Influence of EU Law on Taxation in the EU Member States' Overseas Territories and Crown Dependencies

In-Depth Analysis for the TAXE 2 Committee

2016
Influence of EU Law on Taxation in the EU Member States' Overseas Territories and Crown Dependencies

IN-DEPTH ANALYSIS

Abstract
This legal study researches the influence on tax law and practice in the overseas areas of the Member States by state aid rules, secondary EU tax law and the Overseas Association Decision. The state aid rules and secondary EU tax law apply to the outermost Regions, Gibraltar and the Åland Islands and not to the Overseas Countries and Territories and the Crown Dependencies, although the Savings Directive applies atypically. An amendment of the Overseas Association Decision might provide a solution.

This document was prepared by Policy Department A at the request of the TAXE2 Committee.
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LIST OF ABBREVIATIONS

CCCTB  Common Consolidated Corporate Tax Base
CJEU  Court of Justice of the European Union
OAD  Overseas Association Decision
OCT  Overseas Countries and Territories
OMR  Outermost Regions
TEU  Treaty on European Union
TFEU  Treaty on the Functioning of the European Union
UCC  Union Customs Code

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1 Regulation 952/2013 laying down the Union Customs Code (OJ 2013, L269/1).
EXECUTIVE SUMMARY

Background
Since the discussion on harmful tax competition in the mid-nineties of the preceding century, the question arises to which extent national tax law can be influenced by EU law. The Commission started a first wave of state aid cases with regard to favourable tax measures in July 2001 and concluded that tax measures of several Member States constituted unlawful state aid. The tax laws had to be amended and the state aid in some cases recovered. State aid has shown to be a powerful tool to influence national tax legislation which was considered to be harmful. Not all harmful taxes can however be characterised as state aid. Furthermore, some overseas areas offering low tax offshore constructions are part of EU Member States or have a special relationship with them. For those areas the question arises whether their 'regional' tax laws can be influenced by EU law.

Aim
The in-depth analysis should evaluate the impact of EU law on the tax law of the overseas' countries and territories (OCT) and the outermost regions of the EU Member States.

The research in this report will:

- discuss the influence of EU law on the tax law and practices of the Member States in general (chapter 1);
- establish the territorial scope of application of EU law with regard to the OCT and the outermost regions (chapter 2);
- examine the application of EU State aid law and its enforcement in tax matters in overseas countries and territories and the outermost regions (chapter 3);
- specify to which extent current and/or future EU secondary law concerning direct and indirect taxes has to be implemented by overseas countries and territories and the outermost regions (chapter 4);
- conclude with an overview of the legal possibilities of the Union to influence the tax law and practices of the overseas countries and territories and the outermost regions (chapter 5);
- present a case study on the absence of taxation of profits of companies established on the Dutch OCTs Bonaire, Sint Eustatius and Saba (chapter 6).
Conclusion

For the purpose of this executive summary, an overview of the findings of this report is represented in the form of a matrix in the following table.

Table 1: Matrix of relevant EU law in the overseas

<table>
<thead>
<tr>
<th>Overseas Area</th>
<th>State Aid</th>
<th>Direct taxation</th>
<th>Indirect taxation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Companies</td>
<td>Savings dir.</td>
</tr>
<tr>
<td>OMR</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- French</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>- Spanish</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>- Portuguese</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>OCT</td>
<td>X</td>
<td>X</td>
<td>✓</td>
</tr>
<tr>
<td>Gibraltar</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Åland Islands</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Crown Dep.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Channel Isl.</td>
<td>X⁴</td>
<td>X</td>
<td>✓</td>
</tr>
<tr>
<td>- Isle of Man</td>
<td>X⁶</td>
<td>X</td>
<td>✓</td>
</tr>
</tbody>
</table>

2 Since the UCC applies to goods coming from outside the Customs Territory, the sign ✓ means that the area is included in the Customs Territory and the sign X means that the area is located outside the that territory.

3 Directive 2003/48/EC on taxation of savings income in the form of interest payments (the Savings Directive) (OJ 2003, L157/38) applies only to the Dutch and five Caribbean British OCT, with the exception of Bermuda. As for the French OCT, it only applies to Saint-Barthélemy. It does not apply to the Danish OCT Greenland.

4 Except for agricultural products and limited to Articles 108(1) TFEU and the first sentence of Article 108(3) TFEU.
1. **INFLUENCE OF EU LAW ON THE MEMBER STATES' TAX LAW**

**KEY FINDINGS**

Direct taxation remains Member States' jurisdiction. That jurisdiction must, however, be exercised consistently with EU law. Direct taxation is influenced by the provisions on free movement and state aid. Secondary EU law in the field of direct taxation must be decided on unanimously by the Council. Secondary EU law in the field of direct taxation of companies is only marginal, since the major areas of company taxation are not harmonised.

This chapter will discuss the legal possibilities of the Union to influence the tax law and practices of the Member States in general.

1.1. **Direct taxation of companies**

1.1.1. **Influence of primary EU law**

The jurisdiction or competence to regulate direct taxation is retained by the Member States. This does not mean that EU law has no influence on national tax law. As the CJEU expresses it: "the powers retained by the Member States must nevertheless be exercised consistently with [EU-]law".  

National tax rules of the Member States may unduly hinder free movement of mainly establishment (Article 49 TFEU), services (Article 56 TFEU), or capital (Article 63 TFEU). In cases coming to the CJEU by preliminary reference or by infringement procedure, the CJEU often ruled that national tax rules disallowing non-residents tax advantages granted to residents of a Member State infringed one of the free movement provisions of the TFEU without justification. This leads to so-called negative harmonisation.

At the same time, tax law - both direct and indirect - of the Member States may not conflict with the state aid rules of Articles 107 TFEU et seq. Fiscal measures may also constitute state aid, even though no State resources have been transferred to the undertaking, as in

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6 Case C-279/93 Schumacker 1995 [ECR] I-225, para. 12; this is a standard formula/mantra used by the CJEU in free movement cases with regard to national tax rules which (possibly) hinder free movement.


the case of a subsidy.\textsuperscript{10} Therefore they must be notified to and cleared by the European Commission on the basis of Article 108(3) TFEU, in default of which the state aid is unlawful.\textsuperscript{11}

1.1.2. Influence of secondary direct tax law

Positive harmonisation of the Member States' tax laws as such and by itself is not an objective of EU law. Secondary EU law in the domain of direct taxation of companies is found in the policy field of the internal market (Article 26 TFEU) in order to abolish tax obstacles to cross-border business.

