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Global Tax Alert

European Commission opens new State aid investigation into rulings obtained by Luxembourg subsidiary of a Finnish Group

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On 7 March 2019, the European Commission (the Commission) announced that it opened a new in-depth investigation to examine whether tax rulings granted by the Luxembourg tax authorities to the Luxembourg subsidiary of a Finnish group may constitute State aid. The opening decision has not been published yet.

According to the Commission, the investigation concerns three tax rulings issued by the Luxembourg tax authorities to the Luxembourg subsidiary in 2009, 2012 and 2013. The 2009 tax ruling was disclosed as part of the so-called "Luxleaks" investigation in 2014.

The Luxembourg company carries out intra-group financing activities re-financed by interest free-loans (IFLs) granted by an Irish company of the same group. The tax rulings confirm the deductibility of "fictitious interest payments" (terminology used by the Commission) on the IFLs. According to Luxembourg, these interest expenses correspond to interest payments that an independent third party in the market would have demanded on a loan.

At this stage, the Commission has doubts that this tax treatment can be justified. The Commission is concerned that Luxembourg has accepted a unilateral downward adjustment that may grant the company a selective advantage, because it would allow the group to pay less tax than other stand-alone or group companies whose transactions are priced in accordance with market terms. The Commission therefore decided to open an in-depth investigation into this case.

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In a statement published on the same day, the Luxembourg Ministry of Finance affirmed that it did not grant unlawful State aid. The Ministry of Finance also commented that since the time the rulings in question were granted, Luxembourg implemented significant tax law reforms, in particular by implementing the European Union Anti-Tax Avoidance Directive,[1] and that Luxembourg is fully committed to the OECD[2] BEPS[3] project.

Implications

This decision only concerns the opening of a new State aid investigation into the tax treatment of a specific company. Whether the rulings granted by the Luxembourg tax authorities do indeed constitute State aid will now have to be assessed by the Commission in more detail.

If the Commission concludes that Luxembourg granted unlawful State aid to the company, it may ask Luxembourg to recover the advantage granted, plus interest, from the Luxembourg company. Any such decision and recovery should not have a direct impact on other companies that would be in a comparable situation financed with IFLs. Nonetheless, it is recommended that companies with a potentially similar fact pattern monitor developments of this case.

Should the Commission conclude, at the end of the investigation, that Luxembourg granted unlawful State aid, the Commission's decision can be appealed before the European courts.

Endnotes

1. Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.
2. Organisation for Economic Co-operation and Development.
3. Base Erosion and Profit Shifting.

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