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Chapter 10

Overlap between the scope of the State aid rules and the scope of the fundamental freedoms

10.1. Introduction

As we have demonstrated extensively in the previous Chapter, the analysis of national tax measures under the State aid rules and the fundamental freedoms follows a substantially similar methodology which boils down to answering the questions (i) whether the measure under review constitutes discrimination in the sense that it treats objectively comparable situations differently and if so, (ii) whether such discrimination can be justified. Advocate General Kokott recognized this when she observed in the Regione Sardegna case:

“[…] the same questions arise with regard to the law of State aid as with regard to the fundamental freedoms, and there is no reason why the reply in relation to the latter should differ from the reply regarding the former. Rather, to avoid conflicting assessments as between the law of State aid and the law of fundamental freedoms, the same criteria must be applied in both cases.”

Due to the similarity of the methods of assessment under the two norms and primarily, the fact that both selectivity and discrimination expresses the principle of equality of treatment, one and the same national tax measure may be captured by both the prohibition of State aid and the ban on discrimination or restriction on the fundamental freedoms. A measure which treats non-resident undertakings less favourably than resident ones may constitute both a discrimination against non-residents and a selective advantage to residents. O’Brien, one of the first commentators who dealt with the interaction of the State aid rules and the fundamental freedoms, observed already in 2005 that many of the direct tax measures which were held by the CJ to infringe the fundamental freedoms, mostly in preliminary ruling procedures which originated in national actions brought by individuals, could also have been the subject of State aid procedures initiated by the Commission leading

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to a finding of incompatible State aid.\textsuperscript{1813} To illustrate this, she mentioned the measures at issue in \textit{Eurowings}, \textit{Baxter} and \textit{Verkooijen}.\textsuperscript{1814} We could add further examples to these from the more recent case law. For example, the taxation of outbound dividends by way of withholding tax as opposed to the exemption of domestic dividends may be regarded not only as a discrimination against non-resident shareholders but also a selective favouring of resident shareholders.\textsuperscript{1815} Similarly, a withholding tax on dividends paid to non-resident investment undertakings\textsuperscript{1816} or on remuneration for services provided by contractors in the construction sector not registered in the State where the service is provided\textsuperscript{1817} constitutes a discrimination against non-resident investment or construction undertakings while at the same time it could also be regarded as a selective benefit to their domestic counterparts. An R\&D tax credit granted only if the research is carried out in the territory of the Member State can be seen as a discrimination against non-resident research undertakings or a selective advantage for domestic undertakings providing contract research.\textsuperscript{1818} That these examples are not only hypotheses is proven by the \textit{Regione Sardegna} case.\textsuperscript{1819} In this case, the Court held upon a referral by the Italian Constitutional Court that a regional tax adopted in the exercise of autonomous powers by the Region of Sardinia which was imposed on stopovers for tourist purposes by luxury yachts and aircrafts only on non-resident operators of such means of transport constituted both an infringement of the freedom to provide and receive services under Article 56 TFEU and State aid within the meaning of Article 107(1) TFEU.

This raises the question whether the State aid rules and the fundamental freedoms can, indeed, be applied concurrently to the same Member State measure or whether the application of one norm should take precedence over the other. As both the State aid rules and the fundamental freedoms constitute primary EU law and, moreover, both are fundamental legal guarantees

\textsuperscript{1813} O'Brien, supra note 1298, p. 231.
\textsuperscript{1814} ECI, 26 October 1999, Case C-294/97 \textit{Eurowings Luftverkehrs AG v Finanzamt Dortmund-Unna}; ECI, 8 July 1999, Case C-254/97 \textit{Société Baxter and Others v Premier Ministre and Others}; ECI, 6 June 2000, Case C-35/98 \textit{Staatssecretaris van Financiën v B.G.M. Verkooijen}.
\textsuperscript{1815} Similarly, F. Engelen, \textit{State Aid and Restrictions on Free Movement: Two Sides of the Same Coin?}, 52 European Taxation 5 (2012), pp. 204-209, at p. 208. For example, Case C-170/05 \textit{Denkavit}; Case C-379/05 \textit{Amurta}; Case C-540/07 \textit{Commission v Italy}; Case C-487/08 \textit{Commission v Spain}; and Case C-284/09 \textit{Commission v Germany}.
\textsuperscript{1816} For example, Case C-303/07 \textit{Aberdeen}; CJ, 10 May 2012, Case C-338/11 \textit{Santander Asset Management SGIIC SA and Others v. Direction des résidents à l’étranger et des services généraux}; CJ, 25 October 2012, Case C-387/11 \textit{Commission v Belgium}.
\textsuperscript{1817} CJ, 9 November 2006, Case C-433/04 \textit{Commission v Belgium}.
\textsuperscript{1818} Case C-39/04 \textit{Laboratoires Fournier}.
\textsuperscript{1819} Case C-169/08 \textit{Regione Sardegna}.
of the internal market, no relationship of hierarchy can be established between them. Therefore, should their concurrent application be excluded, an order of priority cannot be established between them on the basis of their ranking in the hierarchy of the sources of EU law; hence, another criterion of precedence needs to be identified.

Whether the State aid rules and the free movement provisions may be applied simultaneously depends on the legal consequences which ensue from the infringement of each rule; specifically, whether such legal consequences are reconcilable with each other. The legal consequences include the procedures through which the State aid rules, on the one hand, and the free movement provisions, on the other, can be enforced as well as the legal remedies that are foreseen for the breach of the two distinct rules.\textsuperscript{1820}

As regards procedures, in the enforcement of the State aid rules the Commission plays a predominant role. The State aid rules, specifically the provisions under Article 108 TFEU, lay down a system under which all new aid measures planned to be introduced by the Member States must be notified to the Commission. New aid cannot be implemented without the prior authorization of the Commission (standstill obligation). The monitoring of existing aid also falls within the Commission’s competence. The Procedural Regulation describes the Commission’s role as follows:

“...the Commission has specific competence under Article 93 [now Article 108 of the Treaty] to decide on the compatibility of State aid with the common market when reviewing existing aid, when taking decisions on new or altered aid and when taking action regarding non-compliance with its decisions or with the requirement as to notification.”\textsuperscript{1821}

The assessment of the compatibility of proposed or existing aid measures with the internal market based on the criteria laid down in Article 107(2) and (3) of the TFEU is the exclusive responsibility of the Commission, subject to review by the Union Courts.\textsuperscript{1822} Although the standstill obligation under Article 108(3) TFEU has direct effect which can be relied on by private parties before national courts, the Commission Enforcement Notice

\textsuperscript{1821} Preamble to Regulation No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (hereinafter ‘Procedural Regulation’), first indent.
expressly points out that private enforcement of the State aid rules before national courts still has a relatively limited importance as compared to the Commission’s role in State aid control.¹⁸²³

In contrast, the enforcement of the fundamental freedoms – due to their direct effect established at a very early stage in the history of EU law – lies primarily with private parties who are keen to assert their rights which they derive from the EU freedoms before the national courts.

As regards remedies, the non-compliance with the notification and standstill obligation under State aid rules – i.e. the grant of unlawful aid which is found to be incompatible with the internal market – results in the obligation of the Member State to recover the aid from the beneficiary together with interest.¹⁸²⁴ As the Court held:

“*The withdrawal of unlawful aid by recovery is the logical consequence of the finding that it is unlawful. That recovery [serves] the purpose of re-establishing the previously existing situation […]. By repaying, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored […]***”¹⁸²⁵

In the case of State aid in the form of tax measures, the recovery of the aid normally means that the beneficiary has to pay the tax (together with interest) from which it was exempted or which it did not pay in full due to the selective advantage from which it benefitted.

Conversely, the remedy in the case of infringement of the fundamental freedoms by tax measures discriminating against cross-border movements is the refund of the tax which the non-resident taxpayer or the taxpayer involved in cross-border operations paid in addition to what a resident taxpayer carrying out only domestic operations would have been liable to pay.

As it appears, these differences between the State aid rules and the fundamental freedoms as regards the enforcement procedures and the remedies they are coupled with may cause anomalies when the two rules apply concurrently to one and the same tax measure. If a procedure is initiated before a national court on the basis of the fundamental freedoms with regard to a national measure which qualifies as breach of the fundamental freedoms

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¹⁸²³. Ibid. para. 4-5.
¹⁸²⁵. Case C-148/04 *Unicredito*, para. 113; ECJ, 29 April 2004, Case C-372/97 *Italy v Commission*, paras. 103-104.
Starting point: the Ianelli case

and, at the same time, State aid, the adjudication by the national court of the matter may result in the Commission’s being deprived of its exclusive competence to declare aid (in)compatible with the internal market. In such case, the fact that a private party chooses to bring an action on the ground of the fundamental freedoms may frustrate the purpose of the State aid rules. Another problematic scenario is when the Commission orders the recovery of unlawful fiscal State aid with regard to a measure which constitutes both State aid and discriminative taxation under the freedoms. In such case, the payment of the tax by the beneficiary who enjoyed an exemption may not be an adequate remedy for its competitor who, at the same time, has been disadvantaged by the levy of the discriminatory tax.

In the forthcoming Sections we will examine the Courts’ case law dealing with the overlap of the State aid rules and the fundamental freedoms or some other directly effective Treaty provisions and endeavour to answer the question whether the concurrent application of the two sets of rules are permissible or rather one should be given precedence over the other.

10.2. Starting point: the Ianelli case

The question whether a system of aid falling under the scope of Article 107-108 TFEU can be assessed for its compliance with other provisions of the Treaty was answered by the Court as early as 1977. In the Ianelli case, the Court dealt with a system of aid introduced by Italy aimed at promoting and regulating the cellulose and paper production industry. The system was administered by a public body, ENCC, and consisted of, inter alia, subsidising the purchase of paper by newspaper publishers. This took the form of a price subsidy, that is, newspaper publishers could buy paper from Italian paper mills at a reduced price and the balance between the normal price and the reduced price was paid by ENCC to the paper mills. The subsidy also applied to paper imported from other Member States as long as it was imported through the ENCC. Thus, the benefit was withheld only in the case when the newspaper publishers bought paper from direct importers. In addition, the subsidies were financed by a parafiscal levy which was imposed on the production, sale and importation of cellulose and paper. In the case at hand, a purchaser of imported paper who was subject to the parafiscal levy challenged the legality of the levy before an Italian court. The purchaser argued, first, that the aid scheme that the levy was financing contravened what is now Article 34 TFEU insofar as it granted subsidies to

1826. ECJ, 22 March 1977, Case 74/76 Ianelli & Volpi SpA v Ditta Paolo Meroni.
newspaper undertakings to enable them to buy paper more cheaply subject to the condition that the paper was produced in Italy or imported by ENCC to the exclusion of paper imported directly from other Member States. Thus, the scheme constituted a measure having equivalent effect to quantitative restrictions on imports within the meaning of Article 34 TFEU. According to the purchaser, the fact that the aid scheme violated the Treaty provisions on free movement affected the legality of the levy which served to finance the aid scheme. Second, the purchaser maintained that the levy itself which it had to pay was more burdensome on imported than domestically produced paper and thus constituted discriminatory internal taxation in breach of what is now Article 110 TFEU.

As it appears, the scheme was composed of multiple elements which were challenged under various provisions of the Treaty raising questions of delineation of the scope of Articles 30, 34, 110 and 107-108. From our point of view, the only issue of relevance is the interaction of the State aid rules and the free movement of goods, specifically Article 34. In this regard, the Court first of all pointed out that although the field of application of Article 34 is broad, it does not include obstacles to trade covered by other provisions of the Treaty. With regard to the State aid provisions, this means that:

"[...] the fact that a system of aids provided by the State or by means of State resources may, simply because it benefits certain national undertakings or products, hinder, at least indirectly, the importation of similar or competing products coming from other Member States is not in itself sufficient to put an aid as such on the same footing as a measurehaving an effect equivalent to a quantitative restriction within the meaning of Article 30 [now Article 34]."

Thus, the fact that State aid is granted to undertakings or activities which fall under the (territorial) jurisdiction of a Member State to the exclusion of undertakings of other Member States or activities carried out in the territory of other Member States is inherent in the notion of State aid and, although it indirectly disadvantages the latter, it cannot be regarded as a restriction on free movement within the meaning of the fundamental freedoms. In the context of the case, this means that the fact that the subsidies were granted only to Italian newspaper publishers, which may make Italian newspapers cheaper than foreign newspapers and in turn render foreign newspapers less attractive for Italian customers, cannot be regarded as a measure having equivalent effect to a quantitative restriction.

1827. Case 74/76 Ianelli, para. 10.
The Court then recalled that the Treaty confers exclusive powers on the Commission in the monitoring of State aid inasmuch as a finding that an aid is incompatible with the internal market can only be made by the Commission in the framework of an appropriate procedure as laid down in Article 108 TFEU. In contrast, national courts cannot rule on the compatibility of State aid with the internal market. An overly wide interpretation of the freedoms could lead to a situation that aid could be challenged before the national courts on the basis of the directly effective freedoms and national courts could, in effect, decide on the compatibility of such aid:

“The effect of an interpretation of Article 30 [now Article 34 TFEU] which is so wide as to treat an aid as such within the meaning of Article 92 [now Article 107 TFEU] as being similar to a quantitative restriction referred to in Article 30 [now Article 34 TFEU] would be to alter the scope of Articles 92 and 93 of the Treaty [now Article 107 and 108 TFEU] and to interfere with the system adopted in the Treaty for the division of powers by means of the procedure for keeping aids under constant review as described in Article 93 [now Article 108 TFEU].”

However, applying the free movement provisions simultaneously with the State aid rules does not always entail a risk of jeopardizing the Commission’s competence in State aid control and thus does not always have to be precluded. The Court distinguished two situations:

“Those aspects of aid which contravene specific provisions of the Treaty other than Articles 92 and 93 [now Article 107 and 108 TFEU] may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately so that their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore be determined in the light of the procedure prescribed in Article 93 [now Article 108 TFEU].

Nevertheless the position is different if it is possible when a system of aid is being analysed to separate those conditions or factors which, even though they form part of this system, may be regarded as not being necessary for the attainment of its object or for its proper functioning.

In the latter case there are no reasons based on the division of powers under Articles 92 and 93 [now Article 107 and 108] which permit the conclusion to be drawn that, if other provisions of the Treaty which have direct effect are infringed, those provisions may not be invoked before national courts simply because the factor in question is an aspect of aid.”

