EUDTG Newsalert
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The Court of Justice of EU rules that Luxembourg did not grant any State aid to Amazon

On 14 December 2023, the Court of the Justice of the European Union ("CJEU") rendered its judgment in the case C-475/21 P regarding the appeal brought by Amazon group companies and Luxembourg against the judgment of the General Court of the European Union ("GC") of 12 May 2021 (T-816/17 and T-318/18). In essence, the CJEU upheld the GC judgment despite errors in the GC's reasoning. This was because the European Commission's (EC) decision had to be annulled in any event because of the incorrect determination of the reference system, rather than for the reasons given by the GC.

Background and facts

The EC investigation was related to rulings issued by the Luxembourg tax authorities in 2003, confirming the tax treatment of royalty payments between two group entities. The rulings were confirming the transfer pricing applicable to the royalty that Amazon EU Sarl ("AEU") paid to Amazon Holding Technologies ("AEHT").

In its decision of 4 October 2017 (SA.38944), the EC considered that the rulings granted State aid because they set a transfer pricing result and methodology that was considered by the EC to be not in line with the arm's length principle. The EC claimed that the royalty paid by AEU to AEHT, a Luxembourg partnership, was excessive and did not reflect the economic reality of the functions performed by each entity. The EC calculated a lower royalty using a different method and concluded that the tax ruling conferred a selective advantage to Amazon and constituted unlawful State aid. The EC ordered Luxembourg to recover the aid from Amazon. Subsequently, Amazon and Luxembourg challenged the EC's decision before the GC. On 12 May 2021, the GC annulled the EC's decision on the basis that the EC did not sufficiently demonstrate the existence of a selective advantage. For further details on this judgment, you may refer to our previous EUDTG newsalert by clicking here.

Final CJEU judgment

The CJEU found that the GC erred in affirming the applicability of the arm's length principle in the case at hand. Indeed, since the arm's length principle is not a free standing principle of EU law, the EC's dependence on it for the identification of the reference framework for the State aid selectivity analysis is justified solely when this principle is integrated into the pertinent national tax law. Similarly, the Court stated that the OECD transfer pricing Guidelines were not relevant to the transactions as there was no clear citation of the Guidelines in Luxembourg tax law at the time. As a result, the CJEU ruled that the GC judgment was based on an incorrect determination of the relevant reference framework.

However, the CJEU upheld GC's annulment of the EC decision because of the incorrect definition of the reference framework, rather than for the reasons given by the GC. In that regard, the CJEU ruled that the EC erred in recognising the arm's length principle as if it were an autonomous principle of EU law that applies regardless of whether it is incorporated into national law. In order for the arm's length principle to be used in assessing the existence of a selective advantage under Article 107(1) of the Treaty on the Functioning of the European Union (TFEU), national law must explicitly reference this principle.

Furthermore, according to the CJEU, the EC employed the OECD transfer pricing Guidelines without substantiating their complete or partial formal adoption in Luxembourg's legal framework. This approach contravenes the prohibition against considering external parameters and guidelines, such as the OECD transfer pricing Guidelines, in the evaluation of a selective tax advantage under Article 107(1) TFEU. Such external guidelines are not to be factored into the determination of the tax burden of an enterprise, unless explicitly referenced by the relevant national tax system.

In light of these considerations, the CJEU ruled that it was evident that the GC was justified in determining that the EC did

not prove the granting of an advantage to the Amazon group within the meaning of Article 107(1) TFEU. Consequently, the GC was correct in annulling the decision in question.

Takeaway

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 (we refer you to EUDTG newsalerts on Engie and FIAT).

Let's talk

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