

## CONFERENCE INVITATION

### “(Fiscal) State Aid and Its Quantification and Recovery”

25 November 2011

On 25 November 2011, Leiden University is organizing a conference on the subject of EU-Law. The title of this conference is: “(Fiscal) State Aid and Its Quantification and Recovery”. As the name suggests, the focus of this conference is the quantification of unlawful State aid granted through the tax system, and the subsequent recovery hereof.

This conference is jointly organized by the Institute for Austrian and International Tax Law at Vienna University of Economics and Business (WU), the Center for Tax Law at Uppsala University, the Institute for Tax Law and Economics at Leiden University and the International Tax Center Leiden, in cooperation with the European Association of Tax Law Professors (EATLP). This particular conference is organized in cooperation with the Leiden Expert Group on State Aid (LEGSA).

#### Program

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| 9:30 – 10:00  | <i>Reception</i>   |
| 10:00 – 10:30 | <i>Welcome (Anna Gunn, MA (Cantab), LL.M)</i>                                |
| 10:30 – 11:15 | <i>What are the issues and why do they matter? (prof. dr. Frank Engelen)</i> |
| 11:15 – 11:30 | <i>Coffee break</i>  |
| 11:30 – 12:15 | <i>Fiscal State aid: a tax accountant’s perspective (Bart Janssen)</i>       |
| 12:15 – 13:00 | <i>The European Commission’s experience (Barbara Brandtner)</i>              |
| 13:00 – 14:15 | <i>Lunch break</i>   |
| 14:15 – 15:00 | <i>Practical experience from Italy (Claudio Valz)</i>                        |
| 15:00 – 15:45 | <i>Practical experience from Hungary (dr. Anita Gyürkés)</i>                 |
| 15:45 – 16:00 | <i>Tea break</i>   |
| 16:00 – 17:00 | <i>Interactive debate: “Solving problems, finding solutions”</i>             |
| 17:00 – 18:30 | <i>Drinks</i>  |

The conclusions derived from this conference will be published in the “Conflict of Norms” series, published by the International Bureau of Fiscal Documentation (IBFD).

#### Contact and registration

Participation is free of charge, but subject to prior registration by e-mail via [belastingrecht@law.leidenuniv.nl](mailto:belastingrecht@law.leidenuniv.nl). Please contact **Anna Gunn** ([a.f.gunn@law.leidenuniv.nl](mailto:a.f.gunn@law.leidenuniv.nl)) or **Lodewijk Wisse** ([j.l.l.wisse@law.leidenuniv.nl](mailto:j.l.l.wisse@law.leidenuniv.nl)) in the event of questions or comments.

With kind regards,

**prof. dr. Tanja Bender**  
**prof. dr. Frank Engelen**

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## Conference Outline

“(Fiscal) State Aid and Its Quantification and Recovery”

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### **Objectives: Why have we chosen the subject of (fiscal) State aid?**

Under article 107 and 108 of the Treaty on the Functioning of the EU (TFEU), certain forms of State aid are considered to be incompatible with the internal market. The rationale behind this lies in the need to prevent distortions of competition within the common market.

Underlying the State aid rules is the recognition that if Member States are free to support national industries and enterprises unchecked, this could pose a serious threat to the level playing field between European companies. It is settled European case law that State aid can also encompass measures granted via the tax system of a Member State. Examples of this could be tax exemptions, credits or advantageous rules on the deduction of costs or the depreciation of assets applicable only to a select group of enterprises.

The legal basis for the regulation of State aid is provided in Article 107 and 108 TFEU. These provisions accord an important role to the European Commission. The Commission is tasked with the protection of the State aid rules, and has correspondingly been armed with a number of possible sanctions which can be taken in the event that Member States fail to adhere to their treaty obligations. Crucially, there is scope for the Commission to demand the recovery of unlawful State aid (including an interest component) from the beneficiaries hereof. This means that European enterprises can be confronted with a demand to repay an amount received to the Member State in question. Although this is not intended as a punitive measure and instead is just meant to ‘even out’ the distortion in the internal market, it is not hard to see how this ‘cash-out’ might come as an unwelcome surprise to businesses.

Combined with the fact that many taxpayers are still not especially familiar with the EU State aid rules and that it is not always obvious that a particular tax measure even poses a State aid risk, the recovery of fiscal State aid is often regarded as extremely unfair. This suggests that the current status of the rules and guidance provided on fiscal State aid is not effective in terms of guaranteeing the legal certainty of the individual taxpayers. This is of course unfortunate for the taxpayers involved, and also risks undermining public confidence in the EU and its institutions. In our view, this lends a sense of urgency to the issue of fiscal State aid.

