State Aid Investigations in the EU: Are US Firms Being Unfairly Targeted?

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Introduction

Although the policing of state aid to corporations is not part of the mandate for competition authorities in most jurisdictions worldwide, the European Union competition enforcement agency (DG Comp) has embraced this role since the late 1990s. In recent years, a number of high-profile investigations by DG Comp into state aid given to prominent US companies has raised a question as to whether the agency may be unfairly targeting US firms. In this article, we investigate whether there is any evidence to support such a claim.

The regulation and enforcement of antitrust and competition policy in most jurisdictions is governed by three mandates. The first mandate is to scrutinize any abuse of market dominance by a single firm or a small number of firms. The second mandate is to investigate and punish any illegal collusive activity by multiple firms trying to illegally boost their market power through cartel-like behavior. The third mandate is to police proposed mergers and acquisitions to avoid having to intervene later as part of the first mandate. Unlike regulatory authorities in most other jurisdictions, DG Comp has added a fourth mandate to its role, namely the policing of state aid to corporations and undertakings that it believes may represent a special case of unfair competition.[1]

Economists and others have long questioned the economic efficiency of state aid, and point to potentially negative welfare implications. Raising the money to provide such aid through taxation is costly and creates distortion in the economy; in addition, the recipients of such aid gain an unfair advantage over their competitors, which must succeed without this assistance. Therefore, from a global welfare perspective, significant social or economic benefits must flow from such aid in order to offset the negative effect of distortions.

Regardless of these concerns, states have many reasons to engage in these aids to corporations that go beyond simple efficiency considerations. Some of these reasons may have merit, such as furthering the development of poorer regions, supporting research and development, and helping new industries. Others may be more dubious, such as favoring local entities over foreign corporations, or pandering to constituents. Of course, there may be differing views and interpretations as to the propriety of such actions. Where one stakeholder may see pandering, another may see important regional development; and what some may view as virtuous investments in research and development to benefit future generations, others may view as inefficient support of unworthy local efforts.

State aid to corporations comes in many shapes and forms, including grants, loans, guarantees, and equity participation. However, in European countries, tax advantages (or quasi-tax advantages) have

[1] The Commission's 2005 State Aid Action Plan defines the objective of state aid control: "Making more use of a refined economic approach is a means to ensure a proper and more transparent evaluation of the distortions to competition and trade associated with state aid measures." See "THE ECONOMIC ANALYSIS OF STATE AID: SOME OPEN QUESTIONS," Christian Buelens, Gaëlle Garnier, Matthew Johnson, and Roderick Meiklejohn, European Economy Economic Papers. N. 286, September 2007.

recently come under particular scrutiny. Tax advantages are generally used as incentive tools, but recently, these tax incentive tools have evolved towards targeting a specific undertaking, or a limited group of undertakings. These include (but are not limited to) allowing corporations to exclude some revenue from their tax base, allowing them to defer payment of certain taxes, exempting them from paying taxes for a period of time, or offering them advantages on quasi-taxes, such as reduced landing fees at airports or reduced rates from public utilities. When combined, these benefits may significantly reduce the operating costs of the undertaking or the group of undertakings benefitting from them, and hence distort competition.

In recent years, the European Commission's state aid control activities have come under criticism from US authorities, which have expressed concern that the Commission is unfairly targeting US companies.[2] Indeed, the Commission has recently started to review the tax deals that several large US corporations struck with Ireland, the Netherlands, and Luxembourg. To date, the Commission has reached decisions that were unfavorable to the corporations in three cases (Apple, Starbucks, and Amazon), with one other case still being investigated (McDonald's).

This article investigates whether there is evidence that the EU authorities are unfairly targeting US firms. In the first section, we present a short summary of the EU state aid control policies, their origin, their purpose, and the history of their applications. In the second section, we analyze the history of the Commission's decisions regarding state aid involving tax advantages in an effort to detect any potential bias against US firms.

Section 1: The European Union State Aid Control Policies

The European Union policy on state aid is governed by articles 107 to 109 of the Treaty on the Functioning of the European Union (TFEU).

Article 107 bans any form of state aid that might distort competition and trade among member states. "[A]ny 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."[3] According to the policy, social programs and aid in response to "damage caused by natural disasters or exceptional occurrences" are allowed.

As noted previously, state aid control by the European Commission is rooted in a desire to avoid distortions that may result from such aid (as opposed to, for example, a desire to protect its member states from implementing a potentially wasteful and ineffective form of subsidy). It logically follows then that the Commission recognizes that state aid may provide benefits to the firms receiving assistance. If

[2] https://www.theguardian.com/world/2016/jan/29/european-commission-unfairly-targeting-us-companies-starbucks-mcdonalds-amazon-apple-taxes-treasury; https://www.nytimes.com/2016/09/20/business/international/europe-us-tax-luxembourg-engie-vestager.html?_r=0.