With regard to internal market directives in the field of fiscal policy, the Council has to decide "unanimously in accordance with a special legislative procedure" according to Article 114(2) and 115 TFEU. This is one of the few domains in which Member States still hold a veto-right since unanimity is required. The European Parliament and the Economic and Social Committee have a consulting role in this procedure.

Positive harmonisation of direct taxation of companies has been effectuated by the following four directives:

- directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (the Parent-Subsidiary Directive);\textsuperscript{12}
- directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (the Interest and Royalty Directive);\textsuperscript{13}
- directive 2009/133/EC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (the Merger Directive).\textsuperscript{14}
- directive 2011/16/EU as regards administrative cooperation in the field of taxation (the Administrative Cooperation Directive).\textsuperscript{15}

The first two directives provide (under conditions) for tax-free intra-group payments of (i) dividends and (ii) interest and royalties. Furthermore, the Merger Directive provides (under conditions) for tax-free group restructuring. The Administrative Cooperation Directive provides for exchange of information between Member States' tax authorities and other forms of administrative cooperation. For further details on these directives and possible future directives regarding the direct taxation of companies, see section 4.1.1., below.


\textsuperscript{11} According to the definition of Article 1(f) of Regulation 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015, L248/9).

\textsuperscript{12} OJ 1990, L225/20.

\textsuperscript{13} OJ 2003, L157/49.


The major areas of direct company taxation are however not harmonised, such as the definitions of

- taxable persons;
- the tax base (i.e. the definition of taxable profit and deductible costs, period of amortisation of investments and R&D-costs, etc.); and
- tariffs.

The above mentioned four directives concern relatively minor details of the national tax legislation. Positive harmonisation of direct taxation of companies is in the author's view therefore only marginal.

1.2. Indirect taxation

Since one of the main pillars of EU law is the customs union within which free movement of goods is allowed, all rules with regard to customs duties is harmonised in Regulation 952/2013 laying down the Union Customs Code (the Union Customs Code (UCC)).

Related to that is that vast harmonisation of other indirect taxes, such as VAT through Directive 2006/112/EC on the common system of value added tax, excise duties on alcohol, tobacco and energy and indirect taxes on the raising of capital. In those areas, there is hardly any room left for the Member States to regulate indirect taxes on a national level independent of that vast harmonisation.

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16 OJ 2013, L269/1.
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2. TERRITORIAL SCOPE OF EU LAW WITH REGARD TO THE OVERSEAS

KEY FINDINGS
EU law applies to the entire territory of all Member States with a variable intensity. The association regime is EU law and therefore EU law applies to the OCTs.

This chapter will discuss the territorial scope of application of EU law with regard to the overseas parts of Member States in general and the OCT and the OMR in particular.

2.1. The general framework: Art. 52 TEU & Art. 355 TFEU and Accession Protocols
The territorial scope of EU law is defined by Article 52 TEU. According to Article 52(1) TEU the Treaties (i.e. the TEU and TFEU;20 thus primary EU law) shall apply to the Member States.21 This implies that (primary) EU law applies to the complete territory of the Member States. The territorial scope of EU law is according to Article 52(2) TEU further specified in Article 355 TFEU. Especially with regard to the overseas parts of some Member States further specifications are made in that provision. Some group-wise as the so-called Outer-Most Regions (OMR) and Overseas Countries and Territories (OCT) (the OMR and OCT concerned are enumerated in Annex 1 to this report) and others are distinguished individually to which a status sui generis. It concerns in:
- Article 355(1) TFEU: the French, Portuguese and Spanish OMR;
- Article 355(2) TFEU: the British, Danish, Dutch and French OCT;
- Article 355(3) TFEU: Gibraltar;
- Article 355(4) TFEU: the Finnish Åland Islands;
- Article 355(5)(c) TFEU: the Crown Dependencies of the Channel Islands and Isle of Man.

On the basis of Article 355(6) TFEU, the status of an OMR may be changed to the OCT and vice versa by an unanimous decision of the European Council. The first decisions of this kind were taken with regard to the French island of Saint-Barthélemy, whose status was changed from OMR to OCT22 and a status change from OCT to OMR was adopted with regard to the French island Mayotte.23

Next to the specifications made in Article 355 TFEU, some (protocols to) treaties of accession also provide for further specification of the territorial scope in relation to the new Member

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20 According to Article 1 TEU.
21 The Euratom-Treaty has defined its own territorial scope in Article 198 and slightly differs from the other Treaties. Since the Euratom-Treaty is outside the scope of the report, that treaty and the differences will not be treated further.
States, without Article 355 TFEU referring to those protocols. For example, Article 25 (1) of the Act of Accession of Spain and Portugal\(^24\) determines that

"[t]he Treaties and the acts of the institutions of the European Communities shall apply to the Canary Islands and to Ceuta and Melilila, subject to the derogations referred to in paragraphs 2 and 3 and to the other provisions of this Act."

Protocol 2 to the Act of Accession of Spain and Portugal contains further specifications on the (territorial) application of EU law to the Canary Islands and Ceuta and Melilila. This study will not research the application of EU law in Ceuta and Melilila further. The Canary Islands are a Spanish OMR.

2.1.1. Article 355(1) TFEU: Outermost Regions

According to Article 355(1) TFEU "[t]he provisions of the Treaties shall apply to [the OMR] in accordance with Article 349."

On the basis of Article 349 TFEU, further measures "shall be adopted" by the Council

"[t]aking account of the structural social and economic situation of [the OMR], which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development".

On the basis of this provision, secondary EU law has been adopted which applies specifically to the OMR.\(^25\)

The main rule is that EU law applies to the OMR. Therefore the OMR are part of the internal market, but (tailor-made) exceptions are allowed.\(^26\)

2.1.2. Article 355(2) TFEU: Association of the OCT

According to Article 355(2) TFEU only Part Four of the TFEU will apply to the OCT (Articles 198-204 TFEU). This is the so-called Association Regime. Based on this regime (i.e. Article 203 TFEU) is the so-called Overseas Association Decision (OAD) which contains more detailed rules. The OAD is replaced periodically. Since 1 January 2014 the Eighth OAD\(^27\) is in force. The OCT are listed in Annex II to the TFEU (see also annex 1 to this report).

