Across the EUniverse

A Simple Tool to Enhance our Common Understanding of EU law

NUMBER EIGHT

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In this Issue

Editorial ................................................................. 3
What’s app in Europe? ........................................... 4
Direct access to judicial review of EU law – The recent Sugar case ............................................. 6
The Rusal Armenal case: the Court of Justice decides on the relationship between the EU legal order and the WTO ................................................................. 9
Case Report: Rusal Armenal and China MES ........ 11
Excessive Deficit Procedure: the Council fines a Member State for the first time ..................... 14
Geographical Indications in the TTIP ..................... 18
Incentives for innovations in Intellectual Property (IP) and State Aid: the current legal framework .... 20
IP BOX: Italian and European Legal Framework .... 23
The Fourth Railway Package: the Commission proposes, Member States aren’t disposing .......... 25
Action Plan for Fair and Efficient Corporation Taxation in the EU .................................................. 28
Horizon 2020: what, who and how it works in practice ................................................................. 30
GMOs: the current legal framework and the latest proposals for change ...................................... 32
EU, the Connected Continent: Roam like at Home and Net neutrality ........................................ 36

Editorial

We live in December 2015, the worst of times. We live in the best of times. We live in a time of transition that seems faster than ever before. But there is one thing that must remain constant. In good and bad times. That is the rule of law. Without the rule of law there can be none of those things that we hold dear, that we have built up over hundreds of years: security, the division of labour, innovation, the pursuit of happiness.

Across the EUuniverse is about the development of law. It is based on the rule of law. We focus not on national law but regional law. We map the shift from the national to the regional and look to the development of international law.

In this last number of 2015 we want to look back at what we have achieved in this first year of publication. So we have chosen what our readers have selected as the most read of all the issues we have addressed. There does not seem to be any pattern to this. Other than the fact that these articles have stimulated debate on how the law should develop respecting the fundamental principles of transparency, equality and fairness in how we chose to govern ourselves.

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What’s going on in Brussels? This section aims to provide the reader with an overview of some of the most significant issues being addressed by the EU institutions and the main topics that have been discussed in the last month.

Commission proposes modern digital contract rules to simplify and promote access to digital content and online sales

On 9 December 2015, the Commission published two proposals aimed at promoting access to digital content and online sales across the EU. This initiative is part of its Digital Single Market Strategy. The first proposal deals with the supply of digital content (like streaming music), while the second concerns the online sale of goods.

These initiatives aim to reduce the main obstacles to cross-border e-commerce in the EU, namely the fragmentation of the law in the area of consumer contract and low consumer trust when buying online from another country. Consumers will benefit from the proposals by means of the reversal of the burden of proof and more clear rights from digital content. Business will benefit thanks to more legal certainty and a business-friendly environment, and cost savings.

The Digital Market Strategy is expected to be turned into concrete legislative acts in the next six months.

EU and 79 African, Caribbean and Pacific countries join forces for ambitious global climate deal

On 8 December 2015, the EU formed an alliance with 79 African, Caribbean and Pacific countries in a final effort towards agreement at the climate Summit COP21. This coalition reached an agreement on some of the most divisive aspects of the proposed deals, i.e. the legally binding nature that Paris agreement shall possess, its need of being reviewed every 5 years as well as including a transparency and accountability system to track nations’ progress on their climate pledges.

The EU would pay 475 million euros to support climate action in the partner countries up to 2020 in African, Caribbean and Pacific countries.

We report on this coalition between the 28 EU Member States and the 79 ACP States as it is clear that it formed the basis of the agreement with all States allowing for a successful conclusion of COP21. If this sort of coalition can be repeated in other sectors these two groupings can have a strong influence on the way the world is governed.

State financing for Poste Italiane’s universal service obligation approved

On 4 December 2015, the Commission approved the compensation aimed to satisfy its so-called ‘universal service obligation’, which was granted by Italy to Poste Italiane for the periods 2012-2015 and 2016-2019.

Some months previously Italy had notified the Commission, in accordance with EU state aids rules on public service compensation, of its intention to offset Poste Italiane for its universal postal service obligation, providing basic postal services throughout the whole country and subject to low prices and a few quality requirements. Poste Italiane would receive a maximum of €1.05 billion for the years 2016-2019 (£262 million per year).

Formal investigation into Luxembourg’s tax treatment of McDonald’s

On 3 December 2015, the Commission opened a formal State aid investigation into suspected tax arrangements enjoyed by McDonald’s in Luxembourg. The Commission is concerned that those arrangements are unlawful State aids. This initiative recalls the formal investigations launched i) against the Netherlands, which had given Starbucks a tax deal, ii) against Luxembourg in relation to the Chrysler-Fiat issue and Amazon, iii) against Ireland in relation to Apple, and iv) into Belgium’s ‘excess profit’ ruling system.

The Commission will now investigate whether McDonald’s Europe Franchising was granted a favourable tax treatment in breach of EU state aid rules. Indeed, the Commission suspects that Luxembourg misused the provisions on double
taxation in order to grant McDonald’s an advantage not available for any other competitor in the market.

**EU finalises proposal for investment protection and Court System for TTIP**

On 12 November 2015, the Commission formally presented to the US its proposal for a reformed approach on investment protection and a new and more transparent system for resolving disputes between investors and states, the Investment Court System.

The proposal seeks to safeguard the right to regulate and create a court-like system with an appeal mechanism based on clearly defined rules. The key elements are that i) judges would be qualified and ii) the transparency of proceedings should be assured. Additional improvements on access to the new system by SMEs were also proposed.

The EU will now resume negotiations with the US on the subject of investment protection and resolution of investment disputes, which has been at an impasse until now. In the meanwhile, the Commission will start working on setting up a permanent International Investment Court. This project would lead to the full replacement of the ‘old ISDS’ mechanism with a modern, more efficient, more transparent and impartial system for international investment dispute resolution.

**Commission approves new promotion programmes for agricultural products**

On 12 November 2015, the Commission approved 33 new programmes aiming to promote EU agricultural products within the EU (20 with the scope of internal market) and in third country markets (with 13 programmes set aside for that).

These programmes will apply to products which have been harmed the most because of market difficulties, namely dairy products, meat, fruit and vegetables, olive oil, organic as well as quality products covered by geographical indications.

The plan - worth €108 million, half of which emanates from the EU budget - will lead to the opening of new markets and a significant improvement in the consumption trends of the products within the EU and beyond its borders.

**The General Court confirms that the aids granted by Spain to the operators of the terrestrial television platform are illegal**

On 26 November 2015, the General Court found that public funding grants - worth EUR260 million - granted by Spain to Digital Terrestrial Television (‘DTT’) operators during the period 2005-2009 were illegal.

Between 2005 and 2009 the Spanish authorities adopted a series of measures aimed at facilitating the transition from analogue to digital television. By decision in June 2013, the Commission declared that the aid accorded to the operators of the terrestrial television platform for the deployment, maintenance and operation of the digital terrestrial television network in Area II to be unlawful and incompatible with the internal market. Spain and some Autonomous Communities in that country brought an action for annulment against that decision.

The November 2015 ruling of the General Court dismissed all the actions and confirmed the Commission’s decision. The General Court considered that, first, the Commission did not err in concluding that, in the absence of a clear definition of the operation of a terrestrial network as a public service, the measures at issue should be regarded as State aid. Second, the Commission correctly considered that the measures at issue could not be considered as State aid compatible with the internal market, in particular since they did not respect the principle of technological neutrality.

Spain must now decide whether to recover the unlawful aids from the recipients or to launch an appeal before the Court of Justice against the decision of the General Court.
Direct access to judicial review of EU law – The recent Sugar case

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The Courts of the European Union (the Court of Justice and the General Court) have the competence to review the legality of legislative acts of the Union institutions and acts intended to produce legal effects vis-à-vis third parties. The question of who can trigger the jurisdiction of the Court, by seeking the annulment of an act, is set out in Article 263 of the Treaty of the Functioning of the European Union (TFEU).

EU Member States, the European Parliament, the Council and the Commission always have the right to bring actions before the Court of Justice. The Court of Auditors, the European Central Bank and the Committee of the Regions have rights to bring actions to protect their prerogatives.

The rights of natural or legal persons are set out in the fourth paragraph of Article 263 which provides:

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Therefore, to seek the annulment of an act within the meaning of Article 263(4) TFEU, i) the act must be addressed to that person or ii) where the contested act is of general application the plaintiff must prove direct and individual concern or iii) a natural or legal person can challenge a regulatory act when it is of direct concern to them and does not entail other implementing measures.

The provisions in relation to challenging regulatory acts which are of direct concern only (and not of individual concern) and do no entail implementing measures is new. This article addresses how the EU Courts have interpreted this new provision.

In the most recent case from April 2015, the General Court has given an interpretation of this new rule which can be considered restrictive and continues its policy of restricting the right of natural and legal persons to challenge acts of the EU directly before the EU Courts.

In practice the Court of Justice has reinforced its long-term view that natural and legal persons must challenge the legality of EU measures via national courts and not directly in the EU Courts in Luxembourg.

Before the Lisbon Treaty

Before Lisbon, the relevant Article (then Article 230(4) EC) provided:

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The article did not distinguish between regulatory and non-regulatory acts and required in all cases for the applicant to prove direct and individual concern.

With regard to direct concern, the Court of Justice has held that there is direct concern when there is a direct link between the challenged measure and the loss or damage that the applicant has suffered. Furthermore, the Court of Justice has stated that there is direct concern when the challenged act constitutes “a complete set of rules which are sufficient in themselves and require no implementing provisions”.

As for individual concern, the test to be applied was set out in the Court’s judgment in Plaumann & Co v. Commission as follows:

Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of

certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.

The Court of Justice has consistently applied a restrictive interpretation to the Plaumann test formulating the so-called “closed class test”. According to this test in order to be awarded individual concern the applicant must prove that he belongs to a group that could not be expanded after the EU act has entered into force.

This presented problems for applicants seeking to contest a Regulation. Challenges against a regulation could be allowed only if the applicant was able to prove that the EU measure was not a regulation but rather a decision of individual concern. To determine what was a Regulation, the ECJ applied the stricter “abstract terminology test”. A Regulation is a regulation in form and substance if it applies to “objectively determined situations and produces legal effects with regard to categories of persons described in a generalised and abstract manner.”

That being said in Codorniu the Court of Justice found that even when the regulation is in fact a “true” regulation, a non-privileged applicant can still challenge it if he proves the it concerns him individually.

**After the Lisbon Treaty**

The restrictive approach taken by the EU Courts came in for considerable criticism. As a result, the provision relating to the standing of private parties was reviewed in the Treaty of Lisbon and a new possibility was added to the text: a natural or legal person may challenge “a regulatory act which is of direct concern to them and does not entail implementing measures.”

In other words, an act (irrespective of its nature) must always be of direct concern to potential plaintiffs for them to be able to seek its annulment before the EU Courts.

As for the other requirements: a) in case of non-regulatory acts, the plaintiffs must also be able to prove individual concern, and b) in case of a regulatory act, the act must not entail implementing measures.

In Inuit the meaning of the revised article was discussed for the first time. The Court of Justice concluded that a ‘regulatory act’ should be defined as “an act of general application which is not a legislative act”. In Microban the Court of Justice confirmed this approach.

The most recent case is that of Sugars Ltd and Sidul Acuzares, Unipessoal Lda v European Commission. In this case the applicants were two cane sugar refiners who brought an action before the General Court seeking the annulment of two Regulations the aim of which was to authorise EU producers to market a limited quantity of sugar and isoglucose in excess of the domestic production quota and creating a tariff quota allowing any economic operator concerned to import a limited quantity of sugar.

As regards the concept of ‘implementing measures’ the General Court found that Article 263(4) TFEU must be interpreted in light of the objective of the provision which is to “ensure that individuals do not have to break the law in order to have access to a court”. When the responsibility for the implementation of the act lies with the Member States, individuals can contest the measure before the national courts (by pleading the invalidity of the basic act at issue and requesting a preliminary ruling from the Court of Justice pursuant to Article 267 TFEU) and when the responsibility lies with the institutions of the EU, individuals can bring a direct action before the EU Courts under the conditions stated in the fourth paragraph of Article 263 TFEU.

