General Court of the European Union
PRESS RELEASE No 118/19
Luxembourg, 24 September 2019

Press and Information

Judgment in Cases T-755/15 Luxembourg v Commission
and T-759/15 Fiat Chrysler Finance Europe v Commission

The General Court confirms the Commission's decision on the aid measure granted by Luxembourg to Fiat Chrysler Finance Europe

On 3 September 2012, the Luxembourg tax authorities issued a tax ruling in favour of Fiat Chrysler Finance Europe ('FFT'), an undertaking in the Fiat group that provided treasury and financing services to the group companies established in Europe. The tax ruling at issue endorsed a method for determining FFT's remuneration for these services, which enabled FFT to determine its taxable profit on a yearly basis for corporate income tax in the Grand Duchy of Luxembourg.

In 2015, the Commission concluded that the tax ruling constituted State aid under Article 107 TFEU and that it was operating aid that was incompatible with the internal market.[1] It also noted that the Grand Duchy of Luxembourg had not notified it of the proposed tax ruling and had not complied with the standstill obligation. The Commission found that the Grand Duchy of Luxembourg was required to recover the unlawful and incompatible aid from FFT.

The Grand Duchy of Luxembourg and FFT each brought an action before the General Court for annulment of the Commission's decision. They criticise the Commission in particular for: (1) having adopted an analysis leading to tax harmonisation in disguise; (2) having found that the tax ruling at issue conferred an advantage, notably on the ground that it did not comply with the arm's length principle, contrary to Article 107 TFEU and to the obligation to state reasons and in breach of the principles of legal certainty and protection of legitimate expectations; (3) having found that that advantage was selective, contrary to Article 107 TFEU; (4) having found that the measure at issued restricted competition and distorted trade between Member States, contrary to Article 107 TFEU and to the obligation to state reasons; and (5) having breached the principle of legal certainty and infringed the rights of the defence, by ordering that the aid at issue be recovered.

In today's judgment, the General Court dismisses the actions and confirms the validity of the Commission's decision.

In the first place, with regard to the plea relating to tax harmonisation in disguise, the Court notes that, when considering whether the tax ruling at issue complied with the rules on State aid, the Commission did not engage in any 'tax harmonisation' but exercised the power conferred on it by EU law by verifying whether that tax ruling conferred on its beneficiary an advantage as compared to 'normal' taxation, as defined by national tax law.

In the second place, as regards the pleas relating to the absence of an advantage, the Court first considered whether, for a finding of an advantage, the Commission was entitled to analyse the tax ruling at issue in the light of the arm's length principle as described by the Commission in the contested decision.

In that regard, the Court notes in particular that, in the case of tax measures, the very existence of an advantage may be established only when compared with 'normal' taxation and that, in order to

[1] Decision (EU) 2016/2326 of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat (OJ L 351, 22.12.2016, p. 1).

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 position in the absence of the measure at issue and under the normal rules of taxation.

The Court goes on to note that the pricing of intra-group transactions is not determined under market conditions. It states that, 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, 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. The Court holds that, in those circumstances, when examining, pursuant to the power conferred on it by Article 107(1) TFEU, a fiscal measure granted to such an integrated undertaking, the Commission may compare the fiscal burden of such an integrated undertaking resulting from the application of that fiscal measure with the fiscal burden resulting from the application of the normal rules of taxation under the national law of an undertaking placed in a comparable factual situation, carrying on its activities under market conditions.

The Court makes clear that the arm's length principle as described by the Commission in the contested decision is a tool that allows the Commission to check that intra-group transactions are remunerated as if they had been negotiated between independent companies. Thus, in the light of Luxembourg tax law, that tool falls within the exercise of the Commission's powers under Article 107 TFEU. The Commission was therefore, in the present case, in a position to verify whether the pricing for intra-group transactions endorsed by the tax ruling at issue corresponds to prices that would have been negotiated under market conditions.

The Court further notes that it does not follow from the contested decision that the Commission found that every tax ruling necessarily constitutes State aid.

Second, with regard to demonstrating the actual existence of an advantage, the Court examined whether the Commission was right to find that the methodology for calculating FFT's remuneration, as endorsed by the tax ruling at issue, did not enable an arm's length remuneration to be obtained and whether this resulted in a reduction of FFT's taxable profit.

In that regard, the Court concludes that the Commission correctly found that the arrangements for the application of the transactional net margin method (TNMM) endorsed by the tax ruling at issue were incorrect and, specifically, that the whole of FFT's capital should have been taken into account and a single rate should have been applied. In any event, the Commission also correctly considered that the method consisting, on the one hand, in using FFT's hypothetical regulatory capital and, on the other, in excluding FFT's shareholdings in Fiat Finance North America (FFNA) and Fiat Finance Canada (FFC) from the amount of the capital to be remunerated could not result in an arm's length outcome.

Consequently, the Court finds that the methodology approved by the tax ruling at issue minimised FFT's remuneration, on the basis of which FFT's tax liability is determined. The Commission was therefore fully entitled to conclude that the tax ruling at issue conferred an advantage on FFT because it resulted in a lowering of FFT's tax liability as compared to the tax that it would have had to pay under Luxembourg tax law.

In the third place, as regards the pleas relating to the non-selectivity of the advantage granted to FTT, the Court concludes that the Commission did not err in finding that the advantage conferred on FFT by the tax ruling at issue was selective, since the conditions attached to the presumption of selectivity were fulfilled in this case. The Court adds that, in any event, the Commission also established that the measure at issue was selective on the basis of the three-step analysis of selectivity, irrespective of the reference framework used by the Commission, whether that is the general system of corporate income tax or Article 164 of the Tax Code.

In the fourth place, the Court rejects the pleas advanced by the Grand Duchy of Luxembourg and FFT to the effect that the Commission failed to establish that there was a restriction of competition.

In the fifth and last place, the Court considers that **recovery of the aid at issue does not breach the principle of legal certainty or infringe the rights of the defence.**

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.

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