Comment

State aid and tax: the US view

Speed read

The EU's state aid overreach rankles the US tax authorities, which has already complained of the 'unfair targeting' of US multinationals. The state aid decisions undermine US tax treaty policy, and there is a risk that the US government may consider using retaliatory tools at its disposal.

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When the EC Competition Directorate injected itself into international tax policy, it set off a firestorm that threatens to undermine years of promising work by the OECD, the G20 and tax authorities from over 60 countries. To many observers, the state aid decisions in *Starbucks* and *Fiat* represent a significant overreach by the directorate outside its traditional areas of focus into a subject matter already being addressed by the Commission separately and as part of the BEPS process.

The state aid decisions are particularly troubling to US multinationals and the US government. In testimony before the US Congress, Robert Stack, Deputy Assistant Treasury Secretary, questioned whether the Commission was disproportionately targeting US multinationals. While the Directorate denies this, such a view is understandable when four of the six known state aid cases involve well-known US multinationals.

There are several reasons why US multinationals and the US government are concerned about the state aid investigations. First, it is an open question whether any tax collected by a member state as part of a state aid decision could be used to offset US tax. The US has a worldwide taxation system with double tax eliminated through a foreign tax credit. The US Treasury is studying whether taxes collected as a result of state aid qualify as creditable taxes. If a credit was in fact available, the US government would end up footing the bill for state aid. Since the US is the only major country with a worldwide tax system, sceptics might suggest that US multinationals represent an easy and high profile target for the Commission.

Second, the state aid decisions undermine US tax treaty policy. Income tax treaties are meant to represent a comprehensive negotiation of the tax relationship between two countries. By inserting itself into that relationship, the Directorate raises a question as to whether a member state can speak with one voice on tax treaty matters.

Third, in both *Starbucks* and *Fiat*, the Commission applied methodology wholly inconsistent with internationally agreed transfer pricing standards and then imposed its decisions on a retroactive basis. Basically, the Competition Directorate said: 'We know better.'

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The US government has retaliatory tools at its disposal. Section 891 of the Internal Revenue Code authorises the imposition of a double rate of tax on citizens and companies from countries acting in a discriminatory manner against US taxpayers. The Senate Finance Committee has already asked Treasury to investigate whether s 891 applies as a result of the state aid decisions.

The state aid investigations come at an unfortunate time for international tax policy. BEPS is working. Taxpayers are altering their behaviour, tax authorities are collaborating in an unprecedented fashion and international tax policies are converging, albeit slowly, toward agreed international norms. The Competition Directorate has thrown a spanner in the works that threatens to upend this progress and create additional uncertainty for taxpayers and tax authorities around the world. ■

With acknowledgment to the contribution of Stephen Weerts, partner at White & Case, Los Angeles.

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