The General Court held that whether a regulatory act entails implementing measures should be assessed by reference to the position of the person pleading the right to bring proceeding.

The essence of the General Court’s ruling is that if the Regulation affected the potential plaintiffs

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7 Case C-456/13 P, paragraph 29.

8 Case C-456/13 P, paragraph 32.
only through the intermediary of acts taken by national authorities, in the Sugars case the decision of the authorities granting or refusing the necessary certificates, these constitute implementing measures and the new provisions of the fourth paragraph of Article 263 TFEU do not apply.

This case is of interest because it clarifies that even if the national authority does not have discretion to grant or not to grant the relevant certificates, in other words where the implementation by the national authorities is mechanical, that still counts as an implementing measure. The mechanical nature of the measure “is irrelevant is irrelevant in ascertaining whether those regulations entail implementing measures within the meaning of the final limb of the fourth paragraph of Article 263”.

As for the requirement of individual concern, the General Court found that the appellants were not individually concerned because the Regulation was adopted taking into account the fact that the quantities covered by the applications for import licences lodged between certain dates exceeded the available quantity and without taking into account particular qualities of the appellants.

The ruling in Sugars is not without problems, however. In paragraph 62 of the judgement, the General Court found that “under the fourth paragraph of Article 263 TFEU, natural or legal persons may institute proceedings against an act which is not addressed to them and entails implementing measures only if that act is of direct and individual concern to them”. The General Court in this paragraph seems to confuse the different provisions for admissibility for acts and regulatory acts.

In Sugars, the General Court does not contest that the Regulations at issue were regulatory acts within the meaning of Article 263(4). The literal interpretation of Article 263(4) is that a regulatory act addressed to a person other than the plaintiff may be challenged if it is of direct concern to him and does not entail implementing measures. This means that when dealing with a regulatory act, the provision seems to clearly state that the individual concern requirement is not applicable.

To rule on whether or not the applicants were individually concerned was unclear because individual concern has not been a requirement for regulatory acts since the Lisbon Treaty.

That being said, the intent of the General Court is clear. In most circumstances natural and legal persons can only challenge the legality of EU law via the national courts and references from those national courts to the EU Court of Justice via the preliminary ruling procedure provided for in Article 267 TFEU.

The question now to be addressed is how the national courts will apply the provisions of Article 267 TFEU and their willingness to refer questions to the Court of Justice.

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*Case C-456/13 P, paragraph 42.*
The *Rusal Armenal* case: the Court of Justice decides on the relationship between the EU legal order and the WTO

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The Council of the European Union (the ‘Council’), in support of the Commission, successfully appealed to the Court of Justice (the ‘Court of Justice’) the ruling of the General Court of the European Union (the ‘General Court’) finding that certain provisions in the WTO Anti-Dumping Agreement have direct effect in the EU legal order.

The relation between the EU legal order and the WTO rules

The *Rusal Armenal* case deals with the relationship between the EU legal order and provisions set out in the WTO Agreements.

According to settled case-law, provisions set out in the WTO Agreements are not in principle among the rules in light of which the EU Courts are to review the legality of measures adopted by the EU institutions. The general principle is thus that WTO law does not have ‘direct effect’ in EU law.

In *Portugal v Council*, the Court of Justice clarified that this principle is based on a variety of reasons, including (i) the subject-matter and purpose of the WTO Agreements, whose compliance is founded on negotiations amongst contracting Parties rather than the binding effect of WTO rules, and (ii) the lack of direct effect of those provisions in the legal orders of many other WTO Members. Accepting that EU Courts have direct responsibility for guaranteeing that EU law is compliant with WTO rules would deprive the EU legislature or the EU’s executive bodies of the discretion which is enjoyed by other WTO Members.

In *Van Parys*, the Court of Justice reinforced this general principle considering that WTO Dispute Settlement Body’s recommendations and decisions that find a EU measure to be inconsistent with provisions in the WTO Agreements do not have direct effect in the EU legal order either.

There are two exceptional situations to this general rule whereby the EU Courts can review the legality of an EU measure in light of the WTO Agreements. The first exception is known as the *Fediol* exception and applies where the EU act refers explicitly to specific provisions in a WTO Agreement. The second exception is known as the *Nakajima* exception, according to which the WTO rules have direct effect in the EU legal order where the EU intends to implement a particular obligation assumed in the context of those agreements.

The facts

*Rusal Armenal* concerned the validity of Regulation (EC) No 925/2009 (‘the contested Regulation’) by which the Council imposed an anti-dumping duty on imports of certain aluminium foil originating, *inter alia*, in Armenia.

In 2009 Rusal Armenal ZAO (the ‘Applicant’ or ‘Rusal’), a producer and exporter of aluminium products, established in Armenia, challenged the validity of Regulation (EC) No 925/2009 before the General Court. The Applicant argued, *inter alia*, that the methodology set out in Article 2(7) of Regulation (EC) No 1225/2009 (‘the basic AD Regulation’) to calculate the normal value for imports from non-market economy countries was not applicable to it, since that methodology was inconsistent with provisions in the WTO Agreements.

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10 Case T-512/09, Rusal Armenal v Council, judgment of 5 November 2013, not yet published.  
12 Case C-377/02, Van Parys NV v Belgisch Interventie, judgment of 1 March 2005, ECR I-1465.  
14 Case C-69/89, Nakajima All Precision Co. Ltd v Council of the European Communities, Judgment of the Court of 7 May 1991, ECR I-2069.  
not consistent to Article 2.7 of the WTO Anti-Dumping Agreement, read in conjunction with the Second Supplementary provision to Article VI of GATT 1994, set out in Annex I therein. In 2003 Armenia had become a WTO Member. According to the Applicant, from that moment on it was no longer possible for the EU institutions to consider that country as a ‘non-market economy’ for the purpose of anti-dumping investigations. As the Council had used the non-market economy methodology set out in Article 2(7) of the basic AD Regulation, the Applicant argued that the Council had violated the general scheme of Articles 2.1 and 2.2 of the WTO Anti-dumping Agreement regarding the determination of dumping.

By judgment of 5 November 2013, the General Court upheld the first plea in law put forward by Rusal and annulled the contested Regulation insofar as it imposed an anti-dumping duty on Rusal’s imports.16 The Commission appealed to that judgment before the Court of Justice and the Council took part in the proceedings seeking to have that judgment set aside.

On 16 July 2015 the Court of Justice found the appeal to be well-founded and set aside the judgment of the General Court.17

The Court of Justice first recalled its settled case-law according to which the WTO Agreements are not in principle among the rules in the light of which the EU Courts can assess the legality of measures adopted by the EU institutions. The Court then examined whether the Nakajima exception could be applied in the case at hand.

The Court of Justice observed that Article 2(7) of the basic AD Regulation introduces a special regime for the calculation of normal value for imports from non-market economy countries, including Armenia. The distinction between countries with or without ‘market economy status’ is not present in Article 2 of the WTO Anti-Dumping Agreement, or any other provisions in the WTO Agreements.

The rules laid down in Article 2(7) of the basic AD Regulation are therefore to be intended as the EU legislator’s choice to adopt a specific regime for calculating normal value in case of imports from countries without ‘market economy status’. Consequently and contrary to the General Court’s findings, Article 2(7) of the basic AD Regulation cannot be regarded as the implementation of any particular obligation assumed in the context of the WTO.

On this ground, the Court of Justice concluded that the Nakajima exception is not applicable in case at hand, and the General Court committed an error of law. The judgment of the General Court was therefore set aside.

The Council was assisted by a team from NCTM lead by Bernard O’Connor, Managing Partner of the Brussels office, assisted by Sébastien Gubel and Elena Bertolotto, associates.

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Case Report: Rusal Armenal and China MES

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Introduction

When the EU adopts law it is bound to observe relevant International Law. Article 216(2) TFEU (in combination with Article 3(5) TEU) provides that international agreements concluded by the EU are binding upon the EU institutions.

In relation to WTO law, the European Court of Justice has constantly recognised the policy space that exists between the WTO and domestic EU law. The policy space gives the EU legislator a wide margin of discretion to implement, or not implement, WTO law. The reason is that WTO law is not always clear and precise and, because of the absence of reciprocity, the EU should not bind itself where other WTO Members might not.

As part of the idea of creating a policy space for the EU legislator and to ensure that the space is protected from legal challenge, the Court of Justice has ruled that litigants can only invoke WTO law as a basis to challenge the legality of EU trade rules in very restricted circumstances.

The Court of Justice, and Advocate General Kokott acting as advisor, have had the occasion to review the relationship of the EU legal order and WTO law in relation to market economy status in Rusal Armenal, Case C-21/14 P.

Rusal Armenal has a significant impact on the China MES debate

The judgement in Rusal Armenal is from 16 July 2015 and therefore post-dates pretty much all of the academic writing and legal opinions on the interpretation of Article 15 of the Protocol of Accession of China to the WTO. Thus, from an EU law perspective, all previous legal analyses need to be re-evaluated in the light of the Court of Justice's ruling.

The Court of Justice found in Rusal Armenal that WTO Anti-Dumping law ‘has no specific rules relating to’ market economy status. It follows from this consideration that the rules in the EU basic Anti-Dumping Regulation setting out how to calculate normal value in a non-market economy are not an implementation of WTO rules, rather, they are rules developed independently by the EU legislator.

This finding by the Court of Justice is very much in line with Article 15(d) of the Protocol of Accession of China to the WTO. Paragraph (d) recognises that the criteria for determining if the status of the Chinese economy for the purposes of calculating normal value are set out in the domestic rules of the importing WTO Member.

The Court of Justice also found that GATT Article VI does not have any provisions in relation to the calculation of normal value in respect of imports from non-market economies, and the second supplemental provision to Article VI only addresses situations where a country has a complete monopoly on trade. This provision does not apply to China. But it does not set out what the EU must do in relation to a non-market economy, like China’s, either.

On this basis the Court of Justice found that ‘the provisions of the basic [anti-dumping] regulation [on calculating normal value from non-market economies] cannot be considered to be a measure intended to ensure the implementation in the EU legal order of a particular obligation assumed in the context of the WTO’.

The Court concluded that the EU legislator, when it adopted Article 2(7) of the basic Anti-Dumping Regulation dealing with normal value in non-market economies, was exercising ‘its regulatory competence, as regards the calculation of normal value in respect of imports from non-market economy countries members of the WTO, by taking an approach specific to the EU legal order…’.

And, as Advocate General Kokott said in her Opinion, the EU legislator has ‘deliberately opted to take its own, very particular, approach …’ in calculating normal value for non-market economies.

In other words, the EU rules on normal value for goods originating in China are not the
implementation of a particular obligation assumed in the context of the WTO. And the Court of Justice recognises that the EU is sovereign and independent on this issue, or, has the space to take its own policy approach.

**The consequences of Rusal Armenal for China MES**

The Court of Justice determined that the rules on how to calculate normal value for goods coming from non-market economies have been made by the EU legislator in the sovereign policy space between WTO and EU law. The EU is entitled to use that space to legislate in a way that is ‘specific to the EU legal order’ and taking ‘its own, very particular, approach’.

Three simple conclusions can be drawn from analysing the Court of Justice’s position:

a) Whatever WTO law or Article 15 of the Protocol of Accession of China to the WTO provides, the EU legislator is independent and has its own policy space to take its own particular approach on calculating normal value for non-market economies.

b) As the EU legislator has discretion, then any possible change is a question of EU policy and must be subject to the appropriate legislative due diligence and the Juncker Better Regulation provisions: i.e. wide consultation of stakeholders and prior assessments of the impacts of the different policy choices must be considered.

c) Currently the WTO is the only body competent to interpret Article 15.

*It does not matter how Article 15 is interpreted*

The first conclusion is startling. The EU legislator enjoys a policy space to decide to change or not to change the rules on normal value. The EU can continue to have its own ‘very particular […] approach’ for calculating normal value in relation to China.

This conclusion is also evident from the fact that the EU did not consider that it was obliged to change the basic Anti-Dumping Regulation when Article 15 became part of WTO law in 2001. This conclusion was never the subject of an action before the Court of Justice, or a matter for debate by the EU legislator.