Thus, the Court concluded that when the aspect of aid which breaches a fundamental freedom (or other provision of the Treaty with direct effect) is

1829. Case 74/76 Ianelli, para. 12, third subparagraph.
1830. Ibid. para. 14.
‘indissolubly linked’ to the object of the aid the State aid rules should take precedence over the fundamental freedom in the sense that the measure should only be assessed in the light of the State aid rules and according to the procedure provided for under the State aid rules. Conversely, when the element of the aid which is suspect of violating a fundamental freedom is separable from the other elements and conditions thereof the fundamental freedom can be applied to the aid measure at issue by a national court or by the Commission, as the case may be.

Applying the above to the aid scheme at issue in Ianelli, the condition of the scheme according to which newspaper publishers could only buy domestically produced paper or paper imported by the ENCC at a lower price does not seem necessary for attaining the objective of the scheme. As the condition was separable from the rest of the scheme, it could be reviewed on its own by the Italian court in the light of Article 34 TFEU. The CJ also clarified that the fact that the national court may find a separable element of the scheme in breach of a specific provision of the Treaty does not enable the national court to declare the whole scheme incompatible with the Treaty or to find the levy which finances the aid scheme illegal for this reason alone.\(^{1831}\) In the case at hand, the national court could examine the levy, which was also a separable element of the scheme, directly in the light of Article 110 TFEU which was likely to be infringed by the levy, therefore, there was no need to try to establish the illegality of the levy on any other ground.

The lesson which we can draw from this very early case dealing with the interaction of the State aid rules and the fundamental freedoms is that the main risk which is inherent in allowing the two sets of rules to be applied simultaneously without an order of precedence to one and the same national measure is that such application may jeopardise the exclusive competences of the Commission to review State aids and declare them compatible with the internal market. The Court emphasised that the application of the directly effective freedoms to a measure which qualifies as aid may result in altering the scope of Articles 107 and 108 TFEU “and [...] interfere with the system adopted in the Treaty for the division of powers” through the procedure set out under Article 108 TFEU. The facts of Ianelli demonstrated very well the existence of such risk. The procedure was initiated in front of an Italian court by an individual who was harmed by the aid measure which he claimed to be in breach of the Treaty provisions on the free movement of goods. The individual asked the Italian court to invalidate the whole aid scheme, including the parafiscal levy that he had to pay, on account of the

\(^{1831}\) Ibid. para. 16.
Where the aspects of State aid are separable

fact that an aspect of the aid, which was unrelated and separate from the parafiscal levy, violated the free movement of goods. From the submissions of the parties, it can be inferred that the aid scheme at issue was most probably an existing aid which was being monitored by the Commission at the time when the action was brought before the national court. As a result of the monitoring, the Commission ordered amendments to the aid scheme which have been implemented by Italy; the Ianelli case, however, still referred to the situation before such amendments. If in these situations national courts were permitted to apply the provisions on the free movement of goods to aid schemes without any further qualifications and conditions it could lead to national courts invalidating aid measures without the Commission being able to assess them and, if it sees fit, approve them. This would deprive the Commission of the powers assigned to it by the Treaty and compromise the effectiveness of the State aid procedure set under Article 108 TFEU. The solution given in Ianelli – i.e. the State aid rules take precedence over the freedoms in cases where the element of aid which conflicts with the freedoms cannot be severed from the elements which effectuate the purpose and object of the aid – reflects the Court’s intention to avoid such risk entailed by the concurrent application of the two regimes.

As Ianelli appears to have spelled out a principle intended to govern the relationship of the State aid rules and the fundamental freedoms, it needs to be seen whether and to what extent such principle was followed in subsequent cases. For this analysis, we will divide the case law into two groups according to the two scenarios that were distinguished in Ianelli.

10.3. Where the aspects of State aid are separable

10.3.1. Concurrent application of substantive rules

The Court held in paragraph 14 of Ianelli that aspects of an aid scheme which are not necessary for the attainment of its object or for its proper functioning may be reviewed in the light of Treaty provisions other than Article 107-108 and, if the latter provisions are directly effective, the review may be carried out by national courts. The provisions which are most frequently claimed to be infringed by measures that, at the same time, constitute State aid are the fundamental freedoms, specifically the provisions on the free movement of goods, and the prohibition of discriminatory internal taxation set out in Article 110 TFEU.
Typical examples of aid schemes where the aspect of the aid which constitutes an infringement of the fundamental freedoms is separable from the other conditions which are necessary for the attainment of the objective of the aid are provided by two rather old infringement cases. One case concerned a French aid scheme which granted newspaper publishers a tax deferral on the condition that they had their newspapers printed in France. The other dealt with an Italian measure which granted subsidies to municipal transport undertakings for the purpose of purchasing more energy-efficient transportation vehicles and made the subsidies subject to the condition that the vehicles be manufactured in Italy. The Commission claimed in both cases that the measures infringed the prohibition of Article 34 TFEU insofar as they had restrictive effects on imports of the respective products from other Member States. The Commission argued that, although the contested provisions formed part of a scheme which may constitute State aid, they were not necessary for achieving the aim of that scheme and therefore they could be reviewed separately in the light of Article 34. In particular, newspaper publishers can be assisted by fiscal advantages without it being necessary to link the advantage to the condition of their using local newsprints. Similarly:

“The objective of establishing a fleet of vehicles which consume less energy may be attained without its being necessary to make the aid subject to the condition that the vehicles be made in Italy.”

On the contrary, the Member States argued that since the contested provisions formed an integral part of an aid scheme, they could not be separated from the latter and thus could only be reviewed in the light of Article 107-108 TFEU. The Court held that:

“[…] Articles 92 and 94 [now Articles 107 and 108] cannot, as is clear from a long line of cases decided by the Court, be used to frustrate the rules of the Treaty on the free movement of goods or the rules on the repeal of discriminatory tax provisions. According to those cases, the provisions relating to the free movement of goods, the repeal of discriminatory tax provisions and aid have a common objective, namely to ensure the free movement of goods between Member States under normal conditions of competition […]. The mere fact that a national measure may possibly be defined as aid within the meaning of Article 92 [now Article 107] is therefore not an adequate reason for exempting it from the prohibition contained in Article 30 [now Article 34] […]”

1832. ECJ, 7 May 1985, Case 18/84 Commission v France; ECJ, 5 June 1986, Case 103/84 Commission v Italy.
1834. Case 103/84 Commission v Italy, para. 15.
1835. Case 18/84 Commission v France, para. 10; Case 103/84 Commission v Italy, para. 15.
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Although the Court did refer to *Ianelli* as one of the long line of cases, it did not repeat the basic distinction – i.e. elements which are unnecessary for achieving the objective of the aid and elements indissolubly linked to the objective of the aid – which was drawn in that case. The Court’s reasoning is not based on the fact that the contested provisions are separable from the other conditions of the aid scheme and are unnecessary for its functioning. Instead, we find a generic statement that the State aid rules cannot be used to frustrate the provisions of the Treaty on free movement, as they both pursue the same objective. The last sentence seems even to contradict *Ianelli* – to a certain extent – as it states in a general manner that Article 34 is always applicable whether or not the provision at hand is part of a measure which constitutes aid without carving out the situation where the provision is indissolubly linked to the object of the aid. According to *Ianelli*, in the latter case the measure can only be reviewed under Article 108. On the other hand, having regard to the concrete measures at issue in *Commission v France* and *Commission v Italy*, the outcomes of these cases do not contradict *Ianelli*. That is because in both cases, the aspect of the aid which was challenged under, and found incompatible with, Article 34 was separable, that is, unnecessary to achieve the objective of the aid. Furthermore, the different approaches in *Commission v France* and *Commission v Italy*, on the one hand, and *Ianelli*, on the other, can be explained by the differing contexts of these cases. In the two infringement cases, the emphasis was rather on a substantive issue namely, whether the provisions on the fundamental freedoms can be applied in a case where the State aid rules are (potentially) also applicable. There was no issue about different EU and national bodies applying these rules. It was the Commission (and ultimately, the Union Courts) who had applied both sets of rules. On the other hand, in *Ianelli* the main concern of the Court was that the application of the directly effective freedoms by a national court should not jeopardise the competences of the Commission in the State aid procedure. Thus, the emphasis was on the division of competences between the national courts and the Commission.

Another type of measures where the conditions of the aid are separable and thus, reviewable independently in the light of Treaty provisions other than the State aid rules is constituted by aid schemes where the aid is financed by the imposition of special parafiscal levies the revenue from which is exclusively allocated, i.e. hypothecated, to the aid. In the case of these measures, it is quite evident that the imposition of the parafiscal levy is not necessary for achieving the objective of the aid, as the aid could well be financed from

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1837. Although neither the French nor the Italian measure had been notified to the Commission, the Commission could initiate a State aid procedure parallel with or after the infringement procedure.
the general budget too. Therefore, the parafiscal levy should be regarded, in terms of the Ianelli-reasoning, as a separable element of the scheme which can be scrutinized in the light of Article 30 or 110 TFEU. Such measure was at issue in the Sovrapprezzo case.1838 Italy levied a surcharge on white sugar (‘sovrapprezzo’) which applied to both domestically produced and imported sugar on the basis of the same criteria. The proceeds from the surcharge were used to finance aids to domestic sugar producers which meant that the burden on domestic products was neutralized by the advantages which domestic producers derived from the aid. The Commission brought an infringement procedure against Italy maintaining that such a system of financing of aid was in breach of the prohibition of discriminatory internal taxation set out in Article 110 TFEU. The Court agreed with the Commission. However, before reaching such conclusion it had to decide on the claim of inadmissibility brought up by the Italian government. The latter argued that the legality of the system of financing an aid can only be considered within the framework of the State aid procedure laid down in Article 108 TFEU and not in an infringement procedure under Article 258 TFEU. In response, the Court pointed out that the State aid rules and Article 110 pursue the same objective that is, maintaining undistorted conditions of competition in the internal market. Although the application of the two rules presupposes distinct conditions and they also differ as to their legal consequences inasmuch as in the implementation of the State aid rules, differently from Article 110, the Commission plays a significant part, these:

“[…] do not rule out the possibility that a measure carried out by means of discriminatory taxation, which may be considered at the same time as forming part of an aid within the meaning of Article 92 [now Article 107], may be governed both by […] Article 95 [now Article 110] and by those applicable to aids granted by States. It follows that discriminatory tax practices are not exempted from the application of Article 95 [now Article 110] by reason of the fact that they may at the same time be described as a means of financing a State aid and that they may consequently form the subject-matter of a distinct procedure under Article 169 [now Article 258].”1839

In essence, this reasoning is very similar to the one that we saw above in Commission v France and Commission v Italy. It authorises the cumulative application of the State aid rules and other, directly effective, Treaty provisions. It does so without expressly referring to Ianelli and without an analysis as to whether the aspect of the aid scheme challenged under Article 110 is separable from its object and purpose. The case is interesting, however, as it adds an additional perspective to the matter, a procedural one.

1838. ECJ, 21 May 1980, Case 73/79 Commission v Italy (Sovrapprezzo).
1839. Case 73/79 Commission v Italy, para. 9.
Where the aspects of State aid are separable

10.3.2. Parallel procedures

10.3.2.1. State aid procedure and infringement procedure

While in the two infringement procedures discussed above the Member States’ defence was based on the argument that the various substantive norms at issue cannot be applied simultaneously, the Italian government in Sovrapprezzo focused rather on the question of what scope the State aid procedure and the infringement procedure ought to have and whether the two may run parallel as regards one and the same national measure. The question thus relates to two procedures each of which falls within the responsibility of the Commission. This is a clear difference as compared to Ianelli, which dealt with the impact of two procedures – one within the responsibility of the Commission, the other within that of a national court – on each other. This may also explain why the Court in Sovrapprezzo did not refer to Ianelli.

The Court made some important remarks in Sovrapprezzo as regards the procedural aspect of the relationship between the State aid rules and other Treaty provisions. First, it pointed out that an infringement procedure is not devoid of purpose just because the measure which the Commission challenges as being in violation of a Treaty provision is also considered to be part of a system of aids which is investigated under a State aid procedure. With this, the Court dismissed the argument of the Italian government that an infringement procedure should not be run parallel with a State aid procedure given that, on the one hand, the scope of the State aid procedure is broad enough to cover the assessment of the means of financing of an aid and, on the other, it can lead in itself to ordering the Member State to modify any aspect of an aid or abolish it as a whole. Second, the Court spelled out the limits of the Commission’s discretion in the State aid procedure:

“[...] whilst the procedure provided for in Articles 92 and 93 [now Article 107 and 108] leaves a wide discretion to the Commission [...] to come to a decision regarding the compatibility of a system of aids granted by States with the requirements of the common market it is clear from the general plan of the Treaty that that procedure must never produce a result which is contrary to the specific provisions of the Treaty concerning, for example internal taxation.”

From this it follows that if the Court rules that the imposition of the surcharge on sugar is contrary to the provisions of Article 110, the State aid procedure conducted by the Commission cannot lead to a result that the

1840. Case 73/79 Commission v Italy, para. 11.
measure is allowed to be maintained in its original form. The Court added
that for this reason the pursuance of an infringement procedure concerning a
measure which is, at the same time, subject to a State aid investigation is not
such to jeopardise the Member State’s interest in maintaining the measure as
an aid compatible with the internal market. When a measure is condemned
in an infringement procedure, it means that it is contrary to some Treaty
provisions and as such it could in no way be declared compatible aid within
the framework of a State aid procedure.

