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By PwC Deutschland | 08 June 2023

ECJ: Luxembourg tax rulings granted to Amazon unauthorized state aid?

Advocate General Kokott is of the view that the Commission erred in deciding that Luxembourg had granted unauthorized state aid to Amazon in the form of tax advantages.

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Background

By decision of 4 October 2017, the Commission found that Luxembourg had granted Amazon unauthorized state aid via a tax ruling granted in 2003. In that ruling, the Luxembourg tax authorities set out their position regarding the appropriate amount of a royalty between two Luxembourg subsidiaries of the Amazon group. The amount of that royalty had an influence on the corporate income tax liability of Amazon EU Sàrl. The higher the royalty, the less corporate income tax was payable in Luxembourg.

In the Commission's view the underlying transfer pricing agreement was not consistent with the arm's length principles of the OECD. The Commission made its own calculation to determine the appropriate amount of the royalty in accordance with a different method and arrived at a lower royalty. Since that would have resulted in a higher corporate income tax burden, the tax ruling was considered to have granted a selective advantage to the subsidiary paying the royalty.

Luxembourg and Amazon brought proceedings before the General Court seeking the annulment of that decision which was upheld by the General Court in its judgment of 12 May 2021. The Commission then submitted an appeal before the European Court of Justice (ECJ) against that judgment.

Opinion of the Advocate General

In her Opinion of today Advocate General (AG) Juliane Kokott proposes that the Commission's appeal be dismissed and consequently that the General Court's judgment, which annulled the Commission decision, be upheld.

The Commission based its review of the appropriate amount of the royalty exclusively on the OECD Transfer Pricing Guidelines, although Luxembourg law at the time when the tax ruling was issued did not specifically refer to those guidelines. The Commission therefore incorrectly failed to take the Luxembourg national law as the relevant reference system for its review of a selective advantage. Therefore, all the subsequent considerations in the Commission decision are erroneous. The General Court was therefore correct in annulling the Commission decision at issue – albeit on different grounds – in the absence of a demonstrated selective advantage.

The Court of Justice is not required to rule on whether those other grounds – which the Commission expressly challenges in its appeal – are viable arguments.

Even if the ECJ were to consider itself bound by the choice of the incorrect reference system, the Commission's argument would be unfounded. In the view of the AG, the method selected in the Luxembourg tax ruling - even if applying the OECD Transfer Pricing Guidelines - would not have been manifestly the incorrect method, nor was it manifestly misapplied.

More information to be found in the **PRESS RELEASE No 97/23** of 8 June 2023.

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ECJ, Opinion of 8 June 2023 in Case C-457/21 P *Commission v Amazon.com and Others*.

Keywords

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