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The CV/BV Structure in the Post-Starbucks Era: Inadmissible State Aid, Yes or No?

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"Starbucks tax deal equals inadmissible state aid": it was with this headline that newspapers reported on 21 October 2015 that the European Commission – instigated by Margrethe Vestager, the European Commissioner for Competition – had ruled that the Netherlands had been favouring Starbucks with an "inadmissible" tax advantage in the 20 to 30 million euro range. It was not just on arrangements of this kind that the European Commission had trained its eye: it might also have it in for the Dutch "limited partnership-limited company" mechanism (CV/BV Structure) which has become such a firm favourite with predominantly US-based multinational companies (such as Starbucks).

This post addresses the question as to whether the CV/BV Structure should indeed be dismissed as inadmissible state aid, as a topic for whose discussion I would consider the time to be ripe given (i) the commonality of the structure, (ii) the potentially huge impact of the "state aid" qualification, and (iii) the recently launched negotiations between the United States and the Netherlands on the applicable double taxation convention.

The Dutch limited partnership-limited company mechanism (CV/BV structure)

A Dutch limited partnership-limited company set-up is used as a vehicle for enabling a US-based party to hold a participating interest in a Dutch-based limited partnership (CV), with the latter in turn participating in a Dutch-based private limited-liability company (BV) that acts as a holding company on behalf, more often than not, of the various European operating companies. The CV has (at least) one general (or managing) partner and one limited (or silent) partner, the latter being a US-based group company. As the CV has a fiscally controlled status which can result in the underlying partners rather than the partnership being liable for Dutch taxes, this ensures fiscal transparency where the CV itself is concerned.

The United States – much differently to the Netherlands – offers the option of conferring fiscal transparency or non-transparency upon foreign group companies. This is what is known as the "check the box" system. The US will tax the US-based limited partner on income distributed by the Dutch CV as it considers the Dutch CV to be lacking in transparency. The object of this mechanism (and thus its main attraction) is to relay – as dividends, interest or royalties – earnings generated (more often than not) by European operating companies to the CV, with the aforementioned disparity enabling taxation being deferred owing to the fact that (i) the Netherlands will not levy taxes at all at the level of the CV (the hybrid entity) whereas (ii) the United States will

refrain from doing so unless and until the earnings in question are repatriated from the CV to its US-based limited partner.

Differently to the United States, the US-based limited partner additionally has Dutch tax liability where it concerns payments made by the BV to the CV. The US-based limited partner (i) as a beneficiary of the proceeds on the one hand will owe 15% in dividend tax which the limited company will dock from dividends paid out to the limited partnership, while (ii) in its capacity of foreign taxpayer on the other hand may be liable for 25% corporation tax on profit participating royalties collected in connection with the limited partnership's licensing of intellectual property to the limited company. However, thanks to the double taxation convention in force between the Netherlands and the United States the US-based limited partner will qualify for mitigation of its tax charge to 5% (where it concerns dividends) or even reduced to 0% (where it concerns qualifying dividends, interests and royalties).

Inadmissible state aid?

The fly in the ointment where the US-based limited partner's reliance on the above tax advantages is concerned has been article 24(4) of the double taxation convention between the Netherlands and the United States, waging war as it has been on the use of such hybrid entities. As this was a thorn in the side of the (then) Dutch State Secretary for Finance, it was decreed in 2005 to leave the stipulation in question out of the double taxation convention between the Netherlands and the United States on condition that particular substance requirements in or via the Netherlands should be satisfied.

However, the application of the aforementioned Decree has prompted the question as to whether there could be a question of inadmissible state aid given that the application of the double taxation convention with the United States will result in the Netherlands refrain from levying a tax on dividends. TFEU, the Treaty on the Functioning of the European Union, defines inadmissible state aid measures as any scenario involving (i) an advantage having been made available to a business (ii) for the funding of which state resources have been used, (iii) which aid-related measure is having a disruptive effect on competition and commerce within the European Union (iv) as well as being selective in nature.

The question has to be asked on the one hand to what extent the Netherlands has been favouring US-based multinational companies that rely on the Decree and have this reflected in a tax ruling issued at the discretion of the Dutch Tax and Customs Administration. Dividends represent a particularly thorny issue, as only (dividend) tax is levied on the disbursement of dividends rather than (corporation) tax being levied on the entity's dividend income. Moreover, the set-up in question, rather than having been created with the aim of stopping dividend tax being levied, has been devised for the purpose of deferring US taxes being levied on paid out earnings so that it cannot be said to favour particular players.

There are those who profess that royalties paid by the BV to the CV should likewise be liable for corporation tax. It is my opinion that this remains very much to be seen, as the profit entitlement clause merely deals with royalties relating to profit entitlement and it is the very essence of a royalty that it should be turnover-related. Here too the conclusion – mutatis mutandis – would have to be that there is no question of particular players being favoured.

Then again there is a lot to be said against the alleged selectiveness of the aid measure. This would

call for (i) the identification of the reference framework in order to enable (ii) the assessment being made as to whether said reference framework is being departed from for the benefit of particular economic agents that are similar both factually and legally to other agents, with (iii) the departure in question being justifiable by virtue of the nature of the reference framework. The mere implication underpinning the "inadmissible state aid argument", viz. that the object and purport of the Decree favours particular US-based enterprises, is open to debate, in addition to which there are plenty of critical comments to be made on the reference framework and the associated selectiveness.

It cannot be denied that the European Commission's allegation to the effect that the CV/BV structure is tantamount to the Netherlands (covertly) furnishing state aid hinges on several highly debatable presumptions, in addition to which it remains very much to be seen whether the state aid measure is the appropriate tool for combating mismatches involving hybrid entities. Add to this the frequency with which the Dutch CV/BV structure is practised and the conclusion has to be that the ratification of the European Commission's verdict is a long way off.

Tax treaty negotiations pending: "reduction of dividend withholding tax?"

The United States and the Netherlands have recently been reported as having taken up fresh negotiations on the topic of the double taxation convention between them. In so far it might have been the CV/BV structure alleged state aid that has helped spark the tax treaty negotiations. Now would thus be a good time to do away altogether with dividend tax between the Netherlands and the United States altogether. It will be de facto reciprocity and the potential absence of approving policies by virtue of tax exemption for dividends originating in the Netherlands which will be instrumental in curbing the risk of alleged state aid, to the point, in fact, where I am firmly convinced that any alleged state aid at all will be altogether eliminated.

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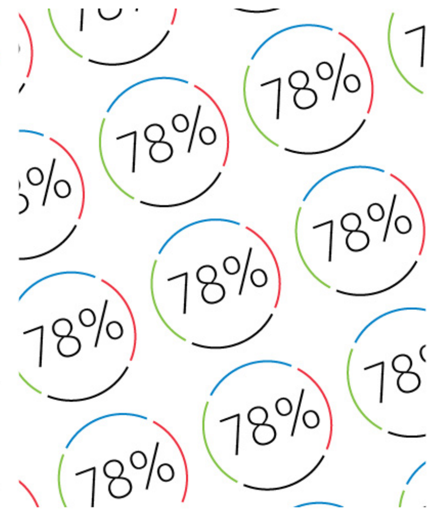

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