### **Current status of the academic debate on (fiscal) State aid**

Thankfully, there is an increasing interest and awareness of some of the issues surrounding (fiscal) State aid. This holds true for academics and tax practitioners, but also of course for the many different EU enterprises which have already may in the future be confronted with

questions regarding tax measures in breach of articles 107 and 108 of the TFEU. It is widely recognized that there are still a number of difficulties in respect to the application of the State aid rules to tax measures, and considerable amount of time and creative energy has already been devoted to providing (or at least improving) legal certainty in this field. The application of the concept of selectivity applied in a tax context has, for example, been chosen for as the theme of a number of academic conferences.<sup>1</sup> In addition to this, various recent publications have also appeared on this topic.

Notwithstanding all the work described above, the subject of quantification and recovery is in our view underrepresented in the academic debate. This is unfortunate, as the issue is one of much practical importance. Imagine, for example, a situation in which it is established that an enterprise has enjoyed unlawful fiscal State aid through the application of a measure of national tax law a number of years previously. In the event the recovery of this aid were ordered, the question arises as to how this amount (hereafter referred to as: “the recovery amount”) should be calculated. In other words, how is the amount of fiscal State aid in any particular case quantified? It is this question which we seek to address.

### **What do we already know?**

In the 1998 Commission notice on the application of the State aid rules to measures relating to direct business taxation (98/C 384/03), this issue is briefly touched upon (emphasis added):

“If the Commission finds that State aid which has been put into effect in breach of [the notification rule under Article 108(3) TFEU] does not qualify for any of the exemptions provided for in the Treaty and is therefore incompatible with the common market, it requires the Member State to recover it, except where that would be contrary to a general principle of Community law, in particular legitimate expectations to which the Commission’s behavior can give rise. In the case of State aid in the form of tax measures, *the amount to be recovered is calculated on the basis of a comparison between the amount actually paid and the amount which should have been paid if the generally applicable rule had been applied. Interest is added to this basic amount.* The interest rate to be applied is equivalent to the reference rate used to calculate the grant equivalent of regional aid.”

Under the approach outlined above, a comparison is made between (i) the amount of tax which would have been paid *without* the State aid measure and (ii) the amount of tax which has actually been paid. The delta between these two amounts constitutes the amount of State aid provided. Legal interest is subsequently charged of this amount.

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<sup>1</sup> These include: the conferences at Leiden University (2009) and the University of Luxembourg (November 2011).

## **What questions need to be answered?**

At first sight, the approach outlined above seems to be pretty straightforward. Applied in practice, however, questions can arise.

### ***Issue 1: Timing differences***

What is the impact of timing differences? How should one for example quantify the value of a measure which involves accelerated depreciation on assets? How do changes in the tax rate interact with this? At what moment in time should the value of the aid be quantified, i.e., does it matter that at the moment when the accelerated depreciation was used, future developments in the tax rate were not yet known?

### ***Issue 2: Optional regimes***

What is the impact of juridical choices which have been influenced by the use of the State aid regime? I.e., how should the use of optional regimes be evaluated when determining the tax which would have been paid *in absentia* the use of the State aid measure? Is the decision to use certain juridical choices distinct from the choice for particular business activities (such as the choice to locate a business in a particular place, in the belief that this will permit the use of an advantageous regime).

### ***Issue 3: The tax base can be positive or negative***

What is the impact of the tax base can be both positive and negative, owing to the impact of losses? In the event aid is granted in a loss year, this aid could arguably be considered as not yet having reduced the amount of tax due (as no tax would yet have been paid). Under these circumstances, should the aid already be considered as having been granted? If yes, to what amount? Does the availability of carry-forward and/or carry-back rules matter? To what extent are future changes in the tax rate (i.e., the future value of carry-forward losses) relevant? What is the impact of loss years when calculating the amount of interest payable?

### ***Issue 4: Interaction with other tax systems***

In some cases, the total amount of tax paid by an enterprise can be impacted by the interaction with other tax systems. A good example of this is the provision of tax credits aimed at the prevention of double taxation. Imagine the case where a resident of Member State A has a permanent establishment (PE) in Member State B. It is established that Member State B has calculated the tax base of the PE using a fiscal provision which turns out to be State aid. An amount of tax is then recovered from the PE. The question arises whether Member State A would provide (additional) relief in respect of the amount recovered. If Member State A calculates the amount of relief which it is willing to provide without having reference to the Member State B rules, a variation on this question can become relevant. Let's say that Member State A is found to be operating a fiscal measure which provides unlawful State aid. This could for example be because in the calculation of

the tax base, Member State A *in casu* allows for a particular deduction, which in turn leads to a lower level of tax. If Member State A uses these rules when calculating the taxpayer's relief for the PE in Member State B, the amount of relief granted will necessarily be less than would have been due in absence of the (unlawful) rule. Is there scope for the taxpayer to demand a higher level of relief for double taxation from Member State A?

***Looking forward to seeing you in Leiden!***

By organizing this conference, we hope to answer some of the questions raised above. We hope to see you in Leiden on 25 November 2011!