Although Article 355(2) TFEU suggests that only the Association regime of Part IV TFEU applies to the OCTs, it is not excluded that EU law of more general nature which are not contained in the Association Regime apply to the OCT. For example, judges from OCTs are judges from a Member State who can ask the CJEU for a preliminary ruling on the basis of Article 267 TFEU.\(^28\) Nevertheless, the main rule stays that only the Association Regime of Part Four TFEU and the OAD applies to the OCT; material rules such as the internal market and state aid rules do not apply (see chapters 3 and 4 below).

The importance of the OAD for the definition of the legal relationship between EU rules and the law of the covered OCT suggest to take a deeper look into the decision-making process of the OAD and the role of the OCTs therein.


\(^{26}\)Case 148/77 Hansen 1978 [ECR] 1787, para. 9 and 10.


\(^{28}\)Joined cases C-100/89 and C-101/89, Kaefer and Procacci [1990] ECR I-4647, para. 8-10.
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The decision making process of the OAD and the role of the OCTs

After a proposal from the Commission, the Council decides unanimously on the basis of Article 203 TFEU on (the content of) the OAD in accordance with a special legislative procedure and after consulting the European Parliament.

The (representatives of the) OCTs are formally not involved in the decision making process of the OAD. This might lead to (possible) conflicts of interest between a Member State and its 'own' OCTs when voting for (an amendment of) the OAD. The following example is illustrative of such a conflict. With regard to the preferential treatment of sugar and rice coming from the Dutch OCTs, the Kingdom of the Netherlands intended to vote for an amendment of the OAD limiting the amount of sugar and rice under the preferential treatment. This was not in the direct interest of the Dutch OCT. The Dutch OCT tried fruitlessly to obtain a judicial order from a Dutch judge to prohibit its government / minster of external affairs to vote in the Council's meeting on the amendment.29

Even though, the (representatives of the) OCTs are formally not involved, they were however (informally) involved in the preparation of the Eighth OAD as stakeholders.30

Furthermore, an OCT can request the Council to be outside the territorial scope of application of the OAD. At first sight, one might expect that the OAD applies de jure to all OCTs listed in Annex II to the TFEU. Nevertheless, the Council may decide otherwise and limit the territorial scope of the OAD by excluding specific OCTs. The following example is illustrative of such an exclusion. Although the British OCT Bermuda has been mentioned as OCT in the list of OCTs in Annex II to the TFEU since the accession of the UK to the EU, the OADs which were in force before the current Eighth OAD were not applicable to Bermuda "in accordance with the wishes of the Government of Bermuda."31 Since the entry into force of the Eighth OAD, the OAD is applicable to Bermuda since it "decided to join the [OAD]"32 and therefore applies to all OCTs listed in Annex II to the TFEU.

This case demonstrates that Bermuda (wished to be) opted-out till the Eighth OAD and opted-in to the Eighth OAD. With regard to opting-out/in, it is in the author's view - in the future - not up to OCTs to opt-out from the OAD. At least, the OAD is legally binding for the OCTs, since the Member States to which the OCTs 'belong' are party to the TFEU and bound by the Association regime of Part IV. Whether ignoring the wishes of an OCT is politically feasible and whether a request for an opt-out from the OAD can be denied by the Council, seems to be questionable in the author's view, having regard to the colonial history of most of the OCTs and consequent (sensitive) discussions on autonomy of the OCTs within the

29 These cases concerned the limitation of the quantities of rice and sugar which could be imported against preferential tariff from the Netherlands Antilles into the internal market on the basis of the OCT Decision applicable at the time; the OCT Decision was amended for that reason. The Dutch Government voted in favour of that amendment. See further: L.F.M. Besselink, 'Suiker en rijst uit de West- en Zuid-neren Europese betrekkingen', NJB 1998, nr. 29, p. 1291.


31 Recital 22 of the preamble of the Seventh OAD (OJ 2001, L314/1).

constitutional order of the Member States and the history of many OCTs becoming independent third States.

2.1.3. Article 355(3) TFEU: Gibraltar

Article 355(3) TFEU specifies that "the provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible." The Member State of the United Kingdom of Great Britain and Northern Ireland is responsible for the external relations of Gibraltar. Therefore, the general rule for Gibraltar is that EU law applies to its territory. However, specific exceptions have been made for Gibraltar in the UK Act of Accession, such as the exclusion of Gibraltar from the customs territory. That exclusion further "entails the inapplicability of the Treaty provisions and secondary legislation on trade in goods, unless otherwise expressly provided." Other primary EU law, such as the state aid rules (see Chapter 2 below), is nevertheless applicable.

2.1.4. Article 355(4) TFEU: Finnish Åland Islands

Article 355(4) TFEU specifies that EU law "shall apply to the Åland Islands in accordance with the provisions set out in Protocol 2 to [the Act of Accession of Austria, Finland and Sweden]." According to that Protocol "the Treaties on which the European Union is founded shall apply to the Åland islands with the [...] derogations" specified in that Protocol. For the purposes of this report only the derogation of Article 2(a) of that Protocol is relevant, since it determines that indirect tax directives will not apply to the Åland Islands. No derogation was made for the application of primary EU law.

33 As stated by the CJEU in Cases C-30/01 Commission/United Kingdom [2003] ECR I-9481, ECLI:EU:C:2003:489, para. 47 and C-145/04 Spain/United Kingdom [2006] ECR I-7917, para. 19 and as confirmed by the UK in Declaration 55 to the Treaty of Lisbon: "The Treaties apply to Gibraltar as a European territory for whose external relations a Member State is responsible. This shall not imply changes in the respective positions of the Member States concerned."

34 The act concerning the conditions of accession for the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the adjustments to the Treaties (OJ 1972, L73/14).

35 Article 29 of that the UK Act Of Accession and Annex I, Section I, point 4, thereto.


37 Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1994, C241/358).


40 Cf. e.g. Case C-42/02 Lindman [2003] ECR I-13519 ECLI:EU:C:2003:613 on the application of the freedom to provide services in relation to local lottery taxes on the Åland Islands; this case demonstrates that primary EU law is applicable. Although, it should be noted that Article 1 of Protocol 2 allows for non-discriminatory restrictions for EU-citizens who do not possess the regional citizenship of the Åland Islands.
2.1.5. Article 355(5)(c) TFEU: The Channel Islands and Isle of Man

According to British (unwritten) constitutional law,\(^{41}\) the Crown Dependencies are not part (of the territory) of the United Kingdom.\(^{42}\) Parts of EU law nevertheless apply to those islands on the basis of Article 355(5)(c) TFEU and Protocol 3 to the UK Act of Accession.

