THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

December 2024

MODULE 3.01 – EU DIRECT TAX OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Part 1

Step-by-step analysis of the restriction on the freedom to provide services. Ms. Jones is treated differently in comparison to resident performers. Are the two comparable? In relation to the taxation on gross v. net income, Ms. Jones is in a comparable situation to residents and should be allowed to deduct her expenses that are directly linked to the performance/service at source – case law from Gerritse onwards. In relation to the minimum taxable income, it is settled case law that this serves a social purpose, and thus, it should not be available to non-residents (Gerritse). However, if Ms. Jones has no taxable income elsewhere (as in Wallentin), then she should be able to benefit from the minimum taxable income exemption – this does not seem to be the case here.

Part 2

Application to the Schumacker doctrine. Ms. Jones could be found to be in comparable situation to a resident if she makes the major part of her income in a state other than her residence state and she cannot benefit from taking into account her personal and family circumstances there (at residence). From the facts of the case, the candidates could hypothesize that either a) the 10% she makes at residence falls below the minimum taxable income and thus, the residence state is not able to deduct her alimony payments (assuming it does so for residents that make all their income there); b) that this deduction is taken into account at residence. In case of scenario this 'negative income' should be taken into account somewhere and if Member State B gives this possibility to its residents, it should do so also for Ms. Jones, otherwise her freedom to provide services (or her freedom of establishment) would be unjustifiably restricted.

Part 3

The imposition of WHT by Member State D should be seen both from the perspective of the residence State A and Member State D. The imposition of the WHT is not per se illegal according to EU law. However, once Member State D extends its jurisdiction to the taxpayer (through the imposition of the WHT), then it should provide to them (Ms. Jones), the same treatment it provides to its own residents. If this disadvantage is neutralized through the DTC between the two Member States, then the effects of the restriction on the free movement of capital could be neutralised. As to Member State, in principle, it is not obliged to relieve the juridical double taxation that arises from the imposition of WHT on the inheritance (see Kerkchaert-Morres, Damseaux).

Question 2

Facts of the case

According to the facts of the case, Company X, tax resident in Member State X, is a subsidiary of Company Z, which is tax resident in Member State Z. The parent company, Company Z, experiences financial difficulties and is in need of additional funding. The subsidiary, Company X, has excess cash that could be made available immediately to its parent. The two companies signed an inter-company loan agreement, under which Company X (the subsidiary) lent the funds to Company Z (the parent) for an initial period of five years at a zero interest rate.

Member State X has adopted the arm's length principle but it applies it only to cross-border transactions between associated enterprises. For transactions between associated enterprises that are both tax-resident in Member State X, the legislation does not require the application of the arm's length principle.

Based on this legislation, the tax authority of Member State X has made an adjustment to Company X's profits, claiming that the interest rate on the inter-company loan should be at arm's length and that a zero interest rate is not permissible.

Company X argues that the legislation discriminates against companies that belong to EU groups, as they must price intra-group transactions at arm's length whereas domestic groups do not have the same obligation.

Which freedom applies?

The facts of the case concern the granting of a loan by a subsidiary company to its parent company. First of all, it should be noted that the granting of credit is classified as a capital movement, for which the provisions for the free movement of capital in Art. 63 TFE apply. For the definition of capital movements for the application of the free movement of capital of the TFEU, the Court systematically refers to the nomenclature in Annex A of the now repealed Directive 88/361/EEC. Indeed, the Treaty contains no definition of the term 'capital movements'. However, since Article 63 TFEU essentially reproduces the content of Article 1 of Directive 88/361 and notwithstanding that that directive is based on Articles 69 and 70(1) of the EEC Treaty (Articles 67 to 73 of the EEC Treaty were replaced by Articles 73b to 73g of the EC Treaty, subsequently Articles 56 to 60 EC, now Articles 63 to 66 TFEU), it is settled case law that the nomenclature in respect of movements of capital annexed to that directive still has the same indicative value for the purposes of defining the notion of 'capital movements'. (See Case C 222/97 Trummer and Mayer, paragraph 21; Joined Cases C 519/99 to C 524/99 and C 526/99 to C 540/99 Reisch and Others, paragraph 30; Case C 513/03 Van Hilten-van der Heijden, paragraph 39; Case C 452/04, Fidium Finanz , paragraph 41; and Case C 25/10 Missionswerk Werner Heukelbach , paragraph 15.)

