EU Direct Tax Newsalert

EU's General Court confirms European Commission's State aid decision in Fiat

On 24 September 2019, the General Court of the European Union (GC) rendered its judgment (T-755/15 and T-759/15) regarding the action brought by Fiat Chrysler Finance Europe, formerly Fiat Finance and Trade Ltd (FFT) and Luxembourg for the annulment of the final State aid decision of the European Commission (EC) of 21 October 2015 on Fiat (SA.38375). The GC dismissed the actions and confirmed the validity of the EC's decision.

Background and facts

On 11 June 2014, the EC started a formal investigation into a tax ruling granted by the Luxembourg tax authorities to FFT dealing with intra-group financing transactions. FFT was borrowing and on lending intra-group. On 21 October 2015, the EC issued its final decision finding that the tax ruling represented State aid mainly based on transfer pricing arguments, arguing that Luxembourg did not apply correctly the arm's length principle (ALP). Click here for our EUDTG newsalert.

Luxembourg and FFT appealed the EC's decision criticizing the EC in particular for: (1) having adopted an analysis leading to tax harmonization in disguise; (2) having found that the tax ruling at issue conferred an advantage; (3) having found that that advantage was selective; (4) having found that the measure at issue restricted competition and distorted trade between Member States; and (5) having breached the principle of legal certainty and infringed the rights of the defense, by ordering that the aid at issue be recovered.

The GC's judgment

As regards the first plea, the GC confirmed that the EC exercised its power conferred on it by EU law by verifying whether the tax ruling conferred on its beneficiary an advantage as compared to 'normal' taxation as defined by the national tax law.

With respect to the second plea, firstly, the GC confirmed that the EC was entitled to analyse the tax ruling in light of the ALP. It clearly stated that the ALP is a tool that allows the EC to check that intra-group transactions are remunerated as if they had been negotiated between independent companies and that this tool falls within the competence of the EC's powers under Article 107 TFEU. Then, on the existence of an advantage itself, the GC stated that the EC was right to find the methodology for calculating FFT's remuneration as not complying with an AL remuneration. More specifically, the application of the transactional net margin method (TNMM) as performed in the tax ruling was incorrect as (i) all FFT's capital should have been included in the calculation and (ii) only one rate should have been applied. It is also mentioned that the use of FFT's hypothetical regulatory capital and the exclusion of certain FFT's shareholdings could not result in an AL outcome.

The GC concluded that the methodology approved in the APA reduced FFT's remuneration which led to a lower tax liability for FFT in comparison to the tax that would have been paid under Luxembourg tax law, this being constitutive of an advantage. Regarding the third plea, the GC considered that the conditions of the presumption of selectivity were met. The GC also ruled that, in any event, the three-step analysis of selectivity would be met, irrespective of the reference framework used by the Commission (i.e. general system of corporate income tax or Article 164 LITL).

Further, the GC confirmed that the advantage led to a restriction of competition given that the corresponding tax reduction improved the financial position of FFT but also of the Fiat Group to the detriment of its competitors. The GC considered that Fiat and Luxembourg did not bring evidence of an absence of restriction of competition. One of the arguments referring to the overall-effect of the higher margin at Fiat group level seems not to have been retained by the GC.

Takeaway

It remains to be seen whether an appeal will be brought before the European Court of Justice. Commissioner Margrethe Vestager commented that the judgment gives important guidance on the application of EU State aid rules in the area of taxation and confirms that, while Member States have exclusive competence in determining their laws concerning direct taxation, they must do so in respect of EU law, including State aid rules.

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