EUDTG Newsalert
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CJEU Annuls EC Decision That Concluded Luxembourg Tax Rulings Granted to the Engie Group Were State Aid

On 5 December 2023, the Grand Chamber of the Court of the Justice of the European Union ("CJEU") rendered its judgment in the joined cases C-451/21 P and C-454/21 P regarding the appeals brought by Luxembourg and the Engie group companies against the judgments of the General Court of the European Union ("GC") of 12 May 2021 (T-516/18 and T-525/18) that previously confirmed the existence of State aid under article 107 TFEU. The CJEU ruled that the European Commission ("EC") erred in its State aid analysis of the tax rulings granted to the Engie group.

Background and facts

The EC's investigation focused on tax rulings issued by the Luxembourg tax authorities between 2008 and 2014, which were confirming the tax treatment of certain mandatorily convertible instruments (the "instruments") issued by two Luxembourg group subsidiaries ("borrowers") to two other Luxembourg companies of the group ("lenders"). The rulings were confirming the following tax treatment:

- the borrowers treated the instruments as debt and recorded in their accounts accretions which were deductible at their level;
- the lenders entered into a forward sale agreement with a third entity with the receipt being exempt under the participation exemption regime.

In its final decision of 20 June 2018 (SA.44888), the EC considered that the tax rulings granted State aid by incorrectly lowering the tax basis of the Luxembourg companies. The EC analysed the intra-group financing structure by looking at its final overall economic result (leading, in its view, to an inconsistent treatment of the same amounts as representing deductible expenses on the instruments at the level of the borrowers and exempt income under the domestic participation exemption regime at the level of the lenders), disregarding the specific tax treatment applicable under the Luxembourg law at the time for each individual transaction.

In its judgments, the GC approved this approach and confirmed that the EC can determine the existence of a selective advantage for State aid purposes on the grounds of the non-application by tax authorities of a local concept of abuse of law. For further details on these judgments, you may refer to our previous EUDTG newsalert by clicking here.

CJEU judgment

The CJEU ruled that the EC erred in determining the reference system that is the starting point of the comparative analysis to be performed as part of the selectivity assessment, being one of the key conditions to be met for classifying a tax measure as State aid.

The CJEU reiterated that the determination of the common tax regime or reference system, being the "normal" tax system applicable in the EU Member State concerned, is of importance since the existence of an economic advantage, under Article 107 TFEU, can only be established by comparison with a "normal" taxation. The CJEU further explained that, in tax matters which are not harmonised at EU level, only the national law applicable in the EU Member State concerned must be taken into account in order to identify the reference system. In this context, the EC must demonstrate that a measure derogates from the reference system because it differentiates between undertakings which are in a comparable situation. Furthermore, the EC is not allowed to base its analysis on a general objective of taxation of all resident companies.

In the case at hand, the EC assumed that the Luxembourg tax law in force at the time included a link of conditionality, according to which the tax exemption of income derived from a subsidiary was contingent on the taxation of the subsidiary's underlying profits. The CJEU highlighted that this link did not exist, as demonstrated by Luxembourg. In this

regard the CJEU stated that the EC was required to accept the interpretation of the relevant provisions of national law given by Luxembourg provided that the interpretation i) is compatible with the wording of the provisions and ii) is not invalidated by case law or administrative practice of Luxembourg. Hence, the GC made an error in confirming the EC's decision as to the existence of such a link of conditionality between the two above tax treatments.

In addition, the CJEU also ruled that both the GC and the EC erred in considering that the administrative practice of the Luxembourg tax authorities with regard to the abuse of law provision was not to be taken into account and that the Luxembourg tax authorities were therefore entitled to not apply the abuse of law provisions in this case in accordance with their own administrative practice.

Takeaway

The present judgment of the Grand Chamber of the CJEU 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 decision of the CJEU on the FIAT case (see here for our previous EUDTG newsalert).

Let's talk

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