

## EU Tax Alert

EU Law and Tax Departments – EU tax practice  
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### **The General Court dismisses the action brought by Nike to annul the EU Commission decision to open an EU State aid formal investigation**

Since 2014, as part of a wider strategy, the EU Commission started a deep analysis on tax advantages granted by EU Member States to selected multinational Groups, in the form of tax rulings and/or tax sweeteners, relying on State aid rules (Articles 107 and 108 TFEU), despite fiscal autonomy of EU Member States.

So far, the EU Commission opened a number of in-depth investigations under Article 108 TFEU, mostly directed to tax advantages - schemes and *ad hoc* measures - adopted by certain EU Member States (namely, Ireland, Luxembourg, Belgium and the Netherlands).

Involved EU Member States and taxpayers appealed these decisions and, in certain cases, the General Court of the European Union (the “EUGC”) delivered the first judgments<sup>1</sup>, the last of which is the Nike judgment of 14 July 2021 (the “**Judgment**”)<sup>2</sup>. Differently than in other cases, though, the Judgment does not concern an EU Commission final decision to recover an illegal State aid, but rather the decision to open a formal investigation, under Article 108, para. 2, TFEU.

This type of decisions contains the EU Commission preliminary and not definitive assessment on the qualification of the measures at stake as State aids, under Article 107 TFEU. Thus, the assessment may evolve during the formal procedure, on the basis of the information provided by the national authorities and other interested parties, and even bring the EU Commission to conclude for the absence of State aids in the decision taken on completion of the investigation.

In this newsletter, we analyze the most significant points of interest of the Judgment.

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<sup>1</sup> For a comment to cases T-516/18 and T-525/18 (“Engie”) and to cases T-816/17 and T-318/18 (“Amazon”), see our EU Tax Alert here.

<sup>2</sup> T-648/19, Nike European Operations Netherlands BV, Converse Netherlands BV v. Commission.

## 1. The facts of the case and the action of the EU Commission

The Judgment regards five tax rulings granted by the Netherlands between 2006 and 2015, which provided for advanced pricing agreements on the deductible amount of royalties paid by two Dutch BVs (the “**Companies**”) to certain entities of the Nike group, in particular: (i) to a Bermuda limited company until 2015 and afterwards to a Dutch CV, in one case; and (ii) to a Dutch CV, in the other case. The Bermuda and CVs recipients of the deductible royalties were not taxable in the Netherlands, due to the lack of a withholding tax provision and to CVs’ tax transparency.

The Companies’ taxable base was constituted by a margin determined through the transactional net margin method.

At the end of the preliminary investigations the EU Commission reached the conclusion that the said tax rulings might have conferred a selective advantage to the Companies, not complying with the arm’s length principle. In order to obtain the information needed to adopt a final decision, in 2019 the EU Commission opened a formal investigation under Article 108 TFEU.

## 2. The claims raised by the Nike group

The Companies asked the EUGC to annul the decision, claiming, in essence, that the EU Commission:

- (i) did not include sufficient and coherent reasonings in its decision;
- (ii) ignored the common use of similar tax rulings and structures in the Netherlands, thus incorrectly assuming selectivity;
- (iii) breached the principles of good administration and equal treatment, by arbitrarily selecting to investigate the tax rulings at stake, rather than the general scheme.

## 3. The Judgment

The EUGC rejected all the arguments raised by the Companies and entirely dismissed their action, holding in summary as follows:

- (i) a decision to open an investigation shall merely summarise the preliminary assessment of the relevant measure, setting out the doubts as to its compatibility with the internal market, without necessarily including all the factual and legal reasonings. This is a consequence of the provisional nature of the decision to open a formal investigation, where parties may state their respective reasons and positions;
- (ii) the circumstance that certain tax rulings and structures are commonly used does not exclude that a State aid occurs: this is not sufficient to rule out a formal investigation. Further, as far as selectivity is concerned, the decision to open a formal investigation may be grounded on the sole circumstance that an economic advantage is granted, especially in complex cases, such as those involving transfer pricing rules;

- (iii) the EU Commission is not required to determine as a priority whether an aid scheme exists when considering an individual measure. Further, the EU Commission carried out its provisional assessment in a diligent and impartial manner, having sent numerous information requests to the Netherlands.

#### 4. Final remarks

In the Judgment, the EUGC merely reviewed the legality of the EU Commission decision to open the formal investigation and expressly avoided to give a final ruling on questions on which the EU Commission has provided a preliminary view.

From the Judgment it is not possible to anticipate the EUGC's position in the relevant case, also considering that a final decision is still to be formalized and it is for the EU Commission to prove that the outcome of a tax ruling is not in line with the arm's length principle. In case a final negative decision with recovery is taken, the Nike group will have the possibility to file an action for its annulment before the EUGC.

From a procedural perspective, the EUGC did not declare the actions brought by the Nike group as inadmissible, thus leaving room – though limited – to challenge provisional decisions to open formal investigations. The judgement of the EUGC can be appealed before the Court of Justice of the EU.

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