CLEARY GOTTLIEB

ALERT MEMORANDUM

Three Years of EU State Aid Review of Tax Rulings: Taking Stock

July 29, 2016

In 2013, the European Commission started investigating tax ruling practices of Member States under the EU State aid rules. The investigations so far led to three decisions and several guidelines. But appeals are pending and the boundaries of EU law in this area remain unsettled. Three years on, we take stock of developments.

As the Commission has repeatedly stated, tax rulings as such are perfectly legal provided they comply with EU State aid rules. But when does a tax ruling constitute State aid? Considering the severe financial consequences of a finding of illegal and incompatible State aid– such as the recovery of any tax savings obtained over the previous ten-year period—the answer to this question is crucial for groups doing business in Europe.

Following the initial opening decisions concerning tax rulings granted to EU subsidiaries of *Apple*, *Fiat*, *Amazon*, *Starbucks* (2014), and *McDonald's* (2015), and against the Belgian *excess profit ruling system* (2015), the Commission was criticized by some for creating legal uncertainty due to its reliance on the "arm's length" principle and the OECD Transfer Pricing Guidelines. The final decisions in *Fiat* and *Starbucks* (October 2015) and the *Belgian excess profit ruling system* (January 2016), and recent guidance released by the Commission (May/June 2016) to address these concerns, provide an opportunity to assess the Commission's approach.

The Commission investigations take place in the context of a global push for international tax transparency and automatic exchange of tax information between tax authorities, which significantly increases the probability that base erosion and profit shifting (BEPS) strategies are detected. While the precise scope of EU State aid control in the field of tax rulings can only be determined when appeal procedures end, multinational groups relying on tax rulings from EU tax administrations should monitor and mitigate their State aid risk.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

François-Charles Laprévote
+32 2 287 2314
fclaprevote@cgsh.com

Nikolaas Van Robbroeck
+32 2 287 2328
nvanrobbroeck@cgsh.com

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

J.F. Daniel Weyde
+49 69 97103 245
jweyde@cgsh.com

I. Background

In 2013, the European Commission started investigating tax ruling practices of Member States under EU State aid rules. These investigations were initiated against the background of international and European efforts to tackle aggressive tax planning strategies that lead to base erosion and profit shifting (BEPS).[1]

In 2014 and 2015, the Commission opened formal investigations against Ireland (*Apple*), Luxembourg (*Fiat Finance & Trade*, *Amazon* and *McDonald's*), the Netherlands (*Starbucks*) and Belgium (*excess profit ruling system*).[2] In addition, in December 2014, the Commission, using its new investigation powers under Article 25 of the State aid Procedural Regulation,[3] extended its tax ruling investigations to all Member States. Subsequently, the Commission received individual tax rulings from 23 Member States, in some cases after handing down injunctions to provide the information.[4]

Overall, the Commission has reviewed more than 1,000 tax rulings, 600 of which appeared in the so-called Lux Leaks case.[5] The three investigations that have been finalized so far all led to a finding of State aid with a recovery decision.[6]

On May 19, 2016, the Commission adopted the [Notice on the Notion of State aid as referred to in Article 107(1) TFEU]() (the Commission Notice) and on June 3, 2016 it released the (non-binding) [Working Paper on State Aid and Tax Rulings]() (the Working Paper). These two papers, together with the final decisions in *Fiat*, *Starbucks* and the *Belgian excess profit ruling system*, are helpful in understanding the Commission's reasoning in State aid cases.

While European Courts have yet to define the boundaries of State aid in tax ruling practices,[7] the two papers and the cases provide a good opportunity to analyze what we have learned since 2013.[8]

II. Three years on, what have we learned?

Most of the above tax ruling investigations concerned rulings on transfer pricing. After the initial decisions opening formal investigations in

[1] See, *e.g.*, G20 summit in Los Cabos (Mexico) initiating the G20/OECD project against base erosion and profit shifting (BEPS) (see OECD website on BEPS); Commission Recommendation of 6 December 2012 on aggressive tax planning; Commission Recommendation of 6 December 2012 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters.

[2] Commission Decision of 11 June 2014 in Case SA.38373 (*Apple*), OJ C 369, 17.10.2014; Commission Decision of 11 June 2014 in Case SA.38375 (*Fiat*), OJ C 369, 17.10.2014; Commission Decision of 11 June 2014 in Case SA.38374 (*Starbucks*), OJ C 460, 19.12.2014; Commission Decision of 7 October 2014 in Case SA.38944 (*Amazon*), OJ C 44, 6.2.2015; Commission Decision of 3 February 2015 in Case SA.37667 (*Belgian excess profit rulings*), OJ C 188, 5.6.2015; Commission Decision of 3 December 2015 in Case SA. 38945 (*McDonald's*), OJ C 258, 15.07.2016.

