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European Commission Shifts its Competition Focus to Local Companies

by **Marco Hickey**

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The European Commission’s recent probe into Apple, Starbucks and Amazon drew criticism that US companies were being disproportionately targeted and investigated. However, it's a widespread misperception that is not based on the facts.

There are a number of recent cases that indicate that the Commission's attention is very much focused on local, EU-based undertakings.

Luxembourg

This month the Commission opened an in-depth investigation into Luxembourg's tax treatment of the GDF Suez group (now Engie). The Commission suspects that several tax rulings issued by Luxembourg may have given GDF Suez an unfair advantage over other companies, in breach of EU State aid rules.

They allegedly treat the same financial transaction between companies of GDF Suez in an inconsistent way, both as debt and as equity. This is an inconsistent tax treatment of the same transaction. On the one hand, the borrowers can make provisions for interest payments to the lenders (transactions treated as loan). On the other hand, the lenders' income is considered to be equity remuneration similar to a dividend from the borrowers (transactions treated as equity). The Commission stated that such treatment would result in tax benefits in favour of GDF Suez, which are not available to other companies subject to the same national taxation rules in Luxembourg.

Poland

The Commission has also opened an in-depth investigation into a Polish tax on the retail sector. The Commission has concerns that the progressive rates based on turnover give companies with a low turnover a selective advantage over their competitors, which is in breach of EU State aid rules. As a part of the investigation, the Commission has issued an injunction, requiring Poland to suspend the application of the tax until the Commission has concluded its assessment.

Under this Polish tax, companies in the retail sector would pay a monthly tax to the State based on their turnover from retail sales. In particular, the retail tax features a progressive rate structure with three different brackets and rates:

- a tax rate of 0% applies to the part of the company's monthly turnover below PLN 17 million (approximately €3.92 million)
- a tax rate of 0.8% is levied on the part of the company's monthly turnover between PLN 17 million

and PLN 170 million (approximately €39.2 million)
- a tax rate of 1.4% is levied on the part of the company's monthly turnover above PLN 170 million

According to the Commission's preliminary assessment, the progressive rate structure is not justified by the logic of the Polish tax system, which is to collect funds for the general budget. Poland has not yet demonstrated why larger retail operators should be taxed differently from smaller players in light of the objectives of the tax on retail sales.

Hungary

A similar case in July 2016 involved the Commission concluding that a Hungarian progressive turnover-based tax on the retail sector was in breach of EU State aid rules because the progressive tax rates granted a selective advantage to companies with low turnover over their competitors. As is the case with Poland, when it had opened the in-depth investigation, the Commission had required Hungary to suspend the application of the progressive rates until the Commission could complete its State aid assessment. As a result, Hungary did not collect any tax based on the progressive rates structure and no State aid was effectively granted. This meant there was no need for recovery in this after the Commission's final decision.

Under EU law, only Member States are have the authority to decide on their taxation systems. However, Member States must also ensure that their tax systems are consistent with EU rules, to ensure that there is a level playing field across the internal market. In particular, the application of their taxes should not result in the granting of State aid (a more favourable treatment applicable to certain companies) unless it is compatible with EU rules.

So, while the blockbuster Commission decisions in Starbucks, Apple and Amazon may have attracted the attention of US business leaders and media outlets, it would appear that the Commission is working consistently to enforce the EU's State aid rules across the board.

For more information, please feel free to contact Marco Hickey, Partner and Head of the EU, Competition and Regulated Markets team at mhickey@lkshields.ie. Marco is the author of Merger Control in Ireland published by Thomson Reuters.

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