

5 Reasons US Cos. Should Care About The EU's Tax Probes

By **Melissa Lipman**

Law360, New York (February 6, 2015, 8:21 PM ET) -- The European Commission's state aid investigations into tax deals Apple Inc. and others got from national governments may seem like an esoteric exercise to those beyond the bloc's borders, but the burgeoning probes could eventually mean companies doing business in Europe have to repay billions of dollars worth of tax benefits.

Under the European Union's unique state aid system, national governments are not allowed to grant companies selective benefits that put them in a better competitive position compared with other players in the European market.

Interest in tax schemes that might distort competition within the bloc is nothing new. But the scope of the current probes has now gone beyond tailored investigations of tax rulings Apple, Amazon.com Inc., Fiat SpA and Starbucks Corp. got from Ireland, Luxembourg and the Netherlands to reviews of tax rulings national authorities in all 28 member states have granted.

The result, attorneys say, is that the investigations will only get bigger, and billions of euros worth of benefits may be on the line.

"This is something that concerns any company irrespective of nationality," said Crowell & Moring LLP partner Salome Cissal de Ugarte. "Whether you are a company headquartered in Delaware or China, at the end of the day, if you're benefiting from one of the tax rulings being investigated in Europe, you will be affected by that."

Here are five reasons U.S. companies and their lawyers should be paying attention to what happens next.

The probes are going to get bigger.

After a preliminary investigation, in June the EC under former Competition Commissioner Joaquin Almunia **opened a handful of cases** to review whether Apple, Starbucks and Fiat benefited from selective tax rulings in Ireland, the Netherlands and Luxembourg in violation of the bloc's state aid rules.

That **grew in October to cover** Amazon's tax arrangements with Luxembourg, before a group of journalists **released two batches** of hundreds of tax rulings Luxembourg granted companies ranging from GE Group to GlaxoSmithKline PLC.

That led the watchdog, now under the supervision of Commissioner Margrethe Vestager, to ask all 28 EU nations to hand over information about their own tax rulings. So far, Vestager said Tuesday, the countries have been either "cooperative or very cooperative."

And that means that a lot more rulings or tax provisions will likely come in for close scrutiny, experts said.

"What happened here is a practice which has been established, often by law, by a whole host of member states," said Covington & Burling LLP head of competition practice Johan Ysewyn. "It's part and parcel of European corporate tax as it's been applied throughout member states over the last 10 years."

Indeed, on Tuesday the watchdog **announced it was taking a closer look** not at a single tax ruling but at an entire provision of Belgium's corporate tax regime that allows multinationals to get rulings that can significantly reduce their tax burden based on "excess profits" that they allegedly receive because they are part of a larger, international corporate group

"The Belgian case is even more worrying because [it's] against an actual tax structure that applied to quite a number of companies," Ysewyn said. "If the tax structure is illegal, that means everybody that benefited from it has to reimburse what they didn't pay to the taxman. That means the whole ball game is broadening way beyond those four companies."

Even legal tax arrangements can face scrutiny.

It's important to remember that the potential problem with these tax rulings is not that they violate tax law. The rulings essentially confirm what kind of tax structure companies have to abide by under the relevant national law.

The issue is that the commission now thinks that some of these arrangements might distort competition by giving a selective advantage to certain companies.

"From a tax perspective, it might be fine. It might be a completely legal practice in the sense that a number of member states use that," Císnal de Ugarte said. "The problem with that is that some of these tax rulings ... could be distortive."

Companies could end up having to cough up substantial tax savings.

Under state aid rules, generally once the EC decides a benefit distorts competition, the national government that granted the aid has to recover it from the company that received it.

While no one knows yet how much money is at stake, given the number and the size of the companies named in the existing cases and in the leaked Luxembourg documents and how common tax rulings are, the final bill could be astronomical.

"Obviously it depends on how many companies might be involved, how many countries, but I think there's a lot of money involved," Císnal de Ugarte said. "We're talking about billions overall."

If the EC adopts a so-called negative decision ordering the governments to recover state aid in these cases, one issue will be how to calculate what those tax bills should have been.

"Should they have paid 15, 25, 30 percent? Nobody knows. The only thing you know is you got a better deal," Ysewyn said. "It's quite difficult if you work for the companies under investigation to say to the board what is the financial exposure here. There's a lot of uncertainty in the system, which I think for the moment creates quite a lot of angst amongst companies."

The commission could also choose to take a more settlement-style approach to the cases by negotiating changes with the national governments or could use a more unconventional system like the restructuring program the EC implemented under the state aid rules in the banking sector during the financial crisis. That allowed financial services firms to receive the benefits in exchange for making changes to their business models.

And with the EC expected to take decisions in the earlier case by the summer, some of these issues could be headed to the European courts in the near future.

"My expectation is that there'll be mix of outcomes," Ysewyn said. "Some drama, a bit of recovery just to say, 'We can do it, we have teeth.' There'll be some commitments; the commission may issue guidelines, as well, [to] say tax rulings are okay if member states do one, two and three. I think there'll be a mix of all of the above."

The tax rules could change for everyone.

Vestager has repeatedly said that the investigations are not a way of sneaking unified EU tax policy in through the back door, but that doesn't mean that the probes won't lead to changes either directly or indirectly.

"There clearly is an issue, and it's a very populist topic in Europe, that individuals pay too much tax and corporations don't," Ysewyn said. "Clearly there's not much political appetite amongst member states themselves to actually deal with this [through] directives to change the corporate tax structure, to equalize them, so what [the commission is] doing is basically using the state aid instrument to deal with holes in tax systems."

One result could be changes to the kinds of tax rulings European nations can offer depending on which arrangements, if any, the EC decides violate the state aid rules.

"Clearly if the commission comes to the conclusion ... that whatever tax practices or tax rulings are illegal, then the particular member state will have to change the law," Císal de Ugarte said.

The probes and their findings could also be used to fuel proposals from Pierre Moscovici, the European commissioner in charge of tax issues, to foster broader harmonization.

"The fact that the commission is looking into these cases cannot remain without consequence in the sense that ... I think at the European level [there] have been already some attempts to harmonize taxation and to try to get to a common framework, but I think that this will increase it," Císal de Ugarte said.

Now is the time to review your tax rulings.

For companies that could be affected by the EC's investigations, the best step to take now is to look at what tax rulings, if any, they benefit from in the EU and try to assess how those rulings would fare under

a state aid analysis, experts said.

"A lot of companies are looking at this with their tax advisers also to address the issue of selectivity," Ysewyn said. "For the moment, I think there's a lot of monitoring and almost self-introspection going on and really praying that this will not mushroom to something similar to what happened in 2008."

Companies that have potentially implicated tax rulings can talk to the government involved in an effort to try to stave off the risk of having to pay what could be massive tax bills, Ciscal de Ugarte said. It may also be prudent to try to approach the commission about the matter.

But the key issue for many companies trying to assess their risks is the question of whether they've benefited from a "selective" ruling that gives them an advantage over other players, Ciscal de Ugarte said.

--Editing by Kat Laskowski.

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