



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT**  
ECONOMIC AND SCIENTIFIC POLICY **A**



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# EU State Aid Law and National Tax Rulings

In-Depth Analysis for the TAXE Special Committee





DIRECTORATE GENERAL FOR INTERNAL POLICIES  
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

# EU State Aid Law and National Tax Rulings

IN-DEPTH ANALYSIS

## Abstract

This paper forms part of a series of analytical pieces on various key tax issues, prepared by Policy Department A at the request of the Special TAXE Committee. It sets out how tax rulings can be subject to state aid scrutiny if they lead to a beneficial tax treatment of a particular undertaking that is not in line with the normal application of national tax law. However, a deviation from national law in itself is not always an indicator of selective aid. As national law is the only relevant benchmark, the state aid regime is not designed to impose particular doctrines or best practices on the tax systems of Member States.

IP/A/TAXE/2015-02

PE 563.453

October 2015

EN

This document was requested by the European Parliament's TAXE Special Committee.

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Original: EN

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Manuscript completed in October 2015

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# CONTENTS

<b>LIST OF ABBREVIATIONS</b>	<b>4</b>
<b>EXECUTIVE SUMMARY</b>	<b>5</b>
<b>1. INTRODUCTION</b>	<b>6</b>
<b>2. THE NOTION OF (FISCAL) STATE AID</b>	<b>7</b>
2.1 Article 107(1) TFEU	7
2.2 Aid must be present	7
2.3 Granted by a Member State	8
2.4 Distortion of trade and competition	9
2.5 Selectivity	9
<b>3. TAX RULINGS</b>	<b>12</b>
3.1 Monitoring	12
3.2 At arm's length pricing	12
3.3 Mismatches	14
3.3.1 Mismatches causing double non-taxation	14
3.3.2 Deliberate mismatches	15
3.3.3 Increasing transparency	16
3.3.4 Hybrids: do state aid rules require anti-abuse measures?	16
3.4 Is a beneficial ruling selective by definition?	17
3.4.1 Burden of proof	17
3.4.2 Rulings open to major investors	18
3.5 Can a C(C)CTB reduce the risk of state aid and tax rulings?	18
3.5.2 A C(C)CTB cannot do without rulings either	18
3.5.3 Can state aid be a substitute for infringement proceedings?	19
<b>4. RECOVERY OF FISCAL STATE AID</b>	<b>20</b>
4.1 Method of recovery & tax credits	20
4.2 Windfall benefits to Member States	20
<b>5. CONCLUDING REMARKS</b>	<b>22</b>
<b>REFERENCES</b>	<b>23</b>

## LIST OF ABBREVIATIONS

<b>APA</b>	Advance Pricing Agreement
<b>ATR</b>	Advance Tax Ruling
<b>BEPS</b>	Base Erosion and Profit Shifting
<b>C(C)CTB</b>	Common (Consolidated) Corporate Tax Base
<b>CJEU</b>	Court of Justice (as part of the Court of Justice of the European Union, as well as any of its predecessors at the time of the E(E)C)
<b>ECLI</b>	European Case Law Identifier
<b>EEA</b>	European Economic Area
<b>EU</b>	European Union
<b>MS</b>	Member State
<b>NGO</b>	Non-Governmental Organization
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>OJ</b>	Official Journal (of the European Union)
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TP</b>	Transfer Pricing
<b>TTIP</b>	Transatlantic Trade and Investment Partnership
<b>WTO</b>	World Trade Organization

## EXECUTIVE SUMMARY

### Background<sup>1</sup>

As a result of (currently ongoing) European Commission's investigations into the ruling practices of all EU Member States could, certain companies may be facing large revisions of their assessments. The timing of the European Commission's investigations into tax rulings (and advanced pricing agreements) cannot come as a surprise in the aftermath of recent financial crises that put a strain on the budgets of EU Member States. They also are being conducted in parallel with the ongoing discussions on base erosion and profit shifting (BEPS) at the level of the OECD/G20. Rulings can be a very effective instrument in granting special tax benefits below the radar and thus deserve serious public and political scrutiny, but at the same time they can be used to improve the investment climate within a Member State by provide legal certainty to future investors within the limits of the law. There is, however, a large grey area in between these two extremes and it is within this grey area where the boundaries of the EU's rules on state aid must be found.

### Aim

This briefing paper will provide an overview of selected issues that arise in the application of state aid law in the area of tax rulings in general.

### Main findings

- The EU's state aid regime can be a powerful instrument to address tax benefits included in tax rulings that divert from the normal national tax system. There is room for improvement of its recovery system.
- State aid has no role to play in respect of imposing 'best practices' or a most desired tax system on a Member States when they have not been adopted voluntarily.
- Next to dealing with possible flaws in transfer pricing decisions, state aid may also be effective in dealing with certain deliberate mismatches. Examples thereof are (i) differences in qualification of debt/equity in violation of national law and (ii) confirmation of tax transparency of cooperatives that do not act as such.
- The EU's main trading partners do not have a state aid regime in place, which may be a disadvantage should the OECD's BEPS project not be adopted widely.
- An increase in exchange of information on tax rulings can address mismatches and transfer pricing issues. It would also be helpful for the Commission in the exercise of its state aid monitoring obligations. If information on tax rulings is to be shared with non-EU trading partners, the EU should ensure that the other party is able to offer reciprocity. Any information so exchanged could be used to trigger legal actions against fiscal state aid offered by EU Member States under EU/WTO provisions.

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<sup>1</sup> Background text provided by the Policy Department Economic and Scientific Policy.

## 1. INTRODUCTION

This briefing paper will address the topic of state aid and national tax rulings in general. It is not meant to comment on any of the ongoing formal investigations into rulings by the European Commission in specific.<sup>2</sup>

State aid has an important and powerful role to play in the fight against tax avoidance and harmful tax competition, as it is one of the few areas where the European Commission has the competence to directly intervene in national tax law and tax decision making. At the same time, that role is limited as the state aid regime is not designed as an instrument to take care of all tax benefits.

Tax systems are often complex and the application of tax law to the facts of a particular case may be unclear. Rulings are needed to safeguard genuine investments and they are often not a luxury when rather substantial investments are involved. That said, at the same time rulings can play an important role in the sustainability of tax avoidance structures.

In this paper the term 'ruling' will refer to both advance tax rulings (ATRs) and advanced pricing agreements (APAs) or any other kind of advanced confirmation given by governments.<sup>3</sup> The examples given in this paper will focus on corporate taxation, in line with the focus of the ongoing Commission investigations and the OECD's BEPS project. Rulings, as such, can also play a role in the area of wage and payroll taxes, value added taxes and alike, which can be equally important tax factors for multinationals to take into account. Even though these taxes will not be discussed, what will be said about rulings can be applied *mutatis mutandis* in these areas as well.

