

Luxembourg: CJEU's final State aid decision in the European Commission's Fiat case

On 8 November 2022, the Court of Justice of the European Union (CJEU) published its final decision on two appeals (C-885/19 P, and C-898/19P) regarding the formal State aid investigation by the European Commission dating back to October 2015 in relation to an Advance Pricing Agreement (“APA” or “tax ruling”) of Fiat Finance & Trade Ltd (“FFT”). The European Court of Justice annulled the European Commission’s decision setting aside the finding that FFT had received State aid.

Background

FFT has been performing extensive treasury services and financing for Fiat group companies mainly based in Europe, including raising external financing, and managing several intra-group cash pools. In September 2012, FFT obtained an APA, which confirmed the TP methodology that the company should apply for determination of its remuneration for its functions performed and risks borne, and which was used to determine the interest rates that the company charged on the loans it granted to the various group companies. The APA was obtained in accordance with the Luxembourg Circular 164/2 of the 28 January 2011 setting out how the arm’s length principle is to be applied in Luxembourg.

In June 2014, the European Commission initiated a formal investigation procedure under Article 108(2) TFEU in respect of the above-mentioned APA. It concluded that the confirmation by the Luxembourg tax authorities of the TP methodology applied granted a selective advantage to FFT and therefore constitutes State aid based on the following arguments:

- The frame of reference, in relation to which the existence of a selective advantage was to be established, was the Luxembourg income tax system in general, and that system sought to treat group companies and stand – alone entities in a similar manner;
- Accordingly stand- alone and group companies were to be considered as comparable in light of the objectives of the reference system;
- It was therefore necessary to ensure that the profits of group entities and stand- alone entities were calculated on the same basis. This entailed applying an arm’s length standard to the profits of group entities given that the profits of stand-alone entities reflect transactions on the open market;
- Whilst the OECD guidelines may be a helpful tool for assessing whether transactions meet this arm’s length standard, the standard is not necessarily limited to or proscribed by the domestic transfer pricing provisions (e.g. Circular 164/2);
- The APA did not conform to this ‘autonomous’ arm’s length standard and therefore provided a selective advantage.

In December 2015, both the Grand Duchy of Luxembourg and FFT appealed against the decision of the European Commission and requested the General Court of the EU to annul the decision. In 2016, the General Court granted Ireland’s application to intervene in the case. In 2019, the General Court dismissed the case confirming the Commission’s arguments and accordingly upholding their decision. FFT and Ireland appealed against the General Court decision.

Final decision of the CJEU

The European Court of Justice concluded that the General Court’s decision was vitiated by an error of law. More specifically, that error consisted, in essence, in not taking into account the arm’s length principle as provided for in Article 164(3) of the Luxembourg Tax Code and specified in the related Circular No 164/2, when defining the reference system for the purposes of determining whether the tax ruling at issue conferred a selective advantage. Essentially the European Court of Justice confirmed that when performing a State aid analysis in tax cases, the determination of the reference system, which is a key element of that analysis, should be based on the domestic tax legislation of the Member State concerned recognising that at the current stage of development of EU law, there is no general harmonisation of tax measures across the EU and accordingly Member States have the power to define the rules of ‘normal’ taxation of an integrated company (albeit such power must be exercised in a manner consistent with the provisions of EU law).

Takeaway

This is likely to be an extremely important judgment as it represents the first time the European Court of Justice (Grand Chamber) has addressed the substantive arguments in the recent State aid cases concerning transfer pricing rulings. It remains to be seen the impact this judgment will have in the other ongoing cases and investigations State aid and tax measures.

Let's talk

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