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By PwC Deutschland | 12. Mai 2023

Luxembourg Tax rulings: Advocate General sees error in Commission’s findings of unlawful State aid

In her Opinion the Advocate General considers that the European Commission erred in finding that Luxembourg had granted unlawful State aid to the Engie group in the form of tax advantages (tax rulings). The AG proposes that the ECJ should uphold the appeals and, consequently, set aside the judgment of the General Court and annul the decision of the EU Commission.

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Background

The **investigation by the EU Commission** was related to rulings issued by the Luxembourg tax authorities between 2008 and 2014, which were confirming the tax treatment of certain mandatorily convertible instruments issued by two Luxembourg group subsidiaries to two other Luxembourg companies of the Group. The Commission found, by decision of 20 June 2018, that Luxembourg had granted the Engie group unlawful State aid in connection with restructuring operations in Luxembourg.

In the Commission's view, the group had, in tax rulings, been granted tax treatment whereby almost all profits made by two subsidiaries in Luxembourg would ultimately remain untaxed. Even though there was only low taxation at the level of the operational subsidiaries through an agreed basis of assessment, the parent companies benefited from the tax exemption for participation income (group relief). As a result, a selective advantage was granted to the Engie group in derogation from Luxembourg tax law. The Commission considered that a relevant principle of correspondence (tax exemption at the level of the parent company only after taxation at the level of the subsidiary) can be inferred from national law. Moreover, according to the Commission, the tax authorities unlawfully failed to apply an anti-abuse rule.

The **General Court of the European Union** fully endorsed the Commission's view and dismissed the actions. The Engie group and Luxembourg thereupon launched appeals before the European Court of Justice (ECJ).

Opinion of Advocate General (AG) Kokott

In her Opinion delivered today, the AG proposes that the ECJ should uphold the appeals and, consequently, set aside the judgment of the General Court and annul the decision of the EU Commission.

The AG first emphasizes that tax rulings do not, in themselves, constitute illegal State aid. They are an important instrument for creating legal certainty. Tax rulings are unproblematic in terms of State aid law as long as they are open to all taxpayers and are in line with the relevant national tax law, which forms the sole reference framework.

In that respect, the Commission and the General Court proceeded on the basis of an incorrect reference framework. They had assumed that the Luxembourg tax law in force at the time contained a principle of correspondence, according to which a tax exemption for participation income at the level of the parent company is contingent on taxation of the underlying profits at the level of the subsidiary. Such a link is not, however, apparent and cannot simply be interpreted into Luxembourg law because it might be preferable. The EU institutions cannot use State aid law to shape an ideal tax law.

In addition, the AG argues in favor of only a restricted standard of review in respect of tax law decisions taken by the tax authorities that is limited to a plausibility check. Not any incorrect tax ruling, but only tax rulings which are manifestly erroneous in favor of the taxpayer may constitute a selective advantage and be considered an infringement of State aid law.

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In the present case, the tax rulings are not manifestly erroneous. Furthermore, the AG went on to state that an obvious existence of abuse of legal structural possibilities under Luxembourg law was neither evident nor has it been established by the Commission.

Source

Advocate General's Opinion of 4 May 2023 in the cases C-454/21 P *Engie Global LNG Holding and Others v Commission* and C-451/21 *P Luxembourg v Commission*.

The ***complete Opinion*** of AG Kokott to be found **here**.

Schlagwörter

state aid, tax rulings