It follows from the State Aid Scoreboards of 2012 and 2014 that over-all aid has gone down from € 77 Billion in 2008 to € 63 Billion in 2013.<sup>4</sup> In that period fiscal aid has gone down from € 33 Billion to about € 22 billion annually. One should keep in mind that these numbers only represent state aid that has been reported to the Commission and that it is aware of, together with unreported aid in respect of which state aid investigations have been concluded. Fiscal aid as such is a very substantial portion of total aid provided, despite a slight drop from 42% to 34%. Should the Commission's ongoing investigations into tax rulings show a pattern that a substantial number of rulings contains state aid, the total share of fiscal state aid may be far higher than the aforementioned numbers show.

Paragraph 2 will briefly indicate how state aid relates to the direct taxation of corporations in general. Then paragraph 3 will address selected issues in respect of tax rulings in particular. Paragraph 4 will focus on the recovery of fiscal state aid. Paragraph 5 provides for some concluding remarks.

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<sup>2</sup> The ongoing formal investigations are: Commission Decision in case SA.38373 (Apple) of June 11, 2014, OJ C 369/22 of October 17, 2014; Commission Decision in case SA.38375 (Fiat Finance & Trade) of June 11, 2014, OJ C 369/37 of October 17, 2014; Commission Decision in case SA.38374 (Starbucks) of June 11, 2014, OJ C 460/11 of December 19, 2014; Commission Decision in case SA.34914 (Gibraltar ruling practice) of 1 October 2014, not yet published (see press release IP/14/1073); Commission Decision in case SA.38944 (Amazon) of October 7, 2014, OJ C 44/13 of February 6, 2015; Commission Decision in case SA.37667 (Belgian Excess Profit Rulings) of February 3, 2015, OJ C 188/24 of 5 June 2015.

<sup>3</sup> This, by definition, excludes any agreement by the tax authorities in regard to (partial) waivers of tax debts or postponement of tax payments once such debt has been established, as these occur not prior to a transaction or to the filing of a tax return. Even though such actions could amount to state aid, these are not the subject of this paper.

<sup>4</sup> See [http://ec.europa.eu/competition/state\\_aid/scoreboard/index\\_en.html](http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html). Numbers exclude aid to railways and aid granted to financial institutions as a result of the recent the financial crisis.



## 2. THE NOTION OF (FISCAL) STATE AID

### 2.1 Article 107(1) TFEU

The definition of state aid in Article 107(1) TFEU is a general one.<sup>5</sup> Even though it was initially designed with government subsidies and guarantees in mind, the CJEU confirmed that the scope of state aid is broader and should cover tax benefits via the tax system as well.<sup>6</sup>

In order for state aid to be present all of the following four conditions need to be fulfilled:

- Aid must be present; i.e. a financial advantage such as a tax benefit. Such aid must be granted by an EU Member State (or any lower level of government) or through state resources, in a manner attributable to that state.
- Such aid should distort or threaten to distort competition and affect trade between EU Member States.
- Such aid should favor certain undertakings or the production of certain goods; i.e. it needs to be 'selective'.

These four conditions will be discussed in more detail hereafter with a focus on tax related issues.<sup>7</sup>

### 2.2 Aid must be present

In the field of tax law the kind of benefit can take various forms, from tax base exemptions, tax credits and tax deductions to tax deferrals and special tax rates. The most important part here is that whether a tax benefit is present should be determined by comparison to the normal tax system in a Member State. It is the national tax system that is the only relevant benchmark and not the tax system of another Member State or any desirable/best practices as defined by international organizations. Determining the proper benchmark for analysis is the first step in tackling tax benefits via the state aid system.

The notion of 'aid' being granted is an objective one; the fact that a benefit is present is decisive for this condition and not its *raison d'être*.<sup>8</sup> The reason why a particular benefit was given may play a role in the approval of aid by the European Commission on the basis of Articles 107(2) or (3) TFEU.<sup>9</sup>

In the context of rulings, the question comes up in what kind of situations rulings can lead to a benefit when they are used to provide advance certainty to taxpayers. In chapter 3 some of these benefits will be addressed, but as a matter of principle it raises the issue of how to deal with legal uncertainties to start with. When it comes to settling or preventing legal disputes in general, it follows from the *Umicore* case that there is room for

<sup>5</sup> Similar provisions applicable in the EEA will not be discussed as part of this paper nor will special provisions for services of general (economic) interest such as Article 106(3) TFEU.

<sup>6</sup> CJEU 173/73 of 2 July 1974, *Italy v Commission*, ECLI:EU:C:1974:71.

<sup>7</sup> As this chapter will only present some selected issues, for further reference on state aid and taxation see, for instance, K. Bacon (ed.), *European Union Law of State Aid*, 2<sup>nd</sup> edition, Oxford, 2013, ch. 2.; T. Jestaedt, in: M. Heidenhain (ed.), *European State Aid Law Handbook*, C.H. Beck, Munich, 2009, para. 8; C. Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law*, Wolters Kluwer Legal, New York, 2014, ch. 3 and 4; C. Quigley, *European State Aid Law*, 2<sup>nd</sup> edition, Hart Publishing, Oxford, 2009, ch. 3.; W. Schön, in: L. Hancher / T. Ottervanger / P.J. Slot (eds.), *EU State Aids*, 4<sup>th</sup> edition, Sweet & Maxwell, 2012, ch. 10.

<sup>8</sup> See, for instance, CJEU 310/85 of 24 February 1987, *Deufil v Commission*, ECLI:EU:C:1987:96, para. 8.

<sup>9</sup> Notwithstanding the possibility that certain aid will be covered by a *de minimis* provision or a block exemption regulation.

manoeuvring as it may be unclear how national tax law may apply in a particular case given the circumstances of that case. Any ambiguity or inconsistency in legislation or even contradictory positions taken in judgements by lower courts may create a situation where parties may want to settle their dispute without going to court. In such a case the standard for a benefit would be whether the tax authorities made disproportionate concessions as part of settling the dispute. So, if “concessions made by the authorities are clearly out of proportion to the concessions made by the taxable person, given the circumstances”,<sup>10</sup> there may be an actual benefit subject to state aid scrutiny.

