

Public release of the European Commission's State aid decision in Fiat Case

Luxembourg Tax Alert

On 11 June 2014, the European Commission opened a state aid investigation in connection with a 2012 tax ruling on transfer pricing granted by Luxembourg to Fiat Finance and Trade ("FFT"). On 21 October 2015, the European Commission concluded that Luxembourg had granted selective tax advantages to FFT which is illegal under European state aid rules.

Yesterday, the European Commission officially published its decision dated 21 October 2015 including its technical developments and reasoning.

European Commission views

In its decision, the European Commission considered that the tax ruling could be viewed as state aid on the grounds that FFT's remuneration as determined by the tax ruling departs from market-based outcome and is as such not aligned on the arm's length principle. This would result in a lower tax liability for the company compared to other non-integrated companies taxable in Luxembourg viewed as a selective advantage granted by the Luxembourg tax administration.

The Commission did not criticise the choice of the method used by the taxpayer to determine his profits (transactional net margin method called "TNMM") nor the profit level indicator (capital) but rather subsequent choices of the parameters for their implementation to determine (1) the level of the capital to be remunerated and (2) the required return to be applied on it.

Luxembourg views

The Luxembourg government reacted in October 2015 stating that: *"Luxembourg disagrees with the conclusions reached by the European Commission [...] Luxembourg already notes that the European Commission has used unprecedented criteria in establishing the alleged State aid. In particular, the Commission has not established in any way that Fiat Finance and Trade received selective advantages with reference to Luxembourg's national legal framework. Luxembourg does not consider that Fiat Finance and Trade has been granted incompatible State aid, as foreseen by article 107(1) of the Treaty on the Functioning of the European Union."*

Luxembourg adheres to international standards, in particular those relating to the arm's length principle applicable with respect to transfer pricing, and with State aid rules".

Moreover, Luxembourg, as well as the Luxembourg company, appealed respectively in December 2015 against the European Commission's October decision before the General Court of the European Union. Depending on the outcome before the General Court of the European Union an appeal could be made to the Court of Justice of the European Union who will decide upon whether or not there is state aid in this case..

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