



Newsalert

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European Commission explains State aid investigations in Ireland and Luxembourg

On 30 September 2014 the European Commission published its opening decisions in the formal investigations into transfer pricing agreements between Apple and, allegedly, Fiat and - respectively - Ireland and Luxembourg. The European Commission had already communicated these investigations through a press release issued on 11 June 2014. The current decisions explain the reason for these investigations, and specify the additional information which the European Commission has requested from the aforementioned Member States.

These decisions do not yet provide the outcomes of the European Commission's ongoing, formal investigations in this matter.

Background

Both the Irish and the Luxembourg formal investigations pertain to the use of tax rulings on the application of transfer pricing rules. In each case, the European Commission holds the view that agreements made between the taxpayer and the Member State may not reflect a price which corresponds with the 'at arm's length' standard. The European Commission refers to the standards set by the OECD's Transfer Pricing Guidelines.

The European Commission notes that the current agreements do not so much reflect the application of transfer pricing rules as a targeted approach towards reaching a particular (favourable) tax base.

Key reasons

The European Commission specifies a number of aspects of the agreements which it considers to be relevant in the present context:

- The approach taken in the agreements seems to have been the result of a negotiation process (i.e. not a proper transfer pricing analysis);
- There is in the Irish ruling, a general failure to explain the methodology which applies;
- The Irish agreements are open-ended and do not provide for adjustment in the event of the evolution of sales;
- The Luxembourg ruling appears to depart from the at arm's length approach.

Transfer pricing and EU Law

The European Commission asserts that "if the method of taxation for intra-group transfers does not comply with the arm's length principle, and leads to a taxable base inferior to the one which would result from the correct implementation of that principle, it provides a selective advantage to the company concerned."

Whilst this is not the first time that the European Commission has targeted transfer pricing arrangements, the European Commission's current view is likely to prove controversial. If this position is confirmed in the final decisions in these cases, further litigation before the European Courts is likely.

EU Direct Tax Group

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