

Fiscal state aid: are US companies being unfairly targeted?

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Analysis Group president Pierre Cremieux, managing principal Marc Van Audenrode and principal David Mishol analyse whether the European Commission's tax-related state aid investigations disproportionately target US companies.

In recent years, a number of high-profile investigations by the European Commission's Directorate-General for Competition into state aid given to prominent US companies has raised questions about whether the agency may be targeting such companies unfairly. Is there any evidence to support such a claim?

We have analysed the history of the commission's decisions on state aid-related tax cases. 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 to investigate ex officio.

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.

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 company, or a clearly defined and individually identifiable group of companies.

Table 1 below 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. It's worth noting that 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 Cyprus, Ireland, Luxembourg, Malta, Belgium, the Netherlands, and the UK. The commission subsequently extended this enquiry to all member states in December 2014. This appears to have contributed to a recent increase in investigations, as the commission investigated 13 cases between 2014 and 2016.

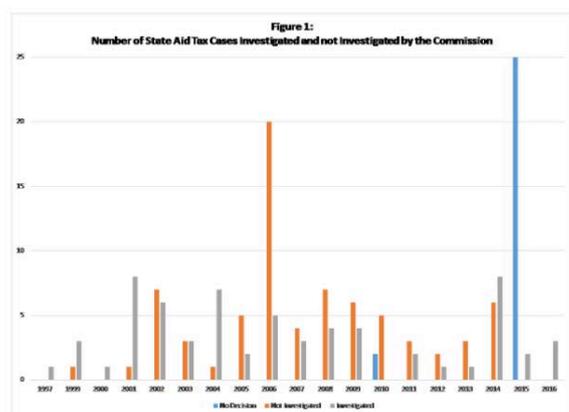


Table 1 shows the number of instances in which the commission was alerted to allegations of member states granting tax advantages to individual corporations since 1999. It identifies whether the company or companies at issue are US companies, or subsidiaries of US companies. The average number of cases 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 incentivise individual companies, or that DG Comp has changed its approach to examining such schemes.

	US Firm or Subsidiary		
	No	Yes	Total
Before 2014			
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			
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 companies or subsidiaries. Since then, six have already been brought to the commission's attention, of which four have been investigated and two are awaiting the commission's decision on whether to investigate.

Switching focus from the commission's decisions to investigate to its final decisions, Table 2 shows that since 2014 the Commission has ruled against US companies in all three instances where a complaint was raised and a ruling

reached. That is also true for non-US companies. In all six instances where the commission reached a decision, the commission declared that the state aid was unlawful. Between 1997 and 2013, the commission 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 where the commission is singling out US companies – but it reveals a more aggressive overall approach to enforcement of state aid than has historically been true, no matter where companies were 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.

	US Firm or Subsidiary		
	No	Yes	Total
Before 2014			
Positive - DG Comp takes no action	22	1	23
Negative - Measure is ruled unlawful aid	28	1	29
	50	2	52
Since 2014			
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 companies may feel unfairly singled out. Before 2014, the commission found unlawful state aid in only one case involving a US company, in 2002; but since 2014 the enforcer has found unlawful state aid three times – in *Apple*, *Starbucks* and *Amazon*, and it continues to investigate McDonald's.

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 companies that the commission has reviewed or declined since 2014. Of the 15 cases, the commission has formally declined to probe another six, found 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 - Avandis (Tax Allowance)	Germany	France	Not Probed
2014	LIP - Hungary - Aid to Nitrogenmek (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 Iva in A.S. (Tax Allowance)	Italy	Italy	No Violation
2014	Thuringen 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. But our review of enforcement activities against both US and non-US companies 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 disproportionately targets US companies.