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THE ‘ALP’ FROM A PLURALISTIC PERSPECTIVE OF EU LAW

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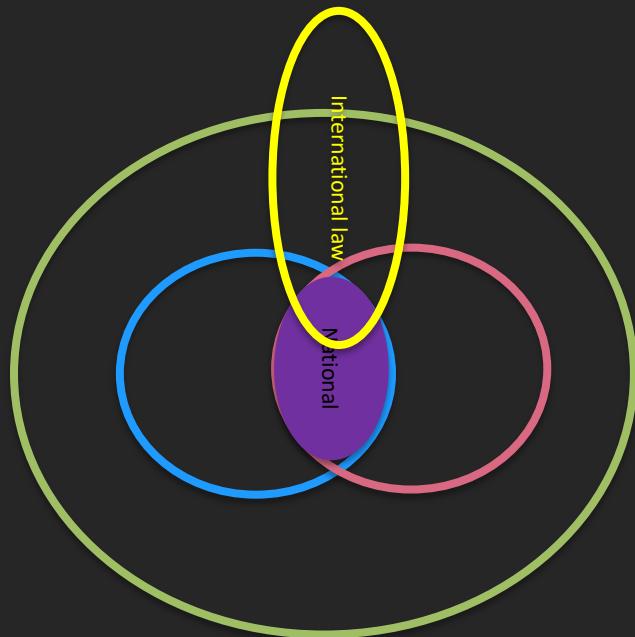
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State aid rule – prohibition – art. 107(1) TFEU

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by **favouring certain undertakings or the production of certain goods** shall, in so far as it affects trade between Member States, be incompatible with the internal market.



Pluralistic perspective?



EU constitutional law

EU State aid law

EU tax law

National law

International law and context

Is the ALP a legally binding principle of the EU law?

- Constitutional aspects
 - Primarily law \Rightarrow Lisbon Treaty
 - Equal treatment (non-discrimination) – art. 2, TEU, art. 18 TFEU
 - State aid – arts. 107 to 109 TFEU
 - Tax – art. 113 TFEU (indirect taxes), art. 114(2) combined with art. 115 TFEU (direct taxes) \Rightarrow special legislative procedure (unanimity votes of the Council)
 - Secondary law \Rightarrow binding effects (art. 288 TFEU)
 - Regulations, directives and decisions \Rightarrow binding effects
 - Recommendations and opinions \Rightarrow no binding effects (theoretically)

Cont.

- Com. S.A. decision – Netherlands APA to Starbucks (**21 Oct 2015**) ↳ ALP as a binding instrument (S.A.38374 Netherlands (Starbucks) para. 264) based on Joined Cases C-182/03 and C-217/03 Belgium and Forum 187 ASBL v Commission
- State aid soft law (**July 2016**)
 - Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, paras 171 & 172 ↳ ALP
- EU tax law (**Aug 2016**)
 - Council Directive (EU) 1164/2016 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, see recital 14, art. 8(2)

Cont. II

- **Case-law** (analysis) ⇔ Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 ASBL v Commission*
 - **Application OR interpretation (!?) of the principle of equal treatment in taxation** ⇔ ALP

(95) In order to decide whether a method of assessment of taxable income such as that laid down under the regime for coordination centres confers an advantage on them, it is necessary, (...), to compare that regime with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition. (Joined Cases C-182/03 and C-217/03 Belgium and Forum 187 ASBL v Commission)

 - “The Belgian tax regime for coordination centres, which derogates from ordinary law, is governed by Royal Decree No 187 of 30 December 1982 concerning the establishment of coordination centres”

PROBLEMS:

**Reference tax system from which the ALP arises
ALP confers an advantage(?!)**

EU Com S.A. decision – S.A.38374 Netherlands (Starbucks) – ALP – general princ. of equal treatment in (EU) tax law(?)

