

EU Fiscal State aid: A briefing document

In Brief

According to the European Commission - the executive body of the European Union - perceived 'aggressive tax planning' is contrary to the principles of the EU's internal market. Fair competition is one of these principles. EU Member States cannot grant 'aid' - e.g. subsidies or tax reliefs - to certain companies on the internal market without prior authorisation by the European Commission. If such aid is granted without authorisation, the aid is unlawful. Unlawful aid has to be repaid by the companies concerned. Recently, the European Commission has made a link between State aid and BEPS. Following are answers to key questions on State aid.

21 October 2015

In Detail

Q1. When is the question of State aid relevant?

EU State aid rules are relevant for undertakings with business activities in the Member States of the EU (European Union) and the three countries of the European Economic Area (EEA), so the EU and Iceland, Liechtenstein and Norway. The term 'undertaking' has been widely construed by the courts but would include, inter alia, activities carried on by partnerships and companies, including activities carried on through a permanent establishment.

Q2. What is (fiscal) State aid?

These States are prohibited from providing certain forms of State aid to undertakings without prior authorisation of the European Commission (or the European Free Trade Agreement (EFTA) Surveillance Authority with respect to Iceland, Liechtenstein and Norway). This prohibition is part of European competition law, and is intended to safeguard fair competition within the EU/ EEA. The legal basis for the State aid ban is in the Treaty on the Functioning of the European Union (TFEU) or for Iceland, Liechtenstein and Norway the EEA Agreement.

The most straightforward example of State aid is a subsidy provided directly to a certain undertaking. However, State aid can also consist of a reduction of taxes otherwise due (e.g. a tax exemption), insofar as this provides an advantage to certain undertakings (i.e. is selective). This is referred to as 'fiscal' State aid.

Q3. What forms does fiscal State aid take?

Broadly speaking, fiscal State aid comes in two forms: (i) a tax measure or regime which provides a selective advantage, and (ii) an individual concession granted to a taxpayer (e.g. through the use of a tax ruling or via a settlement).

Q4. Is State aid always prohibited?

No, under certain circumstances aid granted by EU or EEA Member States can be compatible with EU Law. It is up to the European Commission to determine (subject to appeal before the EU Courts) whether aid is compatible with the EU's internal market. Aid granted without prior authorisation of the European Commission or the EFTA Surveillance Authority, is prima facie unlawful (but see also accession below).

Q5. What if the aid is found to be unlawful State aid?

If the European Commission or the EFTA Surveillance Authority ultimately conclude that the tax benefit in question was more generous than either the local law allowed, or that the local law itself gave an unjustifiable selective tax advantage, then the Commission may be obliged to order the State to recover the unlawful tax benefit from the taxpayer with compound interest for the 10 years from the opening of the investigation.

Q6. What if the aid already existed prior to the accession of a State to the EU/EEA?

Aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force in a new Member State of the EU/ EEA Treaties, are so-called 'existing aid' and not subject to recovery. The European Commission and the EFTA Surveillance Authority monitor such aid and may order that the aid be removed prospectively.

Q7. How should I calculate the aid in a certain situation?

The aid subject to recovery should be quantified by comparing the tax which should 'normally' have been paid – i.e. without application of the selective tax measure – with the tax which has been paid in fact.

Q8. May the recovery of fiscal State aid result in a foreign tax credit in the US?

The answer to this question depends on the facts of each individual case.

However, recovery would ordinarily be via the tax collection system of the Member State concerned, and would normally be regarded as a clawback of prior unlawful tax exemptions / reliefs, i.e. resulting in additional local tax being payable.

Why is it so important now?

Q9. What has the European Commission been doing on State aid?

At the beginning of 2014, the European Commission announced a new focus on fiscal State aid in the context of both a G20/OECD focus (the Base Erosion and Profit Shifting Action Plan) and an EU focus on aggressive tax planning, tax avoidance, and tax evasion by multinational companies. Since then we have seen the European Commission open investigations into specific tax rulings and tax regimes.

Q10. What are the current investigations about?

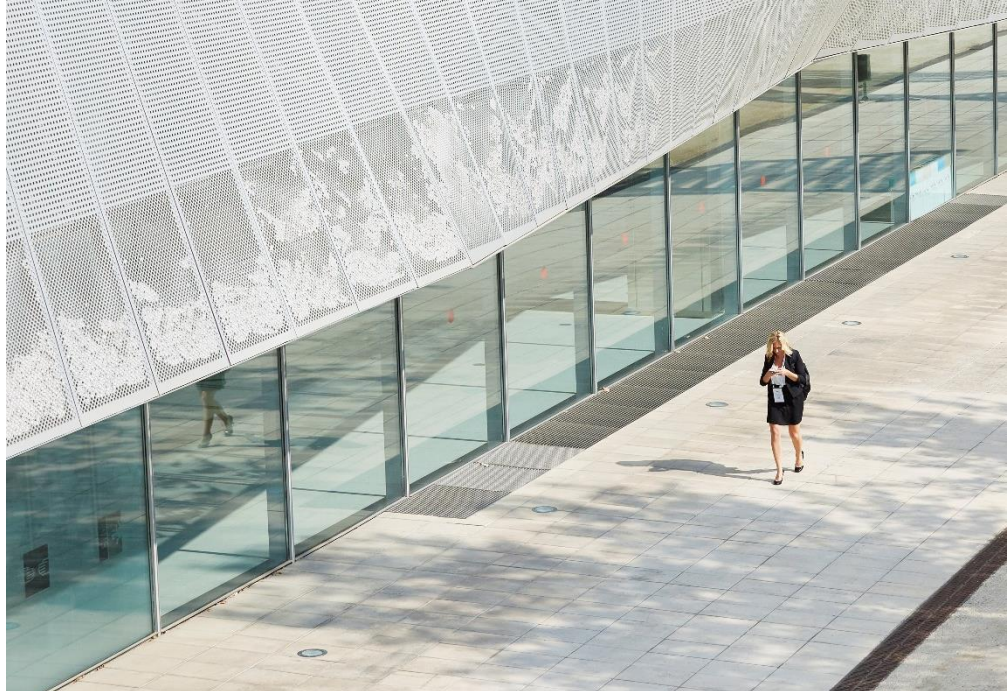
The investigations concern a number of different situations in which the application of transfer pricing rules and the allocation of profit plays an integral part.

