Slaughter and May Podcast
Tax News Highlights: August 2021

Tanja Velling	Welcome to the special August 2021 edition of our tax news highlights podcast which will focus on the cross-over between tax and competition. I am Tanja Velling, Senior Professional Support Lawyer in the Tax department.
Nele Dhondt	And I am Nele Dhondt, PSL Counsel in the Competition department, and I am excited to be joining this edition to discuss the UK's subsidy control bill and the decision of the EU's General Court in the Nike and Converse State aid case.
Tanja Velling	But our listeners shall also not have to go without any pure tax content – we will provide a brief overview of key L-day materials and canter through one or two other recent developments. This podcast was recorded on the 17th of August 2021 and reflects the law and guidance on that date. So, Nele, could you start us off by explaining, at a high level, what the subsidy control bill is and why we need it?
Nele Dhondt	Of course, Tanja. The UK Government recently introduced the subsidy control bill before Parliament setting out the UK's new subsidy control regime. At the same time, the Government published its response to a consultation on its initial proposals earlier this year. You may recall that as part of the implementation of its commitments in the EU-UK Trade and Cooperation Agreement (or the TCA), the UK agreed to a new subsidy control regime, with an "appropriate role" for an independent authority. The core elements of that regime are already in effect by virtue of section 29 of the European Union (Future Relationship) Act 2020, but the Bill elaborates on how those provisions will operate in practice and, in particular, lays out a new procedural regime for the assessment of subsidies. In addition, the Bill's objectives reflect the Government's desire to protect the UK's internal market and so in some areas extend the scope of the regime to intra-UK arrangements that are not covered by the TCA. It's also worth mentioning, Tanja, that subsidies that are subject to the Northern Ireland Protocol – where the EU State aid rules will continue to apply – are explicitly carved out of the scope of this new UK regime.
Tanja Velling	How does the new UK regime compare to the EU's State aid rules?

Nele Dhondt	Well, the Government has said that the proposed regime marks, and I quote, a "clear departure" from the EU State aid regime and it is right that there will be significant procedural differences. So for example, there will be a significantly more limited role for the body administering the regime – which will be a newly established Subsidy Advice Unit within the UK's competition authority, so the Competition and Markets Authority or CMA. The new unit will have an advisory role even for "high risk subsidies", rather than the power to review and clear subsidies pre-award which is what the European Commission has in the context of the EU regime. On the other hand, a closer look reveals that the substantive principles that the UK regime will apply are actually broadly aligned with the approach taken in the EU, reflecting the fact that the regime serves as implementation for the UK's commitments in the TCA. There are seven main principles that public authorities in the UK must use as criteria for evaluating possible subsidies and this includes the six principles set out in the TCA, together with an additional principle aimed at, I quote, "minimising any negative effects on competition or investment within the UK internal market". And then in terms of enforcement, the Government proposes that "interested parties" will be able to apply to the Competition Appeal Tribunal (or CAT) for judicial review of a subsidy decision. "Interested party" is defined as anyone whose interests may be affected by the subsidy (so this could include a competitor of the subsidy recipient), or the Secretary of State. And the CAT can order recovery of an unlawful subsidy (together with interest), which is a remedy that we, State aid practitioners, are of course familiar with in the context of EU State aid rules.
Tanja Velling	And how could the subsidy control bill impact tax?
Nele Dhondt	The Bill essentially adopts the test from the TCA (and therefore from well-established EU law) as to when a tax measure qualifies as a subsidy meaning that over-favourable tax rulings by HMRC, as well as differences of tax treatment, can amount to a subsidy. That said, I should also mention that the Bill stipulates that subsidies provided by primary legislation from the UK Parliament (but not the devolved legislatures) will fall outside the scope of the new regime. So, this means that freeports provided for in the Finance Act 2021 should fall outside the scope of the proposed UK regime. But, in theory, the rules could apply to limit the devolved legislatures' exercise of their powers in respect of the tax competencies that they have acquired – although it is kind of hard to envisage such an application in practice and it would also, surely, be difficult politically. It will be interesting to see how the rules will be implemented and enforced, if adopted in their current form, including how the assessment of potential subsidies will be dealt with in practice.

