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COMMISSION DECISION (EU) 2025/2405

of 28 November 2024

on tax ruling SA.38944 (2014/C) (ex 2014/NN) – Luxembourg, alleged aid to Amazon

(notified under document C(2024) 8565)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter of 24 June 2014, the Commission sent a request for information to the Grand Duchy of Luxembourg ('Luxembourg') regarding its tax ruling practice in relation to the Amazon group of companies ('Amazon' or 'Amazon group').

(2) In that letter, the Commission requested all tax rulings addressed to the Amazon group that were still in force at the time. By email of 18 July 2014, Luxembourg requested an extension of the deadline to respond to the Commission's letter, which was granted.

(3) On 4 August 2014, Luxembourg replied to the Commission's request of 24 June 2014. It annexed to its reply, inter alia, a letter dated 6 November 2003 ('contested tax ruling' or 'Amazon APA') addressed to Amazon.com, Inc. by the Administration des contributions directes ('the Luxembourg tax administration').

(4) On 7 October 2014, the Commission adopted a decision to initiate the formal investigation procedure in accordance with Article 108(2) of the Treaty in respect of the contested tax ruling on the ground that it harboured serious doubts as to the compatibility of that measure with the internal market ('the Opening Decision') ([2]). In that decision, Luxembourg was requested to provide additional information on the contested tax ruling ([3]).

(5) By letter of 21 November 2014, Luxembourg submitted its comments to the Opening Decision. That submission included, inter alia, a transfer pricing report ('the TP Report').

(6) On 6 February 2015, the Opening Decision was published in the *Official Journal of the European Union* ([4]). Interested parties were invited to submit their comments on that decision.

(7) By letter of 13 February 2015, the Commission sent an additional request for information to Luxembourg.

(8) By letter of 5 March 2015, Amazon submitted its observations on the Opening Decision. Comments on the Opening Decision were also submitted by third parties.

([1]) OJ C 44, 6.2.2015, p. 13.
([2]) Several exchanges on confidentialities took place, which are however not individually mentioned in this Section.
([3]) OJ C 44, 6.2.2015, p. 30.
([4]) OJ C 44, 6.2.2015, p. 13.

(9) By letter of 17 March 2015, Luxembourg partially replied to the Commission's request for information of 13 February 2015.

(10) On 19 March 2015, the Commission transmitted the comments of third parties on the Opening Decision to Luxembourg.

(11) On 26 March 2015, the Commission informed Luxembourg that, in accordance with Article 6(a) of Council Regulation (EC) No 659/1999 ([5]), it had identified that the pending formal investigation procedure on the contested tax ruling was ineffective. On that basis, and with the authorisation of Luxembourg, the Commission, in accordance with Article 6(a)(6) of Regulation (EC) No 659/1999, sent a request for information to Amazon on 26 March 2015 (the 'MIT request').

(12) On 4 May 2015, Amazon partially replied to the Commission's request for information of 26 March 2015.

(13) By letter of 13 May 2015, Luxembourg submitted its observations on the third parties' comments on the Opening Decision.

(14) By letters of 24 and 31 July 2015, Amazon provided a partial reply to the Commission's request of 3 July 2015.

(15) By letter of 21 August 2015, Amazon replied partially to the Commission's request of 31 July 2015, by which the Commission reminded Amazon to provide all requested information, in particular complete information on agreements on intellectual property ('IP') and a new ruling granted to Amazon in 2014.

(16) Between 30 September 2015 and 12 September 2017, further exchanges of letters and meetings took place between the Commission, Luxembourg and Amazon (for more details, reference is made to recitals 27 to 89 of the Opening Decision).

(17) On 4 October 2017, the Commission closed the formal investigation by adopting a final decision (Commission Decision (EU) 2018/859 ([6])) finding that the Amazon tax ruling constituted aid within the meaning of Article 107(1) of the Treaty (the 'Closing Decision'). That aid was determined to be incompatible with the internal market and to have been unlawfully put into effect by Luxembourg in breach of Article 108(3) of the Treaty. Luxembourg was ordered to recover the amount of incompatible and unlawful aid obtained by Amazon.

(18) On 12 May 2021, the General Court annulled Decision (EU) 2018/859 ([7]).

(19) On 22 July 2021, the Commission filed an appeal to the Court of Justice seeking to set aside the judgment of the General Court of 12 May 2021.

(20) On 14 December 2023, the Court of Justice dismissed the Commission appeal and thus confirmed the annulment of the Closing Decision ('*Amazon* judgment') ([8]). Like the judgment of the General Court of 12 May 2021, that ruling left the Opening Decision unaffected. Therefore, the formal investigation of the contested tax ruling described in recital 42 is still open and needs to be closed.

