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**EU Tax Task Force**

December 2015

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# APPLE, STARBUCKS AND NOW MC DONALD'S! WHO'S **NEXT?**

Liedekerke has set up an **EU Tax Task Force**, which focuses on **tax rulings and EU state aid**.

The Task Force includes selected members of both the EU and Tax Practice Groups and builds on renowned expertise in the fields of EU and domestic corporate taxation, EU competition law and litigation.

The Task Force aims to assist clients in dealing with all the legal issues arising from the circumstance in which a tax ruling could potentially be classified as prohibited state aid. Some of these issues are the application of domestic tax rules, recovery issues, accounting adjustments, disclosure and corporate governance obligations, plus litigation.

## **TASK FORCE MEMBERS**



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The Task Force relies on the experience of the lawyers from both the Tax Group and the EU Law Group.

## **CREDENTIALS**

### **Advisory**

1. Analysing tax rulings granted to a Belgian-based multinational group in various Member States regarding potential violations of EU state aid law and monitoring the impact of on-going investigations by the European Commission concerning those Member States.
2. Advising public authorities on compliance with state aid rules on public subsidy for the creation and operation of recreational infrastructure.
3. Giving tax advice to a major international retail group concerning its design and implementation of a reorganisation into business lines.

### **Litigation**

1. Representing clients before the European Court of Justice in numerous current and prior cases concerning both EU competition and EU tax law.
  2. Representing a state aid recipient from the airline sector against an action filed by a competitor before the Belgian courts.
  3. Having long-standing experience in representing taxpayers in domestic administrative and judicial proceedings, including before the higher courts.
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## Selected publications from the Task Force members

- E. TRAVERSA, Fighting Harmful Tax Competition through EU State Aid Law: Will the Hardening of Soft Law Suffice?, *European State Aid Law Quarterly*, Volume 14, issue 3, 2015, pp. 323-331.
- E. TRAVERSA, State Aid and Taxation: Can an Anti-avoidance Provision be Selective?, *European State Aid Law Quarterly*, 3, 2014, pp. 518 - 525.
- I. RICHELLE, E. TRAVERSA, Allocating Taxing Powers within the European Union, in *MPI Studies in Tax Law and Public Finance*, Springer, 2013, 327 pp. (published jointly with W. SCHÖN)
- H. VERSTRAETE, "Kritische bespreking van het rulingbeleid", in collaboration with M. ISENBAERT, in *Themis: Fiscaal Recht 2008-2009*, Die Keure, Bruges, no. 53, pp. 31-45.
- P. SABBADINI, *Les Aides d'Etat. Aspects juridiques et économiques*, collection on Competition and Market Practices, under the direction of A. TALON, Larcier, Brussels, 2015, 180 pp.
- I. RICHELLE, E. TRAVERSA, The impact of the rulings of the European Court of Justice in the area of direct taxation, Study prepared for the European Parliament's Committee on Economic and Monetary Affairs, Brussels, 2011 (co-authored with J. MALHERBE and P. MALHERBE).
- I. RICHELLE, E. TRAVERSA, *Direct Taxation in the Case-Law of the European Court of Justice*, Larcier, Brussels, 1st ed. 2008; 2nd ed. 2011, 336 pp. (co-authored with J. MALHERBE and P. MALHERBE).

## STATE AID AND TAX RULINGS IN 4 QUESTIONS

### 1. Are tax rulings state aid?

Depending on the circumstances surrounding the grant and features of certain rulings or tax schemes, tax rulings can constitute state aid, especially where national tax provisions have been misapplied when certain favourable tax rulings have been provided on transfer pricing to multinational groups in the context of so-called "aggressive" tax avoidance schemes.

### 2. Rulings currently being investigated by the European Commission

The European Commission has recently focused state aid enforcement on individual tax rulings granted by Ireland, Luxembourg, the Netherlands and Belgium and requested vast amounts of information on rulings granted by several other Member States. In October 2015, the Commission made public its decision in two of those cases, stating that the Fiat and Starbucks rulings granted illegal state aid as the aid artificially reduced the company's tax burden. Therefore, the Commission ordered Luxembourg and the Netherlands to recover the unpaid taxes, which amounted between EUR 20 and 30 million for each of the beneficiaries. The Commission's decisions should be made available in the next few weeks, and it is likely that the parties concerned will challenge them before the courts. In addition, the Commission recently opened a new investigation into the rulings that Luxembourg granted to McDonald's.

As regards Belgium, the Commission was investigating the "excess profit tax regime based on Art. 185§2 BITC". The Commission has analysed all rulings issued by the Advance Rulings Committee since the scheme was introduced in 2004. This analysis has been conducted under the formal procedure initiated against Belgium in March 2015, under which the European Commission took the preliminary view that downward adjustments resulting from application of the excess profit tax system confers an advantage that counters the principle that all profits should be subject to corporate income tax in Belgium. As that advantage is only available to Belgian entities of international/multinational group of companies and the grant of such rulings is closely linked to employment and investment considerations, the Commission considers such rulings as constituting illegal state aid.

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### 3. The consequences of a potential negative decision ordering recovery of aid

Companies likely to be affected by the current investigations have to prepare an integrated response: dealing with the recovery issues (e.g., assessment of the potential extent of the recovery obligation, negotiation with the tax authorities, assessment of the opportunity to lodge appeals under tax procedure); considering accounting adjustments for the next quarterly report and future provisions to cover the risk of a demand for reimbursement of the amount of tax classified as state aid; meeting disclosure and corporate governance obligations; and, finally, devising a strategic approach to litigation.

Recipients can challenge a Commission decision before the General Court in Luxembourg within two months from the date of its publication in the Official Journal. At the same time, they have to defend themselves in recovery lawsuits against immediate enforcement of the Commission decision.

Companies also have to conduct a state aid compatibility assessment of all other rulings they received from tax authorities and which manifest features that are similar to those currently under investigation by the European Commission.

### 4. Options available to recipients

Companies likely to be affected by the current investigations have to prepare an integrated response: dealing with the recovery issues (e.g., assessment of the potential extent of the recovery obligation, negotiation with the tax authorities, assessment of the opportunity to lodge appeals under tax procedure); considering accounting adjustments for the next quarterly report and future provisions to cover the risk of a demand for reimbursement of the amount of tax classified as state aid; meeting disclosure and corporate governance obligations; and, finally, devising a strategic approach to litigation.

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