

Trust, Tax Administration and State aid

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1. Background and inspiration

- **State aid tax rulings investigations began in 2013** – against Ireland (Apple), Luxembourg (Amazon, Engie, Fiat, Huhtamäki), Netherlands (IKEA, Nike, Starbucks), Belgium (individual excess profits rulings) and Gibraltar.
- Arguments have tended to focus on the **correctness of the Commission's understanding of how the relevant tax rules are supposed to operate** (national or perhaps international – e.g. is there an autonomous EU arm's length principle).
- Concerned about the emphasis on checking whether the correct result was achieved? (e.g. stifle tax administration, the Commission would have authority to check every potential misapplication (thus, supranational tax authority), no leeway given for innocent misapplications)



1. Background and inspiration

- But there were **serious concerns** about the tax administration processes which led to the relevant rulings in the initial investigations.
- In the initial case against Ireland/Apple, there was a suggestion that the tax ruling *reverse engineered* a favourable result for the taxpayer.
- In the case of Luxembourg/Amazon, there was no Transfer Pricing report; it was not clear if adequate documentation to support ruling application was provided; request was **processed in just 11 days**.



“I propose we hire some new management consultants to reverse-engineer the previous consultants’ re-engineering plan.”

1. Background and inspiration



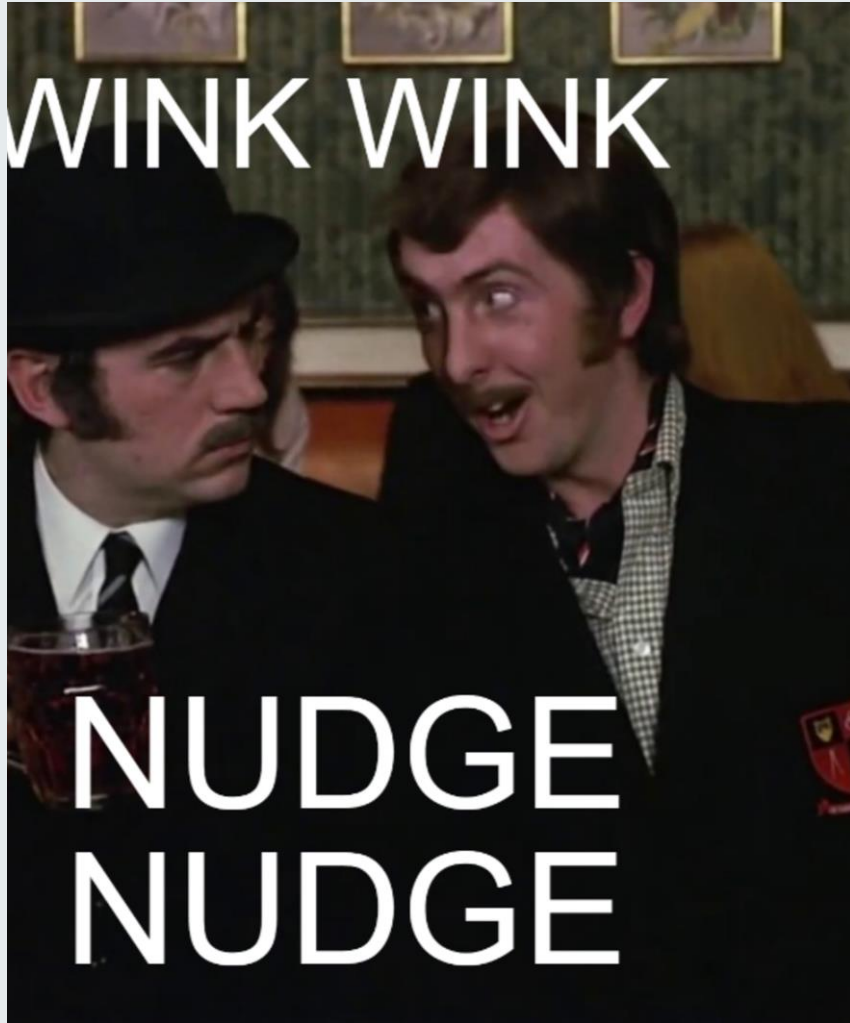
- Concerned about the State aid rules being overly strict *and* that tax authorities need to be held to account in some way, “The Power to Get it Wrong” (2021) Law Quarterly Review 280 proposed a median position.
- Not all misapplications = State aid; but not all bad administration ≠ State aid.
- Underpaid tax + legally improper administration = State aid.
- BUT(!) Commission investigations alone will not ensure propriety in tax administration or catch all instances of impropriety – too resource intensive and complex.
- The new paper seeks to supplement the 2021 LQR paper, by proposing a broader framework for holding tax authorities to account when they provide tax rulings to large taxpayers. **This paper proposes that we need “intelligent accountability” over tax ruling practices at the EU level.**