([5]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1). Regulation (EC) No 659/1999 was repealed and replaced by Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 Treaty on the Functioning of the European Union (codification) (OJ L 248, 24.9.2015, p. 9, ELI: http://data.europa.eu/eli/reg/2015/1589/oj) with effect from 14 October 2015.

([6]) Commission Decision (EU) 2018/859 of 4 October 2017 on State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon (notified under document C(2017) 6740) (OJ L 153, 15.6.2018, p. 1, ELI: http://data.europa.eu/eli/dec/2018/859/oj).

([7]) Joined Cases T-816/17 and T-318/18 *Luxembourg and Amazon EU and Amazon.com* v *Commission*, ECLI:EU:T:2021:252.

([8]) Case C-457/21 P *Commission* v *Amazon.com and others*, ECLI:EU:C:2023:985. The Court of Justice concluded that the General Court had incorrectly determined the relevant reference system and, as a result, had also erred in the analysis of the criterion of selective advantage, within the meaning of Article 107(1) of the Treaty (*Amazon* judgement, paragraphs 46 to 50). The Court of Justice nevertheless found that the General Court was entitled to find that the Commission had not established the existence of an advantage for the benefit of the Amazon group, and to annul, on that basis, the Closing Decision (*Amazon* judgement, paragraphs 53 to 58). In that light, and through a substitution of grounds, the Court of Justice dismissed the appeal in its entirety (*Amazon* judgment, paragraph 59).

2. DESCRIPTION OF THE MEASURE

2.1. The Amazon group

(21) According to the information gathered during the formal investigation, the Amazon group consists of Amazon.com, Inc. and all companies directly or indirectly controlled by Amazon.com, Inc. (collectively referred to as 'Amazon' or the 'Amazon group'). Amazon is headquartered in Seattle, Washington, United States of America.

(22) Amazon operates retail and service businesses. Amazon also generates revenue through other marketing and promotional services, such as online advertising and co-branded credit card agreements. Finally, Amazon manufactures and sells hardware products, such as Amazon Kindle, Amazon Fire and Amazon Echo devices.

(23) Amazon operates thirteen global web sites, including www.amazon.com and six European web sites: www.amazon.de, www.amazon.co.uk, www.amazon.fr, www.amazon.it, www.amazon.es and www.amazon.nl ('the EU websites'). Amazon's operations are organised in three segments: North America, International, and Amazon Web Services ('AWS').

(24) In 2016, Amazon generated worldwide net sales of approximately USD 136 billion and net income of USD 2,37 billion. Globally, 91 % of Amazon's revenue comes from its retail business. 59 % of net sales come from the North America segment, 32 % from the International segment, and 9 % from the AWS segment. In 2016, Amazon had 314 400 full- and part-time employees.

2.2. Amazon's European operations

(25) Two Luxembourgish group entities are of particular relevance for the purposes of the investigation as regards the financial years covering the period from 1 May 2006 to 30 June 2014 ('the relevant period'):

— Amazon Europe Holding Technologies SCS ('LuxSCS') – This entity is a Luxembourgish limited partnership (*Société en Commandite Simple*). While the ownership structure changed throughout the relevant period, the partners of LuxSCS were always US-resident companies. During the relevant period, LuxSCS was expected to function solely as an intangibles holding company for Amazon's European operations, for which LuxOpCo was responsible as the principal operator. LuxSCS would only receive passive income (royalties and interests) from its subsidiaries. LuxSCS also provided intercompany loans to LuxOpCo and other group companies. LuxSCS had no physical presence or employees during the relevant period.

— Amazon EU Société à responsabilité limitée ('LuxOpCo') – During the relevant period, LuxOpCo was a wholly-owned subsidiary of LuxSCS. It was tasked with further developing and improving the software-based business model underlying Amazon's European retail and service business. In this period LuxOpCo functioned as the headquarters of the Amazon group in Europe and the principal operator of Amazon's European online retail and service business as carried out through the EU websites. In 2013 and 2014, the consolidated net turnover of LuxOpCo amounted to EUR 13 612 449 784 and EUR 15 463 362 589, respectively. During the financial year 2013, LuxOpCo employed on average 523 full time employees ('FTEs').

2.3. The License Agreement

(26) With effect from 30 April 2006, LuxOpCo entered into a license agreement (the 'License Agreement') with LuxSCS. Under that agreement, LuxOpCo irrevocably obtained the exclusive right to develop, enhance, and exploit the intangibles for the purpose of operating the EU websites and any other purpose within the European country geographic territory in return for a royalty payment (the 'License Fee'). Any IP created by or further developed by LuxOpCo on the basis of or as a result of access to the intangibles was assigned to LuxSCS. LuxOpCo was required to act on its own initiative and risk to protect and maintain the intangibles. The License Agreement also referred to corporate services to be provided by LuxOpCo for the benefit of LuxSCS without any separate remuneration to LuxOpCo. LuxOpCo further agreed to take over all risks associated with all the activities to be performed by it under the License Agreement. If LuxOpCo acquired any IP to be used for the same purpose as the intangibles from third parties, LuxOpCo was required to license this IP to LuxSCS on a royalty-free basis.

