EU State Aid law and Taxes

Briefing Note

by

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I. Coordination of Member States' policies through State Aid law

State Aid control is one of the strongest instruments of the European Commission. State aid control is next to the administration of EU funds and to the competition control the only policy area in which it can adopt legally binding decisions without the involvement of national administrations.

A state aid is, according to Article 108(3) TFEU, already illegal if it wasn't notified to the European Commission regardless of whether it was a state aid that is in conformity with the internal market or not. If a state aid wasn't notified to the European Commission, it can start formal investigations on its own initiative. An illegal state aid has to be fully repaid. Member States cannot rely on the principle of legitimate expectations in order to refuse repayment.[1]

This severe impact of Commission decisions in State aid affairs creates legal uncertainty amongst undertakings and public authorities with regard to financial support through state money. Therefore the European Commission adopts communications and guidelines. In these communications and guidelines the European Commission explains how it intends to apply EU State Aid law to certain cases. These documents provide in a very detailed manner under which conditions the European Commission considers either that there is no State aid or that a potential state aid is compatible with the internal market. Famous examples for these kinds of communications and guidelines are the so-called "Monti-Kroes package" covering the State aid aspects of services of general interest[2] or the "temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis".[3] Both sets of communications had a significant impact on shaping public financing of services of general interest, on the one hand, and on *ad-hoc* rescue measures for banks, on the other.

These communications and guidelines are no legally binding acts according to Article 288 TFEU. In combination with the Primary law principles of equal treatment and of the protection of legitimate expectations, however, the Commission is self-bound by these guidelines and communications. In adopting rules of conduct and announcing by publishing them that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion under Article 107 TFEU and cannot depart from those rules under pain of being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations.[4]

In sum, State aid control is a powerful tool for the European Commission to coordinate economic and fiscal activities of the Member States. By publicly announcing how it intends to use its discretionary powers under Article 107 TFEU through communications and guidelines, the European Commission adopts "soft law" that harmonises *de facto* national legislation and practices. The Council has, finally, no influence on how the Commission drafts its communications and guidelines.

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[1] ECJ, Case C-24/95, Alcan [1997] ECR I-1591, paras. 35-37.

[2] This package was originally a reaction of the European Commission on the judgment of the ECJ, Case C-280/00, *Altmark Trans* [2003] ECR I-7747, in which the ECJ decided that public compensation for discharging public service obligations is no State aid. The "Monti-Kroes package" contains the (1) Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest ([2012] OJ C 8/4), (2) Communication from the Commission, European Union framework for State aid in the form of public service compensation ([2012] OJ C 8/15), (3) Commission Decision on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest ([2012] OJ L 7/3), (4) Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest ([2012] OJ L 114/8).

[3] Communication of the Commission: Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis ([2011] OJ C 6/5) and its subsequent modifications.

[4] ECJ, Case C-464/09 P, *Holland Malt* [2010] ECR I-12443, paras. 46 et seq.; Joined Cases C-75/05 P and C-80/05 P, *Germany and Others v Kronofrance* [2008] ECR I-6619, paras. 60 et seq.

II. In general: Application of EU State Aid law to national taxes

Pivotal for the understanding of the impact of EU State aid law on national taxes is the interpretation of the European Court of Justice (ECJ) of the **notion of "state aid"**. It understands state aid in terms of Article 107 TFEU wider than a mere subsidy. According to the ECJ, it embraces not only positive benefits, such as subsidies themselves, but also ***interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking*** and which, without being subsidies in the strict meaning of the word, are similar in character and have the same effect.[5] The ECJ considers thus State interventions on the basis of their effects, regardless of the techniques used by the state.[6]

Article 107(1) TFEU 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.*

In order for a measure to constitute State aid falling under Article 107(1) TFEU it must

(1) involve the grant of an economic advantage,

(2) it must be financed by the State or through State resources,

(3) it must be selective (favouring certain undertakings or the production of certain goods),

(4) it must distort or threaten to distort competition and

(5) it must affect trade between Member States.

The European Commission has adopted in 1998 in the field of direct business taxation a communication on how it intends to apply State aid rules to measures relating to direct business taxation (see in the Annex 1 of this briefing).[7] Whilst (2) the financing through State resources, the distortion of competition (4) and the impact in inter-state trade (5) can easily be assumed when it comes to subsidies through tax rules, the (1) granting an economic advantage (3) that is selective is very difficult to assess.

1. Granting an economic advantage

The first condition is that an economic advantage must be granted. In order to identify whether or not a measure constitutes a benefit, it is necessary to find a reference system as a benchmark. The determination of the reference framework is of particular importance because the very existence of an economic advantage can only be established in comparison to a system of financial charges known as normal in the geographical area of reference.[8] Hence the *normal* level of taxation serves as a benchmark or as a system of reference against which a tax measure can be labelled as advantageous or dis-

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[5] For the first time ECJ, Case 30/59 *Steenkolenmijnen v High Authority* [1961] ECR 1, 19; then ECJ, Case C-53/00 *Ferring* [2001] ECR I-9067, para. 15; Case C-308/01 *GIL Insurance* [2004] ECR I-4777, para. 69.

[6] ECJ, Case C-487/06 P *British Aggegrates v Commission* [2008] ECR I-10515, para. 89; Joined Cases C-106/09 P and C-107-09 P *Commission v Gibraltar,* para. 87 et seqq.

[7] Commission Notice on the application of the state aid rules to measures relating to direct business taxation, [1998] OJ C 384/3.

[8] Cf. Commission Decision N597/2006 on the reform of the financing regime of the pensions in the Greek banking sector, [2007] OJ C 308, para. 67.

advantageous.[9] Technically, the advantage may be provided through a reduction in the firm's tax burden in various ways, including:[10]

- a reduction in the tax base (such as special deductions, special or accelerated depreciation arrangements or the entering of reserves on the balance sheet),
- a total or partial reduction in the amount of tax (such as exemption or a tax credit),
- deferment, cancellation or even special rescheduling of tax debt.

An advantage may also be conferred upon undertakings by the "method of determining taxable income, the exemption from property tax, withholding tax and capital duty and the system of national withholding tax".[11]

In general, the assessment of whether or not there is an advantage conferred upon an undertaking is made by the so-called "Market Economy Operator Test" (MEOT). For the application of this test to tax rules one has to answer the question whether a prudent independent operator acting under normal market conditions would have accepted such a tax rule if this operator would have been the taxing authority.

2. Selectivity

Once the existence of an economic advantage is established, the tax measure in question must, furthermore, favour *certain* undertakings or the production of *certain* goods. The so-called selectivity test is crucial for the application of State aid law in tax matters. Only if a tax measure is selective, it can be distinguished from a general tax measure. General tax measures may also be advantageous in comparison to the normal level of taxation in in given geographical area, but they do not distort competition. Therefore a State measure which benefits all undertakings in national territory, without distinction, cannot constitute State aid.[12]

State aid law is hence not right instrument in order to challenge "low" tax rates or the taxable base in a Member State provided that both applies to all undertakings throughout the whole country. State Aid law only looks at the deviations from the generally applicable tax rates and taxable bases. As can be seen in Annex 2, in reality, the different corporate tax rates in the EU Member States are not a problem. Exemptions and case-by-case reductions of the effective tax rate for single undertakings are at the core of the problem of harmful tax competition.