**Article 15 must be interpreted by the WTO**

A second conclusion is also startling. As the EU approach to calculating normal value from non-market economies that are Members of the WTO ‘cannot be considered to be a measure intended to ensure the implementation in the EU legal order of a particular obligation assumed in the context of the WTO’ and as the Court of Justice will not allow the legality of those rules to be reviewed in the light of WTO law, Article 15 has no current relevance to EU law.

If Article 15 cannot be interpreted by the EU Courts to determine if current EU rules on calculating the normal value of goods coming from China, as things stand, the only tribunal competent to interpret Article 15 is the WTO itself.

So in this sense *Rusal Armenal* helps significantly in interpreting Article 15. It shows that the WTO is the body competent to interpret Article 15. This conclusion raises an important question: could the Court of Justice ever have competence to interpret Article 15?

*Can the Court of Justice have competence on this matter?*

It is clear that the EU legislator is entitled to interpret and implement Article 15 of China’s WTO Accession Protocol as the EU legislator sees fit. If it does choose to implement Article 15, does the Court of Justice become competent to review the new EU measure in the light of Article 15?

There are two situations in which the Court of Justice can review the legality of EU law in the light of WTO law. These are the *Fediol* and the *Nakajima* exceptions. The *Fediol* exception allows the Court of Justice to review the legality of EU law in the light of WTO law if the EU law clearly refers to the WTO provisions in question and those provisions are clear and precise. The *Nakajima* exception applies where the EU legislator makes clear its intention to implement a particular obligation assumed in the context of the WTO.

It is unlikely that the *Fediol* exception can apply because the terms of Article 15 in relation to normal value after December 2016 are not clear and precise. This is evident from the heated
debates between lawyers as to its proper interpretation.

For the Nakajima exception to apply then the EU legislator must clearly show that the changes to the basic Anti-Dumping Regulation are intended to implement Article 15.

A further conclusion can be drawn from this. If the EU legislator chooses to implement Article 15, it can do so making explicit its intention to implement the Article and thus giving the Court of Justice competence to review the change in the light of Article 15. Or the EU legislator can choose not to make clear its intention to implement Article 15. If it chooses the latter, then the Court of Justice is not competent to review the change in the light of Article 15. Thus the proper interpretation of Article 15 will be left to the WTO Dispute Settlement Body.

If the EU legislator does in fact choose to declare its intention to implement Article 15 and seeks to come within the Nakajima exception, it places the Court of Justice in the difficult position of possibly having to interpret Article 15 unilaterally in the absence of guidance from the WTO Dispute Settlement Body.

**Does the EU legislator have a free hand in how to interpret and implement Article 15?**

This conclusion in relation to Nakajima raises the question whether the EU legislator is constrained in the way it exercises its wide policy choice in implementing Article 15? Answering this question requires an examination of why the Court of Justice has given the policy space to the EU legislator in the first place.

The Parliament, the Council and the Commission have argued repeatedly before the Court of Justice, and argued in Rusal Armenal, that the EU legislator needs a policy space because other WTO Members interpret and apply WTO differently to the EU. As the EU’s trading partners do not recognise the direct effect of WTO law, the EU should not give direct effect. As there is no reciprocity in the WTO then the EU needs a space to do what is best for the EU: to take the EU’s particular approach. The Court of Justice has accepted these arguments.

In Portugal v Council the Court of Justice held that WTO law cannot have direct effect in the EU legal order (and thus the EU must enjoy a policy space to do what it considers appropriate) because: *the lack of reciprocity in that regard on the part of the Community’s trading partners, in relation to the WTO agreements which are based on ‘reciprocal and mutually advantageous arrangements’…, may lead to disuniform application of the WTO rules’.

**Rusal Armenal and Portugal v Council puts limits on how the EU can interpret Article 15**

This is the third startling consequence of Rusal Armenal. In combination with Portugal v Council, the Court of Justice has found that the EU legislator is, in practice, constrained or limited in how it can interpret and implement Article 15.

The EU legislator cannot abuse the policy space that is recognised in EU law. The EU legislator must act reasonably. In other words, the EU legislator cannot interpret and implement Article 15 without taking into account the reasoning of the Court of Justice as to why the EU legislator has a policy space in the first place.

As the policy space between WTO law and EU law has been recognised by the Court of Justice so as to allow the EU to take into account that WTO law is not always clear and precise and that other WTO Members do not always apply WTO law in the same way as the EU, and because there is no reciprocity, and because there is always a policy element in implementing WTO law, and because there is an overriding necessity to avoid ‘disuniform application of WTO rules’, it means that when the EU legislator interprets and implements Article 15, it should:

a) either to take into consideration how other WTO Members interpret Article 15 in reaching any conclusions on implementation of Article 15; or

b) wait till the WTO has interpreted the Article, so as to allow the EU, including the Court of Justice, to achieve the imperative objective that there is no ‘disuniform application of WTO rules’ and to avoid undermining legality in the policy space recognised by the Court of Justice.
Excessive Deficit Procedure: the Council fines a Member State for the first time

Bernard O'Connor
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On 13 July 2015, the Council of the European Union ('Council') imposed a fine of Euro 18.93 million on Spain for the manipulation of deficit and debt data concerning the accounting, recording and reporting of the expenditure of the Comunidad Autonoma Valenciana.

This is the first investigation launched by the Commission on the basis of Regulation (EU) No 1173/2011 concerning the effective enforcement of budgetary surveillance in the Euro area.

The significance of the case is that both the Commission and the Council are serious about implementing the new legal framework on economic governance in the Eurozone.

National governments, regions, provinces and local authorities will not be able to hide from the full glare of transparent and complete accounting.

The legal framework

Regulation (EU) No 1173/2011 is part of the so-called 'Six-Pack' of laws (five Regulations and one Directive) designed to improve economic governance in the EU. Some of these measures implement Article 121 TFEU concerning the multilateral surveillance procedure, other measures concern the Excessive Deficit Procedure (EDP) within the meaning of Article 126 TFEU.

The Six-Pack legislative provisions entered into force on 13 December 2011.

The Six-Pack amends the Stability and Growth Pact (SGP), and its aim is to ensure that countries in the EU pursue sound public finances and coordinate their fiscal policies. The new provisions strengthen both the preventive and the corrective arm, especially those that provide for enforcement measures in the Euro area.

The preventive arm provides for multilateral surveillance based on Article 121 TFEU in order to ensure sound public finances.

The Six-Pack legislation is designed to prevent excessive deficits and to ensure prompt correction where they occur. The EDP is based on Article 126 TFEU and Protocol (No 12), annexed to the Treaty, the amended Regulation (EC) No 1467/97 and the new Regulation (EU) No 1173/2011.

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Article 6 (1) of Regulation (EU) No 1173/2011 provides that if a Member State 'has not taken
effective action to correct its excessive deficit, the Commission shall, within 20 days of that decision, recommend that the Council, by a further decision, impose a fine, amounting to 0.2 % of the Member State's GDP in the preceding year.

Any 'decision imposing a fine shall be deemed to be adopted by the Council unless it decides by a qualified majority to reject the Commission's recommendation within 10 days of the Commission's adoption thereof'.

In addition, Regulation (EU) No 472/2013 (part of the so-called Two-Pack) introduces additional surveillance and monitoring procedures for Euro Area Member States including the possibility for the Commission to submit autonomous recommendations to Member States with excessive deficits.

Regulation (EU) No 1173/2011 on the effective enforcement of budgetary surveillance in the Eurozone provides, that:

The Council, acting on a recommendation by the Commission, may decide to impose a fine on a Member State that intentionally or by serious negligence misrepresents deficit and debt data relevant for the application of Articles 121 or 126 TFEU, or for the application of the Protocol on the excessive deficit procedure annexed to the TEU and to the TFEU.

Regulation (EU) No 1173/2011 empowers the Commission to look deeper into the quality of Member States' statistics for EDP purposes. On the basis of this Regulation, the Commission is entitled to launch specific investigations if there are serious indications of a misrepresentation.

Member States are obliged to report their annual deficit and debt data to the Commission in full compliance with European statistical rules and procedures (European System of Accounts, ESA).

Article 16 of Regulation (EC) No 479/2009 on the application of protocol on the excessive deficit procedure provides:

On the basis of Article 8(4) of Regulation (EU) No 1173/2011, the Commission (through Eurostat) can request information from the Member State, interview officials, carry out inspections and access government accounts.

Following the investigation, and before submitting any proposal to the Council, the Member State has to be given the opportunity of being heard by the Commission and to comment on any proposal.

Article 8(2) of Regulation (EU) No 1173/2011 establishes that fines imposed by the Council shall be effective, dissuasive and proportionate to the nature, seriousness and duration of the misrepresentation. A maximum level of fine of

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24 Article 6(2) of Regulation (EU) No 1173/2011.
27 Article 8(4) of Regulation (EU) No 1173/2011, provides that: 'The Commission shall be empowered to adopt delegated acts in accordance with Article 11 concerning: a) detailed criteria establishing the amount of the fine referred to in paragraph 1; b) detailed rules concerning the procedures for the investigations referred to in paragraph 3, the associated measures and the reporting on the investigations; c) detailed rules of procedure aimed at guaranteeing the rights of the defence, access to the file, legal representation, confidentiality and provisions as to timing and the collection of the fines referred to in paragraph 1.'
0.2% of GDP of the Member State concerned may be imposed.

Commission Decision 2012/678 sets out a two-step methodology for determining the fine. First, the Commission determines the reference amount that shall be equal to 5% of the larger impact of the misrepresentation on the level of either the general government deficit or debt of the Member State for the relevant years covered by the notification opening the context of the excessive deficit procedure. Second, the Commission may modulate that reference amount upwards or downwards taking into account the specific circumstances of the case.

The factual background

The formal investigation into the possible manipulation of statistics in the Comunidad Autonoma de Valencia was launched on the basis of Article 8(3) of Regulation (EU) No 1173/2011, which provides that:

The Commission may conduct all investigations necessary to establish the existence of the misrepresentations referred to in paragraph 1. It may decide to initiate an investigation when it finds that there are serious indications of the existence of facts liable to constitute such a misrepresentation. The Commission shall investigate the putative misrepresentations taking into account any comments submitted by the Member State concerned.

In May 2012, the Spanish national statistical authorities informed Eurostat that the general government deficit for 2011 would have to be revised beyond 0.4% of the GDP. This modification amended the figures reported for the Excessive Deficit Procedure (EDP) notification a few weeks earlier, and it was explained in light of unrecorded expenditures in the Comunidad Autonoma Valenciana and in the Comunidad Autonoma de Madrid. Following a formal investigation, Eurostat officers found that, while the case of Madrid could be considered as an exceptional adjustment, the case of Valencia needed to be examined deeper.

The Eurostat investigation sought to assess whether the Valencia case could be deemed as ‘deliberate intent of manipulation’ or ‘serious negligence’ within the meaning of Regulation (EU) No 1173/2011. After technical visits and further analysis, Eurostat concluded that there were serious indications of misrepresentation of statistics which justified the initiation of an investigation within the meaning in Article 8 of Regulation (EU) No 1173/2011. On this basis, it recommended the Commission to open an investigation into the misrepresentation of EDP data in Spain. On 11 July 2014, the formal investigation was launched.

The Commission published a Report on 7 May 2015. The Report concluded that the IGGV (Intervención General de la Generalitat Valenciana, the entity responsible of complying the public accounts of the Region) had been seriously negligent as regards the non-recording of health expenditure in national accounts, leading to an incorrect reporting of deficit data to Eurostat in 2012.

According to the Commission, the investigation showed that there were severe irregularities in the accounting, recording and reporting of expenditure of the Comunidad Autonoma Valenciana over a significant period of time. The accuracy principle was not respected, extra-budgetary accounts were used improperly, expenditure was sometimes left unrecorded for years.28

The Commission thus found a series of elements to be taken into considerations in order to determine the reference amount of the fine that recommended to be imposed.29 The revision to the expenditure reported by Spain for the April 2012 EDP notification, corresponding to the unpaid (mainly) health expenditure, amounted to Euro 1.893 billion. The Commission calculated the reference amount as Euro 94.65 million.

