Euro Tax Flash from KPMG's EU Tax Centre

European Commission State aid decision in the GDF Suez (Engie) case

State aid – Double Non-taxation – Tax Rulings - Luxembourg

On June 20, 2018, the European Commission announced its final decision on the state aid investigations into tax rulings granted by the Luxembourg tax authorities to GDF Suez (Engie) (see the EU Commission's press release). The decision confirms the Commission's preliminary view that the tax rulings in question constitute state aid, incompatible with the internal market. As a result, Luxembourg has to recover the aid from the GDF Suez (Engie) group. It is now open to both Luxembourg and the companies concerned to appeal the decisions before the General Court (and possibly later the Court of Justice of the European Union (CJEU)).

Background

The decision follows an in-depth investigation launched by the European Commission further to the announcement of its preliminary conclusions in September 2016 (see ETF 302). It is part of what the Commission refers to as a wider strategy towards tax transparency and fair taxation, which has led to inquiries into the compatibility of the tax ruling practices of Member States with EU law, starting in June 2013. In December 2014, the Commission extended the information inquiry into tax rulings issued by all Member States since January 1, 2010, and in June 2015 requested 15 Member States to provide detailed information on some of their rulings. These investigations have led the Commission to conclude that Belgium (the "excess profit" tax scheme – see ETF 271), Luxembourg (the Fiat case), the Netherlands (the Starbucks case) – see ETF 262, and Ireland (see ETF 300 and ETF 307) have granted selective tax advantages that are illegal under EU state aid rules.

Under EU law, the Commission is obliged to review state aid granted by EU Member States. If it finds that the aid is not compatible with EU law, it is further compelled to require the Member States concerned to abolish or alter such aid within a prescribed time period, as well as force them to recover the aid from the taxpayers that have benefited. Broadly speaking, aid is incompatible with EU law if it distorts competition by, for example, favoring certain undertakings and thus affecting trade between Member States. However, certain aid is specifically considered compatible with EU law, such as certain regional aid granted to promote economic development.

The Decision

The Commission reviewed two similar financial transactions between several GDF Suez (Engie) Group companies in Luxembourg. A Luxembourg company, Engie LNG Holding lent money via an intermediary to Engie LNG Supply and Engie Treasury Management respectively. Under rulings issued by the Luxembourg tax authorities in relation to these loans, the loans carried zero interest but the borrowing companies were able to provide for interest payments in their accounts, thereby reducing their taxable profits. No interest payments were made to the lenders and the loans were then subsequently converted into company shares in favor of the lending companies, incorporating the value of the interest payments provided for by the borrowing companies. This value was treated as a dividend-like payment and accordingly not taxed in the hands of the lenders.

The Commission takes the view that these tax rulings provide an inconsistent tax treatment of the same transactions, as they treat the transactions as both debt (in the borrowers' accounts) and equity (in the lenders' hand). Consequently, the transactions give rise to double non-taxation on Luxembourg profits for both the lending and borrowing companies in each case. As a consequence, the Commission confirms its opening decision that the rulings constitute state aid that is incompatible with EU law. The decision requires Luxembourg to recover the aid from Engie, and provides a specific methodology for calculating this. The Commission estimates the total amount to be recovered to be up to €120 million.

During the press conference, the Commission also welcomed the bills that were presented last week by the Luxembourg government to implement the EU Anti-Tax Avoidance Directive ((EU)2016/1164), as well as the announcement that the implementing bill will also contain two additional tax measures aimed at avoiding possible base erosion situations and non-taxation of certain income resulting from intragroup financing transactions (i.e. upon conversion of debt or in the case of income earned by foreign permanent establishments).

Next steps

This decision forms 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. It is now open to both Luxembourg and the companies in question to appeal the decisions before the General Court (and possibly later the CJEU).

EU Tax Centre comment

In the GDF Suez (Engie) case, the focus of the EU Commission is shifting from allegedly unjustified transfer pricing or allocation of profits, to internal mismatches and a supposed inconsistent application of national law, leading to double non-taxation. In this respect, the investigation should be seen in the context of the EU Commission's examination of the McDonald's case, which also involved tax rulings granted by Luxembourg and leading to the double non-taxation of the US branch of a Luxembourg company. It is perhaps noteworthy that the Commission sees its tax-related state aid investigations as being part of the wider strategy towards fair taxation and greater transparency, which include the automatic exchange of information on tax rulings and country-by-country reports, the Anti-Tax Avoidance Directive, on-going work on the C(C)CTB proposals and the mandatory disclosure requirements for intermediaries.

Should you have any queries, please do not hesitate to contact KPMG's EU Tax Centre, or, as appropriate, your local KPMG tax advisor.

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examination of the particular situation.

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