The selectivity test in the area of taxation normally involves a so-called "two-step-test" in order to establish state aid: *First,* there needs to be a *prima facie* selectivity. *Second,* such a *prima facie* selective measure can be qualified as not being selective as long as it is justified "in the light of the nature or overall structure of the tax system".[13]

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[9] This has to be made already when examining the advantage: "No advantage can be identified without a comparator first being found as a benchmark for treatment" (cf. *Ross* [2000]CMLR 407; *Schön,* State aid in the area of taxation, in: Hancher, EC State aids, p. 241, 256 at point 10-016). It is necessary to identify a benchmark not just in relation to the question of whether an advantage is unilateral or selective but also in connection with the conferment of advantage. However, many legal authors identify the benchmark within the selectivity. If teams are doing so as well, this cannot be seen as a mistake.

[10] Cf. Commission Notice on the application of the state aid rules to measures relating to direct business taxation, No. 9 ([1998] OJ C 384/3).

[11] ECJ, Joined Cases C-182/03 and C-217/03, *Forum 187* [2006] ECR I-5479, para. 88.

[12] ECJ, Case C-143/99, *Adria-Wien Pipeline* [2001] ECR I-8365, para. 35.

[13] ECJ, Case 173/73, *Italy v Commission* [1974] ECR 709, para. 15; Case C-88/03, *Portugal v Commission* [2006] ECR I-7115, para. 52.

a) *Prima facie* selectivity

A tax measure must be “such as to favour certain undertakings or the production of certain goods within the meaning of Article 107(1) of the Treaty in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question.”[14]

This means that the comparison group for establishing selectivity is not, by definition, the entirety of all economic operators in a Member State. It can also be a subgroup of economic operators. This means that a tax measure may appear at first sight to be a selective advantage for certain undertakings if these undertakings are to be compared to entirety of economic operators. If, however, the objective of the tax measure in question covers only a subgroup of economic operators and if all the economic operators of this subgroup are treated equally by the tax measure, this tax measure cannot be qualified to be selective even if it might confer an advantage upon this subgroup of economic operators compared to the entirety of economic operators in a Member State (this is particularly relevant with regard to energy taxation).

According to the case law of the European Court of Justice, a competitive relationship between economic operators that benefit from a tax measure and those that don’t is not required in order to constitute a comparable group.[15] In case 173/73, Italy v Commission, the ECJ has found that a reduction of the applicable social contribution charges in Italy for the entire textile sector was selective.

In general, one can say that in the following three cases the existence of a *prima facie* selectivity of a tax measure can be assumed:

- the scope of the tax measure is limited by **substantive conditions**;
- the scope of the tax measure is **geographically** limited;
- the tax measure contains a **broad discretion** for the tax authorities who enable it to adjust the application of the tax rule having regard to a number of considerations such as, in particular, the choice of beneficiaries, the amount of the financial assistance and the conditions under which it is provided.[16]

b) Justification of the *prima facie* selective tax measure

As a second step, the ECJ assesses the possibility to justify a *prima facie* selective tax measure. At this point one has to distinguish between objectives pursued by the tax measure that are inherent to the general tax system of a Member state (such as e.g. progression) and legitimate objectives that have no link with the general tax system (such as e.g. the protection of the environment).

aa) Justification by objectives that are inherent to the general tax system

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 this measure results directly from the basic or guiding principles of its tax system.

The ECJ[17] and the Commission[18] specified that the following objectives could lead to a justification of a tax measure in the light of the nature or overall structure of the system: redistribution, the criterion of

[14] ECJ, Case C-143/99 *Adria-Wien Pipeline* [2001] I-8365, para. 41.

[15] Different opinion: AG Tizzano, Case C-53/00 *Ferring* [2001] ECR I-9067 point 39.

[16] ECJ, Case C-241/94, *Commission v France* [1994] ECR I-4551, para. 23 et seq.; Case C-200/97, *Ecotrade* [1999] ECR I-7907, para. 40 et seq.

[17] ECJ, Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, para. 81 et seqq.

the ability to pay and the functioning and effectiveness of the general tax system. Besides, both referred to "mechanisms inherent in the tax system itself which are necessary for the achievement of [objectives attributed to a particular tax scheme]."[19] Up to today, mainly cases originating from the last group successfully met the justification test.[20]

bb) Justification by legitimate objectives without a link to the general tax system

In the case law the question was raised whether there is a further possibility to justify tax rules that deviate from the general tax system by referring to legitimate objectives that are pursued by the tax measure in question. The General Court justified in the case of *British Aggregates*[21] a British levy[22] and in the so-called *NOx* case[23] the Dutch emission trading system[24] by environmental objectives. The General Court stated that "Member States are free, in balancing the various interests involved, to set their priorities as regards the protection of the environment and, as a result, to determine which goods or services they are to decide to subject to an environmental levy."[25] The ECJ[26], however, overruled both decisions by referring to the fact that "Article 107(1) TFEU does not distinguish between the causes or the objectives of state aid, but defines them in relation to their effects".[27]

Nevertheless the dicta of the Court in the judgment *Adria-Wien*[28] has led to an academic debate whether there is a "rule of reason" within EU state aid law or not. On the one hand, the cases *Ferring*[29] and *Altmark Trans*[30] represent the Court's tendency to include public policy reasons within the definition of state aid (*in casu* providing services of general interest). On the other hand, by overruling the cases *British Aggregates* and *NOx* and referring to the effects and not to the environmental objective pursued by the tax measure, the Court seems to reject any aim-based reduction of the definition of what is to be considered as state aid. [31]

III. In particular: Application of EU State Aid law in the "LuxLeaks" cases

Currently, the relationship between EU State Aid law and national taxes receives an increased public attention. In June and in October 2014 the European Commission initiated formal investigations under

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[18] European Commission, Commission notice on the application of the state aid rules to measures relating to direct business taxation, [1998] OJ C 384/3 points 23 et seqq.

[19] ECJ, Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, para. 81; European Commission, Commission notice on the application of the state aid rules to measures relating to direct business taxation, [1998] OJ C 384/3 point 26.

[20] ECJ, Joined Cases C-128/03 and C-129/03 *AEM SpA* [2005] ECR I-2861 (increased charge in order to offset the advantage created by the liberalisation of the market in electricity following the implementation of Directive 96/92); Case C-308/01 *GIL Insurance* [2004] ECR I-4777 (higher tax as compensation for VAT exemptions); Case C-353/95 P *Tiercé Ladbroke v Commission* [1997] ECR I-7007 (Belgian racecourse undertakings receiving a share of the levy on races in foreign countries comparable to that which it would receive if the Belgian statutory and fiscal retentions were applied).

[21] CFI, Case T-210/02 *British Aggregates v Commission* [2006] ECR II-2789.

[22] The UK imposed a levy in so-called "virgin aggregates" extracted from nature (Aggregates Levy AGL) whereas recycled aggregates were exempted from this levy.