The interpretation of the term 'capital movements' within the meaning of Article 63 TFEU is an example of the systematic interpretation of legal acts of unequal rank within the European Union hierarchy of norms. The Court interprets primary law by reference to the secondary law adopted on the basis of it.

At the same time, the transaction at issue is a transaction between two associated enterprises, a parent company and its subsidiary. The creation and the outright ownership by a natural or legal person established in a Member State of a secondary establishment, such as a branch or a subsidiary, situated in another Member State, fall within the scope of Article 49 TFEU (see C 414/06, Lidl Belgium, paragraph 15; C 347/09, Dickinger and Ömer, paragraph 35; C-196/04, Cadbury Schweppes, paragraph 41).

In order to determine whether national legislation falls within the scope of one or other of the freedoms of movement, it is clear from now well established case law that the aim of the legislation concerned must be taken into consideration (Joined C 436/08 and C 437/08, Haribo Lakritzen Hans Riegel and Österreichische Salinen, paragraph 33; C 132/10, Halley, paragraph 17).

According to settled case law, national legislation which is intended to apply only to shareholdings enabling the holder to exert a definite influence over a company's decisions and determine its activities is covered by the Treaty provisions on freedom of establishment. On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment, with no intention of influencing the management and control of the undertaking, must be examined exclusively in the light of the free movement of capital (see Haribo Lakritzen Hans Riegel and Österreichische Salinen, paragraph 35 and the case law cited).

According to the facts of the case, the legislation at issue concerns the arm's length principle and is related to the transfer pricing legislation. Transfer pricing legislation and in particular the arm's length principle applies to transactions between associated enterprises, that is in a set of facts under which one company has influence and may affect the decisions of the other company. Therefore, the aim of the national legislation is to apply to transactions between associated enterprises where one party has influence over the other; therefore the applicable freedom is the freedom of establishment. The case must be examined only under the light of the freedom of establishment.

According to the settled case law of the court, any restrictive effects that the national legislation may have on the free movement of capital, such effects would have to be seen as an unavoidable consequence of any restriction on freedom of establishment and they do not justify an independent examination of that regime in the light of Article 63 TFEU (see, C-558/19, Impresa Pizzarotti, paragraph 19).

Therefore, the national legislation at issue in the main proceedings must be examined solely in the light of the provisions of the TFEU concerning freedom of establishment.

Is there discrimination?

The freedom of establishment, (Article 49 TFEU), entails, according to Article 54 TFEU, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in another Member State through a subsidiary, branch or agency (C 170/05, Denkavit International and Denkavit France, paragraph 20; C 593/14, Masco Denmark and Damixa, paragraph 23).

The abolition of restrictions on freedom of establishment also applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State. In the case of companies, it should moreover be noted that their registered office for the purposes of Article 54 TFEU serves, in the same way as nationality in the case of individuals, as the connecting factor with the legal system of a Member State. Acceptance of the proposition that the Member State in which a resident branch is established may freely apply different treatment merely by reason of the fact that the registered office of the parent company is situated in another Member State would deprive Article 49 TFEU of all meaning. Freedom of establishment thus seeks to guarantee the benefit of national treatment in the subsidiary's host Member State, by prohibiting any discrimination, even minimal, based on the place in which companies have their seat.

The Court has previously held that a restriction on freedom of establishment arises in the case of national legislation under which unusual or gratuitous advantages granted by a resident company to a company with which it has a relationship of interdependence are added to the former company's own profits only if the recipient company is established in another Member State (see, to that effect, SGI, C 311/08, paragraphs 42 to 45).

In the present case, domestic legislation concerning the rules on transfer pricing applies only if the associated company is established in another Member State. If, on the other hand, both the subsidiary and the parent company are established in that same member state, no correction of the income is made.

It follows that a subsidiary of a non-resident company is subject to a less favourable treatment than that enjoyed by a subsidiary of a resident company carrying out similar transactions with its parent company.

