State Aid: Decisions of the European Commission regarding anticipatory tax decisions and the IP tax regime

On 24 March 2014 the European Commission adopted two information injunctions ordering Luxembourg to deliver information regarding two tax practices, namely anticipatory tax decisions (i.e. decisions for companies on specific Luxembourg tax matters on a case-by-case basis) and the Luxembourg intellectual property (“IP”) tax regime, to assess their compliance with EU state aid rules.¹

The European Commission considers that "tax rulings are not per se problematic under EU state aid rules, but only if [they] provide selective advantages to specific companies or groups of companies".

In an effort to develop a knowledge-based economy in Europe, several EU Member States individually introduced special tax regimes for IP rights designed to attract innovation, research and development. However, the European Commission recently received indications that certain special tax regimes may mainly benefit highly mobile businesses and not trigger significant additional research and development activity.

In this context, the European Commission had sent information requests to several Member States, including Luxembourg. In both inquiries Luxembourg refused to fully respond to the requests on grounds of fiscal secrecy.²

Action brought by Luxembourg

On 24 April 2014 Luxembourg brought two actions against the European Commission to seek annulment of the aforementioned injunctions of 24 March 2014 directing Luxembourg to provide:

(i) A complete list of anticipatory tax decisions made in 2010, 2011 and 2012 in favour of Luxembourg companies belonging to a group or legal structure involving one or more companies located outside Luxembourg;³ and

(ii) Information relating to the taxation scheme for revenue from intellectual property (i.e. the Luxembourg IP tax regime).⁴

In support of the action against both decisions, Luxembourg relies on four arguments. Firstly, Luxembourg argues that the European Commission is making ‘speculative requests for information’ which are incompatible with the rights of the defence. Secondly, Luxembourg alleges a breach of the principle of proportionality. Thirdly, Luxembourg argues that the European Commission neither explained the reasons for the decisions nor clearly indicated the presumed facts that it envisages investigating. Fourthly, Luxembourg alleges a failure to respect the competence of Member States in matters of direct taxation.

¹ State aid: Commission orders Luxembourg to deliver information on tax practices; IP/14/309 of 24 March 2014
² Ibid.
³ Case T-258/14; Action brought on 24 April 2014 – Luxembourg v Commission
⁴ Case T-259/14; Action brought on 24 April 2014 – Luxembourg v Commission
**Opening of investigations by the European Commission**

On 11 June 2014 the European Commission opened a formal investigation procedure on transfer pricing arrangements on corporate taxation of Fiat Finance and Trade (Luxembourg), and issued two formal notices concerning alleged state aid against Luxembourg.

The Luxembourg Ministry of Finance expressed regrets that the formal investigation procedures ignore the motives that led Luxembourg to seek annulment of the aforementioned injunctions of the European Commission.\(^5\)

It should be noted that the European Commission does not challenge the principle by which the Luxembourg authorities grant anticipatory tax decisions upon request by corporate taxpayers on a case-by-case basis, regarding the Luxembourg tax treatment of certain transactions.

Luxembourg remains committed to fully cooperate with the Commission within the cooperative mechanisms foreseen by EU law, and is confident that the upcoming procedural steps will enable the Luxembourg authorities to successfully defend their position and demonstrate that in terms of both anticipatory tax decisions and the IP tax regime, Luxembourg has not granted companies any illegal state aid.\(^6\)

For more information please contact us.

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\(^5\) Communique from the Luxembourg Ministry of Finance, June 2014.

\(^6\) Ibid.