According to Article 355(5)(c) TFEU "the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the [Protocol 3 to the UK Act of Accession]". According to Art. 1 of that Protocol the Union Customs Code applies to these British Crown Dependencies. Furthermore, EU law applies *grosso modo* to the trade in agricultural products according to Article 1(2) of that Protocol 3 to the UK Act of Accession and a non-discrimination obligation rests on these Crown Dependencies with respect to natural and legal persons on the basis of Article 4 of the aforementioned Protocol. With regard to tax law, only the Union Customs Code applies in conformity with the protocol.

2.1.6. Some exceptions to the rule

According to Article 355(a) TFEU, EU law does not apply to the Danish Faeroe Islands\(^{44}\) and according to Article 355(b) TFEU, EU law does not apply to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia on Cyprus.\(^{45}\)

As for the latter, the question arises to which extent EU law applies to the part of the Member State Cyprus where the government does not exercise effective control. According to Article 1(1) of the Protocol 10 to the Act of Accession of Cyprus (and nine other Member States)\(^{46}\) the application of the *acquis* is suspended in that area.\(^{47}\) Be that as it may, this study will not research the application of EU law on the Faeroe Islands and Cyprus further.

2.2. Secondary EU law

The territorial scope of secondary EU law follows the system of Art. 52 TEU and Art. 355 TFEU, unless specifically provided otherwise by the regulation or directive itself, i.e. in some

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\(^{43}\) The act concerning the conditions of accession for the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the adjustments to the Treaties (OJ 1972, L73/14).

\(^{44}\) Although a Free Trade Agreement applies with respect to the Faeroe Islands; Agreement between the European Community, of the one part, and the Government of Denmark and the Home Government of the Faeroe Islands, of the other part (OJ 1998, L53/2).

\(^{45}\) Except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus annexed to the Act of accession Cyprus (and 9 other Member States). For example, the VAT Directive applies to those bases (Article 7(1) of the VAT Directive) and they are part of the Customs Territory (Article 4(2) of the UCC).

\(^{46}\) Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003, L236/33).

\(^{47}\) Whereas the CJEU held that EU law did apply to a case concerning real estate located in the northern part of Cyprus in a dispute on the execution in the UK of a judgment of a court in the southern part of Cyprus, between residents of the southern part of Cyprus and the UK; Case C-420/07, Apostolides 2009 [ECR] I-3571, ECLI:EU:C:2009:271; see also Skoutaris, N., ‘The status of northern Cyprus under EU law. A comparative approach to the territorial suspension of the acquis’ in D. Kochenov (ed.), *On bits of Europe everywhere. Overseas Possessions of the EU Member States in the Legal-Political Context of European Law*, The Hague: Kluwer Law International, 2011.
regulations and directives the territorial scope is explicitly defined by deviating from this main rule.48 The CJEU concluded that secondary EU law therefore “appl[ies] in principle to the same geographical area as the treaty itself”.49

2.3. Conclusion on the general framework of territorial scope

The conclusion on the territorial scope of EU law is in Ziller’s view that “E[U]-law applies to the entire territory of all Member States, but with a variable intensity”.50 This view is in the author’s view correct, save three minor exceptions: (i) the Danish Faeroe Islands, to which EU law does not apply; (ii) Cyprus, with its northern part and the UK Sovereign Base Areas; and (iii) the British Crown Dependencies which are not part of British territory, but to which (a part of) EU law applies. Those three exceptions do - in the author's view - not alter the quintessence Ziller's conclusion.

As for the OCT, some authors come to the conclusion that the OCTs fall outside the territorial scope of EU law.51 That is in the author’s view an erroneous conclusion for two reasons. Firstly, on the OCTs EU law is applicable, although not the vast part of EU law, but the association regime of Article 198 TFEU et seq., the OAD and some general rules/principles. The association regime is EU law and therefore EU law applies to the OCTs, although with less 'intensity' than to the internal market. Secondly, it is only indicated that the Treaties do not apply to the Faeroe Islands and the UK Sovereign Base Areas on Cyprus; it is not indicated that the Treaties do not apply to the OCT. Therefore one cannot conclude that the OCT fall outside the territorial scope of EU law.

48 E.g. Art. 4 of the Union Customs Code defines the Customs Territory and Art. 5-7 of the VAT Directive explicitly defines the territorial scope of that directive.


3. APPLICATION OF STATE AID LAW TO THE OVERSEAS

**KEY FINDINGS**

State aid law is not applicable to the OCT.

State aid law is not applicable to the Crown Dependencies, save the trade in agricultural products.

State aid law is applicable to the OMR, Gibraltar and the Åland Islands.

This chapter will examine the application of EU State aid law and its enforcement in tax matters in the overseas parts of the Member States. This chapter will not address the material definition of state aid in relation to fiscal regimes, such as for example the specificity-test with regard to fiscal state aid.

### 3.1. Outermost Regions

As indicated in Chapter 2 above, the *acquis* applies to the OMR, although exceptions are possible. The application of the state aid rules of Article 107 TFEU et seq. is not excluded for the OMR.

According to Article 107(3)(a) TFEU aid to promote the economic development of the OMR may be considered compatible with the internal market, since the OMR are explicitly mentioned in this provision and assimilated to

"areas where the standard of living is abnormally low or where there is serious underemployment (...), in view of their structural, economic and social situation".

The Commission has approved many state aid regimes on that basis. Even fiscal state aid cases, for example in the Customs House Docks Area in Dublin the deduction from the taxable profit of two times the actual rent paid (double rent relief) and a relief from the local property tax (local rates remission).\(^{52}\) Albeit Ireland is not an OMR, this case demonstrates that also fiscal state aid can be declared compatible on the basis of Article 107(3)(a) TFEU. The Commission also applied the justification of Article 107(3)(a) TFEU to fiscal state aid on (parts of) the OMR (see the examples in annex 2).

