SLAUGHTER AND MAY

Where have we got to with State aid?

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Here are some things we know, and some things we do not yet know, about the EU's State aid tax challenges.

What we do know:

- The EU expansion of the reach of State aid into tax is a significant move to shape the direct tax policy of Member States, despite the harmonisation of direct taxes being excluded from the scope of the EU treaties.
- Whilst these challenges are not directed specifically at US multinationals, these were the businesses most affected initially, because of the current structure of the US tax regime; in particular, both the deferral of US tax on profits retained offshore and the "check the box" rules provide plenty of opportunity and incentive for non-US tax planning.
- The EU's focus is now moving beyond transfer pricing towards EU groups who are relying on tax rulings for both financing and IP holding structures. Groups relying on such rulings should review their position before the Commission gets in touch.
- The financial consequences of a successful State aid challenge, with its ten year plus look-back, are serious, and it is unlikely that this risk was properly evaluated when the relevant transactions were first entered into, given the difficulty then in anticipating the way in which the EU would develop its thinking in this area.

But the unanswered questions include:

- What does an unacceptable tax ruling look like? The EU does not yet seem to have decided what features it finds offensive, as at the moment it seems simply to be collecting as many rulings as it can lay its hands on and then challenging the rulings that are at the more extreme end. Will it stop there?
- Is this limited to tax rulings, or could it extend, for example, to the discretion of a tax authority to settle a dispute? The Commission suggested in *Engie* that a failure to invoke a GAAR could amount to State aid.
- Does the EU have the resources to apply its approach consistently? If it targets only cases it considers to be egregious, how will the EU ensure its approach is consistent?
- Is the arm's length principle that the EU is seeking to apply different from the well-established OECD arm's length principle, or is it just pushing for a higher price in the "arm's length" range?
- We know that the US believes these challenges represent a US tax cost, but is that always the case? Even if the tax assessed is creditable in the US, in many cases it would actually reduce US tax collected only if the offshore profit was ever remitted back to the US.
- Finally, whose profits are these to tax anyway? In *Apple*, for example, the US seemed happy to delay taxing the profits, perhaps indefinitely, and the Irish are not keen to tax them either. The EU invited other Member States to claim their share, but, if each jurisdiction is happy with its profit share, is it really for the EU to interfere, particularly where the result is that the company that has been incentivised to bring business to a State has to pay the fine whilst the errant State gets away with no real punishment?

One thing is clear - it is going to be many years before we have answers to all of these questions.