

State aid and tax rulings: is there really a competition issue?

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Unpacking Complexity
Unfolding Opportunity



Notion of State aid (Article 107(1) TFEU)

- Criteria

- **Advantage** ("*in any form whatsoever*" - "*favouring*")
- Granted to an "**undertaking**"
- **Selective** ("*certain*")
- Transfer of **State resources** and **imputability** to the State ("*granted by a Member State or through State resources*")



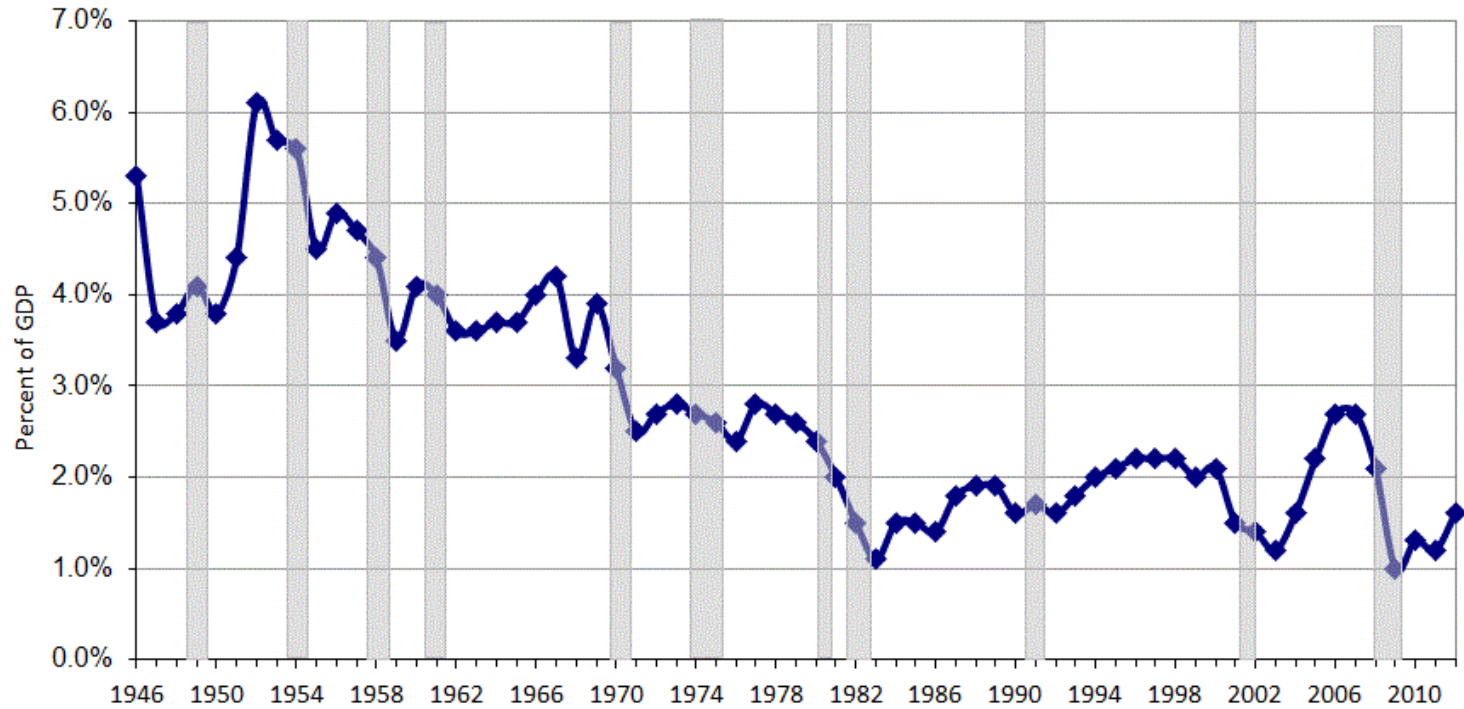
- (likely to) **distort competition** & affect **trade between Member States**
- Legal notion
- Constitutional powers (Commission / Member States)
- No real compatibility issue in the case of tax rulings



Tensions: international law / State aid

- Arbitration
- Free Trade Agreements – Export of State aid law
- Fiscal
 - Nothing new in State aid applying to tax situations
 - Tax rulings *may be* subject to State aid law
 - The question is rather: how does it apply?
- General international corporate tax background

Corporate Income Tax as a Percent of GDP, 1946 - 2012



Notes: Shaded areas represent recessionary periods as recorded by the National Bureau of Economic Research. Miscellaneous taxes such as estate and gift taxes are omitted for the sake of clarity, and comprise a very small fraction of total revenues in any case.