[23] CFI, Case T-233/04, *Netherlands v Commission* [2008] ECR II-591.

[24] The Netherlands granted the right to freely trade Dutch NOx emission certificates on the market.

[25] CFI, Case T-210/02 *British Aggregates v Commission* [2006] ECR II-2789, para. 115.

[26] ECJ, Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10515; Case C-279/08 P *Commission v Netherlands*, not yet reported.

[27] ECJ, Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10515, para. 85; Case C-279/08 P *Commission v Netherlands*, para. 75.

[28] ECJ, Case C-143/99 *Adria-Wien Pipeline* [2001] I-8365, para. 41.

[29] ECJ, Case C-53/00 *Ferring* [2001] ECR I-9067.

[30] ECJ, C-280/00 *Altmark Trans* [2003] ECR I-7747.

[31] Cf. *Honoré,* Selectivity and Taxation [2009] EStAL 527; *Bartosch,* Is there a need for a rule of reason in European State aid law?, [2010] CMLR 729; *López López,* General Thought on Selectivity and Consequences of a Broad Concept of State aid in Tax Matters, [2010] EStAL 807.

Article 108 TFEU against Ireland, Luxembourg and the Netherlands in the cases "Apple",[32] "Starbucks,[33] "Fiat Finance and Trade"[34] and "Amazon"[35]. The state aid investigations concern advanced pricing arrangements (APAs) by which the respective national tax authorities determine, in advance of intra-group transactions, an appropriate set of criteria for the determination of the transfer pricing for those transactions over a fixed period of time.

1. The revolutionary step: Assessment of individual rulings instead of general rules

APAs are prior administrative rulings by the tax authorities on how specific transactions will be treated fiscally for reasons of legal certainty. APAs are requested by taxpayers from tax authorities in order to have legal certainty. By these rulings the tax authorities determine arm's-length profits for related party transactions where the uncertainty may justify an advance ruling practice designed to ascertain whether certain controlled transactions are conducted at arm's length.

The real revolutionary step in EU State Aid law is less the fact the Commission examines transfer pricing. This was already done in the past.[36] It is rather that it examines individual rulings issued by the national tax authorities on the basis of their national tax law instead of limiting the examination to tax rules. Until now the Commission examined whether a tax rule that provided for an exemption from the general tax rule constitutes State Aid. In the cases at hand the general tax rules in the Member States were no problem. But their application in individual cases became a problem, at least a problem big enough for the European Commission to initiate formal investigations.

2. The reason for these investigations: The use of discretionary powers leads to deviation from the general tax rules

The reason for the European Commission to examine individual tax rulings is the danger of individual tax rulings deviating from the general tax rules of a Member State. This deviation is, in principle, considered to be a selective measure which is the core element for establishing State Aid in terms of Article 107(1) TFEU. ***Treating taxpayers on a discretionary basis by adopting tax rulings may turn the individual application of a general measure into a selective measure***, in particular where the exercise of the discretionary power goes beyond the simple management of tax revenue by reference to objective criteria.

Therefore every decision adopted by the tax authorities, which departs from the general tax rules and benefits an individual undertaking, leads to a presumption of State aid. According to the European Commission,[37] tax rulings may be considered to be selective where:

- the tax authorities have discretion in granting administrative rulings;
- the rulings are not available to undertakings in a similar legal and factual situation;
- the administration appears to apply a more "favourable" discretionary tax treatment compared with other taxpayers in a similar factual and legal situation;

[32] Case SA.38373, [2004] OJ C 369/22.

[33] Case SA.38374, [2014] OJ C 460/11.

[34] Case SA.38375, [2014] OJ C 369/37.

[35] Case SA.38944, [2015] OJ C 58/13.

[36] See e.g. Commission Decision 2003/757/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium ([2003] OJ L 282/25)

[37] Cf. Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, para. 177 (published on the website of the European Commission in January 2014: http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html).

- the ruling has been issued in contradiction to the applicable tax provisions and has resulted in a lower amount of tax.

The **consequences** of examining individual tax rulings in addition to general tax rules are tremendous. Since, according to Article 108(3) TFEU, Member States are not allowed to put a measure that contains state aid into effect until the Commission gives its final consent, all APAs (if they are in the end to be considered as state aid) have to be notified to the European Commission prior to their conclusion. Moreover, any competitor who could prove to be affected by a ruling could ask a national court to suspend it or even withdraw it because unlawfully granted irrespective of any examination on its fairness. The European Commission would have the final say in the permissibility of APAs in the EU.

3. The purpose of advanced pricing arrangements

Advanced pricing arrangements (APAs) determine, in advance of intra-group transactions, an appropriate set of criteria for the determination of the transfer pricing for those transactions over a fixed period of time. Transfer pricing concerns the prices for commercial transactions between various parts of the same corporate group, e.g. prices set for goods sold or services provided by one subsidiary of a corporate group to another subsidiary of that same group. Those prices increase the profits of the good-selling/service-providing subsidiary and decrease the profits for the buying subsidiary. By that, transfer pricing has a direct impact on the respective taxable base of both subsidiaries.

Now, in a cross-border situation, multinational corporations underlie different tax jurisdictions with different tax rates. The after tax profit at the corporate group level is the sum of all after tax profits of the group subsidiaries. Therefore the multinational corporation has an interest in legal certainty in tax matters.

There is, furthermore, clearly a financial incentive for multinational corporations to shift profits into tax jurisdictions with lower tax rates. Such a shift can be organised by transfer pricing. The prices e.g. for services provided by a subsidiary established in a tax jurisdiction with a low tax rate to a subsidiary established in tax jurisdiction with a high tax rate may be set at a very high level. This reduces the taxable profits of the subsidiary in the high tax rate country and increases the profits of the subsidiary in the low tax rate country. The total amount of profits after taxes increases with the price charged for the respective service.

4. Advanced pricing arrangements as State aid

Already in a judgment of 22 June 2006 the ECJ decided that a deviation from the standard method to assess profits, which is based on the difference between profits and outgoings of an undertaking, may constitute state aid.[38] Whether a given APA constitutes State aid has to be assessed in accordance with the test set out in section II.

a) Granting an economic advantage

The assessment of whether or not an economic advantage has been conferred upon the beneficiary of the tax ruling requires the establishment of a benchmark based on which the "Market Economy Operator Test" is applied.

aa) Benchmark: The "arm's length principle"

In order to avoid artificial profit shifting, the OECD established in Article 9 of the OECD Model Tax Convention the so-called "arm's length principle" according to which commercial and financial relations

[38] ECJ, Joined Cases C-182/03 and C-217/03, *Forum 187* [2006] ECR I-5479, para. 95.

between associated enterprises should not differ from relations which would be made between independent companies.