(264) The arm's length principle therefore necessarily forms part of the Commission's assessment under Article 107(1) of the Treaty of tax measures granted to group companies independently of whether a Member State has incorporated this principle into its national legal system. It is used to establish whether the taxable profits of a group company for corporate income tax purposes has been determined on the basis of a methodology that approximates market conditions, so that that company is not treated favourably under the general corporate income tax system as compared to non-integrated companies whose taxable profit is determined by the market. Thus, for any avoidance of doubt, the arm's length principle that the Commission applies in its State aid assessment is not that derived from Article 9 of the OECD Model Tax Convention, which is a non-binding instrument, but is a general principle of equal treatment in taxation falling within the application of Article 107(1) of the Treaty, which binds the Member States and from whose scope the national tax rules are not excluded. (Joined Cases C-182/03 and C-217/03 Belgium and Forum 187 ASBL v Commission, ECLI:EU:C:2006:416, paragraph 81)

Joined Cases C-182/03 and C-217/03 Belgium and Forum 187 ASBL v Commission, ECLI:EU:C:2006:416

(81) It should be pointed out, first, that rules relating to tax are not excluded from the scope of Article 87 EC.

(88-102) discussion if the cost-plus method confers an advantage

(95) In order to decide whether a method of assessment of taxable income such as that laid down under the regime for coordination centres confers an advantage on them, it is necessary, as the Commission suggests at point 95 of the contested decision, to **compare that regime with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition.**

(96)(97)

Joined Cases T-760/15 and T-636/15, *Netherlands (Starbucks) v Commission*

(151) In that context, although, through that fiscal measure granted to an integrated company, national authorities have accepted a certain level of pricing for an intra-group transaction, Article 107(1) TFEU allows the Commission to check whether that pricing corresponds to pricing under market conditions, in order to determine whether there is, as a result, any mitigation of the burdens normally included in the budget of the undertaking concerned, thus conferring on that undertaking an advantage within the meaning of that article. The arm's length principle, as described by the Commission in the contested decision, is thus a tool for making that determination in the exercise of the Commission's powers under Article 107(1) TFEU. The Commission also stated, correctly, in recital 261 of the contested decision, that the arm's length principle was a 'benchmark' for establishing whether an integrated company was receiving, pursuant to a tax measure determining its transfer pricing, an advantage within the meaning of Article 107(1) TFEU.

(152) ... when the Commission uses that tool to check whether the taxable profit of an integrated undertaking pursuant to a tax measure corresponds to a reliable approximation of a taxable profit generated under market conditions, the Commission can identify an advantage within the meaning of Article 107(1) TFEU only if the variation between the two comparables goes beyond the inaccuracies inherent in the methodology used to obtain that approximation.

(153) ... although the APA accepted a certain level of pricing for intra-group transactions, it is necessary to check whether that pricing corresponds to prices that would have been charged under market conditions.

Para. 155 about the OECD Guidelines influence on the TP subject.

Para. 156 concludes that the Commission "was entitled to examine, in the context of its analysis under Article 107(1) TFEU, whether intra-group transactions were remunerated as though they had been negotiated under market conditions."

ALP (method implemented) confers an advantage to all businesses under the ref. regime, or only to those that seek APA decisions, or only to one business (e.g. Starbucks)?

C-182/03 and C-217/03 Belgium and Forum 187 ASBL v Commission

- Existing aid, ref. scheme applicable to all coordination centers (Royal Decree)

Joined Cases T-760/15 and T-636/15, Netherlands (Starbucks) v Commission

- APA decisions?
- Individual aid to Starbucks?



FINAL THOUGHTS

ALP can confer an advantage (case-law interpretation) when “the variation between the two comparables goes beyond the inaccuracies inherent in the methodology used to obtain that approximation” (para. 152, T-760/15, Netherlands v Commission)

ALP ↳ complex accountability, mainly if one particular method is not preferred by law ↳ margin for discussion ↳ interpretation ↳ problematic ↳ conferral principle (art. 4(1) TEU, art. 5(1) TEU) ref. to art. 3(1)(b) TFEU, art. 26 TFEU, art. 107(1) TFEU, art. 114(2) & 115 TFEU

EU is constantly developing as a unified group ↳ working towards a single mkt ↳ tackle direct tax competition between MS via S.A. because the legislative way is too difficult



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THANK YOU!

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