(27) The License Agreement was to be in effect for the life of all the licensed intangibles and could only be terminated in the event of a change of control or substantial encumbrance or in the event of one of the parties failing to cure for failure of its performance under that agreement. Accordingly, LuxSCS had no possibility to unilaterally terminate the License Agreement. The License Agreement was amended in January 2010, with effect from 1 January 2009. That amendment concerned the definition of 'EU Operating Profit' used for the purpose of calculating the License Fee.

2.4. **The contested tax ruling**

(28) The measure under assessment in this decision is the letter of 6 November 2003 ([9]) of the Luxembourgish tax authorities to Amazon, approving the transfer pricing arrangement described in the letter of 23 October 2003 by Amazon to those authorities and the structure of the Amazon group described in its letters of 23 October 2003 and 31 October 2003 ([10]).

(29) In its letter of 31 October 2003 to the Luxembourg tax administration ('Amazon's letter of 31 October 2003'), Amazon sought confirmation of the tax treatment of LuxSCS, its US-based partners and dividends received by LuxOpCo under the new envisaged structure. That letter explains that LuxSCS, as a *Société en Commandite Simple*, is not deemed to have a separate tax personality from that of its partners and, as a result, it is not subject to corporate income tax or net wealth tax in Luxembourg. Notwithstanding the tax transparency of LuxSCS, LuxSCS or its US-based partners could still be taxed in Luxembourg if their activities were deemed to be carried out through a permanent establishment in Luxembourg. That letter therefore further sets out that neither LuxSCS nor its partners could be considered to have a tangible presence in Luxembourg (offices, employees etc.) so that, in the absence of a fixed place of business, LuxSCS would not be deemed to have a separate personality from its partners, nor to carry out a commercial activity in Luxembourg. Nor could its partners be regarded as having a permanent establishment in Luxembourg.

(30) In its letter of 23 October 2003 to the Luxembourg tax administration ('Amazon's letter of 23 October 2003'), Amazon requested a tax ruling confirming the treatment of LuxOpCo for Luxembourg corporate income tax purposes. That letter explains Amazon's envisaged business structure in Europe and seeks confirmation that the transfer pricing arrangement for the License Agreement described therein results in '*an appropriate and acceptable profit*' for LuxOpCo '*with respect to the transfer pricing policy and Articles 56 and 164(3) of the LITL*'. That letter refers to an '*economic analysis*' attached thereto, which sets out '*the functions and risks that LuxOpCo was anticipated to undertake, as well as the nature and extent of the intangibles that are anticipated to be the subject of the intangibles License*'. On the basis of that analysis, a transfer pricing arrangement was proposed under which the level of the annual royalty that LuxOpCo would be required to pay to LuxSCS for the use of the intangibles was established.

(31) The present decision assesses whether the transfer pricing arrangement approved in the contested tax ruling contains a selective advantage amounting to State aid.

3. **DESCRIPTION OF THE RELEVANT LEGAL FRAMEWORK**

3.1. **The national legal framework**

(32) The ordinary rules of corporate taxation in Luxembourg are to be found in the Luxembourg Corporate Income Tax Code (*loi modifiée du 4.12.1967 concernant l'impôt sur le revenue,* the 'LIR').

([9]) See Recital 2.

([10]) Following a delay in the implementation of the restructuring of Amazon's European operations, Amazon sought confirmation from the Luxembourg tax administration of the continued validity of the contested tax ruling by letter of 5 December 2004, which the latter confirmed by letter of 23 December 2004. The contested tax ruling, initially concluded for five years, was prolonged in 2010 and was effective until June 2014. Amazon's European structure, as referred to in the ruling request and as endorsed by the contested tax ruling, was put into place from May 2006 and remained applicable until June 2014, when that structure was changed.

(33) Article 18(1) LIR provides the method to establish a corporate taxpayer's annual profit: 'The profit is determined as the difference between net assets as of the end and net assets as of the beginning of the reporting period, increased by the withdrawals of business cash or other assets by the taxpayer for its personal use or any other uses which are not intended in the interests of the company and decreased by additional contributions performed during the reporting period.'.

(34) Article 159 LIR provides that resident tax companies are subject to tax on the totality of their profits. Article 160 LIR provides that non-resident companies are subject to tax on their source income, which is defined in Article 156 LIR. Since 2011, all companies subject to tax in Luxembourg are taxed on their taxable profit at the standard tax rate of 28,80 %.