Whilst the "arm's length principle" sounds completely convincing in abstract terms, it gets extremely difficult when applying it. In order to do so, the OECD Transfer Pricing Guidelines[39] provide five methods to apply the "arm's length principle" to the pricing of transactions and profit allocation between companies of the same corporate group:[40]

- the comparable uncontrolled price method;

  This method observes a comparable transaction between two independent companies and applies the same price for a comparable transaction between group companies.
- the cost plus method;

  This method approximates the income from goods sold or services provided to a group company.
- the resale minus method;

  This method approximates the costs of goods acquired from or services provided by a group company.
- the transactional net margin method

  This method compares the net profit margin (relative to an appropriate base) that the group company earns in the controlled transactions to the same net profit margins earned by the group company in comparable uncontrolled transactions or alternatively, by independent comparable companies.
- the transactional profit split method

  This method seeks to eliminate the effect on profits of special conditions made or imposed in a controlled transaction by determining the division of profits that independent enterprises would have expected to realise from engaging in the transaction or transactions.

In sum, the methods are based on a comparison of intra-group transactions with transactions between independent undertakings. However, the different methods can result in a wide range of outcomes as regards the amount of the taxable basis. They are highly dependent on the facts and circumstances of the taxpayer in question and, by that, not all methods approximate a market outcome in a correct way.

bb) Market Economy Operator Test

Therefore when assessing the appropriateness of the chosen method, the Commission will compare the choices made by the national tax authority to a hypothetical choice that would have been made by a prudent hypothetical market operator, who would require a market conform remuneration of a subsidiary or a branch, which reflect normal conditions of competition.

b) Selectivity

If a prudent hypothetical market operator would not have accepted the chosen method, this advantage has to be qualified as a deviation from the general tax system of the Member State in order to be a selective advantage. There is such a deviation if other undertakings that are in a comparable legal and factual situation as the taxpayer, who was the beneficiary of the tax ruling, would have received the same treatment by the tax authorities.

This part of the State aid assessment is the most difficult one. It partly coincides with the assessment of the proper application of the "arm's length principle" since both require the establishment of a comparable market competitor. This can raise a lot of doubts with regard to the correct classification of the taxpayer for transfer pricing purposes, with regard to the selection of the correct comparable transactions or with regard to the correct adjustments of the chosen transfer pricing method. The

[39] Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD, 2010

[40] Definitions taken from

current investigations and the subsequent judicial disputes at the General Court and the European Court of Justice will certainly provide for some clarification.

A justification is hardly imaginable. The ECJ accepted only objectives that are inherent to the nature and overall structure of the tax system. This can be assumed for APAs that "contain an interpretation of the relevant tax provisions without deviating from administrative practice".[41] "Rulings that deviate from that practice have the effect of lowering the tax burden of the undertakings concerned as compared to undertakings in a similar legal and factual situation."[42] Such rulings are, by definition, not inherent to the overall structure of the tax system. Otherwise there would not have been a necessity for a deviation from the general tax rules.

5. Consequences

The most important consequence relates to the fact that the European Commission examined individual rulings made by tax authorities instead of limiting itself to examining tax rules. This will already create legal uncertainties with regard to existing individual tax rulings. If the Commission will close the investigations with a decision declaring the APAs in question to be incompatible with the internal market, all existing APAs must be considered to be at least formally illegal since they were not notified to the European Commission, in accordance with Article 108(3) TFEU.

The European Commission will have to create quickly legal certainty with regard to APAs. This could be done by adopting a communication which includes criteria on the Commission's interpretation of the "arm's length principle". These criteria may concern transfer pricing and income allocation or the classification of entities (as transparent or opaque for tax purposes). Such a communication could set the level playing field for future APAs made by national tax authorities.

[41] Cf. e.g. European Commission, State aid case SA.38374, Starbucks, para. 125.

[42] Cf. e.g. European Commission, State aid case SA.38374, Starbucks, para. 125.

Commission notice on the application of the State aid rules to measures relating to direct business taxation

(98/C 384/03)

(Text with EEA relevance)

Introduction

1. On 1 December 1997, following a wide-ranging discussion on the need for coordinated action at Community level to tackle harmful tax competition, the Council (Ecofin) adopted a series of conclusions and agreed a resolution on a code of conduct for business taxation (hereinafter 'code of conduct') [1]. On that occasion, the Commission undertook to draw up guidelines on the application of Articles 92 and 93 of the Treaty to measures relating to direct business taxation and committed itself 'to the strict application of the aid rules concerned'. The code of conduct aims to improve transparency in the tax area through a system of information exchanges between Member States and of assessment of any tax measures that may be covered by it. For their part, the State aid provisions of the Treaty will also contribute through their own mechanism to the objective of tackling harmful tax competition.

2. The Commission's undertaking regarding State aid in the form of tax measures forms part of the wider objective of clarifying and reinforcing the application of the State aid rules in order to reduce distortions of competition in the single market. The principle of incompatibility with the common market and the derogations from that principle apply to aid 'in any form whatsoever', including certain tax measures. However, the question whether a tax measure can be qualified as aid under Article 92(1) of the Treaty calls for clarification which this notice proposes to provide. Such clarification is particularly important in view of the procedural requirements that stem from designation as aid and of the consequences where Member States fail to comply with such requirements.

3. Following the completion of the single market and the liberalisation of capital movements, it has also become apparent that there is a need to examine the particular effects of aid granted in the form of tax measures and to spell out the consequences as regards assessment of the aid's compatibility with the common market [2]. The establishment of economic and monetary union and the consolidation of national budgets which it entails will make it even more essential to have strict control of State aid in whatever form it may take. Similarly, account must also be taken, in the common interest, of the major repercussions which some aid granted through tax systems may have on the revenue of other Member States.

4. In addition to the objective of ensuring that Commission decisions are transparent and predictable, this notice also aims to ensure consistency and equality of treatment between Member States. The Commission intends, as the code of conduct notes, to examine or re-examine case by case, on the basis of this notice, the tax arrangements in force in the Member States.

A. Community powers of action

5. The Treaty empowers the Community to take measures to eliminate various types of distortion that harm the proper functioning of the common market. It is thus essential to distinguish between the different types of distortion.

6. Some general tax measures may impede the proper functioning of the internal market. In the case of such measures, the Treaty provides, on the one hand, for the possibility of harmonising Member States' tax provisions on the basis of Article 100 (Council directives, adopted unanimously). On the other, some disparities between planned or existing general provisions in Member States may distort competition and create distortions that need to be eliminated on the basis of Articles 101 and 102 (consultation of the relevant Member States by the Commission; if necessary, Council directives adopted by a qualified majority).

[1] OJ C 2, 6.1.1998, p. 1.

[2] See action plan for the single market, CSE(97) 1, 4 June 1997, strategic target 2, action 1.

7. The distortions of competition deriving from State aid fall under a system of prior Commission authorisation, subject to review by the Community judicature. Pursuant to Article 93(3), State aid measures must be notified to the Commission. Member States may not put their proposed aid measures into effect until the Commission has approved them. The Commission examines the compatibility of aid not in terms of the form which it may take, but in terms of its effect. It may decide that the Member State must amend or abolish aid which the Commission finds to be incompatible with the common market. Where aid has already been implemented in breach of the procedural rules, the Member State must in principle recover it from the recipient(s).

B. **Application of Article 92(1) of the EC Treaty to tax measures**

8. Article 92(1) states that '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 common market'. In applying the Community rules on State aid, it is irrelevant whether the measure is a tax measure, since Article 92 applies to aid measures 'in any form whatsoever'. To be termed aid, within the meaning of Article 92, a measure must meet the cumulative criteria described below.

9. Firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets. The advantage may be provided through a reduction in the firm's tax burden in various ways, including:

— a reduction in the tax base (such as special deductions, special or accelerated depreciation arrangements or the entering of reserves on the balance sheet),

— a total or partial reduction in the amount of tax (such as exemption or a tax credit),

— deferment, cancellation or even special rescheduling of tax debt.

10. Secondly, the advantage must be granted by the State or through State resources. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure. This criterion also applies to aid granted by regional or local bodies in the Member States ([3]). Furthermore, State support may be provided just as much through tax provisions of a legislative, regulatory or administrative nature as through the practices of the tax authorities.

11. Thirdly, the measure must affect competition and trade between Member States. This criterion presupposes that the beneficiary of the measure exercises an economic activity, regardless of the beneficiary's legal status or means of financing. Under settled case-law, for the purposes of this provision, the criterion of trade being affected is met if the recipient firm carries on an economic activity involving trade between Member States. The mere fact that the aid strengthens the firm's position compared with that of other firms which are competitors in intra-Community trade is enough to allow the conclusion to be drawn that intra-Community trade is affected. Neither the fact that aid is relatively small in amount ([4]), nor the fact that the recipient is moderate in size or its share of the Community market very small ([5]), nor indeed the fact that the recipient does not carry out exports ([6]) or exports virtually all its production outside the Community ([7]) do anything to alter this conclusion.

12. Lastly, the measure must be specific or selective in that it favours 'certain undertakings or the production of certain goods'. The selective advantage involved here may derive from an exception to the tax provisions of a legislative, regulatory or administrative nature or from a discretionary practice on the part of the tax authorities. However, the selective nature of a measure may be justified by 'the nature or general scheme of the system' ([8]). If so, the measure is not considered to be aid within the meaning of Article 92(1) of the Treaty. These various aspects are looked at below.

(3) Judgment of the Court of Justice in Case 248/84 Germany v. Commission [1987] ECR 4013.

(4) With the exception, however, of aid meeting the tests of the *de minimis* rule. See the Commission notice published in OJ C 68, 6.3.1996, p. 9.

(5) Joined Cases C-278/92, C-279/92 and C-280/92 Spain v. Commission [1994] ECR I-4103.

(6) Case 102/87 France v. Commission [1998] ECR 4067.

(7) Case C-142/87 Belgium v. Commission [1990] ECR I-959.

(8) Case 173/73 Italy v. Commission [1974] ECR 709.

Distinction between State aid and general measures

13. Tax measures which are open to all economic agents operating within a Member State are in principle general measures. They must be effectively open to all firms on an equal access basis, and they may not *de facto* be reduced in scope through, for example, the discretionary power of the State to grant them or through other factors that restrict their practical effect. However, this condition does not restrict the power of Member States to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the different factors of production. Provided that they apply without distinction to all firms and to the production of all goods, the following measures do not constitute State aid:

    — tax measures of a purely technical nature (for example, setting the rate of taxation, depreciation rules and rules on loss carry-overs; provisions to prevent double taxation or tax avoidance),

    — measures pursuing general economic policy objectives through a reduction of the tax burden related to certain production costs (research and development (R&D), the environment, training, employment).

14. The fact that some firms or some sectors benefit more than others from some of these tax measures does not necessarily mean that they are caught by the competition rules governing State aid. Thus, measures designed to reduce the taxation of labour for all firms have a relatively greater effect on labour-intensive industries than on capital-intensive industries, without necessarily constituting State aid. Similarly, tax incentives for environmental, R&D or training investment favour only the firms which undertake such investment, but again do not necessarily constitute State aid.

15. In a judgment delivered in 1974 [9], the Court of Justice held that any measure intended partially or wholly to exempt firms in a particular sector from the charges arising from the normal application of the general system 'without there being any justification for this exemption on the basis of the nature or general scheme of this system' constituted State aid. The judgment also states that 'Article 92 does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects'. The judgment also points out that the fact that the measure brings charges in the relevant sector more into line with those of its competitors in other Member States does not alter the fact that it is aid. Such divergences between tax systems, which, as pointed out above, are covered by Articles 100 to 102, cannot be corrected by unilateral measures that target the firms which are most affected by the disparities between tax systems.

16. The main criterion in applying Article 92(1) to a tax measure is therefore that the measure provides in favour of certain undertakings in the Member State an exception to the application of the tax system. The common system applicable should thus first be determined. It must then be examined whether the exception to the system or differentiations within that system are justified 'by the nature or general scheme' of the tax system, that is to say, whether they derive directly from the basic or guiding principles of the tax system in the Member State concerned. If this is not the case, then State aid is involved.

The selectivity or specificity criterion

17. The Commission's decision-making practice so far shows that only measures whose scope extends to the entire territory of the State escape the specificity criterion laid down in Article 92(1). Measures which are regional or local in scope may favour certain undertakings, subject to the principles outlined in paragraph 16. The Treaty itself qualifies as aid measures which are intended to promote the economic development of a region. Article 92(3)(a) and (c) explicitly provides, in the case of this type of aid, for possible derogations from the general principle of incompatibility laid down in Article 92(1).

18. The Treaty clearly provides that a measure which is sectorally specific is caught by Article 92(1). Article 92(1) expressly includes the phrase 'the production of certain goods' among the criteria determining whether there is aid that is subject to Commission

(9) See footnote 8.

monitoring. According to well-established practice and case-law, a tax measure whose main effect is to promote one or more sectors of activity constitutes aid. The same applies to a measure that favours only national products which are exported ([10]). Furthermore, the Commission has taken the view that a measure which targets all of the sectors that are subject to international competition constitutes aid ([11]). A derogation from the base rate of corporation tax for an entire section of the economy therefore constitutes, except for certain cases ([12]), State aid, as the Commission decided for a measure concerning the whole of the manufacturing sector ([13]).

19. In several Member States, different tax rules apply depending on the status of the undertakings. Some public undertakings, for example, are exempt from local taxes or from company taxes. Such rules, which accord preferential treatment to undertakings having the legal status of public undertaking and carrying out an economic activity, may constitute State aid within the meaning of Article 92 of the Treaty.

20. Some tax benefits are on occasion restricted to certain types of undertaking, to some of their functions (intra-group services, intermediation or coordination) or to the production of certain goods. In so far as they favour certain undertakings or the production of certain goods, they may constitute State aid as referred to in Article 92(1).

Discretionary administrative practices

21. The discretionary practices of some tax authorities may also give rise to measures that are caught by Article 92. The Court of Justice acknowledges that treating economic agents on a discretionary basis may mean that the individual application of a general measure takes on the features of a selective measure, in particular where exercise of the discretionary power goes beyond the simple management of tax revenue by reference to objective criteria ([14]).

