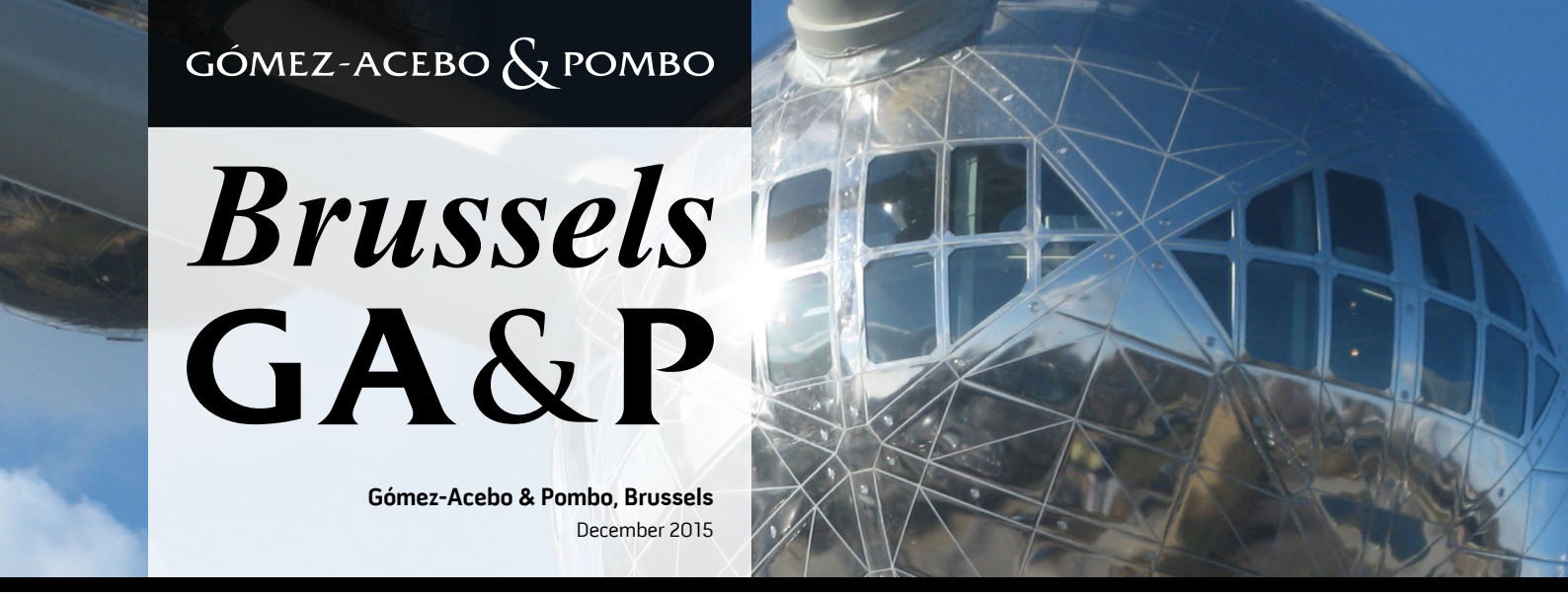

GÓMEZ-ACEBO & POMBO

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Content

News

State aid European Commission opens formal investigation into tax treatment of McDonald's in Luxembourg

In the Commission's preliminary view two tax rulings granted by Luxembourg to the US company McDonald's in 2009 may have granted an advantageous treatment in breach of EU State aid rules. Therefore, the Commission has opened a formal investigation in order to assess whether the Luxembourgish authorities selectively derogated certain national tax law provisions and the Luxembourg-US Double Taxation Treaty granting the company an advantage not available to other companies in comparable factual and legal conditions.

On the basis of these tax rulings, McDonald's Europe Franchising, a company incorporated in Luxembourg, paid no corporate tax in Luxembourg for the profits derived from royalties paid by franchisees in Europe and Russia in return of the right to use the McDonald's brand and associated services, despite recording large profits (more than €250 million in 2013).

McDonald's Europe Franchising has (i) an office in Luxembourg, in charge of McDonald's strategic decision-making, (ii) a branch in Switzerland with limited activity in franchising rights, and (iii) another one in the US, with no real activities. The royalties received by the Luxembourgish branch were transferred internally to the US branch.