(35) Article 164(3) LIR provides: 'Taxable income comprises hidden profit distributions. A hidden profit distribution arises in particular when a shareholder, a stockholder or an interested party receives either directly or indirectly benefits from a company or an association which he normally would not have received if he had not been a shareholder, a stockholder or an interested party.' ([11]). In the Opening Decision the Commission considered – see in particular recital 59 – that Article 164 LIR constituted the legislative basis in Luxembourg for transfer prices and thereby implemented Article 9 of the OECD Model Tax Convention, which laid down the arm's length principle, according to which the prices in intercompany transactions shall be set in line with the market prices (see recital 40 of the present decision).

(36) As of 1 January 2017, a new article 56bis LIR explicitly formalised the application of the arm's length principle under Luxembourg tax law. That has been confirmed by the Court of Justice in the *Amazon* judgment: *'it is only since 1 January 2017, namely after the adoption and extension of the tax ruling at issue, that a new article of the Law on income tax explicitly formalises the application of the arm's length principle under Luxembourg tax law*'.

3.2. **Guidance on transfer pricing**

(37) This decision concerns a tax ruling which validates a transfer pricing arrangement, also referred to as an advance pricing arrangement ('APA'). APAs are arrangements that determine, in advance of intra-group transactions, an appropriate set of criteria for the determination of the transfer pricing for those transactions over a fixed period of time, for tax purposes.

(38) In this context, transfer pricing refers to the prices charged for commercial transactions between various parts of the same corporate group, in particular prices set for goods sold or services provided by one subsidiary of a corporate group to another subsidiary of that same group. Transfer pricing thus concerns profit allocation between different parts of the same corporate group.

(39) Multinational corporations pay taxes in jurisdictions which have different tax rates. The after-tax profit recorded at the corporate group level is the sum of the after-tax profits in each country in which it is subject to taxation. Therefore, rather than maximise the profit declared in each country, multinational corporations have a financial incentive when allocating profit to the different companies of the corporate group to allocate as much profit as possible to low tax jurisdictions and as little profit as possible to high tax jurisdictions.

(40) To achieve a fair taxation, an internationally agreed standard for setting transfer prices has been established. Thus, Article 9 of the OECD Model Tax Convention establishes so called arm's length principle according to which the prices in intercompany transactions shall be set in line with the market prices. The arm's length principle is further detailed in the OECD Transfer Pricing Guidelines ([12]) ('OECD TP Guidelines').

([11]) The application of Article 164(3) LIR to financing companies has been clarified by the Luxembourg tax administrations in Circulars no. 164/2 of 28 January 2011 and no. 164/2bis of 8 April 2011, which were replaced by Circulaire du directeur des contributions LIR n° 56/1 – 56bis/1 du 27 décembre 2016, traitement fiscal des sociétés exerçant des transactions de financement intra-groupe.

([12]) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD, 2010.

4. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(41) In the Opening Decision, the Commission expressed serious doubts as to the compatibility of the contested tax ruling with the internal market. In particular, as to whether the transfer pricing arrangement endorsed by the contested tax ruling resulted in an arm's length royalty payment to LuxSCS and an arm's length remuneration for LuxOpCo.

(42) In its Opening Decision, the Commission noted that with the contested tax ruling the Luxembourgish tax authorities approved the transfer pricing arrangements proposed by Amazon in the ruling request, on the basis of Article 164 LIR which – according to the Commission – implemented Article 9 of the OECD Model Tax Convention and enshrined the arm's length principle into Luxembourg law. On the basis of that principle, in order to prevent a transaction from leading to tax avoidance, the transfer price must be comparable to that which would have been arrived at between independent operators on the basis of the traditional method, according to which the taxable profit was calculated on the basis of the difference between the company's income and charges. Any result that deviated from that outcome and lowered the tax basis had the effect of providing an advantage to the taxpayer concerned.

(43) Therefore, in its Opening Decision, the Commission considered that an approval of a transfer pricing arrangement which did not reflect a market outcome and which favoured a particular undertaking must be deemed as *prima facie* selective. That selective treatment would derive from a deviation or misapplication of the arm's length principle, as set out in the OECD Model Tax Convention and the OECD TP Guidelines and incorporated in national law pursuant to Article 164 LIR.

(44) On that basis, the Commission raised the following doubts in its Opening Decision, which exclusively relate to the legality of the contested tax ruling in light of the arm's length principle as set out in the OECD Model Tax Convention and the OECD TP Guidelines, and as incorporated in the national law pursuant to Article 164 LIR.

(45) First, the Commission noted that the contested tax ruling appeared to have been granted in the absence of a transfer pricing report supporting the arm's length nature of the arrangement under the OECD TP Guidelines. It further observed that the ruling had been granted within eleven working days from the receipt of the request.

(46) Second, the Commission preliminarily concluded that the transfer pricing arrangement endorsed in the contested tax ruling did not seem to be based on any of the generally accepted transfer pricing methods set out in the OECD TP Guidelines.