The problem here is that quantifying what is disproportionate is rather tricky. Suppose that the outcome in a particular case given the facts presented can be that part of income is either to be taxed or exempt. Now suppose that the chance that income is to be taxed, if brought to court, is 70%. May the tax authorities still agree to the alternative of something not being taxed (a 30% chance)? In law, any such quantification is already tricky and sometimes even impossible. Even if it would be possible to reliably set the odds at 70%-30%, it is unclear whether agreeing to the 30% – a possible but not the most probable outcome – would be considered a disproportionate move by the tax authorities that could trigger a benefit. This would all depend on the circumstances of the case at hand. The minimum standard here, to start with, is that from an objective point of view both parties had a reason to have a difference of opinion to start with, such as ambiguous legal provisions or inconsistencies in their application.

### 2.3 Granted by a Member State

By definition, only a State, or any lower level of government with certain autonomous rights, has taxing powers. For tax benefits it may readily be assumed that, if present, they will have been granted by a Member State or out of state resources. An important caveat here is that any benefit must be attributable to the independent actions and decision making of the Member State and it should not be the result of complying with a clear and precise obligation of Union Law (such as a Directive).<sup>11</sup>

If, by introducing a favorable tax regime for a sector of industry, a Member State would be successful in attracting additional budgetary resources in the end, this does not change the fact that tax benefits have been granted to start with. So, if the tax loss for giving benefits to existing companies is compensated by new taxes paid by newly established companies or companies coming from abroad, the fact that on balance there is no use of state resources is of little relevance.<sup>12</sup>

The actual purpose or intention of providing a benefit may become relevant when justifying a benefit, but it cannot prevent the conclusion that state resources have been used. This is also of relevance in the situation that a tax inspector, on his own ‘authority’, decides to provide a benefit to a company that is not fully in line with national law and jurisprudence. The fact that parliament or the government as such did not sanction a tax benefit does not

<sup>10</sup> Commission decision 2011/276/EU of 26 May 2010, OJ L122/76 of 11 May 2011, para. 155. Even though this case was in the context of Belgian law, where both parties would have to participate, this line of thought could be applied to (one-sided) rulings.

<sup>11</sup> Court of First Instance T-351/02 of 5 April 2006, *Deutsche Bahn v Commission*, ECLI:EU:T:2006:104, para. 102; CJEU C-460/07 of 23 April 2009, *Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz*, ECLI:EU:C:2009:254, para. 70.

<sup>12</sup> Commission decision 2002/581/EC of 11 December 2001 (*Italian banking foundations*), OJ L 184/27 of 13 July 2002, para. 42, implicitly confirmed by CJEU C-66/02 of 15 December 2005, *Italy v Commission*, ECLI:EU:C:2005:768, para. 76-82 with reference to CJEU C-372/92 of 15 March 1994, *Banco Exterior de España v Ayuntamiento de Valencia*, ECLI:EU:C:1994:100, para. 14. Prior to that decision the question whether there would be an actual use of tax revenue on balance had been considered relevant in at least one case (Commission decision 2000/735/EC of 21 April 1999 (*Technolease*), OJ L 297/13 of 24 November 2000, para. 38-39).

stand in the way of concluding that such benefit has been granted. The action by the tax inspector would normally be attributable to the Member State.<sup>13</sup>

The attribution of aid is most important when it comes to mismatches. In order for state aid rules to apply a benefit must be attributable to a single member state. For multinationals, many tax benefits arise because they are able to make use of differences in the tax systems of Member States. Now take the following classic example:

A parent company in Member State A (MS A) provides equity to a subsidiary in Member State B (MS B). Because of special conditions attached to this equity, MS B will consider this to be a loan. As such, any 'interest' payment on the loan would be considered to be tax deductible in MS B. However, the payment received would be treated as a tax exempt return on equity (like a 'dividend') in MS A.<sup>14</sup>

This kind of disparity between national legal systems leads to a mismatch resulting in double non-taxation. However, as long as either Member State applies its normal tax rules correctly, this tax benefit would be out of reach of state aid rules. The clear opposite of this would be when MS A agrees to the qualification of equity in clear violation of national tax rules. This could amount to state aid, attributable to one Member State. But, regrettably, these clear-cut cases will be hard to find. See section 3.3 on 'deliberate mismatches' hereinafter.

## 2.4 Distortion of trade and competition

The criterion of finding a potential distortion of intra-EU competition and a likely effect on trade is normally a rather light one. One thing that should be pointed out is that, in order to establish such distortion, it is not relevant whether a Member State tries to lower the tax burden for a particular industry in an attempt to create a level-playing field with tax burdens applicable for that industry abroad.<sup>15</sup>

## 2.5 Selectivity

Selectivity can be present in several forms. Benefits for a particular sector of industry, such as a special tax rate for the financial sector, would normally be selective.<sup>16</sup> Export related benefits are normally considered selective as well as would benefits restricted to companies established in a certain region within the territory of the taxing authority.

There is also selectivity in size, where high minimum levels of investment or a requirement to create a high minimum number of jobs might effectively exclude small and medium sized enterprises. Another example of selectivity in size is when a geographical spread is required, such as a requirement of being active in multiple countries or continents. This brings up the question whether tax benefits specifically aimed at multinationals would be selective per se. From a number of Commission decisions from 2002/2003 it could be derived that a *de jure* requirement of being internationally active would suffice to meet the selectivity criterion. An overview:

<sup>13</sup> It could be argued that the central government would have acted if it had been aware of the tax inspector's improper action and hence intervened, but this test is initially designed in case the actor is a publicly-held enterprise and not directly part of the government itself. (C-242/13 of 17 September 2014, *Commerz Nederland NV v Havenbedrijf Rotterdam NV*, ECLI:EU:C:2014:2224).

<sup>14</sup> Most EU Member States have some domestic anti-abuse provisions in place to deal with excessive deductions of intra-group interests.

<sup>15</sup> CJEU Joined Cases 6-69 and 11-69 of 10 December 1969, *Commission v France*, ECLI:EU:C:1969:68; CJEU C-6/97 of 19 May 1999, *Italy v Commission*, ECLI:EU:C:1999:251, para. 21

<sup>16</sup> Not all special provisions aimed at a particular sector of industry will amount to a selective benefit. Sometimes such provisions are necessary in light of specific characteristics of an industry in order to make sure that the normal tax system applies to them as intended.