[3] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification).

[4] See Commission press release IP/15/5140 of 8 June 2015, referring to information injunctions issued to Estonia, Luxembourg and Poland.

[5] DG COMP Working Paper on State Aid and Tax Rulings, para. 6.

[6] Commission Decision of 21.10.2015 in Case SA.38375 (*Fiat*), not yet published; Commission Decision of 21.10.2015 in Case SA. 38374 (*Starbucks*), not yet published; Commission Decision of 11.01.2016 in Case SA.37667 (*Belgian excess profit rulings*), not yet published.

[7] Claims for annulment have been filed against all final decisions taken so far: Case T-760/15, *Netherlands v Commission* (*Starbucks*), OJ C 59 from 15.02.2016, p.50; Case T-759/15, *Fiat Chrysler Finance Europe v Commission*, OJ C 59 from 15.02.2016, p.49; Case T-755/15, *Luxembourg v Commission* (*Fiat*), OJ C 59 from 15.02.2016, p.48. In the Belgian excess profit ruling case, to date appeals have been published by the Belgian State (T-131/16 - *Belgium v Commission*) and three taxpayers (T-201/16 - *Soudal v Commission*; Case T-278/16 - *Atlas Copco Airpower and Atlas Copco v Commission*; T-266/16 - *Capsugel Belgium v Commission*).

[8] See also our previous Alert Memoranda: "[European Commission Probes Member States Tax Ruling Systems]()" of September 17, 2013 and "[EU State Aid Review of Tax Rulings: What Multinational Corporations Can Do Now]()" of June 29, 2015.

these cases, the Commission was criticized by some for creating legal uncertainty due to its unclear reasoning, in particular its reliance on the "arm's length" principle and the (non-binding) OECD Transfer Pricing Guidelines to determine whether a given ruling contained a selective advantage and therefore gave rise to State aid.

Reliable approximation of a market-based outcome in line with the arm's length principle - manifest breach.

The Commission's reasoning is clearer today. The Commission Notice articulates the rule that the Commission will find a selective advantage when a tax ruling "*endorses a transfer pricing methodology for determining a corporate group entity's taxable profit that does not result in a reliable approximation of a market-based outcome in line with the arm's length principle*",[9] a rule applied in the final decisions in *Fiat*, *Starbucks*, and *Belgian excess profit ruling system*.

According to the DG COMP Working Paper, this "approximation" must be as precise as it can be under the circumstances. This arguably is a high threshold if one considers that transfer pricing is not an exact science, but rather a complex, costly, and time consuming process dependent on resources, (necessarily historic) data, and the exercise of judgment.

Interestingly, the Working Paper further states that "*DG Competition's focus is on cases where there is a manifest breach of the arm's length principle*". "Manifest breach" presumably exists when no reasonable person (or tax administration) would consider the transfer pricing outcome as in line with the arm's length principle.

Cases likely to constitute "manifest breach" include, for example, negotiated fixed-tax bases that do not reflect economic reality and "cost plus" tax bases calculated on cost bases that exclude vital business operating costs.

By contrast, a case of non-manifest breach could arguably include cases where the transfer price is within the range determined by a benchmark study of comparable transactions involving a group of peer companies (although the Working Paper does not explicitly take a position on this).

It is questionable, however, whether the Commission's current approach only focuses on manifest breaches. In particular, while the Commission officially labels the OECD Transfer Pricing Guidelines as a tool among others to assess whether a given tax ruling requires further assessment under State aid rules,[10] the final decisions in *Fiat*, *Starbucks*, and *Belgian excess profit ruling system* show that these Guidelines play a prominent role in the Commission investigations and that the Commission applies them aggressively. In practice, any deviation from the OECD Transfer Pricing Guidelines is likely to raise problems from a State aid perspective.

A Specific EU Law Arm's Length Principle

In the opening decisions, the Commission justified its reliance on the arm's length principle by reference to the prudent market operator test.[11] This approach has been criticized on the grounds that the prudent market operator test is typically used to assess the behavior of a State in transactions that could conceivably be conducted by private operators,

[9] Commission Notice, para. 171.

