

## client alert

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### TAX AND STATE AID

On 19 May 2016, the European Commission issued its Notice on the notion of State aid (hereafter 'the Notice'). This Notice constitutes the latest step in the modernisation of the EU framework on State aid control.

The modernisation of the European Commission's State aid policy is a process which was launched in 2012 and implemented in several steps. It began with the revision of the guidelines applicable to aid in specific sectors (such as the Environmental, Regional or Risk Capital Guidelines, cf. [our January 2014 alert](#)).

The European Commission then reviewed and amended the General Block Exemption Regulation (GBER) in order to focus the Commission's resources on enforcing State aid rules in cases with the biggest impact on the Single Market.

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#### editorial

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This process continued and reaches completion with this new Notice, which aims to both clarify the enforcement of EU state aid rules and facilitate public investments.

The Commission's overall objective is to increase legal certainty and cut red tape for public authorities and companies. This will facilitate public investment in the European Union by helping Member States and companies to design public funding in ways that do not distort competition.

The Notice gives clear guidance in that respect, i.e. it explains when public investments do not involve State aid, notably because they do not risk distorting the level playing field in the Single Market or risk crowding out private investment.

## **THE NEW NOTICE: A WELCOME ADDITION FOR PUBLIC AUTHORITIES AND COMPANIES**

This new Notice constitutes a useful addition to the tools already in place (GBER, the various Guidelines...). Indeed, until now, the notion of State aid as such had not been addressed separately and there was only limited guidance on this topic.

The Notice provides guidance on all aspects of the definition of State aid. As a result, the Notice is structured on the basis of four elements of aid, namely:

- The State origin (criteria of accountability and the involvement of State resources),
- The notion of advantage,
- The concept of selectivity (*de jure* and *de facto*, regional selectivity),
- The effect on competition and on trade between Member States.

The Notice also deals with many fundamental concepts regarding the assessment of State aid: the concepts of undertaking and of economic activity, while taking into account the specifics of certain sectors such as social security, health care, education and research activities, as well as culture conservation.

## **A SYSTEMATIC SUMMARY OF THE CASE LAW OF THE EU COURTS AND OF THE COMMISSION'S DECISIONAL PRACTICE**

For the topics addressed, the Notice intends to be both practical and systematic. It provides a systematic summary of the case law of the EU courts and of the Commission's decisional practice on the assessment of the presence of State aid. Moreover, the Notice provides concrete examples in order to better assess specific investments:

- Public investment for the construction or upgrade of infrastructure is free of State aid, if it does not directly compete with other infrastructure of the same kind;
- Even if infrastructure is built with the help of State aid, there is no aid to its operator and users if they pay a market price;
- EU state aid control focuses on public investments that have a cross-border effect. Funding provided to local infrastructures or local services which are unlikely to attract customers from other Member States, and which only has a marginal effect on cross-border investment, does not fall under EU State aid rules;
- Public financing of certain cultural activities which are not commercial but provided for free or against a minimal fee, will not be covered by State aid rules.

This Notice contributes therefore to a clarification of the scope of EU State aid rules, regarding general concepts, and also provides key clarifications for certain types of public investments.

## TOWARDS MORE CLARITY IN TAX MATTERS?

Another key aspect of this Notice on the notion of State aid is the section devoted to tax matters. The Notice provides in particular additional information on the application of the notion of State aid to tax rulings.

The revelations of the "Lux Leaks" back in November 2014 were shortly followed by a series of investigations by the European Commission, some of which were actually launched earlier in 2014 before the "Lux Leaks". But the recovery decisions dealing with these tax practices (cf. the Starbucks and Fiat decisions, and the Belgian excess profit tax scheme decision) raise many complex legal issues, notably regarding the application of the "arm's length principle" (developed by the OECD) to intra-group transactions.

By referring to the OECD principles on transfer pricing and by deviating from previous decisional practice, these Commission decisions have given rise to significant legal uncertainty. This uncertainty is all the more detrimental since, in case of recovery, the financial consequences for aid recipients can be quite significant.

Adopted before the gathering of tax experts at a Forum organized by the Commission in June 2016, this Notice may be seen as an attempt to define a European policy regarding State aid rules applied to taxation. This field of State aid was recently rediscovered and has drawn much attention, but it is still likely to evolve and change. The summary provided by the Commission may therefore be at best premature, at worst incomplete.

Indeed, several appeals are currently pending before the European Court of Justice against decisions adopted by the Commission in late 2015 and early 2016 (Starbucks, Fiat and the Belgian excess profit tax scheme). In addition, lawsuits and actions for damages by competitors which consider they were put at a disadvantage are on the rise.

Moreover, the Notice refers to some Commission decisions that are still confidential - only the non-confidential version of the decision on the Belgian excess profit tax scheme has been published to date - which partly limits the interest of this chapter of the Notice for now.

This Notice is therefore only a first step towards greater clarity regarding the application of State aid in the field of taxation; the pending questions and legal uncertainty will eventually be addressed when the European Court of Justice issues its final decisions.

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