**Table 1: Selection of cases with references to being active ‘multinationally’<sup>17</sup>**

Case	Criterion used
Åland captive insurance <sup>18</sup>	Foreign ownership
Belgian coordination centres <sup>19</sup>	Part of a group with a multinational character, determined on the basis of establishment (subsidiaries in at least four countries), turnover achieved abroad and capital invested abroad.
Dutch international financing activities <sup>20</sup>	Internationally active groups, operating in at least four countries or on two continents; financial activities for domestic entities to be limited to 10% of total activities.
French central corporate treasuries <sup>21</sup>	Groups need to be present in three countries
French headquarters and logistics centres <sup>22</sup>	Supply of services predominantly to companies whose registered office is outside of France or to establishments of companies within the group situated outside of France
German control & coordination centres <sup>23</sup>	Foreign group headquarters
Luxembourg coordination centres <sup>24</sup>	Provision of services exclusively to companies or enterprises in the same foreign international group; financially linked and incorporated in at least two countries other than Luxembourg; parent company is not a resident taxpayer.
Trieste financial services and insurance centres <sup>25</sup>	Involved in transactions with countries in central and eastern Europe and of the former Soviet Union.
Vizcaya coordination centres <sup>26</sup>	Group needed to include companies resident in at least two foreign countries; 25% of the centre’s funds should have been held by non-residents; at least about 10 million turnover must come from foreign operations.

<sup>17</sup> Adapted from a table previously published in *European State Aid Law Quarterly*, 2009, no.4, p. 477.

<sup>18</sup> Commission decision 2002/937/EC of 10 July 2002, OJ L 329 of 5 December 2002, pp. 22-29.

<sup>19</sup> Commission decision 2003/775/EC of 17 February 2003, OJ L 282 of 30 October 2003, pp. 25-45.

<sup>20</sup> Commission decision 2003/515/EC of 17 February 2003, OJ L 180 of 18 July 2003, pp. 52-66.

<sup>21</sup> Commission decision 2003/884/EC of 11 December 2002, OJ L 330 of 18 December 2003, pp. 23-29.

<sup>22</sup> Commission decision 2004/76/EC of 13 May 2003, OJ L 23 of 28 January 2004, pp. 1-13.

<sup>23</sup> Commission decision 2003/12/EC of 5 September 2002, OJ L 177 of 16 July 2003, pp. 17-21.

<sup>24</sup> Commission decision 2003/502/EC of 16 October 2002, OJ L 170 of 9 July 2003, pp. 20-28.

<sup>25</sup> Commission decision 2003/230/EC of 11 December 2002, OJ L 91 of 8 April 2003, pp. 47-50.

<sup>26</sup> Commission decision 2003/81/EC of 22 August 2002, OJ L 31 of 6 February 2003, pp. 26-31.

However, in the recent Spanish Goodwill cases (*Autogrill / Banco Santander*) the EU's General Court seems to indicate that being internationally active as such does not suffice.<sup>27</sup> In that case Spanish companies would be able to write-off goodwill that was paid upon a takeover of a company, but only if the target company would have been acquired abroad. In case of a domestic take-over goodwill would not be tax deductible, unless both companies would engage in a sort of merger. These judgements are now the subject of an appeal at the CJEU and the outcome of these cases will be very relevant in the handling of fiscal state aid measures targeted to multinationals.

In the *Gibraltar* case the CJEU already held that:

"the criteria forming the basis of assessment which are adopted by a tax system must also, in order to be capable of being recognised as conferring selective advantages, be such as to characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category, thus permitting such a regime to be described as favouring 'certain' undertakings or the production of 'certain' goods within the meaning of Article [107(1) TFEU]."<sup>28</sup>

Even though the author agrees with the General Court that the Commission should identify a category of undertakings based on their specific characteristics to establish selectivity either *de jure* or *de facto*, the need to be engaged in foreign takeovers and hence be internationally active may still be a satisfactory criterion to establish such (*de jure* or *de facto*) selectivity.<sup>29</sup> This will be for the CJEU to determine.

Finally, it should be pointed out that tax benefits granted to individual undertakings are normally selective. As this is of particular importance for rulings, this will be discussed in paragraph 3.4 hereafter.

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<sup>27</sup> General Court T-219/10 of 7 November 2014, *Autogrill España v European Commission*, ECLI:EU:T2014:939 and General Court T-399/11 of 7 November 2014, *Banco Santander and Santusa Holding v European Commission*, ECLI:EU:T:2014:938.

<sup>28</sup> CJEU Joined Cases C-106/09P and C-107/09P of 16 March 2009, *Commission v Gibraltar and the UK and Spain v Commission*, ECLI:EU:C:2011:732, para. 104.

<sup>29</sup> Appeals have been filed in the *Autogrill/Banco Santander* cases. (C-20/15P and C-21/15P pending, see OJ C 81/10 and C 81/11 of 9 March 2015.) In these appeals the Commission argues that 'export of capital' should be treated similar to 'export of goods', something that the CJEU already deemed selective before.

## 3. TAX RULINGS

### 3.1 Monitoring

The European Commission is currently exercising its monitoring powers by using a two-step approach. It first asks Member States for a description of its tax ruling practice and relevant documents together with a longlist of all rulings that were provided during a couple of years (mainly 2010-2013).<sup>30</sup> It then selects certain rulings out of that list for a case-by-case review as part of a (non-public) preliminary investigation. Even though it is not clear what the Commission's criteria for selection are when choosing from the longlist, it does not seem to be an entirely random process. There is a clear focus on multinationals, in particular those who were already under public scrutiny via the press, NGOs or in national parliaments.

At present preliminary investigations into individual rulings are pending in Austria, Belgium, Cyprus, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Lithuania, Malta, Portugal, Romania, Slovakia, Spain and Sweden.<sup>31</sup> As part of these confidential preliminary investigations, the Commission will review one or more rulings per Member State in detail. Should these raise further questions, the Commission may decide to open a formal investigation, which allows it to collect information from all interested parties (including the taxpayer, other Member States involved and potential competitors). Formal investigations are pending in Belgium, Luxembourg, Ireland, the Netherlands and in Gibraltar (United Kingdom).<sup>32</sup>

Despite state aid having the potential to address other issues, the ongoing formal investigations into rulings seem to focus on transfer pricing issues mainly (see paragraph 3.2). Limited attention is given to mismatches at this time (see paragraph 3.3). In order to fully understand the complexities and peculiarities in the interpretation of national law, any legal analysis to track deliberate mismatches does require a thorough understanding of the law involved. In contrast to this, an analysis of transfer pricing issues – albeit depending on national law – to some extent refers to a common language economists and accountants may understand, which makes it easier to raise flags in respect to these issues.