[10] According to the Commission, the OECD Transfer Pricing Guidelines "*capture the international consensus on transfer pricing and provide useful guidance*" […]. "*Consequently, if a transfer pricing arrangement complies with the guidance provided by the OECD Transfer Pricing Guidelines, including the guidance on the choice of the most appropriate method and leading to a reliable approximation of a market based outcome, a tax ruling endorsing that arrangement is unlikely to give rise to State aid*" (Commission Notice, para. 173).

[11] See e.g. opening decision in Starbucks: "*When accepting a calculation method of the taxable basis proposed by the taxpayer, the tax authorities should compare that method to the prudent behaviour of a hypothetical market operator, which would require a market conform remuneration of a subsidiary or a branch, which reflect normal conditions of competition.*" (Commission Decision of 11 June 2014 in Case SA.38374 (*Starbucks*), OJ C 460, 19.12.2014, para. 77).

such as the injection of capital in a company, and not the behavior of a State as a public (tax) authority.

Today, the Commission no longer refers to the prudent market operator test when analyzing tax rulings.[12] The Commission has clarified the legal concepts underpinning its reasoning and in particular its use of the arm's length principle as follows:[13]

> *This arm's length principle necessarily forms part of the Commission's assessment of tax measures granted to group companies under Article 107(1) of the Treaty, independently of whether a Member State has incorporated this principle into its national legal system and in what form. It is used to establish whether the taxable profit of a group company for corporate income tax purposes has been determined on the basis of a methodology that produces a reliable approximation of a market-based outcome. A tax ruling endorsing such a methodology ensures that that company is not treated favourably under the ordinary rules of corporate taxation of profits in the Member State concerned as compared to standalone companies who are taxed on their accounting profit, which reflects prices determined on the market negotiated at arm's length. The arm's length principle the Commission applies in assessing transfer pricing rulings under the State aid rules is therefore an application of Article 107(1) of the Treaty, which prohibits unequal treatment in taxation of undertakings in a similar factual and legal situation. This principle binds the Member States and the national tax rules are not excluded from its scope*.

The arm's length principle the Commission applies in its State aid assessment is thus not that derived from Article 9 of the OECD Model Tax Convention and as such has a different finality. This "EU law arm's length principle" was first articulated in the final decisions in *Fiat* and *Starbucks* and reiterated in *Belgian excess profit ruling system.*[14]

The practical effect of relying on the EU arm's length principle is that it allows the Commission to sidestep using national law as the reference system when assessing whether a tax ruling is a derogation of such a system. Thus, the Commission could find that a tax ruling conforming to a Member State's national law but deviating from the EU arm's length principle is unlawful State aid, even if the Member State's tax laws and practices apply the arm's length principle differently or do not contain such principle at all.

The Commission traces its interpretation back to the European Court of Justice's decision in the *Belgian Coordination Centres* case.[15] In this decision the Court did not expressly refer to an EU arm's length principle concept,[16] but held that a tax scheme that deviates from the general

[12] Interestingly, at least one of the taxpayers that filed a claim for annulment against the final decision in *Belgian excess profit ruling system* argues that the Commission should have applied the private-investor test (see T-201/16 - *Soudal v Commission*).

[13] Commission Decision of 21.10.2015 on State aid which Luxembourg granted to Fiat, SA.38375, not yet published, para. 228; Commission Decision of 21.10.2015 in Case SA. 38374 (*Starbucks*), not yet published, para. 264; Commission Decision of 11.01.2016 in Case SA.37667 (*Belgian excess profit rulings*), not yet published, para. 150 . See also Commission Notice, para. 172.

[14] Commission Decision of 21.10.2015 in Case SA.38375 (*Fiat*), not yet published, paragraph 228; Commission Decision of 11.01.2016 in Case SA.37667 (*Belgian excess profit ruling system*), not yet published, para. 150.

[15] Joined cases C-182/03 and C -217/03, Kingdom of Belgium and Forum 187 ASBL v Commission of the European Communities, 2006 I-05479.

[16] In support of its "European arm's length principle", the Commission essentially refers to the established principle that tax measures are not excluded from the scope of State aid review (see, *e.g.*, Commission Decision of 21.10.2015 in Case SA. 38374 (*Starbucks*), not yet published, footnote 126, referring to paragraph 81 in Joined cases C-182/03 and C -217/03, *Kingdom of Belgium and Forum 187 ASBL v Commission of the European Communities*, 2006 I-05479).

tax system confers an economic advantage if the tax base under that regime is composed in such a way that it cannot, by its very nature, resemble the tax base under the general scheme.

