Executive summary

On 19 May 2016, as part of the State Aid Modernisation package, the European Commission (EC or Commission) published the Notice on the notion of State aid (Notice).

The notion of State aid is provided by art. 107(1) of the Treaty on the Functioning of the European Union (TFEU). The Notice is intended to assist public authorities in identifying when, in particular, public investments do not entail State aid in the light of art. 107(1). However, it also contains general guidance on the scope and definition of the EU State aid rules as they are applied by the EC. The clarifications contained in the Notice reflect the case law of the Court of Justice of the European Union (CJEU) as well as the EC decisions approach. Accordingly, the Notice is an important tool to understand the EC positions and practice regarding State aid.

Detailed discussion

More specifically, the Notice clarifies the following issues concerning potential fiscal State aid.
Cooperative societies
Generally, cooperative societies are not in a comparable factual and legal situation to that of commercial companies and consequently do not entail State aid, provided that: (i) they operate in the economic interest of their members; (ii) the relations with their members are personal and individual; (iii) the members are actively engaged in the work of the cooperatives and iv) they are entitled to equitable distribution of their economic results.

Undertakings for collective investment
Tax measures that serve the purpose of tax neutrality for investments in collective investment vehicles (i.e., that taxpayers are treated the same whether they invest in assets, directly or indirectly through investment funds) are not selective, if they effectively eliminate economic double taxation in line with the logic of the tax system in question. By contrast, measures which are solely open to funds meeting certain conditions, while excluding other funds in a comparable factual and legal situation, should be viewed as selective.

Tax amnesties
Measures ensuring immunity from criminal penalties, fines and interest payments (i.e., tax amnesties) should not be classified as selective, provided that: (i) any undertaking, irrespective of its size or sector, can benefit from the measure; (ii) there is no de facto selectivity and no discretion for the tax authorities in granting the measure; and (iii) the measure does not entail a waiver from verification.

Tax rulings
The Notice confirmed that tax rulings which serve the purpose of legal certainty and predictability on application of the ordinary tax regime are in line with the State aid rules and this purpose is best served if the administrative ruling practice is transparent and the rulings are published. In particular, the Notice highlights that tax rulings that approve a transfer pricing (TP) methodology not in line with the arm's length principle, as interpreted by the Commission, may entail selectivity. According to the EC, the arm's length principle for State aid purposes is the principle of equal treatment embodied in art. 107(1) TFEU, which is binding on all Member States, independently of whether a Member State has incorporated the arm's length principle into its national legal system and in what form. A tax ruling in line with the arm's length principle ensures that a company belonging to a group is treated in the same way as stand-alone companies that are taxed on their accounting profits, which reflect market prices according to the Commission's viewpoint.

In its application, the Commission may refer to the Organisation for Economic Co-operation and Development (OECD) TP Guidelines as an additional tool, which should ensure a reliable approximation of a market-based outcome and capture the international consensus on TP matters. Hence, a TP arrangement is unlikely to be considered selective if the following three criteria are fulfilled:
- It complies with the OECD TP guidelines.
- It gives guidance on the choice of the most appropriate method.
- It leads to a reliable approximation of a market based outcome.

By contrast, tax rulings entail selectivity if they:
- Reduce the tax burden by misapplying the national tax regime.
- Are not available to undertakings in a similar factual and legal situation.

Or
- Provide for a preferential treatment compared with the treatment of undertakings in a similar factual and legal situation, e.g., if they derogate from the arm's length principle because the methodology which is endorsed produces a different result than a market-based outcome. The same applies if the ruling allows its addressee to use alternative, more indirect methods for calculating taxable profits, for example the use of fixed margins for a cost-plus or resale-minus method for determining an appropriate transfer pricing, while more direct methods are available.

Tax settlements
Tax settlements between the taxpayer and the tax authorities may constitute State aid if they reduce the tax liability in a disproportionate manner or the tax settlement is contrary to the applicable tax provisions to the advantage of the taxpayer.

Depreciation and amortization rules
Depreciation and amortization rules are usually regarded as purely technical and thus fall outside the scope of State aid. However, they may present State aid issues if they, for example, give leeway to the tax authorities in determining
the depreciation periods or valuation methods depending on the company or sector. Therefore, a discretionary power of the tax authorities with regard to the application of the rules as well as a compulsory prior authorization from the tax authorities in order to apply a depreciation scheme could be seen as indication of selectivity.

**Fixed basis tax regime for specific activities**
Specific provisions allowing the determination of income tax on a fixed basis are not selective if: (i) the regime is justified by the concern of avoiding disproportionate administrative burden in relation to certain sectors or the size of the undertakings; and (ii) it does not imply a lower tax burden to those undertakings benefitting from the regime as compared to those that are out of scope.

**Anti-abuse rules**
The exclusion of certain taxpayers or transactions from the scope of the anti-abuse rules might be selective, if it contradicts the logic of the rule in question.

**Excise Duties**
Although excise duties are largely harmonized, they can raise concern from a State aid perspective if they are reduced in favor of certain products hence granting a selective advantage to the undertakings that use that product as an input or sell it on the market.

**Impact**
In its introductory remarks, the Commission confirms that the Notice clarifies the objective legal concept of the notion of State aid as interpreted by the EU Courts. Where it lacks such an interpretation by the EU Courts, the clarification should serve as the Commission’s understanding on how the notion of State aid should be construed. Hence, wherever the construction of the notion is not confirmed by the EU Courts, one must treat this Notice with critical care. In particular when it comes to establishing the arm’s length principle as an inherent equality principle of State aid law (the Commission’s approach to the arm’s length principle was neither addressed in the 1998 notice nor in the previous 2014 draft), the Notice unfortunately adds very little to the concrete arm’s length concept as applied by the Commission.

In the domain of tax measures, one of the highlights of the Notice is the explicit reference to the recent *Paint Graphos* judgment of the CJEU, as well as the recent Commission decisions against The Netherlands, Luxembourg and Belgium. It is noteworthy that the EU Commissioner for competition, Margrethe Vestager, also referred to these guidelines in her testimony to the Special Committee on Tax rulings II in the beginning of April 2016.

**Notes**
1. Judgment of the CJEU of 8 September 2011, *Paint Graphos and others*, Joined cases C-78/08 to C-80/08.
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