



Euro Tax Flash

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Euro Tax Flash from KPMG's EU Tax Centre



Commission issues notice on the notion of State aid

State aid clarification – Communication from the Commission – Article 107(1) TFEU

On May 19, 2016 the European Commission published a Notice on the notion of State aid as referred to in Article 107(1) TFEU. The 68 page communication is intended to provide clarification on the key concepts relating to the notion of State aid as referred to in Article 107(1) TFEU and is available in full in the Commission's [press release](#).

Background

The aim of the notice is to contribute to an easier and more transparent and consistent application of the notion of State aid by clarifying key concepts. The guidance is supposed to help (amongst others) tax authorities and companies to identify when measures can be granted without needing approval under EU State aid rules, but should also be seen in light of the Commission's investigations of State aid cases. The Commission intends to maximize the effects and exposure of its recent individual State aid decisions on tax rulings and State aid cases that may be opened in the coming months

Specific issues concerning tax measures

Tax measures are specifically dealt with in para 156 to 184, where the communication discusses issues concerning (in order):

- cooperative societies;
- collective investment undertakings;
- tax amnesties;
- administrative tax rulings;
- tax settlements;
- depreciation/amortization rules;
- fixed basis tax regime for specific activities (e.g. in agriculture or fisheries);
- anti-abuse rules; and
- excise duties

The communication is intended to represent objectively the notion of State aid. However, on issues that have not yet been considered by the Union Courts, the Commission sets out how it considers that the notion of State aid should be construed.

Tax rulings and settlements

Of particular note is the communication's discussion on tax rulings and settlements, which draws on not-yet-published State aid practice and refers specifically to the arm's length principle and guidance provided in the OECD's Transfer Pricing Guidelines for assessing whether transfer pricing rulings constitute State aid. While the Commission notes that the OECD guidelines do not deal with State aid per se, it emphasizes that they capture the international consensus on transfer pricing and that rulings in line with the OECD approach are unlikely to give rise to State aid.

The Commission holds that tax rulings confers a selective advantage in particular when (i) the ruling misapplies national tax law and this results in a lower amount of tax, or (ii) the ruling is not available to all undertakings in similar legal and factual situations, or (iii) the administration applies a more favorable tax treatment compared to other taxpayers in similar legal and factual situations. The latter could be the case e.g. if the tax authority accepts a transfer pricing arrangement that is not arm's length because the methodology endorsed by that ruling produces an outcome that departs from a reliable approximation of a market-based outcome or the authorities accepts indirect methods for calculation of profits where more direct methods are available.

With respect to tax settlements, in the context of disputes over amounts of tax owed, the Commission underlines that the conclusion of such settlements may involve State aid, especially if the amount of tax due has been reduced without clear justification (such as optimising the recovery of debt) or in a disproportionate manner to the benefit of the taxpayer. The communication highlights two situations in particular which may represent selective advantages: (i) if, in making disproportionate concessions to a taxpayer, the administration applies a more 'favourable' discretionary tax treatment compared to other taxpayers in a similar factual and legal situation; (ii) the settlement is contrary to the applicable tax provisions and has resulted in a lower amount of tax, outside a reasonable range.

Next steps

On June 3, 2016 the European Commission will be organizing a High Level Forum in Brussels for government officials, where the Commission will outline its intentions with the communication as well as discuss its interpretation of the notion of State aid.

EU Tax Centre comment

Attempts to clarify the notion of State aid and the European Commission's position is welcomed. It should however be noted that the Commission's interpretation of EU State aid is not necessarily shared by EU Member States nor the European Courts, and should be considered critically.

Should you have any queries, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.



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