On the basis of the Report and the Commission’s recommendation, the Council adopted Decision

29 The circumstances that justified a reduction of the amount of the fine were: a) the misrepresentation of data had no significant impact on the functioning of the strengthened economic governance of the Union, due to the limited impact on the deficit of the Kingdom of Spain as a whole; b) the misrepresentation of data was essentially the work of one entity within the general government sector of the Spain; c) the Spanish statistical authorities and all entities concerned have shown a high degree of cooperation in the course of the investigation.
10297/15 imposing a fine of Euro 18.93 million on Spain for the manipulation of deficit data in the Comunidad Autonoma Valenciana.

Some comments

The Commission’s investigation powers under Regulation (EU) No 1173/2011 are different from those exercised under Articles 258 to 260 TFEU concerning infringement proceedings for failure to fulfil EU obligations.

In the context of the ‘regular’ infringement proceedings, when the Commission finds that a Member State has failed to fulfil its obligations under EU law, it delivers a reasoned opinion after giving the State concerned the opportunity to submit its observations.

If the Member State concerned does not address the concerns expressed in the reasoned opinion within a given period of time, the Commission may bring the case before the Court of Justice of the European Union.

Article 258 TFEU does not grant the Commission investigative powers including inspections and interviews in the Member State concerned. Furthermore, it is only if the Court of Justice finds that the Member State has failed to fulfilled its obligations that a lump sum or penalty payment may be imposed. A recent example of infringement procedure under Articles 258 to 260 TFEU is Case C-653/13 Commission v Italy where the Court of Justice found that Italy failed to fulfil its obligations in relation to the so-called ‘garbage crisis’.

The example from Italy shows that, while Article 260(3) TFEU provides for ‘lump sum or penalty’ imposed by the Court of Justice, Article 8(2) of Regulation (EU) No 1173/2011 provides for a proper fine to be imposed by the Council on the basis of the Commission’s investigation and proposal.

Decisions of the Council pursuant Article 8(5) of Regulation (EU) 1173/2011 are subject to the unlimited judicial review in the context of action of annulment within the scope of Article 263 TFEU.

The Commission’s investigative powers under Regulation (EU) No 1173/2011 can be compared with the Commission’ competences under Regulation (EC) No 1/2003 on implementation of the EU competition policy.

Even though Regulation (EU) No 1173/2011 does not provide for cooperation between the Commission and national authorities, there are some similarities in the strength of powers of the Commission in the two way of performing investigations.

Article 20 of Regulation (EC) No 1/2003, provides for the kind of inspection that Commission officials can perform on undertakings and associations of undertakings.

In the context of competition proceedings, Commission officers are empowered to (i) enter any premises, land and means of transport of undertakings and associations of undertakings; (ii) to examine the books and other records related to the business, irrespective of the medium on which they are stored; (iii) to take or obtain in any form copies of or extracts from such books or records; (iv) to seal any business premises and books or records for the period and to the extent necessary for the inspection; (v) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.


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30 Case C-653/13, Commission v. Italy, judgment of 16 July 2015, not yet published. In March 2010, the Commission asked Italian Authorities to provide information concerning the implementation of the ruling of the Court of Justice in Case C-297/08 that declared that Italy failed to fulfil its obligations under Articles 4 and 5 of Directive 2006/12/EC on waste insofar as it failed to adopt, for the Campania Region, all the necessary measures to ensure that waste is recovered and disposed of without endangering human health and without harming the environment and, in particular, by failing to establish an integrated and adequate network of disposal installations. After a more than one year of exchange of letters and proposals concerning a garbage management plan as requested under Directive 2006/12/EC, in September 2011 the Commission sent to Italy a reasoned opinion asking Italy to submit its observations. On 10 December 2013, the Commission considered that Italy did not take the necessary measures to comply with the judgment of the Court, and thereby brought the case before the Court of Justice under 260 TFEU. On 16 July 2015, the Court of Justice upheld Commission action and imposed to Italy a lump sum of 20 million Euro to address to “Risorse proprie dell’Unione Europea” for failing to properly address garbage crisis.
Similarly, in investigations under Article 8 of Regulation (EU) No 1173/2011 the Commission may request the Member State to provide information, may conduct inspections and accede to the accounts of all government entities at central, state, local and social-security level.

As far as we are aware there are no on-going investigations on the basis of Regulation (EU) No 1173/2011. Nonetheless, it cannot be excluded that, in light of the case against Spain and its effectiveness, the Commission may start using this instrument more often.

Geographical Indications in the TTIP

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For Europeans the idea that special Italian and French (and even Irish) foodstuffs, wines and spirits should be protected goes without saying. The idea of wines like Champagne and Barolo, cheeses like Gorgonzola and Roquefort, cured meats like prosciutto di Parma and Serrano and even Salmon from Clew Bay (in Ireland) or Scotland, resonate with the consumer. These are ‘our’ products and part of our gastronomic and cultural heritage. They have special qualities which are as much to do with the taste and the way they are made as with our feelings in relation to them.

Americans, and particularly those in the United States, think differently. They think that many of the names which we Europeans consider to be specifically linked to a place are not specific at all but common to types of foods. Thus the word champagne describes a type of sparking white wine and gorgonzola a type of blue cheese. Parmesan is what you top your pasta with, not a special cheese made in Parma.

These are two radically different points of view. The US and the EU have been on opposite sides in the WTO Doha Round discussions on GIs, in the reform of the Lisbon treaty on appellations of origin, and now in the TTIP. But the TTIP is different. In Doha or in Lisbon there was no imperative to find an agreement. If TTIP is to succeed then there is going to have to be some sort of agreement on GIs.

The US and the EU are setting themselves up for a round of fierce arm wrestling. 52 US senators have written to the US negotiators saying, in effect, that they will not back TTIP if the US is to lose the use of what they consider to be common names. The EU has said, in effect, that it will not open its agricultural market to increased exports from the
US (a key US demand) if the US does not agree to protect the EU’s GIs.

Wait and see. TTIP will come down to wrangling over how many names that the US considers common and the EU considers specific should be included in the deal. We have seen something similar in the negotiations with Canada for the CETA agreement. It was hard then. Agreement was not reached until the last night of negotiations and only then when Barroso (EU Commission President) and Harper (Canadian Prime Minister) needed to be able to announce an agreement and ran out of time.

The US does not have a special law on GIs. It considers that GIs are a subset of trade marks. The EU considers that GIs are a special form of Intellectual Property right needing a special form of protection. The EU bases its approach on Article 22(1) of the WTO TRIPs Agreement (the agreement on intellectual property which requires all WTO members to protect all IP rights).

As the US uses trade mark law it will not protect EU GIs because it thinks many of them are common names. As such they are not distinctive and thus not registrable as trade marks as they are not capable of distinguishing one product from another.

The US is right that many GI names are not registrable as trade marks. But not for the reason the US gives. They are not registrable as trade marks because they simply are not trade marks. They are GIs. And as GIs different criteria apply. The distinctiveness test for trade marks is just not applicable. No trade mark test is applicable including the basic trade mark concepts like private ownership and first in time first in right.

If there is to be any agreement between the US and the EU on GIs this fundamental difference between trade marks and GIs is going to have to be addressed. So far the EU has been reluctant to do this. It is not clear why.

The EU has law on its side. TRIPs provides a definition of GIs. TRIPs requires that each WTO member has a system to protect GIs. The US does not comply with its TRIPs obligations. The definition of GIs is that the qualities, characteristics or reputation of a GI product must be essentially attributable to their geographic origin. US trade mark law has no provision for carrying out an essentially attributable test. And even if it did there would still be the problem of first in time first in right and private rights. How can first in time first in right be applicable to GIs. GIs are a culture not a sign to be fought over by two competing individual seekers of trade mark rents. GIs belong to the community and not to an individual.

There is a long way to go in educating trade negotiators on the essential differences between trade marks and GIs. But if there is to be agreement on TTIP it is necessary.
Incentives for innovations in Intellectual Property (IP) and State Aid: the current legal framework

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A review of the application of EU State Aid rules is crucial for determining if a national tax incentive scheme for IPs is being implemented lawfully. The result of such a compatibility analysis is not certain. In some decisions, the Commission considered ‘Tax Box’ regimes as not being State aid because they were not selective or specific but rather legitimate general tax policy measures. This approach is, however, at variance with the settled case law of the Court of Justice (CJ), best seen in the judgement of Spain v Commission concerning a tax preference for outbound export-related investments. In essence, under the settled case-law, a tax incentive favouring certain investments or activities, although open to all economic operators, can be considered selective on the basis that it benefits the limited number of undertakings which actually carry out the investments in question.

The CJ’s approach has recently been questioned by the General Court (GC). The GC has made the case that a finding of selectivity under Article 107(1) TFEU requires not only that a tax regime provides an incentive but also that this favours certain undertakings or sectors. In other words, for the GC, to be considered selective within the meaning of State aid rules, a tax incentive shall be proven to be either formally or de-facto in favour of a distinct group of undertakings or beneficiaries belonging to one or more industrial sectors. This means that tax measures open to all economic operators cannot be considered selective.

Under the notorious Italy v Commission judgement, the CJ found that the test to be applied in deciding whether an incentive was selective or not was the notion of ‘justification by the nature or scheme of the tax system’ as opposed to the question of whether it was open or not to all economic operators. If the incentive falls within the nature or scheme of the tax system it will be classified as a legitimate general tax measure rather than a selective State Aid.

The reason for the CJ’s approach is undoubtedly the phenomenon of tax competition for foreign direct investment (FDI). It is a fact that Member States compete with each other in order to attract FDIs and that tax competition for FDIs can be both inter-Member State or intra-Member State (where the State provides for fiscal autonomy to its regions). It is of note that tax incentives favouring FDIs are very effective tools because they provide a high-value at a reduced cost to the exchequer. They do not count as tax expenditures. Rather they erode the tax base of other countries. If uncontrolled, such forms of incentives would start a race to the bottom, which would fragment the internal market.

This is the reason why the Commission, supported by the CJ, has taken a strict stance on selectivity for tax incentives even if they are effectively open to all economic operators. The more these schemes are available the more they are harmful to the internal market. Against this background, the test established by the CJ marks the correct delimitation between State aid and legitimate tax policy making such incentives not selective.

The Relevant Rules

The framework for assessing the compatibility of State aid for research and development and innovation is found in the Communication from the Commission concerning the Framework on State aid for research, development and innovation. At point 4.5.3.1 of the Guidelines relating to ‘Fiscal measures’, the Commission states that in order to assess the compatibility of a tax incentive with State aid rules, the aid intensity of the measure must be calculated otherwise is not transparent and the aid cannot be approved. It follows that the guidelines are only applicable to Input or Back-End Incentives, which are measurable forms of State aid.

Secondly, the Communication on the application of the rules on aid to the measures of direct

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31 See Case C-501/00, Spain v Commission.
32 See Case 173/73, Italy v Commission.
taxation of companies (the Commission Notice on Fiscal Aids) should be mentioned. These guidelines are important because they allow to distinguish between aid and 'genuine' fiscal measures. The following points of the Communication are relevant:

a. (Points 13-15) providing the distinction between aid and general tax measures;

b. (Points 21-22) providing the distinction between application / interpretation of tax by the tax and discretionary tax treatment (e.g. individual tax rulings);

c. (Points 23-26) making reference to the nature of the tax system.

Thirdly, some limited guidance can be found in Commission Communication SEC (2006) 1515/COM/2006/0728 final, on the use of tax incentives for research and development. Section 1.2 of the Communication provides that measures open to all companies that operate (are taxed) in a Member State are in principle general measures.

Finally, reference should be made to Commission practice. In addition to the decision on the Dutch Interest Box, reference should be made to the Commission's decision of 13 February 2008 on the Spanish tax reductions for investments in intangible assets, aid scheme N 480/2007. For the Commission the notified tax regime did not constitute aid because it was not selective and was open to all economic operators. This was an IP regime corresponding to a Front-End Incentive with Nexus providing for tax exclusion of 50% of the income related to the exploitation of intangible assets developed by the beneficiary of the scheme.

