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By PwC Deutschland | 19 December 2023

Update: ECJ annuls Commission’s State aid decision on Luxembourg tax ruling given to Amazon

The European Court of Justice (ECJ) confirms in his most recent judgment that the Commission has not established that the tax ruling given to Amazon by Luxembourg was a State aid that was incompatible with the internal market.

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By a tax ruling of 2003, the Luxembourg authorities accepted the Amazon group's proposal concerning the treatment of two of its subsidiaries established in Luxembourg for the purposes of Luxembourg corporate income tax. By a decision of 2017, the Commission found that that tax ruling constituted a State aid that was incompatible with the internal market. According to the Commission, the account taken of a royalty that one of those two subsidiaries had paid to the other under a license agreement concluded between them on the use of intangible assets artificially diminished the tax base of the first subsidiary and, ultimately, that of the Amazon group in Luxembourg and in Europe.

Luxembourg and Amazon brought an appeal before the General Court of the EU. In May 2021, the General Court held that the Commission had not demonstrated to the requisite legal standard that the Amazon group subsidiary concerned had benefited from an undue reduction in its tax burden and therefore annulled the Commission's decision.

ECJ decision

In its judgment, the ECJ rejects the appeal brought by the Commission against the judgment of the General Court.

First, the ECJ considers that the General Court wrongly recognized the arm's length principle, which seeks to assess whether intra-group transactions are made in accordance with market conditions, as having general application within the context of the implementation of EU State aid rules.

However, despite those errors of law and the incorrect conclusion of the General Court, according to which the reference system determined by Luxembourg tax law enshrined the arm's length principle at the time the tax ruling at issue was adopted, the ECJ upholds the judgment under appeal, since the Commission decision had to be annulled in any event because of the incorrect definition of the reference system, rather than for the reasons given by the General Court. The General Court had annulled the Commission's decision owing to errors committed in the application of that reference system and, therefore, on the basis of an inaccurate hypothesis that that system complied with the treaty.

Update (19 December 2023)

Summary: The present CJEU judgment reiterates once again that the foundational aspect of any selectivity examination under EU State aid rules is the national law defined by the respective EU Member State. Consequently, the EC is not permitted to introduce external elements or general principles into the selectivity analysis. In this regard, the judgment aligns with the earlier Grand Chamber judgment of the CJEU on the Engie and FIAT cases.

(This takeaway is an excerpt from our **EUDTG Newsalert 18 December 2023.pdf**)

Source:

ECJ, judgment of 14 December 2023 (**C-457/21 P**) *Commission v Amazon.com and Others*

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