The *Belgian Coordination Centers* case is thus a relatively vague and general precedent. Indeed, claims for annulment filed against the final decisions criticize the Commission for creating legal uncertainty by applying an EU principle that does not exist or by applying the arm's length principle incorrectly.

The European Courts' judgment in this respect will determine the boundaries of the Commission's arm's length principle.

Selectivity

In order for a tax measure to constitute State aid it must be "selective", *i.e.*, it must differentiate between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation.[17]

The Commission Notice does not provide separate guidance on the notion of selectivity in the context of tax rulings. In the final decisions, the Commission suggests that *any* individual tax ruling that deviates from the EU arm's length standard is selective.[18]

In *Belgian excess profit ruling system*, which concerns an aid *scheme*, the Commission compared the category of taxpayers that received an excess profit ruling with various other categories of taxpayers that could not obtain a similar ruling, including Belgian standalone corporate taxpayers but also other multinationals that did not seem to be eligible for an excess profit ruling (in particular, those that do not make additional investments in Belgium and those that do not have the sufficient size to generate synergetic effects). The Commission considers these other taxpayers to be in a comparable legal and factual situation as the beneficiaries of the excess profit rulings.

Several pending appeals against the Commission's decisions are contesting the application of the selectivity criterion by the Commission. The pending decision of the Court of Justice in the *Autogrill*[19] case might shed some light on this issue in the next few months. In first instance, the General Court considered that in order to establish selectivity the Commission must clearly identify the privileged category and cannot merely refer to the conditions under which an aid is granted (*i.e.*, the fact that it derogates from the 'normal' tax regime). In his recent opinion issued on July 28, 2016 in the context of the appeal brought by the Commission against the General Court's judgment, Advocate General Wathelet proposed to reject the General Court's reasoning. According to the Advocate General,[20] such strict interpretation of the concept of selectivity only applies if the contested regime in practice discriminates between companies which are in a comparable situation, as was the case in *Commission and Spain v. Government of Gibraltar and United Kingdom*. By contrast , it is in his view not necessary to identify the privileged category if the measure at issue derogates from the normal or reference tax regime. Should the Court of Justice follow the Advocate General's position, this might further

[17] See *e.g.* Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* [2011] ECR I-7611, para. 49.

[18] Commission Decision of 21.10.2015 on State aid which Luxembourg granted to Fiat, SA.38375, not yet published, para. 217; see also Commission Decision of 21.10.2015 in Case SA. 38374 (*Starbucks*), not yet published, para. 253, and Commission Decision of 11.01.2016 in Case SA.37667 (Belgian excess profit rulings), not yet published, para. 131.

[19] T-219/10 *Autogrill España v Commission* ECLI:EU:T:2014:939; T-399/11 *Banco Santander and Santusa v Commission* ECLI:EU:T:2014:938.

[20] Opinion of Advocate General Wathelet delivered on 28 July 2016 in Joined Cases C-20/15 P and C-21/15 P *European Commission v World Duty Free Group, formerly Autogrill España SA* (C-20/15 P), *Banco Santander SA, Santusa Holding SL* (C-21/15 P).

support the reasoning of the Commission on selectivity in the tax rulings cases.

III. What can multinational groups do?

A finding that a tax ruling constitutes State aid may have severe financial consequences. In addition to prohibiting continuing the ruling, the finding will normally require the Member State to recover the aid granted over the past ten years, increased with interest. A recovery order must be implemented even if an action for annulment of the Commission decision is brought before the European Courts, except if an application for interim measures is brought successfully.[21]

Increased international tax transparency and automatic exchange of tax information between tax authorities significantly increase the probability that base erosion and profit shifting will be detected, including in cases where such structures are confirmed in a tax ruling. For financial years commencing on or after January 1, 2016, EU Member States and a significant number of other jurisdictions will start exchanging the country-by-country tax reports that multinational groups are required to file to the tax administration.[22] In addition, information (including summaries) relating to cross-border rulings and advance pricing arrangements issued by the tax administration of an EU Member State on or after January 1, 2017 will be automatically exchanged with other Member States and with the European Commission. Rulings issued or amended between January 1, 2012 and December 31, 2016 will also automatically be exchanged, subject to certain restrictions.[23]

While the precise scope of EU State aid rules will only be known when appeal procedures end, multinational groups relying on tax rulings from EU tax administrations can try to minimize their State aid risk in a number of ways.