The question of parallel proceedings also arose, albeit in a different con-
text, in Matra.\textsuperscript{1841} The case addressed the issue of the interplay between the
State aid procedure and another procedure under competition law, namely
that relating to anti-competitive agreements. The applicant in the case chal-
lenged the Commission’s decision not to raise objections against an aid
scheme to be provided by the Portuguese government to a joint venture of
Volkswagen and Ford for the purpose of setting up a factory of multi-
purpose vehicles in Portugal. The applicant, a potential competitor of the
beneficiary of the aid, argued, inter alia, that the Commission disregarded
the link between Articles 107 and 101 TFEU by approving the aid without
awaiting the outcome of the procedure under Regulation No 17 with respect
to the agreement between Volkswagen and Ford. The Court reiterated the
statement made in Sovrapprezzo that the State aid procedure must never
produce a result which is contrary to the specific provisions of the Treaty.
It added that:

\begin{quote}
“\textit{That obligation on the part of the Commission to ensure that Articles 92 and
93 [now Articles 107 and 108] are applied consistently with other provisions of
the Treaty is all the more necessary where those other provisions also pursue,
as in the present case, the objective of undistorted competition in the common
market.”}\textsuperscript{1842}
\end{quote}

Nevertheless, the Court concluded that the procedure under Article 101 and
that under Article 108 are independent procedures governed by specific
rules and therefore, the Commission is not obliged to await the outcome
of the former procedure before deciding on the compatibility of State aid
under the latter procedure. This however, does not change the fact that the
Commission in order to reach a conclusion on the compatibility of the aid
with the internal market does have to assess whether the recipient of the
aid is in breach of Articles 101 and 102 TFEU.\textsuperscript{1843} The conclusion from

\textsuperscript{1841.} ECJ, 15 June 1993, Case C-225/91 Matra SA v Commission.
\textsuperscript{1842.} Ibid. para. 42.
\textsuperscript{1843.} Ibid. para. 45.
Where the aspects of State aid are separable

this case, i.e. recognising the possibility of conducting parallel procedures ensuring, however, that the State aid procedure in itself does not lead to infringements of other Treaty provisions, is in line with what we have seen with regard to the interaction of the State aid procedure and the infringement procedure. A difference compared to Sovrapprezzo is that the Court in Matra referred to Ianelli when it recalled that certain aspects of the aid can be so indissolubly linked to the object of the aid that it is not possible to evaluate them separately in the light of other Treaty provisions. To us, it is rather unclear why this reference is relevant in the context of this case.

Returning to infringement procedures, Sovrapprezzo confirmed that the Commission may pursue an infringement procedure parallel with a State aid procedure if the measure which constitutes aid is, at the same time, contrary to a Treaty provision other than Articles 107-108. The question, nevertheless, remained whether the simultaneous conduct of the two procedures is a mere possibility for the Commission or an obligation on it. In other words, can the Commission choose to pursue only the State aid procedure and decide upon the infringement of a Treaty provision other than Articles 107-108 in the framework of that procedure or does it have to initiate an infringement procedure for the latter purpose? This question was answered by the Germany v Commission case. Germany brought an action before the Court for the annulment of a Commission decision concerning a German tax provision which provided for a roll-over relief for gains on shares if the gains were reinvested in acquisition of shares of companies having less than 250 employees and having both their registered office and central administration in the new Länder and Berlin (i.e. in the federal States which were East-Germany before the reunification). The Commission found the measure to be unlawful and incompatible State aid which benefitted the investors acquiring shares in the eligible companies as well as, indirectly, the eligible companies themselves. The Commission also found that the measure infringed the freedom of establishment under Article 49 TFEU. Germany contested the decision on the ground that the measure did not fulfil all the conditions under Article 107(1) for being qualified as State aid. In addition, according to Germany, the Commission cannot provide alternative reasons based on Article 49 in a decision adopted pursuant to Article 108(2) where the measure at issue cannot be considered State aid in the absence of meeting all the conditions for the latter. The Court, first, held that the measure did fulfil all the conditions under Article 107(1) and as such, constituted State aid. It then pointed out that it is true that the

1844. Ibid. para. 41.
1845. ECJ, 19 September 2000, Case C-156/98 Germany v Commission.
Commission cannot have recourse to the State aid procedure to ascertain the infringement of another Treaty provision after it had found that the measure at issue did not constitute State aid. However, that was not the case at hand. The tax advantage had been qualified as State aid, therefore, the Commission was not prevented from considering the possible violation of other Treaty provisions when deciding on the aid’s compatibility with the internal market.\textsuperscript{1846} The Court then reiterated the tenet that we have seen in \textit{Sovrapprezzo} according to which the State aid procedure cannot lead to a result which is contrary to the specific provisions of the Treaty.

In consequence, the Commission was right to consider whether the measure at issue infringed Article 49. As it appears, the Court did not insist that the infringement of the fundamental freedoms or other Treaty provisions can only be determined in an infringement procedure. Instead, it acknowledged that such determination can be made in the framework of the State aid procedure. This makes perfect sense considering that in both procedures the Union Courts exercise ultimate control over the legality of the Commission’s decisions. Even if the Commission decides on the infringement of the freedom of establishment in a State aid decision, the fact that the legality of the State aid decision can eventually be reviewed by the Court(s) ensures the last word for the Court(s) just as in the case of the infringement procedure. Conversely, Rossi-Maccanico argues that, since the actions of the Commission are governed by the principle of conferral, “it cannot use an inappropriate procedure to establish an infringement that can only be determined by the Court following its more limited procedural competences”\textsuperscript{1847} This view, which considers that the infringement procedure governed by Article 258 TFEU offers more safeguards for the Member States’ interest than the State aid procedure, is in accordance with the Opinion of Advocate General Saggio in \textit{Germany v Commission}. The Advocate General argued there that when the Commission closes the State aid procedure with a negative decision and orders the Member State to abolish or alter the measure at issue and the Member State does not comply with such decision, the Commission may refer the matter directly to the Court without following the procedure under Articles 258 and 259 TFEU.\textsuperscript{1848} However, in such a case, the Member State to whom the State aid decision is addressed may request the review of its legality by the Court by bringing an action for annulment within the prescribed period of time. The mere fact that a Member State fails to bring such an action does not make the State

\begin{itemize}
\item \textsuperscript{1846} Case C-156/98 \textit{Germany v Commission}, paras. 76-77.
\item \textsuperscript{1847} Rossi-Maccanico, supra note 1812, p. 25.
\item \textsuperscript{1848} Opinion of Advocate General Saggio, 27 January 2000, Case C-156/98 \textit{Germany v Commission}, para. 42 cited by Rossi-Maccanico, supra note 1812, p. 25.
\end{itemize}
aid procedure less shielded in terms of safeguards. In fact, the case law shows that the Court considers the State aid procedure as implying more safeguards than the infringement procedure. Accordingly, the Court is much more concerned with the protection of the proper scope of the State aid procedure than that of the infringement procedure. In the Court’s words:

“It follows that the procedure laid down in Article 93(2) [now Article 108(2)] provides all the parties concerned with guarantees which are specifically adapted to the special problems created by State aid with regard to competition in the common market and which go much further than those provided in the preliminary procedure laid down in Article 169 of the Treaty [now Article 258] in which only the Commission and the Member State concerned participate. Accordingly, although the existence of that special procedure in no way prevents the compatibility of an aid scheme in relation to Community rules other than those contained in Article 92 [now Article 107] from being assessed under the procedure provided for in Article 169 [now Article 258], the Commission must, however, use the procedure laid down in Article 93(2) [now Article 108(2)] if it wishes to establish that that scheme, as aid, is incompatible with the common market.”

Not surprisingly, the Court did not follow Advocate General Saggio’s Opinion in Germany v Commission when it confirmed that the Commission may decide upon the infringement of Treaty provisions other than Articles 107-108 in the State aid procedure. Rossi-Maccanico interprets the Court’s position as holding that “the economy of the State aid review system allows the Commission to establish that certain ulterior effects of the infringement are also anticompetitive and therefore do not allow a tax measure constituting aid to be considered compatible with the internal market ...”. As far as we understand it, this would mean that the Commission in the State aid procedure can only have regard to such infringements of Treaty provisions other than Articles 107-108 by the measure under review which, at the same time, distort competition. While probably all infringements of the fundamental freedoms and the prohibition of discriminatory internal taxation distort competition and therefore this condition would not restrict the scope of infringements that can be taken into account, we consider that the Court’s approach is driven by ensuring the full effectiveness of the fundamental freedoms and the non-discrimination provisions rather than protecting them only as another prohibition of distortion of competition. In summary, in our view, allowing infringements other than the State aid rules to be established

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1849. ECJ, 30 January 1985, Case 290/83 Commission v France, para. 17.
1850. Rossi-Maccanico, supra note 1812, p. 25
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in the State aid procedure does not pose any risk to Union principles and to the safeguards which are inherent in the different procedures designed to enforce EU law.

Taking into account the fact that Germany v Commission focused on the interaction of procedures which are both within the competence of the Commission, it is not surprising that the Court did not refer to Ianelli which concerned the division of competences between national courts and the Commission. Despite the lack of reference to Ianelli, it is worth pointing out that in this case, the infringement of the freedom of establishment was a separable element which was not necessary for the functioning of the aid. In the eyes of the Court, the infringement of Article 49 derived from the fact that companies established in a Member State other than Germany and operating in the new Länder or Berlin in the form of a branch or fixed establishment were excluded from the scope of the roll-over relief.\textsuperscript{1851} The fact that shares of companies established outside the new Länder and Berlin which did not operate in the form of a permanent establishment there were not included in the scope of the scheme was not considered to be an infringement of the freedom of establishment. The latter element made the scheme selective geographically but it was not considered to be a discrimination against companies established in other Member States.\textsuperscript{1852} As regards the factor which constituted discrimination (i.e. permanent establishments of companies of other Member States operating in the eligible region were excluded from the benefit), the aid scheme could easily have functioned without it. As the infringement of the freedom of establishment was not necessary for attaining the purpose of the aid, it could be established individually and separately.\textsuperscript{1853}

As regards the conclusions to be drawn from the case law above, the Commission Notice summarises them as follows:

\textit{“The Commission could not [...] authorise aid which proved to be in breach both of the rules laid down in the Treaty, particularly those relating to the ban on discrimination and to the right of establishment, and of the provisions of secondary law on taxation. Such aspects may, in parallel, be the object of a separate procedure on the basis of Article 169 [now Article 258]. As is clear from case law, those aspects of aid which are indissolubly linked to the object of the aid and which contravene specific provisions of the Treaty other than

\textsuperscript{1851} Case C-156/98 Germany v Commission, para. 86.

\textsuperscript{1852} To the contrary, Case C-21/88 Du Pont Nemours, see Section 10.4. infra.

Articles 92 and 93 [now Articles 107 and 108] must however be examined in the light of the procedure under Article 93 [now Article 108] as part of an overall examination of the compatibility or the incompatibility of the aid."

10.3.2.2. State aid procedure and procedure before a national court

While in Sovrapprezzo the Court ruled that the Commission may pursue an infringement procedure parallel with a State aid procedure if the measure which constitutes aid contravenes, at the same time, other Treaty provisions, in Germany v Commission it clarified that the initiation of a procedure under Article 258 TFEU is not an obligation on the Commission insofar as it can also decide upon such infringement in the State aid procedure. The question whether cumulative procedures could be conducted also with the involvement of a national court had already been answered by Ianelli, however, it was still open whether procedures before national courts could also be initiated on the basis of the directly effective freedoms after the Commission has authorised the national measure at issue in a State aid procedure. In particular, can a national court hold a measure to be contrary to the fundamental freedoms or the prohibition of discriminatory internal taxation when the measure has been approved by the Commission as aid compatible with the internal market? This issue came up in Nygård, another case concerning an aid scheme financed by hypothecated parafiscal levies. At issue was a Danish pig levy that was charged on the slaughter of pigs in the domestic market as well as the export of live pigs. The levy was payable to a fund which financed activities related to sales promotion, research, product development, provision of advice and sanitary measures and disease control benefitting the pig breeding and production sector. Mr Nygård, a pig breeder established in Denmark who exported live pigs to Germany, challenged the pig levy before a Danish court on the ground that its imposition on exports of live pigs constituted a charge having equivalent effect to a customs duty on exports within the meaning of Article 30 TFEU or, alternatively, discriminatory internal taxation contrary to Article 110 TFEU. The Danish scheme of production levies, including the pig levy, had been notified to the Commission under Article 108(3) TFEU and the Commission authorised it as State aid compatible with the internal market. Against this background, the Danish court asked the CJ whether the approval by the Commission granted in a State aid procedure precludes a national court from setting aside, even in part, a levy used for the purpose of financing the approved aid on the ground that it is contrary to provisions

of the Treaty other than Articles 107-108. The CJ held that the national court can examine the compatibility of a parafiscal levy with Articles 30 and 110 TFEU even when the aid scheme of which the levy forms part has been authorised by the Commission. However, the Court emphasised that this conclusion derives from the fact that the factor of the aid scheme, i.e. the parafiscal levy, which the national court is to scrutinize is separable from the core conditions of the scheme. In this regard, the Court expressly referred to *Ianelli*: 

“Admittedly, the possibility for national courts to assess the arrangements of a system of aid in the light of Treaty provisions other than those of Articles 92 and 93 [now Articles 107 and 108] presupposes that the arrangements in question can be evaluated separately, and are thus conditions or factors which, though forming part of the system of aid in question, are not necessary for the attainment of its object or for its functioning (*Iannelli* & *Volpi*, ..., paragraph 14).”

Then the Court pointed out that allowing the national court to examine the compatibility of a parafiscal levy which forms part of an aid scheme with various directly effective Treaty provisions after the scheme’s approval by the Commission enables the potential deficiencies of the State aid review to be corrected:

“[...] the national courts and the Commission fulfil complementary and separate roles within the actual system of supervision of State aid established by the Treaty, the same applies, a fortiori, where what is in issue is the examination of a parafiscal charge, intended to finance an aid scheme, in the light of Treaty provisions other than those concerning State aid, with a view to remedying, if necessary, infringements of Community law which have not been confirmed in the procedure provided for under Article 93 of the Treaty [now Article 108].”

This, in turn, enhances the protection of rights of individuals without compromising the Commission’s competences in State aid matters:

“[...] the assessment carried out [...] by national courts makes it possible to guarantee individuals the legal protection deriving from the direct effect of the Community law provisions such as Articles 12 and 95 of the Treaty [now Articles 30 and 110] and, should those provisions be infringed, to re-establish internal legality, without thereby encroaching on the central and exclusive role which Articles 92 and 93 of the Treaty [now Articles 107 and 108] reserve to the Commission in determining whether aid is compatible with the common market.”

