911)

<sup>67</sup> For example, Churchill in his 'Speech to the academic youth' held at the University of Zurich, 1946

<sup>68</sup> See articles 101-106 TFEU

<sup>69</sup> Ben J.M. Terra, Peter J. Wattel, 'European Tax Law,' Sixth edition, Kluwer: Deventer 2012, p. 18

governments, leads to less creation of wealth and welfare.<sup>70</sup> Integrating European countries, which leads to more wealth and welfare, is the EU's main purpose, as stated in the preamble of the Treaty on European Union. Therefore to distort competition would be to act against the ratified TEU. For this reason, it can be said that the state aid provisions have been implemented to make sure national governments wouldn't undermine further economic integration in the EU by implementing competition distorting policies.<sup>71</sup>

From a political perspective, if countries on the same internal market notice other countries play unfair, meaning they are supporting domestic companies or activities; they will also be inclined to do so. They may implement the same kind of measures, or pull out of the internal market altogether, with potential disastrous results to the economies and political environments of both the countries and the EU as a whole. Such behavior would then undermine the foundation of the European Union. Therefore, to guard against these pressures, all of the countries on the internal market would have to be bound by the same set of rules that prohibit competition distorting policies.

Prohibiting the distortion of competition means to treat undertakings under similar circumstances in a similar way. Regarding the TEU, TFEU and economic theory, fair competition on the internal market would mean treating undertakings the same way under the same conditions. This implies a broader application than merely the distinction between domestic and foreign undertakings or activities. However, the main economic and political concerns regarding creating a level playing field focus on exactly that distinction. It can therefore be said that the purpose of the state aid provisions is to ensure foreign actors or activities are not discriminated against.

### **5.3 The use of elimination of discrimination against interstate or foreign economic activity as the common purpose**

As discussed in paragraph 5.1, the purpose of the Dormant Commerce Clause can be said to be the elimination of discrimination against interstate commerce. This is to achieve the greater purpose of promoting the general welfare of the United States.

As discussed in paragraph 5.2, the purpose of the prohibition of state aid can be said to be elimination of discrimination against foreign actors or activities. This is to achieve a level playing field leading to the creation of an internal market, ultimately creating wealth and welfare for the European Union.

Formulated like this, both purposes are remarkably similar. Interstate commerce can be regarded as the equivalent in the United States to what intra-community trade is in the European Union. It consists of the trade between (Member) States. An overlapping and in the EU widely used term would be economic activity. As not to lose sight of the fact that the EU consists of many countries and the US consists of many states, respectively foreign and interstate economic activity would be appropriate terms.

Conceptually unifying these purposes would result in a formulation as follows. The purpose would then be the elimination of discrimination against interstate or foreign economic activity. In a sense,

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<sup>70</sup> Jeff Frank, 'Monopolistic Competition, Risk Aversion, and Equilibrium Recessions,' *The Quarterly Journal of Economics* Vol. 105 No. 4, 1990, p. 921-938

<sup>71</sup> Richard Baldwin, Charles Wyplosz. 'The Economics of European Integration,' Third Edition, McGraw-Hill Higher Education, p. 426

by eliminating discrimination against foreign or interstate commerce, one actually attempts to create a level playing field. These are different wordings for essentially the same concepts.

## 5.4 Testing against the purpose

### 5.4.1 Testing the Dormant Commerce Clause against its purpose

To test the Dormant Commerce Clause against the purpose of elimination of discrimination against interstate economic activity is to answer the following question:

To what extent is discrimination against interstate economic activity legally possible under the Dormant Commerce Clause as applied to taxation?

As discussed in paragraph 3.2.2, a state tax which violates one of the Complete Auto Transit criteria would be discriminating against interstate economic activity. As discussed in paragraph 3.3, such a state tax would be struck down by the Supreme Court. The Supreme Court would even strike down state taxes that discriminate against intrastate economic activity, essentially having a broader impact than the purpose of the Dormant Commerce Clause. Therefore, in theory, the Dormant Commerce Clause achieves and transcends its purpose by eliminating state taxes discriminating against intrastate and interstate economic activity.

### 5.4.2 Testing the prohibition of state aid against its purpose

To test the effects of the state aid provisions against the purpose of elimination of discrimination against foreign economic activity is to answer the following question:

To what extent is discrimination against foreign economic activity legally possible under the state aid provisions as applied to taxation?

