Comment

State aid and tax: where next?

Speed read

Increased information available to the European Commission is likely to fuel further investigations into perceived tax 'favours' by member states. While transfer pricing rulings will remain a focus, we could see the Commission raising its sights: potential future targets could include so called 'negative state aid' measures, where categories of taxpayers are disadvantaged, and certain sector-specific tax measures.

Liesl Fichardt
Clifford Chance
Liesl Fichardt is a tax partner at Clifford Chance, based in London, and is head of tax dispute resolution. She has extensive experience in tax litigation, negotiation with revenue authorities and settlement of disputes. She has conducted cases in the tribunal, the courts of appeal and the European Court of Justice. Email: liesl.fichardt@cliffordchance.com; tel: 020 7006 2044.

The European Commission's investigations into perceived tax 'favours' by member states show no sign of abating. From 1 January 2017, the Commission will have even more information at its disposal, as member states will be required to notify both the Commission and each other about new tax rulings and advance pricing agreements. It seems inevitable that the breadth and scale of tax-related state aid investigations will continue to increase.

Rulings concerning transfer pricing will, without doubt, remain an area of particular interest. The Commission has recently recruited a number of additional transfer pricing specialists, and many of its recent high profile investigations into multinationals have targeted this area. Another main focus of the Commission will continue to be tax legislation which grants preferential treatment to particular categories of taxpayer. For example, in January 2016 it concluded that the Belgian 'excess profit' scheme, which reduced the tax base of eligible multinational groups, constituted illegal state aid. These cases are likely to result in significant litigation.

> The Commission may well set itself altogether more ambitious sights

It remains to be seen whether the Commission will react to recent pressure from the other side of the Atlantic, where Robert Stack (the US Treasury official responsible for international tax policy) has accused the Commission of 'disproportionately targeting US companies', and members of the US Senate have urged the US Treasury to consider imposing punitive taxation on European companies in retaliation.

There are tentative signs that this may be having an effect. The Commission took the trouble to stress that 'mainly European companies' were involved in the Belgian 'excess profits' scheme; and it has been reported that the Commission is examining alleged state aid benefiting a major Swedish furniture retailer.

> If the Commission fails to act in cases of negative state aid, it may well find that taxpayers are increasingly willing to use state aid as a 'sword' to protect their own interests

The Commission may well set itself altogether more ambitious sights. Its recent high profile state aid investigations have focused on measures perceived to grant tax advantages to categories of taxpayers. The Commission has not yet focused its attention on measures intended to disadvantage categories of taxpayers, where these have the indirect effect of advantaging other taxpayers in similar circumstances (in many cases, market competitors), otherwise referred to as 'negative state aid'.

Particular targets could include certain sector-specific tax measures, such as those imposed on banks in the UK and Poland, under which some taxpayers in one sector (in this case, banks) are disadvantaged, but a competitive advantage results to other taxpayers in similar circumstances (such as non-bank lenders). Another example could be the recent legislation ending the entitlement of carried interest holders in fund partnerships to reduce their capital gains liability through 'base-cost shifting'.

The recent crowd-funded judicial review application by buy-to-let landlords, challenging changes to stamp duty land tax and the deductibility of mortgage interest on the basis that they constitute state aid to corporate landlords, suggests that if the Commission fails to act in cases of negative state aid, it may well find that taxpayers are increasingly willing to use state aid as a 'sword' to protect their own interests. State aid taxation issues are unlikely to disappear any time soon. ■

With acknowledgment to the contribution by Robert Sharpe, associate at Clifford Chance.

Most read on taxjournal.com:

1. **Employment tax: preparing for 2016/17** (Mark Groom, 10.2.16)
2. **Quarterly transfer pricing briefing: 2015/16** (Shiv Mahalingham, 3.2.16)
3. **Tax disputes in 2016** (Rupert Shiers, 17.2.16)
4. **The European Commission's anti-tax avoidance package** (Heather Corben, 3.2.16)
5. **A corporation tax system under strain** (David Smith, 3.2.16)