For the reasons illustrated above, one should consider however that that decision does not accurately reflect the settled case-law on the subject, and is therefore a bad precedent on which to base the compatibility of a system of IP tax regime of the type of a Patent Box.

The Selectivity Reasoning

It is settled case-law that the concept of aid is more general than that of subsidy because it includes not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which accordingly, without being subsidies in the strict sense, have the same nature and the same effect. Tax cuts may constitute State aid. Art. 107(1) TFEU prohibits aid that favours certain undertakings or certain productions namely those being selective.

In this respect, Article 107(1) does not distinguish between State measures on the basis of their objectives but only their effects\(^\text{34}\). Tax reductions which may benefit only one or several categories of undertakings are accordingly State aid, irrespective of the fact that the beneficiaries constitute one or more distinct economic subsectors within a larger group of competing undertakings. The fact that a tax reduction applies without giving the authorities any measure of discretion and automatically to all undertakings according to objective criteria, is not decisive to fulfil the specificity criterion.

Indeed, for the CJ, the only requirement for selectivity is that certain undertakings other than the beneficiaries, being in a comparable legal and factual situation from the point of view of the tax system, are excluded from the benefit. Accordingly, the fact that the undertakings making different investments than the ones giving rise to a tax reduction would be excluded from the benefit, is sufficient to show that that tax reduction fulfils the condition of specificity.

In order to establish the selective nature of a tax measure, it is not necessary for the competent national authorities to have a discretionary power in the application of a tax reduction\(^\text{35}\), although the existence of that discretion may enable the public authorities to favour certain undertakings to the detriment of others and, therefore, to establish the existence of the specificity condition under Article 107(1) TFEU. In fact, a tax reduction granted to all economic operators objectively defined as those carrying out certain investments does benefit only one category of undertakings, namely those that make the investments covered by the measure. Such a finding is sufficient to show that the tax measure complies with the requirement of specificity, which constitutes one

\(^{34}\) See judgment in Case 173/73, Italy v Commission, para. 27.

\(^{35}\) See judgment in Case C-75/97, Belgium v Commission, para. 27.
of the defining features of State aid, namely the selective nature of the benefit in question.\textsuperscript{36}

It is true that not all the differentiations in tax treatment between undertakings constitute State aid. An examination of the national tax systems and social security schemes or other rules affecting undertakings’ costs shows that the national laws regulating those intervisions do not lay uniform rules but also provide for derogations from the common rules and specific regimes applicable to certain undertakings on the basis of objective conditions. It is therefore necessary to distinguish, among such differential treatments, those arising from the application of general principles deriving from the logic of the tax or regulatory system to specific situations and those favouring certain undertakings by objective terms that depart from the internal logic of the common rules but rather pursue other objectives which can also be general policy objective but are not stated as principles of the tax or regulatory system in question.

It is for this reason that only the nature and structure of the tax system of the Member State in which the national measures can provide, in principle, a proper justification for the exceptions to the otherwise generally applicable tax rules. In that case, those derogations in so far as they are consonant with the logic of the tax system in question and proportionate to attain the differentiation stemming from the inner logic of that system, do not meet the requirement of specificity.\textsuperscript{37}

\textit{Possible Justification of IP Regimes}

It should be noted that, in the present state of Union law, direct taxation falls within the competence of the Member States, and again according to settled case-law, Member States must exercise that competence consistently with Union law.\textsuperscript{38} On this basis Member States must avoid taking any measure capable of constituting State aid incompatible with the internal market.

However, in order to justify a tax incentive with respect to the nature or structure of the tax system, it is not enough for a Member State to state that they are intended to promote a general policy objective such as to favour research and development activities. That purpose is, undoubtedly, a general economic objective, but that may not be enough. It must also be shown that the incentive falls within the overall logic of the tax system, and applicable to all taxable undertakings subject to the same legal and factual conditions under the tax system of reference.\textsuperscript{39}

Therefore, the fact that the contested measures pursue a commercial or industrial policy objective such as the promotion of IP investment is not sufficient to avoid the measures outside the scope of Article 107(1) TFEU. The only way to implement a IP tax regime of the type of a Patent Box in a way that is compatible with the rules on State aid is by showing that the incentive that is inherent to the internal nature of the tax system (this is the meaning incentive open to all economic operators acceptable by the CJ).

One can make an example of a IP tax regime of the type of a Patent Box that does not constitute State aid because justified by the nature and scheme of the tax system.

A tax regime reducing the tax burden does not constitute State aid, provided that it applies without distinction to all firms and all production in relation to certain production activities, objectively defined and pursuing an aim of general economic policy (for example, development of IP rights), in as far as the value of the tax reduction on the income derived from IP investments is justified by the nature of the tax system, such as, for example, the principle of tax neutrality according to which the high profitability of certain investments and the high tax yield justifies a current tax reduction in order to equalise the overall taxation borne during in a given multiannual period by less profitable investments.

\textsuperscript{36}See, with respect to a tax reduction granted by Spain in favour of domestic products being exported, judgment relative to Case C-501/00, Spain v Commission, para. 120; and, with regard to the repayment of interest on export credits, judgment relative to Case 57/86, Greece v Commission, para. 8.

\textsuperscript{37}See judgement in Joined Cases C-78/08, C-79/08 and C-80/08, Paint Graphos e.a., paras 49, 65 and 69.

\textsuperscript{38}See, for all, judgment in Case C-391/97, Gschwind, para. 20.

\textsuperscript{39}See judgment in Case C-143/99, Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke, para. 42.
IP BOX: Italian and European Legal Framework

On 22 December 2014, the Italian Parliament approved the Budget for 2015. Among other measures, the law introduces the possibility of an exemption from corporate income tax (IRES, generally levied at 27.5%) and local tax (IRAP, generally levied at 3.9%) on income derived from qualifying intangible assets (such as patents, know-how and other intellectual property rights). The regime is eligible for taxpayers who perform research and development (R&D) activities and is characterized by a five year lock-in period. An advance clearance is required in a number of circumstances.

By means of this law, Italy has introduced the Patent Box regime, based on the OECD Nexus Approach. This helps determine what income qualifies for the reduced tax rates. Specifically, the qualifying income is calculated by multiplying the overall income derived from the IP asset by the ratio of "qualifying R&D expenditures" over the "total expenditures incurred to develop IP".

Italian law had already provided for tax credits for R&D expenses to incentivise technological development by Italian entities. There where however no incentives on the revenue side. This meant that multinational groups maintaining R&D centres in Italy so as to benefit from tax credits, subsequently transferred the mature IP to other countries, where the taxation on royalties was lower. This mechanism implies a loss of the tax base for the Italian tax authorities.

The new patent box regime aims to stop this phenomenon so that intangible assets remain in Italy, and potentially those currently held abroad by Italian and foreign multinational groups may be repatriated.

The new regime is optional and can be accessed by all entities carrying out business activities in Italy, under the condition that they carry out R&D activities either directly or through agreements with universities or other research entities. Foreign entities carrying out business activities in Italy through a permanent establishment can also benefit from the regime, provided that they are resident in a country that has a double taxation treaty in force with Italy and undertake to effectively exchange information with Italy.

Opting to participate in the regime is irrevocable and applies for the subsequent five fiscal periods. After the first five fiscal period, an extension is likely to be allowed.

The Italian Patent Box Regime is applicable to any kind of patent, to certain brands “functionally similar to patents”, as well as to processes, formulas and know-how related to industrial, commercial or scientific fields that can be legally protected. Also, income deriving from exploitation of copyright appears to be included.

The Italian Patent Box Regime clearly takes inspiration from similar regimes already in place elsewhere in the EU.

The concept of a Patent Box was first introduced in 2000 by Ireland and in 2001 by France as a reduced rate of tax revenue form IP licencing or the transfer of qualified IP.

Currently IP-Box regimes in Europe have been introduced by Belgium, Hungary, Luxembourg, Netherlands, Spain and the United Kingdom.

In particular the Patent Box regime in UK is a tax incentive introduced in 2013 designed to encourage companies to make profits from their patents by reducing the UK tax paid on those profits. Qualifying patents must have been granted by an approved patent-granting body, including the UK Intellectual Property Office, the European Patent Office and designated European territories: Austria, Bulgaria, The Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Poland, Portugal, Romania, Slovakia and Sweden.
The Patent Box excludes patents registered in territories such as USA, France and Spain because of differences in the search and approval process for patent applications.

**OECD Level and EU references**

Action Item 8 of the OECD initiative aimed at tackling Base Erosion and Profit-Shifting (BEPS) has established that IP regimes should not be considered harmful if the grant of a tax benefit depends on the performance of substantial activities in the relevant jurisdiction providing for the tax benefit. However finding the appropriate preferential IP regimes has proven elusive and work is still on-going both in the OECD and in the EU.

While Member States are making extensive efforts to agree on the features of a model IP regime that is not excessively harmful and at the same respectful of the EU fundamental freedoms such as freedom of establishment and freedom to provide services protected by Articles 49 to 55 TFEU, and 56 to 62 TFEU, little or no reflection has been put in considering the prohibition to grant State aid incompatible with the internal market pursuant to Articles 107 and 108 TFEU. This is a grave weakness of the on-going discussion because unlike the coordination efforts to tackle harmful taxation and the infringement proceedings run by the Commission pursuant to Article 258 TFEU where the Commission enjoys a large margin of discretion in deciding whether to pursue or not possible infringements of the fundamental freedoms, State aid rules give little discretion to the Commission particularly with respect to the deciding whether a tax measure is aid or not.

The issue of state aids for the Patent Box is discussed in the next article of this edition of Across (see page 6).

As background, Member States are discussing BEPS within the EU’s Code of Conduct on Business Taxation, a coordination forum between Member States’ tax authorities to fight against harmful tax competition and, in respect to tax incentives for intangibles, to find a common approach to define the substantial activity requirement. Following a proposal made by the United Kingdom to the OECD Forum on Harmful Tax Practices (FHTP), which is the group within the OECD entrusted to counter harmful tax practices, the Code of Conduct has embraced the idea of a Substantial Nexus. This Nexus links the tax benefits to be foreseen by the preferential IP regimes to the amount of R&D expenditure incurred by taxable entities in the relevant country. Consensus was found on the substantial nexus approach. Under this approach a model IP regime is not harmful if the benefits of a lower rate on royalty income are conditional on there being substantial R&D activities in the concerned country, where expenditures incurred in that country stand as a proxy for substantial activities made within the meaning of the substantial nexus approach. Many Member States are taking inspiration from that approach to design their IP regimes.

A distinction should be made between different forms of tax incentives, including the Input or Back-End (tax) Incentives and the Output or Front-End Incentives.

A most common example of Input or Back-End Incentive is the tax credit (for R&D expenditure). The incentive is proportionate to the expenditure made and reduces the tax liability that normally results from the taxable income of a beneficiary, or its net amount of income after the gross income has been reduced by the allowable deductions, multiplied by tax rate. Unlike a deduction the value of which depends on the particular taxpayer’s applicable tax rate (so that the value is greater for higher tax-bracket taxpayers), the credit has the same value for all taxpayers.

An Output or Front-End Incentive is an exclusion or exemption of certain revenues deriving from an activity to be incentivised from the gross or net taxable income. Since the incentive insulates the qualifying income from the general business income, this type of tax incentive is also called the IP or Royalty Box. This value of this type of incentive is variable depending on the profitability and tax-bracket of the beneficiary taxpayer and is potentially unlimited because it is not calculated as a percentage of the expenditure incurred but it is in function of the tax rate applicable on income excluded or exempt from tax.

Since IP revenues, benefiting from tax exemptions under the Front-End Incentives, derive from

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activities that are mobile, these incentives not only have the highest value for taxpayers but are also less expensive from a tax revenue point of view. These forms of exemption can induce multinational groups (MNEs) to change the location of activities which were previously taxable elsewhere. This can have the effect of eroding the tax base of other countries without losing any of its own tax revenues. It is for this reason that the Royalty Boxes are the favourite form of IP Regimes.