(47) Third, the Commission established that, contrary to recommendations contained in paragraph 6.16 of the 1995 and 2010 OECD TP Guidelines, the royalty payment approved by the contested tax ruling was not related to output, sales or profit. Instead, the royalty was calculated as the residual profit from LuxOpCo's intra-group transactions, which was determined by deducting a routine return attributable to LuxOpCo's functions from LuxOpCo's actually recorded profit.

(48) Fourth, following the OECD TP Guidelines, the Commission questioned whether it was correct to consider LuxOpCo as performing less complex functions as compared to LuxSCS. Based on the description of functions performed by LuxOpCo and the risks assumed by it, those functions and risks appeared, in fact, to be more complex than those performed by LuxSCS. The specific functions related to the intangibles, for which LuxSCS is allegedly remunerated, were described neither in the ruling request, nor by the Luxembourg tax administration in the contested tax ruling. Furthermore, although, according to the ruling request, LuxSCS was to retain all risks associated with the ownership of that IP, those risks to be assumed by LuxSCS while holding the intangibles were not specified, in particular as compared to the entrepreneurial risks assumed by LuxOpCo.

(49) Fifth, the Commission considered that a [4-6] % mark-up on operating expenses in application of Transactional Net Margin Method ('TNMM') under the OECD TP Guidelines, which was endorsed by the contested tax ruling for the functions performed by LuxOpCo, was relatively low. In particular, bearing notably in mind that the functions of LuxOpCo were presented as central and strategic commercial decision making, concentrating the business risk of the entire European market. In addition, the application of a floor and a cap to determine LuxOpCo's arm's length remuneration, which effectively overrode the transfer pricing arrangement based on operating expenses, was not explained. Finally, the Commission questioned whether the choice of an indirect transfer pricing method to determine LuxOpCo's remuneration was justified given that the OECD TP Guidelines set a preference for the use of direct methods for setting an appropriate level of taxable profits.

(50) Sixth, the Commission observed that while the contested tax ruling had been granted in 2003, it appeared to be still in force in 2014. The Commission noted that such duration was much longer than the length of tax rulings concluded in other Member States. The Commission expressed doubts as to whether it was correct to consider the remuneration accepted in the ruling to still be at arm's length more than 10 years later without any review or obligation to notify the administration, should any critical circumstances have changed in the meantime.

(51) In light of those doubts, in its Opening Decision the Commission came to the provisional conclusion that the contested tax ruling conferred a selective advantage to Amazon as a result of a royalty payment for LuxSCS and a remuneration for LuxOpCo that deviated from an arm's length outcome. Since all the other conditions of Article 107(1) of the Treaty appeared to have been fulfilled and there was no apparent compatibility basis pursuant to Article 107(2) or (3) of the Treaty, the Commission came to the provisional conclusion that the contested tax ruling constituted State aid incompatible with the internal market.

5. COMMENTS FROM THE LUXEMBOURG AUTHORITIES ON THE OPENING DECISION

5.1. On alleged legal errors in the Opening Decision

(52) Luxembourg considered the Opening Decision to be vitiated by a number of legal errors.

(53) First, Luxembourg considered that decision to constitute an interference of its sovereign powers in the area of direct taxation. In particular, it considered the Commission to have exceeded its powers in the field of State aid by developing and imposing its own interpretation of the arm's length principle.

(54) Luxembourg drew particular attention to the specific nature and complexity of transfer pricing. According to the OECD TP Guidelines, the national tax authorities need certain discretion to be able to interpret the tax rules in the context of an individual case and decide whether the transfer pricing methodology used results in an acceptable transfer price. Luxembourg argued that it had received confirmation that its tax ruling practice was appropriate and complied with the Code of Conduct for Business Taxation and with the OECD TP Guidelines

(55) Second, Luxembourg argued that the precedents relied upon by the Commission in the Opening Decision differ from the contested tax ruling in that they concerned schemes which contained elements leading to an advantage irrespective of the individual circumstances of taxpayers.

(56) Third, Luxembourg alleged that the Opening Decision lacks a selectivity analysis and, more specifically, does not identify the reference tax system or the reference group of taxpayers with regard to which Amazon's tax treatment should be compared. Consequently, no derogation from the reference tax system applied to Amazon and no advantage were identified.

(57) With regard to the correct reference framework, Luxembourg considered it to be the national tax law, and in particular Articles 164(3) and 18 LIR. Luxembourg insisted that the contested tax ruling has to be assessed in the light of the relevant regulatory framework in place and the economic context prevailing at the moment of granting the measure, i.e. in 2003. Luxembourg noted that, at that time, the 2010 OECD TP Guidelines did not exist, and no reference was made in Luxembourg law to the 1995 OECD TP Guidelines.

(58) Fourth, Luxembourg considered that the Commission had not identified any category of undertakings that might have benefited from the measure. As regards the reference group of taxpayers, Luxembourg considered that only taxpayers subject to transfer pricing rules and its tax ruling practice would be in a comparable factual and legal situation.