22. If in daily practice tax rules need to be interpreted, they cannot leave room for a discretionary treatment of undertakings. Every decision of the administration that departs from the general tax rules to the benefit of individual undertakings in principle leads to a presumption of State aid and must be analysed in detail. As far as administrative rulings merely contain an interpretation of general rules, they do not give rise to a presumption of aid. However, the opacity of the decisions taken by the authorities and the room for manoeuvre which they sometimes enjoy support the presumption that such is at any rate their effect in some instances. This does not make Member States any less able to provide their taxpayers with legal certainty and predictability on the application of general tax rules.

Justification of a derogation by 'the nature or general scheme of the system'

23. The differential nature of some measures does not necessarily mean that they must be considered to be State aid. This is the case with measures whose economic rationale makes them necessary to the functioning and effectiveness of the tax system ([15]). However, it is up to the Member State to provide such justification.

24. The progressive nature of an income tax scale or profit tax scale is justified by the redistributive purpose of the tax. Calculation of asset depreciation and stock valuation methods vary from one Member State to another, but such methods may be inherent in the tax systems to which they belong. In the same way, the arrangements for the collection of fiscal debts can differ from one Member State to the other. Lastly, some conditions may be justified by objective differences between taxpayers. However, if the tax authority has discretionary freedom

([10]) Joined Cases 6 and 11/69 Commission v. France [1969] ECR 561.

([11]) Commission Decision 97/239/EC of 4 December 1996 in the 'Maribel bis/ter' case (OJ L 95, 10.4.1997, p. 25) (currently *sub judice*, Case C-75/97).

([12]) In particular, agriculture and fisheries, see paragraph 27.

([13]) Commission decision of 22 July 1998 in the 'Irish corporation tax' case (SG(98) D/7209) not yet published.

([14]) Case C-241/94 France v. Commission (Kimberly Clark Sopalin) [1996] ECR I-4551.

([15]) Commission decision 96/369/EC of 13 March 1996 concerning fiscal aid given to German airlines in the form of a depreciation facility (OJ L 146, 20.6.1996, p. 42).

to set different depreciation periods or different valuation methods, firm by firm, sector by sector, there is a presumption of aid. Such a presumption also exists when the fiscal administration handles fiscal debts on a case by case basis with an objective different from the objective of optimising the recovery of tax debts from the enterprise concerned.

25. Obviously, profit tax cannot be levied if no profit is earned. It may thus be justified by the nature of the tax system that non-profit-making undertakings, such as foundations or associations, are specifically exempt from the taxes on profits if they cannot actually earn any profits. Furthermore, it may also be justified by the nature of the tax system that cooperatives which distribute all their profits to their members are not taxed at the level of the cooperative when tax is levied at the level of their members.

26. A distinction must be made between, on the one hand, the external objectives assigned to a particular tax scheme (in particular, social or regional objectives) and, on the other, the objectives which are inherent in the tax system itself. The whole purpose of the tax system is to collect revenue to finance State expenditure. Each firm is supposed to pay tax once only. It is therefore inherent in the logic of the tax system that taxes paid in the State in which the firm is resident for tax purposes should be taken into account. Certain exceptions to the tax rules are, however, difficult to justify by the logic of a tax system. This is, for example, the case if non-resident companies are treated more favourably than resident ones or if tax benefits are granted to head offices or to firms providing certain services (for example, financial services) within a group.

27. Specific provisions that do not contain discretionary elements, allowing for example tax to be determined on a fixed basis (for example, in the agriculture or fisheries sectors), may be justified by the nature and general scheme of the system where, for example, they take account of specific accounting requirements or of the importance of land in assets which are specific to certain sectors; such provisions do not therefore constitute State aid. Lastly, the logic underlying certain specific provisions on the taxation of small and medium-sized enterprises (including small agricultural enterprises [16]) is comparable to that underlying the progressiveness of a tax scale.

[16] Operators in the agricultural sector with no more than 10 annual work units.

C. Compatibility with the common market of State aid in the form of tax measures

28. If a tax measure constitutes aid that is caught by Article 92(1), it can nevertheless, like aid granted in other forms, qualify for one of the derogations from the principle of incompatibility with the common market provided for in Article 92(2) and (3). Furthermore, where the recipient, whether a private or public undertaking, has been entrusted by the State with the operation of services of general economic interest, the aid may also qualify for application of the provisions of Article 90 of the Treaty [17].

29. The Commission could not, however, authorise aid which proved to be in breach both of the rules laid down in the Treaty, particularly those relating to the ban on discrimination and to the right of establishment, and of the provisions of secondary law on taxation [18]. Such aspects may, in parallel, be the object of a separate procedure on the basis of Article 169. As is clear from case-law, those aspects of aid which are indissolubly linked to the object of the aid and which contravene specific provisions of the Treaty other than Articles 92 and 93 must however be examined in the light of the procedure under Article 93 as part of an overall examination of the compatibility or the incompatibility of the aid.

30. The qualification of a tax measure as harmful under the code of conduct does not affect its possible qualification as a State aid. However the assessment of the compatibility of fiscal aid with the common market will have to be made, taking into account, *inter alia*, the effects of aid that are brought to light in the application of the code of conduct.

31. Where a fiscal aid is granted in order to provide an incentive for firms to embark on certain specific projects (investment in particular) and where its intensity is limited with respect to the costs of carrying out the project, it is no different from a subsidy and may be accorded the same treatment. Nevertheless, such arrangements must lay down sufficiently transparent rules to enable the benefit conferred to be quantified.

[17] Judgment of the Court of First Instance in Case T-106/95 FFSA and others v. Commission [1997] ECR II-229. Order of the Court of Justice in Case C-174/97 P [1998] I-1303.

[18] Case 74/76 Iannelli v. Meroni [1977] ECR 557. See also Cases 73/79 'Sovraprezzo' [1980] ECR 1533, T-49/93 'SIDE' [1995] ECR II-2501 and Joined Cases C 142 and 143/80 'Salengo' [1981] ECR 1413.

32. In most cases, however, tax relief provisions are general in nature: they are not linked to the carrying-out of specific projects and reduce a firm's current expenditure without it being possible to assess the precise volume involved when the Commission carries out its *ex ante* examination. Such measures constitute 'operating aid'. Operating aid is in principle prohibited. The Commission authorises it at present only in exceptional cases and subject to certain conditions, for example in shipbuilding, certain types of environmental protection aid ([19]) and in regions, including ultra-peripheral regions, covered by the Article 92(3)(a) aid derogation provided that they are duly justified and their level is proportional to the handicaps they are intended to offset ([20]). It must in principle (with the exception of the two categories of aid mentioned below) be degressive and limited in time. At present, operating aid can also be authorised in the form of transport aid in ultra-peripheral regions and in certain Nordic regions that are sparsely populated and are seriously handicapped in terms of accessibility. Operating aid may not be authorised where it represents aid for exports between Member States. As for State aid in favour of the maritime transport sector the specific rules for that sector apply ([21]).

