

# Multinational enterprises, European state aid and transfer pricing

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**MULTINATIONAL ENTERPRISES, EUROPEAN STATE AID AND TRANSFER PRICING:  
*A Study of the Application of EU State Aid Law to Transfer Pricing and Allocation of Income to  
Permanent Establishments***

1. Since legislative proposals on EU tax law require a special legislative procedure and an unanimous vote in the Council of the EU, the action on the part of the EC's DG COMP taken to prevent harmful tax competition and aggressive tax planning, such as intentional intra- and inter-state(s) mismatches caused by fiscal arrangements between States and MNEs to the extent they violate EU State aid rules, is laudable.
2. It is a matter of choice for the CJEU to let the assessment of the fiscal arm's length principle – adhered to at national level – prevail over the examination under the arm's length tool and benchmark as established by the EC and the General Court. An affirmative answer would require the CJEU to decide that Member States are sovereign in fiscal matters and may adhere to the fiscal arm's length principle by the autonomous legislatures' choice to reinforce the corporate tax base of MNEs under their national CIT systems.
3. Abandoning the adherence to the arm's length tool and benchmark under Article 107(1) TFEU can, in certain cases, allow the DG COMP to redirect its attention to assess intra-group transactions in relation to national anti-avoidance provisions, focussing on defeating the effect of transactions that have little or no commercial reality but are intended to reduce or avoid a tax charge or to artificially create a tax deduction or a tax refund.
4. Intra-group loan arrangements and transactions relating to intangibles of an MNE are the most technical and challenging aspects of assessing income allocation under EU State aid rules due to ongoing regulatory developments and their non-uniform application across countries.
5. The OECD's efforts to tax activities that create a real value may extend beyond the arm's length principle, which is likely to be supplemented by a formulaic approach.
6. Where the conditions of the *Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak* adopted under Article 107(3)(b) TFEU are not satisfied or where the measure is not covered by this Framework, a Member State should still be able to obtain prompt EC's clearance directly under Article 107(3)(b) TFEU.
7. Allowing companies to report too much income while benefitting from R&D&I tax incentives such as tax credits, allowances, deferrals, and 'patent box' regimes, should not escape the attention of the DG COMP, as it can constitute State aid if all the criteria of Article 107(1) TFEU are fulfilled.
8. Whereas many have an opinion about the State aid framework used to analyse transfer pricing and income allocation rules, this research calls for increased transparency and certainty through the solutions recommended on how this framework should be changed.
9. The greatest value of travelling is that often what you see and experience on the spot is completely different from what you learn about those locations before you depart; travelling gives you the luxury of forming your own opinions.
10. Climbing brings happiness when you know that you still have a few hundred steps to reach your goal that is right in front of you; mountains are there to experience the joy of conquest in every (little) step you take.