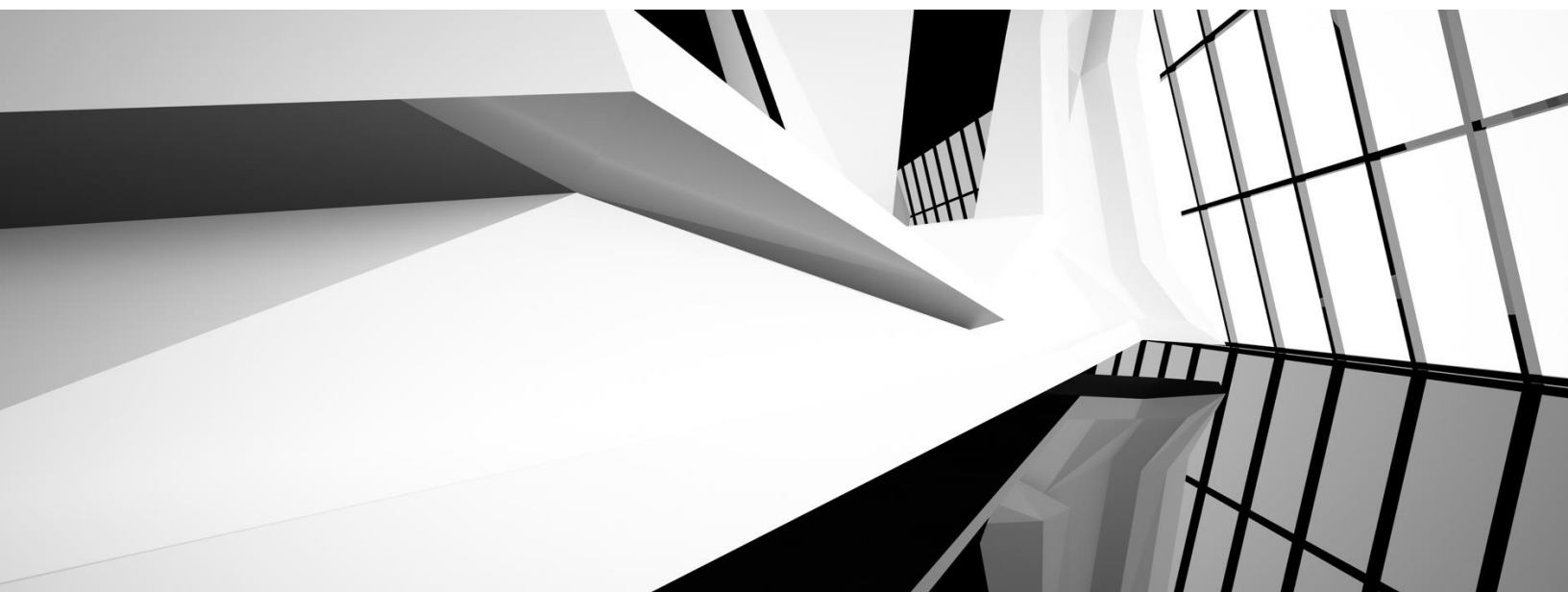


Praxio Tax Alert

Septembre 2019

State aid : EU General Court clarifies the rules of the game



Creativity

Efficiency

Sophistication

Knowledge

On September 24th 2019, the EU General Court (“EUGC”) confirmed the decisions of the European Commission (“EC”) related to the state aid granted by the Grand-Duchy of Luxembourg to Fiat Chrysler Finance Europe formerly Fiat Finance and Trade Ltd (“FFT”) , and seized the occasion to hammer the prerogatives of the EC.

The case began on June 2014, when the European Commission launched a state aid investigation in connection with a 2012 tax ruling on transfer pricing granted by Luxembourg to FFT . On 21 October 2015, the European Commission concluded that Luxembourg had granted selective tax advantages to FFT which is illegal under European state aid rules.

The Grand Duchy of Luxembourg and FFT each brought an action before the General Court for annulment of the Commission’s decision. They criticized the Commission in particular for :

- having adopted an analysis leading to tax harmonization in disguise;
- having found that the tax ruling under consideration conferred an advantage, notably on the ground that it did not comply with the arm’s length principle.

As a matter of fact, the Commission challenged the transfer pricing analysis and notably with regard to the methodology applied. In the case at hand the Commission found that the arrangements for the application of the transactional net margin method (TNMM) endorsed by the tax ruling at issue were incorrect and, specifically, that the whole of FFT’s capital should have been taken into account and a single rate should have been applied. In addition, the Commission considered that the method consisting, on the one hand, on using FFT’s hypothetical regulatory capital and, on the other, in excluding FFT’s shareholdings from the amount of the capital to be remunerated could not result in an arm’s length outcome.

In its decision dated September 24th 2019, the EUGC found that the methodology approved by the tax ruling at issue minimised FFT’s remuneration on the basis of which FFT’s tax liability was determined. The Commission was therefore fully entitled to conclude that the tax ruling conferred an advantage on FFT because it resulted in lowering FFT’s tax liability as compared to the tax that it would have had to pay under Luxembourg standard tax law.

The Luxembourg finance ministry reacted in a press statement saying that Luxembourg will “analyze the judgment with all due diligence and reserves all its rights”, and highlighted the fact that Luxembourg is fully committed to fight tax base erosion and the profit shifting and recalled that it has implemented numerous reforms in recent years to combat tax erosion.

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