Such a difference in the tax treatment of subsidiaries based on the place where their parent companies with which transactions on non-arm's-length terms have been entered into have their registered office is liable to constitute a restriction on freedom of establishment, within the meaning of Article 49 TFEU. The parent company might thereby be deterred from acquiring, creating or maintaining a subsidiary in a Member State other than its Member State of residence because of the tax burden imposed, in a cross-border situation, on transactions entered into on non-arm's-length terms (see, C-558/19, Impresa Pizzarotti, paragraph 27; C 382/16, Hornbach-Baumarkt, paragraph 35).

Possible justification

A national tax measure that is in breach of a Treaty freedom may be justified either by a reason that is explicitly provided in the Treaty itself or by another reason – justifications that have been accepted by the Court as valid justifications, that is only if it can be justified by overriding reasons in the public interest recognised by EU law. In addition it must respect proportionality, meaning that it must be suitable for ensuring the attainment of the objective it seeks to achieve and it does not go beyond what is necessary to attain that objective (C-382/16, Hornbach-Baumarkt, paragraph 36).

In the present case, the rules on transfer pricing are intended to prevent the taxable amount of a company established in one state from being reduced on account of transactions carried out by that subsidiary with its parent company which are not in line with market conditions (arm's length principle).

The Court has held that the need to maintain the balanced allocation of the power to tax between Member States may be capable of justifying a difference in treatment where the system in question is designed to prevent conduct liable to jeopardise the right of a Member State to exercise its power to tax in relation to activities carried out in its territory (C 382/16, Hornbach-Baumarkt, paragraph 43).

The Court has in particular held that allowing companies resident in a Member State to transfer their profits, in the form of unusual or gratuitous advantages, to companies with which they have a relationship of interdependence and which are established in other Member States may well undermine the balanced allocation of the power to tax between the Member States and that legislation of a Member State providing that the resident company is to be taxed in respect of such advantages which it has granted to a company established in another Member State allows the former Member State to exercise its tax jurisdiction in relation to activities carried out in its territory. The Court has further held that such national legislation pursues legitimate objectives which are compatible with the Treaty and constitute overriding reasons in the public interest and that such legislation must be regarded as appropriate to ensure the attainment of those objectives (see, C-311/08, SGI, C 311/08, paragraphs 63, 64 and 69; C-382/16, Hornbach-Baumarkt, paragraph 44; C-558/19, Impresa Pizzarotti, paragraph 30).

Conclusion

In the light of all the foregoing considerations, we conclude that the national provision at issue constitutes a restriction of the freedom of establishment under Article 49 TFEU, but would be justified by the need to preserve the balanced allocation of taxing powers between Member States.

PART B

Question 3

Part 1

Candidates should perform a first analysis to prove that the case at issue falls within the ATAD CFC rules → holding and difference in tax rates → Company B qualifies as a CFC under the ATAD. Then they should proceed to explain that according to the categorical approach enshrined in Article 7a of the ATAD, certain non-distributed income should be included in the parent company's tax base. This type of income includes interest, royalties, dividends, capital gains, etc., unless the CFC carries on a substantive economic activity (supported by staff, equipment, assets and premises). Candidates are encouraged to at least consider whether Company B may have substance in its jurisdiction.

In relation to the interest, this should fall under Art. 7 and thus, will be included in Company A's tax base. Computation in line with Articles 8(1) to 8(4). In relation to the distribution of dividends that happens in Year 2, Article 8(5) states that the tax base on the real dividend distribution has to be reduced by the amount of the fictitious distribution due to the CFC legislation. In addition, taxation of this distribution could also be caught by Article 8(6) and 8(8). Candidates are encouraged to explain how these two exemptions could apply.

Part 2

Candidates are encouraged to mention that GloBE rules, especially the IIR resemble CFC rules, in the sense that the imposed 'top-up' taxes for undertaxed income. The ATAD CFC rules apply in parallel to the GloBE rules. In practice, ATAD CFC rules will apply first and any additional taxes paid by a parent company under a CFC regime in a given fiscal year will be taken into consideration in the GloBE rules, by attributing those to the relevant low-taxed entity for the purpose of computing its jurisdictional effective tax rate.

