



To:
Professor Dr Marco Greggi

31/12/2025

Call for Abstracts - Interpretation of Tax Legislation

Dear Professor Dr Greggi,

Hereinafter, you can find the abstract of the presentation I would like to make during the session "The European Approach to Interpretation: the Tax Case" of the forthcoming conference on "Interpretation of Tax Legislation".

Is there any modus interpretandi employed by the ECJ on tax matters? The critical case concerning competition within the internal market

Key words: primary law; competition; internal market; State aid; interpretation.

Primary law and the ECJ's decisions are fundamental for Member States and European citizens, as they can also influence tax law. To this end, one may analyse rules and decisions on competition within the internal market, given that they can have repercussions on taxation. Article 107 TFEU, in fact, prevents any distortion therein through State aids also of a tax nature.

In this regard, one could argue that, when interpreting Article 107 TFEU, the ECJ does not appear to adhere strictly to the wording of the law. Even though that provision states that only a State aid that (in so far as it) "affects trade between Member States" is incompatible with the internal market, the ECJ eventually concludes that a potential effect on such trade is sufficient to this end (*Philip Morris v. Commission* case).

Instead, when the ECJ interprets the other fundamental provision on competition, the *modus interpretandi* appears to differ. In fact, when interpreting Article 101 TFEU, the Court appears to favour a literal interpretation of the provision: it follows the wording of that law and concludes that only agreements that "may affect trade between Member States" are incompatible with the internal market (*Irish Sugar* and *Schenker* cases).

For these reasons, one could state that the ECJ employs different interpretive criteria to primary law addressing the same subject (i.e., competition within the internal market). Also, the Court seems to apply a more loose approach when interpreting Article 107 TFEU than

Dr Federico Bertocchi

Adjunct Professor of Tax Law
Department of Law
federico.bertocchi@edu.unige.it



when it deals with Article 101 TFEU, thus reducing the opportunities for Member States to introduce aids (also) of a tax nature.

However, one could argue that, when interpreting Article 107 TFEU, the ECJ follows an autonomous *modus interpretandi* of the relevant provision, which appears to be driven by economic considerations that are usually alien to traditional methods of interpretation of the law.

This situation, eventually, prevents the identification of a *modus interpretandi* regularly adopted by the ECJ *vis-à-vis* primary law, thus making it less easy for Member States and national courts to apply the relevant provisions consistently. It also leads to a less uniform application of Article 107 TFEU, to the detriment of State aid of tax nature.

Dr Federico Bertocchi
Adjunct Professor of Tax Law
University of Genoa (Italy)

Visiting researcher
Max Planck Institute for Tax Law and Public Finance
Munich - Germany

Thank you for your attention.

Kind regards.