

European Commission State Aid Announcement - Amazon

On October 4, 2017, the European Commission [announced its final decision](#) on its state aid investigations into transfer pricing rulings granted by Luxembourg to the Amazon group. In its decision the Commission rules that the rulings in question may underestimate the taxable profits of the group by deviating from the arm's length principle, and therefore constituted illegal state aid. The Commission estimates the value of the competitive advantage granted at up to EUR 250 million, plus interest. It is up to the Luxembourg tax authorities to determine the exact amount and to recover what the Commission considers to be illegal aid.

Background

The decision concerning Luxembourg follows an in-depth investigation launched in October 2014 and is part of what the Commission refers to as a wider strategy towards tax transparency and fair taxation, which has led to inquiries into the compatibility of the tax ruling practices of Member States with EU law. The Commission is required by EU law to review state aid granted by Member States and, if it finds that the aid is incompatible with the internal market, to order the Member State concerned not to put it into effect, or to abolish or alter it. The Member State is also required to recover the aid from the beneficiary within a prescribed timeframe in order to remove the distorting effect on competition. Broadly speaking, aid is incompatible with EU law if it distorts competition by, for example, selectively favoring certain undertakings thus affecting trade between Member States, provided that it does not meet the conditions for Commission approval under the EU Treaty.

The Decision

The decision concerns a tax ruling granted by Luxembourg in respect of the method to calculate the taxable base of a Luxembourg resident operating company of the Amazon group. In the Commission's view, the tax ruling endorsed an unjustified method to calculate the operating company's taxable profits. The operating company paid royalties to a Luxembourg-incorporated limited partnership. The royalties related to the right to use Amazon intellectual property, which was held by the limited partnership under a cost-sharing agreement with Amazon in the US. The limited partnership was not subject to corporate taxation in Luxembourg.

According to the Commission, the level of the payments, particularly in proportion to what the limited partnership paid to the US parent company under the group cost-sharing agreement, did not reflect economic reality as the payments reduced the profits of the operating company to "a quarter of what they were in reality". Therefore, the Commission considered that the rulings enabled the company to pay less tax than other companies, which is illegal under EU State aid rules. The Commission made it clear that its investigation did not challenge the limited partnership's ownership of the intellectual property nor did it concern the wider group structure, but only focused on the tax treatment of the operating company and the limited partnership established in Luxembourg.

Meijburg & Co comment

The Luxembourg Ministry of Finance has acknowledged the Commission's decision in a statement issued on the same day, noting that "Luxembourg will use appropriate due diligence to analyse the decision and reserves all its rights." The statement also notes that Amazon was taxed in accordance with the tax rules in force at the time, which have evolved since in line with Luxembourg's commitment to tax transparency, the fight against harmful tax avoidance and the OECD BEPS project – Luxembourg is a member of the OECD Inclusive Framework on BEPS.

It is noteworthy that the Commission sees its tax-related state aid investigations as being part of the wider strategy towards fair taxation and greater transparency, which include the automatic exchange of information on tax rulings and country-by-country reports, the Anti-Tax Avoidance Directive, on-going work on the C(C)CTB proposals and the proposed mandatory disclosure requirements for intermediaries.

It remains to be seen what the view of the CJEU will be on the Commission's transfer pricing approach within the framework of the State Aid rules.

Should you have any queries, please do not hesitate to contact your local Meijburg & Co advisor.

Meijburg & Co
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