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1857. Ibid. para. 60.
1858. Ibid. para. 63.
While the conclusion of the case is rather clear, some questions remain open. First, the Court’s acknowledgment of the power of national courts to scrutinize an aid scheme subsequent to a Commission’s authorization seems to be limited to parafiscal levies which are used to finance an aid scheme. This is apparent from the paragraphs cited above as well as from other parts of the judgment.\textsuperscript{1859} This raises the question whether the review by national courts is also allowed as regards other separable elements of an aid scheme, for example, the ones that we have seen in \textit{Germany v Commission} (exclusion of permanent establishments of companies of other Member States from the advantage), \textit{Commission v France} or \textit{Commission v Italy} (making the advantage dependent on using local products). In our view, the \textit{Ianelli}-reasoning governs this issue meaning that all separable conditions or elements of an aid scheme which are not necessary for its functioning should be reviewable by national courts in the light of directly effective Treaty provisions even after the Commission has authorised the aid scheme. The other question is to what extent the conclusion drawn from \textit{Nygård} is reconcilable with previous case law. It has to be recalled that since \textit{Foto-Frost}, it is settled case law that national courts cannot declare acts of the Union institutions invalid.\textsuperscript{1860} When a national court sets aside a certain element of an aid scheme which has been authorised by the Commission and which is nevertheless contrary to the fundamental freedoms or the prohibition of discriminatory internal taxation the national court, in essence, sets aside part of the Commission decision which approved the aid as a whole. The fact that the Commission approves the aid as a whole, including the parafiscal levy which may possibly finance the aid, is also apparent from the case law:

\begin{quote}
\text{“[...] the method by which an aid is financed may render the entire aid scheme incompatible with the common market. Therefore, the aid cannot be considered separately from the effects of its method of financing [...] Quite to the contrary, consideration of an aid measure by the Commission must necessarily also take into account the method of financing the aid in a case where that method forms an integral part of the measure.”}\textsuperscript{1861}
\end{quote}

\textit{Nygård} does not suggest in any way whatsoever that the national court would have to refer a preliminary question to the CJ in order to enable the latter to decide upon the validity of the Commission decision in view of the claim that it infringes provisions of the Treaty other than Articles 107-108. It thus seems to entail an exception to the \textit{Foto-Frost} rule insofar as by allowing national courts to declare a separable condition of an approved

\textsuperscript{1859} See Case C-234/99 \textit{Nygård}, paras. 61, 64-65.
\textsuperscript{1860} Case 314/85 \textit{Firma Foto-Frost}.
\textsuperscript{1861} ECJ, 21 October 2003, Joined Cases C-261/01 and C-262/01 \textit{Belgium v Eugene Van Calster and Others}, para. 49.
aid scheme incompatible with directly effective Treaty provisions it recognizes the power of national courts to, in practice, partially invalidate the Commission decision approving the aid scheme. In addition, it also allows to avoid the effect of the *TWD Textilwerke Deggendorf* rule,\(^\text{1862}\) which would preclude a competitor or other individual adversely affected by the aid scheme from invoking the (partial) invalidity of the Commission decision approving the aid scheme before a national court if he or she could have brought an action for annulment against such decision but failed to do so within the prescribed deadline. Thus, if a competitor or other person who is individually and directly concerned by a Commission decision approving an aid scheme which violates Treaty provisions other than the State aid rules fails to challenge such decision in a direct action it is not fatal to his claim, as it can still be brought to a national court without a time-limit. Taking into account the Court’s reasoning in *Nygård* – ‘remediing infringements of Community law’, ‘guaranteeing individuals legal protection’ and ‘re-establish internal legality’ – it does not greatly differentiate the *Nygård*-type of situation from other cases of unlawful Commission decisions. The deviation from settled principles of the case law may be motivated by the fact that the unlawfulness of the Commission decision is perceived to be especially grave when it involves the infringement of the fundamental freedoms or other directly effective Treaty provisions. Even if this is the reason, the *Ianelli* ruling would seem to exclude its consistent application. As Luja points out, national courts cannot apply the fundamental freedoms to an approved aid scheme if the element infringing the fundamental freedoms is indissolubly linked to the object and purpose of the aid measure.\(^\text{1863}\)

Summarising the above, the Court acknowledges the possibility of concurrent application of the State aid rules and other directly effective Treaty provisions, primarily the fundamental freedoms, to a national measure which constitutes aid as long as the aspect of the aid which infringes a Treaty provision other than the State aid rules can be separated from the other factors of the aid and is not necessary to achieve the objective of the aid. The application of the two sets of primary law norms to one and the same national measure may take place (i) in the framework of the State aid procedure only (*Germany v Commission* and, in practice, *Matra*), or (ii) in an infringement procedure which may potentially but not necessarily run parallel with a State aid procedure (*Sovraprezzo, Commission v France, Commission v Italy*), or (iii) in a procedure before a national court which may also run parallel with (*Ianelli*) or subsequent to (*Nygård*) a State aid procedure. It is conspicuous

\(^{1862}\) Case C-188/92 *TWD Textilwerke Deggendorf*, see Section 6.1.3.

\(^{1863}\) Luja, supra note 1363, pp. 125-126.
that from all these cases only Matra and Nygård followed expressly Ianelli in that they repeated the distinction between measures where the infringement of a Treaty provision other than Articles 107-108 is separable from the core of the aid and where such infringement is indissolubly linked to the object and purpose of the aid. Although the reasoning in the other cases was not based on this distinction, they do not contradict Ianelli, as in all these cases the application of Treaty provisions other than the State aid rules were allowed with regard to aid measures where infringements of the latter provisions could be separated from the object and purpose of the aid.

10.4. Where the aspects of State aid are inseparable

10.4.1. Case law deviating from Ianelli

The other scenario that was distinguished in Ianelli is the situation where the violation of a fundamental freedom or another directly effective Treaty provision by an aid scheme is inherent in the scheme in the sense that it is necessary for the very operation of the aid. To recall the Court’s formulation:

“Those aspects of aid which contravene specific provisions of the Treaty other than Articles 92 and 93 [now Article 107 and 108 TFEU] may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately so that their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in Article 93 [now Article 108 TFEU] [...]”

Thus, for this situation, Ianelli lays down the rule that the State aid rules take precedence over the other Treaty provisions, meaning that the latter are not applicable independently and the effect of their infringement can only be considered in the framework of the State aid procedure under Article 108 TFEU.

Although in academic literature it is common to refer to the two scenarios identified in Ianelli and emphasise the difference between them as regards the possibility of simultaneous application of the State aid rules and the fundamental freedoms, it must be pointed out that the practical relevance of the second scenario seems to be minimal. This is because the Court has

never applied the rule which it laid down in *Ianelli* in respect of inseparable infringements in any subsequent case. This does not mean, however, that the situation of inseparable infringements is, indeed, unknown or inexistent.

An example of an aid scheme where the aspect of the aid constituting an infringement of a freedom is indissoluble from its object and purpose can be found in the *Commission v Ireland* case.1865 The case originated from an infringement procedure that the Commission launched against Ireland because of a publicity campaign organized by the Irish government in order to promote the purchase and consumption of Irish goods in Ireland. The campaign was conducted by a body which was set up by the government and financed by subsidies from the government. The Commission brought the infringement action on the basis of Article 34 TFEU considering that the campaign constituted a measure having equivalent effect to quantitative restrictions on imports. As a defence, the Irish government argued that even if the purpose or effect of the campaign was to discourage imports of products of other Member States the campaign must be assessed on the basis of the State aid rules. In this regard, the government referred to the fact that the only government action in connection with the campaign was providing financing for the body organising the campaign. As the State aid rules exclude the application of Article 34, the Commission’s action lacks legal basis, argued the government. The Court held that:

“ [...] the fact that a substantial part of the campaign is financed by the Irish government, and that Articles 92 and 93 of the Treaty [now Articles 107 and 108] may be applicable to financing of that kind, does not mean that the campaign itself may escape the prohibitions laid down in Article 30 [now Article 34].”

As it appears, the Court considered that the element of financing is separable from the rest of the scheme. Contrarily, the fact that the campaign was financed by State resources merely means that one of the conditions of State aid as set out in Article 107 TFEU had been fulfilled by the measure. Thus, the financing provided by the government cannot be considered as constituting the aid itself. In fact, such financing was an integral and inseparable part of the measure just as all the other factors thereof. In the end, this is a typical example of a measure where the various elements are indissolubly linked to the objective of the measure. The fact that the importation of products from other Member States is restricted is an inherent consequence of the fact that the measure encourages the purchase of domestic products. When consumers buy more domestic products as a consequence of the advertising

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1865. ECJ, 24 November 1982, Case 249/81 *Commission v Ireland.*

1866. Ibid. para. 18.
Where the aspects of State aid are inseparable

campaign, the purchase of imported products automatically falls. On one side of the coin, the measure is an advantage for domestic products, on the other, a disadvantage for imported products. Thus, such measure, according to the Ianelli ruling, should be judged solely in light of the State aid rules in a procedure conducted pursuant to Article 108 TFEU. In contrast to this, the Court – without making any reference to Ianelli – confirmed the applicability of Article 34 to the measure and found the measure to infringe the latter.

A further example of an aid scheme the conditions of which are indissolubly linked to the objective of the aid and as such are inseparable from each other is the one at issue in Du Pont de Nemours.1867 The case concerned a piece of Italian legislation which reserved a certain proportion of public supply contracts to undertakings established in Southern Italy, an economically disadvantaged region within the country. In particular, all public authorities, municipalities, regions, public undertakings held by the State, including local health authorities, were obliged to procure at least 30% of supplies and services from undertakings established in that region. The case was brought before an Italian court by a competitor of the favoured undertakings who was not established in the eligible region and was therefore excluded from certain public tenders. The Court decided the case on the basis of Article 34 TFEU holding that the system under review prevented Italian public authorities and bodies from procuring some of their supplies from undertakings established in other Member States an thus, it discriminated against products from other Member States. The Court found it irrelevant that products of undertakings established in Italy elsewhere than the privileged region were equally discriminated:

“[The] conclusion is not affected by the fact that the restrictive effects of a preferential system of the kind at issue are borne in the same measure both by products manufactured by undertakings from the Member State in question which are not situated in the region covered by the preferential system and by products manufactured by undertakings established in other Member States.”1868

The Court also pointed out that although not all domestic products benefitted from the preferential system in comparison with products of other Member States, nevertheless, all the products which benefitted were domestic products. As regards the national court’s question relating to the possibility that the system at issue may qualify as State aid, the Court recalled the case law according to which:

1867. ECJ, 20 March 1990, Case C-21/88 Du Pont de Nemours Italiana SpA v Unità sanitaria locale N° 2 di Carrara.
1868. Ibid. para. 12.
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“[...] Article 92 [now Article 107] may in no case be used to frustrate the rules of the Treaty on the free movement of goods. [...] those rules and the Treaty provisions relating to State aid have a common purpose, namely to ensure the free movement of goods between Member States under normal conditions of competition. [...] the fact that a national measure might be regarded as aid within the meaning of Article 92 [now Article 107] is therefore not a sufficient reason to exempt it from the prohibition contained in Article 30 [now Article 34].”\textsuperscript{1869}

In the light of the above, the Court held that there was no need to consider whether the measure constituted State aid because the fact that the measure might fall under Article 107(1) cannot, in any event, exempt it from the prohibition set out in Article 34.

The preferential system at issue in \textit{Du Pont Nemours} is a prime example of regional State aid granting selective advantages to undertakings located in a defined geographical area of a Member State. The reservation of the advantage for such undertakings automatically implies that other undertakings established outside the privileged area, including undertakings of the same Member State and those of other Member States, as well as their products are disadvantaged. Thus, the measure entails selective advantage for a certain category of domestic products and, at the same time, discriminates against products from other Member States. Advantage and disadvantage are in this case two sides of the same coin.\textsuperscript{1870} This means that the factor which causes the selectivity of the measure is inseparable from the one which causes its discriminatory nature. This is easy to see if we try to eliminate the discriminatory element, that is, we take away the condition that the suppliers of the procurement contracts have to be established in the eligible region. If we do so, the measure loses its object and purpose. All in all, the measure perfectly fits into the category of measures where, according to \textit{Ianelli}, the infringement of the freedom is indissolubly linked to the object and purpose of the aid measure. Despite this, the Court did not refer to \textit{Ianelli} at all. Instead, it quoted \textit{Commission v Italy} (see Section 10.3.1.) when it reiterated that the State aid rules may not frustrate the Treaty rules on the free movement of goods. From this, the conclusion followed that the provisions on the free movement of goods were applicable to the measure irrespective of whether or not it constituted aid. Thus, the \textit{Ianelli}-rule according to which only the State aid rules are applicable to a measure such as this, has not been followed again.

\textsuperscript{1869} Ibid. para. 20.
\textsuperscript{1870} Expression used by Engelen, see supra note 1815.
Hansen\textsuperscript{1871} is yet another case in which the issue of simultaneous application of the State aid rules and other directly effective Treaty provisions came up with regard to a measure the conditions of which were inseparable from the point of view of the infringements of the various Treaty provisions. The case concerned the relationship between the State aid rules and Article 37 TFEU which relates to State monopolies of a commercial character. In particular, Article 37 TFEU requires the Member States (i) to adjust such State monopolies in a way that they do not create discrimination between products and nationals of different Member States, and (ii) not to introduce new measures contrary to the prohibition of customs duties and quantitative restrictions. As the Court confirmed in this case, Article 37 has direct effect, therefore, the case raises the same issues as those that we have seen in relation to the State aid rules and the fundamental freedoms or the prohibition of discriminatory internal taxation. At issue was a German law concerning the State monopoly in spirits which comprised several elements, inter alia, a tax on the consumption of both domestic and imported spirits at an equal rate and the purchase of spirits from domestic producers and the resale of that spirit in the domestic market by the monopoly. The law introduced a uniform increase in the rate of tax on the consumption of spirits. The plaintiff in the case who marketed imported spirits in Germany brought an action before a German court complaining about the tax increase. He alleged that the increase, in effect, discriminated against imported spirits, as its sole purpose was to make good the losses of the monopoly administration which stemmed from the fact that it paid an excessive purchase price to domestic producers which was not covered by the resale market price at which it could sell the spirits to the consumers. Such a system may involve State aid to domestic producers of spirits and a charge equivalent to customs duties on imports within the meaning of Article 30 as well as an infringement of Article 37. Therefore, the German court asked the CJ which of these provisions were applicable to the measure.

First of all, it is important to note that the plaintiff’s claim targeted the tax which was imposed on the consumption of (domestic and imported) spirits and which was alleged to finance the aid scheme operated through the exercise of exclusive rights by the monopoly. It is true that, according to the case law of the Court, a parafiscal levy which is imposed on domestic and imported products, in principle, at an equal rate but the proceeds from which are used to finance aid benefitting only domestic products may qualify as a charge having equivalent effect to customs duties on imports.

