The European Commission’s Case

Kelly Stricklin-Coutinho
Barrister, 39 Essex Chambers
Visiting Lecturer, King’s College London
Justified?

- Tax sovereignty
- Conflict as to new principle
- Retroactivity
- Legal certainty
- Target countries
Battlegrounds

- Are tax rulings de facto selective?
- Can the Commission prove a distortion of competition?
- What is the EU Arm’s Length Principle?
- Are general principles a defence?
- Does TNMM constitute an advantage?
- Use of Information
- What is the appropriate reference system?
Summary Position

• The main question: whether the rulings confer a selective advantage
  – Treating taxpayers on a discretionary basis may mean individual application “takes on the features of a selective measure”
  – “particularly where the exercise…goes beyond the simple management of tax revenue by reference to objective criteria.”

• Globally active firms – any aid distorts or threatens to distort competition
Summary Position

“The Court of Justice has confirmed that if the method of taxation for intra-group transfers does not comply with the arm’s length principle, and leads to a taxable base inferior to the one which would result from a correct implementation of that principle, it provides a selective advantage to the company concerned.”

- OECD Guidelines are an appropriate guide
State of Play

- Starbucks: NL to recover €20-30m
- Fiat: Lux to recover €20-30m
- Belgian Excess Profits: €700m from 35 multinationals
- Apple (Ireland): Decision awaited
- Amazon (Lux): Decision awaited
- McDonalds: 3/12/15 Investigation opened
State of Play

- Starbucks: SA. 38374, appeal T-760/15
- Fiat: SA. 38375, appeal T-759/15 & T-755/15
- Belgian Excess Profits: SA. 37667
- Apple (Ireland): SA. 38373
- Amazon (Lux): SA. 38944
- McDonalds: SA. 38945
Arguments against the European Commission
Appeals - Fiat

Luxembourg:

• Annul the decision or annul the recovery decision
• Misapplied “selective advantage” and did not show APA liable to distort competition
• Failure to explain how it derives ALP from EU law
• Legal certainty – “introduces complete uncertainty and confusion”
• Legitimate Expectation: OECD & departure
Appeals - Fiat

Fiat:

• Annul the decision
• Commission has not adduced proof of selectivity
• Commission has not adduced proof of advantage OR restriction of competition
• Commission requires recovery: legal certainty & rights of defence
# Appeals - Fiat

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<th><strong>Luxembourg</strong></th>
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<td>Annul the main decision or the recovery decision</td>
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<td>Selectivity test misapplied</td>
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Appeals - Starbucks

NL:

- Annul the decision
- APA not selective, Commission has not demonstrated selectivity criteria fulfilled
- Erroneously took general NL CT system as reference.
- EU ALP: not a principle of EU law, not part of SA assessment
NL:

• TNMM: incorrect to state unreliable approach to market outcome
• TNMM: C does not demonstrate that remuneration and surcharge on cost price have no business value
• Incorrect to say APA confers advantage as a result of use of TNMM
• Commission incorrect on application of TNMM
• C did not assess and include all relevant information, uses anonymous information, information not shared with NL govt
Appeals – Common Issues

Each argues:

• APA not selective; selectivity not proven
• No EU Arm’s Length Principle
• No proof of advantage
• General principles of EU law
• New Arm’s Length Principle: Dutch ALP should apply

• Reference System:
  – General Dutch system of corporation tax (Commission)
  – Group Entities only (Dutch)
Who else?
US Treasury

- DG COMP’s “sweeping interpretation” of State aid law “threatens to undermine” progress against erosion of tax bases
- Investigations predominantly against US companies
- “…this new interpretation creates disturbing international tax policy precedents”
- Undermines G-20 and BEPS project
US Treasury

Four Key Points of Concern:

1. Retroactive penalties based on a “new and expansive interpretation of State aid rules”

2. Targeting US companies disproportionately

3. Target income MSs have no right to tax under established international tax standards

4. Undermines US tax treaties with EU Member States
Commission Response

• Common objective to close the loopholes that enable multinational groups to shift profits for tax avoidance purposes

• Combination of actions: “legislative action and enforcement of EU State aid rules, with the aim of establishing fair tax competition within the European Union”

• Anti Tax Avoidance Package

• Tax Transparency Package
Commission Response

• CCCTB

• State aid rules long standing

• Since 1999, 170 decisions, only a handful against US

• Territorial taxation

• Arm’s length principle
“Legislative action”?
Anti Tax Avoidance Package

- Draft Directive covering:
  - Rules on interest deductibility
  - Rules on exit taxation
  - A switch-over clause
  - A GAAR
  - Controlled foreign companies rules
  - Rules addressing hybrid mismatches
Tax Transparency Package

- Introduction of automatic exchange of information between Member States on their tax rulings
- Review of the Code of Conduct on Business Taxation
- Repeal of the Savings Tax Directive
- Quantifying the scale of tax evasion and tax avoidance
CCCTB

- Single set of rules allowing companies to calculate their tax base within the EU
- Single consolidated tax return for all EU activity
- Apportionment of profits to companies by formula
- MSs tax profits at the national rate
- Optional system
What next?

- Commission intends to proceed with other investigations
- Has identified a number of others in Luxembourg to investigate
- Using LuxLeaks database information
- Starbucks decision due to be published
- Apple decision due
What next?

- What happens on 24 June 2016?
- EU ALP
- Settlements
- Other countries?
- Certainty: 7-8 years
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