[3] Article 107, TFEU.

state aids were completely ineffective and a waste of public money, there would be no reason for the Commission to become involved.

But if well-designed state aid may distort competition, why should it ever be allowed? Buelens *et al.* (2007) note that the Commission "has the power to grant derogations in respect of aid for the following purposes:

> a) to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;
>
> b) to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
>
> c) to facilitate the development of certain economic activities or of certain economic areas, 'where such aid does not adversely affect trading conditions to an extent contrary to the common interest';
>
> d) to promote culture and heritage conservation 'where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.' [4]

In economic terms, there are multiple possible justifications for state aid even when it is distortionary. These include:

1. *Market Failure*: State aid can be justified to correct existing market failures. For example, aid to banks and the financial sector that many member states provided during the 2008-2009 financial crisis may well have been distortionary, but that distortion was arguably preferable to the alternative of a wrecked financial system. Similarly, in industries and activities which generate large positive externalities (such as research and development), state aid might be justified.
2. *Fostering of Competition*: In some cases, state aid can be seen as fostering rather than harming competition. For example, state aid can be justified in regions where, for geographic or historical reasons, producers would suffer a cost disadvantage. State aid may overcome these natural disadvantages and help to foster competition. Similarly, in highly concentrated industries, aiding the development of new competitors may be welfare enhancing, even if the concentrated industries tend to be abroad and the new competitors domestic.
3. *Correcting Existing Distortions*: State aid can also help correct distortions that adversely affect economic activity. Taxes are one of the largest examples of such distortions; state aid schemes that help provide less distortionary and better-tailored tax rates may be competition enhancing.[5]

[4] "The economic analysis of state aid: Some open questions," Christian Buelens, Gaëlle Garnier, Roderick Meiklejohn, and Matthew Johnson, European Economy Economic Papers, September 2007.
[5] See, for example, "State Aids: Economic Analysis and Practice in the European Union," by David Spector, in *Competition Policy in the EU*, Xavier Vives, ed.

These "good" reasons for state aid significantly muddy the waters. This explains why, for each instance of state aid, the Commission has to weigh the reasons and potential impacts of the aid scheme as well as its potential to distort and ultimately harm competition.

Section 2: An Analysis of the History of EU Decisions Related to State Aid

We have analyzed the history of the Commission's decisions on state aid-related tax cases.[6] The database includes information on all the cases investigated by the Commission since 1999. These include cases in which member states notified the Commission; cases investigated by the Commission following complaints by competitors or the general public; and cases that the Commission decided *ex officio* to investigate.

In each instance, the Commission may further investigate or decline to do so. Further investigations may be limited to additional information requests from the member state or become a full-fledged enquiry.

At the end of the enquiry, the Commission can render any of several decisions related to the practice being investigated:

- the practice does not constitute a state aid in the sense of the Treaty;
- the practice is a state aid in the sense of the Treaty, but will not distort competition and is therefore acceptable;
- the practice is a state aid in the sense of the Treaty, but falls within one of the exceptions considered in the Treaty;
- the practice is a state aid in the sense of the Treaty, and the monies paid through the aid scheme must be recovered; or
- the practice is a state aid in the sense of the Treaty; the monies paid through the aid scheme don't have to be recovered, but the scheme must cease.

As of June 2017, the Commission database listed 1,596 cases of state aid schemes brought to the Commission's attention. The cases cover a variety of tax advantages and go back as far as 1997. Of these, 166 schemes (10.4%) appear to have been designed to benefit a single corporation, or a clearly defined and individually identifiable group of corporations.

Figure 1 shows the evolution of the number of state aid tax cases investigated and not investigated by the Commission each year. Historically, the Commission has been very proactive in the investigation of tax-related state aid schemes, investigating a steady stream of such schemes in the early 2000s. Between 2011 and 2013, however, it investigated only four cases in total. Of note, in response to calls for more transparency around tax rulings, in June 2013 the Commission began an enquiry into the tax ruling practices – under state aid rules – of seven member states (Cyprus, Ireland, Luxembourg, Malta, Belgium, The Netherlands, and the UK). The Commission subsequently extended this enquiry to all member states in December 2014.[7] This appears to have contributed to a recent increase in

[6] http://ec.europa.eu/competition/elojade/isef/
[7] http://europa.eu/rapid/press-release_IP-14-2742_en.htm

investigations, as the Commission investigated 13 cases between 2014 and 2016.[8]

Figure 1:
Number of State Aid Tax Cases Investigated and not Investigated by the Commission