Tanja Velling	And what are the next steps for the subsidy control bill? When is it expected to be passed?
Nele Dhondt	Well, the Bill will progress through Parliament and the UK Government expects that the new regime will come into effect in 2022 if approved by Parliament. The UK Government will also set out further details on implementation and guidance for public authorities in due course. In fact, some key concepts and features of the regime are yet to be defined so watch this space!
Tanja Velling	Thank you very much for this overview. But let's now have a look at the General Court's decision in the Nike and Converse State aid case. The reference to Nike and Converse here is to two subsidiaries of the Nike group. Both subsidiaries were resident in the Netherlands and paid royalties to related entities (a Bermudan group company in Nike's case and a transparent Dutch entity in Converse's), and in each case, those royalty payments were for IP licences. The case concerned five advance pricing agreements in which the Dutch tax authorities effectively undertook to regard the royalties as paid at arm's length and deductible provided that, following their payment, Nike and Converse each retained a minimum operating margin on total revenue on which it would be subject to tax. After having reached the provisional conclusion that the analysis underlying the APAs seemed flawed, the Commission decided on the 10th of January 2019 to open an in-depth investigation into whether the APAs constituted unlawful State aid.
Nele Dhondt	And at this stage, it's probably good to look at the investigation procedure in a bit more detail. The European Commission's powers in this area are based on a few Articles in the Treaty on the Functioning of the European Union. And they basically provide that the Commission may, of its own initiative, commence what we call a preliminary investigation into measures that could be unlawful State aid. If, following the preliminary investigation, the Commission finds that there are doubts as to whether the relevant measure is compatible with the internal market, it can then initiate the formal investigation procedure. This procedure would eventually result in a decision by the Commission as to whether or not the measure constituted unlawful State aid. In the meantime, the Commission could, however, require the relevant Member State to suspend the measure and/or provisionally recover the aid.
Tanja Velling	And it was the decision to commence the formal investigation procedure (rather than any conclusion as to whether there was actually unlawful State aid) which Nike and Converse challenged before the General Court, alleging

	amongst others a failure to state reasons, a breach of Nike's and Converse's procedural rights and that opening a formal investigation was premature.
Nele Dhondt	The General Court dismissed the challenge and upheld the Commission's decision, stressing that the purpose of the formal investigation procedure is for the Commission to gather relevant evidence so as to be able to form a considered view as to whether the measures constitute unlawful State aid. The Court expressly stated that its "review…of the legality of a decision to initiate the formal investigation procedure must necessarily be limited. The General Court must in fact avoid giving a final ruling on questions on which the Commission has merely formed a provisional view." End of the quote. So, perhaps unsurprisingly, the General Court concluded that the Commission's decision to open a formal investigation had not been premature and that it had given sufficient reasons, noting that it is not necessary to cover all relevant facts and law, and that the level of reasoning required depends on the nature and purpose of the measure in question. Nike's and Converse's procedural rights were not breached, according to the Court, seeing that they, as recipients of the alleged aid, could participate in the formal investigation procedure. After all this competition or State aid-related content, do you now want to highlight some L-day materials, Tanja?
Tanja Velling	Sure. On the 20th of July, known as "L-day", draft legislation for inclusion in the next Finance Bill was published for consultation until the 14th of September. A number of responses to consultations were also published and some new consultations were commenced. I would like to highlight key points in relation to two items, the large business notification of uncertain tax treatment and the modernisation of stamp taxes on shares. Starting with the large business notification of uncertain tax treatment, the model is much improved from the original starting point, but some concerns about it remain and further details are awaited in guidance.
Nele Dhondt	So what do we know so far?