5.2. **On the doubts expressed in the Opening Decision**

(59) Luxembourg also specifically addressed the doubts expressed by the Commission in the Opening Decision regarding the contested tax ruling's compliance with the arm's length principle in line with the OECD TP Guidelines.

(60) First, Luxembourg argued that the Commission's concern that the contested tax ruling was granted in the absence of the required economic analysis is unfounded, as a transfer pricing report was prepared to substantiate the transfer pricing arrangement proposed in the ruling request.

(61) Luxembourg explained that since online retail is an activity with low margins subject to fierce competition, Amazon's strategy was to differentiate itself through technological innovation. As a consequence, the intangibles were considered to be the essential source of value in Amazon's activities.

(62) Luxembourg submitted that the contested tax ruling endorses a transfer pricing arrangement based on the TNMM to determine the level of the arm's length royalty paid by LuxOpCo to LuxSCS, which aligns with the regulatory framework of Luxembourg in place at the moment of granting the measure. The TNMM is a transfer pricing method which corresponds to Luxembourg transfer pricing rules and administrative practice. The acceptance of the TNMM by the Luxembourg tax administration reflected the functional analysis included in the transfer pricing report. Therefore, LuxOpCo was regarded as being the less complex entity in comparison with LuxSCS and had been properly selected as the tested party. Other methods would have produced more volatile results. In light of these considerations, Luxembourg claimed that the contested tax ruling cannot be regarded as accepting 'the lowest possible outcome' for LuxOpCo.

(63) Third, in response to the Commission's doubt expressed in the Opening Decision that the royalty paid by LuxOpCo to LuxSCS is not related to output, sales, or profit, Luxembourg confirmed that the royalty is calculated as a residual profit. However, Luxembourg considered such an outcome inherent in the application of the TNMM and compliant with the functional and risk analyses.

(64) Fourth, Luxembourg claimed that LuxOpCo's real financial return for each year of the relevant period fully complies with the arm's length principle.

(65) Fifth, as regards the doubt expressed on the relevance of the floor and cap for LuxOpCo's remuneration, Luxembourg argued that the floor guaranteed a positive remuneration increasing in line with expanding business. Furthermore, the cap and the ceiling encouraged LuxOpCo to manage its activities efficiently. Given that the margin obtained by LuxOpCo over the period 2006-2013 was on average [3,5-4] (*) % and was each year within the limits of the interquartile range, Luxembourg concludes that the ceilings and caps did not have any real and practical impact.

(66) Luxembourg further argued that the taxable basis had not been capped and had increased in line with Amazon's expansion and investment in the EU. The remuneration margin was applied to all of LuxOpCo's operating costs, not just to its operating costs incurred in Luxembourg.

(*) Confidential information.

(67) Sixth, as regards the duration of the contested tax ruling, Luxembourg explained that it was originally envisaged to be valid for five accounting periods from the start of Amazon's activities in Luxembourg, which actually took place in 2006 ([13]). Therefore, the contested tax ruling was initially in application until 2011. Luxembourg further explained that, according to its administrative practice at the time, transfer pricing rulings were generally amended only if the activity model or market conditions changed significantly. Luxembourg additionally explained that, following the 2008 economic crisis, remuneration for comparable activities (online retail sales) were under significant pressure and Amazon's operating margins kept shrinking. In this context, Luxembourg considered that the review of the pricing arrangement could have led to a reduction in LuxOpCo's remuneration.

6. **COMMENTS FROM INTERESTED PARTIES ON THE OPENING DECISION**

6.1. **Comments from Amazon**

(68) In its comments, Amazon focused on alleged legal errors and on the doubts expressed by the Commission in the Opening Decision.

(69) Regarding the alleged legal errors, Amazon argued that the Commission did not correctly identify the reference framework and did not prove the selectivity of the measure in its Opening Decision. According to Amazon, the contested tax ruling should be reviewed against a specific rule of national law and/or administrative practice and not the corporate tax system as a whole. Therefore, the correct reference framework to assess the contested tax ruling is the arm's length principle as laid down in Article 164(3) and Article 18 LIR, together with the relevant administrative practice applying the provisions in question. Moreover, according to Amazon, there could only be a State aid concern if the contested tax ruling deviated from the normal interpretation and application of the arm's length principle in Luxembourg which, according to Amazon, was not the case for the contested tax ruling. In addition, Amazon argued that the Commission did not demonstrate the selectivity of the measure.

(70) Regarding the doubts expressed by the Commission in the Opening Decision, Amazon's comments largely coincide with those of Luxembourg, insofar as it also argued that the ruling request was accompanied by a transfer pricing report and that that request was vigorously scrutinised.

(71) Amazon further argued that the transfer pricing method chosen, the residual profit split, is not only in line with the OECD TP Guidelines, but also with Luxembourg transfer pricing rules and administrative practice ([14]).