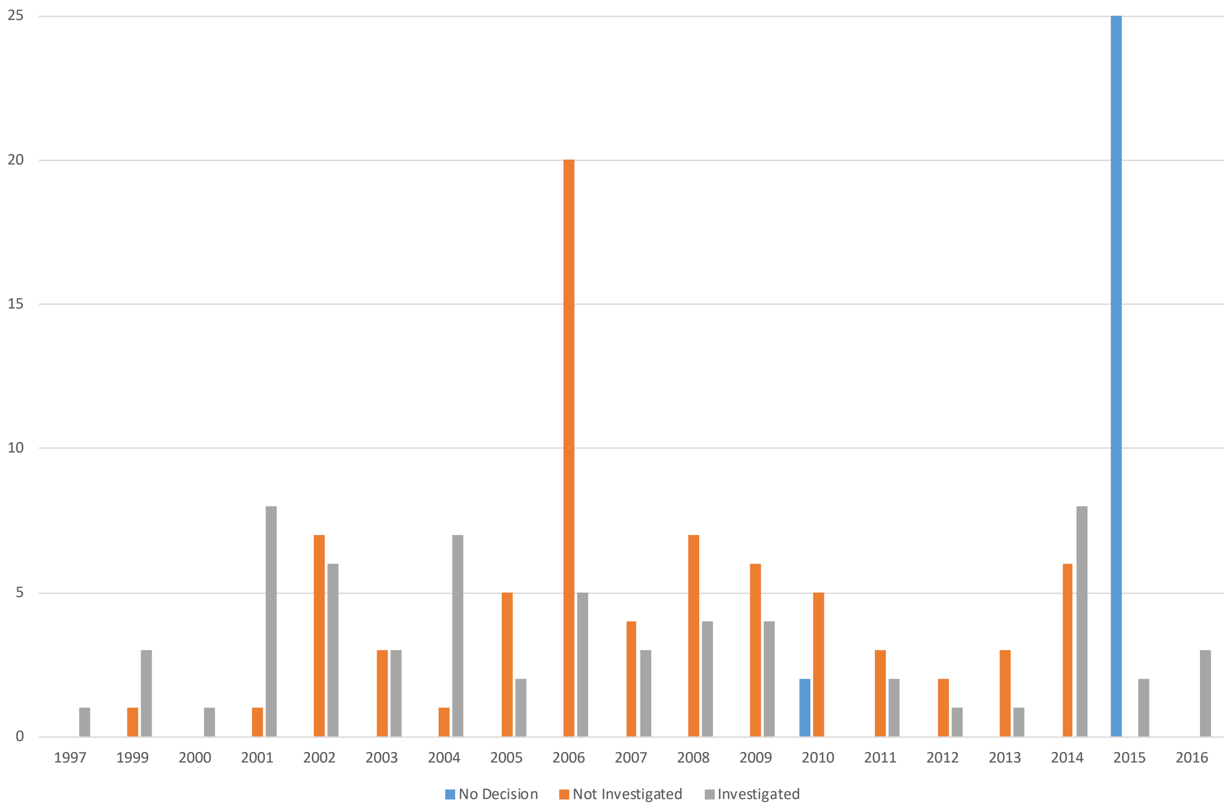

Table 1 shows the number of instances in which the Commission was alerted to allegations of member states granting tax advantages to individual corporations since 1999. It identifies whether the firm(s) at issue are US firms or subsidiaries of US firms. The average number of cases considered by DG Comp per year has recently increased by 80%, from 8.1 cases for 1999-2013, to 14.7 cases for 2014-2016. This suggests that either this specific tool is used with greater frequency to assist or incentivize individual firms, or that DG Comp has changed its approach to examining such schemes.

[8] For 2015, the number of cases still to be decided included many instances of similar aid cases by a single member state.

Table 1 State aid control in the European Union Tax advantages granted by member states to specific corporations All cases considered by DG Comp Decision to Investigate			
Before 2014			
	US Firm or Subsidiary		
	No	Yes	Total
Cases against which DG Comp decided to take no action	67	3	70
Cases DG Comp decided to investigate further	50	2	52
	117	5	122
Since 2014			
	US Firm or Subsidiary		
	No	Yes	Total
No decision	23	2	25
Cases against which DG Comp decided to take no action	6	0	6
Cases DG Comp decided to investigate further	9	4	13
	38	6	44

Between 1997 and 2013, the Commission investigated 42.6% (52 of 122) of cases. Where the Commission has decided whether to investigate or not, the corresponding rate for 2014-2016 is 68.4% (13 of 19). However, during the latter period, the Commission has yet to decide on whether to proceed on 25 of the 44 cases, making it difficult to assess whether it has tightened its control over such aids.

Before 2014, only five cases brought to the Commission's attention involved US corporations or subsidiaries. Since then, six already have been brought to the Commission's attention, of which four have been investigated and two are awaiting the Commission's decision to investigate or not.