Question 4

From: Tax Adviser
To: Company A, Member State A
Issue: The compatibility of the New Special Tax of member State A with the EU Fundamental Freedoms

Facts

Member State A recently introduced a new special tax that is imposed in addition to its regular corporate income tax. According to the new legislation, the tax is imposed on the turnover of corporate taxpayers that are resident in Member State A. In the case of group companies, whether domestic or foreign, the aggregate turnover of the group is taken into account when determining the applicable tax rate. The law provides for a steeply progressive tax scale, under the presumption that the higher the turnover of the group, the greater the ability to pay of the group member that is subject to tax in Member State A.

Which freedom applies?

In the present case, as a result of the application of the steeply progressive scale of the special tax to the overall turnover of that group, Company A is concerned that it will be disproportionately affected, as it is expected to be subject to a considerably higher tax rate, than that of similar companies in Member State that do not belong to a non-resident group.

According to the established case law of the Court, in order to determine which freedom applies in each particular case, the purpose of the legislation concerned must be taken into consideration (Case C 35/11 Test Claimants in the FII Group Litigation, paragraph 90 and case-law cited). National legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the scope of Article 49 TFEU on freedom of establishment (see Test Claimants in the FII Group Litigation, paragraph 91 and the case-law cited). The questions referred to me concern the allegedly discriminatory rate of taxation imposed, by virtue of the special tax, on taxable persons that belong to groups, domestic or foreign. Since the aim of the national legislation applies and takes into account the aggregate turnover of groups of companies, i.e. situations in which there is a direct or indirect majority influence in another company. As a consequence, the national legislation must be assessed under the freedom of establishment.

Is there discrimination?

According to settled case-law, the rules regarding equal treatment forbid not only overt discrimination based on the location of the registered offices of companies, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, by analogy, inter alia, C 279/93 Schumacker , paragraph 26; C 383/05, Talotta, paragraph 17; C 440/08, Gielen, paragraph 37). The legislation at issue imposes, in particular, a criterion of differentiation between, on the one hand, taxable persons subject to the special tax which are members of a group, and, on the other hand, taxable persons which are not part of a group of companies. That criterion of differentiation does not entail any direct discrimination where the special tax is levied in identical circumstances for all the companies exercising their activity in Member State A. However, that criterion has the effect of disadvantaging legal persons which are linked to other companies within a group compared with legal persons which are not part of such a group of companies (C-385/12, Hervis Sport, paragraph 33).

This is a result of the combination of two characteristics of the special tax: (a) the rate of that tax, which is steeply progressive in accordance with turnover and (b) the fact that it applies, for taxable persons belonging to a group of companies, to the consolidated turnover of all the members of the group, although it is limited to the turnover of the taxable person on an individual basis in the case of legal persons which are not members of a group. That means that the taxable persons belonging to a group of companies are taxed on the basis of a fictitious turnover (C-385/12, Hervis Sport, paragraphs 34-36).

The legislation applies in the same way to both domestic groups and foreign groups. Therefore it seems that the differentiation is de jure an objective criterion of differentiation of the level of turnover. However, if it were to be found that it disadvantages de facto the subsidiaries of parent companies that have their registered offices in other Member States, in the light of the structure of the relevant market in member State A. therefore, as it was held by the Court in the case Hervis Sport, if it is established that the companies that are competitors of Company A in Member State A are in fact more leniently taxed as they are organized in a different way and they do not belong to groups of companies. That is because the application of the steeply progressive scale of the special tax to a consolidated tax base consisting of turnover is liable to disadvantage, in particular, taxable persons members of foreign groups.

Where that is the case, the legislation on the special tax on turnover although it does not make a formal distinction according to the registered office of the companies, may entail indirect discrimination on the basis of the registered office of the companies for the purposes of Articles 49 TFEU and 54 TFEU (see, to that effect, Gielen, paragraph 48; C-385/12, Hervis Sport, paragraph 41).

Such a measure does not appear to be justified by any overriding reason in the public interest.

