General Court of the European Union
PRESS RELEASE No 79/21
Luxembourg, 12 May 2021

Judgments in Cases T-816/17 Luxembourg v Commission and T-318/18 Amazon EU Sàrl and Amazon.com, Inc. v Commission

Press and Information

No selective advantage in favour of a Luxembourg subsidiary of the Amazon group: the General Court annuls the Commission's decision declaring the aid incompatible with the internal market

According to the General Court, the Commission did not prove to the requisite legal standard that there was an undue reduction of the tax burden of a European subsidiary of the Amazon group

From 2006, the Amazon group pursued its commercial activities in Europe through two companies established in Luxembourg, namely Amazon Europe Holding Technologies SCS ('LuxSCS'), a Luxembourg limited partnership, the partners of which were US entities of the Amazon group, and Amazon EU Sàrl ('LuxOpCo'), a wholly owned subsidiary of LuxSCS.

Between 2006 and 2014, LuxSCS held the intangible assets necessary for the Amazon's group's activities in Europe. To that end, it concluded various agreements with US entities of the Amazon group, namely licence and assignment agreements for pre-existing intellectual property with Amazon Technologies, Inc. (ATI) ('the Buy-In agreements') and an agreement for the sharing of costs linked to the development of those intangible assets ('the cost-sharing agreement') with ATI and a second entity, A9.com, Inc. Under those agreements, LuxSCS obtained the right to exploit certain intellectual property rights, consisting essentially of technology, customer data and trade marks and to sub-licence those intangible assets. On that basis, LuxSCS concluded, inter alia, a licence agreement with LuxOpCo, as the principle operator of the Amazon group's business in Europe. Under that agreement, LuxOpCo undertook to pay a royalty to LuxSCS in return for the use of the intangible assets.

On 6 November 2003, in response to a request from the Amazon group, the Luxembourg tax authorities granted that group a tax ruling ('the tax ruling'). The Amazon group had requested confirmation of the treatment of LuxOpCo and LuxSCS for the purposes of Luxembourg corporate income tax. As regards, more specifically, the determination of LuxOpCo's annual taxable income, the Amazon group had proposed that the 'arm's length' royalty to be paid by LuxOpCo to LuxSCS should be calculated according to the transactional net margin method ('the TNMM'), using LuxOpCo as 'the tested party'.

The tax ruling, first, confirmed that LuxSCS was not subject to Luxembourg corporate income tax because of its legal form and, secondly, endorsed the method of calculating the annual royalty to be paid by LuxOpCo to LuxSCS under the abovementioned licence agreement.

In 2017, the European Commission found that, in so far as it had endorsed the 'arm's length' nature of the method of calculating the royalty to be paid by LuxOpCo to LuxSCS, that tax ruling, and its annual implementation from 2006 to 2014, constituted State aid for the purpose of Article 107 TFEU, in this case operating aid which is incompatible with the internal market. [1] More specifically, the Commission found an advantage in favour of LuxOpCo, considering essentially that the royalty paid by LuxOpCo to LuxSCS during the relevant period - calculated in accordance with the method endorsed in the tax ruling - was too high, with the result that LuxOpCo's remuneration and, consequently, its tax base were artificially reduced. In that respect, the

[1] Commission Decision (EU) 2018/859 of 4 October 2017 on State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon (OJ 2018 L 153, p. 1).

Commission's decision was based on a primary finding and three subsidiary findings. The primary finding concerned an error as regards the 'tested party' for the purposes of applying the TNMM. The three subsidiary findings concerned, respectively, an error in the choice of the TNMM as such, an error in the choice of the profit level indicator as a relevant parameter for the application of the TNMM and an error consisting in the inclusion of a ceiling mechanism in the context of the TNMM. Having found, ultimately, that the tax ruling had been implemented by Luxembourg without having been notified to the Commission in advance, the Commission ordered the recovery, from LuxOpCo, of that aid which was unlawful and incompatible with the internal market.

Luxembourg and the Amazon group each brought an action seeking the annulment of that decision. In their actions, they contested, inter alia, each of the findings on which the Commission based its reasoning as regards the existence of an advantage.

In its judgment delivered today, the General Court of the European Union upholds, in essence, the applicants' pleas and arguments contesting both the primary and subsidiary findings of an advantage and consequently annuls the contested decision in its entirety.

Relying on the principles previously set out concerning the implementation of the criteria of 'State aid' in the context of tax rulings, the General Court provides important clarifications as regards the scope of the Commission's burden of proof in establishing the existence of an advantage where the level of taxable income of an integrated company belonging to a group is determined by the choice of transfer pricing method.

Assessment of the General Court

The General Court notes, first of all, the settled case-law according to which, in examining tax measures in the light of the EU rules on State aid, the very existence of an advantage may be established only when compared with 'normal' taxation, with the result that, in order to determine whether there is a tax advantage, the position of the recipient as a result of the application of the measure at issue must be compared with his or her position in the absence of the measure at issue and under the normal rules of taxation.