1. Background and inspiration

- SO there's quite a bit of heavy lifting needs to be done
- Part 1 of the paper:
 - *explains the utility of trustworthiness*
 - *defines and defends intelligent accountability,*
- Part 2 of the paper then seeks to apply this intelligent accountability framework to tax rulings granted to large taxpayers:
 - *tax transparency*
 - *internal accountability*
 - *the role of the Commission*

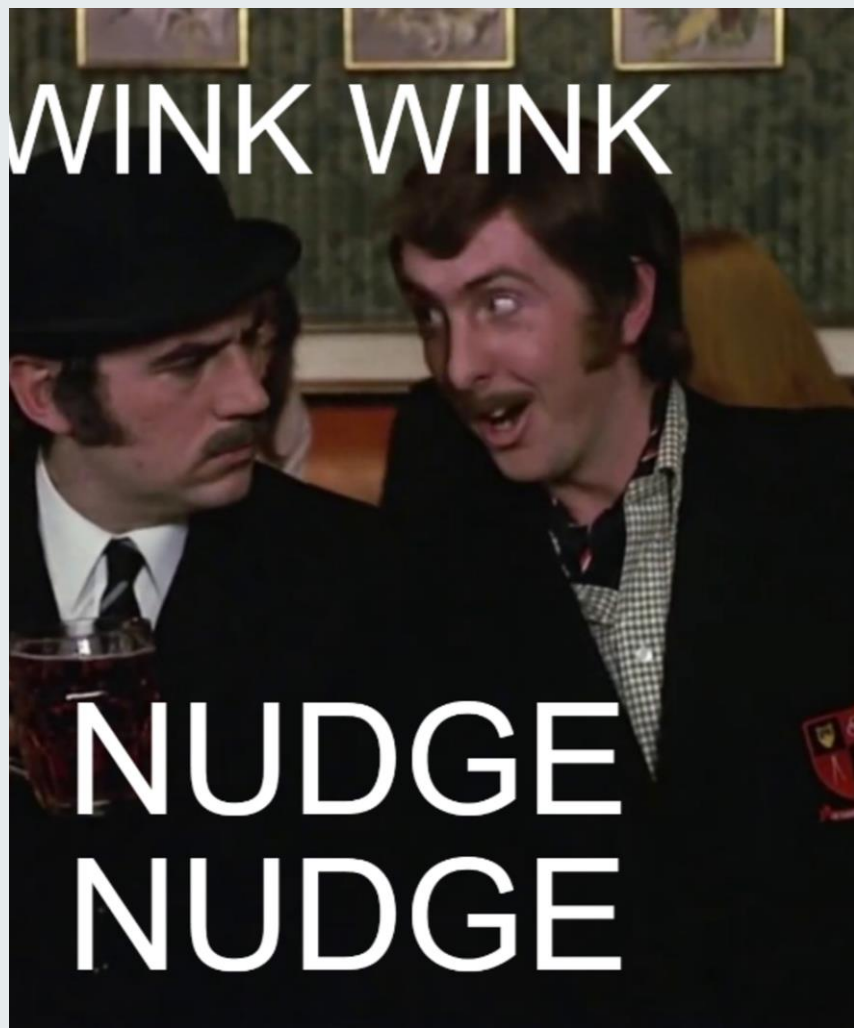


2. The utility of trustworthiness



- Proposition: The failure to collect taxes due by multinationals is an issue in which the Commission (the ‘Guardian of the Treaties’) has an interest:
 - There are macroeconomic and budgetary consequences;
 - Reduction in overall tax base;
 - Unjustified economic distortions (and possible State aid).
- It is important that the Commission knows whether to trust tax authorities to collect these taxes

2. The utility of trustworthiness



- Can we trust that Member State tax authorities faithfully collect *all* taxes due from multinationals?
 - Well, maybe that is the wrong question – Onora O’Neill, a foremost authority on trust, implores that we focus on **trustworthiness** rather than **trust**.
 - Trustworthiness is about whether somebody lives up to their **commitments** and is **competent** in completing the assigned tasks.
 - Given one of the norms of competence to be expected of a tax authority is that of **carrying out the task of collecting taxes objectively**, an untrustworthy tax authority which does not collect all taxes dispassionately (and thus discriminates between taxpayers).
 - The Commission can **sensibly place its trust** in those who are trustworthy and not in those who are untrustworthy. E.g. a tax authority which tends not to hand out unduly favourable tax rulings is a trustworthy one.

