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Why a 1999 EU study was kept a secret till now: France made tax deals outside the law.

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The 1999 Simmons & Simmons report on administrative practices is now public, together with the responses by Member States. My suspicion was correct: France had reason to keep the documents a secret. Let me explain.

On 22 April, 2015, I published on this a site a blog titled: “A mysterious study in the Code of Conduct Report 1999 and a rumoured French connection” (<http://www.kluwertaxlawblog.com/blog/2015/04/22/a-mysterious-study-in-the-code-of-conduct-report-1999-and-a-rumoured-french-connection/>). The blog did attract attention and document discovery procedures started. Progress was made. On 20 October, 2015, the Netherlands Ministry of Finance sent the Study and an annex (responses by Member States) to Parliament. However, the documents were to be kept confidential. On 29 October, 2015, Pieter Omtzigt, a Dutch MP, twittered that the study and annex had been obtained through an EU Document discovery procedure. I assume he refers to Regulation (EC) No. 1049/2001, regarding access to European Parliament, Council and Commission documents. His tweet can be translated as “Wiebes [NL Secretary for Taxation–TJK] did not want to disclose secret EU documents about tax. Nor did EU. Obtained via EU document discovery procedure.” A few hours later the documents (both in English) were attached to an article (in Dutch) with header: “French Government negotiated directly on tax deals” (website: <http://www.nu.nl/politiek/4154935/franse-regering-onderhandelde-rechtstreeks-belastingdeals.html>). The Simmons & Simmons study (62 pages) can be found at: <http://www.nu.nl/files/doc%20%20-%20STUDY.doc.pdf> and the Annex containing responses from Member States (420 pages) can be found at: <http://www.nu.nl/files/doc%20%20-%20annex%20to%20study%20-%20replies%20MS.pdf> .

Para. 1.1. of the study reads in part: “No part of this report may be published or circulated other than by, or with the express permission of, the European Commission.” The study and annex are publicly available and obtained through a legal procedure based on an EU regulation aimed to do just that; hence, I feel free to disclose and write about the content.

In my April blog, I wrote “Strong rumour has it the report was not published because the French administration did not like it and certainly did not want it out in the open.” The study and the annex confirm the French Government’s strong interest to keep the documents secret. The study is quite revealing with even more details in the response from France. I am convinced the response is prepared by the 15 Member States (para.26 of Code of Conduct

appears to confirm this, the letter of October 20, 2015 to Dutch Parliament mentioned above leaves no doubt). However, it never actually says so in the study nor in the annex. I will quote some parts and leave it to you, the reader, to read more in the study or the annex. The study, dated 1999, covers the administrative practices in the then 15 Member States; it was part of the 1999 Code of Conduct Report.

The study reads in part:

- in the Executive Summary: “We have found no instances where special taxation regimes have been negotiated directly with the government of a Member State except in the case of France.”
- in the section on France
 - in para. 1.2: “Some taxpayers implementing large projects have obtained tax treatments significantly more favourable than those prescribed by statute.”
 - In para. 2.4: “some multinational businesses operating in France (especially those in competition with French State owned businesses) perceive their tax affairs to be subject to a greater degree of procedural scrutiny than is applied to companies based in France.”

It is interesting to note the contribution by France covers 58 pages, whereas, say Germany required only 19 pages and the United Kingdom 20 pages.

Response by France reads in part:

- p.1: “authorities effectively have the power to comment on tax laws, they cannot modify or alter the law.”
- p.1: “ the French legal system does allow a statutory ruling to be obtained in accordance with strict legal conditions and procedure. It is also possible to get certain rulings (usually requested in advance) outside the formal legal framework”
- p.2: “it is public knowledge that a well known amusement park benefitted from very

favourable rulings. The rulings granted were so exceptional that negotiations with tax authorities took place at the highest level”

- p.6: “During the discussions about the re-assessment process, the company raised the point that the consequences of the proposed re-assessment would impact its financial situation so greatly that a massive lay-off would be necessary. Following negotiations and in order to preserve employment, the authorities abandoned almost 50% of the re-assessment.”
- p.7: “Under French rules, tax exemptions or tax advantages may only be granted by law.”
- p.11: “For instance, a French service company whose share capital has been held by the State, obtained several written positions from the *Service de la Legislation Fiscale* or *SLF* (see 2.2. (A) 2 below). These rulings allowed it to determine the taxable basis of some important taxes (corporation tax and business license tax) according to methods which would give rise to significant reductions in the tax bill. The ruling applicable to the business license tax is described precisely at the end of 3.3 (A) below.”

I could continue with quoting but leave it to you, the reader, if you want to see more.

State Aid – why were Starbucks and FIAT given special treatment?

Reading this makes me wonder why the EU has not challenged France when looking for a case in the area of state aid and taxation? After all, the EU Commission is aware of the

Simmons & Simmons study since 1999. The French dossiers have been available for 16 years and wonder why EU DG Comp chose to challenge the OECD Transfer Pricing Guidelines (essence of the Starbucks case) instead in their State Aid tax case.

Conclusion

The French Government had every reason to suppress the publication of the study and annex. Concluding a deal to attract investors going outside the legal framework enacted is wrong within France in 1999, wrong in the EU in 1999 and it would be a miracle were it to continue today. Given the attention by politicians and media about tax avoidance and tax planning (both legal) wonder what they are now going to say. Anyway, I do expect DG Competition to open immediately a dossier on state aid regarding the violations by the French Government.

Finally, as an aside: I cannot but stop wondering what the document discovery procedure Regulation would do for the recently agreed confidential exchange of information on rulings by Member States or for the framework of confidential country by country reporting on tax. Would the Regulation enable such documents to be published or not? Reading the text of the Regulation, I recommend the text to be amended to maintain what was specifically intended: to keep rulings and cbc's confidential. Assume at least one country agrees.

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