



## ***EU Direct Tax Newsalert***

### ***EU Commission finds that Luxembourg gave State aid to GDF Suez (now Engie)***

On 20 June 2018 the European Commission (“EC”) issued a press release concerning its final decision in the State aid investigation into tax rulings granted by the Luxembourg tax authorities to GDF Suez group (now Engie) (“the Group”) in relation to the treatment of certain financing transactions. The EC considered that the Group received an undue advantage and requested recovery of up to EUR 120 million of tax.

The text of the final decision has not yet been made public by the EC.

#### **Background**

The formal investigation concerned the treatment of certain interest-free convertible loans (“instruments”) issued by two Luxembourg group subsidiaries (“borrowers”) to two other Luxembourg companies of the Group (“lenders”). According to the description in the press release:

- the borrowers treated the instruments as debt and recorded in their accounts provisions for financing charges which were deductible at their level;
- the borrowers did not make payments on the instruments to the lenders under the terms of the instruments;
- the lenders converted the instruments into shares in the borrowers that they subsequently cancelled for the receipt of cash/profits which had been accumulated by the borrowers.

#### **Decision**

The EC considered that the two sets of tax rulings governing the treatment of the instruments incorrectly lowered the tax basis of the Luxembourg companies.

The press release does not contain details regarding the legal argumentation of the EC but mentions that the EC considered that the Luxembourg tax treatment of the instruments did not reflect economic reality. The EC also considered that the rulings endorsed an inconsistent treatment of the same transaction as both debt and equity leading to non-taxation at all levels

because the borrower deducted expenses similar to interest on the loan while the creditor did not pay tax because Luxembourg tax rules exempt income from equity investments. The EC considered that this is a more favourable treatment than that generally available under Luxembourg tax rules, which exempt from taxation income received by a shareholder from its subsidiary, provided that income is in general taxed at the level of the subsidiary.

#### **Takeaway**

- The decision is the latest in a number of high profile cases concerning EC’s approach to State aid and taxation.
- While a number of the recent cases concern transfer pricing matters, the decision in GDF Suez’s case appears to focus on the fact that the arrangement gives rise to a deduction of an expense without a corresponding income inclusion. The EC’s concerns perhaps have some echoes of the BEPS Actions and the matters which have been further addressed through the European Union Anti Tax Avoidance Directives (“ATAD I” and “ATAD II”).
- However, the text of the final decision will be important for the understanding of the EC’s detailed argumentation and position in the case.
- As with the prior cases, it can be expected that the decision will be appealed by Luxembourg to the General Court of the EU.
- In the meantime it is perhaps interesting to note that the appeals in respect of a number of the earlier cases will be heard in front of the General Court over the course of the next few weeks.

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