However, some fiscal regimes in the OMR were characterised as unlawful state aid, such as the reductions of the income tax rate for natural and legal persons having their tax residence in the Azores.\(^{53}\)

### 3.2. Overseas Countries and Territories

As indicated in Chapter 2 above, only the association regime of Article 198 TFEU et seq. and the OAD apply to the OCT. The state aid rules of Article 107 TFEU et seq. fall outside those provisions and are therefore not applicable. The OAD itself provides in Article 60 for the implementation of competition rules, but only for a cartel prohibition and a prohibition of the

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\(^{53}\) Decision 2003/442/EC of 11 December 2002 on the part of the scheme adapting the national tax system to the specific characteristics of the Autonomous Region of the Azores which concerns reductions in the rates of income and corporation tax (OJ 2003 L 150, p. 52), upheld by the CJEU in Case C-88/03 Portugal/Commission 2006 [ECR I-7115 ECLI:EU:C:2006:511].
abuse of a dominant position, similar to Articles 101 and 102 TFEU and does not provide for application of state aid rules similar to Article 107 TFEU et seq. The European Commission’s decision with regard to state aid at the benefit of the inhabitants of the French OMR and OCT is instructive on this point.


3.3. Gibraltar
As indicated above in section 2.1.3., the provisions of the Treaties shall apply to Gibraltar, unless an exception is provided. The application of the state aid rules of Article 107 TFEU et seq. is not excluded. The Commission has initiated several state aid cases against fiscal regimes in Gibraltar (see the examples in annex 2).

3.4. Finnish Åland Islands
As indicated above in section 2.1.4., the provisions of the Treaties shall apply to the Åland Islands unless derogations are provided for in Protocol 2 to the Act of Accession of Austria, Finland and Sweden. As for the state aid rules of Article 107 TFEU et seq. no derogations were made. Therefore the state aid rules apply to those islands. The Commission has initiated a state aid case against a fiscal regimes on the so-called captive insurance scheme (see annex 2).

3.5. The Channel Islands and Isle of Man
As indicated above in section 2.1.5., only few provisions of EU law apply to the British Crown Dependencies. According to Article 1(2) of Protocol 3 to the UK Act of Accession, EU law applies _grosso modo_ to (trade in) agricultural products. Also the state aid rules apply to (trade in) agricultural products, although limited Articles 108(1) TFEU and the first sentence of Article 108(3) TFEU on the basis of Article 2 Regulation 706/73. 55 Consequently the Commission shall be notified by the UK of aid in the Crown Dependencies, it can propose appropriate measures, but it cannot oppose to the granting of such aids. With regard to direct taxation of companies on the Crown Dependencies, the state aid rules do not apply.

3.6. Conclusion on state aid law
State aid law is not applicable to the OCT. As for the Channel Islands and the Isle of Man (a part of the) state aid law is only applicable to the agricultural sector and therefore not to fiscal state aid which might be offered in offshore tax constructions. State aid law is applicable to the OMR, Gibraltar and the Åland Islands. The European Commission has already initiated state aid cases with regard to tax measures in those regions (see annex II). As far as the authors is aware the French OMR, to which the state aid rules apply, are not known/(in)famous for offering off-shore tax structures. Besides, state aid is often allowed in the OMR since they are remote and economically disadvantaged regions.

54 Commission decision of 5 October 2010 in N 159/2010 concerning state aid at the benefit of the inhabitants of the French overseas, para. 39 and footnote 15 (only available in French).

4. APPLICATION OF SECONDARY TAX LAW TO THE OVERSEAS

KEY FINDINGS

Directives concerning direct taxation of companies apply to the OMR, Gibraltar and Åland Islands.

Which overseas areas of the Member States are included in the Customs Territory or in the Fiscal Territory for VAT purposes varies.

In this chapter it will be specified to which extent current and/or future EU secondary law concerning direct and indirect taxes has to be implemented in the OCT and OMR. The focus of this chapter is on secondary tax law which affects the taxation of companies.

4.1. Direct taxation of companies

4.1.1. Internal Market Directives

As indicated in section 1.1.2, above, in the field of direct taxation of companies, four directives are in force:

- the Parent-Subsidiary Directive;
- the Interest and Royalty Directive;
- the Merger Directive.
- the Administrative Cooperation Directive.

These four directives are internal market directives and therefore only applicable to the overseas' parts of the Member State which are part of the internal market; i.e. the OMR.56 These directives also apply to Gibraltar. With regard to the internal market rules, only the rules and directives on the free movement of goods do not apply to Gibraltar, since it is outside the customs territory.57 As for the Finnish Åland Islands, no derogations from these directives were provided for and consequently the apply ratione territoriae on those islands.

Next to the aforementioned four directives, an inter-governmental Convention is in force between all the Member States on double taxation and transfer pricing.58 Since this convention was concluded outside the ambit of the European Community, now European Union, this convention will not treated further for the purposes of this report.

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56 Nevertheless, France took up the obligation to extend the scope of the mutual assistance directive 77/799/EEC to its OCT Saint-Barthélemy upon its change of status from OMR to OCT; Recital 4 of European Council Decision 2010/718/EU of 29 October 2010 amending the status with regard to the European Union of the island of Saint-Barthélemy (OJ 2010, L325/4).

57 Confirmed by the CJEU concerning the failure to partially implement the mutual assistance directive 77/799/EEC in Case C-349/03 Commission / UK 2005 [ECR] I-7321 ECLI-code: ECLI:EU:C:2005:488.

4.1.2. Proposed directives in the field of direct taxation

As to possible future harmonisation in the field of direct taxation of companies, the Commission has issued three proposals for directives:

- on a Common Consolidated Corporate Tax Base (CCCTB);\(^{59}\)
- on anti tax avoidance;\(^{60}\)
- on the automatic exchange of information on tax rulings;\(^{61}\)

Since these are also internal market directives, it meets the same fate: only applicable to the overseas' parts of the Member State which are part of the internal market; i.e. the OMR, Gibraltar and the Åland Islands.

4.2. Indirect taxes

This section focuses on VAT and Custom duties. Other indirect taxes, such as excise duties\(^{62}\) on alcohol, tobacco and energy and indirect taxes on the raising of capital\(^{63}\) are outside the scope of this report, since - in the author's understanding - they fall outside the scope of the aim of the TAXE 2 Committee.

4.2.1. Fiscal Territory for VAT purposes

With regard to the overseas' areas of the Member States on which this report focuses, the VAT Directive\(^{64}\) determines that it does apply to the Portuguese OMR,\(^{65}\) but does not apply to the French\(^{66}\) and Spanish\(^{67}\) OMR and to the Åland Islands.\(^{68}\)

Gibraltar also falls outside the territorial scope of the VAT Directive on the basis of Article 28 of the UK Act of Accession to the European Communities determines that "the acts on the harmonization of legislation of Member States concerning turnover taxes, shall not apply to Gibraltar unless the Council, acting unanimously on a proposal from the Commission, provides otherwise."

