EUROPEAN COMMISSION, STATE AID, AND TAX TRANSPARENCY – MORE STEPS IN ONE DIRECTION

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Further to last month's article on State Aid, "Tax Rulings in the European Union – State Aid as the European Commission's Sword Leading to Transparency on Rulings,"[1] this article addresses recent developments, including the European Commission's related initiative on tax transparency:

BACKGROUND

As outlined in the preceding Insights article,[2] following its investigations into private rulings issued to Apple Inc., Fiat SpA, and Starbucks Corp. by the tax authorities of Ireland, Luxembourg, and the Netherlands, respectively, the European Commission requested data on tax rulings from 22 E.U. Member States in an effort to increase tax transparency. All these requests are based on the European Commission's authority to target measures by Member States constituting State Aid comprising, *inter alia*, the area of direct business taxation. State Aid may exist if private tax rulings issued by E.U. Member States to specific corporations provide selective advantages to a specific company or group of companies. This selective advantage given by tax authorities infringes E.U. law.

The European Commission for Competition is clear on the aim of this initiative: "If the Commission has serious doubts about the compatibility of a specific tax ruling with E.U. State Aid rules, it would open a formal investigation," the spokesman for European Commission for Competition, Ricardo Cardoso, said recently.[3] With respect to secrecy concerns addressed not only with respect to such ruling requests but also the proposal for a directive on the automatic exchange of tax rulings[4] presented as part of a transparency package in March of this year, Cardoso emphasized that such fiscal information would be subject to confidentiality as the Commission itself is "bound by rules of confidentiality."

GERMANY

While Estonia and Poland have so far not shown any intent to cooperate and have been served with injunctions by the European Commission, mandating the production of private tax rulings,[5] Germany indicated that it will furnish details of private

1. See *Insights*, Vol. 2 No. 6, "Tax Rulings in the European Union – State Aid as the European Commission's Sword Leading to Transparency on Rulings."
2. *Id.*
3. See Bloomberg BNA, 153 DTR I-2.
4. Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation.
5. See also *Insights*, "Tax Rulings in the European Union."

tax rulings entered into with a dozen corporations. It is expected that these rulings will be delivered to the European Commissioner for Competition within the next two months. Germany's decision to comply with the Commission request puts added pressure on other Member States to comply.

FRANCE

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How sharp the State Aid sword is and how hard it can hit E.U.-based companies is shown by the following recent decision taken by the European Commission in July. Électricité de France ("EDF"), the main electricity provider in France, has been granted tax breaks, which the Commission determined to be incompatible with E.U. rules on State Aid. In 1997, certain accounting provisions for expenditures were reclassified as capital rather than as a current expense. This increased taxable income. Nonetheless, France did not levy all the corporation tax otherwise due and payable by EDF as a result of the reclassification. This allowed EDF to enjoy an undue economic advantage over other operators and was considered a distortion of competition. If an existing tax provision comprises State Aid, and if no exemption applies, the Member State is obliged, upon a decision of the Commission, to recover the unlawful State Aid from the beneficiary. In order to remedy this distortion, EDF must thus repay that aid.

The Commission's decision was remanded by the E.U. to verify whether France's tax revenue loss was economically justified, as if it were a private investment in the company. The standard was laid down by the European courts in other decisions. On remand, the Commission concluded that justification was absent because the projections of profitability showed an inadequate return for an investor. Hence, the tax exemption granted to EDF was not deemed to be an investment made on economic grounds. Rather, the tax treatment agreed to by French tax authorities merely strengthened EDF's financial position without furthering any objective of common interest. It was therefore State Aid.

The amount in question is some €1.37 billion, of which €889 million is a tax exemption granted in 1997 and €488 million is interest. The exact amount will be calculated in cooperation with the French authorities.

E.U. DOES NOT MOVE ON TAX HAVEN "BLACKLIST" DESPITE PRESSURE FROM O.E.C.D.

Part of the European Commission's tax transparency initiative was an action plan adopted to make corporate taxation fairer, more efficient, and more transparent, presented on June 17, 2015.[6] One of the key actions in tackling corporate tax avoidance includes a list of third countries and territories currently blacklisted by Member States (the "Blacklist"). The list is available online.[7]

Criticism has been directed towards the lack of transparent and consistent methodology in establishing the Blacklist. The Commission's standard is relatively simple.

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6 *Id.*

7 See "Tax good governance in the world as seen by EU countries," European Commission.

If a country appeared on a minimum of ten E.U. Member States' national tax haven blacklists, it was placed on the Blacklist. The methodology is not consistent with the standards as set forth by the O.E.C.D. Global Forum on Transparency and Exchange of Information for Tax Purposes. The O.E.C.D. is concerned because it deems the Global Forum's standards to be incorporated into the European Commission's principles of good governance in tax matters. Apparently, 15 countries included on the Blacklist are deemed by the O.E.C.D. to be fully or largely compliant. To illustrate, Guernsey is on the Blacklist, while Luxembourg and Ireland are omitted even though they are currently under scrutiny for providing State Aid. The European Commission contends this is not a problem because the Member States apply objective criteria that result in a more accurate assessment. For example, Member States take into account a country's record on tax information exchange, tax governance, and tax laws allowing for unfair tax competition.

In early August, the Commission held meetings in Brussels to address the issue. Although the European Commission stated that it would revise the list by the end of 2015, none of the 30 countries or independent territories on the list has yet been removed.

CONCLUSION

Although the O.E.C.D.'s B.E.P.S. initiative is subject to further discussions until implementation, multinationals with European operations are already experiencing a changed landscape within the E.U. Tax results are more transparent – meaning everyone that is a stakeholder in the economy has a right to know the tax posture of all corporate taxpayers. In this environment, multinationals are advised to closely monitor the European Commission's actions with respect to private tax rulings. The result in the EDF case is not an anomaly.