\textsuperscript{1871} ECJ, 13 March 1979, Case 91/78 Hansen GmbH & Co. v Hauptzollamt de Flensburg.
(or, potentially, discriminatory internal taxation).\textsuperscript{1872} For this, however, the revenues from the parafiscal levy must be specifically allocated to the financing of the aid (hypothecated levy). The plaintiff argued on this line in order to claim a refund of the tax which he had to pay on the imported spirits. The question asked by the referring court from the CJ followed the same line of argumentation. However, the referring court gave a hint that the tax on the consumption of spirits was not hypothecated to the scheme but it was credited to the general budget and thus, only indirectly financed the activities of the monopoly.\textsuperscript{1873} In such a case, the measure could not have been qualified as a charge having equivalent effect to customs duties. The CJ, instead of drawing this conclusion and dismissing the claim, reformulated the question of the referring court and, in fact, decided upon an aspect of the scheme which was different from the one questioned by the plaintiff and the referring court. Specifically, the Court examined the question whether or not a system of aid in conjunction with the operations of a State monopoly which together constitute a guarantee to domestic producers of a purchase price which is higher than the market resale price infringes Article 37 TFEU.\textsuperscript{1874} It is important to point this out, as only the question as reformulated by the CJ reflects the actual nature of the scheme, that is, the State aid element was inseparable from the infringement of Article 37. The factor complained of by the plaintiff – the tax on the consumption of spirits – was, in fact, a separable element of the scheme which would not bring this case to the category of measures discussed here. To explain, the aspect of the measure which constituted the advantage for domestic producers was the guaranteed purchase price paid by the monopoly, which was higher than the actual market price. The disadvantage for importers was that the resale price charged by the monopoly was lower not only than the purchase price paid to the domestic producers but also than the price of spirits of comparable quality imported from other Member States. The cheaper spirit of domestic origin evidently discouraged consumers from buying the more expensive imported spirits. Thus, the pricing policy of the monopoly constituted both State aid for domestic products and discrimination against products of other Member States prohibited by Article 37. The Court, although not using the expression ‘indissolubly linked’, referred to a ‘close link’ between the two provisions:

“[...] the national court was justified in requesting clarification of the relationship between Article 37 and the provisions of the Treaty concerning official

\textsuperscript{1872} See to that effect Case C-234/99 Nygårde, paras. 16-49.
\textsuperscript{1873} See Case 91/78 Hansen, para. 5, Question 2(A).
\textsuperscript{1874} Ibid. para. 13, first subparagraph.
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aids since the operations of the monopoly are closely linked with the support of certain categories of producer by means of purchase prices guaranteed by law.”

Specifically, the Court had to answer the question whether the fact that the measure at issue comprises State aid could exempt it from the application of the prohibition of discrimination set out in Article 37. Similar to many of the cases we have seen above, the Court started by pointing out that Article 37 and Articles 107-108 pursue the same objective inasmuch as they intend to ensure that two categories of intervention on the part of a Member State, namely action by a State monopoly and granting of aid, do not distort competition or create discrimination in the internal market. It then referred to the differences between the two provisions as regards their legal consequences insofar as the Commission plays a predominant role in the implementation of the State aid rules while the enforcement of Article 37 relies on its direct effect. Thereafter, it stated that a measure such as the one at issue is governed both by the provisions of Article 37 and those of Articles 107-108 from which it follows that the operations of a State monopoly are not exempted from the application of Article 37 by reason of the fact that they may at the same time be classified as State aid. The reasoning so far is very similar to that which the Court later repeated in Sovrapprezzo, Commission v France and Commission v Italy (see Section 10.3.1.). However, the Court did not stop there but added some remarkable statements which have not appeared again in later cases:

“[...] in all cases where the arrangements for marketing a product such as spirits entail the intervention of a public monopoly acting pursuant to its exclusive right the specific provisions of Article 37 are applicable, even if the relationship between the monopoly and producers may be in the nature of an aid.

The answer [...] must therefore be that Article 37 of the Treaty constitutes in relation to Articles 92 and 93 of that Treaty [now Articles 107-108] a lex specialis in the sense that State measures, inherent in the exercise by a State monopoly of a commercial character of its exclusive right must, even where they are linked to the grant of an aid to producers subject to the monopoly, be considered in the light of the requirements of Article 37.”

This does not mean parallel or concurrent application of the two provisions. If Article 37 is lex specialis in relation to Article 107-108, the measure is governed exclusively by Article 37 which pre-empts the application of the latter provisions which are in the nature of lex generalis. The Court’s last

1875. Ibid. para. 8, fifth subparagraph.
1876. Ibid. para. 9, fifth subparagraph, and para. 10.
remark – it is unnecessary, in view of the answer above, to consider to what extent Articles 107 and 108 are applicable to a measure which concerns spirits – confirms this outcome. On the one hand, this goes further than what we have seen in *Commission v Ireland* and *Du Pont Nemours* where the Court merely stated that the fact that the measure under review or, a certain element of it, could be regarded as aid was not sufficient to exempt it from the application of another Treaty provision. Contrary to *Hansen*, the latter statement could be interpreted as permitting the concurrent application of the State aid rules and the other Treaty provision concerned. Although decided after *Hansen, Commission v Ireland and Du Pont de Nemours* did not refer to the former, which could mean that either it was not considered relevant or it was implicitly overruled or just simply forgotten. In any event, the conclusion in *Hansen* also appears to contradict *Ianelli*. *Ianelli* gave precedence to the State aid rules with regard to aid measures where the infringement of another Treaty provision is indissolubly linked to the object and purpose of the aid. *Hansen* gives precedence to the other Treaty provision which is perceived to be specific in relation to the State aid rules.

Finally, a more recent case must be mentioned here which again involved the UK Aggregates Levy (AGL) which is the subject-matter of a series of cases discussed previously in Chapter 9. As we recall, the AGL is a special environmental levy aimed at reducing and rationalising the extraction of minerals used as aggregates. The chargeable event is the subjection of aggregates to commercial exploitation within the UK, therefore, the AGL applies to imported aggregates in the same way as to aggregates extracted in the UK. The *British Aggregates Association* case we are dealing with here concerned a relief scheme introduced for Northern Ireland in the context of the AGL. The relief entailed an 80% exemption from the AGL for quarries operating in Northern Ireland which enter into environmental agreements with the UK government. Aggregates imported from Ireland were subject to the AGL at a full rate. The UK justified the relief on the basis of Northern Ireland’s special geographical position as compared to the other parts of the UK in that it had a land border with Ireland. That made the importation of aggregates from Ireland easier, including non-declared imports. The relief was aimed at preventing the loss of international competitiveness of Northern Irish quarries due to the potential undeclared imports of aggregates from Ireland. The Commission, without opening the formal investigation under Article 108(2), declared the relief scheme compatible with the internal market under Article 107(3)(c) considering it to be in accordance

\[1877. \text{GC, 9 September 2010, Case T-359/04} \text{British Aggregates Association and Others v Commission}.\]
with the Environmental Aid Guidelines. British Aggregates Association and the other applicants who were quarries operating in Ireland requested the General Court to annul the decision. They claimed that the Commission should have opened the formal investigation, as there were serious doubts as to the compatibility of the exemption with the internal market. In particular, they maintained that the exemption constitutes either a charge having equivalent effect to customs duties within the meaning of Article 30 TFEU or discriminatory internal taxation under Article 110 TFEU. The General Court summarised the case law on the interaction between these Treaty provisions and the State aid rules in the following terms:

“[...] although the procedure provided for in Articles 87 EC and 88 EC [now Article 107 and 108] leaves a margin of discretion to the Commission for assessing the compatibility of an aid scheme with the requirements of the common market, it is clear from the general scheme of the EC Treaty that that procedure must never produce a result which is contrary to the specific provisions of the EC Treaty (see, to that effect, Case 73/79 Commission v Italy ...; Case C-156/98 Germany v Commission ...; and Joined Cases T-197/97 and T-198/97 Weyl Beef Products ...). That obligation on the part of the Commission to ensure that Articles 87 EC and 88 EC [now Article 107 and 108] are applied consistently with other provisions of the EC Treaty is all the more necessary where those other provisions also pursue the objective of undistorted competition in the common market, as Articles 23 EC and 25 EC or Article 90 EC [now Article 28, 30 and 110] do in the present case in seeking to safeguard the free movement of goods and competition between domestic and imported products. [...]”

Accordingly, State aid, certain conditions of which contravene other provisions of the EC Treaty, cannot be declared by the Commission to be compatible with the common market (Case C-156/98 Germany v Commission .... and Case C-204/97 Portugal v Commission ...). In addition, in determining whether aid is compatible with the common market, it must take account of market conditions, including fiscal aspects (see, to that effect, Case 73/79 Commission v Italy... and Case C-204/97 Portugal v Commission ...). It follows that, under the EC Treaty system, aid cannot be implemented or approved in the form of tax discrimination, by a Member State, in respect of products originating from other Member States (see, to that effect, Joined Cases 142/80 and 143/80 Essevi and Salengo ...).”

It then confirmed that the exemption leads to domestic products being taxed at a lower rate than products imported from Ireland. Having regard to this, the Commission was not entitled to adopt the contested decision without

1878. Ibid. paras. 91-92.
having examined the possible tax discrimination entailed by the exemption for which it should have opened the formal investigation. Therefore, the General Court annulled the contested decision.\textsuperscript{1879}

Although the judgment gives a detailed account of the previous case law, it does not refer to the very first case, \textit{Ianelli}. It also does not discuss the question of the severability of the aspects of the measure. As the case focused on the State aid procedure conducted by the Commission and did not involve a parallel procedure pursued before a national court, the General Court may have considered \textit{Ianelli} not relevant to the case. Given that the Commission cannot declare an aid compatible with the internal market when such aid infringes other provisions of the Treaty whether the aspect constituting the infringement is separable or indissoluble from the objective of the aid, the examination of this issue may have appeared unnecessary to the General Court. As Luja points out, the issue would have become relevant if British Aggregates Association or the other applicants in the case had failed to bring an action for annulment against the Commission’s decision.\textsuperscript{1880} Had they wanted in such case to rely on the directly effective prohibitions set out in Article 30 or Article 110 in front of a national court, the \textit{Ianelli}-distinction between separable and indissoluble infringements should have – in principle – been applied. We agree with Luja’s assessment that the (partial) exemption from the AGL of aggregates extracted in Northern Ireland is an integral and essential part of the relief scheme which, at the same time, constitutes a restriction on the free movement of goods in relation to aggregates imported from Ireland. The General Court hinted at this when it stated that “it results from the general AGL scheme, and from the relief scheme for Northern Ireland approved by the contested decision, that identical products are taxed differently”.\textsuperscript{1881} Thus, the infringement of the free movement of goods is apparently indissoluble from the functioning of the aid. This would prevent a national court from deciding upon the infringement of the latter provisions in a national procedure. This follows – at least in theory – from \textit{Ianelli} which states that in such cases the measure at issue should only be assessed in the framework of the State aid procedure.

\textsuperscript{1879} For a similar case with a similar outcome see ECJ, 3 May 2001, Case C-204/97 \textit{Portugal v Commission}.

\textsuperscript{1880} Luja, supra note 1363, p. 127.

\textsuperscript{1881} Case T-359/04 \textit{British Aggregates Association}, para. 99.
10.4.2. Possible explanations for the deviation

The cases analysed in this Section confirm what we projected above, that is, Ianelli has never been followed in later cases as far as those aid measures are concerned in the case of which the infringements of Treaty provisions other than Articles 107-108 were inseparable from the object of the aid. In Commission v Ireland, the Court avoided the Ianelli-rule by considering that the infringement of Article 34 by the government financed publicity campaign under review was separable from the element which constituted State aid in the measure. In Du Pont de Nemours, Article 34 was held to be applicable to a measure which reserved a certain proportion of public supply contracts to undertakings established in Southern Italy irrespective of the fact that it constituted State aid and that the restriction on the free movement of goods was inherent in the aid measure. In Hansen, the provisions of Article 37 were applied to the effect of excluding the application of the State aid rules in the case of a measure where the exercise of exclusive rights under a State monopoly entailed State aid for a certain category of producers. In none of these cases were the State aid rules given precedence over the other Treaty provisions. This raises the question whether the Ianelli-rule can, indeed, be considered a rule. In fact, in all the cases which were decided after Ianelli, including the ones discussed in Section 10.3. above, the Court’s concern seems to be much more the protection of the other Treaty provision which was infringed simultaneously with the State aid rules than the State aid rules themselves. This is apparent from formulations such as:

“[Articles 107 and 108] cannot [...] be used to frustrate the rules of the Treaty on the free movement of goods or the rules on the repeal of discriminatory tax provisions” (Commission v France)

“[...] discriminatory tax practices are not exempted from the application of [Article 110] by reason of the fact that they may at the same time be described as a means of financing a State aid” (Sovrapprezzo)

“[ Article 107] may in no case be used to frustrate the rules of the Treaty on the free movement of goods [...] the fact that a national measure might be regarded as aid within the meaning of [Article 107] is not [...] a sufficient reason to exempt it from the prohibition contained in [Article 34]” (Du Pont de Nemours)

This shows that the Court’s attention shifted from safeguarding the competence of the Commission in the distribution of powers with regard to the control of State aid towards protecting the effectiveness of other Treaty provisions. As regards the preservation of the Commission’s exclusive competence in declaring State aid compatible with the internal market, it is a justified concern only in cases which involve (potentially) parallel procedures
before a national court, on the one hand, and the Commission, on the other. Only in these cases can the Ianelli-rule, i.e. precedence of the State aid rules and the State aid procedure over the other Treaty provisions if the elements of the aid are inseparable, serve the purpose of preventing national courts from expropriating the competence reserved for the Commission in State aid matters. In the light of this, it may be explicable why the Court disregarded Ianelli in Commission v Ireland, which concerned an infringement procedure, and British Aggregates Association, which concerned a State aid procedure, both solely within the competence of the Commission. The question, nevertheless, can be raised whether the two types of national measures identified in Ianelli should still be distinguished in these cases. In the light of the rule that the State aid procedure may never produce a result which is contrary to specific provisions of the Treaty such distinction does not seem to be relevant. Whether the infringement of a fundamental freedom or another non-discrimination provision is necessary or unnecessary for the functioning of the aid makes no difference, as in neither case can the Commission declare the aid compatible with the internal market. Another question is whether from a procedural perspective it makes sense to insist on the Ianelli-solution according to which ‘inseparable’ aid measures should be assessed in a State aid procedure only. As we recall, the Commission chose the ‘wrong’ form of procedure in Commission v Ireland where it assessed an ‘inseparable’ aid measure in the framework of an infringement procedure. The Commission condemned the measure and it can be argued that the outcome would not have been different in a State aid procedure either having regard to the fact that the Commission cannot approve a measure which contradicts other provisions of the Treaty. Nonetheless, in view of the conclusion that we drew above according to which the State aid procedure offers more guarantees to the parties involved than the infringement procedure (see Section 10.3.2.1.), the choice of the wrong procedure could be objected by the Member State.

