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TAX PLANNING AND STATE AID UNDER THE EUROPEAN LAW

Summary

There is a strong link between funding criteria from government sources and the advantage and selectivity associated with classifying an event as government assistance. However, the selectivity criterion is very important when considering whether there is a banned state aid. Finally, the European Court of Justice no longer applies the rule of law and exclusion to selectivity. Instead, the selectivity review consists of two parts: whether a precaution is selective and whether preference is necessary and proportionate.
Key words: *EU, tax, tax avoidance, state aid, tax planning, competition*

AVROPA HÜQUQUNDA VERGİ PLANLAMA VƏ DÖVLƏT YARDIMI

Xülasə

Dövlət mənbələrindən maliyyələşmə meyarları, verilən üstünlük və tədbirin Dövlət yardımı kimi təsnifatı ilə bağlı seçicilik arasında sıx əlaqə mövcuddur. Qeyri-qanuni dövlət yardımının olub olmadığını araşdırarkən seçicilik meyarı daha yüksək əhəmiyyətə malikdir. Nəhayət, Avropa Ədalət Məhkəməsi artıq seçicilik imtahanı üçün qayda və istisna prinsipini tətbiq etmir. Bunun əvəzinə seçicilik müayinəsi iki hissədən ibarətdir: Tədbir seçicidirsə və seçmə ölçüsü əsaslı və mütənasibdirsə araşdırılmalıdır.
Açar sözlər: *AB, vergi, vergidən yayınma, dövlət yardımı, vergi planlaşdırması, rəqabət*

Introduction

The following definitions of tax avoidance, tax evasion and aggressive tax planning are greatly abridged but get to the heart of the problem: If under tax avoidance one understands the legal possibilities of avoiding tax and under tax evasion the illegal (i.e. punishable) activities to reduce the tax burden, there remains a relatively large grey area between the two in which so-called aggressive tax planning assumes a large role."

Despite the absence of a conclusive definition, particular features that are characteristic of the term aggressive tax planning" can be established. In its recommendation of 6 December 2012 concerning aggressive tax planning, the European Commission defined it as follows: Aggressive tax planning consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability. Aggressive tax planning can take a multitude of forms. Its consequences include double deductions (e.g. the same loss is deducted both in the state of source and residence) and double non-taxation (e.g. income which is not taxed in the source state is exempt in the state of residence)."

The OECD comes to this conclusion in its BEPS Report, where it states that A number of indicators show that the tax practices of some multinational companies have become more aggressive over time, raising serious compliance and fairness issues".

The decisive provisions on state aid are articles 107 and 108 TFEU. TFEU Article 107 para. 1 states: Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market." There is no question that tax incentives should also be judged from the a state-aid perspective. The conditions on which tax incentives would come under the prohibition of state aid were also listed in more detail in the 1998 Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation. Fundamentally, selective tax incentives can be categorised as state aid.

EU State-Aid Law.

According to the article 107 of the TFEU there are four elements of State Aid in this definition:

First: an advantage, granted out of
Second: state resources, which
Third: causes distortion, and which
Fourth: favours certain undertakings.
The fourth element is referred to as the selectivity requirement.

For fiscal State aid, the most important two elements are: and advantage, which is selective.

"Advantage" criteria.

With regard to the existence of an 'advantage', it must not be forgotten that the concept of aid is broader than a subsidy. Not only the positive benefits, but also the budget of an initiative, which is included in the budget of an initiative, and therefore there are no subsidies in the full sense of the word. the same effect. In order to decide whether a taxable income assessment method provides an advantage or not, it is necessary to compare this regime with the existing tax system.

In relation to this common or 'normal' tax regime, it is necessary to evaluate and determine whether any advantage provided by the tax measure is selective by showing that the measure deviates from this common regime. In the light of the target assigned to the tax system of the relevant Member State, it makes a distinction between comparable economic and legal operators. In the case of Paint Graphos - a lawsuit involving the misuse of the legal form of a cooperative society for tax purposes - the EU Court of Justice may rule that tax benefits or other tax benefits may be required by the nature or general order of the tax system. However, in such a case, it is still necessary for the relevant Member State to ensure that these benefits are consistent with the principle of proportionality and that they do not go beyond what is necessary, because the 'legitimate' goal pursued cannot be achieved in a less comprehensive way. measurements.

It is clear that the 'legitimate' purpose of a tax avoidance is extremely important for selectivity analysis. As a result, only legitimate targets can distinguish one group of companies from another.

Selectivity criterion

The advantage should be selective, that is the advantage should favour certain undertaking over others.

In the Azores case, the EU Court of Justice said the following about this: "A measure which creates an exception to the application of the general tax system may be justified by the nature and overall structure of the tax system if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system.

In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives."

In 2014, the European Commission stated that, over the last ten years, several Member States have introduced special tax regimes for IP rights that are 'supposed' to stimulate innovation and investments in new technologies. Such regimes include "patent boxes", which provide for tax reductions on income from patents.

In 2008, the Commission reviewed such a regime in Spain and concluded that the scheme did not constitute aid. Since then, however, the Commission has received indications that special tax regimes seem to mainly benefit highly mobile businesses and do not trigger significant additional research and development activity.