It is for the competitive pressure that Front-End Incentives puts on tax jurisdictions, that these incentives have been subject to review under the harmful tax competition initiatives at OECD and EU levels to limit their possible harmfulness. As a result, a third type of IP regime can be identified as a type of Front-End Incentive, however corrected by the Substantive Nexus requirements, which is now inspiring many of the Patent Boxes in the EU Member States and in non-EU countries.

This form of IP regime is a milder form of Output Incentives in the sense that it also provides for full or partial exemptions or exclusions of the qualifying income deriving from IP activities, however is considered not to be harmful taxation.

The Fourth Railway Package: the Commission proposes, Member States aren’t disposing

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The Fourth Railway Package aims to remove the remaining barriers to the creation of a single European market for rail services. The proposed legislation would reform the EU’s rail sector by encouraging competition and innovation in domestic passenger markets. It would also implement structural and technical reforms. The end result should be higher levels of safety, interoperability and reliability in the European rail network.

The European rail network remains quite fragmented. Different Member States use different safety standards and technical systems. Cross-border train services, for example, have to get safety authorisation from several different national authorities and deal with several different signalling systems. This makes it complicated and expansive for new rail operators and new technical equipment to enter the rail market.

By removing the remaining barriers to the single European rail area, the proposed Fourth Railway Package will help create a more competitive rail sector, with better connections between the EU and its neighbouring countries.

The changes would also help the EU meet targets for reduced emissions and encourage increased use of rail transport, as outlined in the Commission’s 2011 Transport White Paper44.

A Communication from the Commission entitled ‘The Fourth Railway Package – Completing the single European railway area to foster European competitiveness and growth’ gives some indications for the future of European railways and defines the legislative framework needed to achieve this future vision.

The creation of a Single Rail market has been on the EU agenda for many years. Early EU legislation laid down the basic principles guiding the improvement of rail efficiency via progressive market opening and in particular the separation of service providers (passenger and goods) and infrastructure. Since 2000, these ideas have been progressively translated into reality, not least through the adoption of three successive packages of EU legislation. However the share of rail in the overall transport mix has remained modest, partly due to suitability issues (for example, rail is not practical for many short distance urban journeys such as trips to the supermarket) but also because of obstacles to market entry hampering competition and innovation.

In 2012, parts of this legislation were simplified, consolidated and further reinforced by Directive 2012/34/EU establishing SERA bolstering existing provisions on competition, regulatory oversight and financial architecture of rail sector. This strengthens the power of national regulators, improves the framework for investment in rail, and ensures fairer access to rail infrastructure and rail-related services. It entered into force on 15 December 2012 with transposition required by mid-2015.

For Infrastructure governance, it is urgent to create common rules for the governance of the Infrastructure Managers (IM) that treat all Rail Services Undertakings (RU) as equals and guarantee proper involvement of public authorities and users of infrastructure in the preparation of decisions having an impact on them. IMs will need to establish a coordination body with RUs, customers and public authorities making them central players in investment planning and the drive for efficiencies. It will set economic incentives and performance indicators to measure and to improve the efficiency of IMs and, finally, it will establish a European Network of IMs to promote cross-border cooperation, with particular attention paid to operations along RFCs and international passenger transport routes.

Relating to Interoperability and Safety, to realise the potential of the single market, higher levels of harmonization are necessary at EU level, so the Commission proposes revising the European Rail Agency (ERA) Regulation to transfer to the Agency competence for issuing vehicle authorisations for placing on the market and for safety certification for RUs. While legal responsibility would lie with ERA, it would work in close cooperation with relevant National Safety Authorities (NSA). At the same time it would have an enhanced role in the supervision of national rules and monitoring NSAs, as well in facilitating the deployment of the European Rail Traffic System (ERTS). The proposed changes to ERA’s role will be reflected in amendments and updating the legislation. Besides these changes, ERA’s governance structure and internal operating methods will be improved and aligned with recently adopted Joint Statement and Common Approach on the EU decentralised agencies.

The aim of these proposals is to achieve a 20% reduction in the time to market for new RUs and a 20% reduction in the cost and time taken to authorise rolling stock.

Regarding the social dimension, the Commission underlines that the rail sector will, in the next decade, face simultaneously the challenges of an ageing working population and the efficiency effects of market opening. Approximately 30% of all rail workers will retire in the next 10 years leading to workforce shortages, while at the same time several RUs may need to be restructured to improve productivity and efficiency. IM/RU separation will require more people to do complementary tasks in the short term. It is important to enable the rail sector to improve its attractiveness as an employer for innovative and highly skilled professions with an adequate level of remuneration.

‘The low efficiency and quality of some rail services are mainly the result of low competition, remaining market distortion and suboptimal structures’.

46 Italy has transposed the Directive with a legislative decree in May 2015. The object of the Decree is to answer the infringement procedure number 2008/2097 and the EU Court of Justice ruling on Italy’s failure to implement the rules.
47 Domestic Passenger Rail Markets IA
this reason it is hoped that the package will contribute to creating a more efficient customer-responsive industry and improving the relative attractiveness of rail sector vis-à-vis other modes.

The Fourth Railway Package comprises the following legislative proposals:49

• Proposal for a Directive on the interoperability of the rail system within the European Union (Recast);50

• Proposal for a Regulation amending Regulation (EC) No 1370/2007 concerning the opening of a market for domestic passenger transport services by rail;

• Proposal for a Regulation on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004;51

• Proposal for a Regulation repealing Regulation (EEC) No 1192/69 of the Council on common rules for the normalisation of the accounts of railway undertakings;52

• Proposal for a Directive on railway safety;53

• Proposal for a Directive amending the Directive 2012/34/EU of 21 November 2012 establishing a single European railway area, as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure.54

The State of Play

With the Fourth Railway Package, the European Commission has put forward proposals to move towards that objective by regulating the liberalisation of national rail markets and harmonising technical standards and requirements. Negotiations on the package started in 2013.

The technical part of the Package is largely agreed by all stakeholders and an informal agreement has now been reached between the European Parliament, Commission and Member States. The Luxembourg Presidency of the Council could close negotiations before the summer of 2015. In October the Luxembourg Presidency hopes to reach a compromise on the more political aspects of the packages including:

• establishment of passenger-friendly common ticketing platforms;

• inefficiencies in infrastructure management including unfair capacity allocation;

• unused rolling stock, paid for with taxpayers’ money, which could be available for news services and operators;

• creating a level playing field in the rail market to ensure fair competition, which includes the involvement of new entrants and private sector operators – essential for innovation and growth.

All stakeholders agree that rail has a bright future. But national monopolies and champions are always hard to break down. Success on the creating a single market for a sector is precisely the sort of EU that the UK wants and a bell weather of its frustration with its European partners.

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49 All these proposals are dated on 31.1.2013
Action Plan for Fair and Efficient Corporation Taxation in the EU

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Corporation taxation in the EU needs to be fundamentally reformed. Today's corporate tax systems in EU Member States were conceived in the 1930s, when cross-border trade was more limited, business models were simpler and products were tangible. But as business evolves, so too must the tax system. The current rules no longer work in a globalised, digital, mobile and services oriented business environment. The out-dated system is inefficient and creates opportunities for companies to use sophisticated tax-planning schemes to escape taxes. Some companies currently generate large profits in the Single Market but pay little or no tax in the EU.

This corporate tax avoidance results in significant revenue losses for Member States, a heavier tax burden for citizens and local companies and competitive distortions for businesses not structured to play the tax avoidance game.

It also undermines EU growth and competitiveness. Member States are pulled into intense competition to attract or to keep companies profits in their own territories. Through this competition, they often undermine each other's ability to collect legitimate revenues or to focus on growth-friendly taxation. In addition, Member States' unilateral efforts to protect their tax bases with uncoordinated anti-abuse measures are creating obstacles for business in the Single Market besides the proliferation of legal disputes. The lack of coordination between Member States on corporate taxation also causes uncertainty, administrative burdens and compliance costs for business and investors. This undermines the EU’s goals of creating a stronger, more competitive Single Market.

The new Action Plan presented by the Commission in June 2015 therefore sets out a series of measures for the short, medium and long term, to overhaul the EU Corporate Tax framework and make it fair, efficient and more growth-friendly.

In particular, the Action Plan aims to establish a new approach to corporate taxation in the EU to tackle tax avoidance, ensure sustainable revenues and foster a better business environment in the Single Market.

But it should not be forgotten that Member States have already committed themselves to a non-binding Code of Conduct on Business Taxation, which sets out the criteria to assess whether national tax measures create harmful competition. This assessment is carried out by the Code of Conduct Group, which is made up of Member States representatives. In recent years, the Code has become less effective tool for tackling harmful tax regimes. This is partly because the criteria in the Code are no longer adequate to assess certain modern and complex tax regimes and partly because the Code Group lacks a strong enough mandate to act decisively.

In the short term the Commission will make a proposal to reform of the Code of Conduct to enable it to better react to modern cases of harmful tax competition. This will include extending the Group's mandate and changing its working methods. The Code Group should also be active in screening for cases of harmful tax competition in non-EU Countries as part of a EU approach to non-cooperative jurisdictions.

The Action Plan provides for Five key Areas for the Commission legislative proposals. It seems to be important to underline that the measures in

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55 The Code of Conduct Group (Business Taxation) was set up by ECOFIN on 9 March 1998. It mainly deals with assessing the tax measures which fall within the scope of the Code of Conduct (adopted in December 1997) for business taxation and overseeing the provision of information on those measures. The Code of Conduct is not a legally binding instrument but its adoption requires the commitment of Member States to: (i) abolish existing tax measures that constitute harmful tax competition; (ii) refrain from introducing new ones in the future. The Group mainly works on: anti-abuse rules; transparency and exchange of information in the area of transfer pricing; administrative practices; promotion of the principles of the code of conduct in non-EU countries. An Anti-abuse Sub-group was created under the Irish presidency of the Council in 2013. It reports to the Code of Conduct Group and works on hybrid mismatches. Next meetings will take place on 19 September and 21 October 2015.
the Action Plan are very much aligned with the OECD Base Erosion and Profit Shifting (BEPS) reforms.56

Re-launching the Common Consolidated Corporate Tax Basis (CCCTB)

Negotiations on the CCCTB proposals, which were put forward by the Commission in 2011, are currently stalled, largely due to its sheer scale. In November 2014, President Juncker announced that the Commission would examine how to re-launch the CCCTB in order to break this deadlock. This idea was well received by Member States, MEP’s, businesses and many other groups, as the benefits of the CCCTB are widely recognised.

The Commission has therefore announced that it will come forward with a new proposal within 18 months to revive the CCCTB. The proposal will be for a mandatory CCCTB, introduced through a step-by-step approach.

Fair Taxation where profits are generated

The fundamental principle of corporate taxation is that companies should pay tax where they make their profits. Some companies make large profits in the Single Market, but they pay little or no tax on them in the EU. They take advantage of the Treaty freedoms, national mismatches and provisions in EU corporate tax law to shift profits between Member States and out of the EU, untaxed.

A new proposal is being prepared by the Commission while at the same time the Council continues to work on some aspects of the common tax base, linked to the BEPS project.

Creating a better business environment

Any reform of the corporate tax system must have a strong focus on improving the tax freedom for business. A cohesive EU approach to corporate taxation would remove many of the tax obstacles, legal uncertainties, compliance costs and competitive distortions that many businesses face today. At the end of 2015 the Commission will set out some proposals for eliminating competitive disadvantage for smaller companies that do not have the means for aggressive tax planning. A transparent tax system is conductive to growth. In addition a number of actions will address specific elements of corporate taxation which should promote growth.

SME’s will benefit greatly from the business friendly elements in the Action Plan. The CCCTB and other measures to improve the business environment will make it easier and cheaper for SME’s (particularly start-ups) to expand and operate cross-border.

Increase transparency

In March 2015 the Commission proposed an ambitious Tax Transparency Package.57 It set out measures to ensure greater openness between Member States on their corporate tax regime and to make companies more accountable for their tax practice.

The Transparency Package also announced that the Commission would begin impact assessment work on possible requirements for companies to publicly disclose their tax information.

In addition, it is useful to remember that the Commission published a list of non-cooperative jurisdictions58. This pan-EU list of third-country non-cooperative jurisdictions will allow Member States to compare their national list in a easy and transparent way.

