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# ***EU Fiscal State aid – a briefing document***

15 October 2014

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## ***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.

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## ***In detail***

### **What is the State aid problem?**

#### **Question 1: 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, 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.

#### **Question 2: 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 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.

#### **Question 3: 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).

#### **Question 4: 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) 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).

**Question 5: 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.

**Question 6: 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.

**Question 7: 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.

**Question 8: 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?**

**Question 9: 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 which has been triggered by the unfolding OECD/G20's Base Erosion and Profit Shifting (BEPS) Action Plan and in the context of the EU's own agenda to crackdown on aggressive tax planning, tax avoidance and tax evasion by multinational companies. In concrete terms, this has resulted in the opening of a series of investigations into specific tax rulings and tax regimes. These cases have attracted a considerable amount of attention from the European Commission.

**Question 10: What are the current investigations about?**

The European Commission is currently investigating a number of different situations in which the application of transfer pricing rules and the allocation of profit plays an integral part. At this stage, the European Commission has indicated in two cases that a tax approach which potentially differs from the arm's length standard could ultimately prove problematic from a State aid perspective.

**Question 11: 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.

**Question 12: Will there be more investigations into fiscal State aid?**

At the present time, it is difficult to predict whether there will be further State aid investigations, and - if yes - into which undertakings or tax measures these will be. However, given the current focus of the European Commission, further investigations are likely.

**Question 13: How long does the European Commission take to come to a final decision in these investigations?**

In case of non-notified – and therefore unlawful – new fiscal aid, the European Commission is under no legal obligation to give its decisions within a certain time limit. Depending on the communication with the Member States concerned, the complexity of the issue, the number of interested parties, etc., the period between the first investigation and the final decision may easily take up to 1,5 to 2 years or even more.

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

**Question 14: 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.

**Question 15: 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.

**Question 16: 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.

**Question 17: When should you consider State aid when agreeing tax arrangements?**

State aid should be one consideration when establishing any new tax position with the tax authorities, whether in relation to a tax ruling, tax settlement or the application of a specific tax regime. Any measure in an

EU or EEA Member State, be it a tax rule, regime, system, assessment, agreement or ruling, but especially if it seems abnormal or overly generous should be considered from a State aid perspective.

**Question 18: How can PwC 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.

## ***Let's talk***

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