The Commission is therefore gathering information to assess whether the regimes grant a selective advantage to a particular group of companies, in breach of EU state aid rules.

With the state-aid regulations the Commission actually has the most effective means of combating aggressive tax planning and tax dumping in its hands. In June 2014, in three cases the Commission had already begun to examine whether the decisions of the national tax authorities in Ireland, the Netherlands and Luxembourg concerning the corporation tax to be paid by Apple, Fiat Finance and Starbucks were in accord with the EU legal requirements on state aid. A formal investigation process was initiated for each case. In the current context of tight public budgets, it is particularly important that large multinationals pay their fair share of taxes. Under the EU s state aid rules, national authorities cannot take measures allowing certain companies to pay less tax than they should if the tax rules of the Member State were applied in a fair and non-discriminatory way," Joaquin Almunia, the Commissioner responsible for state aid law, emphasised on the announcement of this investigation process. And the then Commissioner for taxation, Algirdas Semeta emphasised: Fair tax competition is essential for the integrity of the Single Market, for the fiscal sustainability of our Member States, and for a level playing field between our businesses. Our social and economic model relies on it, so we must do all we can to defend it."

Essentially this investigation process concerns whether the tax decisions of the three finance authorities mentioned concerning the confirmation of the agreements on transfer prices on the part of corporations should be questioned from the point of view of state aid law. Using transfer pricing, the prices for transactions of goods or services inside the corporation, there is the possibility to shift profits between companies belonging to the corporation that are based in different countries. If these transfer prices accord with market circumstances, then according to the state aid regulations there is no state aid. However, if there are divergences, because the transfer prices cannot be economically justified, then it may be a question of state aid, which under competition law is impermissible. It is also problematic from the point of view of state aid law if the tax authorities do not have a clear margin of discretion as to how these transfer prices can be established. In October the Commission announced that it would also be investigating the transfer-pricing agreements that are part of the taxation of Amazon in Luxembourg. Here too the words of the then Commissioner responsible for competition policy Joaquin Almunia were unusually sharp: National authorities must not allow selected companies to understate their taxable profits by using favourable calculation methods. It is only fair that subsidiaries of multinational companies pay their share of taxes and do not receive preferential treatment which could amount to hidden subsidies. This investigation concerning tax arrangements for Amazon in Luxembourg adds to our other in- depth investigations launched in June. I welcome that cooperation with Luxembourg has improved significantly." Here too the Commission emphasises that the transfer prices must be based on market prices and that if this is not the case it may constitute impermissible state aid. In the press release the Commission adds that the royalties that reduce Amazon s profit in Luxembourg, evidently already accepted by the Luxembourg financial authorities in 2003, may not be in conformity with the market, as they lead to an unjustifiable economic advantage for Amazon. These are at least very clear words from the Commission that indicate that there will be serious investigations here. And this also leads to the hope that these investigative processes will be more frequent in future. The current publications from the Commission at least give cause to hope that here success against tax dumping can be achieved.

The European Commission holds the preliminary view that the interest exemption results in unlawful State aid which must be repaid by the companies which have benefitted from it.

In June 2014, the Commission started a formal investigation into the transfer pricing arrangements on corporate taxation of Apple (Ireland), Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg).

In October two thousand and fourteen, the Commission extended an in-depth investigation into the Gibraltar corporate tax regime to include its tax rulings practice.

Moreover, the Commission announced and investigation into the transfer pricing arrangements on corporate taxation of Amazon in Luxembourg, and in 2015 the Commission opened an in-depth investigation into the Belgian excess profit ruling system.

In all of those cases, the European Commission has stated that "where a tax ruling concerns transfer pricing arrangements between related companies within a corporate group, that arrangement should not depart from the arrangement or remuneration that a prudent independent operator acting under normal market conditions would have accepted."

It is the key concern of the Commission that the tax rulings are not in line with the 'prudent independent operator test' and provide, therefore, a selective advantage to the companies concerned. This may in particular be the case if the OECD's transfer pricing guidelines have not been respected. Of course, if the Commission is right, those companies should repay the benefit to the State which granted the aid, with interest.

Other measures against aggressive tax planning

In the context of the corporate tax reform package, the European Commission has published a proposal to amend the ATAD in order to extend the rules on hybrid mismatches to those involving non-EU countries. Hybrid mismatches are used as aggressive tax planning structures, which in turn trigger policy reactions to neutralise their tax effects. The proposal seeks to neutralise mismatches by obliging Member States to deny the deduction of payments by taxpayers or by requiring taxpayers to include a payment or a profit in their taxable income.

In addition, on 25 October 2016, the European Commission decided to re-launch the common corporate tax base project in two steps, with the publication of two new interconnected proposals for directives on a common corporate tax base and a common consolidated corporate tax base (CCCTB). The purpose of the proposals is to establish common rules for corporate taxes and to provide for the framing of a single set of rules for the determination of the corporate tax base. The proposals are still under discussion in the Council.

