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Briefing note October 2015

European Commission issues State Aid Decisions against Fiat and Starbucks

Key Points

- Commission decides that tax rulings provided to Fiat and Starbucks constitute state aid.
- Member States ordered to recover back taxes plus interest from Fiat and Starbucks.
- The decisions form part of wider European Union efforts to combat the misuse of tax rulings.
- Companies which have received tax rulings should review their rulings and take advice to mitigate their risk.
- Decisions may have wide implications for other groups who may also be required to pay back taxes.

The Commission's Decisions

The European Commission has today announced its formal decisions that tax rulings provided to Fiat and Starbucks, by Luxembourg and the Netherlands respectively, constitute state aid contrary to European Union law.

In 2014 the Commission opened formal investigations into the tax affairs of Fiat, Starbucks, Amazon and Apple in relation to potential infringements of the state aid rules. What links these investigations is that in each case the alleged state aid was provided to the company concerned in the form of tax rulings agreed by the Government of an EU Member State. These tax rulings provided the companies with assurances as to their tax treatment under the laws of the country providing the ruling.

Such tax rulings do not necessarily constitute state aid if they merely give certainty to the company as to how the relevant laws are to be applied in practice. However, in the Commission's view, the tax rulings provided to Fiat and Starbucks went beyond this, providing the companies with derogations from the normal scheme of taxation, which had the effect of granting them a selective advantage over their competitors.

The Commission's decisions require the Governments of Luxembourg and the Netherlands to recover the state aid from Fiat and Starbucks, which means the companies will be required to pay the tax which would have been due if the tax rulings had not been provided, plus compound interest. Computing these amounts is somewhat complex and so the decisions each contain a formula for the respective Governments to apply in calculating the tax which should have been paid. The somewhat unseemly result is that the Governments of Luxembourg and the Netherlands look set to reap tax windfalls as a result of their own state aid.

Fiat and Starbucks may yet appeal the Commission's decisions before the European Courts. Their competitors may also pursue damages claims in the event that they are able to establish loss. However, the decisions mark an important milestone in the use by the Commission of the European Union state aid rules to challenge tax rulings granted to companies by Member States. The Commission's investigations in relation to Amazon and Apple are ongoing.

Increased Scrutiny of Tax Rulings

The decisions announced today form part of the wider European effort to combat the perceived misuse of tax rulings, including the unanimous agreement earlier this month for Member States to automatically exchange information about tax rulings with other Member States from 1 January 2017.

The decisions illustrate that the Commission is increasingly willing to scrutinise the grounds on which tax rulings have been agreed by tax authorities. Relevant factors include the information provided to the Member State in advance of the tax ruling; the factual and legal circumstances of the arrangements in question; whether the ruling corresponds to economic reality; and the quality and consistency of the Member State's practice in providing tax rulings.

The Commission's state aid investigations are likely to significantly increase in number, and where state aid can be shown, the financial and reputational consequences for recipients of rulings may be severe. In light of both these decisions and the increased scrutiny and focus on tax rulings generally, companies and groups which have received tax rulings are advised to review their rulings carefully and take steps to mitigate their risk.

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