(72) Amazon added that LuxSCS's contributions consist not only of the sublicensing of intangibles, but also of the assumption of risks associated with LuxOpCo's operations,

(73) Amazon further argued that the application of the CUP method was not suitable for the given circumstances. Amazon claimed that in any event, the Luxembourg tax administration has to start the transfer pricing analysis on the basis of the methodology selected by the taxpayer. Amazon also recalled that the application of any transfer pricing method typically produces a range of results rather than a precise price, as transfer pricing is not an exact science and requires the exercise of judgment.

(74) Amazon also defended the validity of the duration of the contested tax ruling by submitting an *ex-post* transfer pricing report it had commissioned in 2012 ('the 2012 *ex post* TP Report'). This report presented two updated company datasets: one based on data from 2004-2006 and another from 2008-2010, which, according to Amazon, confirmed that LuxOpCo's remuneration remained within the arm's length range throughout the relevant period.

([13]) By letter of 5 December 2004, Amazon informed Luxembourg that the restructuring would be completed only in 2006 and asked for the contested tax ruling to be applicable for the first five years as of that moment. On 23 December 2004, Luxembourg confirmed that the described delay did not affect the agreement of 6 November 2003, provided that other stipulations of the request of 23 October 2003 were maintained.

([14]) Amazon illustrates this argument with reference to the tax rulings issued by Luxembourg and published by ICIJ. Among them, Amazon identified 97 rulings, which, according to Amazon, are based on the residual profit split method and within financing arrangements allocate a non-unique return, i.e. fixed financial margin to a Luxembourg entity, while the residual profit is allocated to the holder of a financing instrument.

6.2. **Comments from other interested parties**

(75) EPICENTER ([15]), Computer & Communications Industry Association ('CCIA'), ATOZ and Fedil submitted their comments raising number of concerns. EPICENTER considered the Opening Decision not to be mindful of the appropriate degree of discretion inherent to transfer pricing practice, and considered the Commission to exceed its legal powers in direct taxation matters using the State aid rules to tackle harmful tax competition. Both ATOZ and Fedil argued that it was not correct to consider the OECD transfer pricing rules for the purpose of State aid assessment, as they were not incorporated in the Luxembourgish legislation at that time.

(76) Oxfam, the Booksellers Association of the United Kingdom & Ireland Ltd., the European and International Bookseller Federation, le syndicat de la librairie française, the Federation of European Publishers and le Syndicat des Distributeurs de Loisirs Culturels and Bundesarbeitskammer either supported the arguments of the Commission or welcomed the State aid investigations of the Commission.

7. **INFORMATION SUBMITTED BY COMPANY X**

(77) Company X, a competitor of Amazon active in the online retail business in an EU market who did not want its identity to be disclosed, submitted market information to the Commission in relation to the investigation. It explained that the main drivers for a successful and durable online retail business were clients and marketing, thus the key assets to ensure growth in this market were a solid client database and the financial capability to undertake significant investments in marketing. Company X also emphasized that Amazon had been quite aggressive in investing in technology and marketing, thus obtaining advantages hard to compete with.

8. **COMMENTS FROM THE LUXEMBOURG AUTHORITIES ON THIRD PARTIES' COMMENTS AND ON INFORMATION SUBMITTED BY COMPANY X**

(78) By letter dated 20 April 2015, Luxembourg expressed its agreement to the comments submitted by Amazon, FEDIL, CCIA, ATOZ and EPICENTER, whereas it considered that the other comments submitted in response to the Opening Decision were not relevant to the case.

(79) On 2 May 2016, Luxembourg submitted its comments to Company X's submission. Luxembourg stated that Amazon, as a market operator, was better placed to provide comments to Company X's submission.

9. **FURTHER SUBMISSION BY AMAZON**

(80) In its further submissions, Amazon provided supplementary information to justify that the remuneration for LuxSCS and LuxOpCo endorsed by the contested tax ruling was in line with Luxembourg tax system.

(81) Further, Amazon questions whether Company X is actually comparable to LuxOpCo and argued that the information it provided should not have been considered as it had not been available at the time of granting the contested tax ruling.

(82) As to Amazon's technology-centric e-tailing business, Amazon argues that technological innovation is at the heart of its service-oriented e-tail business model and is of outmost importance for business.

(83) As to the critical threats for Amazon's European operations, Amazon named the following ones: (i) e-commerce competition, (ii) (lack of) customer adoption of new products, services and technologies, and (iii) Local economic and political conditions and changes to the legal framework.

(84) In its further submissions Amazon provided a statement to the US Tax Court procedure and a newly commissioned transfer pricing report. The former was provided to support the royalty rate that LuxSCS received over the relevant period, while the later *ex-post* report was to support that LuxOpCo's remuneration was at arm's length.