As for the Crown Dependencies a division has to be made, since the VAT Directive does apply to the Isle of Man\(^{69}\) and does not apply to the Channel Islands.\(^{70}\)

\(^{59}\) Proposal for a directive on a Common Consolidated Corporate Tax Base (COM(2011) 121/4 final).
\(^{60}\) Proposal for a Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market (COM(2016) 26 final).
\(^{64}\) Directive 2006/112/EC on the common system of value added tax (OJ 2006, L347/1).
\(^{65}\) Nevertheless, particular provisions on the Azores and Madeira may be found in the VAT Directive in Articles 105, 142 and 149.
\(^{66}\) Article 6(1)c of the VAT Directive.
\(^{67}\) Article 6(1)b of the VAT Directive.
\(^{68}\) Article 6(1) of the VAT Directive.
\(^{69}\) Article 7(1) of the VAT Directive.
\(^{70}\) Article 6(1)e of the VAT Directive.
4.2.2. Customs Territory

According to Article 4(1) of the Union Customs Code\(^{71}\), the British, Danish, Dutch and French OCT are excluded from the Customs Territory. The OMR and Åland Islands are not excluded from the customs territory. The Isle of Man and Channel Islands are explicitly mentioned as being part of the Customs Territory. Gibraltar is outside the customs territory in accordance with Article 29 of that the UK Act of Accession and Annex I, Section I, point 4, thereto.\(^ {72}\)

\(^{71}\) Regulation 952/2013 laying down the Union Customs Code (OJ 2013, L269/1).

\(^{72}\) Confirmed by the CJEU in Case C-30/01 Commission/United Kingdom [2003] ECR I-9481, ECLI:EU:C:2003:489, para. 47.
5. POSSIBLE INFLUENCE BY THE EU ON THE TAX LAW AND PRACTICES OF THE OMR AND OCT

KEY FINDINGS

Although the Savings Directive constituted an internal market directive, its territorial scope was extended to overseas areas outside the internal market.

The application of the state aid rules to the OCT could be realised by including those rules in the OAD (by amendment).

Member States could voluntarily give commitments that their OCTs and Crown Dependencies would not become a tax haven.

This chapter will discuss the legal possibilities of the Union to influence the tax law and practices of the overseas countries and territories and the outermost regions in particular.

5.1. The direct tax directives do not apply overseas, except for Savings Directive

As mentioned in section 1.1, above, direct taxation remains one of the few policy fields where Member States have the general competence to regulate and on which the Council has to vote unanimously when it comes to harmonisation. To the OCTs which offer attractive tax structures from a company point of view, the internal market directives on direct taxation of companies do not apply, since the OCTs are not part of the internal market. Nevertheless, the internal market Directive 2003/48/EC on taxation of savings income in the form of interest payments (the Savings Directive)\(^{73}\) demonstrates that even within this domain, where consensus is complicated because of veto-right, a solution was found to extend the territorial scope to the (most) Caribbean OCTs and to the Crown Dependencies, even though those areas are outside the internal market.

5.1.1. Extension of the territorial scope outside the internal market

The Netherlands and the United Kingdom committed themselves to introduce, within the framework of their constitutional arrangements, measures equivalent to the Directive within the territory of their OCTs.\(^{74}\) As for the UK these were the Crown Dependencies and only its Caribbean OCTs with the exception of Bermuda. The territorial scope of the Savings Directive was even extended to five third countries on the basis of bilateral agreements concluded with the European Community.\(^{75}\)

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74 Cf. 2181st ECOFIN Council meeting of 25 May 1999 (PRES/99/165) and the written implementation guarantees as included in the follow-up of 31 May 2005 to ECOFIN-Council on 12 April 2005 (9536/05).
Influence of EU law on Taxation in the EU Member States’ Overseas Territories and Crown Dependencies

With the status change from OMR to OCT of Saint-Barthélemy "France has undertaken to conclude the agreements [to ensure that the Savings Directive] will continue to apply in future to the territory of Saint-Barthélemy." 76

5.1.2. Implementation through a range of international treaties
The savings directive was implemented for those Crown Dependencies and British, Dutch and French OCT by all sorts of international treaties. As for the French OCT Saint-Barthélemy this was done by an agreement between the European Union and France.77 For all other overseas areas this was done in form of bilateral treaties often by an exchange of letters bases on model agreements agreed upon between the territories concerned and the Council. As an example of the amount of bilateral treaties to be concluded: for the Crown Dependencies this had to result in 75 bilateral Agreements between the (then) 25 existing and acceding Member States and the three Crown Dependencies in 2004.78

5.2. Influence through the Overseas Association Decision

5.2.1. Including State Aid Rules in the Overseas Association Decision
Although the application of the state aid rules is excluded for the OCT, the OAD contains a provision on competition law, albeit limited to the cartel prohibition and the prohibition to abuse a dominant position. In the author’s view this could be extended with the state aid rules. And - if appropriate - such an extension can be limited to fiscal state aid (alone) or even more specifically only to offshore financial services.79

This probably would not be in the interest of the OCTs which offer fiscal state aid through attractive tax law and practices, since the economies of many OCTs are largely dependent on the tax revenues and related financial services. Nevertheless, the Council decides unanimously (Article 203 TFEU) on (the content of) the OAD and not (the representatives of) the OCTs as described section 2.1.2, above. As the abovementioned example on preferential treatment of sugar and rice coming from the Dutch OCTs demonstrates, the Member States can take decisions against the interests of their 'own' OCTs. Furthermore, the case of the Savings directive demonstrate that the UK, the Netherlands and (even) their OCTs were not unwilling to cooperate. Eventually, exchange for economic loss might be found in an increase of the (financial) instruments for sustainable development which are already included in Part Four of the OAD (Articles 74 et seq.).

5.2.2. Cooperation in taxation matters
According to Article 66(2) of the OAD

"[n]othing in this Decision may be construed so as to prevent the adoption or enforcement of any measure aimed at preventing tax fraud or avoidance or evasion of taxes pursuant to the tax provisions of agreements to avoid double taxation or other tax arrangements, or domestic tax legislation in force."

