



PwC's EU Direct Tax Group

The EUDTG is PwC's pan-European network of EU law experts, which is embedded in PwC's Global Tax and Administration Network. We specialise in all areas of direct tax: the fundamental freedoms, EU directives, State aid rules, and all the rest. The EUDTG provides assistance to organizations, companies and private persons to help them to fully benefit from their rights under EU law. Find out more on: www.pwc.com/eudtg

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EU Direct Tax Newsalert

Non-confidential version of EC's final State aid decision on the Fiat case

On 8 June 2016, the European Commission ("EC") published its final decision dating 21 October 2015 on the formal State aid investigation into the Advance Pricing Agreement ("APA") of Fiat Finance & Trade Ltd ("FFT"). The EC concluded that the APA obtained by FFT from the Luxembourg tax authorities on 3 September 2012 in relation to the transfer pricing ("TP") methodology applicable to its financing transactions constitutes State aid, and ordered immediate recovery of the amount of tax by which the tax liability of the company for the period concerned was considered underestimated. Luxembourg has appealed the final decision before the General Court of the European Union on 4 December 2015.

Background

According to the description of the facts in the final decision, FFT provides extensive treasury services and financing to Fiat group companies based mainly in Europe, including raising external financing, and manages several intra-group cash pools. In September 2012, FFT obtained an APA, which confirmed the TP methodology that the company can apply for determination of its arm's length remuneration for its functions performed and risks borne, and which it used to calculate the interest rates that the company charged out on the loans granted to the various group companies.

The TP methodology applied was the TNMM and the remuneration was determined as follows:

- (i) Estimation of the "capital at risk" by estimating the minimum capital required by applying the Basel II framework;
- (ii) Identification of the capital used to perform the functions and support the financial investments;
- (iii) Estimation of the expected remuneration of the capital at risk based on Capital Asset Pricing Model ("CAPM") and identification of the capital reward return for the functions;
- (iv) Determination of the margin by summing up (i) and (iii).

Key reasons

The EC concluded that the confirmation by the Luxembourg tax authorities of the TP

methodology applied grants a selective advantage to FFT and therefore constitutes State aid based on the following arguments:

- The framework of reference, in relation to which the existence of a selective advantage was established, was the Luxembourg income tax system in general, and not the Luxembourg specific TP provisions;
- Contrary to the Luxembourg and taxpayer's submissions, who considered that comparison for selectivity should be made by reference to other companies with intra-group transactions subject to TP requirements and who obtained APAs, the EC considered that the comparability needs to be established by reference to both stand-alone and group companies, and that it cannot assess selectivity by reference to other taxpayers with APAs, as the APAs in the possession of the EC did not provide sufficient consistency;
- Similar to the Belgian excess profits case, the EC considered that the arm's length principle is neither the one derived from Article 9 OECD nor the one under Luxembourg's TP provisions, but is a general principle under Article 107 (1) of the Treaty on the Functioning of the EU that prevents distortion of competition;
- Although initially contested in the opening decision of the investigation, the TNMM was eventually accepted as an appropriate TP method; however the EC contested all the parameters and calculations applied by the company for the determination of the arm's length remuneration;
- The EC stated that it is not bound by its previous decision making procedure and contrary to Luxembourg's submission, that comments made by the OECD and the Code of Conduct group do not create legitimate expectations.

Takeaway

Although the EC's final decision has been appealed before the General Court, given that it contains very detailed observations by the EC on the TP methodology and calculations used, companies may wish to review these in view of their own facts and circumstances.