### 3.2 At arm's length pricing

In order to ensure that profit is allocated properly to taxable entities most Member States use (a variation of) the at arm's length principle in order to determine what prices should be considered acceptable between related parties (group companies) when engaging in internal transactions. When the Commission stressed the importance of the at arm's length principle in a series of decisions taken from 2002 to 2004, it did this in reference to countries that adopted at least some version of that principle in national law.<sup>33</sup> In order for the Commission to be able to refer to this at arm's length principle it must be part of the reference framework, i.e. the national legal system at hand.

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<sup>30</sup> As the lists received by the European Commission have not been made public, it is unclear as yet whether the overviews of rulings provided by the Member States also included arrangements made with local tax authorities under the control of sub-national or sub-federal governments. It is also unclear whether Member States included rulings with respect to other taxes than corporate taxes.

<sup>31</sup> Commission press release IP/15/1540 of 8 June 2015. As Estonia and Poland failed to provide all information requested the Commission was not yet in a position to determine whether specific rulings should be requested from them.

<sup>32</sup> See footnote 2. For these Member States it is still possible that formal investigations will be opened into other rulings.

Member States should properly apply the at arm's length criterion when determining a proper transfer price, provided that this principle is embedded in domestic law to start with. It follows from the aforementioned decisions that Member States should not use fixed margins or fixed rates to determine taxable profit but engage in a case-by-case assessment against facts. Also, perpetual rulings or rulings that are valid for a rather long time raise red flags as there should be at least some periodical review to check whether relevant facts and circumstances have changed. This will require Member States to actively demand adequate documentation on transfer pricing calculations in order to check whether appropriate benchmarks have been used. In line with this, in the ongoing investigations the Commission also asks for the choice of the calculation method used to be substantiated.<sup>34</sup>

It is important to determine what the function of transfer pricing corrections is in a particular Member State as that function may be important when determining whether or not a benefit occurs in light of the nature and general scheme of the tax system. Again, this all comes down to establishing the proper benchmark. Some examples:

Transfer pricing corrections may serve to properly allocate profit per taxable entity within a Member State. It allows all transactions with related (group) companies to be set, to the extent possible, at normal commercial value (at arm's length). An adjustment may be both upwards and downwards as to establish the proper taxable profit of said entity.

- Transfer pricing corrections may serve as an anti-abuse provision, making sure that profits allocated to a particular Member State in intra-group transactions are not too low. This may therefore lead to a unilateral upwards adjustment.
- Transfer pricing corrections may serve as a means to avoid double taxation. This may either result in a bilateral adjustment or in a unilateral adjustment. The latter raises the question whether a unilateral adjustment should be conditional upon what happened in the other state. This does not need to be so necessarily. The two main methods to avoid double taxation are (i) an exemption – certain income will not be taxed as the other state is entitled to tax it – and (ii) a credit – foreign taxes paid will be credited against domestic taxes due. Despite its potential for creating a situation of double non-taxation, a pure tax exemption system as such does not require that income is taxed abroad prior to it being exempt. The fact that certain income should be taken into account abroad is normally sufficient, despite the risk of such income remaining untaxed. For this reason Member States may built safeguards in their bilateral tax treaties and their tax exemption systems as to make an exemption conditional upon something being taxed abroad, but this is not the standard (yet).

So in the first and third case it may fit well within the national tax system that no corresponding adjustment is required abroad as to prevent double non-taxation of certain income. A benefit from double non-taxation, in a situation where both Member States apply their normal tax rules in respect of assigning profits to group entities, cannot be attributed to a single Member State in order for state aid rules to apply. Still a ruling confirming a transfer price leading up to double non-taxation can be very beneficial. A way of dealing with this is to improve the exchange of information on rulings between the tax authorities of EU Member States. That said, exchange of information is no panacea.

If one Member State decided to adjust a price in a way that fewer profits will be taxed in that state, this in itself may not be sufficient to allow the other Member State to make a corresponding adjustment to ensure that remaining profits will be taxed at least once. If, taxable profit in the latter state would be considered too high as to close that gap, a

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<sup>33</sup> See footnotes 17 to 26.

<sup>34</sup> See footnote 2.

corresponding adjustment might be contestable in court. This will all depend on how much leeway the domestic tax system of the latter state allows its tax authorities to close any holes in situations of bilateral taxation.

In respect of transfer pricing, once no market price is available the price that is to be set via one of various methods available will often be within an acceptable range of prices. Where there is a range of prices taxpayers are not held to pursue the highest price (as a seller) or the lowest price (as a buyer) to get the highest profit achievable. It should also be kept in mind that in each Member State the starting point for a determination of profit can be rather different. Some use the doctrine of the authoritative principle ("Maßgeblichkeitsprinzip") where commercial accounts are leading in the determination of taxable profit. Other Member States allow for separate tax accounting where commercial accounts and tax accounts can use rather different methods of valuation, depreciation, timing of recognition of profits and losses, etc. The latter could well lead to a situation where having a relatively high commercial profit and a far lower taxable profit fits within the doctrine of having separate accounting methodologies. Therefore, such a phenomenon would not necessarily be a reliable indicator of tax avoidance or of the presence of special tax arrangements despite its initial appearance.

In most of the ongoing investigations, the Commission is testing transfer prices with reference to the OECD transfer pricing guidelines. It should be pointed out that it is up to each Member State's domestic legal system to determine whether these guidelines have any legal meaning in a Member State. For instance, the legislator may have formally adopted these guidelines or transposed them into national law with the stated intention of fully complying with those rules. But even if this is done, any diversion from those rules intended by the legislator should be taken into consideration. Also it should be clarified what role any amendments to the OECD guidelines would have under domestic law after their initial adoption.

### **3.3 Mismatches**

#### **3.3.1 Mismatches causing double non-taxation**

As said before the Commission is currently focusing on transfer pricing issues. But it should be checking for more than transfer pricing, in particular deliberate mismatches. If undertakings operate in several countries, mismatches may occur. Examples of mismatches are:

- Debt versus equity:  
the laws of one Member State qualify an intra-group capital transaction as a loan and allow for the deduction of interest; the laws of another Member States qualify that same transaction as equity and will exempt any payment received as dividend.
- Tax transparency of hybrid entities:  
one Member State assumes that profit will be taxed at the level of the participants in a transparent legal entity; the other Member State assumes that profits have been taxed at the level of the legal entity and will not tax them in full at the level of resident participants.
- The attribution of assets and liabilities to permanent establishments:  
for tax purposes assets may be assigned to activities taxable in another Member State while liabilities may be attributed to activities at home.



- The allocation of costs and profits between group companies: for tax purposes certain costs and profits are either allocated in the Member State where they provide for the highest tax advantage, or profits may be allocated in such a manner that both Member States assume that they will be taxed in the other Member State.