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77 OJ 2013, L313/1.
78 According to Outcome of proceedings of 15 December 2004 on the two Model Agreements agreed upon between the Crown Dependencies and the Council (7408/3/04)).
79 A tailor made solution is in the author’s view possible, as is demonstrated by the Crown Dependencies to which state aid rules only apply to (trade in) agricultural products; see section 3.5, above.
However, this does not mean that any enforceable specific measures of such nature are provided for by the OAD. Article 73 of the OAD provides for a 'promotion' only of cooperation in taxation matters.

"The Union and the OCTs shall promote cooperation in the tax area in order to facilitate the collection of legitimate tax revenues and to develop measures for the effective implementation of the principles of good governance in the tax area, including transparency, exchange of information and fair tax competition."

Although this provision is in the author's view a soft-law obligation and not a hard legal obligation, it might form a basis to influence the national tax laws of the OCTs. Furthermore, the OAD can of course be amended in order to alter this soft-law obligation into a hard legal obligation. After a proposal of such an amendment from the Commission, the Council can decide such an amendment unanimously according to Article 203 TFEU after consulting the European Parliament.

5.3. Commitment for the Åland Islands not to become a tax haven

As a last example, it seems that during the accession negotiations Finland gave a commitment that it would not allow the Åland Islands to become a tax haven.80 The Commission is allowed under Article 2(b) of the Protocol No 2 to the Act of Accession to submit appropriate proposals to the Council when the fiscal exemptions with regard to custom duties and VAT "are no longer justified, particularly in terms of fair competition or own resources". This so-called safeguard clause seems to secure the commitment for the Åland Islands not to become a tax haven. In the event the commitment is not lived up to, the EU could withdraw the fiscal exemption through the safeguard clause.81

With respect to the Åland Islands, the commitment seems to be the result of the accession negotiations. Since those negotiations is a passed station for the EU Member States with OCTs and Crown Dependencies, they cannot involuntarily be 'forced' by the EU institutions to give a similar commitment with regard to the OCT and Crown Dependencies. Furthermore, any safe-guard measures to enforce the commitment are not available.

Nevertheless, Member States with OCTs have voluntarily done so with respect to the Savings Directive by letter to the Council. In the event those Member States are willing to give a commitment similar to Finland that 'their' OCTs and Crown Dependencies will not become 'tax havens', but do not live up to their commitment, the question arises whether an obligation under EU law is infringed. In the author's view, an infringement could be based on that voluntary commitment itself, whether or not in conjunction with the principle of loyal obligation of Article 4(3) TEU.

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6. CASE STUDY: ABSENCE OF PROFIT TAX ON DUTCH OCTS BONAIRE, SINT EUSTATIUS AND SABA

KEY FINDINGS

The absence of a profit tax on the BES-islands would have constituted state aid in the event the state aid rules were applicable.

For OCTs with sufficient regional autonomy, advantageous tax systems are not regionally selective and therefore do not qualify as state aid.

In this chapter a case study will be done on the taxation of profits of companies established on the Dutch OCTs Bonaire, Sint Eustatius and Saba (together abbreviated with the acronym BES or BES-islands). Companies established on those islands are taxed under the Tax Law BES (Belastingwet BES). The Tax Law BES does not contain any taxation of profits. This means that profits realised by companies established on one of the BES-islands is exempt from taxation. When that profit is distributed by that company to its shareholder a dividend withholding tax is due of 5% (Opbrengsbelasting; Article 5.1 Tax Law BES et seq.).

Even though the state aid rules are not applicable to the OCTs, it is for the purpose of the case study useful to establish whether the absence of a profit tax on the BES-islands would have constituted state aid in the event the state aid rules were applicable.

A measure is considered state aid when

(i) it is granted by a Member State or through State resources in any form whatsoever;
(ii) which distorts or threatens to distort competition;
(iii) by favouring certain undertakings (whether the aid is specific);
(iv) in so far as it affects trade between Member States.

As for the first criterion, when a Member State foregoes tax income the aid is granted through State resources, even though no payment is made directly by the State to the undertaking. As for the last criterion, the measure most probably affects trade between Member States, since companies established on the BES-Islands are presumably active worldwide. As for the second criterion, when a measure grants a specific advantage to an undertaking, this (almost) automatically distorts or threatens to distort competition. The most predominant criterion is the third criterion, whether the tax law grants undertakings a specific advantage.

Not levying a tax on profits of companies is undeniably an advantage. This is also confirmed by the preparatory documents of Act on the Tax Law BES. According to those documents, companies which are established on the BES have a tax burden which is significantly lower than for companies which are established in the Netherlands.

As for the question whether the aid is specific, one can distinguish material selectivity and regional selectivity. As for material selectivity, a company must fulfil material criteria to qualify for the advantage. Only companies established on the BES-islands are not taxed on their profits. When they are not established on the BES-islands, they are presumed to be

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82 Staatsblad 2010, nr. 845.
83 MvT Belastingwet BES, TK 2009–2010, 32 189, nr. 3, p. 35.
established in the Netherlands and are subject to the regular Dutch Corporate Income Tax (Vennootschapsbelasting) (Article 2(8) of the Dutch Corporate Income Tax). Under various alternative criteria a company can qualify as established on the BES-islands. The most important for the purposes of this report is that a company is considered to be established on the BES-islands when it employs full time three inhabitants of the BES-islands which manage amongst other investments, subsidiaries and loans to persons outside the BES-islands and have at their disposal real property at the value of at least USD 50,000 (Article 5.2(2)(c) Tax Law BES). Although many companies can qualify, not every company qualifies. Therefore, the conclusion may already be that the advantage is materially specific. Secondly, the measure can also be regionally specific. When the area of reference is the BES-islands, the measure is not regionally specific since every company established on the BES-islands are able to benefit from the measure. When the area of reference is the Netherlands as a whole, the measure is regionally specific, since only the companies established on the BES-islands can benefit, whereas companies established in the European part of the Netherlands cannot benefit. According to the CJEU in its judgment on the fiscal state aid on the Azores, the area of reference is limited to the regional territory provided that

(i) the regional authority sufficiently exercises autonomous powers,
   o which means that the decision must have been taken by a regional authority;
   o which has, from a constitutional point of view, a political and administrative status separate from that of the central government;

(ii) the measure has been adopted without the central government being able to directly intervene as regards its content; and

(iii) the regional authority assumes the political and financial consequences of such a measure, without the loss of (tax)revenue being offset by aid or subsidies from central government or other regions.