33. If it is to be considered by the Commission to be compatible with the common market, State aid intended to promote the economic development of particular areas must be 'in proportion to, and targeted at, the aims sought'. For the examination of regional aid the criteria allow account to be taken of other possible effects, in particular of certain effects brought to light by the code of conduct. Where a derogation is granted on the basis of regional criteria, the Commission must ensure in particular that the relevant measures:

— contribute to regional development and relate to activities having a local impact. The establishment of off-shore activities does not, to the extent that their externalities on the local economy are low, normally provide satisfactory support for the local economy,

— relate to real regional handicaps. It is open to question whether there are any real regional handicaps for activities for which the additional costs have little incidence, such as for example the transport costs for financing activities, which lend themselves to tax avoidance,

— are examined in a Community context ([22]). The Commission must in this respect take account of any negative effects which such measures may have on other Member States.

D. **Procedures**

34. Article 93(3) requires Member States to notify the Commission of all their 'plans to grant or alter aid' and provides that any proposed measures may not be put into effect without the Commission's prior approval. This procedure applies to all aid, including tax aid.

35. If the Commission finds that State aid which has been put into effect in breach of this rule does not qualify for any of the exemptions provided for in the Treaty and is therefore incompatible with the common market, it requires the Member State to recover it, except where that would be contrary to a general principle of Community law, in particular legitimate expectations to which the Commission's behaviour can give rise. In the case of State aid in the form of tax measures, the amount to be covered is calculated on the basis of a comparison between the tax actually paid and the amount which should have been paid if the generally applicable rule had been applied. Interest is added to this basic amount. The interest rate to be applied is equivalent to the reference rate used to calculate the grant equivalent of regional aid.

36. Article 93(1) states that the Commission 'shall in cooperation with Member States, keep under constant review all systems of aid existing in those States'. Such review extends to State aid in the form of tax measures. So as to allow such review to be carried out, the Member States are required to submit to the Commission every year reports on their existing State aid systems. In the case of tax relief or full or partial tax exemption, the reports must provide an estimate of budgetary revenue lost. Following its review, the Commission may, if it

([19]) Community guidelines on State aid for environmental protection (OJ C 72, 10.3.1994, p. 3).

([20]) Guidelines on national regional aid (OJ C 74, 10.3.1998, p. 9).

([21]) Community guidelines on State aid to maritime transport (OJ C 205, 5.7.1997, p. 5).

([22]) Case 730/79 Philip Morris v. Commission [1980] ECR 2671.

considers that the scheme is not or is no longer compatible with the common market, propose that the Member State amend or abolish it.

E. **Implementation**

37. The Commission will, on the basis of the guidelines set out in this notice and as from the time of its publication, examine the plans for tax aid notified to it and tax aid illegally implemented in the Member States and will review existing systems. This notice is published for guidance purposes and is not exhaustive. The Commission will take account of all the specific circumstances in each individual case.

38. The Commission will review the application of this notice two years after its publication.

Non-opposition to a notified concentration

(Case No IV/M.1202 — Renault/Iveco)

(98/C 384/04)

(Text with EEA relevance)

On 22 October 1998, the Commission decided not to oppose the above notified concentration and to declare it compatible with the common market. This decision is based on Article 6(1)(b) of Council Regulation (EEC) No 4064/89. The full text of the decision is only available in French and will be made public after it is cleared of any business secrets it may contain. It will be available:

— as a paper version through the sales offices of the Office for Official Publications of the European Communities (see list on the last page),

— in electronic form in the 'CFR' version of the CELEX database, under document number 398M1202. CELEX is the computerised documentation system of European Community law; for more information concerning subscriptions please contact:

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Withdrawal of notification of a concentration

(Case No IV/M.1246 — LHZ/Carl Zeiss)

(98/C 384/05)

(Text with EEA relevance)

On 24 September 1998, the European Commission received notification of a proposed concentration between LH Systems and Carl Zeiss Stiftung. On 1 December 1998, the notifying parties informed the Commission that they withdrew their notification.

Table 4: Adjusted top statutory tax rate on corporate income, 1995–2014

(%)

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Belgium	40.2	40.2	40.2	40.2	40.2	40.2	40.2	40.2	34.0	34.0	34.0	34.0	34.0	34.0	34.0	34.0	34.0	34.0	34.0	34.0
Bulgaria	40.0	40.0	40.2	37.0	34.3	32.5	28.0	23.5	23.5	19.5	15.0	15.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0
Czech Republic	41.0	39.0	39.0	35.0	35.0	31.0	31.0	31.0	31.0	28.0	26.0	24.0	24.0	21.0	20.0	19.0	19.0	19.0	19.0	19.0
Denmark	34.0	34.0	34.0	34.0	32.0	32.0	30.0	30.0	30.0	30.0	28.0	28.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	24.5
Germany	56.8	56.7	56.7	56.0	51.6	51.6	38.3	38.3	39.6	38.3	38.7	38.7	38.7	30.2	30.2	30.2	30.2	30.2	30.2	30.2
Estonia	26.0	26.0	26.0	26.0	26.0	26.0	26.0	26.0	26.0	26.0	24.0	23.0	22.0	21.0	21.0	21.0	21.0	21.0	21.0	21.0
Ireland	40.0	38.0	36.0	32.0	28.0	24.0	20.0	16.0	12.5	12.5	12.5	12.5	12.5	12.5	12.5	12.5	12.5	12.5	12.5	12.5
Greece	40.0	40.0	40.0	40.0	40.0	40.0	37.5	35.0	35.0	35.0	32.0	29.0	25.0	35.0	35.0	24.0	20.0	20.0	26.0	26.0
Spain	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	32.5	30.0	30.0	30.0	30.0	30.0	30.0	30.0
France	36.7	36.7	41.7	41.7	40.0	37.8	36.4	35.4	35.4	35.4	35.0	34.4	34.4	34.4	34.4	34.4	34.4	36.1	36.1	38.0
Croatia	25.0	25.0	35.0	35.0	35.0	35.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0
Italy	52.2	53.2	53.2	41.3	41.3	41.3	40.3	40.3	38.3	37.3	37.3	37.3	37.3	31.4	31.4	31.4	31.4	31.4	31.4	31.4
Cyprus	25.0	25.0	25.0	25.0	25.0	29.0	28.0	28.0	15.0	15.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	12.5	12.5
Latvia	25.0	25.0	25.0	25.0	25.0	25.0	25.0	22.0	19.0	15.0	15.0	15.0	15.0	15.0	15.0	15.0	15.0	15.0	15.0	15.0
Lithuania	29.0	29.0	29.0	29.0	29.0	24.0	24.0	15.0	15.0	15.0	15.0	19.0	18.0	15.0	20.0	15.0	15.0	15.0	15.0	15.0
Luxembourg	40.9	40.9	39.3	37.5	37.5	37.5	37.5	30.4	30.4	30.4	30.4	29.6	29.6	29.6	28.6	28.6	28.8	28.8	29.2	29.2
Hungary	19.6	19.6	19.6	19.6	19.6	19.6	19.6	19.6	19.6	17.6	17.5	17.5	21.3	21.3	21.3	20.6	20.6	20.6	20.6	20.6
Malta	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0	35.0
Netherlands	35.0	35.0	35.0	35.0	35.0	35.0	35.0	34.5	34.5	34.5	31.5	29.6	25.5	25.5	25.5	25.5	25.0	25.0	25.0	25.0
Austria	34.0	34.0	34.0	34.0	34.0	34.0	34.0	34.0	34.0	34.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0
Poland	40.0	40.0	38.0	36.0	34.0	30.0	28.0	28.0	27.0	19.0	19.0	19.0	19.0	19.0	19.0	19.0	19.0	19.0	19.0	19.0
Portugal	39.6	39.6	39.6	37.4	37.4	35.2	35.2	33.0	33.0	27.5	27.5	27.5	26.5	26.5	26.5	29.0	29.0	31.5	31.5	31.5
Romania	38.0	38.0	38.0	38.0	38.0	25.0	25.0	25.0	25.0	25.0	16.0	16.0	16.0	16.0	16.0	16.0	16.0	16.0	16.0	16.0
Slovenia	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	23.0	22.0	21.0	20.0	20.0	18.0	17.0	17.0
Slovakia	40.0	40.0	40.0	40.0	40.0	29.0	29.0	25.0	25.0	19.0	19.0	19.0	19.0	19.0	19.0	19.0	19.0	19.0	23.0	22.0
Finland	25.0	28.0	28.0	28.0	28.0	29.0	29.0	29.0	29.0	29.0	26.0	26.0	26.0	26.0	26.0	26.0	26.0	24.5	24.5	20.0
Sweden	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	26.3	26.3	26.3	26.3	22.0	22.0
United Kingdom	33.0	33.0	31.0	31.0	30.0	30.0	30.0	30.0	30.0	30.0	30.0	30.0	30.0	30.0	28.0	28.0	26.0	24.0	23.0	21.0
Norway	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0	27.0
Iceland	33.0	33.0	33.0	33.0	30.0	30.0	30.0	18.0	18.0	18.0	18.0	18.0	18.0	15.0	15.0	18.0	20.0	20.0	20.0	20.0

