The Interplay between the State Aid Rules and other BEPS-Preventing Tools (SA.38375)

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October 28, 2015

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I. The State aid prohibition as applied to tax rulings

The CJEU established that any measure reformed partially or wholly exempting undertaking’s charges arising from the normal application of the general tax system, without them being justified by an objective of general interest, constitutes State aid within the meaning of Article 107 TFEU. No distinction between measures by reference to their cause or aim can be made, only their effects matter to the purpose of establishing State aid. This, however, does not apply to fiscal measures adopted by Member States in order to neutralise the effects of intra-group transfers into a third Member State or the stiffness of an external market (calculating the cost of the supplies or services at a lower price for the supplying entity) or, indirectly, to neutralise the disparities between Member States’ tax systems by applying the same method of taxation throughout the EU.

II. The necessity of economic substance

The question whether a transaction is economically meaningful is often challenging to determine because of the absence of a rigorous, objective test. The most important factor left to assess is the actual economic value added. If the transaction is merely a façade with no real economic substance, it will be the subject of a State aid inquiry.

III. The Market Economy Investor Principle (MEIP)

The MEIP applies to inter-group transactions where the arm’s-length principle does not apply, imposing a uniform remuneration for both intra-group and inter-group transactions, while avoiding the potential for tax arbitrage. The key issue here is whether the transaction reflects normal market conditions. If the transaction is not market-reflective, Member States may prove that the transaction reflects their national tax system, gaining a competitive advantage over their peers.

IV. The MEIP in practice

The application of the MEIP in practice is subject to discretionary interpretation by tax authorities within the Member States. The key question is whether the transaction reflects normal conditions of competition. For example, a market operator would not accept that its market operator, which would require a market conform remuneration of a subsidiary or a branch, which outcome in a correct way. When accepting a calculation method of the taxable basis proposed by the tax authorities, the national authorities should impose that method to the parent’s hypothetical investor. The MEP of the transaction must reflect normal market conditions.

V. The necessity of determining the economic value added

The determining factor for economic value added is the decision on whether the economic value added is correctly determined. The fact that the transaction is economically meaningful is often challenging to determine because of the absence of a rigorous, objective test. The most important factor left to assess is the actual economic value added. If the transaction is merely a façade with no real economic substance, it will be the subject of a State aid inquiry.
the law shall enjoy priority meaning that any unlawful aid must be recovered, thus the irregularity produced will be corrected by offsetting the advantage.

1. [Case 173/73, Italy v. Commission, EU:C:1974:71[17].]

2. [Case C 75/97, Belgium v Commission, EU:C:1999:311 [33] and [41]. See also Case C-56/93, Belgium v Commission, EU:C:1996:64 [73].]

3. [C-452/10 P, BNP Paribas, EU:C:2012:366 [121].]

4. [Case C-241/94, France v Commission, EU:C:1996:353 [23-4].]

5. [SA.34914, SA.38373, SA.38374, SA.38944. See more (click here).]

6. [OECD/G20 Base Erosion and Profit Shifting Project, Aligning Transfer Pricing Outcomes with Value Creation, 5 October 2015, p 13.]

7. [Under the CUP method, the arm’s length price for commodity transactions may be determined by reference to comparable uncontrolled transactions and by reference to comparable uncontrolled arrangements represented by the quoted price.]

8. [The method compares the net profit of an entity part of an intra-group transaction with an appropriate comparable entity making adjustments based on the actual circumstances of the transaction in order to obtain the arm’s length net profit margin. The latter is applied to an item of profit to approximate the amount of taxable profit. Equity was selected as the net profit indicator, in which context an approximated arm’s length margin on equity was predicted through the CAPM financial model. According to financial theory, a prudent investor diversifies its risk by investing in several securities instead of investing in only one security. The next assumption is that an efficient market would only remunerate the non-diversifiable risk component for each asset.]

9. [Commission Decision, State aid SA. 38375 (2014/NN) (ex 2014/CP) Brussels, 11.06.2014 [62], p. 22. See also Joined Cases C-182/03 and C-217/03, Forum 187 ASBL, EU:C:2006:416 [94-5]. ‘In order to decide whether a method of assessment of taxable income [such as TNMM] confers an advantage on [certain undertakings], it is necessary […] to compare that regime with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition’.]


12. [Case C-222/04, Cassa di Risparmio di Firenze, EU:C:2006:8 [150-2].]