Improving coordination between Member States

This means that measures are envisaged to coordinate corporate tax matters. The Action Plan focuses on better coordination between Member States to achieve fairer and more efficient taxation in the EU. All the actions include elements which would promote cooperation, transparency and common approach between national authorities, with a view to creating a solid EU framework for corporate taxation. There are currently a number

56 OECD and G20 Countries have agreed three key elements that will enable BEPS Project: a mandate, an implement package and some criteria’s (see BEPS Reports, February 2015, OCDE Homepage).


of instruments aimed at ensuring coordination between Member States on corporate tax matters. However, these could be used to better effect and the Action Plan sets out how to achieve this.

Horizon 2020: what, who and how it works in practice

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Horizon 2020 is the biggest EU Research and Innovation financing programme ever, the general objective of which is to contribute to the objectives of the Europe 2020 Strategy and complete the European Research Area (ERA).

Research and innovation are at the core of the Europe 2020 Strategy aiming to develop an economy based on knowledge and innovation, promote a more resource efficient, greener and more competitive economy and foster a high-employment economy delivering social and territorial cohesion.\(^\text{59}\)

Regulation (EU) No 1291/2013\(^\text{60}\) lays down the rules establishing 'Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020)' and determines the framework governing EU support for research and innovation activities. Horizon 2020 has been established for the period from 1 January 2014 to 31 December 2020, with nearly €80 billion of funding.

Horizon 2020 hopes to leverage additional research, development and innovation funding and by contributing to attaining research and development targets, including the target of 3% of GDP for research and development across the EU by 2020. This general objective should be pursued through three priorities: i) excellent science, ii) industrial leadership and iii) societal challenges.\(^\text{61}\)

Horizon 2020 supports indirect actions through one or several of the forms of funding provided


\(^{61}\) idem.
How to participate in Horizon 2020?

Regulation (EU) No 1290/2013 sets out a three steps assessment procedure for participation in Horizon 2020 programmes: i) the 'legal entity' condition, ii) conditions for participating, and ii) eligibility for funding.

First, the funding programme is open to any 'legal entity' or international organisation, within the meaning of Article 7 of Regulation (EU) No 1290/2013. A 'legal entity' is any natural person, or any legal person created and recognised as such under national law, EU law or international law, which has legal personality and which may, acting in its own name, exercise rights and be subject to obligations.

Holding the status of 'legal entity' within the meaning of Article 7 is nevertheless not sufficient. As a second step, Article 9 of Regulation (EU) No 1290/2013 lists the minimum conditions for participation in grant-awarding procedures, namely i) at least three legal entities have to participate in an action (and the three entities should be legally distinct); ii) the three legal entities have to be established in different Member States or associated Country; iii) the three legal entities shall be independent of each other.

There are three exceptions to the 'three entities' requirement. The participation of one legal entity established in a Member State or associated Country is first sufficient in case of: i) European Research Council (ERC) frontier research actions, ii) the SME instrument, where the action has a clear European added value, iii) programme co-

fund actions, and iv) justified cases provided for in the work programme or work plan. In addition, the participation of one legal entity is sufficient in the case of coordination and support actions and training and mobility actions. Finally, the 'three entities requirement' may not be required for specific work programmes or work plans providing for specific conditions regarding the number of participants, the type of participant and the place of establishment.

Third, Article 10 of Regulation (EU) No 1290/2013 determines which legal entities are eligible for funding. These are i) any legal entity established in a Member State or associated Country, or created under EU law; ii) any international European interest organisation; iii) any legal entity established in a third Country identified in the work programme.

Horizon 2020 offers a large variety of funding opportunities, that are set out in calls for proposals. Calls for proposals cover different issues, from looking for solutions for a cleaner air to making scientific careers more attractive to younger researchers, from finding new means to contrast terrorism to helping Europe become a global actor.

How does Horizon 2020 work in practice?

A legal entity having found an interesting topic, has to submit its proposals within the deadline. For this purpose, it shall have to look for potential partners (unless exceptions to the 'three entities' rule applies), and draft a proposal including a draft plan for the exploitation and dissemination of the results. Finally, it shall have to register on the online Participant Portal and submit its proposal.

Once the deadline has expired, all proposals are evaluated by a panel of independent specialists in their fields. The panel checks each proposal against a list of criteria (excellence, impact, quality and efficiency of the implementation) to see if it should receive funding.

Once a proposal passes the evaluation stage, applicants are informed about the outcome.

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64 For the purposes of Regulation (EU) No 1290/2013, 'legal entity' means any natural person, or any legal person created and recognised as such under national law, EU law or international law, which has legal personality and which may, acting in its own name, exercise rights and be subject to obligations.
65 Article 9 of Regulation (EU) No 1290/2013.
67 Article 15 of Regulation (EU) No 1290/2013.
The Commission then draws up a grant agreement with each participant. The grant agreement confirms what research and innovation activities will be undertaken, the project duration, budget, rates and costs, the Commission’s contribution, rights and obligations and more. Normally, the grant agreements should be signed within three months.68

The Horizon 2020 programme has recently allocated Euro 130.6 million to almost 400 SMEs that operate in different fields all over Europe. This latest awards raises to 827 the number of SMEs that has currently received subsidies, for a total of Euro 255 million distributed.69 It is difficult to predict the real economic impact of these funding initiatives but, surely, Horizon 2020 represents a valuable chance to promote European excellence and find concrete solutions to today's global issues.

GMOs: the current legal framework and the latest proposals for change

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In European Food Law there is nothing more controversial than the issue of Genetically Modified Organisms (GMOs). Member States are divided in the Council, one half of the EU legislator. Thus clear decision making in the Council is not easy. The other legislator, the European Parliament, seems to be strongly against their use. The Commission, or the EU executive and the competent authority for the authorisation of new GMOs, is caught in the middle trying to devise legislation to respect the fact that EU food law is based on Science and the EU’s scientific advisor, the European Food Safety Authority (EFSA), considers that many GMOs are scientifically safe to use.

What are GMOs and what is the EU approach on GMOs

Food and feed generally originate from plants and animals selected, grown and bred by humans over thousands of years. Over time, those plants and animals with the most desirable traits were chosen for breeding and planting as next generations of food and feed. This was, for example, the case for plants with an increased resistance to environmental pressures such as diseases, or with an increased yield. These desirable traits appeared through naturally occurring variations in the genetic make-up of those plants and animals. In recent times, it has become possible to modify the genetic make-up of living cells and organisms using techniques of modern biotechnology called gene technology. The genetic material is modified artificially to give the organism a new property (e.g. a plant's resistance to a disease, insect or drought, a plant's tolerance to an herbicide, improving a food’s quality or nutritional value, increased crop productivity). Such organisms are called 'genetically modified organisms' (GMOs). Food and feed which contain or consist of such GMOs,

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68 Articles 18 to 20 of Regulation (EU) No 1290/2013.
69 “Ue: Fondi Horizon 2020, finanziamenti a 107 Pmi italiane - Da ambiente a energia In arrivo 130.6 mil euro a 387 Pmi europee, www.ansa.it, accessed on 9 April 2015.
or are produced from GMOs, are called ‘genetically modified (GM) food or feed’.

The approach chosen in the EU as regards GMOs is a precautionary approach imposing a pre-market authorisation for any GMO to be placed on the market and a post-market environmental monitoring to ensure that non-authorised GMOs are not present on the market. In order to provide consumers with information and freedom of choice, traceability and labelling obligations are imposed for the use of any authorised GMO.

**Regulation (EC) No 1829/2003**

The European Union has in place a comprehensive legal framework for the authorisation, traceability and labelling of GM food and feed.

Regulation (EC) No 1829/2003 on GM food and feed covers food, food ingredients, and feed containing, consisting of, or produced from GMOs. It also covers GMOs for other uses such as cultivation, if they are to be used as source material for the production of food and feed. The Regulation has put in place an authorisation procedure, the aim of which is to ensure that the placing on the market of the products concerned will not pose a risk to human and animal health or the environment.

Applications to request the authorisation are submitted first to the competent authority of a Member State. The application must clearly define the scope of the application, contain studies and data demonstrating the safety of the product, indicate which parts are confidential and must include a monitoring plan, a labelling proposal and a detection method. The application and any supplementary information supplied by the applicant must be made available for a scientific risk assessment covering risk to both the environment and human and animal health.

The scientific risk assessment is at the centre of the procedure: every authorisation for placing on the market of a product has to be duly justified and the main ground on which such a justification can rely is scientific assessment. The law gives responsibility for this scientific risk assessment to EFSA. Where the application is made for cultivation of GMOs, a first risk assessment is made by the scientific bodies of the Member States. This is then endorsed, or not, by the other Member States working though EFSA. The EFSA’s opinion is made available to the public and a public consultation is open for a period of one month.

Where the results of the risk assessment show that the product does not pose a risk to health or to the environment under the proposed conditions of placing on the market and use, the Commission - within three months of receiving the opinion of EFSA - submits to the Member States, represented in the Standing Committee, a draft decision to authorise the marketing and or use of the GMO. Under this procedure, Member States vote under the ‘qualified majority’ defined in the Treaty.

In the Standing Committee, if Member States vote ‘Yes’, the Commission adopts the draft decision. If they vote ‘No’, or if the result of the vote is ‘No opinion’ (no qualified majority either in favour or against is expressed), the Commission may submit the draft decision to another body representing the Member States at a higher level: the Appeal Committee.

In the Appeal Committee, the Member States vote a second time on the draft decision tabled by the Commission. If the Member States vote ‘Yes’, the Commission adopts the draft decision. If they vote ‘No’, the Commission cannot adopt the draft decision. If the result of the vote is ‘No opinion’, the Commission is required by the GMO legal framework and by the Charter of Fundamental Rights to adopt a decision on the application so, in practice, has little choice but to give the authorisation.

Examining this procedure might be considered a bit too much for readers of Across the EUUniverse. However, it is important to look at this process.

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71 Articles 7 and 19 of Regulation (EC) No 1829/2003 provide that the Commission may, in addition to EFSA’s opinion, take into account ‘other legitimate factors relevant to the matter under consideration’.

72 The new qualified majority introduced by the Lisbon Treaty corresponds to at least 55% of the Member States, comprising at least 15 of them, and representing at least 65% of the European population. A blocking minority may be formed comprising at least four Member States.

Member States have competence to decide. But the Member States have never been able to reach clear positions. This, in effect, has delegated decision making power to the Commission. And for many GMOs it is the Commission which has taken the decision to authorise its use.

Once a GMO has been authorised by the EU authorisation procedure, based on a thorough scientific evaluation of risk and a political management of that risk, the story should end there. But it doesn’t. Because Member States still have the capacity to ban the use of the authorised GMOs on their territory and some Member States have continually done so, often in breach of the EU rules.

It is this problem that the latest changes to law seek to address. First, there is the change on cultivation already adopted into law. Second, there is the proposed change in relation to the use of GMOs.

**Opt-out measures by Member States for the GMOs cultivation: Directive (EU) 2015/412**

The newly adopted Directive (EU) 2015/412 gives Member States more flexibility to decide on the cultivation of GMOs under certain conditions, at two distinct points in time. First, during the authorisation procedure: a Member State can ask to amend the geographical scope of the application to ensure that its territory will not be covered by the EU authorisation. Second, after a GMO has been authorised: a Member State may prohibit or restrict the cultivation of the crop based on grounds related amongst others to environmental or agricultural policy objectives, or other compelling grounds such as town and country planning, land use, socio-economic impacts, co-existence and public policy.

Before the adoption of this Directive, Member States could provisionally prohibit or restrict the use of a GMO on their territory only if they had new evidence that the organism concerned constitutes a risk to human health or the environment or in the case of an emergency. No Member State which had adopted a so-called ‘safeguard clause’ had ever been in a position to put forward new evidence. As EU food law is based on science, only a scientific justification could be used. This set the bar very high. Particularly as the EU’s own scientific advisor, EFSA, had found that the GMO in question was scientifically safe.

The new Directive allows Member States to base a refusal to allow cultivation on grounds other than science. These grounds include: environmental policy objectives; town and country planning; land use; socioeconomic impacts; avoidance of GMO presence in other products; agricultural policy objectives; public policy.