As discussed in paragraph 4.2.2 the state aid provisions capture the purpose of prohibiting discrimination against foreign economic activity through its application on tax measures. The provisions apply to many other forms of selectivity, broadening the scope of the state aid provisions in light of its purpose. The substance captures and goes beyond the purpose. As discussed in paragraph 4.3, the consequences of a tax measure which constitutes illegal state aid will be the amendment or abolishment of this measure. The granted amounts of existing state aid can even be recovered including interest to restore effective taxation. Furthermore, because of the preventive supervision on new aid, potentially discriminatory state aid would, in theory, never be implemented at all.

## 5.4 Conclusion

The purposes of the Dormant Commerce Clause and the prohibition of state aid can be described as the elimination of discrimination against interstate or foreign economic activity. As their purposes are heavily similar, they can be usefully compared to each other.

The Supreme Court would strike down state taxes that discriminate against intrastate as well as interstate economic activity, essentially having a broader impact than the purpose of the Dormant Commerce Clause. Therefore, in theory, the effect of the Dormant Commerce Clause achieves and transcends the purpose by eliminating state taxes discriminating against intrastate and interstate economic activity.



The state aid provisions capture the purpose of prohibiting discrimination against foreign economic activity through its application on tax measures. The provisions apply to many other forms of selectivity as well, broadening the scope of the state aid provisions in light of its purpose. The substance captures and goes beyond the purpose.

## Paragraph 6: Evaluation of differences and similarities

### 6.1 Differences and similarities between US and EU legal and taxation systems

#### 6.1.1 Differences and similarities between US and EU legal systems

The US is one country consisting of many states. As Congress holds the legislative power, it can lay and collect taxes, duties, imposts and excises, provide for the common defense and general welfare of the United States, and regulate commerce with foreign nations and among the several States. The federal government has the authority to legislate all matters attributed to it by the Constitution and the state government has the authority to legislate every other matter. The Supreme Court interprets the law, including the Constitution. It is limited to interpreting as there is no general federal common law.

The European Union is an economic and political union between 28 countries. The 28 Member States have transferred part of their sovereignty to EU institutions, with many decisions made at the European level. The European Parliament and the Council together act as the European legislative power. The European Commission holds the daily executive power of the European Union. The Court of Justice is the most superior court in the European Union. Case law is secondary and subordinate to statutory law, meaning that it is limited to the interpretation of said statutory law. When there is a conflict between national law and European law, primacy of European Union law dictates that European law takes precedence over national law.

Though the United States is one single country and the European Union consists of 28 countries, both the US and EU are a collection of separate bodies combined in, and to certain extent governed by, a higher level of government. The United States' legal system on a federal level can be considered to be similar to the legal system of the European Union on a supranational level, as both of the highest courts are bound to interpretation of the law. Lower levels of government, the States and the Member States, are bound by both legislation of the higher level of government and rulings of the highest court interpreting that legislation.

#### 6.1.2 Differences and similarities between US and EU taxation systems

The US levies several taxes on a federal level and several taxes on a state level. Federal taxes most notably include personal and corporate income tax, payroll tax, estate tax, gift tax and excise tax. The state taxes vary across the different states. Though differing in subject, object and rate, generally speaking these state taxes can most notably include personal and corporate income tax, property tax, sales tax and use tax.

The competence to levy tax in the European Union lies with national governments. The EU does not levy any tax on supranational level. The system of Value Added Tax is largely harmonized though. As with any national law, national tax laws must also be in coherence with European Union law according to the primacy of European Union law.

The general allocation of taxation rights between the different levels of government in the US and EU can be considered to be very different from each other. Where the US levies several taxes on a federal level and several taxes on a state level, the EU doesn't levy any tax on supranational level with the addition that VAT is largely harmonized.

## 6.2 Differences and similarities of the substance

The substance of the Dormant Commerce Clause consists of the following criteria:

1. There must to be a substantial nexus.
2. There must be nondiscrimination.
3. There must be a fair apportionment.
4. There must be a fair relationship to services provided by the state.

The substance of the state aid provisions consist of the following criteria:

1. There has to be an advantage in any form whatsoever.
2. This advantage is granted by a Member State or through State resources, thus from State-originated resources.
3. This advantage only applies to certain undertakings or the production of certain goods.
4. This advantage distorts or threatens to distort competition between Member States.

These substances are very different in both theory and appliance.