Tanja Velling	The new requirement will have effect for returns due to be filed on or after the 1st of April 2022. So, it will be relevant for current transactions. A tax treatment is uncertain if it meets one of the following three conditions (this is down from the original seven triggers): • The first condition is that a provision has been recognised in the accounts to reflect the probability that a different tax treatment will be applied. This should be the most straightforward. • The second condition is that the tax treatment relies on an interpretation or application of the law not in accordance with HMRC's "known" position. Importantly, the "known position" test does not look at what the taxpayer actually knows. A "known" position includes anything apparent from guidance in the public domain. But what if there is conflicting guidance – does HMRC have two known positions or none? And when is something in the "public domain" – does this mean only materials published on HMRC's website or is it sufficient if the position was communicated to a working group? Perhaps some of these questions will be addressed in guidance. • The third condition is that it is reasonable to conclude that there is a "substantial possibility" that, if the matter came before a tribunal or court, it would be found that the tax treatment was incorrect in one or more material respects. This is a new condition. Conflicting advice (previously a trigger in itself) would be an indicator that the third trigger applies, but what is a "substantial possibility" for these purposes? Again, maybe guidance will provide some clarity. As to exemptions from the regime, no notification will be required where HMRC are already aware of the uncertain tax treatment. Anything below a threshold of £5 million will also be excluded, and the same goes for uncertainties regarding the choice or application of a transfer pricing method, but this is more limited. In applying the £5 million threshold similar transactions have to be aggregated. But, to find out how exactly that will work, we will – you have guessed it – have to wait for the draft guidance.
Nele Dhondt	And what's happening in relation to stamp taxes on shares?
Tanja Velling	One might be tempted to say "nothing", but that would not be entirely true. It is true that, after the discontinuation of physical stamping from mid-July, the Government is not proposing any further immediate changes, but it will continue to work on potential reforms of the system. In light of the consultation responses, the Government will explore the feasibility and implications associated with the key priority areas identified in the consultation responses. The priority areas include a single self-assessed tax on shares, territorial scope and digitisation. A working group will be set up to help the Government with this exploration – interested stakeholders have until the 10th of September

	to apply to join – and we can expect several rounds of consultation on the policy design and implementation.
Nele Dhondt	And were there any other developments that you wanted to highlight?
Tanja Velling	Yes, the Supreme Court's judgment in *Tinkler* was published on the 30th of July. It is a cautionary tale, reminding taxpayers that procedural arguments should be raised, or (at the very least) one's position on them reserved, at the outset of a potential tax dispute. On the facts of the case, HMRC and the taxpayer's advisers appeared to have acted on the common assumption that HMRC had opened an enquiry and proceeded to correspond on the substantive merits of the case. On receipt of the closure notice in respect of this assumed enquiry, the taxpayer, however, sought to argue that the closure notice was invalid because there had never been an enquiry in respect of which it could have been issued, because the notice opening said enquiry had never been validly issued. If this argument had succeeded, the taxpayer would have escaped liability because, at this point in time, it would have been too late for HMRC to correct the initial failing. But the Supreme Court decided that, in the circumstances, the taxpayer was estopped from raising this argument and thereby denying that a valid enquiry had been opened.
Nele Dhondt	This does, indeed, sound like a cautionary tale – and not the most cheerful note (at least from a taxpayer perspective) on which to end the podcast. Next month, listeners may expect Zoe back for the usual tax news highlights format. But what can our listeners look out for in the meantime?
Tanja Velling	• Well, on the 31st of August the consultation on basis period reform for income tax closes. This was published on L-day. The proposal is to move to a tax year basis and to end overlap relief. Businesses which do not currently draw up their accounts to align with the tax year will find that the move could bring forward tax liabilities and have a cash flow impact. Transitional rules have been proposed to mitigate this. • And, as I already mentioned, you can apply to join the stamp taxes working group until the 10th of September, and provide comments on the draft legislation for Finance Bill 2022 until the 14th of September.
Nele Dhondt	Thank you, Tanja. That leaves me to thank you, the listeners, for listening. If you have any questions, please contact Tanja or me, or your usual Slaughter and May contact. Further insights from the Slaughter and May Tax department can be found on the European Tax Blog – www.europeantax.blog. And you can also follow them on Twitter – @SlaughterMayTax. For news from the Competition department, please refer to the Slaughter and May website; we are also regular contributors to the firm's other blogs, in particular the Beyond Borders blog which brings together all publications and content from our Brexit

	Practice Group, and the Lens which provides updates and insights on digital developments. Thank you.