EU Commission announces final decisions on state aid investigation into the Netherlands and Luxembourg tax rulings

State aid – tax rulings – the Netherlands – Luxembourg

On October 21, 2015 the European Commission announced its final decisions on its State aid investigations into transfer pricing rulings granted by the Netherlands and Luxembourg to companies in the Starbucks and Fiat Finance groups, respectively. These decisions confirm the Commission's preliminary view that the rulings in question involved State aid. This aid has now been determined to be incompatible with the internal market, and must be recovered (with interest) by the relevant national authorities from the beneficiaries of the aid.

Background

The Commission announced its preliminary conclusions in the present two cases in June 2014. Similar investigations have been launched in respect of possible State aid granted by Ireland and Luxembourg to companies in the Apple and Amazon groups, respectively. In December 2014 the Commission ordered all Member States to list all the tax rulings issued since January 1, 2010, and in June 2015 requested 15 Member States to provide detailed information on some of their rulings. The investigations of tax rulings (primarily APAs) is one of three relevant EU initiatives in the areas of tax transparency and tackling harmful tax competition between Member States and tax avoidance. A related but separate development is the recent agreement on the exchange of information on tax rulings between Member States and the Commission. (The related information was detailed in our earlier newsletter.)

The Commission is required by EU law to review state aid granted by Member States and, if it finds that the aid is incompatible with the internal market, to order the Member State concerned not to put it into effect, or to abolish or alter it, or order the beneficiary to repay such aid within a prescribed timeframe. Broadly speaking, aid is incompatible with EU law if it distorts competition by, for example, favoring certain undertakings thus affecting trade between Member States, provided that it does not meet the conditions for Commission approval under the EU Treaty. Such aid is illegal and must be recovered by the Member State in question from its beneficiary.

Next steps

These decisions form part of the standard state aid investigation procedure. The non-confidential parts of the decision are expected to be published in the next few months. Final decisions on the other two investigations are still awaited. It is now open to the Member States or the companies in question to appeal the decisions before the Court of Justice of the European Union. The Dutch government has reacted by saying that it is surprised at the Commission's decision on the Starbucks case and that it considers that the international guidelines have been properly followed. The Dutch government will consider the decision carefully and will inform the Dutch parliament within a few weeks of its findings and possible next steps. The Luxembourg government has made similar statements.

KPMG's comment

These decisions are clearly a significant step in the Commission's efforts to improve transparency and combat aggressive tax planning. Whether the rulings in question will ultimately be considered to constitute state aid will now depend on whether the decisions are appealed to the Court of Justice of the European Union. The recovery of state aid is a politically sensitive issue and there have been calls in the European Parliament for aid not to be given to the Member States that granted the state aid, but instead for this aid to be diverted to, for example, the EU budget. The latter is not currently possible and requires modification of the EU Treaty, which is unlikely at the moment.

Should you require further assistance in this matter, please contact our experts.

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