Source: Budget of the United States Government, Historical Tables, Table 2.3

Based on Adam Carasso, "The Corporate Income Tax In the Post-War Era," Tax Facts Column, Tax Notes Magazine, March 03, 2003

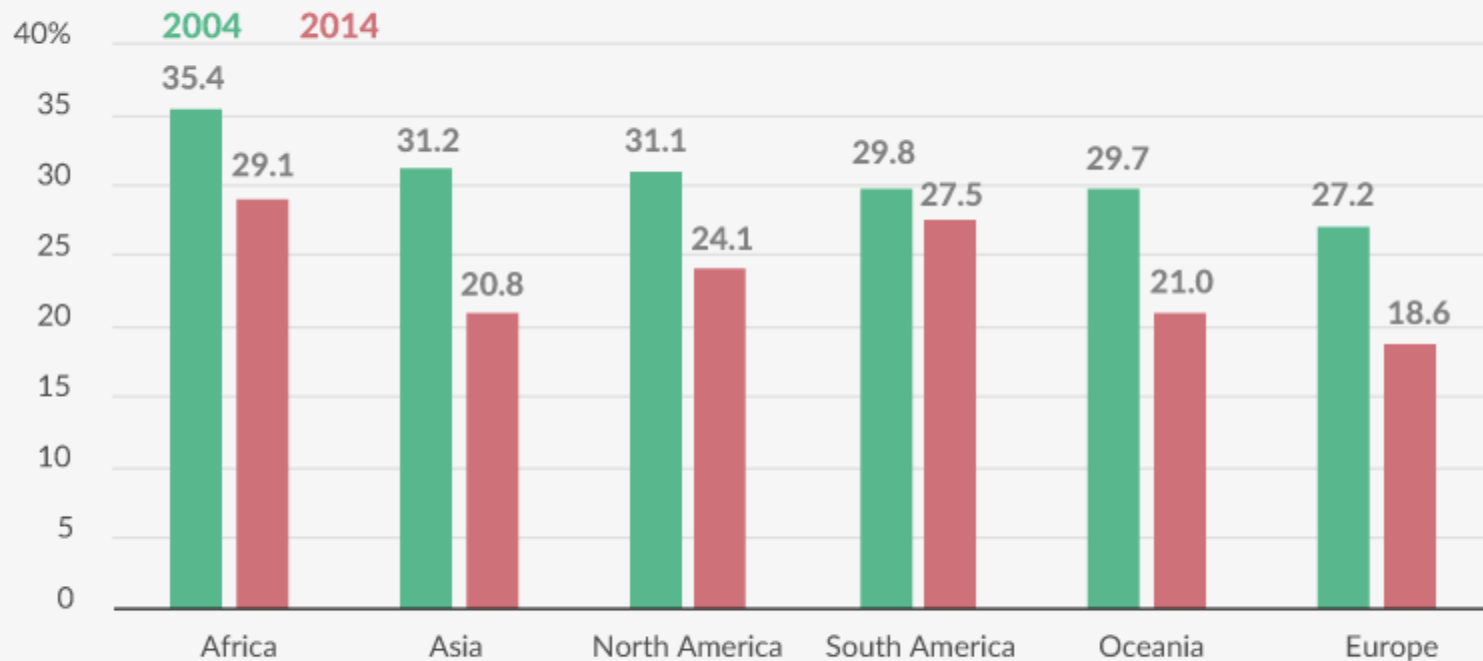
U.S. Effective Corporate Tax Rate 1947-2011



Source: Federal Reserve

Corporate Tax Rates throughout the World Have Declined over the Past Decade

The Average Top Marginal Corporate Tax Rate by World Region, 2004 and 2014



Note: Simple averages used.

Source: Tax Foundation calculations based on data from World Bank, OECD, and KPMG.

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State aid in tax

- Advantage: not under “normal market conditions”
 - Tax exemptions
 - At arm’s length test (§ 171 Notice on notion of aid)
- Selective: reference framework?
 - Tax schemes for multinationals: see decisions in early 2000
 - *Umicore* (2011/275): VAT settlement, selective?
 - Three-step approach (*not always*)
 - reference framework (‘common’ or ‘normal’ regime)
 - differentiation between comparable undertakings
 - justification on the basis of the nature and general scheme of the system?
 - *MOL* (C-15/14 P): not selective
 - *World Duty Free* (C-20 & 21/15 P): discrimination, comparability
 - *Lübeck* (C-524/14 P)



Selectivity in tax ruling

- Non-selective advantage may exist: no aid
 - *Irish Company Holding, Dutch Groepsrentebox*
- Comparison at the level of one Member State only
- Collapse of “advantage” and “selective”
 - two separate, autonomous, conditions in their essence
 - selectivity should not depend consubstantially upon advantage
 - different comparisons in nature
 - advantage: comparison with normal market conditions – *competition*
 - selectivity: comparison with the normal action of the State – *reference system*
 - Presumption for individual measures (mis)used to merge the advantage and selectivity conditions
 - Tax rulings result from schemes, general rules of taxation (*MOL*)
- http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html

Thank you for your attention!

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