3. Defines and defends intelligent accountability



- The question should be: *how can the Commission gather evidence as to trustworthiness which can then form the basis of trust in tax authorities?*
- This evidence allow the Commission to focus limited resources on those less trustworthy tax authorities.
 - One means of doing so is by engaging in lengthy State aid investigations.
 - “Intelligent accountability” is another, a model developed by O’Neill.

3. Defines and defends intelligent accountability



- Intelligent accountability follows the usual models of accountability: 1) *who/to whom*, 2) *about what*, 3) *through what process*, 4) *by what standards*, and 5) *with what effect*.
- But it is “intelligent” because it focuses on what is important when designing an accountability framework – that **expertise** is harnessed so that the “principal” can be properly informed; that we garner **evidence as to trustworthiness** (and direct resources accordingly); that is **antithetical to managerialism**.
- Intelligent accountability requires the **informed** (i.e. expert) and **independent** (i.e. free from bias) monitoring of performance with the **intelligible communication** (i.e. in a way which can be understood by the principal) of that performance to the principal.

4. Moving on to Part 2

- Part 2 of the paper then seeks to apply this intelligent accountability framework to tax rulings granted to large taxpayers:
 - *tax transparency*
 - *internal accountability*
 - *the role of the Commission in implementing intelligent accountability*



5. Tax transparency



- Transparency – publish tax rulings?
 - Taxpayers and tax authorities, the argument goes, would be more cautious in ensuring that all taxes due are paid, as issues of impropriety could be highlighted by NGOs, experts, other taxpayers, other public bodies and the public more generally who could then apply pressure to the taxpayers and tax authorities
 - Public transparency only useful for the purposes of generating evidence of commitment and competence if the information is ‘accessible’ (would public have all the relevant info?) and ‘intelligible’ (would public have the relevant expertise?)

6. Internal accountability



- Internal accountability mechanisms as intelligent accountability
- Lengthy study (example Finnish system)
 - Informed (e.g. staff and access to information)
 - Independent (e.g. VOVA won 15 of 33 tax decisions of Supreme Court)
 - Intelligible (e.g. reports, judgments)

7. Role of the Commission

- **Transparency – Code of Conduct for Business Taxation**
 - For it to be truly useful then, there would need to be some means of specifically engaging those persons with relevant expertise
 - MS encouraged to publish anonymised tax rulings supplied to large taxpayers and create a channel for the public
 - Sample of rulings can be scrutinized by the Commission and the expert Code of Conduct group
 - Code's peer review process could be engaged also
 - Where MS tax rulings are evaluated as falling below the required standards, pressure can be applied to the tax authority for it to explain itself, begin auditing or proceedings to capture the uncollected taxes (subject to domestic procedural rules) or change course for the future.
 - Where it is deemed that a favourable ruling raises a State aid issue, the Commission will have the ability to bring infringement proceedings

7. Role of the Commission

- European Semester – establish frameworks for intelligent accountability
 - Member States would be required, in the first place, to explain to the Commission whether it has mechanisms in place to produce intelligent accountability
 - Commission should establish a ‘Tax Administration Group’ formed of tax administration experts from Member State tax authorities, business and civil society
 - Commission could begin to issue broad recommendations, based upon learnings from the previous iterations and comparative analysis, to be implemented and monitored within the European Semester.
 - More intensive peer review of specific aspects of internal accountability or tax rulings schemes could follow, along with discrete CSRs thereafter where Member States are deemed to have failed to make necessary improvements and to buy-in to the process

8. Thank you for listening



- ✓ Highlighted the relevance of trustworthiness
- ✓ Propounded intelligent accountability
- ✓ Proposed there should be supranational monitoring of tax authorities
- ✓ Made concrete proposals on transparency and harnessing intelligent accountability