

ATOZ ALERT

The Amazon State aid case: CJEU rules that the EU Commission's decision infringes EU law

15 December 2023

On 14 December 2023, the Court of Justice of the European Union ("CJEU") delivered its [judgment in the Amazon State aid case](#), concluding that the EU Commission's review of the tax rulings granted by Luxembourg to the Amazon group was in breach of EU law.

Background

According to the decision of the EU Commission of 4 October 2017, Luxembourg granted illegal State aid to Amazon and should collect circa EUR 250m of taxes from Amazon, a fairly large US multinational group that focuses on e-commerce, cloud computing, online advertising, digital streaming and artificial intelligence.

In the Amazon case, the EU Commission challenged the tax treatment confirmed in two tax rulings obtained by the group in 2003. Here, the Luxembourg tax authorities ("LTA") confirmed in particular the appropriateness of royalty payments made by a Luxembourg company. As such, this State aid case is linked to transfer pricing.

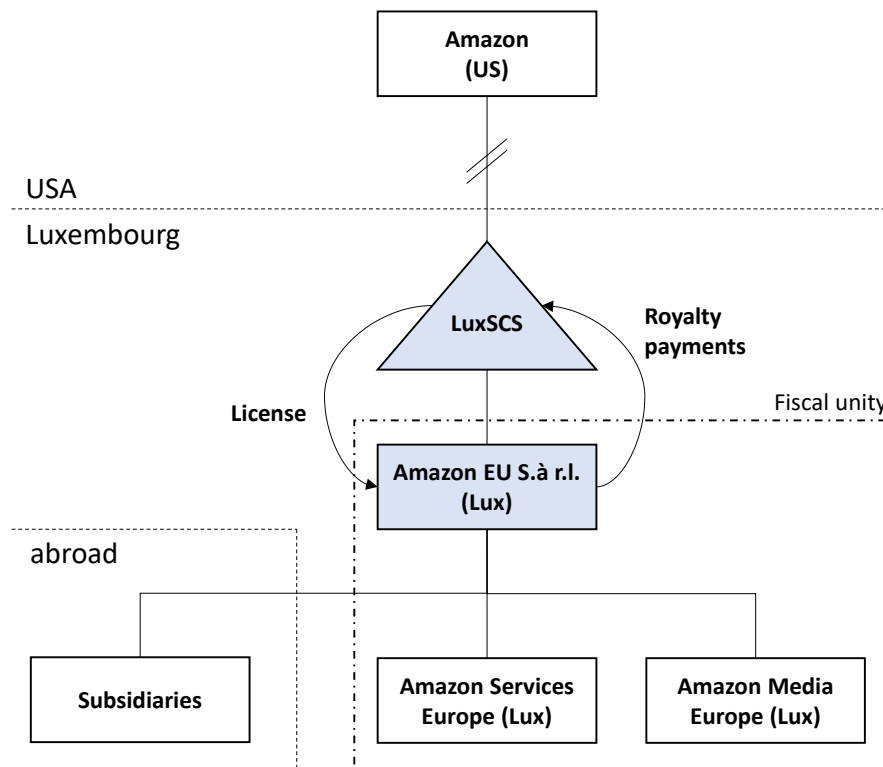
The EU Commission found that the royalty payments for the use of intangible assets artificially diminished the tax base of the paying Luxembourg company and, thus, that of the Amazon group in Luxembourg and Europe.

Following the decision of the EU Commission, Amazon and Luxembourg brought actions before the General Court of the European Union which held that the EU Commission had not demonstrated to the requisite legal standard that the Amazon group subsidiary concerned had benefited from an undue reduction in its tax burden ([see judgement of 12 May 2021, Luxembourg and Amazon EU S.à r.l. and Amazon.com vs. Commission, T-816/17 and T-318/18](#)). It further held that Luxembourg had not granted a selective advantage in favour of that subsidiary and therefore annulled the decision of the EU Commission.

The EU Commission then brought an appeal before the Court of Justice.

The Amazon case at a glance

The European structure of the Amazon group during the relevant period is depicted in the following chart:



A Luxembourg limited partnership (“**LuxSCS**”) owned the participation in Amazon EU S.à r.l. that is subject to Luxembourg corporate income tax (“**CIT**”) and municipal business tax (“**MBT**”).

LuxSCS granted a license to Amazon EU S.à r.l. The royalty payments made by Amazon EU S.à r.l. were deductible for CIT and MBT purposes.

Amazon EU S.à r.l. and its Luxembourg subsidiaries Amazon Services Europe and Amazon Media Europe formed a fiscal unity. Hence, the taxable income of the three entities would be consolidated at the level of Amazon EU S.à r.l.

In the Amazon State aid case, the EU Commission challenged the appropriateness of the royalties paid by Amazon EU S.à r.l. (i.e. the Commission found the royalty payments too high).

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 to 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 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

The CJEU upholds the judgement under appeal despite the Court considers that the General Court wrongly recognised the arm’s length principle as having general application within the context of the implementation of EU State aid rules.

In fact, since the arm’s length principle has no autonomous existence in EU law, the EU Commission may rely on it only if it is incorporated into the national tax law concerned (here, Luxembourg domestic tax law).

Moreover, contrary to the findings of the General Court, the OECD Transfer Pricing Guidelines could be of practical importance only in the case if Luxembourg tax law made explicit reference to them.

The CJEU concluded therefore that the EU Commission had wrongly determined the ‘reference system’, which is the first step in analysing a national measure to be able to categorise it as State aid.

However, regardless of those errors of law and the incorrect conclusion of the General Court (according to which the reference system determined by Luxembourg tax law enshrined the arm’s length principle at the time the tax rulings at issue were obtained), the CJEU upholds the judgment under appeal, since the Commission decision had to be annulled in any event because of the incorrect definition of the reference system, rather than for the reasons given by the General Court.

Conclusion and outlook

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

The EU Commission launched its investigation into the tax ruling practices of EU Member States back in June 2013, which has led to unprecedented legal uncertainty over the past decade. The question is whether, in hindsight, it was worth it, given that legal uncertainty is bad for business and investment.

The Amazon 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 Engie and the Fiat cases. 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. On this basis, it seems unlikely that the EU Commission will be successful in other State aid cases (in tax matters).

Do you have further questions?



[Oliver R. Hoor](#)

Partner & Head of [Transfer Pricing](#)

oliver.hoor@atoz.lu

T + 352 26 940 646