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Simple averages																				
EU-28	35.0	35.0	35.2	34.2	33.5	32.0	30.4	29.0	28.0	26.8	25.3	25.1	24.4	23.8	23.8	23.2	23.0	22.9	23.2	22.9
EU-27	35.3	35.3	35.2	34.1	33.5	31.9	30.7	29.3	28.3	27.0	25.5	25.3	24.5	24.0	23.9	23.3	23.1	23.0	23.3	23.1
EA-18	36.2	36.3	36.4	35.2	34.7	33.9	32.6	31.2	29.8	28.8	27.4	27.0	26.2	25.7	25.6	25.0	24.8	24.8	25.5	25.3
EA-17	36.8	37.0	37.0	35.8	35.2	34.4	33.0	31.8	30.4	29.6	28.1	27.7	26.8	26.3	26.2	25.6	25.4	25.4	26.1	25.9

Notes:
1. Only the 'basic' (non-targeted) top rate is presented here; some countries apply small profits rates or special rates, e.g., in case the investment is financed through issuing new equity, or alternative rates for different sectors. Such targeted tax rates can be substantially lower than the effective top rate.
2. Existing surcharges and local taxes are included (see country notes below).

Country notes:
Belgium: (a) A 3 % 'crisis' surcharge is applicable since 1993; (b) since 01.01.2006 Belgium applies a system of notional interest deduction (ACE) which reduces the 'effective tax rate' by several percentage points, depending on the difference between the rate of return and the rate of the notional interest deduction.
Cyprus: In 2003 and 2004 the rate includes the additional 5 % surcharge on companies with income exceeding EUR 1.7 million. In 2013, under the macro-financial adjustment programme and prior to the first disbursement of assistance, the corporate income tax rate was increased to 12.5 % (with effect on 01.01.2013).
France: 33.33 %; 34.43 % including 3.3 % additional social surcharge for large companies; 36.1 % (2012–13) and 38.0 % (2014–15) including the temporary surcharge (contribution exceptionnelle) for very large companies (turnover above EUR 250 million). Companies can benefit from a tax credit equal to 6 % (since 2014) of the payroll for (most) employees. The local business tax (contribution économique territoriale) is not included (capped to 3 % of value added).
Germany: The rate includes the solidarity surcharge of 5.5 % and the Berlin rate for the trade tax ('Gewerbesteuer' — 14.35 %; in 2012 average trade tax rate for former federal territory was 13.825 % and 12.985 % for new Länder). From 1995 to 2000 the rates for Germany refer only to retained profits. For distributed profits lower rates applied. Until 2007 the trade tax was an allowable expense for the purpose of calculating the income on which corporation tax is payable. As from 2008 enterprises are subject to an overall tax burden of around 30 %.
Greece: The rate includes a special contribution introduced in 2009 (2008 income) on companies with net income above EUR 5 million. The contribution is levied at progressive rates, with the marginal rate reaching 10 %. In 2010 (2009 income) the contribution applies to income above EUR 100 000, top rate being 10 % (income above EUR 5 million).
Hungary: Including the local business tax of maximum 2 % that applies on the gross operating profit (turnover minus costs) and which is deductible from the CIT. In the typical case of a local tax of 2 %, the total tax paid is 19*(1-2 %) + 2 = 20.62. For energy providers and other utilities, a cca. 50 % CIT rate applies. An 'Innovation tax' of 0.3 % is also due on the same base as the local business tax while micro and small enterprises are exempted from paying (not included in the calculation).
Ireland: 25 % for non-trading income, gains and profits from mining petroleum and land dealing activities. Until 2003, Ireland applied a 10 % CIT rate to qualifying manufacturing and services companies.
Italy: As from 1998 the rates for Italy include IRAP (rate 3.90 %), a local tax levied on a tax base broader than corporate income. The rate may vary up to 0.92 percentage point depending on location. 'Robin tax' on financial institutions is not included. From 2012, an ACE is in force, reducing the effective tax rate (see also previous note on Belgium).
Lithuania: A 'social tax' (applied as a surcharge) has been introduced in 2006 and 2007 (at 4 % and 3 % respectively). As from 2010, companies with up to ten employees and taxable income not exceeding LTL 500 000 (approx. EUR 144 810), benefit from a reduced tax rate of 5 % . As from 2012, the threshold has been increased to LTL 1 000 000 (about EUR 289 603).
Luxembourg: Basic local tax (municipal business tax) is 3 % to be multiplied by a municipal factor ranging from 2 to 3.5. The rate in the table is for Luxembourg City.
Malta: The rate shown does not take into account the corporate tax refund system
Portugal: As from 2007 the rate for Portugal includes the maximum 1.5 % rate of a municipal surcharge. As from 01.01.2014 the State tax is 3 % on taxable profits between EUR 1.5 and 7.5 million, 5 % on taxable profits between EUR 7.5 and 35 million and 7 % on profits exceeding EUR 35 million.
Slovakia: the standard CIT rate has been reduced to 22 % on the 01.01.2014, together with the introduction of a minimum (lumpsum) tax, whose value vary with turnover (EUR 480 for not VAT registered companies, EUR 960 if small VAT registered companies and EUR 2 880 if annual turnover above EUR 500 000)
United Kingdom: Rates given are rate for the tax year starting in April. The main rate of corporation tax has been cut from 28 % (2010) to 21 % (2014) and the government has announced a further cut by April 2015.

Source: Commission services