

Margrethe Vestager
Commissioner Competition
European Commission
Rue de la Loi 200/ Wetstraat 200
1040 Bruxelles / Brussel
Belgique

Brussels, 29 July 2016

Dear Commissioner Vestager,

The American Chamber of Commerce to the European Union (AmCham EU) speaks for 164 American companies who together account for more than 4.3 million jobs and €2 trillion of investment in Europe. AmCham EU has concerns regarding the European Commission's (the Commission) current approach to tax rulings granted by fiscal authorities of the Member States. AmCham EU's intention is not to interfere in any way with any investigations or their outcomes, this letter aims at outlining some concerns at a high level, and we would of course be happy to discuss them with you in more detail.

AmCham EU is concerned that the published decisions are used to make broad policy statements not strictly limited to the facts at stake, which may create uncertainty in an area that used to be characterised by the reliability of tax rulings until either a change of law or their expiration. The retrospective nature of inquiries into the Member States' practice of issuing tax rulings does interfere *de facto* with a well-known and well-established mechanism of fiscal administration, whose exclusive purpose and essential function is to be reliable and to be relied upon by the investor.

Threat of Uncertainty

When the State Aid Investigations into tax rulings began, it initially seemed that, *inter alia*, the Commission intended to use the arm's length principle as set out in Article 9 of the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention, in combination with the OECD Transfer Pricing Guidelines of 2010, as the legal benchmark for any finding of State Aid. It now seems that the Commission is intending to rely on an arm's length principle derived directly from Article 107(1) of the Treaty on the Functioning of the European Union (TFEU).¹ AmCham EU fears that this would add to the uncertainty companies face presently.

¹ In another recently decided matter, the *Belgian Excess Profit* Decision (at para. 150), the Commission appears to expressly reject the arm's length principle as set out in Article 9 of the OECD Model Tax Convention, as the arm's length principle it is relying on (which is all the more surprising as the same decision holds the OECD Model Tax Convention to be 'the authoritative statement on arm's length principle', at para. 53). Further, in the same decision (in paras. 138 and 139), the Commission makes statements as to *de jure* selectivity that might be understood as suggesting that any transfer pricing-based tax ruling would be automatically deemed selective, as transfer pricing by definition is only engaged in by multinational groups.

This shift to an Article 107-derived arm's length principle of unknown scope would not provide sufficient guidance on how companies can or should comply with it, and it is not in line with transfer pricing principles under the OECD Guidelines and with Member States' domestic legislations. Further, it contrasts with the fact that transfer pricing lies at the heart of any multinational company's tax affairs and there should be no uncertainty about how transfer prices need to be set.

Need for Advance Legal Certainty

Tax rulings do not establish taxes or tax bases. Rather, they confirm the application of the provisions of law that do establish taxes and tax bases. Tax rulings are a legitimate and longstanding part of companies' tax compliance and operations: they provide companies with the legal certainty needed to run their global operations. Determining in advance how transactions are taxed is desirable for both taxpayers and tax authorities. It helps them to develop cooperative compliance relationships that encourages greater tax compliance and discourages disputes. This is why the reliability of tax rulings is so important to investors.

The European Parliament ECON Committee's 2015 report on tax rulings noted that '*...tax legislation is complex, extensive, variable, unclear, uncertain and vague. Consequently, it is very difficult for the taxpayer to judge for himself the legal tax consequences of his actions...Therefore, taxpayers want to know the administration's legal interpretation of tax law before doing any transaction. Thus, it is clear that tax rulings contribute to legal certainty.*'

There is no mechanism for a company to gain advance certainty of tax treatment within the EU other than through tax ruling(s). Companies have no means to obtain clearance from the Commission itself and would find it extremely challenging to conduct due diligence as to whether or not a ruling could be considered as selective and constituting State Aid (potentially many years down the line). In the view of AmCham EU, it is the retrospective nature of the Investigations that creates most of the frictions that cause uncertainty for its corporate members.