Under the first tax ruling, the Luxembourgish branch was not obliged to pay corporate tax since the profits were to be subject to tax in the US on the basis of the Luxembourg-US Double Taxation Treaty. McDonald's was required to justify every year that the royalties transferred to the US via Switzerland were declared and subject to taxation in these two countries. However, the profits were not subject to tax in the US, so the condition required by Luxembourg to benefit from a tax exemption in Luxembourg under the ruling was not fulfilled.

Therefore, McDonald's requested for a second ruling, and insisted that Luxembourg should nevertheless exempt the profits not taxed in the US from taxation in Luxembourg. McDonald's argued that the US branch of McDonald's Europe Franchising constituted a "permanent establishment" under Luxembourg law, because it had sufficient activities to constitute a real US presence. By contrast, McDonald's argued in the US simultaneously that its US-based branch was not a "permanent establishment" under US law because, from the perspective of the US tax authorities, its US branch did not undertake sufficient business or trade in the US.

Consequently, the Luxembourg authorities recognised the McDonald's Europe Franchising's US branch as the place where most of their profits should be taxed, while at the same time US tax authorities did not recognise it. While knowing that the profits were not subject to tax in the US, the Luxembourg authorities exempted the profits from taxation in Luxembourg.

Case-Law & Analysis

The General Court annuls fines totaling €790 million to airlines participating in a cartel
(Judgments of the General Court of 16 December 2015 in Cases T-9/11, T-28/11, T-36/11, T-38/11, T-39/11, T-40/11, T-43/11, T-46/11, T-48/11, T-56/11, T-63/11, T-62/11, T-67/11 Air Canada v Commission)

In February 2006, following an earlier application for immunity under the 2002 Leniency Notice, the European Commission carried out unannounced inspections to several airlines that had participated in a cartel. This led to the adoption of a decision in November 2010, declaring that the infringing companies had coordinated their behaviour as regards the pricing of freight services.

Certain of these infringements were committed by all airlines whereas others only by some of them. Whereas the Commission indicated four infringements in the operative part of the decision in relation to different periods and routes, the grounds made reference to a one single and continuous worldwide infringement covering all the routes. The Commission imposed fines on all participants, with the exception

of Lufthansa and its subsidiaries, which had been granted immunity.

The companies concerned challenged the decision before the General Court that has upheld their claim.

The Court first reminded that based on the principle of effective judicial protection the operative part of a Commission shall be particularly clear and precise so that the infringing companies are able to understand and to contest their liability and the penalty.

Then the General Court confirms that there is a contradiction between the grounds of the decision and its operative part, rejecting the argument that the differences between the grounds and the operative part can be explained by the fact that the airlines which were not mentioned in certain articles of the operative part did not operate the routes referred to in those articles.

Moreover, the companies were held liable for the entirety of the infringement with no distinction between the routes which were operated by those carriers and those which were not.

The General Court has also found that that the grounds were not internally consistent since they contained assessments which are difficult to reconcile with the existence of a single cartel covering all routes as referred to in the operative part. In this sense, the Court has concluded that such inconsistencies were liable to infringe the concerned companies' rights of defence and prevent the Court itself from correctly exercising its power of review; and therefore has annulled the Commission's decision.

As a result of this judgment the following airlines have seen their fines annulled:

AIRLINE	FINE (IN MILLION EUR)
Air Canada	21
Air France-KLM	182.9 jointly and severally with Société Air France)
	124.4 (jointly and severally with Koninklijke Luchtvaart Maatschappij)
Société Air France	182.9 (jointly and severally with Air France-KLM)
Koninklijke Luchtvaart Maatschappij	2.7 124.4(jointly and severally with Air France-KLM)
British Airways	104
Cargolux Airlines International	79.9
Cathay Pacific Airways	57.1
Japan Airlines Corp. Japan Airlines Co.	35.7
Latam Airlines Group (previously LAN Airlines) Lan Cargo	8.2
Martinair Holland	29.5
Qantas Airways	Did not challenged the decision
SAS SAS Cargo Group Scandinavian Airlines System Denmark-Norway-Sweden	22.3 (SAS only) 4.2 (jointly and severally between SAS Cargo Group and Scandinavian Airlines System Denmark-Norway-Sweden) 32.9(jointly and severally between SAS Cargo Group and SAS) 5.3 (Scandinavian Airlines System Denmark-Norway-Sweden only) 5.2 (jointly and severally)
Singapore Airlines Cargo Singapore Airlines	74.8

