European Commission - Press release

State aid: Commission opens in-depth investigation into Luxembourg's tax treatment of GDF Suez (now Engie)

Brussels, 19 September 2016

The European Commission has opened an in-depth investigation into Luxembourg's tax treatment of the GDF Suez group (now Engie). The Commission has concerns 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.

The Commission will assess in particular whether Luxembourg tax authorities selectively derogated from provisions of national tax law in tax rulings issued to GDF Suez. They appear to treat the same financial transaction between companies of GDF Suez in an inconsistent way, both as debt and as equity. The Commission considers at this stage that the treatment endorsed in the tax rulings resulted in tax benefits in favour of GDF Suez, which are not available to other companies subject to the same national taxation rules in Luxembourg.

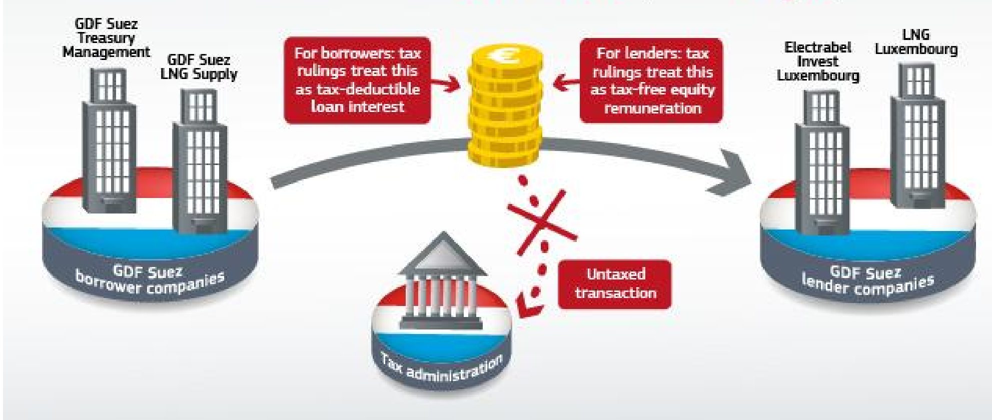
Margrethe Vestager, Commissioner in charge of competition policy, said: "*Financial transactions can be taxed differently depending on the type of transaction, equity or debt - but a single company cannot have the best of two worlds for one and the same transaction. Therefore, we will look carefully at tax rulings issued by Luxembourg to GDF Suez. They seem to contradict national taxation rules and allow GDF Suez to pay less tax than other companies.*"

As from September 2008, Luxembourg issued several tax rulings concerning the tax treatment of two similar financial transactions between four companies of the GDF Suez group, all based in Luxembourg. These financial transactions are loans that can be converted into equity and bear zero interest for the lender. One convertible loan was granted in 2009 by LNG Luxembourg (lender) to GDF Suez LNG Supply (borrower); the other in 2011 by Electrabel Invest Luxembourg (lender) to GDF Suez Treasury Management (borrower).

The Commission considers at this stage that in the tax rulings the two financial transactions are treated 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 tax treatment appears to give rise to double non-taxation for both lenders and borrowers on profits arising in Luxembourg. This is because the borrowers can significantly reduce their taxable profits in Luxembourg by deducting the (provisioned) interest payments of the transaction as expenses. At the same time, the lenders avoid paying any tax on the profits the transactions generate for them, because Luxembourg tax rules exempt income from equity investments from taxation.

The final result seems to be that a significant proportion of the profits recorded by GDF Suez in Luxembourg through the two arrangements are not taxed at all.



The infographic is available in high resolution here.

The Commission's preliminary assessment is that GDF Suez is able to avoid paying taxes on such transactions as a result of the tax rulings. It appears to be obtaining a considerable economic advantage not available to other companies subject to the same national tax rules. If confirmed, this would amount to illegal state aid.

The investigation does not call into question the general tax regime of Luxembourg.

The opening of an in-depth investigation gives interested third parties and the Member States concerned an opportunity to submit comments. It does not prejudge the outcome of the investigation.

