

Simplified application of the Three-step approach in a tax case involving material selectivity

Assume: Member State (MS) has a corporate income tax of 25% of the 'profit' of all undertakings within that MS's tax jurisdiction. However, the tax allows for a lower tax rate (5%) over 'profit from 'green' activities'; this lower rate is referred to as the 'reduction' and has an environmental objective.

Step:	'Broad' approach:	'Narrow' approach:
Reference framework?	Tax on profits - <i>objective</i> : raise revenue by taxing profits of all undertakings.	Reduction of tax for 'green' profits - <i>objective</i> : promote the environment by taxing 'green' profit at a lower rate than other profits.
Prima facie selectivity?	Yes; undertakings with 'green' profits are comparable to all other undertakings when it comes to a tax on profits and are treated differently. The reduction for undertakings with 'green' profits is therefore a derogation from the reference framework.	No; all undertakings with 'green' profits are treated the same; the treatment of other undertakings is not relevant in this view . There is no derogation from the reference framework.
Justification? <u>NOTE</u> : The question of the proportionality is not included in this chart. Proportionality is significant for the justification of a measure that is <i>prima facie</i> selective.	<p>No - <i>basic argumentation</i>: there is no intrinsic characteristic of the <i>tax on profits</i> which justifies a different treatment of 'green' undertakings</p> <p style="text-align: center;"><u><i>Or (this approach is sometimes suggested):</i></u></p> <p>Yes - <i>basic argumentation</i>: what is relevant are the intrinsic characteristics of the <i>reduction</i> for 'green' profit. In this case, the distinction between 'green' profit and other profit would be regarded as relevant. The different treatment of 'green' profit would be justified on the grounds that the aforementioned situations are not comparable.</p> <p><u>NOTE</u>: The second approach results in an assessment of the reduction on the basis of the reduction itself; such an approach in effect denies the very existence of selectivity, and is therefore problematic if not incorrect.</p> <p>Does this mean that a MS can never have an environmental tax? Answer: No, it just means that the tax may need to be notified to the EC for approval under Article 107(2) or (3) TFEU. In this sense, the approach used for selectivity affects the scope of the EC's power vis-a-vis State aid control.</p>	<p>N.A.</p> <p style="text-align: right;"><i>See also:</i> Artikel104.nl/cloud</p>
Outcome	Depends on the approach in Step 3; the better view is - to my eyes - that the reduction is selective (but noting that approval by the EC may be possible).	Not selective; consequently no State aid under Article 107(1) TFEU.