The Directive has been adopted by both EU legislators; the Council and the Parliament, and had been proposed by the Commission. Thus both the EU legislators and the executive agree on its content. However, it can be asked whether this Directive is in line with EU policy as set out in established EU law. In particular, is it in line with the Treaty rules on the free movement of goods within the EU, or the objectives of the Common Agricultural Policy as set out in Article 39 of TFEU. Finally, can this Directive be in line with the objectives of EU food law as set out in the General Food Law Regulation from 2002 which states that all food law must be based on science.

In any event, on the basis of this Directive, by the deadline of 3 October 2015, nineteen EU Member States – including Italy – took advantage from the new expanded and non scientific safeguard clause and notified to the Commission the request to prohibit in their own territory the cultivation of all the genetically modified organism which are authorised in the European Union.

**The Commission’s latest proposal on GMOs: more freedom for Member States to decide.**

On 22 April 2015 the Commission presented the outcome of its review of the decision-making process for the authorisation of Genetically

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Modified Organisms as food and feed. This review derives from the Political Guidelines presented to the EU Parliament in July 2014, on the basis of which this Commission was elected. The review confirms the need for changes that reflect public views and allow national governments to have a greater say on the use of EU-authorised GMOs for animal (feed) or human (food) consumption.

As a result of this review, the Commission proposes to amend the legislation to confer upon Member States more freedom to restrict, or prohibit the use of EU-authorised GMOs in food or feed on their territory without affecting the EU risk assessment.

The outcome of the Commission’s review on the GMO’s decision-making process comprises two documents: a communication and a proposal for a Regulation allowing Member States to restrict or prohibit the use of GMOs for food or feed purposes in their territory (GMOs for cultivation are excluded from the scope of the proposal because that they are already covered by Directive (EU) 2015/412).

The Communication highlights the need to extend the principles set forth in Directive (EU) 2015/412 to the use – not only the cultivation – of GM food and feed. To this end, the proposal was made to the EU Parliament and to the Council to amend Regulation (EC) No 1829/2003. While the authorisation process will not be amended, Member States will be given decisional power regarding the use of GM food or feed on their territory.

The Commission suggests that the proposal should mirror the Directive on cultivation: it would offer – under certain conditions – the possibility to Member States to restrict or prohibit the use of GMOs on their territory after these products have been authorised at EU level.

According to the Commission’s proposal, Member States would have to justify that their opt-out measures are compatible with EU law and the principles of proportionality and non-discrimination between national and non-national products. However, they are not allowed to use justifications which conflict with the assessment of risks to human and animal health and the environment carried out by EFSA.

So the Commission’s latest proposal in relation to use has all the difficulties of the previous Directive in relation to cultivation.

The first step: the vote of the EU Parliament’s Environment Committee

On 13 October 2015 European Parliament’s Environment Committee (ENVI) opposed the Commission’s proposal. ENVI Members are concerned that the proposal might prove unworkable and lead to the reintroduction of border controls between pro and anti-GMO countries.

ENVI chair Giovanni La Via said: ‘A clear majority in the committee does not want to jeopardize the internal market. For us, the existing legislation should remain in place, and member states should shoulder their responsibilities and take a decision together at EU level, instead of introducing national bans’.

‘This proposal conflicts with the principles of “better regulation” and transparency which the new European Commission has taken on board. After we spent so many years getting rid of internal barriers, this proposal could fragment the internal market and lead to a return to border inspections, which we all worked hard to get rid of at the time’, he added.

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78 Better regulation is about designing EU policies and laws so that they achieve their objectives at minimum cost. It ensures that policy is prepared, implemented and reviewed in an open, transparent manner, informed by the best available evidence and backed up by involving stakeholders. See ‘Where is EU Law going? Towards a New Commission Strategy for better regulation’ by Giovanni Moschetta and ‘Will the better regulation for better results works?’ by Bernard O’Connor, both having been published in Across the EUUniverse Number 3.

79 Article 34 of TFEU reads as follows: ‘Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.’ That is why the Member States which made use of this proposal should need to justify the measures taken based on grounds in accordance with Article 36 TFEU and the notion of overriding reasons of public interest, as developed by the case-law of the Court of Justice. In addition, the measures envisaged should need to be compatible with the principles of proportionality and non-discrimination between national and non-national products.
The recommendation was approved by 47 votes to 3, with 5 abstentions. It will be put to a plenary vote at the 26-29 October plenary session in Strasbourg.

The GMO saga continues.

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EU, the Connected Continent: Roam like at Home and Net neutrality

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On 27 October 2015 the European Commission (Commission) has welcomed the vote by the European Parliament (EU Parliament) to end roaming charges by June 2017 and to introduce net neutrality rules for the first time in EU law. The ‘Connected Continent’ Proposal for a telecoms single market, which was proposed by the Commission in September 2013, aimed at completing a European single market for electronic communications.

In June 2015, the EU Parliament, Council and Commission reached an agreement in trilogue on a partial approach, agreeing on just two points of those listed in the footprint note: roaming charges and net neutrality. Most of the remaining aspects of the initial proposal will be addressed in a review of EU telecoms rules in 2016. In fact, creating the right conditions for digital networks and services is a key objective of the Commission’s plan for a Digital Single Market presented in May 2015.

The Digital Single Market aims to break down the barriers, and to offer more opportunities: it wants be a seamless area where people and business can trade, innovate and interact legally, safely, securely, and at an affordable cost.

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80 The main proposal’s issues are: i) simplification of regulation for companies; ii) more coordination of spectrum use, so that we see more wireless broadband, more 4G investment, and the emergence of pan-EU mobile companies with integrated networks; iii) standardised fixed access products, encourages more competition between more companies and facilitates increasing provision of pan-EU services; iv) protection of Open Internet, guarantees for net neutrality, innovation and consumer rights; v) pushing roaming premiums out of the market through a carrot and stick approach to say goodbye to roaming premiums by 2016 or earlier; vi) consumer protection: plain language contracts, with more comparable information, and greater rights to switch provider or contract.

81 The Digital Single Market strategy is made up of three policy areas: i) better online access to digital goods and service; ii) an environment where digital networks and services can prosper; iii) digital as a driver for growth.
Moreover, a completed Digital Single Market will also ensure that Europe maintains its position as a world leader in the digital economy, helping European companies to grow globally.

No roaming charges after 15 June 2017

Roaming is the practice of charging extra for making and receiving mobile-phone calls, transmitting or receiving data, or accessing other services when travelling outside the geographical coverage area of the home network. For a decade, as a result of three EU Regulations\(^\text{82}\), roaming charges have decreased within the EU (data roaming is now 91% cheaper compared to 2007).

The proposed regulation will bring this to an end. A complete ban on roaming charges for using mobile phones abroad in the EU is became law.

It will take effect by June 2017 in two phases: a transitional period from 30 April 2016 until 14 June 2017, where roaming will be charged at the domestic call price plus a small surcharge (i.e. €0.05 per minute for outgoing voice calls, €0.02 for text messages (SMS), or €0.05 per megabyte of mobile internet use); and a second phase from 15 June 2017, after which all European consumers would pay the same price for calls, texts and mobile data, wherever they are travelling in the EU, at home.

‘This abolition of roaming surcharges has been long awaited by everybody: ordinary people, start-ups, SMEs [small to medium-sized enterprises] and all kinds of organisations’ said the rapporteur, Pilar del Castillo (EPP, ES), in the debate before the vote.

The regulation will also introduce a ‘Fair use safeguard’ to prevent abusive uses or permanent roaming. I.e. according to the Commission, ‘if the customer buys a SIM card in another EU country where domestic prices are lower to use it at home; or if the customer permanently stays abroad with a domestic subscription of their home country’\(^\text{83}\). The exact details for this will be defined by the Commission and telecoms regulators.

The increasing number of Europeans who travel in the EU are the primary beneficiaries. The measure will also create a better environment for businesses and for innovation. The new rules will notably promote the cross-border use of connected devices and services (e.g. connected cars) and boost the evolution of mobile apps, on which one million Europeans now work.

Roaming charges currently teach users to switch off their mobile phone when abroad. If they are not afraid of their bills anymore, they will use their devices more regularly when they are travelling – this means more opportunities for online businesses and start-ups to provide services to consumers when they travel in the EU.

Network neutrality

Network neutrality, (or more simply, net neutrality) refers to how data transmissions are managed over an electronic communications network. For working purposes, the Body of European Regulators for Electronic Communication (BEREC)\(^\text{84}\) defines net neutrality to mean that all electronic communication passing through a network is treated equally (i.e. independently of content, application, service, device, sender or receiver)\(^\text{85}\).


\(^{83}\) European Commission Fact Sheet – questions and answers on roaming charges and open Internet.

\(^{84}\) The role of BEREC: in April 2011, the Commission asked the Body of European Regulators for Electronic Communications (BEREC) to undertake a fact-finding exercise on issues crucial to ensuring an open and neutral Internet, including barriers to changing operators, blocking or throttling of Internet traffic, transparency and quality of service. As a result, BEREC published a Report on best practices to facilitate switching in October 2010 as well as a framework for quality of service in December 2011. At the same time, BEREC adopted guidelines on transparency by identifying best practices and recommended approaches. In December 2012, BEREC published its guidelines on quality of service as well as reports on differentiation practices and related competition issues, and IP Interconnection.

\(^{85}\) R. Davies, European Parliamentary Research Service ‘Net neutrality in Europe’.
Until now, there have been no clear rules on net neutrality at EU level, leaving most Europeans without legal protection for their right to access the open internet. Some EU countries have adopted national laws on net neutrality. However, in a Digital Single Market, we cannot afford that 28 Member States adopt 28 different approaches on that issue. The freedom of European citizens to access or distribute internet content must not depend on the country in which they are. Having an EU law on net neutrality will avoid further fragmentation of telecoms regulation in Europe.

The agreed proposal includes the principle of net neutrality in Article 3 (3): “Providers of internet access services shall treat all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.”

It means that there will be truly common EU-wide internet rules, contributing to a single market and reversing current fragmentation. All traffic will be treated equally. This means, for example, that there can be no paid prioritisation of traffic in the internet access service. At the same time, equal treatment allows reasonable day-to-day traffic management according to justified technical requirements, and which must be independent of the origin or destination of the traffic and of any commercial considerations. Common rules on net neutrality mean that internet access providers cannot decide which content and services are available because all content and services will be available at the same velocity. Every European must be able to have access to the open internet and all content and service providers must be able to provide their services via a high-quality open internet.

The rules establish the principle of equal and non-discriminatory traffic management and prohibit any blocking, throttling, degradation or discrimination of internet traffic by internet service providers. This general prohibition is subject to a limited number of tightly defined and exhaustive exceptions:

- to comply with Union or national legislation related to the lawfulness of content or with criminal law, or with measures implementing this legislation such as a decision by public authorities or a court order, for instance if a judge or the police have ordered blocking of specific illegal content;

- to preserve the security and integrity of the network, for instance to prevent misuse of a network and combat viruses, malware or denial of services attacks;

- to minimise network congestion that is temporary or exceptional. This means that operators cannot invoke this exception if their network is frequently congested due to under-investment and capacity scarcity.

Under the Regulation, consumers will be informed about the minimum and maximum available internet speeds they can expect when signing a contract. If the operator does not deliver the promised speeds, this would be deemed to be a breach of contract.

‘Thanks to this agreement, Europe will also become the only region in world which legally guarantees open internet and net neutrality. The principle of net neutrality will be applied directly in the 28 member states. It also ensures that we will not have a two-speed internet’ said Pilar del Castillo (EPP).

Proponents of net neutrality believe that an open internet is the best guarantee of freedom expression. Nevertheless, it is mandatory to consider privacy issues. Internet Service Providers (ISPs) may use different techniques to improve internet traffic. Some of these techniques may be very intrusive, and even let ISPs know the content of the traffic that passes through their networks.

Depending on the level of intrusion, such techniques may infringe on the principles of data minimisation: accessing personal and identification data as little as possible and proportionality: the action taken should not exceed that which is strictly necessary to achieve the set objectives. Therefore it could be incompatible with EU data protection law, in

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87 Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
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