Impact of Uncertainty on Inward Investment

By providing certainty, tax rulings in Europe have allowed investors to create jobs, and to develop innovative product and service offerings. They have thus contributed to creating wealth as well as economic and social development. The certainty and stability of the market, including taxation within it, has played a role in shaping Europe into one of the most important global hubs for innovation and technical and economic progress. Concern over the retrospective effects of Commission State Aid Investigations (and the new and retrospective law that these decisions would appear to impose) are having a significant and detrimental impact on the investment certainty in Europe for three key reasons:

- i) When tax rulings are considered likely to be subject to broad *ex post facto* review, they cannot serve the very purpose they are intended for, and taxpayers are ultimately unable to ascertain the tax treatment in advance for any future investments;

- ii) Where tax rulings have already been granted and been relied on for many years, the retrospective effect of the investigations could seriously undermine the faith of investors from within and outside Europe in the EU as an investment destination; and
- iii) Without a clear and consistent international understanding of the methodologies of calculating arm's length prices, it is impossible for multinational companies to meet their legal obligations in calculating transfer prices and pay the appropriate taxes due at the right time, even on transactions that have not been ruled upon. Efforts to further improve and harmonize these methodologies, would best be dealt with at OECD-level or through the appropriate tools of EU legislation.

Impact of Uncertainty on EU-US relations

AmCham EU is aware of the comments made by Secretary Lew in his letter to Commission President Juncker of 11 February 2016. We agree with those comments that it is indeed to the advantage of both the EU and the US to encourage cross border trade and investment. We also agree that certainty plays an important part in achieving this. Given AmCham EU's aim to foster investment between the EU and the US, we greatly appreciate the Commission's strong and repeated confirmation that it is *not* primarily targeting US-based companies. AmCham EU is, however, concerned that several public statements about '*double non-taxation*' could be misinterpreted as reflecting a similar bias, all the more as the question of whether and when the profits of European subsidiaries of US groups are taxed in the US should be irrelevant from an EU State Aid law and policy point of view.

International Tax Policy and Comity Considerations

AmCham EU fully understands that non-harmonised areas are not immune from the EU's State Aid rules. Further, AmCham EU does recognise the need for certain reforms to internationally agreed standards on direct taxation. The OECD/G20 Base Erosion and Profit Shifting (BEPS) project has garnered high level international support, and the EU has an important role to play in facilitating consistent implementation of the OECD's recommendations in line with an internationally agreed framework, whilst respecting the allocation of powers between the EU and the Member States. We believe that adopting an approach outside the OECD guidelines could risk undermining the validity of these very guidelines.

The Commission has on several occasions focused on the fact that some profits of US headed groups are not subject to immediate taxation in the US but instead to deferred taxation. This has been a longstanding feature of the US tax system and, as per the Double Taxation Treaties that the US has signed with many of the EU's Member States, it remains the right of the US to ultimately tax these profits. There is an established process for tax authorities of countries with Double Taxation Treaties to negotiate and agree transfer pricing, including competent authority and Mutual Agreement Procedures (MAP). The Commission, through its actions, is overriding this process, despite there being no access or method for any other country (within the

EU or outside) to contest the Commission's decisions. The Commission's actions thereby undermine the validity and purpose of the Double Taxation Treaty network between countries.

Given the complexity of international tax policy considerations, which must take into account international taxation policies, subsidiarity and comity issues, AmCham EU believes that State Aid enforcement is not a suitable tool to develop a separate definition of the arm's length principle from that set out in the OECD Guidelines and would thus be unlikely to be respected outside of the EU. International tax policy groups and experts have long recognised that there are many different ways and methods required to determine 'arm's length' prices within an internationally operating corporate organisation, and these methods can be very fact-specific. The complexity around this is one of the very reasons that companies seek tax rulings - to ensure that all parties are aware of the relevant facts and that the price being applied is indeed in line with the relevant rules under the Member State's domestic legislation.

Guidance following Public Consultation

Finally, pending the ultimate clarification of methodological issues regarding the assessment of transfer pricing-based tax rulings under EU State Aid law, AmCham EU believes it would be extremely helpful if the decisions at the outcome of the investigations abstained, to the greatest extent possible, from formulating overly broad policies through *obiter dicta*. We believe those policy considerations should be left to a broader guidance document following a public consultation.

Conclusion

In conclusion, AmCham EU encourages the Commission to actively seek to minimise the potentially negative impact of its State Aid actions on current and future investment in Europe. While it is not at all the purpose or role of AmCham EU to take a view on the legality of ongoing Investigations or decisions taken, AmCham EU wishes to express its concern about the economic consequences created where legal and commercial certainty is affected. For the reasons stated above, AmCham EU deems that clarity as to the Commission's approach to State Aid in corporate tax matters is crucial. Furthermore, we urge the Commission to support the on-going international tax reforms to achieve the desired harmonisation of tax regimes within the BEPS framework. We remain available to discuss these issues further with you.

Yours sincerely,



Susan Danger
Managing Director
American Chamber of Commerce to the European Union (AmCham EU)