

# EU State Aid Law and Taxation

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# Welcome!



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# State aid and Taxation: making headlines



FT, 29 September 2014

## THE EUROPEAN COMMISSION'S RECENT STATE AID INVESTIGATIONS OF TRANSFER PRICING RULINGS

U.S. DEPARTMENT OF THE TREASURY  
WHITE PAPER



August 24, 2016

## McDonald's to scrap Luxembourg tax structure

Fast-food chain's reorganisation means £800m from restaurants in Europe will flow through the UK instead

The Guardian, 8 December 2016



## Vestager, Moscovici to go big on tax

Brussels presents one-two tax punch, with the competition commissioner taking on Apple and Amazon after the EU tax chief presents VAT reforms.

Politico.eu, 10 March 2017

# What's next?



Bloomberg.com (27 March 2018)

Gert Jan Koopman, the commission's deputy director general for State aid and Competition Commissioner Margrethe Vestager's top man in charge of the cases, has said that the EU's probes are nowhere near finished.

"We are still looking at a variety of individual cases, but also a number of schemes in member states," Koopman said at an event last year.

"This remains a very large priority and I would also expect over the next year for there to be a large number of cases."

# Agenda

- State aid law and Taxation – international controversy
- Legal framework
  - Selectivity requirement
- Procedural aspects
- Hot topics
  - Transfer pricing
  - Tax rulings
  - IP regimes
- What's next?
- Practical implications

# International controversy

## US Treasury White Paper (24 August 2016)

- The Commission's approach is **new** and was unforeseeable by the relevant companies and EU Member States
- The Commission should not seek to impose recoveries under this new approach in a **retroactive** manner
- The Commission's approach **undermines** U.S. tax treaties and international transfer pricing guidelines already accepted broadly in the global tax community, and undermines the BEPS project

# Harmonization through the backdoor?

## Commission Notice on the Notion of State aid (2016)

"This arm's length principle necessarily forms part of the Commission's assessment of tax measures granted to group companies under Article 107(1) of the Treaty, **independently** of whether a Member State has **incorporated** this principle into its national legal system and in **what form**."

# Legal framework

Article 107(1) TFEU:

“1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition **by favouring certain undertakings or the production of certain goods** shall, in so far as it affects trade between Member States, be incompatible with the internal market.”

- Commission Notice on the notion of State aid: summary and systemisation of Commission practice and case law
- Procedural Regulation 2015/1589



# Legal framework

## Article 107(1) TFEU:

1. Determination of the **advantage** granted by the tax measure: identification of common or 'normal' regime applicable in the Member State
2. Assessment of the **objective** of the tax measure: intrinsic objectives are legitimate, extrinsic objectives are not
3. Comparability analysis: are the undertakings in a **comparable** factual and legal situation in the light of the legitimate objective
4. **Justification**: intrinsic objectives are relevant
5. Proportionality: is the measure **suitable and necessary** to attain the legitimate objective (look in particular at the effects of the measure)

[Joined Cases C-78/08 to C-80/08, Paint Graphos]

# Legal framework – Example of application (1)

Gibraltar – Opening Decision by EC (16 October 2013, SA.34914)

Interest and royalty income **exempt**

Other income taxable

State aid because payments  
were deductible elsewhere?



# Legal framework – Example of application (2)

## Case C-6/12, P Oy

"26. (...) the application of an authorisation system which enables losses to be carried forward to later tax years (...) cannot, in principle, be considered to be selective if the competent authorities have, when deciding on an application for authorisation, only a **degree of latitude** limited by **objective criteria which are not unrelated to the tax system** established by the legislation in question, such as the objective of avoiding trade in losses.

27. On the other hand, if the competent authorities have a **broad discretion** to determine the beneficiaries or the conditions under which the financial assistance is provided on the basis of **criteria unrelated to the tax system**, such as maintaining employment, the exercise of that discretion must then be regarded as favouring 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued, are in a comparable factual and legal situation (...)."

# Legal framework – Example of application (3)

## Commission Notice of the notion of State aid (2016)

A tax ruling amounts to State aid if:

- (a) the ruling misapplies national tax law (incl. tax treaties) and this results in a lower amount of tax;
- (b) the ruling is not available to undertakings in a similar legal and factual situation; or
- (c) the administration applies a more 'favourable' tax treatment compared with other taxpayers in a similar factual and legal situation.

# Procedural aspects

## Article 108(3) TFEU:

"The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."

- Standstill provision has direct effect

# Procedural aspects

## Recovery of unlawful State aid

- Existing aid vs new aid
- Ten years recovery period
- Compound interest
- Legitimate expectations can only be created by the Commission or the Council

# Pending cases

## Individual aid

- Starbucks: deduction of royalties and other payments made to **hybrid entity**
- FIAT: intra-group **financing** (alleged inconsistent application of TNMM)
- Apple: **allocation of profits** to a permanent establishment (empty head office)
- Amazon: deduction of **royalties** (payments to hybrid entity)
- McDonald's: exemption of profits of a **non-taxed foreign PE** under a tax treaty
- ENGIE: provision of a **loan and double non-taxation** ('mismatch')
- IKEA: valuation of **IP**

## Aid schemes

- Gibraltar: **exemption** of passive income
- Gibraltar: tax **ruling practice** State aid as a whole (examination of 165 tax rulings)
- Belgian **Excess Profit** regime: synergy benefits and transfer pricing (alleged inconsistencies and double non-taxation)
- Autogrill and Santander: amortisation of goodwill on **foreign participations**
- **IP regimes** which are not fit for purpose: press release on Luxembourg IP regime
- UK CFC regime – **group financing**

# Pending cases – take aways

## DG COMP Working Paper

- European Commission: transfer pricing follows directly from the TFEU
- Equal treatment of group companies and stand-alone companies
- But: criticism on deductibility of payments which are not actually made...
- Very critical towards one-sided APAs and TNMM
- Preference for BAPAs, profit split and CUP

## Common themes

- EU principle of equality and transfer pricing
- Notion of selectivity
- Mismatches
- Double non-taxation or low taxation



# Hot topics

- Tax rulings
- Tax settlements
- Transfer pricing
- Tax treatment of cooperative societies
- Undertakings for collective investment
- Tax amnesties
- Depreciation and amortisation rules
- Fixed basis tax regimes for specific activities
- Anti-abuse rules
- IP regimes
- Rules on avoidance of double taxation

# Hot topics – Transfer pricing (APAs)

Starbucks

APA with Dutch authorities

Royalty to 'empty' UK LP:  
Non-taxation relevant?



# Hot topics – Tax rulings (non-TP)

McDonald's

PE profit exempted in Lux

Tax treaty interpretation

Relevance of OECD  
Commentary?



# Hot topics – IP regimes

- Objective
- Promotion of R&D: Article 179(1) TFEU
- Commission Decisions
- Code of Conduct Group
- Modified Nexus Approach



# Practical implications

## Reporting

- Board
- External auditor

## Be in control

- Focus on situations where group profits are not taxed or taxed at a low rate

## State aid law should be integral part of group tax strategy

- Dealing with existing and new risks / risk appetite

# Practical implications

## Transfer pricing policy

- State of the art
- Documentation, design, consistency
- Following the business means economic reality

## System of risk management

- Show how it includes State aid

**Proactivity** means high quality discussions with the board and with the external auditor

**Being in control** means less risk and less worries, also in terms of disclosure

# Thank you

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