



PwC's EU Direct Tax Group

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EU Direct Tax Newsalert

EU Commission Notice on notion of State aid

On 19 May 2016, the EU Commission (EC) published its final Notice on the notion of State aid. The Notice updates the EC's Notice on the application of the State aid rules to various measures including those relating to direct business taxation (98/C 384/03), which essentially sets out the EC's view on how State aid applies and also how the EC interprets the CJEU's jurisprudence. The final Notice largely follows the EC's draft Notice on the notion of State aid which was published in January 2014.

The availability of comprehensive EC guidance in the field of direct tax law is important. The problems associated with Article 107(1) TFEU and the application of State aid rules to tax measures are becoming ever more urgent. The timing of the final Notice may be related to EU Competition Commissioner Vestager's announcement on 4 April 2016, in a hearing of the EU Parliament's TAXE II Committee, of an EC organized High-Level State aid Forum meeting with senior representatives from the EU-28 national Finance Ministries on 3 June 2016 on how to apply the State aid rules in practice, based in particular on the experience the EC has gained so far from its latest State aid decisions.

The sections in the final Notice relevant to tax measures cover: cooperative societies, undertakings for collective investment, tax amnesties, tax rulings and settlements, depreciation/amortisation rules, fixed basis tax regime for specific activities, anti-abuse rules, and excise duties. Some of the sections are summarised below.

Administrative tax rulings

A large part of the section "Specific issues concerning tax measures" simply reproduces what was already stated in the draft EC Notice. However, a specific subsection discussing tax rulings confirming transfer pricing arrangements has been added. According to the EC, the granting of a tax ruling must respect the State aid rules. Where a tax ruling endorses a result that does not reflect in a reliable manner what would result from the normal application of the ordinary tax system, that ruling may confer a selective advantage upon the addressee, in so far as that selective treatment results in a lowering of that addressee's tax liability as compared to companies in a similar factual and legal situation. The EC is of the view that a deviation from the arm's length principle confers a selective advantage on the taxpayer, by virtue of the fact that their tax liability under the ordinary tax system is reduced as compared to standalone companies which must use their actually recorded profits to determine their taxable base.

The EC states that the arm's length principle should be applied regardless of whether a Member State has incorporated this principle into its legislation. The EC opines that the application of the arm's length principle is based directly on Article 107(1) TFEU, which would require equal treatment of standalone entities and group companies.

Moreover, the EC states that when examining whether a transfer pricing ruling complies with the arm's length principle, the EC may have regard to the OECD Transfer Pricing (TP) Guidelines. According to the EC, a transfer pricing arrangement is unlikely to give rise to State aid, if it complies with the TP Guidelines, including the OECD guidance on the choice of the most appropriate method, and leads to a reliable approximation of a market based outcome. It should be noted here that the EC states that a tax ruling may confer a selective advantage if it allows its addressee to use alternative, more indirect methods of calculating taxable profits (cost-plus or resale-minus method), while more direct methods are available.

Fixed basis tax regime for specific activities

In this subsection the EC states that non-discretionary provisions which allow income tax to be determined on a fixed basis may be justified by the nature and general scheme of the system, where, for example, these provisions take account of the specific accounting requirements or the importance of certain assets which are specific to certain sectors.

Discretionary administrative practices

New is a paragraph inserted at the section dealing with the selectivity stemming from discretionary administrative practices. According to the EC, the fact that a tax relief requires prior administrative authorisation does not automatically mean that it constitutes a selective measure; prior administrative authorisation may be based on objective, non-discriminatory criteria which are known in advance, thus circumscribing the exercise of the public administrations' discretion. In the view of the EC, such prior administrative authorisation scheme must also be based on an easily accessible procedural system capable of ensuring the objective and impartial consideration of a taxpayer's request. Furthermore, a possible rejection of such a request must be capable of being challenged in judicial or quasi-judicial proceedings.

Takeaway

This EC Notice seems largely consistent with the recent EC investigations in respect of the use of tax rulings concerning the application of the transfer pricing rules and the arm's length principle. However it is not always clear in those investigations whether the EC's approach to arms length is entirely consistent with what one might have expected per the OECD TP Guidelines. Therefore the question of what is a 'reliable approximation of a market based outcome' may still remain a matter of some debate for the foreseeable future. In addition, the EC's arguments in this area remain to be tested by the European Courts.