Self-Assessment. International groups should review tax rulings received from tax authorities in the European Union to assess EU State aid compatibility. Such self-assessment should seek to confirm that the tax rulings uphold a reasonable appreciation of the facts and a defensible interpretation of tax rules. If this cannot be confirmed, the tax ruling may be problematic from a State aid perspective.

The same State aid compatibility checks should be made with respect to any new tax rulings or renewals of tax rulings requested from EU tax administrations.

Scope of review. The Commission's Working Paper demonstrates the Commission's focus on unilateral transfer pricing rulings, including those concerning financing activities, IP structures, and tax deductions for virtual (royalty) payments.

Review of transfer pricing rulings should include a robust inquiry into the underlying functional analysis and contracts, the selection of the transfer pricing method, choices made in applying the transfer pricing method (such as tested party, profit level indicator), the

[21] In this respect, on July 19, 2016, the President of the General Court dismissed the Belgian State's application for interim measures against the final decision in the *Excess profit ruling* case, on the basis that there was no urgency (Case T-131/16 R, ECLI:EU:T:2016:427, not yet published).

[22] Country-by-country tax reports contain information for tax administrations, by jurisdiction, about employees employed, profits earned, income tax paid, group entities and main business activities, among other things.

[23] Information on tax rulings obtained by the European Commission in this process cannot be used for purposes other than those required for monitoring the correct implementation of the exchange system (Art. 23a.1 of Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, as amended by Council Directive (EU) 2015/2376 of 8 December 2015). This, however, will not prevent the Commission from using its broad investigation powers under State aid rules to request Member States to provide copies of tax rulings on an *ad hoc* basis.

composition of the peer group in the benchmark study, the interpretation and use of collected data, among other things.

The final decision in the *Fiat* case[24] provides an good illustration of the Commission's level of review. This case concerned a transfer pricing ruling granted by the Luxembourg tax administration to Fiat's Luxembourg intra-group treasury company, Fiat Finance and Trade (FFT).

During the formal investigation *Fiat* successfully convinced the Commission that the TNMM[25] method, with return on equity as the profit level indicator, was appropriate to estimate the arm's length remuneration for FFT. But the Commission considered that several methodological choices made by FFT's tax advisor deviated from the arm's length standard and resulted in a selective advantage to FFT.

The methodological choices the Commission held to be inconsistent were (i) applying the return on equity to a hypothetical Basel II regulatory capital instead of Fiat's actual accounting equity; (ii) underestimating the risks actually borne by Fiat and applying lower capital requirement ratios than the ratios prevailing under Basel II; and (iii) making arbitrary adjustments to the hypothetical regulatory capital.

Furthermore, the Commission found that errors were made in determining the profit ratio (the return on equity) accepted in the tax ruling:

- First, the sample of companies used in the benchmark study included companies active in different segments of the financial industry—and even central banks—and was thus found inappropriate.
- Second, by using the 25th percentile in the range of comparables, the tax advisor erroneously assumed that Fiat's beta was lower than that of other banks in the benchmark study, while the Commission assumed the opposite because Fiat's less-diversified loan portfolio (concentrated on car companies of the Fiat group). The Commission considered the correct point in the range to be used was arguably higher than the median.

Despite the current focus on transfer pricing, State aid control is not limited to these types of rulings. Tax rulings regarding open tax norms and rules requiring factual appreciation are most likely to be challenged, especially if they concern structures with a potential for base erosion and profit shifting (BEPS). Examples include tax rulings confirming the absence of a taxable permanent establishment[26] and tax rulings confirming that certain income items are outside the scope of a territorial tax regime. Tax rulings regarding qualification issues, such as with respect to hybrid instruments (qualification as debt or equity), hybrid entities (qualification as tax transparent or opaque), and other tax mismatch arrangements are concerned too.

The self-assessment should extend to tax rulings covering the past ten years, the maximum time period provided for in EU rules to collect unlawful and incompatible State aid.

Quality of ruling procedure. The self-assessment should, in the first place, concern the substantive confirmations obtained through the tax rulings. However, tax rulings obtained through deficient ruling procedures, such as unpublished rulings, negotiated rulings, rulings

[24] See para. 241-311 of Commission Decision of 21.10.2015 in Case SA.38375 (*Fiat*), not yet published.

[25] *I.e.*, Transactional Net Margin Method, one of the transfer pricing methods proposed by the OECD Transfer Pricing Guidelines. The TNMM is a so-called indirect method that approximates the arm's length by using a profit level indicator (for example, costs or capital) and a profit ratio (derived from a benchmark study). In the opening decision, the Commission had expressed doubts as to whether the TNMM was an appropriate method.