## 6.3 Differences and similarities of the procedures

There is no preventive supervision at hand, the only procedural aspect available is challenging state legislature in the court of law. The outcome of a state tax law challenged by the Dormant Commerce Clause essentially consists of one out of two possibilities. Either the state law will be upheld, or it will be struck down. The Supreme Court forbids a state law regarding taxation under the Dormant Commerce Clause in the following cases:

1. If there is no substantial connection between a state and a tax subject, a substantial nexus.
2. If the state tax discriminates between intrastate and interstate commerce.
3. If the state tax taxes more than a fair apportionment.
4. If the state tax does not constitute a fair relationship to services provided by the state.

In other cases the state law will be upheld.

Considering the procedure of the prohibition of state aid one has to distinguish new and existing aid. New aid is under preventive supervision, existing aid is under repressive supervision. Regarding new aid, as it is under preventive supervision, the Commission will have to agree on the implementation of new aid. Therefore, aid which the Commission deems to be incompatible with the internal market, otherwise said aid which is discriminatory against foreign economic activity, will either never be implemented or will be amended until found satisfactory. Regarding existing aid, as it is under repressive supervision, the Commission shall decide that the aid must be abolished or amended until found satisfactory. The Commission can even recover the granted amounts including interest to restore effective competition. This ensures that existing state aid will cease to exist.

Concerning the procedures, there are differences and similarities. Where the consequence of the procedure, or lack thereof, of the Dormant Commerce Clause only comprise of the survival or downfall of the state law, the effects of the state aid provisions comprise of those and adding amendment and preventive supervision.

#### 6.4 Differences and similarities of the tests against the purpose

The Supreme Court would strike down state taxes that discriminate against intrastate as well as interstate economic activity, essentially having a broader impact than the purpose of the Dormant Commerce Clause. Therefore, in theory, the effect of the Dormant Commerce Clause achieves and transcends the purpose by eliminating state taxes discriminating against intrastate and interstate economic activity.

The state aid provisions capture the purpose of prohibiting discrimination against foreign economic activity through its application on tax measures. The provisions apply to many other forms of selectivity as well, broadening the scope of the state aid provisions in light of its purpose. The substance captures and goes beyond the purpose.

Both the Dormant Commerce Clause and the state aid provisions capture and transcend their purpose of elimination of discrimination against interstate or foreign economic activity, yet they do so in a different way. The Dormant Commerce Clause affects both intrastate and interstate economic activity, where the state aid provisions affect many other forms of selectivity as well.

#### 6.5 Conclusion

There are general differences and similarities between the United States and European Union governmental and taxation systems. The US is one country consisting of many states where the EU is a supranational entity consisting of many countries. The United States' legal system on a federal level can be considered to be similar to the legal system of the European Union on a supranational level, as both of the highest courts are bound to interpretation of the law. The taxation systems differ widely, where the US levies several taxes on a federal level and several taxes on a state level, the EU doesn't levy any tax on supranational level with the addition that VAT is largely harmonized.

The general allocation of taxation rights between the different levels of government in the US and EU can be considered to be very different from each other. Where the US levies several taxes on a federal level and several taxes on a state level, the EU doesn't levy any tax on supranational level with the addition that VAT is largely harmonized.

The substance of the Dormant Commerce Clause and the state aid provisions can be considered to be different.

Concerning the procedures, there are differences and similarities. Where the procedure of the Dormant Commerce Clause only comprise of the survival or downfall of the state law, the effects of the state aid provisions comprise of those and adding amendment and preventive supervision.

The purposes of the Dormant Commerce Clause and the prohibition of state aid can be described as the elimination of discrimination against interstate or foreign economic activity. As their purposes are heavily similar, they can be usefully compared to each other.

Both the Dormant Commerce Clause and the state aid provisions capture and transcend their purpose of elimination of discrimination against interstate or foreign economic activity, yet they do so in a different way. The Dormant Commerce Clause affects both intrastate and interstate economic activity, where the state aid provisions affect many other forms of selectivity as well.

## Paragraph 7: Conclusion

There are general differences and similarities between the United States and European Union governmental and taxation systems. The US is one country consisting of many states where the EU is a supranational entity consisting of many countries. The United States' legal system on a federal level can be considered to be similar to the legal system of the European Union on a supranational level, as both of the highest courts are bound to interpretation of the law. The taxation systems differ widely, where the US levies several taxes on a federal level and several taxes on a state level, the EU doesn't levy any tax on supranational level with the addition that VAT is largely harmonized.

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