

# ECJ Advocate General Opines that Transfer Pricing Arrangements on Corporate Taxation Granted to Amazon Are Compatible State Aid

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Advocate General (AG) Juliane Kokott of the Court of Justice of the European Union (ECJ) has opined that the transfer pricing arrangements on corporate taxation granted to Amazon constitute compatible State aid in Case C-457/21P *Commission v Amazon.com and Others* and, for that reason, the appeal should be rejected. Details of the opinion are summarized below.

(a) Facts. On 4 October 2017, the European Commission held that the transfer pricing arrangements on corporate taxation for Amazon in Luxembourg constituted incompatible State aid because it was not consistent with the arm's length principles of the OECD (see [European Commission: Luxembourg provided illegal State aid to Amazon \(4 October 2017\)](#)). The case concerned royalty payments between two Luxembourg subsidiaries of the Amazon group, which had an effect on the corporate income tax liability of Amazon EU Sàrl, established in Luxembourg.

On 21 May 2021, the General Court annulled that decision because on the basis of the OECD Guidelines it could not find that the determination of transfer pricing was erroneous and that the tax base was artificially reduced (see, [General Court Decides on State Aid Case Concerning Transfer Pricing Arrangements on Corporate Taxation of Amazon \(Joined Cases T-816/17 et T-318/18\) \(12 May 2021\)](#)). This decision was appealed by the European Commission (see, [European Commission Appeals General Court's Judgment on Amazon State Aid Case in Luxembourg - Details \(16 November 2021\)](#)).

(b) Issue. The issue was whether the transfer pricing arrangements on corporate taxation for Amazon in Luxembourg constitute incompatible State aid.

(c) AG's opinion. The AG opined that transfer pricing arrangements on corporate taxation granted to Amazon constitutes compatible State aid. Therefore, the Commission's appeal should be dismissed and the decision of the General Court should be upheld.

## Selective advantage

The AG noted that the existence of a selective advantage is inextricably linked with the question whether the reference system was determined correctly. The AG referred to the decision of the ECJ in *Luxembourg v. Commission* (T-755/15) and *Fiat Chrysler Finance Europe v. Commission* (T-759/15) (see [Fiat Wins Appeal Against European Commission on State Aid Case \(8 November 2022\)](#)). In that case, the ECJ decided that parameters and rules external to the national tax system at issue can only be taken into account if the national tax system explicitly refers to those rules. The AG noted that the Commission based its conclusion of the appropriate amount of the royalty exclusively on the OECD Transfer Pricing

Guidelines, but Luxembourg law at the time of issuing the tax ruling did not refer to those guidelines. Consequently, the AG held that the Commission incorrectly did not take the Luxembourg national law as the relevant reference system for its review of the existence of a selective advantage. This means that all subsequent considerations of the Commission's decision are vitiated by an error of law.

Therefore, the AG held that the General Court correctly annulled this decision, due to the absence of a demonstrated selective advantage.

As a result, the AG held that the ECJ does not have to address all other grounds of the Commission's appeal. However, even if the ECJ would regard itself bound by the choice of the incorrect reference system, the Commission's argument would be unfounded. The AG reasoned that the method selected in the Luxembourg tax ruling is not a manifestly incorrect method and not manifestly misapplied when applying the OECD transfer pricing guidelines. This means that no selective advantage exists, and the Commission did not show that the tax ruling had conferred a selective advantage on Amazon.

The full text of the AG opinion is available [here](#).

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