[26] See Commission Decision of 3 December 2015 in Case SA. 38945 (*McDonald's*), OJ C 258, 15.07.2016.

granted following limited review by the tax administration, or rulings granted for an extended period of time are more likely to attract the European Commission's attention. Taxpayers will be in a more comfortable position if they can demonstrate that a ruling was granted after robust review by the tax administration and that the ruling explains its legal and factual basis. In addition, the ruling should preferably not be granted for a period longer than five years unless justified by the specific circumstances.[27]

Informal agreements and tax settlements. The above considerations also apply to informal tax rulings and tax settlements. A position taken in a tax return that is not challenged by the tax administration during an audit may potentially also be at risk.[28]

Assessment of the amount at risk. Once a problematic tax ruling has been identified, the risk at stake should be assessed. In this respect, the recoverable amount of State aid is the tax saved as a result of the tax ruling plus interest. Such amount is calculated on the basis of the general tax scheme and the factual and legal situation of the beneficiary. However, calculating the tax saving may not always be straightforward. For example—to what extent can the new tax assessment be based on tax relief that was available during the period of the ruling, but was not claimed because the tax ruling was more favorable? In any case, it seems that hypothetical alternative situations based on different operational and legal circumstances that the taxpayer could have chosen in the absence of a tax ruling, are not taken into account. [29]

The Commission deems that aid was granted on the day the tax saved would have been due in the absence of a ruling, in principle taking into account the effect of carried-forward tax losses.[30]

Impact on M&A transactions. Mapping and assessing the potential State aid risk associated with tax rulings is also key in M&A transactions where (potential) purchasers will want to understand and allocate risk. Considering the ten-year look back period and the potentially long State aid proceedings, this may be a challenge. The fact that in the final decisions[31] the multinational group as a whole has been identified as the aid recipient –which means that the aid can be recovered not only from the tax ruling recipient but potentially also from, for example, the parent company of the group– may also have an impact on M&A transactions and structuring.

Participation in the Commission proceedings. State aid investigations are formally bilateral procedures between the European Commission and the implicated Member State. The Commission has large investigation powers. For example, the Commission can ask the beneficiary or its competitors to provide detailed business information such as whether a certain activity can be outsourced, the margin earned on a certain activity, and whether an independent

[27] See, *e.g.*, Commission Decision of 11 June 2014 in Case SA.38373 (*Apple*), OJ C 369, 17.10.2014, para. 45 and 65.

[28] See, *e.g.*, Commission Decision of 11 June 2014 in Case SA.38373 (*Apple*), OJ C 369, 17.10.2014, footnote 23: "*If, instead of issuing a ruling, the tax administration simply accepted a method of taxation based on prices which depart from conditions prevailing between prudent independent operators, there would also be State aid. The main problem is not the ruling as such, but the acceptance of a method of taxation which does not reflect market principles*."

[29] See, *e.g.,* Commission Decision of 11.01.2016 in Case SA.37667 (*Belgian excess profit rulings*), not yet published, Section 7.2.

[30] Ibid.

[31] Commission Decision of 21.10.2015 in Case SA. 38375 (*Fiat*), not yet published; Commission Decision of 21.10.2015 in Case SA. 38374 (*Starbucks*), not yet published; Commission Decision of 11.01.2016 in Case SA.37667 (*Belgian excess profit rulings*), not yet published.

subcontractor would have to pay a royalty.[32] The beneficiary, its competitors or other persons (such as NGOs, trade associations, or Unions) may share information with the Commission upon request or on a voluntary basis.

As long as the Commission has not opened a formal investigation, potential beneficiaries lack formal due process rights like the right to access the file or the right to be informed of the state of the Commission's investigation. In practice, at this early stage, potential beneficiaries must rely on the willingness of the Member State to keep them informed of the investigation. Once the formal investigation is opened, companies can formally make their views known as interested parties, but their procedural rights are still limited at this stage and do not include access to the file. However, the Member State or the Commission may provide them with more information (and sometimes even documentation) at this stage. Finally, once the formal investigation is opened, the Commission may require information directly from the companies, provided that the Member state agrees.

In light of the risks and exposure of a State aid procedure, companies potentially involved should carefully review their options to participate in the Commission's investigation on the basis of a case-by-case analysis of the circumstances and merits of each case.

…

CLEARY GOTTLIEB

[32] See, *e.g.*, Commission Decision of 21.10.2015 in Case SA. 38374 (*Starbucks*), not yet published, para. 20.