In summary, while the Court’s disregard of Ianelli in subsequent cases which involved procedures that fell solely within the Commission’s competence may have adverse consequences from the point of view of procedural safeguards, it does not fundamentally question the validity of the Ianelli-rule given that the two lines of cases are distinguishable. In the later cases, the fundamental freedoms or other non-discrimination provisions were not invoked before national courts; therefore, the fact that the Court found such provisions applicable did not endanger the competences of the Commission.

On the other hand, Du Pont de Nemours and Hansen both represent situations at which the Ianelli-rule is aimed. Namely, in both cases the question
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of whether Treaty provisions other than Articles 107-108 can be applied to measures which constitute State aid arose before national courts in procedures brought by individuals who were competitors of the aid beneficiaries. Still the Court decided both cases to the contrary to Ianelli. Treaty provisions other than the State aid rules were held to be applicable to the measures at issue and, apparently, not even concurrently with the State aid rules but exclusively. This is quite clear in Hansen, which classifies Article 37 lex specialis in relation to the State aid rules and thereby excludes the applicability of the latter. In Du Pont de Nemours, it is not as clear as in Hansen but it can be inferred from the Court’s statement that there was no need to consider whether the rules at issue were in the nature of aid. As observed above, the Court was much more concerned with protecting the direct effect of Article 34 than the competence of the Commission in State aid matters. The most indicative of this is the Court’s emphasising that “the national court must ensure the full application of Article 34”.1882 Having regard to this, the question arises whether after Hansen and Du Pont de Nemours, Ianelli can still be considered good law. First, it is doubtful whether the Ianelli-rule has ever been good law in the sense that it was reasonable. The rule provides that to aid measures which infringe a directly effective Treaty provision in a way that the infringement is indissolubly linked to the object and purpose of the aid only the State aid rules should be applied in a State aid procedure in order to protect the Commission’s competence to declare aid compatible with the internal market. However, it is also settled case law that the State aid procedure must never produce a result which is contrary to specific provisions of the Treaty. This means that the Commission will not be allowed to approve a measure which infringes a Treaty provision. This raises the question of why should the Commission’s competence be protected if the Commission’s procedure cannot lead to a result any different from that of the procedure before the national court. The State aid procedure would end with a decision on incompatibility whilst the national court would set aside the measure on account of infringing a directly effective Treaty provision. Hence the fate of the measure is, in any event, doomed. One explanation for the Court’s deviation from the Ianelli-rule is thus that the Court has recognized its inconsistency.

Contrary to the above, Rossi-Maccanico proposes another interpretation of the Ianelli-rule and the subsequent case law. In his view, the case law which sets out that State aid certain conditions of which contravene other provisions of the Treaty cannot be declared compatible with the internal market does not, in fact, envisage a per se incompatibility of each and every

1882. Case C-21/88 Du Pont de Nemours, para. 22.
such measure. Instead, the Commission must assess the market effects of the infringement of the other Treaty provision inflicted by the measure. As Rossi-Maccanico formulates, “[t]he Commission ... remain free to ascertain the market effects of another infringement. Only if such effects are additional to the ones caused by the aid, the Commission may conclude that the cumulative effects can cause the aid to be incompatible. If the effects are already implicit in the grant of the aid, the discrimination can be justified and the aid can still be declared to be compatible with the internal market and granted following a positive decision of the Commission”.

This appears to apply precisely to those measures where, according to Ianelli, the infringement of another Treaty provision is indissoluble from the object of the aid and therefore necessary for its functioning. (In the case of separable infringements, which are not necessary for the functioning of the aid, the Commission does not need to evaluate the effect of the infringement because it may only authorise the aid on the condition that it is modified and the factor infringing the other Treaty provision is removed from it.) Rossi-Maccanico’s interpretation implies that ‘inseparable’ aid measures infringing other Treaty provisions can still be declared compatible aid by the Commission. This would, indeed, give meaning to the Ianelli-rule and would reinforce its rationale which strives to preserve the competence of the Commission with regard to such type of measures.

Rossi-Maccanico also suggests a solution as regards the reconciliation of Ianelli and Hansen. He maintains that the combined meaning of the two judgments is that when an infringement of a directly effective Treaty provision is inherent in the operation of an aid measure, that is, the factor constituting the infringement is indissolubly linked to the object and purpose of the measure the more specific infringement prevails and the national court is obliged to examine the measure in the light of that (potentially) infringed rule. In fact, this interpretation implies that Ianelli had been overruled. Apparently, it is not the case that all ‘inseparable’ measures must be assessed by the Commission in a State aid procedure pursuant to the State aid rules. The national court is permitted to determine which the more specific rule is which should govern the measure. Thus, the lex specialis approach of Hansen prevails. As far as we understand, the view of Rossi-Maccanico is that the more specific provision will not always and not necessarily be the fundamental freedom or other directly effective Treaty provision infringed by the aid measure. Rather, the question of which is the more specific rule depends on the nature and characteristics of the measure at issue. In Hansen,

1883. Rossi-Maccanico, supra note 1812, p. 27.
1884. Ibid. p. 24.
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which concerned a State monopoly with exclusive rights to buy and sell a certain product, Article 37 was undoubtedly affected more specifically due to the characteristics of the measure than Articles 107-108. In conclusion, according to Rossi-Maccanico, the determination of the more specific rule is a matter of case by case analysis.

10.5. How to resolve the overlap of the State aid rules and the fundamental freedoms in the case of direct tax measures?

10.5.1. Lessons from the case law

The purpose of the analysis conducted in the previous Sections was to draw conclusions as regards the possibility of concurrent application of the State aid rules and the fundamental freedoms to fiscal measures which may be in breach of both sets of rules. We have mentioned the example of the stopover tax introduced by the Region of Sardinia which the Court held to be both State aid and discriminatory restriction of the freedom of provision of services. Although the case manifests the core substantive issue that was dealt with in Ianelli and the subsequent case law discussed above, staggeringly, neither the Court nor the Advocate General referred to any of those cases.\footnote{1885} It is true that the procedural context of the Regione Sardegna case was different from all the previous cases. It was a reference for a preliminary ruling from the Italian Constitutional Court in a procedure which was aimed at the constitutional review of the regional legislation of Sardinia. The Council of Ministers of Italy initiated a review procedure against the Region of Sardinia on the ground that the legislation at issue adopted by the Region in the exercise of its autonomous powers was not in line with EU law and in turn, since the legislature is bound by EU law according to the Italian Constitution, it was unconstitutional. The issue of the concurrent application of the State aid rules and the fundamental freedoms arose in an abstract review procedure without any individual relying on the direct effect of the freedoms in front of a national court. Accordingly, the case did not affect the division of competences between the Commission and national courts or the scope of different procedures belonging to the responsibility of the Commission. This may explain why the Court did not see a connection to the Ianelli-line of case law. Because of the peculiarity of the procedure,

\footnote{1885. The Court cited once Case C-156/98 Germany v Commission, however, in relation to an issue which had nothing to do with the interaction of the State aid rules and the fundamental freedoms, see Case C-168/08 Regione Sardegna, para. 56.}
there was also no need for the Court to clarify the implications of its holding – the simultaneous applicability of the State aid rules and the fundamental freedoms – in terms of legal remedies. The most acute question which arises from the simultaneous application of the two regimes is whether the remedy proper for the infringement of the freedoms (refund of the unlawfully charged tax) or that proper for the grant of unlawful State aid (payment of the tax normally due) should be applied. In this regard, Wattel observes that from the national constitutional law perspective the regional tax at issue was simply unconstitutional and therefore invalid, which would entail, as a remedy, the refund of tax charged on the basis of invalid law.\footnote{1886. Wattle, supra note 1298, p. 131.}

Although the Court failed to draw conclusions in \textit{Regione Sardegna} from the \textit{Ianelli}-line case law, it does not mean that no lessons can be learned from the latter with regard to the substantive issue of concurrent application of the fundamental freedoms and the State aid rules. Similarly, although the Court remained silent on the question of legal remedies, it does not mean that such question should not be addressed and resolved with regard to future cases which may very well involve concrete disputes in which individuals must be given concrete remedies.

In the light of the \textit{Ianelli}-distinction, tax measures which may constitute both State aid and a restriction on one or other of the fundamental freedoms fall within the category of measures the elements of which are ‘inseparable’. Looking at the regional stopover tax imposed only on operators of yachts and aircraft who are resident outside Sardinia, it is apparent that the discrimination against non-resident operators is an inherent consequence of the exclusion of domestic operators from the scope of the tax. The infringement of the freedom of services is indissolubly linked to the object and purpose of the aid which favours domestic operators in that it exempts them from the burden of the tax. Advantage and disadvantage are therefore two sides of the same coin in this case.\footnote{1887. Engelen, supra note 1815.} The same is true in the case of most direct tax restrictions on the fundamental freedoms. As mentioned in the Introduction, these measures could, in theory, be qualified as State aid given that the disadvantageous treatment of non-residents could – from another perspective – be regarded as an advantageous treatment of residents. A withholding tax only on outbound dividends can be regarded as a discrimination against non-resident shareholders or a selective advantage to resident shareholders. Similarly, a limitation of loss relief to domestic group of companies may amount to a restriction on the freedom of establishment of parent companies.
acquiring holdings in non-resident companies or a selective advantage to those acquiring domestic holdings. If these measures were, indeed, State aids besides restrictions on the respective freedoms, according to the *Ianelli*-ruling, they would need to be assessed pursuant to the State aid rules only and their infringement of the freedoms could only be considered as part of the overall examination of their compatibility or incompatibility with the internal market. This evidently cannot be right taking into account that many of these measures have already been held to contravene one or other of the freedoms in a procedure brought on the basis of the direct effect of the freedom concerned. This means either that these measures are, in fact, not State aids or even if they are, their State aid character cannot preclude their being invoked before national courts and being assessed on the basis of the freedoms. The *Ianelli*-ruling does not preclude the latter option having regard to the fact that *Ianelli* has never been followed in later cases involving ‘inseparable’ measures. Thus, as *Ianelli* is not conclusive as regards the question whether tax measures which discriminate against non-residents and, at the same time, grant advantages to residents should be assessed in the light of the fundamental freedoms or the State aid rules or both, we need to analyse the question from other angles.

10.5.2. Regional measures

Measures which discriminate against non-residents and, at the same time, grant advantages to residents may differ as to their geographical scope of application. It is noteworthy that the Sardinian stopover tax did not apply to the whole of the territory of the Member State concerned but it was a regional measure applicable only in a certain region of Italy. In this sense, the *Regione Sardegna* case can be considered in parallel with some similar regional measures we have discussed in the previous Sections. In particular, with *Germany v Commission* which dealt with a measure that limited the benefit of a roll-over relief to investments in the capital of companies established in former East Germany and *Du Pont de Nemours* where the measure under review reserved a certain proportion of public service contracts to companies established in Southern-Italy.\(^{1888}\) Conspicuously, the

\(^{1888}\) It is true that *Regione Sardegna* differed from the other two cases insofar as the measure in the former case was adopted by an infra-State body (i.e. the Region of Sardinia) while in the latter cases by the central government of the Member States. The Region of Sardinia enjoys fiscally autonomous powers in Italy therefore, provided that it satisfies the *Azores* conditions (*Case C-88/03 Portugal v Commission*), the measures it adopts must be assessed within the reference framework that is constituted by the territory over which the regional authority exercises its powers. However, this aspect is of no relevance.
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Court decided all three cases differently. In Germany v Commission (see Section 10.3.2.1.), basically, it held that the State aid rules were applicable to the case. In Du Pont de Nemours, it examined the measure under the free movement of goods (Article 34) implying that the State aid rules were not applicable (see Section 10.4.1.). In Regione Sardegna, it applied simultaneously the State aid rules and the freedom of providing services to the regional tax under review. It is worth having a closer look at these cases in order to see how an approach more consistent than the Court’s could be devised.

As regards Germany v Commission, the outcome of the case was, in essence, giving priority to the State aid rules. Admittedly, the Court held that the freedom of establishment was also infringed and the Commission was entitled to determine such infringement in the State aid procedure, however, it was with regard to an aspect of the measure which was separable from the object and purpose of the aid (i.e. permanent establishments of companies of other Member States operating in the region were excluded from the measure). It is important to note that from the point of view of the comparison with Regione Sardegna this separable infringement is irrelevant, therefore, we shall disregard it in this analysis. Instead what we are trying to establish here is whether the feature of the German measure which constituted State aid could have been, at the same time, considered an infringement of the freedoms. First of all, it needs to be pointed out that the German measure involved advantages for both the investor who made use of the roll-over relief (direct beneficiaries) and the company in whose capital the investment was made (indirect beneficiaries). From the point of view of the indirect beneficiaries, it is quite evident that the advantage that they drew from the measure cannot at the same time be considered a disadvantage for all non-resident companies that did not have any operation in any form whatsoever in the eligible region. The exclusion of the latter from the measure is inherent in the notion of State aid and does not constitute an independent infringement of a fundamental freedom. The Court has emphasised this in a number of cases with regard to aid measures whose scope covered the whole of the territory of the Member State:

“[...] as a rule aid is granted to undertakings established on the territory of the Member State granting it. Such a practice and the consequent unequal treatment of undertakings of other Member States is thus inherent in the concept of State aid”.

from the point of view of our analysis. The regional stopover tax insofar as it excluded from the scope of the tax operators resident in Sardinia was selective even when assessed within the reference framework of the regional legislation, see Case C-169/08 Regione Sardegna, paras. 60-62.

1889. Case C-94/99 ARGE Gewässerschutz, para. 36. See also Case 74/76 Ianelli, para. 10.
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This is equally true for a regional measure such as the German one at issue. However, from the point of view of the direct beneficiaries of the measure, i.e. the investors, the fact that they only received the benefit of the rollover relief when they invested in domestic companies which were established in a certain region of their own Member State may as well be considered an infringement of their freedom of establishment. This can be the case even if the benefit is also denied when they invest in domestic companies established outside the eligible region. This was the position of the Court in *Du Pont de Nemours* in the context of the free movement of goods. It considered that a measure which guaranteed a certain proportion of public supply contracts to products originating in a certain region of a Member State restricted the importation of goods from other Member States irrespective of the fact that it also had restrictive effects on supplies of domestic products which did not originate in the privileged region. While the Court found the measure to contravene the free movement of goods it almost totally ignored the question whether the measure could also be qualified as State aid holding that, since Article 34 TFEU was applicable, such question was irrelevant. Finally, in *Regione Sardegna*, the two sets of rules were applied simultaneously to the same measure. Unfortunately, the reasons for the Court’s approach can only be guessed. The Court simply ruled that the measure was both State aid and a restriction on the freedom of provision of services without addressing in a single word the questions of whether the two regimes can be applied concurrently, if so why and, what problems – if any – the concurrent application may lead to and how to solve those problems.