The European Commission has now concluded two of its investigations into specific rulings. In both cases the Commission decided that, in its opinion, a tax approach based on transfer pricing which potentially does not reflect market conditions and/or economic reality constitutes unlawful State aid.

The other investigations are ongoing.

Q11. Is the topic of State aid limited to the application of transfer pricing rules?

Although the application of transfer pricing rules and focus on substance play an important role in the European Commission's current investigations, the State aid rules are not only relevant in the context of transfer pricing and have been at the heart of many previous investigations, especially those concerning special tax regimes in particular Member States. This is because any measures or agreements which result in a selective reduction of tax can lead to State aid



Q12. Will there be more investigations into fiscal State aid?

The European Commission has requested that Member States provide information about their tax ruling practice, including whether they provide tax rulings and, if so, a list of companies which received rulings between 2010 and 2013 (this enquiry was extended to all Member States in December 2014). The European Commission has also requested copies of individual tax rulings from 21 Member States. This review is conducted under the EU's Competition Law rules.

A recent statement by European Competition Commissioner Vestager implied that further investigations may be likely.

Q13. What else is happening in the EU regarding tax rulings?

On 6 October 2015, EU Finance Ministers reached political agreement in the ECOFIN Council to amend the existing Directive 2011/16/EU on administrative cooperation in the field of taxation. The Directive will require Member States to automatically exchange a basic set of information on advance cross-border tax rulings and advance pricing arrangements (APAs) which are entered into after 1 January 2017, or which were entered into in the previous 5 years (either (i) rulings which were still valid at 1 January 2014, or (ii) rulings entered into after that date regardless of whether they are still valid). This additional reporting is designed to foster transparency and exchange of rulings and is not meant to prejudice the reporting of fiscal State

aid cases. Accordingly, the European Commission cannot go into the central database to search for cases to assert an unlawful fiscal State aid issue. However, this will likely lead to increased scrutiny of rulings and all the existing avenues of finding out about State aid remain at the disposal of the Commission. This Directive will be adopted by the Member States in December 2015.

In addition it is worth noting that the European Parliament's Special Committee on tax rulings and other measures similar in nature or effect (the 'TAXE Committee') has recently published a draft report on Member States' tax practices and the enforcement work done by the Commission. This report is being amended and is expected to be adopted by the end of November 2015, when the mandate of this special committee ends. The committee has no direct powers in the field of taxation but may be influential. In the draft report, they encourage the Commission to 'make full use of its powers under EU competition rules' to tackle harmful tax practices in this area.

Q14. What is expected to happen next?

We await the conclusion of the European Commission's other open investigations into tax rulings provided to specific taxpayers and the Belgian Excess Profit regime.

In the meantime it appears likely that one or both of the Commission's recent two final decisions may be challenged before the European courts.

What is PwC doing about this and what should companies do?

Q15. Where can you get additional information?

PwC's EU Direct Tax Group (EUDTG) has a State Aid working group (SAWG) with members from nine EU countries who monitor relevant developments and produce alerts.

Q16. What existing tax arrangements should you review now?

State aid should be considered whenever it's apparent that a tax ruling, tax settlement or even tax regime is the subject of investigation or fact finding by the European Commission, or is similar to a situation in another State that is subject to European Commission investigation or fact finding.

More generally however any tax arrangement which could be argued to have the features identified above (see in particular Q3) should be considered for the possible impact of State aid.

Q17. When might you have a direct role in a State aid case?

A decision on State aid by the Commission is addressed to the Member State concerned, even if it involves aid granted to one particular company. Many Commission investigations involve tax measures where there have been a number of unnamed beneficiaries, e.g. a particular sector. Where you are an 'interested party' you have a right to submit written comments to the Commission as a response to the decision opening a formal investigation. Where you can show that an act of the Commission is of 'direct and individual concern' to you, you have a limited time to contest the Commission's finding in the European Courts.

Q18. How will State aid be relevant when seeking any ruling or clearance from tax authorities?

State aid should be one consideration when confirming the application of the tax laws with any tax authority to a specific fact pattern or when reaching an agreement with tax authorities on disputes regarding the application of tax law. Any measure in an EU or EEA Member State, be it a tax rule, regime, system, assessment, agreement or ruling, especially if it seems abnormal or overly generous should be considered from a State aid perspective.



Who in PwC can help?

We may be able to help with a review of the risk of companies being affected by a State aid decision, with a specific investigation or with any resulting litigation. You may like to discuss State aid with your local PwC contact but in other cases, the members of PwC's State Aid Working Group (SAWG) would be happy to assist you:

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