Conclusion

Based on the above considerations and on the case law of the Court, I conclude that the special tax of Member State A can indeed constitute indirect discrimination based on nationality if it is established by the facts that it in fact affects disproportionally, i.e. it is subject to a considerably higher tax rate, only companies that are member of foreign groups, having their parent company in other EU member states.

Please let me know if you require any additional clarifications.

Yours sincerely
Tax Adviser

PART C

Question 5

A brief presentation of Article 107 TFEU conditions. Focus on selectivity; general measures which are not selective but which may nevertheless be capable of distorting or threatening to distort competition are not qualified as state aids. General measures are not selective when it can be assumed that they have the same or comparable impact on all sectors. However, sectoral aid is not necessarily state aid. In order to classify a domestic tax measure as ‘selective’, it is necessary to begin by identifying and examining the common or ‘normal’ tax regime applicable in the Member State concerned – the reference framework. It is in relation to this common or ‘normal’ tax regime that it is necessary to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in comparable factual and legal situations (Paint Graphos and subsequent case law).

The decision on the reference framework (how broad – e.g. the whole corporate tax system, or how narrow, e.g. one particular sector) affects the selectivity test. As part of the selectivity test, one has to identify whether there is any derogation from the standard regime resulting in an advantage for certain economic operators. In other words, if the cases are comparable from a factual and legal standpoint. Are there any specific characteristic of this particular sector that place them in a situation which is not factually nor legally comparable to other companies within the reference framework. In this case, the sector may escape being found selective (see again, Paint Graphos and subsequent case law). Students should also consider if the advantage could be justified by the logic of the system of corporate taxation.

Question 6

Reference to relevant case law; Hervis, Vodafone etc. Identification that turnover has been considered by the CJEU as an appropriate tax basis and as a relevant indicator of a taxable person's ability to pay. Identification that 'foreign companies' suffer more than domestic companies and this could impose a restriction on these companies' freedom of establishment. However, this has been considered by the CJEU as de facto discrimination. As the Court has decided in the aforementioned cases, this result is fortuitous, if not a matter of chance, and which may arise, even in a system of proportional taxation, whenever the market concerned is dominated by undertakings of other Member States or of non-Member States or by national undertakings owned by natural persons or legal persons of other Member States or of non-Member States.

An analysis under state aid rules would also be due. According to said case law, the tax burden borne by the 'foreign-owned companies' is the result of a general tax the revenue from which is transferred to the State budget, that tax not being specifically allocated to the funding of a tax advantage for which a particular category of taxable persons qualify.

The candidates could, alternatively, perform here an Article 107 TFEU analysis, under which they could consider whether the measure is selective in the sense of actually affecting certain undertakings more than others. If the measure applies to all undertakings alike, as the scenario implies, then the only differentiation criterion would be the turnover which would favour generally 'smaller' than 'bigger' companies and would be difficult to qualify as selective.

Question 7

In order to achieve the aim of creation of an internal European market, having the characteristics of a national market, requires the free movement of goods, services, persons and capital, irrespective of national borders, a level playing field, as far as competition is concerned, and the harmonization of national laws in order to eliminate any gaps, any disparities in national laws that create problems to the functioning of the internal market. Accordingly, integration of the tax systems of member states is necessary to a certain extent. In the area of direct taxation, the competence has remained exclusively in the hands of member states. However, member states may only exercise this competence in accordance with EU law, especially respecting the fundamental freedoms.

Such integration may be positive or negative. Positive integration is the policy integration. That means that the integration is effected through legislation, coordination and cooperation at Union level. The result is the harmonization of national tax laws or at least policy coordination between member states.

Because of the lack of legal basis for positive integration and because of the member states reluctance to give up sovereignty in respect of direct taxation there is little secondary EU law on direct taxation. Measures of positive integration have been adopted in the area of direct taxation through the adoption of directives in the following areas:

- the parent-subsidiary directive;
- the interest and royalty directive;
- the anti-tax avoidance directive;
- the mergers directive;
- the settlement of cross-border tax disputes; and
- the European economic interest grouping and the European company.

