



ATOZ ALERT

CJEU rules that the EU Commission's decision in the Engie State aid case infringes EU law

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On 5 December 2023, the Court of Justice of the European Union (“CJEU”) delivered its judgment in the Engie state aid case, concluding that the EU Commission's review of the tax rulings granted by Luxembourg to the Engie group was in breach of EU law.

Background

According to the decision of the EU Commission of 20 June 2018, Luxembourg granted illegal state aid to Engie (formerly known as GDF Suez) and should collect circa EUR 120m of taxes from Engie, a partly state-owned, French multinational which operates in the fields of electricity generation and distribution, natural gas, nuclear and renewable energy.

In the Engie case, the EU Commission challenged the tax treatment confirmed in two tax rulings obtained by the group in 2008 and 2010. However, the tax treatment described in these tax rulings did not entail any particular tax benefit but merely confirmed the general tax treatment under Luxembourg tax law which would have applied to other companies in the same situation in a very similar manner.

Following the decision of the EU Commission, the Engie group and Luxembourg brought actions before the General Court of the European Union, which dismissed their actions (see judgement of 12 May 2021, Luxembourg and Others vs. Commission, T-516/18 and T-525/18). Engie and Luxembourg then brought an appeal before the CJEU.

The concept of state aid

According to settled case-law of the CJEU, for a measure to be categorized as aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (“TFEU”), all conditions set out in that provision must be fulfilled. Hence, for a measure to be categorized as State aid, the following cumulative conditions have to be met:

- i. The measure has to be granted by State resources;
- ii. It has to confer an advantage to undertakings;
- iii. The advantage has to be selective; and
- iv. The measure must affect trade between Member States and distort or threaten to distort competition.

State aid cases in tax matters usually fail because it cannot be evidenced that an advantage granted to an undertaking is not of a selective nature.

According to CJEU case law, Article 107(1) TFEU requires a determination whether, within the context of a particular legal system, a measure constitutes an advantage for certain undertakings in comparison with others in a comparable legal and factual situation.

For that purpose, the CJEU developed the following three-step analysis to determine whether a particular tax measure is selective:

- i. Identification of the reference legal system (i.e. the “**normal**” tax system – here, the Luxembourg corporate tax system);
- ii. Assessment as to whether the measure derogates from that common regime in as much as it differentiates between economic operators who, in the light of the objective assigned to the tax system, are in a comparable factual and legal situation (“**comparability test**”). In other words, it has to be analysed whether the tax treatment of a taxpayer is more beneficial than that of other undertakings that are factually and legally in a similar situation; and
- iii. According to the jurisprudence of the CJEU, a measure found to be selective on the basis of the “comparability test” can still be found to fall outside the scope of the state aid rules if it is justified by the nature or the general scheme of the tax system (“**justification test**”).

Decision of the CJEU

In the present case, the CJEU considers that the EU Commission made errors in its various analysis of the reference framework defining the normal tax system (including the provisions of Luxembourg tax law and the administrative practice of the Luxembourg tax authorities).

The CJEU noted that the fiscal competence and autonomy of the EU Member States in areas that have not been harmonised at EU level would be disregarded if the EU Commission could define a reference framework exclusively based on the general objective pursued by national law of taxing all resident companies.

Those errors led the CJEU to decide that the whole of the selectivity analysis and the Commission’s decision is annulled.

Conclusion and outlook

In the Engie case, the CJEU decided in favour of the taxpayer and Luxembourg and annulled the state aid decision of the EU Commission.

The Engie state aid case is another example of the EU Commission’s failure to respect EU law and the sovereignty of EU Member States in tax matters. The CJEU came to the same conclusion in the Fiat case. Similarly, in the Starbucks and Apple cases, the General Court did not find state aid.

Ultimately, the CJEU's decision is a positive sign for the rule of law and legal certainty. However, the EU Commission may see it as a bad omen for other pending state aid cases before the CJEU and the ongoing state aid investigations.

Do you have further questions?



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