If one reads these examples it may be hard to understand that some of these mismatches may be the result of genuine mismatches, because two Member States qualify the same set of facts differently from the perspective of their national law. Obviously, it would be possible to design particular financial instruments or cost/profit sharing arrangements that would exploit such differences, but then the question arises to what extent state aid can play a part here.

Genuine mismatches in legal classification cannot be attributed to a single state in order for state aid to apply. These mismatches – also called disparities – in the national tax system are normally outside of the scope of the state aid regime, as these differences in legislation are to be dealt with by efforts to coordinate, either by introducing Directives harmonizing national definitions or by introducing Directives aimed at preventing double non-taxation should a mismatch occur.<sup>35</sup>

Even if a state would change its national qualification across-the-board and thereby create a mismatch, such actions would still not be attributable to that Member State as long as this is the new general interpretation of the law within that Member State. The only exception here would be when the new qualification would only be of relevance in international situations, without any impact whatsoever on domestic situations. In this case there may be a state aid issue, depending on the outcome of the aforementioned *Autogrill/Banco Santander* cases.

### 3.3.2 Deliberate mismatches

Despite the state aid regime not being suited to deal with mismatches in general, it can play its part in some situations. Two examples:

1. The tax authorities, by means of a ruling, confirm that an intra-group payment qualifies as debt (or equity), in violation of the normal interpretation of national law.
2. Special legislation is introduced that creates a mismatch, which specifically applies to a selective group of undertakings. For instance, a special definition of debt or equity could be introduced in national law for use in the financial sector without being warranted by the specific characteristics of that sector. Or, a special definition of debt or equity is introduced just for international transactions, which would not apply as part of the normal tax system domestically.

In contrast, if one country has a specific definition of what is debt and what is equity and it applies those definitions consistently in both domestic and foreign situations, those definitions will not normally contribute to state aid, even though they may lead to a mismatch in international situations.

The most interesting question that is open for discussion here is whether there needs to be internal consistency in the law of a Member State to avoid state aid scrutiny. In the *Group Interest Box* case the Commission had to address a proposal where one Member State proposed to introduce a special tax rate for intra-group interest payments.<sup>36</sup> This would

<sup>35</sup> See, for instance, Council Directive 2014/86 EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 219/40 of 25 July 2014.

<sup>36</sup> Commission decision 2009/809/EC of 8 July 2009, OJ L 288/26 of 4 November 2009.

reduce the domestic tax rate on such interest received from 25.5% to 5%, but it would also reduce the rate at which the interest would be deductible from 25.5% to 5%. In a domestic setting this was a somewhat neutral arrangement, but it would be very beneficial in situations where group companies could deduct such interest at a high tax rate abroad while group interest received would be taxed at 5%. Despite the fact that the 5% tax rate was created deliberately, the outcome was a tax system that applied in both domestic and in foreign situations and both at the debtor and the creditor. The Commission found this to be a no-aid case. (The proposed tax rate was never effectively introduced.)

To conclude, mismatches may contribute to base erosion and profit shifting and attribute to harmful tax competition. However, mismatches should not be put on a par with state aid unless they are deliberately caused (i) by rulings that clearly divert from (a reasonable interpretation of) domestic law and jurisprudence or (ii) by means of special legislation that is selective by itself.

### 3.3.3 Increasing transparency

The EU's efforts to increase transparency within the EU by exchanging advance rulings between tax authorities (and with the European Commission) will be an important step in addressing mismatches, and deliberate mismatches in particular.<sup>37</sup>

Should an EU-wide tax ruling database be established, the EU should be careful when exchanging such information with its main trading partners without any means to ensure actual reciprocity. For example, if the other trading partner does not have an adequate ruling database for his own domestic purposes it will normally not be required to gather that information for the specific purpose of exchanging it with the EU.

In this respect it should be noted that the European Commission has proposed to report on a semi-annual basis details on amounts and 'where possible' on recipients of certain subsidies to the USA as part of the TTIP negotiations.<sup>38</sup> This reporting obligation is likely to extend to a number of rulings that would be in the database the Commission proposed to set up.<sup>39</sup> This raises the question of whether US competitors, or the US government on their behalf, would be in a position to file a complaint with the European Commission asking it to investigate unlawfully granted state aid that they perceive to be present in certain rulings it would be given access to. This would be a one-way street as long as the USA has no effective state aid control mechanism in place. The above is not related to TTIP as such. Any information on tax rulings exchanged with other countries that are a Member of the WTO might be used to trigger the WTO's anti-subsidies mechanism, if those rulings would lead to tax benefits to companies that would satisfy WTO criteria on prohibited or actionable subsidies.<sup>40</sup>

### 3.3.4 Hybrids: do state aid rules require anti-abuse measures?

It follows from the *Paint Graphos* case that a mere difference in legal form is insufficient to justify different treatment within a corporation tax, if entities are otherwise comparable in light of their economic activities.

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<sup>37</sup> Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory exchange of information in the field of taxation of 18 March 2015, COM(2015)135 final.

<sup>38</sup> Some safeguards on confidentiality have been proposed as well. See the EU's textual proposal released on 7 January 2015, [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153031.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153031.pdf).

<sup>39</sup> Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory exchange of information in the field of taxation of 18 March 2015, COM(2015)135 final.

<sup>40</sup> See the WTO Agreement on Subsidies and Countervailing Measures.

The CJEU held that having a special tax regime that allows for cooperatives to be treated as transparent legal entities – where profits will be taxed in the hands of participants instead of at the level of the entity – may be warranted in because of the way these participants work together in their mutual interest.<sup>41</sup> Because of their very nature classical cooperatives ‘are not managed in the interests of outside investors’ and have ‘limited access to equity markets and are therefore dependent for their development on their own capital or credit financing’, thus the CJEU.<sup>42</sup> The relationship between the cooperative and its participants are not just commercial in nature, but rather individual and personal because of the active involvement of members in a cooperative’s business. They can play a role as buyers, sellers or users of products and services offered by the cooperative. In this light the CJEU accepted that classic cooperatives are not in a legal of factual situation that is comparable to that of a normal capitalized company, which normally has easier access to market capital.<sup>43</sup> But at the same time the CJEU held:

*‘It is for the Member State concerned to introduce and apply appropriate control and monitoring procedures in order to ensure that specific tax measures introduced for the benefit of cooperative societies are consistent with the logic and general scheme of the tax system and to prevent economic entities from choosing that particular legal form for the sole purpose of taking advantage of the tax benefits provided for that kind of undertaking.’<sup>44</sup>*

Here the CJEU points out that if a cooperative’s business method does not allow it to distinguish itself from other capitalized companies, then the question should be raised whether transparency should be granted to cooperatives-in-name-only.<sup>45</sup>

Now the above is of importance to rulings as well. If, as part of a ruling, tax authorities sign off on a structure with cooperatives that are merely cooperatives in name and that use that status to create tax transparency for tax planning purposes, than such confirmation could fall within the scope of state aid. For these types of hybrids, state aid may prove to be a useful instrument.