Positive integration has the benefit of providing certainty as the rules to be applied and interpreted are found in a common text, the respective directives. In addition the Commission has competence to monitor the correct application and interpretation of the directives, whereas the court has also confidence to review the correct application and the interpretation of these rules by the member states, ensuring the uniform application in all EU member states.

Negative integration on the other hand is the market integration, that is the integration through prohibitions: the abolition of restrictive national tax measures that are incompatible with the treaty, ultimately following a court judgement to that effect. The Court of Justice of the European Union has been the main actor of negative integration in the area of direct taxation.

The current negative integration of tax law consists mostly of case law of the Court of Justice of the European Union on the incompatibility of national tax measures with the treaty freedoms or the state aid prohibition. In the area of direct taxation the most important agents of negative integration are the five fundamental freedoms: The freedom to move and reside freely within the territory of the union, the free movement of goods, persons, services and capital. The fundamental freedoms prohibit in principle all differences in taxation between cross-border situations and comparable domestic situations.

The state prohibition has also become an important negative market integrator indirect taxation. Negative integration has its limitations. First of all it is fragmented and unsystematic. It depends un luck, regarding the issues but will ultimately reach the court; it also depends on the willingness of national courts to send preliminary questions to the Court of Justice. The court cannot simply strike down every national measure which restricts free trade or free movement. Moreover the judiciary cannot solve political problems (cannot and should not make policy choices, where member states have not decided on a certain area). In addition the court can only solve problems that are caused by the unilateral behaviour of one jurisdiction; it cannot solve problems that have been created by the differences between the tax laws and that ministrative practises of member states and the parallel exercise of taxing power of member states; it cannot solve disparities. Still, in the course of the years, a substantial body of case law has been developed by the court concerning direct tax measures, that has resulted in bringing a certain level of harmonisation in that area.

Question 8

The European Commission has very important powers in relation to state aid issues The powers of the Commission can be found in Articles 107-109 TFEU and in Regulation 2015/1589/EU, laying down detailed rules for the application of Article 108 TFEU (the ‘procedural regulation’). A brief outline of those powers is described in the following sections.

Monitoring of existing aid

On the basis of Article 109 TFEU, the Council has adopted Regulation 2015/1589/EU, laying down detailed rules for the application of Article 108 TFEU (the ‘procedural regulation’) where “existing aid” is defined.

Under Article 108 TFEU, the Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. In doing so, the Commission shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. The member state may accept the proposed measures and it will be bound to implement the appropriate measures.

If the Commission has initiated this procedure and the Member State makes an application to the Council asking it to decide that, under exceptional circumstances, the aid in question (which that member State is granting or intends to grant) be considered compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, the Commission procedure is suspended until the Council has made its attitude known. The Commission shall give its decision on the case if the Council has not made its attitude known within three months of the application that the member State made.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

Under Article 108(4) TFEU, the Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article. Under Article 109 TFEU the Commission shall propose to the Council any appropriate regulations for the application of Articles 107 and 108 TFEU.

Notification of new aid

In relation to new aid or changes to an existing aid scheme, the Commission must be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure of Article 108(2) TFEU. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision. The standstill obligation of Article 108(3) has direct effect. This means that national authorities, including judicial authorities, are obliged to disapply domestic tax law measures that have been put into effect in contravention of this provision. If no decision is issued by the Commission within two months of the complete notification, the aid is considered to have been authorized by the Commission and the member state may implement the measures in question after giving the Commission prior notification thereof.

Recovery of unlawful aid

New aid put into effect in contravention of article 108(3) TFEU is considered as “unlawful aid”. The Commission may on its own initiative examine any information regarding alleged unlawful aid from whatever source. The Commission may also act on the basis of a complaint submitted by any interested party. The Commission shall examine such a complaint without undue delay and shall ensure that the member state concerned is kept fully and regularly informed of the progress and the outcome of the examination. In the course of the examination the Commission has wide powers to request for information. Where negative decisions are taken in cases of unlawful aid the Commission shall decide that the member state concerned shall take all necessary measures to recover the aid from the beneficiary. The aid to be recovered shall include interest at an appropriate rate fixed by the Commission.