A further step in tax transparency would be to broaden it by providing publicly available information relating to tax paid at the place where profits are actually made. To achieve that, the European Commission published a proposal for a directive providing for public country-by-country reporting, as an amendment to Accounting Directive 2013/34. Public country-by-country reporting (CBCR) is the publication of a defined set of facts and figures by large multi-national enterprises (MNEs), thereby providing the public with a global picture of the taxes MNEs pay on their corporate income. The proposal is still under discussion in the European Parliament and the Council.

A considerable number of EU initiatives have therefore been launched recently, especially since 2012. The legal framework is constantly developing, in order to fill the previously identified gaps. However, these recent changes have not always been timely or fully implemented by the Member States.

Aggressive tax planning could also be considered contrary to the principles of Corporate Social Responsibility, given taxes paid by businesses can positively impact the rest of society.

The Commission reaffirmed its commitment to fairness in taxation in its action plan to strengthen the fight against tax fraud and evasion, published in 2012. The plan set out 34 actions which could be taken to enhance administrative cooperation and to support the development of the existing good governance policy, tackle the wider issues of interaction with tax havens and aggressive tax planning as well as other aspects, including tax-related crimes. Not only did the action plan highlight existing EU initiatives to reduce tax evasion and avoidance, but it also set out new initiatives which could help promote fairness. In particular, the ActionPlan included recommendations on how to tackle aggressive tax planning. This recommendation suggests that Member States should reinforce their double tax conventions, to prevent them from resulting in no taxation at all. It also recommends the adoption of a common General Anti-Abuse Rule, under which countries could ignore any artificial arrangement carried out for tax avoidance purposes and tax instead on the basis of actual economic substance.

The action plan also put forward the Commission's intention to propose new legislation to close loopholes in the Parent Subsidiary Directive, which were resulting in double non-taxation. It is a credit to Member States that amendments to the Parent Subsidiary Directive have already been agreed placing them on a stronger footing to prevent double non-taxation. This demonstrates Member States' willingness to act to ensure fairness in the tax system.

The action plan largely focuses on limiting both companies' ability to evade taxes and their ability to exploit inadvertent loopholes and gaps between international tax systems. However, it also stresses that national measures, which promote tax shopping by citizens and business, are unacceptable.

Code of Conduct to Combat Tax Avoidance

Adopted by the Council on 1 December 1997, this was intended to remove distortions in competition over company taxation inside the EU in order to prevent massive shortfalls in corporation tax. Although the code of conduct is in principle not legally binding on the member states, they are still under a political obligation and by adopting it they have committed themselves to abandoning existing tax measures that are considered harmful and not to introduce any further harmful measures in future. Under the code of conduct measures are categorised as harmful if they result in a significantly lower effective tax burden than the normal tax level of the state, which can lead to zero taxation. In November 1999, a working group established in 1998 published a report listing 66 harmful measures. The majority of these can be assigned to the following two categories:

-Tax incentives for holding companies and for internal services in the corporation (company headquarters administration, research, marketing, sales, internal consultancy)

-Tax incentives for companies in the finance sector (financing activities, asset management, licence management, insurance business etc.).

In the meantime these measures have largely been repealed by the member states affected. And also this working group still currently monitors the situation and regularly reports to ensure that no new harmful measures are introduced.

Where Member States have failed to bring their tax legislation into conformity with European Union law, the ECJ has done it for them by striking down any national tax laws that violate these fundamental freedoms.

For example, one of the first tax competition cases heard by the ECJ dealt with the free movement of goods. In a case popularly known as the Newspaper Publishers case, the ECJ struck down a French tax law that permitted deductions for publishers that produced newspapers related to politics, as long as the publisher was actually printing in France. The ECJ concluded that the tax law obstructed intra-community trade because it denied benefits to newspaper publishers established in other Member States. Thus, the Court struck down the law for violating the principle of the free movement ofgoods.

Adjustment The Parent-Subsidiary Directive

The Parent-Subsidiary Directive is a measure of the European Union, which seeks to abolish withholding tax on outgoing payments and economic double taxation within an EU-based corporate group structure. In this respect, the objective of the Parent-Subsidiary Directive (partly) coincides with unilateral measures often taken by countries to prevent economic double taxation.

The Parent-Subsidiary Directive was initially adopted on July 23, 1990 and has been revised several times since, requiring updates of domestic tax legislations.

Technically, the Parent-Subsidiary Directive provides that:

1) intra-group cross-border payments of dividends should be exempted from withholding tax; and

2) the Member State of the parent company, that is the entity receiving the dividend, must either exempt the income or provide for a credit on underlying taxes.

The Parent-Subsidiary Directive relates to companies resident within the EU, which are subject to corporate income tax and have a certain (listed) legal form. The parent company must hold a qualifying interest in the subsidiary (ten per cent as of 2009) and meet a minimum holding period requirement of two years.

In recent years, there have been discussions that the application of the Parent-Subsidiaries Directive might result in non-taxation. For that reason, on November 25, 2013, the European Commission made a proposal to amend the Parent-Subsidiary Directive to close these perceived loopholes. In particular, the adjustment targets tax planning arrangements using hybrid loan arrangements. Furthermore, also a general anti-abuse rule was introduced.

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