As the *Paint Graphos* case was based on a direct reference by a national court for a preliminary ruling, the CJEU took this opportunity to use rather clear language to point out to the Member State involved that state aid rules may demand certain anti-abuse provisions to be in place. In this respect this has been a unique case and it raises the question of whether the CJEU is willing to take such a proactive stance again in future.

### 3.4 Is a beneficial ruling selective by definition?

#### 3.4.1 Burden of proof

As rulings are normally addressed to a particular undertaking or to a group of undertakings, it is most likely that this criterion can be fulfilled rather easily when a ruling turns out to be (too) beneficial. However, even if it would be established that a benefit is granted to an individual company, it will be necessary to check whether that same benefit could have been acquired by other undertakings based on public, objective and verifiable

<sup>41</sup> CJEU Joined Cases C-78/08 to C-80/08 of 8 September 2011, *Paint Graphos*, ECLI:EU:C:2011:550, para. 71-72, with reference to the 1998 Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384 of 10 December 1998, pp. 3-9, para. 25).

<sup>42</sup> *Ibid.*, para. 57-58.

<sup>43</sup> *Ibid.*, para. 58 and 60-61.

<sup>44</sup> *Ibid.*, para. 74 (italics added). Even though the *Paint Graphos* case focused on the characteristics of cooperatives in one Member State (Italy), these findings seem of relevance to all EU Member States where such regimes have been introduced.

criteria. In the handling of rulings this may become an important matter as the Commission will first have to establish selectivity.

In the author's view, should the Commission provide evidence that a ruling contains a benefit by diverting from the normal tax system it will also have to check whether that benefit would not be available *prima facie* to others without such a ruling. Here it may ask for specific information from the Member State for the purpose of invalidating its initial finding, like public and binding policy statements that taxpayers could rely on in Court. If the Commission succeeds establishing *prima facie* selectivity with this two-step approach, then the burden of proof that such benefit would have been generally available to all those that would have been in a similar situation should be put on the Member State involved. The latter would be in a better position to go through the rather massive amount of case files needed to disprove the existence of what seems a *prima facie* benefit.

### 3.4.2 Rulings open to major investors

Most Member State tax authorities have to restrict the number of rulings they provide as thorough investigations demand a lot of resources (staff). Therefore the question comes up whether Member States are at liberty to limit rulings to those companies that commit to new major investments or to creating or keeping a large number of new jobs within a Member State.

Obviously this raises the question whether Member States may actively market their well-established ruling practice to international investors. From a state aid view, a domestic policy choice to limit access to rulings to those that can contribute the most to the local economy is – essentially – not a matter of state aid. In this author's view, as long as the ruling only provides advance certainty on the proper application of domestic law, the mere existence of a ruling confirming this will not lead to state aid.

Despite the fact that getting advanced legal certainty can lead to some derived benefits, mere (correct) confirmation of how the tax law is to be applied to facts presented should not be scrutinized under state aid rules. Keep in mind that when a Member State stays within the room for manoeuvring offered by the *Umicore* case, there is not necessarily a benefit. This is different when a ruling clearly diverts from national tax law.<sup>45</sup> Also, tax authorities living up to an advanced ruling despite a substantial change in facts can lead to individual aid as well when those changes should have led to a different interpretation of the law.

## 3.5 Can a C(C)CTB reduce the risk of state aid and tax rulings?

### 3.5.2 A C(C)CTB cannot do without rulings either

In order to address mismatches the EU should focus on other means than state aid, such as coordination of legislation with the objective to prevent double non-taxation. Here we should keep in mind that it may not be just tax law that needs to be coordinated but also private law, to the extent definitions of, for instance, debt or equity in private law would be guiding for tax law purposes.

Other means of coordination could go beyond anti-avoidance provisions and result in a full-scale tax base, such as a C(C)CTB. Here one should keep in mind that before considering

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<sup>45</sup> Ibid., para. 50-53 and 62-63.

<sup>46</sup> See paragraph 2.2.

any such tax base, the EU's institutional and procedural framework should be amended as to be up to the task of managing it. First and foremost, in case of a coordinated tax base a procedure should be put in place that authorizes at least one of the institutions to issue interim-measures as to close loopholes when they appear as to avoid retroactive taxation.

The current EU multi-layered decision making system where the Commission, the Council and Parliament may be involved may not be equipped for this task. Moreover, most Member States have established separate tax courts to deal with the large number of tax-related cases that often require specialized knowledge and judges with some economic/accounting training as well as to allow for a full, factual review. When introducing a common tax base basic principles of taxation may have to be redetermined by the Courts from a varying body of principles and doctrines established in 28 Member States and there may be a need for some uniform definitions of private law concept for cross-border tax purposes. So the number of cases should not be underestimated.

Why is the procedural framework for the C(C)CTB relevant from a state aid perspective? In case a common tax base is introduced, despite likely attempts to create clear and understandable legislation, tax law has a tendency to end up as a rather complex matter when applied to the facts of a case at hand. So even in the presence of a C(C)CTB there will be a need for rulings to be handed down, which may again contain tax benefits that divert from the C(C)CTB's intentions. Tax authorities may still be in a position to give rulings beneficial to headquarters or subsidiaries established in their territory in case of transactions with non-EU trading partners and group companies. Either way, especially in the start-up phase of a C(C)CTB there will be a lot of uncertainty which will likely be a trigger for a substantial number of advance ruling requests.

### 3.5.3 Can state aid be a substitute for infringement proceedings?

The Commission normally uses infringement proceedings to bring Member States back in line when a breach of Union Law is suspected, like in cases of value added tax (VAT). In order for effective enforcement of the goals of a C(C)CTB – in the absence of a European tax authority – the inevitable question is whether the Commission should use the state aid instrument more actively instead of or next to infringement proceedings. State aid procedure will allow for retroactive effect vis-à-vis the tax payer concerned more easily.

As stated before, institutional and procedural questions like these should be settled first before considering any kind of substantive definitions of a common tax base.