In our view, in all three cases the State aid rules should have been given priority over the freedoms. Admittedly, as Engelen emphasises, in the case of *Regione Sardegna* individual boat and aircraft owners resident outside Sardinia were also subject to the stopover tax who – not being ‘undertakings’ – do not fall within the scope of the State aid rules. They could fall, however, under the freedom of provision of services provided that they were residents in other Member States. This may explain the Court’s ruling that besides the State aid rules also the freedom of services applied.\^1890\(^{1890}\) Leaving this special aspect of the *Regione Sardegna* case aside, in general, it can be concluded that in the case of regional measures only the State aid rules can offer comprehensive remedy to all the parties who may be harmed by such measures. When a measure limits the advantage it offers to a certain part of the territory of the Member State not only undertakings in other Member States but also those established in the same Member State outside the privileged region are disadvantaged. The latter category can only obtain redress

\(^{1890}\) Engelen, supra note 1815, p. 209.
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if the State aid rules are applicable, as – in most cases – the freedoms cannot be invoked in situations that are confined within the borders of one Member State. There are some limited exceptions to the latter, especially as far as the free movement of goods is concerned. In fact, the situation at issue in Du Pont de Nemours fell within such exception. The Court held Article 34 TFEU to apply in a case where an Italian company complained about not having access to certain proportion of public supply contracts which had been reserved for products of other Italian companies. Arguably, there was no cross-border situation present in this case. The Court, however, focused on the fact that only domestic products could benefit from the measure, even if not all of them, which entailed an obstacle to importation of products of other Member States and thus a hindrance to intra-Union trade. This was considered sufficient for a breach of Article 34.\textsuperscript{1891} Nevertheless, it seems that in the case of the other freedoms the requirement of cross-border element is interpreted more strictly.\textsuperscript{1892} Thus, in Germany v Commission and Regione Sardegna where the freedom of establishment and the freedom of provision of services were at issue domestic competitors which were resident outside the privileged regions could not have relied on those freedoms and would have been left without remedy had the State aid rules not been found applicable. It is true that in both cases, the State aid rules were held applicable. In Germany v Commission on their own, in Regione Sardegna together with the freedom of services.

The question is whether it is necessary or reasonable to apply the two sets of rules concurrently. In this respect, the different enforcement mechanisms and the different remedies attached to the State aid rules, on the one hand, and to the fundamental freedoms, on the other, need to be taken into account. The direct effect of the freedoms facilitates their enforcement to a great extent by private parties that are injured by the measure in question. However, it has been long settled case law that the standstill obligation set out in Article 108(3) TFEU also has direct effect.\textsuperscript{1893} When an aid has not

\begin{itemize}
  \item \textsuperscript{1891} In some other cases, measures confined within a single Member State were also held to fall within the scope of the free movement of goods e.g. cases related to charges having equivalent effect to customs duties which were levied on crossing internal borders within a Member State (Joined Cases C-363/93, C-407/93 to C-411/93 Lancy and Others; ECJ, 9 September 2004, Case C-72/03 Carbonati Apuani Srl v Comune di Carrara).
  \item \textsuperscript{1892} Concerning the free movement of workers and the freedom of establishment, see ECJ, 1 April 2008, Case C-212/06 Government of the French Community and Walloon Government v Flemish Government, paras. 37-38.
  \item \textsuperscript{1893} ECJ, 11 December 1973, Case 120/73 Lorenz GmbH v Germany et Land de Rhénanie-Palatinat, para. 8; ECJ, 21 November 1991, Case C-354/90 Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v France, paras. 11; ECJ, 11 July 1996, C-39/94 Syndicat français de l’Express international (SFEI) and others v La Poste and others, para. 39.
\end{itemize}
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been notified or it has been implemented before the Commission’s approval,
individuals whose rights are affected by the unlawful granting of aid can
turn to national courts which must protect their rights:

“[...] the standstill obligation laid down in Article 88(3) [now Article 108(3)]
of the Treaty gives rise to directly effective individual rights of affected parties
(such as the competitors of the beneficiary). These affected parties can enforce
their rights by bringing legal action before competent national courts against
the granting Member State. [...]”\textsuperscript{1894}

Further:

“[...] where [...] a breach [of Article 108(3)] is invoked by individuals, national
courts must take all the consequential measures, in accordance with national
procedures, as regards both the validity of measures giving effect to the aid
and the recovery of financial support granted in disregard of [Article 108(3)]”\textsuperscript{1895}

Therefore, competitors of the aid beneficiary, whether non-resident or resi-
dent, can rely on the direct effect of Article 108(3) TFEU to request protec-
tion of their rights from the national courts. This means that the conclusion
that aid measures of a regional nature should be governed solely by the State
aid rules does not curtail the rights of individuals who are harmed by the
measure in enforcing their rights before national courts.

From the point of view of legal remedies, the proposition to apply only
a single set of rules is aimed at avoiding contradictory remedies, which
may result from the concurrent application of the State aid rules and the
fundamental freedoms. If, instead of an abstract constitutional dispute, the
Regione Sardegna case had originated in an action brought by an operator
subject to the stopover tax the holding of the Court that both rules were
applicable would have lead to such contradictory remedies. Specifically,
had the claimant been an operator resident in France he could have claimed
the refund of the stopover tax he had paid on the ground that it was levied
in violation of the freedom of services. Had the claimant been an operator
resident in Italy outside the Region of Sardinia he could have claimed that
the beneficiaries should be ordered to repay the benefit, i.e. to pay the tax. If
the tax were refunded to non-residents while imposed on Sardinian residents
the result would also be selective advantage, only this time, to the non-re-
sidents. In the same vein, in a scenario such as that at issue in Germany v
Commission, a company investing in a non-resident subsidiary may claim

\textsuperscript{1894}. Commission Enforcement Notice, para. 24.
\textsuperscript{1895}. Case C-354/90 \textit{Fédération Nationale du Commerce Extérieur des Produits}, para.
12; C-39/94 \textit{SFEI}, para. 40.
the extension of the rollover relief to its acquisition while another company investing in a German subsidiary established outside the new Länder could claim the recovery of the relief from the beneficiaries. This again would lead to the reversal of the aid in favour of non-residents. Our proposal to apply only one set of rules, which in the case of measures confined to a certain region of a Member State should be the State aid rules, is aimed at avoiding such anomaly.

However, when determining whether the application of the State aid rules in such cases ensures appropriate remedies, we must keep in mind that we are dealing with aid through tax measures. Under the case law, there is an express obligation on the Member States to refund taxes which had been levied in breach of Union law:

“[...]although there are no provisions in European Union law concerning the repayment of national taxes incompatible with European Union law, the right to obtain repayment of such taxes is the consequence and complement of the rights conferred on individuals by the provisions of European Union law as interpreted by the Court. The Member State is therefore required to repay charges levied in breach of European Union law, the right to repayment being a subjective right derived from the legal order of the European Union.”

At the same time, the State aid rules do not allow the refund of a tax to those liable to pay it when the aid itself is constituted by an exemption from the same tax. This is clear also from the case law:

“[...] those liable to pay a tax cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that tax [...] It follows that, even if the exemption at issue in the main proceedings constitutes aid within the meaning of Article 87 EC [now Article 107], the fact that the aid may be unlawful does not affect the legality of the tax itself.

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[...] an extension of the circle of potential recipients to other undertakings would not make it possible to eliminate the effects of aid granted in breach of Article 88(3) EC [now Article 107(3)] but would rather, on the contrary, lead to an increase in the effects of that aid.”

The above shows that the breach by a national tax measure of the fundamental freedoms, on the one hand, and that of the State aid rules, on the other, not only involves different remedies but the swapping of such remedies is explicitly precluded by the respective rules as interpreted by the Court.

On the basis of the above, in a scenario such as that in Germany v Commission our proposition to apply the State aid rules to the measure at hand leads to the result that the appropriate remedy is the recovery of the benefit, i.e. the tax deferral under the rollover relief, from the beneficiary undertakings that acquired shareholdings in companies established in the new Länder. In contrast, the extension of the benefit to undertakings acquiring shareholdings in non-resident companies or in resident companies outside the privileged region is not be permitted under the State aid rules. The situation is more difficult in a case such as Regione Sardegna. Luja maintains with regard to this case that “[h]ad recovery been ordered [...] such recovery would have taken away both the state aid as well as the infringement of the freedom of services as all parties would then again have been treated alike notwithstanding the possibility for remaining damages to be claimed in accordance with domestic law.” We are not persuaded by this taking into account that in this case, the aid derived from the fact that a tax was imposed selectively/discriminatorily on certain categories of taxpayers. Such an imposition of tax in breach of Union law entails, according to the case law cited above, the right of the taxpayer to a refund of the unduly levied tax. In fact, the case law confirms that the refund of tax is the appropriate remedy in cases where the aid itself is constituted by the imposition of a tax. This was the situation in Laboratoires Boiron concerning a tax on the direct sales of medicinal products by pharmaceutical companies:

“In this case, the measure alleged to constitute an aid is the tax on direct sales itself and not some exemption which is separable from that tax.

1897. ECJ, 15 June 2006, Joined Cases C-393/04 and C-41/05 Air Liquide Industries Belgium SA v Ville de Seraing and Other, paras. 43, 45. Only one exception is made to this, namely, when the tax at issue is hypothecated to the aid, see Joined Cases C-393/04 and C-41/05 Air Liquide, para. 46. While the Air Liquide case excludes the extension of an exemption to a taxpayer who is liable to pay a tax as a remedy of unlawful State aid, the Commission Enforcement Notice goes even further than this inasmuch as it seems to deny standing under Article 108(3) to a taxpayer with such claim, see paras. 73-75.

1898. Luja, supra note 1363, p. 125.
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In such a case, it should be accepted that an economic operator [...] may plead that the charge on direct sales is unlawful, for the purposes of applying for reimbursement, on the ground that it amounts to an aid measure.

The result of this would not, in any case, be to allow the national court to increase the number of recipients of the aid. On the contrary, such reimbursement, to the extent that it is payable, is a very appropriate way of reducing the number of economic operators harmed by the measure deemed to constitute aid, and thus, of limiting the anti-competitive effects of that measure.”

Admittedly, in the case of Regione Sardegna it is more debatable whether the aid derived from the imposition of the stopover tax on non-residents or an exemption from such tax for residents. Nevertheless, on the basis of the case law above the refund of the stopover tax to those who had to pay it would be, in our opinion, an appropriate remedy. Hence, our proposed solution that only the State aid rules should be applied to the measure does not entail adverse consequences for operators resident in other Member States as regards remedies. They may claim the same remedy – reimbursement of the tax – as if their free movement rights had been infringed. Incidentally, such remedy would also be available to competitors of the beneficiaries resident in the same Member State but outside the privileged region, as their equal treatment with the other category of claimants must be ensured.

In the light of the conclusion we have drawn above as regards regional measures, it is worth analysing two regional tax measures introduced in Belgium by the Flemish and Walloon Regions which has recently come within the purview of the Commission’s attention. The measures are interesting, as they demonstrate a whole range of the complex issues raised by the overlap of the fundamental freedoms and State aid rules. The measure introduced by the Walloon Region grants a personal income tax reduction when buying shares or bonds of the Investment Fund of Wallonia. The Flemish legislation concerns a venture capital scheme whereby a tax reduction is provided for loans from residents of the Flemish region to businesses established in that region. The Commission started infringement procedures against Belgium due to the fact that the respective tax reductions are only available to residents of the Walloon and Flemish Region, respectively, to the exclusion of non-residents who earn their income in these regions in Belgium. The Commission is of the opinion that because of the latter, the measures restrict the free movement of workers and the freedom of establishment. Besides this possibly discriminatory aspect, the measures

1899. ECJ, 7 September 2006, Case C-526/04 Laboratoires Boiron SA v Urssaf de Lyon, paras. 39-41.
contain several other elements that could be questioned both under the State aid rules and the free movement provisions other than that of workers. First, similarly to the stopover tax in Regione Sardegna, these measures were introduced by regional authorities that enjoy limited fiscal autonomy within Belgium. That raises the potential of a geographically selective State aid. As long as the regions are sufficiently autonomous, the jurisdiction over which they exercise their powers constitutes the reference framework for the assessment of the selectivity of the measures. Therefore, the fact that the legislation of the other regions in Belgium does not grant such reductions does not necessarily make the measures selective. However, the circle of indirect beneficiaries is also limited to the respective regions. Thus, as was the case in Germany v Commission, we need to distinguish with regard to these measures between direct and indirect beneficiaries. The direct beneficiaries are the individual investors and lenders who are resident in the regions and who make the investments concerned. The indirect beneficiaries are the Flemish businesses and the Walloon Investment Fund benefitting from the loans and the capital investments encouraged by the measures. The measure may well constitute State aid for the indirect beneficiaries taking into account that the beneficiary in the case of the Walloon measure is one single investment fund while in the case of the Flemish measure businesses resident in the Flemish region. On the other hand, the latter aspect of the Flemish measure cannot be regarded as a restriction on the freedom of establishment, as the fact that State aid benefits only undertakings established in or having activities in the jurisdiction of the granting authority is inherent in the notion of State aid. As far as the direct beneficiaries are concerned, the fact that the tax reduction is limited to their investments in resident companies may well constitute a restriction on their freedom of establishment or the free movement of capital. Theoretically, it could also be State aid for the investors who invest in a specific fund (Walloon) or a specific category of businesses (residents in the Flemish Region) the reductions, however, seem to be limited to personal income tax hence the beneficiaries – being individuals – fall outside the scope of the State aid rules. Even so, the measure involves at the very least State aid for the indirect beneficiaries and most probably a restriction on the freedom of establishment or capital in respect of the investors/lenders making use of the reductions. The latter is the consequence of their falling outside the scope of the State aid rules. If the addressees of the measure were undertakings, the State aid rules should be applied instead of the fundamental freedom, as they would grant more comprehensive remedy including those competitors who invested in companies resident in another region of Belgium instead of companies resident outside Belgium. In this respect, the fundamental freedom plays a complementary role in relation to the State rules despite the fact that they cannot offer
remedy to all the potentially injured persons. In the light of all these possible problems inherent in the measures, it is interesting that the Commission’s challenge is based, probably, on the most innocent aspect thereof.

