

EU General Court judgements: Engie received illegal state aid, Amazon did not

On 12 May 2021, the EU General Court delivered two judgements relating to appeals made against the EU Commission's decisions taken back in 2017 and 2018.



In these decisions, the Commission had considered that both Amazon and Engie had, through Luxembourg tax rulings, benefitted from undue benefits that qualified as an illegal State aid in the meaning of Article 107(1) TFEU, and that should be recovered by Luxembourg.

A summary of these decisions was published by the Commission and can be consulted [here](#) for the Engie Case and [here](#) for the Amazon case.

The Engie case:

In relation to a financing structure implemented in Luxembourg, Engie had been confirmed the tax treatment of certain transactions by tax rulings issued by the Luxembourg tax authorities as from 2008.

In these rulings, the Luxembourg tax authorities had confirmed the deduction of accrued, but unpaid, charges on a convertible

loan (ZORA), whereas, upon conversion of such convertible instrument into shares, the holder thereof (which was another Luxembourg company forming part of the Engie group) could still benefit from the participation exemption regime.

The application of the Luxembourg tax law (the relevant provisions have in the meantime been repealed) hence allowed an actual deduction without inclusion which was, according to the Commission, constitutive of a selective advantage.

Following its analysis, the General Court approved the Commission's approach to, when presented with a complex intra-group financing structure, assess the economic and fiscal reality of the whole structure, as endorsed by contested the tax rulings, rather than to look at each transaction carried by one or another entity in an isolated way.

In the case at hand, although each of the deduction and the exemption, taken separately, were made in accordance with the tax law, the General Court noted that the Commission was right in its findings that Luxembourg does not allow the exemption of income if the related expenses are deductible at the level of the debtor. Hence it concluded that the structure was abusive and that the tax rulings should have been denied under the Luxembourg general anti-abuse rule.

In this scope, the General Court therefore upheld the Commission's decision.

The Amazon case:

This case related to transfer pricing and more specifically to the determination of royalties paid by a Luxembourg operational company to a related Luxembourg partnership which was itself not subject to Luxembourg income tax (tax transparent).

The partnership was the owner of various intangible assets exploited within the Amazon group and it had been confirmed, in a tax ruling issued by the Luxembourg tax authorities in 2003, that the transactional net margin method (TNMM) was the appropriate method for the calculation of the arm's length price of the royalty.

Because the operational (Luxembourg based) company was the tested party, the arm's length price had been determined unilaterally and corresponded to the excess profits realized by the (Luxembourg based) operational company over an arm's length remuneration determined under the said TNMM method.

The Commission did not agree with the transfer pricing approach retained and ordered the recovery of what it considered to be an unlawful aid, incompatible with the internal market.

The General Court however denied the existence of such a selective advantage on several grounds:

First, the General Court found that the Commission committed several errors in its functional analysis. The Commission was indeed considering the partnership as a mere passive holder the intangible assets, whereas it was assuming significant other risks and

functions, and notably the exploitation of the said intangible assets.

The General Court further considered that the Commission did not demonstrate that it was easier to find a comparable for the operational company (than for the partnership), and that the Luxembourg authorities had therefore incorrectly chosen the operational company as the tested party.

Moreover, the General Court considered that overall, the Commission, in its methodology, did not take into consideration the remuneration of the services rendered by the partnership, which were not low value-adding services, nor the subsequent increase in value of the intangible assets held.

Finally, the General Court found that the Commission did not justify why the functions assumed by the operational company should have led to a higher remuneration and did not show that the use of another transfer pricing method would have resulted in a less reduced tax base.

In this scope, the General Court concluded to the annulment of the decision of the Commission. The latter declared that it would carefully study the judgement and reflect on possible next step. This statement can be found [here](#).

Both General Court's judgements may be appealed, on points of law only, before the European Court of Justice within 2 months and 10 days of notification of these decisions.

In case you have any questions, or wish to discuss specific circumstances, please reach out to any of the authors of this publication.

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