## 4. RECOVERY OF FISCAL STATE AID

### 4.1 Method of recovery & tax credits

Procedural Regulation 659/1999 prescribes that recovery should normally be ordered in case of unlawfully granted state aid, unless principles of Union Law would be violated by that (such as legitimate expectations raised by actions from the European Commission).<sup>47</sup> It also prescribes that recovery should take place in accordance with national procedures, to the extent that the latter allow for the immediate and effective execution of such an order. It is left to the Member State to decide how state aid, accompanied by an interest charge, is to be recovered in the end. Even though it might be preferable to have state aid in the corporate tax scene recovered via the tax system, Member States are at liberty to use any other means of private or public law available to them to recover aid.

Why may this be of importance? Some countries may grant a tax credit to a resident company for taxes paid abroad on foreign activities or foreign sources of income. So, in essence, it may be possible to deduct (part of) the tax paid in an EU country where activities or the source of income are located, from the tax due abroad.

In case corporate tax benefits would not be recovered via the tax system the other country might argue that no credit is to be awarded since any such retroactive payment is not to be treated as a tax. As a result the other company might indirectly benefit from not having to grant a credit. It is therefore recommended that – taking the need to effectuate recovery as a given – Member States consider to amend their national procedures accordingly as to ensure that any corporate tax benefit is recovered as back taxes as to be eligible for foreign tax credits (to the extent foreign time limits to claim such credits have not passed, as recovery may go back about 10 years). If not, the EU may end up in a situation where other (also non-EU) countries would benefit from effective state aid recovery via non-fiscal means by being able to avoid to award tax credits that would normally have been granted.

### 4.2 Windfall benefits to Member States

To the extent tax rulings have been used to attract and secure foreign investments, the interesting phenomenon may occur that upon recovery of unlawful state aid the Member State involved may be in a position in which it receives a windfall benefit of additional taxes plus interest.<sup>48</sup> Taxes based on profits from activities that would, at least in some situations, not have been located in that country without the benefits the ruling meant to ensure.

It follows from the *Unicredito* case that the taxpayers themselves will have to live with the consequences of the choices that they made. The CJEU held:

‘It would not be right to determine the amounts to be repaid in the light of various operations which could have been implemented by the undertakings if they had not opted for the type of operation which was coupled with the aid. That choice was made in the knowledge of the risk of recovery of aid granted contrary to the procedure laid down in Article [108(3) TFEU]. Those undertakings could

<sup>47</sup> Council Regulation 659/1999 (EC) of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [now Article 108 TFEU], OJ L 83/1 of 27 March 1999, as amended, Article 14.

<sup>48</sup> Despite the quantitative benefit for the Member State involved, there is still the potential fallout in respect of reputational damage that such State may suffer from. In respect of using the term ‘windfall’ benefit, it should

have avoided that risk by opting immediately for operations structured in other ways.<sup>49</sup>

It also pointed out that in order to determine the amount of aid that has to be recovered in order to re-establish the status quo on the EU's internal market, past events should not be reconstructed differently on the basis of hypothetical alternatives the taxpayer could have opted for.<sup>50</sup>

Now, while the above considerations do make perfect sense from the perspective of safeguarding Union interest vis-à-vis the recipient of unlawfully granted aid it has the opposite effect for the Member State involved. The Member State will receive additional budgetary resources because of this same reasoning, as it should be disregarded what the taxpayer could or would have done in the absence of a favourable ruling. So, for instance, it is to be assumed that a decision to locate headquarters or financing activities in a certain Member State would not have changed.

State aid law as it stands today does not provide for a legal basis to withhold any part of the windfall benefit enjoyed by the Member State. No part of the recovered amount flows to the Union's resources. Introducing an obligation for a Member State to hand off part of amounts recovered to the EU might require a change of the Treaties, which is rather infeasible at this point in time.

Either way, recovery can be a time-consuming process. In case a Member State fails to live up to its obligation to recover state aid effectively and in time when ordered, the current process to address this non-compliance is rather burdensome. It involves a reference to the CJEU twice and, in the end, any sanction for long term non-compliance (i.e. a lump sum payment) may be relatively low in comparison to the interest the Member State will collect from the aid recipient until the latter complies with the recovery order.<sup>51</sup>

To conclude, the state aid system could be improved by making sure that Member States have an obligation to have legislation in place that ensures the effective and immediate execution of a recovery order. At present, this process can be rather burdensome in some Member States and lead to delays. The multi-stage judicial process that is available to ensure Member State compliance in itself is burdensome and rather ineffective. The TFEU does not provide for a legal basis to have parts of amounts recovered to flow into the EU's own resources in order to discourage Member States from granting unlawful state aid. An improvement in these areas would make sure that state aid, and state aid recovery in particular, would be considered an even bigger factor of importance to companies and Member States when dealing with tax rulings than it already is today.

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be considered that any loss of business activities or investments as a result of a recovery action may well neutralise what is perceived as a windfall benefit in the long run.

<sup>49</sup> CJEU C-148/04 *Unicredito* of 15 December 2005, ECLI:EU:C:2005:774, para. 114-116.

<sup>50</sup> *Ibid.*, 118-119.

<sup>51</sup> For a recent example, see CJEU C-184/11 of 13 May 2014, *Commission v Spain*, ECLI:EU:C:2014:316.

## 5. CONCLUDING REMARKS

The European Commission has initiated a number of preliminary and formal investigations into tax rulings. Regardless of the outcome of these cases, they made sure that public and company perspectives on tax rulings have changed.

As the Commission's resources are limited, it will have to prioritise and decide which kind of tax ruling cases to look into. Even if only relatively few rulings can be selected for further review, the threat of a potential investigation as such will likely ensure that Member State tax authorities, tax payers and their accountants will be more careful before issuing rulings or taking them for granted.

The Commission has proposed to increase the transparency of advanced rulings, which will also allow it to better exercise its state aid monitoring powers. Despite the fact that the ongoing investigations mainly focus on issues of transfer pricing, it is to be expected that the European Commission will also use the state aid instrument to address deliberate mismatches during its monitoring process.

With its rather strict state aid regime and its enforceable recovery decisions, the EU has a rather unique regime in place that can also play its part in addressing some aspects of tax avoidance and tax competition. As competing States may not have a similar regime in place, one should realize that in the long run the EU and its Member States may end up in a less advantageous position because of it. This should not withhold the EU from using the state aid regime for what it is designed to do, but at the meantime international action is needed to rail in tax competition in other States in order not to widen the gap.



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**NOTES**

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ISBN 978-92-823-8039-0 (paper)  
ISBN 978-92-823-8040-6 (pdf)

doi: 10.2861/843973 (paper)  
doi: 110.2861/20917 (pdf)