10.5.3. Measures treating residents and non-residents differently

The situation is different from the above in the case of those direct tax measures which apply generally in the whole territory of a Member State and which discriminate against non-residents while, at the same, inherently favour residents, such as an exemption from withholding tax only on domestic dividends or loss relief system only for domestic groups. To such measures, only the fundamental freedoms should be applied. As we concluded in Chapter 9, the concept of discrimination under the freedoms is narrower than that of selectivity under the State aid rules. Discrimination is directed at differential treatment of comparable cross-border and domestic situations while selectivity is aimed at any differential treatment which is capable of distorting competition. While all differentiations between domestic and cross-border situations affect the competitive conditions under which resident and non-resident undertakings operate or domestic and imported products are traded in the internal market not all differential treatment that distorts competition discriminates, at the same time, against non-residents or intra-Union trade. Therefore, in this sense, the concept of discrimination appears to be more specific than that of selectivity. Hence, the fundamental freedoms are also more specific in relation to the State aid rules. According to the doctrine of *lex specialis derogat lege generali*, only the specific rule should be applied to a factual situation which in principle falls under the scope of both the general and the specific rule. A national measure which treats non-residents or transactions with non-residents less favourably than residents or domestic transaction should be tackled by the more specific norm, that is, the fundamental freedoms the scope of which is tailored to trans-frontier situations. In the case of a national measure which grants advantages to undertaking established in (or products originating from) a certain region of a Member State thereby disadvantaging both non-resident undertakings (or products of other Member States) and undertakings (or products) of the same Member State which are established (or originate) outside the eligible region the scope of the fundamental freedoms, which is confined to cross-border situations, is too narrow to cover all aspects of the measure and to offer remedy to all who might be harmed by the measure. In such case, the more general State aid rules should be applied given that they offer remedies to all the disadvantaged competitors and thereby cover
all aspects of the measure. Now assuming that the measures at issue in Germany v Commission were extended so that the rollover relief would cover acquisition of shareholdings generally in German companies irrespective of the area where they are established. Thus, instead of the advantage being limited to companies located in a certain area of Germany it would apply to all German companies in whose capital the investor acquires shareholdings. In this form, the measure would only exclude from its scope acquisitions in the capital of companies established in other Member States. This measure would no longer qualify as State aid but as a restriction on the freedom of establishment or free movement of capital as regards German investors intending to make outbound investments. As the measure would treat outbound investments less favourably than domestic investments it would fall within the scope of the freedoms which are specifically designed to tackle these differential treatments instead of the more general State aid rules. Similarly, if the stopover tax had been introduced not by the Region of Sardinia but by the central Italian authorities in a way that only non-resident boat and aircraft operators would have been liable to it the tax would fall exclusively under the scope of the freedom of providing services. Thus, a differentiation between cross-border and domestic situations brings the measure within the scope of the freedoms. There is one exception to this, namely, the situation of reverse discrimination where a national measure treats cross-border and domestic situations differently but to the detriment of domestic situations. Such differential treatment is not covered by the scope of the freedoms. It may, however, very well fall within the scope of the more general rule, i.e. the State aid rules.

The approach we propose – treating the fundamental freedoms as the more specific rule as compared to the State aid rules – finds support in Hansen. As we recall, in that case the Court with regard to a measure where the exercise of exclusive rights under a State monopoly entailed aid to certain producers held that Article 37 TFEU on State monopolies had the status of lex specialis compared to the State aid rules. Article 37 TFEU contains a non-discrimination rule which prohibits discrimination between nationals and products of different Member States. Thus, Article 37 is based on the same discrimination concept as the fundamental freedoms. If Article 37 is lex specialis in relation to the State aid rules the fundamental freedoms should also be.

As discussed above, Rossi-Maccanico gives a different explanation to Hansen in an attempt to try to reconcile it with Ianelli. He maintains that

whether the State aid rules or the fundamental freedoms qualify as *lex specialis* depends on the characteristics of the measure and the circumstances of the case. Thus, there is no *a priori* relationship of general-specific between the State aid rules and the fundamental freedoms thus neither of them is more specific than the other in the abstract. However, in the concrete circumstances of a case it is possible to choose the more specific norm. Accordingly, he states that when a case is brought before a national court against a measure which constitutes aid and, at the same time, inherently infringes another Treaty provision “it is critical for the court to determine which one is the most specific infringement in order to fulfil the obligation to provide the more pertinent judicial remedy”.\textsuperscript{1902} If the anti-competitive effects of the measure are the main reason for the individual’s challenge the national court will have to apply the State aid rules and provide the remedies available under national law – interim measures in the form of ordering the suspension or the recovery of the unlawfully granted aid – but cannot rule on the compatibility of the aid. On the other hand, if the applicant suffers from a generic violation of her fundamental freedoms and the effects on competition are secondary, the national court will apply the directly effective freedom as the more specific rule. Rossi-Maccanico adds that the national court may request guidance from the Court of Justice as regards which infringement is more specific in the case at hand.

As we have explained above, we consider that there is a preordained general-specific relationship between the State aid rules and the fundamental freedoms. This is determined by the scope of the concepts of selectivity and discrimination respectively. Therefore, in our view, the circumstances of the case and the characteristics of the measure will be relevant from the point of view of determining whether we need the general rule or the specific one to cover those facts appropriately.

Engelen puts forward yet another proposal as regards the approach to tax measures where an infringement of the fundamental freedoms is ‘indissolubly linked’ to the object and purpose of aid or, in his words, where discriminatory taxation of non-resident undertakings and State aid in favour of resident undertakings appear to be two sides of the same coin.\textsuperscript{1903} He states that a “difference in treatment of resident and non-resident undertakings that in an objectively comparable situation either constitutes an “advantage” for resident undertakings or a “disadvantage” for non-resident undertakings,

\textsuperscript{1902} Ibid.
\textsuperscript{1903} Engelen, supra note 1815.
but not both”.1904 He discusses in the context of the Regione Sardegna case under what circumstances an exemption from tax granted only to resident undertakings can be regarded as State aid. In his view, that is the case only where the exemption reduces the tax that would normally be due by the undertaking. The question whether the exemption reduces the tax normally due must be determined in the light of the aim of the tax legislation at issue. As regards the stopover tax, he concludes that — in the light of its environmental objective put forward by the Sardinian authorities — the tax should have been due also by residents and therefore, the exemption constitutes an ‘advantage’ and in turn, State aid for the residents. He adds that according to Ianelli, such aid should not fall within the scope of application of the freedom to provide services. In contrast, a dividend withholding tax exemption limited to resident shareholders could not be regarded — in the light of its objective of relieving economic double taxation — as an ‘advantage’ compared to a tax normally due. It is rather the taxation of non-resident shareholders which can be considered “abnormal” and such, a ‘disadvantage’ for the latter. Therefore, such measure is an infringement of the freedom of establishment of non-residents and not a State aid for residents.

In our view, it is rather difficult to draw a line between ‘advantage’ and ‘disadvantage’ in the sense proposed by Engelen even if the objective of the national legislation is used as a guide in this respect. For instance, taking the example of a group relief system which is limited to domestic groups would this be considered an ‘advantage’ for residents or a ‘disadvantage’ for non-residents in the light of the objective of the measure, i.e. treating companies belonging to a group as an economic unit? We are inclined to consider this rather an advantage (taking into account that in many jurisdictions group relief systems do not exist at all), in which case the limitation of the measure to resident companies would be State aid. However, intuitively, such measures are rather restrictions on the freedom of establishment and the Court consistently treats them as such. Similarly, the rollover relief at issue in Germany v Commission, if it was applied to acquisition of shareholding in resident companies to the exclusion of non-resident companies, it would most likely be an advantage for resident companies according to the approach proposed by Engelen. Conversely, as we discussed above, in our view, such measure should rather be regarded as a restriction on the freedom of establishment. All in all, the proposal to distinguish between ‘advantage’ and ‘disadvantage’ for the purpose of deciding whether the State aid rules or the fundamental freedoms should prevail in case of measures which may fall within the scope of both norms seems to raise some conceptual

1904. Ibid. p. 209.
difficulties. In fact, these conceptual difficulties are similar to those we discussed in Chapter 9 as regards the identification of the benchmark system when applying the derogation test. We consider that our proposal to apply only the fundamental freedoms as more specific rules to all cases where the differential treatment under review specifically aims at distinguishing between cross-border and domestic situations can avoid such conceptual difficulties and therefore, brings about more legal certainty.

10.6. Overview

The analysis in this Chapter revolved around the question how to resolve the overlap between the State aid rules and the fundamental freedoms as regards tax measures which discriminate against non-residents and, at the same time, necessarily and inherently favour residents. In search of an answer to this question, we have examined the case law concerning the parallel application of the State aid rules with other Treaty provisions. On the basis of the first case which addressed this problem, Ianelli (Case 74/76), we have drawn a distinction between aid measures where the factor constituting an infringement of a Treaty provision other than Articles 107-108 is not necessary for achieving the objective of the aid (‘separable’ measures) and where such infringement is indissolubly linked to the object and purpose of the aid (‘inseparable’ measures). As regards ‘inseparable’ measures, Ianelli lays down the rule that such measures must be assessed solely according to the State aid rules and the State aid procedure; in academic literature, this is sometimes referred to as ‘cumulative and joined review’.1905 On the other hand, ‘separable’ measures may be the object of parallel procedures, that is, ‘cumulative and disjoined’ review.1906 The rationale of giving precedence to the State aid rules and the State aid procedure with regard to measures where the aspect infringing a Treaty provision other than Articles 107-108 is inseparable from the aspects necessary for the functioning of the aid was safeguarding the competence of the Commission vis-à-vis national courts in the distribution of powers laid down in the Treaty with regard to the control of State aid. If national courts could assess and – if needed – set aside such measures in national procedures on the basis of directly effective Treaty provisions the Commission’s exclusive competence to declare aid compatible or incompatible with the internal market could be jeopardised.

1905. Rossi-Maccanico, supra note 1812, p. 22.
1906. Ibid.
As regards parallel procedures concerning ‘separable’ aid measures, such procedures can be conducted by the Commission, on the one hand, and a national court, on the other. In such case, the national court is permitted to decide upon whether or not a separable element of the aid measure violates one or other of the fundamental freedoms. The national court’s power in this regard is not affected by the fact that the aid measure had been authorised by the Commission (Case C-234/99 Nygård). In effect, such power enables the national court to partially set aside the Commission’s decision approving the aid.

In addition, parallel review procedures can be run by the Commission itself. This is the case where the compatibility of a separable condition of the measure with a Treaty provision other than the State aid rules is examined an infringement procedure while the aid itself may be subjected to a procedure pursuant to Article 108 TFEU. The case law makes it clear that the initiation of an infringement procedure in such a case is only a right but not an obligation on the Commission insofar as it can also decide upon such infringement in the framework of a State aid procedure (Case C-156/98 Germany v Commission).

As regards the joined review of ‘inseparable’ measures, according to Ianelli, the joined review must take place in the framework of the State aid procedure. Even though the Commission’s competence is not at risk when it can carry out the joined review, although not in a State aid procedure rather in an infringement procedure, such practice (Case 249/81 Commission v Ireland) is objectionable on the ground that it allows the more extensive safeguards of the State aid procedure to be set aside.

The case law defines the limits of the Commission’s discretion in the State aid procedure insofar as such procedure must never produce a result which is contrary to the specific provisions of the Treaty. Accordingly, State aid certain conditions of which contravene other provisions of the Treaty cannot be declared by the Commission to be compatible with the internal market. As explained in academic writing, this does not mean that ‘inseparable’ aid measures constituting an infringement of other Treaty provisions can never be declared compatible aid. In the case of such measures, the Commission evaluates the market effects of the infringement of the other Treaty provision and only if such effects are additional to the ones caused by the aid itself will the Commission consider the aid incompatible.

With regard to substantive issues, the Court acknowledges the possibility of concurrent application of the State aid rules and the fundamental freedoms
to ‘separable’ measures. In fact, the case law after Ianelli shows a shift in the Court’s attention from protecting the Commission’s competence in State aid control towards protecting the effectiveness and direct effect of the fundamental freedoms. In cases concerning ‘separable’ measures, the Court has consistently held that the State aid rules cannot be used to frustrate the Treaty rules on free movement and the mere fact that a national measure may possibly be defined as aid is not a sufficient reason for exempting it from the prohibition contained in the freedoms.

As regards ‘inseparable’ measures, the case law is far from being consistent which is best demonstrated by the fact that the Ianelli-rule has never been followed in subsequent cases (Case 249/81 Commission v Ireland, Case C-21/88 Du Pont de Nemours, Case 91/78 Hansen). Instead of giving priority to the State aid rules and the State aid procedure, in these cases the Court found the fundamental freedoms (or other directly effective Treaty provision) applicable thereby enabling the national courts to effectively set aside measures where the aspect infringing such freedoms was inseparable from the object and purpose of the aid.

Finally, we discussed whether ‘inseparable’ tax measures which discriminate against non-residents and, as a consequence, inherently favour residents should be qualified as a restriction on the fundamental freedoms or State aid or both. On the basis of the Court’s approach in Hansen, we proposed to perceive the relationship of the State aid rules and the fundamental freedoms as being in the nature of general – specific. Such relationship derives from their core concepts, i.e. selectivity – discrimination, selectivity covering all differential treatment of comparable situations which distort competition while discrimination encapsulating a specific category of such differential treatments, namely that between residents and non-residents or domestic and cross-border situations. Accordingly, national measures which treat non-residents or transactions with non-residents less favourably than residents or domestic transaction should be tackled by the more specific norm, that is, the fundamental freedoms. On the basis of the premise that lex specialis derogat lege generali, these measures come within the scope of the freedoms but not that of the State aid rules. In the case of reverse discrimination where a national measure treats cross-border situations more favourably than domestic ones, the differential treatment falls outside the scope of the fundamental freedoms, however, it is covered by the more general State aid rules. Similarly, when a national measure entails a differentiation other than cross border – domestic or resident – non-resident it will come within the scope of the general rule, i.e. State aid. Such is the case when a national measure grants advantages limited to a certain geographical
area of a Member State. Such measure disadvantages both non-resident undertakings (or products of other Member States) and undertakings (or products) of the same Member State which are established (or originate) outside the eligible region. As the scope of the fundamental freedoms is too narrow to cover all aspects of such measures, the more general State aid rules should be applied which offer remedies to all the disadvantaged competitors and thereby cover all aspects of the measure. Our analysis showed that the conclusion that regional measures should only be governed by the State aid rules without the concurrent application of the fundamental freedoms has the advantage of avoiding any contradictory remedies while not causing any adverse consequences for those potentially harmed by the measure as regards the enforcement of their rights before national courts or the remedies that they may be entitled to.