The General Court of the EU has annulled the European Commission's decision declaring that part of the Spanish Tax Lease System constituted a state aid incompatible with the internal market (*Judgment of 17 December 2015 in joined cases T-515/13 and T-719/13*)

In a ruling made public on 17 December, the court overturned the Decision of the European Commission of 17 July 2013 which considered that three of the five fiscal measures comprising the so-called Spanish Tax Lease System constituted an incompatible state aid. It also annulled the order to recover the alleged aid granted from investors.

The Spanish Tax Lease System was a combination of tax measures which provided two different tax benefits: an anticipated and accelerated depreciation of the vessel compared to the depreciation permitted by ordinary corporate rules, and a special Tonnage Tax which also entailed a tax exemption on the capital gain resulting from the sale of the vessel to the final buyer.

The anticipated and accelerated depreciation was based on a privileged regime in the Spanish Corporate Tax legislation, according to which companies could create a form of joint venture for tax purposes, incorporated under Spanish Law ("Economic Interest Group" or "EIG") to invest in new vessels to be built by Spanish shipyards. The EIG was organized by a bank which offered shares to interested investors, even though the investors were not involved in shipping activities. Since the EIG was tax transparent, the losses incurred by it were directly passed to its members, normally large Spanish taxpayers, reducing their tax base and consequently resulting in a tax saving for them.

Although the Spanish Tax Lease System was organized by the bank in order to generate tax benefits for the members of the EIG, it transferred part of these benefits to the shipping companies in the form of a significant discount in the final price of the vessel.

As a result, tax advantages were generated for the investors, part of these advantages (between 85% and 90%) being transferred to the shipyards in the form of a rebate on the selling price of the vessel. The remaining advantages (between 10% and 15%) were received by the investors as a return on their investment.

The investigation of the EU Commission concluded that the Spanish Tax Lease System allows the investors to enjoy the tonnage tax regime which should only benefit companies engaged in the shipping business. Consequently, the investors, not the constructors or the charterers, should refund to the Spanish state the aids they have unduly benefited from.

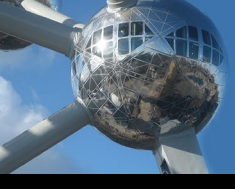
The Kingdom of Spain, Lico Leasing (a company having invested in a number of EIGs) and Pequeños y Medianos Astilleros Sociedad de Reconversión, S.A. brought actions for annulment against the Commission's Decision before the General Court of the EU. The Court has declared that the Commission erred when declaring that certain of the fiscal measures comprising the Spanish Tax Lease System granted a selective economic advantage to the EIGs and the investors and, therefore, when stating that these fiscal measures constituted a state aid. As far as it concerns the investors, the Court considers that the economic advantage obtained by them was not selective. Although the system was subject to prior authorization, the advantages in question were available to any investor which decided to participate in the transactions within the Spanish Tax Lease System, irrespective of its field of activity. As investors were likely to operate in all sectors of the economy, the measures could not be considered as being selective. In this respect, for the Court it was irrelevant that the benefits were only available to businesses making this kind of investment.

Besides, the Court also considers that the Commission did not give sufficient grounds for its decision that the measures were likely to distort competition and affect trade between Member States.

There are other 63 cases pending before the General Court related to the annulment of the abovementioned Commission Decision.

Currently at GA&P Brussels

On 19th January 2016, our Brussels Office organizes a lunch seminar jointly with the Belgian Institute of Corporate Lawyers (Instituut voor Bedrijfjuristen – Institut des Juristes d'Entreprise) on the subject:



"**Information exchange between competitors: Do's and Don'ts**".

More information on: www.ije.be - http://www.ije.be/EventDetail.aspx?searchID=219

If you want to attend it, you may also join our Brussels office:

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