For some OCTs these criteria may make advantageous tax systems not (regionally) selective and therefore not qualify as state aid, in the event the state aid rules were to apply to the OCTs. The Tax Law BES was however enacted by the central legislator of the Netherlands, Dutch parliament. Furthermore, the revenues and foregone revenues of the BES Tax Law go to the central Dutch public funds. Therefore, the BES Tax Law does not comply with any of the three aforementioned criteria on regional selectivity. Consequently, the area of reference is the Netherlands as a whole, which makes the absence of profit tax regionally selective.

The absence of a profit tax on the BES-islands would have constituted state aid in the event the state aid rules were applicable.

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84 The Kingdom of the Netherlands constitutionally consists of four lands: Aruba, Curacao, St. Maarten and the Netherlands. The latter has a European part and a Caribbean part which consists of the BES-islands.


REFERENCES


## ANNEX 1: LIST OF OMR AND OCT

### French OMR
- Guadeloupe
- French Guiana
- Martinique
- Réunion
- Saint-Martin
- Mayotte

### Portuguese OMR
- the Azores
- Madeira

### Spanish OMR
- the Canary Islands

### Danish OCT
- Greenland

### Dutch OCT
- Aruba
- Bonaire
- Curaçao
- Saba
- Sint Eustatius
- Sint Maarten

### French OCT
- Saint-Barthélemy
- New Caledonia and Dependencies
- French Polynesia
- French Southern and Antarctic Territories
- Wallis and Futuna Islands
- Saint Pierre and Miquelon

### British OCT
- Anguilla
- Cayman Islands
- Falkland Islands
- South Georgia and the South Sandwich Islands
- Montserrat
- Pitcairn
- Saint Helena and Dependencies
- British Antarctic Territory
- British Indian Ocean Territory
- Turks and Caicos Islands
- British Virgin Islands
- Bermuda

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87 OMR as enumerated in Article 355(1) TFEU.

88 Although Mayotte is still listed in Annex II to the TFEU as OCT and not mentioned as OMR in Article 355(1) TFEU, it has become OMR but by means of a decision of the European Council on the basis of Article 355(6) TFEU; 2012/419/EU: European Council Decision of 11 July 2012 amending the status of Mayotte with regard to the European Union (OJ 2012, L204/131).

89 OCT as enumerated in Annex II to the TFEU.

90 The French pacific island of Clipperton is not mentioned as OMR or OCT. In the author’s view the consequence of the general rule of Article 52(1) TEU is therefore that EU law applies to that overseas island. Murray is of the same opinion; F. Murray, The EU and Member State Territories: A New Legal Framework Under the EU Treaties, The Hague: TMC Asser Press, 2012, p. 100. The European Commission is however of the opinion that EU law does not apply to it (answer on written question nr. 1007/84, OJ 1985, C62/34 and reconfirmed in OJ 2007, C293), although it - in the author’s view erroneously - figures in the list of OCTs in the Study on Structures of Aggressive Tax Planning and Indicators of the European Commission (Taxation papers, working paper 61–2015, p. 164).

91 Although Saint-Barthélemy is still mentioned as OMR in Article 355(1) TFEU and not listed in Annex II to the TFEU as OCT, it has become OCT but by means of a decision of the European Council on the basis of Article 355(6) TFEU; 2010/718/EU: European Council Decision of 29 October 2010 amending the status with regard to the European Union of the island of Saint-Barthélemy (OJ 2010, L325/4).
ANNEX 2: LIST OF FISCAL STATE AID CASES CONCERNING THE OVERSEAS

This list contains fiscal state aid cases concerning the Portuguese OMR, Gibraltar and the Åland Islands as of 2000.92

OMR: Azores and Madeira
- **N555/1999** Régime d'aides fiscales à l'investissement dans la région de Madère
  Compatible on the basis of Article 107(3)(a) TFEU
- **N55/2000** Tax aid scheme to promote investment on Madeira
  Compatible on the basis of Article 107(3)(a) TFEU
- **N96/2000** Régime de réductions fiscales en faveur de l'investissement à Madère
  Compatible on the basis of Article 107(3)(a) TFEU
- **SA.38832** Reduced rate of excise duty applied to liqueurs and eaux-de-vie produced and consumed in the Autonomous Region of the Azores for the period 2014-2020
  Compatible on the basis of Article 107(3)(a) TFEU
- **C35/2002** Adaptation of the national tax system to the specific characteristics of the autonomous region of the Azores:
  - Reductions in the tax base, income tax credits
    Compatible on the basis of Article 107(3)(a) TFEU
  - Tax rate reduction for persons and companies residing on the Azores, also compatible with the exception of aid awarded to firms that carry on financial activities or activities of the "intra-group services" type (coordination, financial or distribution centres)93

Gibraltar:
- **C52/2001** Gibraltar qualifying offshore companies
  Tax rate between 2 and 10% negotiated with tax authority instead of statutory rate of 35%.
  Unlawful State Aid, Negative decision without recovery
- **C53/2001** Gibraltar exempt companies
  Fixed annual tax of £200 or £225 or £300, exempting the company from further taxation

92 The searchable online data base of state aid cases of the Commission's DG Competition contains titles of the cases in either the working languages French and English, or in the language of the Member State concerned and predominantly contains decisions in the languages of the Member State concerned. Although the author has researched the data base with due care, the list of examples enumerated in this annex might for the aforementioned reasons not be considered exhaustive.

93 Decision 2003/442/EC of 11 December 2002 on the part of the scheme adapting the national tax system to the specific characteristics of the Autonomous Region of the Azores which concerns reductions in the rates of income and corporation tax (OJ 2003 L 150, p. 52), challenged, but upheld by the CJEU in Case C-88/03 Portugal/Commission 2006 [ECR] I-7115 ECLI:EU:C:2006:511.
Existing Aid, Proposal for appropriate measures

- C66/2002 Gibraltar government corporation tax reform
  Various beneficial tax measures
  Negative decision on notified aid not put into effect\(^{94}\)

- SA.34914 UK- Gibraltar Corporate Tax regime (ITA 2010)
  Exemption of passive income (interest, dividends or royalty)
  Decision to initiate the formal investigation procedure
  No final decision publicly available yet

Finnish Åland Islands:

- C55/2001 Tax rate reduction for Captive Insurance Companies
  Unlawful State Aid, Negative decision without recovery

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