Switching focus from decisions to investigate by the Commission to its rulings, Table 2 shows that since 2014 the Commission has ruled against US firms in all three instances where a complaint was raised and a ruling reached. That is also true for non-US firms. In all six instances where a ruling was reached, the Commission declared the state aid unlawful. Between 1997 and 2013, the Commission had concluded that there has been unlawful state aid in 56% of cases.

Overall, while the numbers remain small, the pattern that emerges is not one whereby the Commission is singling out US firms relative to European firms, but rather it reveals a more aggressive overall approach to enforcement of state aid than had been true historically, regardless of where a company is based. Of course, it is also possible that the state aid cases brought to the Commission in recent years presented a greater and more systemic threat to competition than did cases that predate 2014.

Table 2			
State aid control in the European Union			
Tax advantages granted by member states to specific corporations			
All cases considered by DG Comp			
Ruling			
Before 2014			
	US Firm or Subsidiary		
	No	Yes	Total
Positive - DG Comp takes no action	22	1	23
Negative - Measure is ruled unlawful aid	28	1	29
	50	2	52
Since 2014			
	US Firm or Subsidiary		
	No	Yes	Total
No decision	3	1	4
Positive - DG Comp takes no action	0	0	0
Negative - Measure is ruled unlawful aid	6	3	9
	9	4	13

Table 3a illustrates why US authorities and US corporations may feel unfairly singled out. Whereas in the years prior to 2014, the Commission ruled against only one US firm for violations of European competition rules related to state aid (back in 2002), since 2014 three US firms have already been ruled against (Apple, Starbucks, and Amazon), and another remains under investigation (McDonald's).

Table 3a			
State aid control in the European Union			
Tax advantages granted by member states to US corporations			
Year	Corporation	Member State	Decision
2003	Dow Pet Food	Germany	Not Probed
2007	Signet Solar (Direct Grant)	Germany	Not Probed
2009	Global Foundries (Direct Grant)	Germany	Not Probed
2007	Dell (Direct Grant)	Poland	No Violation
2002	US Companies Foreign Sales (Tax Base Reduction)	Belgium	Violation
2014	Apple (Tax Base Reduction)	Ireland	Violation
2014	Starbucks (Tax Base Reduction)	Netherlands	Violation
2014	Amazon (Tax Base Reduction)	Luxembourg	Violation
2014	McDonald's (Tax Base Reduction)	Luxembourg	Under Review

As a comparison, Table 3b shows the cases involving non-US firms reviewed or declined by the Commission since 2014. Of the 15 cases, the Commission has formally declined to probe another six, ruled that another six reflected unlawful aid, exonerated one, and is still reviewing the remaining two.

Table 3b
State aid control in the European Union
Tax advantages granted by member states to Non-US corporations

Year	Corporation*	Member State	Corporation Country	Decision
2014	Oresund Fixed Link (Tax Base Reduction)	Denmark	Denmark	Not Probed
2014	MSF 2002 - Avancis (Tax Allowance)	Germany	France	Not Probed
2014	LIP - Hungary - Aid to Nitrogénmvek (Tax Allowance)	Hungary	Hungary	Not Probed
2014	Aid to Apollo Tyres (Hungary) Kft (Tax Allowance)	Hungary	India	Not Probed
2014	LIP-Latvia: Baltic New Technology (Tax Advantages)	Latvia	Latvia	Not Probed
2014	Restructuring aid for Alestis (Tax Deferment)	Spain	Spain	Not Probed
2014	Alleged aid for Ilva in A.S. (Tax Allowance)	Italy	Italy	No Violation
2014	Thüringen Porzellan GmbH (Tax Base Reduction)	Germany	Germany	Violation
2014	Larco General M&M Company S.A. (Tax Deferment)	Greece	Greece	Violation
2014	Larco General M&M Company S.A. (Other Tax Advantages)	Greece	Greece	Violation
2015	State aid which Luxembourg granted to Fiat (Tax Base Reduction)	Luxembourg	Italy/US	Violation
2015	State aid which Luxembourg granted to Fiat (Other Tax Advantages)	Luxembourg	Italy/US	Violation
2016	Aid to certain Spanish football clubs (Other Tax Advantages)	Spain	Spain	Violation
2016	Potential aid to GDF Suez (Tax Base Reduction)	Luxembourg	France	Under Review
2016	Potential aid to GDF Suez (Tax Advantages)	Luxembourg	France	Under Review

** The same corporation can appear multiple times when the program involved multiple forms of tax aid.*

The very large size of the companies investigated since 2014, as well as the high visibility of each of these cases, appears to exacerbate the sense of biased enforcement. However, our review of enforcement activities against both US and non-US corporations suggests that, although the Commission appears to have recently become more aggressive in its views on state aid generally, there is no evidence yet that its enforcement is biased against US entities.