



EU Direct Tax Newsalert

EU Commission finds that Luxembourg granted unlawful State aid to Amazon

On 26 February 2018 the European Commission (EC) published the non-confidential version of its final decision issued on 4 October 2017 in the Amazon State aid investigation opened in October 2014. According to the decision, in the EC's opinion, Luxembourg's tax treatment of Amazon gave rise to State aid in the amount of up to € 250 million.

Background

In 2014, the EC launched an investigation into a ruling dated 6 November 2013 issued by the Luxembourg tax authorities to a Luxembourg tax resident company of the Amazon group. According to the decision, the ruling was applied by the group until 2014. The period after 2014 was not put in question by the EC.

Facts in the case

According to the facts as described in the decision during the period under scrutiny Amazon EU Sarl (AEU) functioned as the European headquarter of the group and principal operator of Amazon's European online retail and service business. In this position, AEU was in charge of the strategic decisions related to the retail and services business carried through the EU websites; it also acted as the seller of record for the inventory on the EU websites and carried out treasury management functions. AEU employed in average 523 employees. In order to carry out its operations, AEU used under a licence agreement intellectual property (IP) rights from Amazon Europe Holding Technologies (AEHT), a Luxembourg partnership. Under the domestic law, AEHT was not subject to tax itself as it represented a tax transparent partnership. Its functions were those of an IP holding company and a participant in the development of those intangibles under a cost-sharing arrangement with Amazon US. Under the transfer pricing analysis carried out at the time when the ruling was obtained, the royalty that AEU paid to AEHT was determined based on the residual profit split method, in a transfer pricing report that explained why this method was preferable over the comparable uncontrolled price method (CUP) which was also analysed.

For the EC's full account of the facts of the case and transfer pricing details please refer to the text of the decision [here](#).

Initial assessment

In its initial preliminary decision, the EC questioned that: the ruling appeared to be granted without a transfer pricing support; the result may not be compliant with the arm's length principle, as it found that the royalty paid for the use of the IP was a function of the residual profit of Amazon EU and not based on sales. It also questioned the magnitude of the functions of AEHT vs. the ones of AEU in light of the pricing of the royalty and questioned the application of the ruling for a period of more than 10 years without an apparent obligation to review the facts.

Decision

In its final decision the EC concluded in essence that:

- Amazon as a group received an individual selective advantage in the form of the tax ruling in question as it sets, in the views of the EC, a transfer pricing result and methodology that is not in line with the arm's length principle;
- Despite the submissions of the company that AEHT was the party carrying out the unique key value drivers related to the IP and AEU the non-unique functions which justified the choice of the residual profit method, the EC considered that AEHT did not perform functions commensurate with the disputed profit allocation. Also, even accepting the application of the residual profit method, the EC considered that AEHT should have tested as the "low function" entity and AEU as the key function entity;

It is worth noting that several 3rd parties submitted comments to the EC during the proceedings providing their views on certain aspects of the case both pro and con the EC's position.

Takeaway

This decision is the latest in a number of related high profile cases concerning the EC's approach on State aid, in particular in relation to tax rulings and transfer pricing.

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