In that respect, the General Court observes that the pricing of intra-group transactions carried out by an integrated company in that group is not determined under market conditions. However, where national tax law does not make a distinction between integrated undertakings and stand-alone undertakings for the purposes of their liability to corporate income tax, it may be considered that that law is intended to tax the profit arising from the economic activity of such an integrated undertaking **as though it had arisen from transactions carried out at market prices**. In those circumstances, when examining a fiscal measure granted to such an integrated company, the Commission may compare the tax burden of that undertaking resulting from the application of that fiscal measure with the tax burden resulting from the application of the normal rules of taxation under national law of an undertaking, placed in a comparable factual situation, carrying on its activities under market conditions.

In addition, the General Court points out that, in examining the method of calculating an integrated company's taxable income endorsed by a tax ruling, the Commission can find an advantage **only if it demonstrates** that the methodological errors which, in its view, affect the transfer pricing do not allow a reliable approximation of an arm's length outcome to be reached, but rather lead to a **reduction in the taxable profit of the company concerned compared with the tax burden resulting from the application of normal taxation rules**.

In the light of those principles, the General Court then examines the merits of the Commission's analysis in support of its finding that, by endorsing a transfer pricing method that did not allow a reliable approximation of an arm's length outcome to be reached, the tax ruling at issue granted an advantage to LuxOpCo.

In that context, the General Court holds, in the first place, that the primary finding of an advantage is based on an **analysis which is incorrect in several respects**. Thus, first, in so far as the

Commission relied on **its own functional analysis** of LuxSCS in order to assert, in essence, that contrary to what was taken into account in granting the tax ruling at issue, that company was **merely a passive holder of the intangible assets in question,** the General Court considers that analysis to be incorrect. In particular, according to the General Court, the Commission did not take due account of **the functions performed by LuxSCS for the purposes of exploiting the intangible assets in question or the risks borne by that company in that context**. Nor did it demonstrate that it was easier **to find undertakings comparable to LuxSCS than undertakings comparable to LuxOpCo**, or that choosing LuxSCS as the tested entity would have made it possible to obtain more reliable comparison data. Consequently, contrary to its findings in the contested decision, the Commission did not, according to the General Court, establish that the Luxembourg tax authorities had incorrectly chosen LuxOpCo as the 'tested party' in order to determine the amount of the royalty.

Secondly, the General Court holds that, even if the 'arm's length' royalty should have been calculated using LuxSCS as the 'tested party' in the application of the TNMM, the Commission was **not able to establish the existence of an advantage** since it was also unfounded in asserting that LuxSCS's remuneration could be calculated on the basis of the mere passing on of the development costs of the intangible assets borne in relation to the Buy-In agreements and the cost sharing agreement **without in any way taking into account the subsequent increase in value of those intangible assets**.

Thirdly, the General Court considers that the Commission also erred in evaluating the remuneration that LuxSCS could expect, in the light of the arm's length principle, for the functions linked to maintaining its ownership of the intangible assets at issue. Contrary to what appears from the contested decision, such functions **cannot be treated in the same way as the supply of 'low value adding' services**, with the result that the Commission's application of a rate of return most often observed in relation to intra-group supplies of a 'low value adding' services is **not appropriate** in the present case.

In view of all the foregoing considerations, the General Court concludes that the elements put forward by the Commission in support of its primary finding **are not capable of establishing** that LuxOpCo's tax burden was artificially reduced as a result of an overpricing of the royalty.

In the second place, after examining the three subsidiary findings of an advantage, the General Court concludes that the Commission also failed to establish, in that context, that the methodological errors identified had **necessarily led to an undervaluation** of the remuneration that LuxOpCo would have received under market conditions and, accordingly, the existence of an advantage consisting of a reduction of its tax burden. More specifically, although the Commission could validly consider that certain functions performed by LuxOpCo, connected with the intangible assets, went beyond mere 'management' functions, it nevertheless did not justify to the requisite legal standard the methodological choice it inferred from this. Nor did it demonstrate why LuxOpCo's functions, as identified by the Commission, should necessarily have **led to a higher remuneration for LuxOpCo**. Likewise, as regards both the choice of the most appropriate profit level indicator and the ceiling mechanism endorsed by the tax ruling at issue for the purposes of determining LuxOpCo's taxable income, even if they were erroneous, the Commission did not satisfy the evidential requirements it is required to meet.

On those grounds, the General Court concludes that none of the findings set out by the Commission in the contested decision **are sufficient to demonstrate the existence of an advantage** for the purposes of Article 107(1) TFEU, with the result that the contested decision must be annulled in its entirety.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If

the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

Press contact: Gitte Stadler ☎ (+352) 4303 3127