Further details on the two zero interest convertible loans

The two arrangements between LNG Luxembourg (lender) and GDF Suez LNG Supply (borrower) as well as Electrabel Invest Luxembourg (lender) and GDF Suez Treasury Management (borrower) work as follows:

- Under the terms of the convertible zero interest loan the borrower would record in its accounts a provision for interest payments, without actually paying any interest to the lender. Interest payments are tax deductible expenses in Luxembourg. The provisioned amounts represent a large proportion of the profit of each borrower. This significantly reduces the taxes the borrower pays in Luxembourg.
- Had the lender received interest income, it would have been subject to corporate tax in Luxembourg. Instead, the loans are subsequently converted into company shares in favour of the lender. The shares incorporate the value of the provisioned interest payments and thereby generate a profit for the lenders.
- However, this profit - which was deducted by the borrower as interest - is not taxed as profit at the level of the lender, because it is considered to be a dividend-like payment, associated with equity investments.

Background

GDF Suez is a French electric utility company, which in the meantime has changed its name to *Engie.* The investigation concerns several subsidiaries of the group established in Luxembourg. GDF Suez Treasury Management is a treasury company of the group, which receives interest payments from other European group companies. GDF Suez LNG Supply is active in the purchase, sale and trading of liquefied natural gas and gas derivative products. LNG Luxembourg and Electrabel Invest Luxembourg are GDF Suez group companies that mainly act as intermediaries for intra-group financing transactions.

According to Article 107(1) of the Treaty on the Functioning of the European Union (TFEU), state aid which affects trade between Member States and threatens to distort competition by favouring certain undertakings is in principle incompatible with the EU Single Market.

Since June 2013, the Commission has been investigating the tax ruling practices of Member States. It extended this information inquiry to all Member States in December 2014. Tax rulings as such are not a problem under EU state aid rules if they simply confirm that tax arrangements between companies within the same group comply with the relevant tax legislation. However, tax rulings that confer a selective tax advantage to specific companies, and so give them a subsidy, can seriously distort

competition within the EU's Single Market and violate EU state aid rules.

In its decisions and ongoing formal investigations, the Commission has been looking at different issues in tax rulings that are able to grant selective advantages to companies:

- **Transfer prices, which do not reflect economic reality**: The Commission's October 2015 decisions on the tax treatment of Fiat in Luxembourg and Starbucks in the Netherlands concluded that the tax rulings endorsed transfer prices, which did not reflect the conditions that apply between independent companies at arm’s length. They granted selective tax advantages to the companies in breach of EU State aid rules. The Commission also opened an investigation into a transfer pricing arrangement granted by Luxembourg to Amazon. This investigation is ongoing. Finally, the Commission's decision that Belgium's "excess profit" ruling system was contrary to EU state aid rules was also based on derogations from the "arm's length principle".
- **Profit allocation methods, which do not reflect economic reality**: The Commission decided in August 2016 that Apple received illegal tax benefits in Ireland because the tax rulings endorsed a method to internally allocate profits within two Irish Apple group companies, which did not have any factual or economic justification.
- **Inconsistent application of national law, giving rise to a discretionary double non-taxation:** Today's investigation into Luxembourg's tax treatment of GDF Suez looks into an alleged inconsistent application of national tax law endorsed in the tax rulings, leading to double non-taxation. The Commission also has an ongoing investigation into tax rulings granted by Luxembourg to McDonald's. These exempt almost all of the group company's income from taxation in Luxembourg on the basis that they are taxed in the US, despite the Luxembourg tax authorities' knowledge that they were in fact not taxed in the US.

The non-confidential version of the decision to open the investigation will be made available under the case number SA.44888 in the State Aid Register on the competition website once any confidentiality issues have been resolved. New publications of state aid decisions on the internet and in the Official Journal are listed in the State Aid Weekly e-News.

IP/16/3085

Press contacts:

Ricardo CARDOSO (+32 2 298 01 00)
Yizhou REN (+32 2 299 48 89)

General public inquiries: Europe Direct by phone 00 800 67 89 10 11 or by email

Attachments

GDF_Suez_en.pdf

Photos & Videos

image EN