([15]) EPICENTER describes itself as an independent initiative of six leading think tanks across the European Union. It seeks to inform the EU policy debate and promote the principles of a free society by bringing together the economic expertise of its members.

10. **ASSESSMENT**

(85) According to Article 107(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods shall be incompatible with the internal market, in so far as it affects trade between Member States.

(86) As held by the Union Courts ([16]), the qualification of a measure as aid within the meaning of Article 107(1) of the Treaty therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and have the potential to affect trade between Member States.

(87) For the purposes of this decision, it is in particular necessary to further examine the presence of a selective advantage.

(88) According to settled case-law, the condition relating to a selective advantage 'requires a determination as to whether, under a particular legal regime, the national measure at issue is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable legal and factual situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory' ([17]).

(89) More specifically, the Court of Justice has developed a three-step analysis to determine whether a particular tax measure is selective ([18]). First, the common or normal tax regime applicable in the Member State is identified. This constitutes the 'reference system'. Second, it is determined whether the tax measure in question constitutes a derogation from that system, in so far as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure constitutes a derogation from the reference system, it is then established, in the third step of the analysis, whether that measure is justified by the nature or the general scheme of the reference system. A tax measure which constitutes a derogation from the application of the reference system may be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of that tax system ([19]). If that is the case, the tax measure is not selective. The burden of proof in that third step lies with the Member State.

(90) In the *FIAT* judgment ([20]), the Court of Justice further clarified how to identify the relevant reference system. The Court of Justice indicated that the Commission should not consider parameters and rules that are external to the national tax system when determining the reference system. More specifically, in paragraph 96 of the *FIAT* judgment, the Court of Justice considered that '[p]*arameters and rules external to the national tax system at issue cannot therefore be taken into account in the examination of the existence of a selective tax advantage within the meaning of Article 107(1) of the Treaty and for the purposes of establishing the tax burden that should normally be borne by an undertaking, unless that national tax system makes explicit reference to them*'.

(91) In light of those principles, which are recalled at paragraph 44 of the *Amazon* judgment, the Court of Justice confirmed, at paragraph 58 thereof ([21]), the General Court's finding that the Commission had not established, in the Closing Decision, the existence of an advantage for the benefit of the Amazon group, within the meaning of Article 107(1) of the Treaty. The Court of Justice therefore upheld the annulment of the Closing Decision.

([16]) Case C-399/08 P *Commission* v *Deutsche Post*, ECLI:EU:C:2010:481, paragraph 39.

([17]) Case C-457/21 P *Commission* v *Amazon.com and others*, ECLI:EU:C:2023:985, paragraph 33. See also Joined Cases C-451/21 P and C-454/21 P *Luxembourg and Others* v *Commission*, ECLI:EU:C:2023:948, paragraph 106. See, further, C-172/03 *Heiser*, ECLI:EU:C:2005:130, paragraph 40.

([18]) Joined Cases C-78/08 to C-80/08 *Paint Graphos*, ECLI:EU:C:2009:417, paragraphs 49 and 64-65. That three-step method of analysing the selectivity of aid was designed in order to reveal the concealed selectivity of advantageous tax measures that are apparently available to any undertaking: see Joined Cases C-649/20 P, C-658/20 P, C-662/20 P *Spain and Others* v *Commission*, ECLI:EU:C:2023:60, paragraph 48.

([19]) Joined Cases C-78/08 to C-80/08 *Paint Graphos*, ECLI:EU:C:2009:417, paragraph 65.

([20]) Joined Cases C-885/19 P and C-898/19 P *Commission* v *Fiat Chrysler Finance Europe*, ECLI:EU:C:2022:859.

([21]) Case C-457/21 P *Commission* v *Amazon.com and others*, ECLI:EU:C:2023:985: see also the reasoning set out at paragraphs 41 to 50 and 53 to 58.

(92) Pursuant to Article 266 of the Treaty, it is therefore incumbent on the Commission to take the necessary measures to comply with the *Amazon* judgment.

(93) The findings of the Court of Justice in the *Amazon* judgment are indeed directly relevant for assessing the doubts raised in the Opening Decision with regard to the contested tax ruling. Those doubts were based, in particular, on an analysis of the presence of a selective advantage grounded on a reference system which assumed the incorporation of the OECD arm's length principle, as outlined in article 9 of the OECD Model Tax Convention, into Luxembourg tax law. That same approach was predicated on the applicability of the OECD TP Guidelines within the Luxembourg tax system.

(94) More specifically, the Commission noted, in the Opening Decision, that Article 164 LIR was considered to incorporate Article 9 of the OECD Model Tax Convention into national tax law. The Commission concluded that any result that deviated from the arm's length principle, as expressed in that Convention and the OECD TP Guidelines, and lowered the tax basis had the effect of providing an advantage to the taxpayer concerned ([22]).

(95) In other words, the preliminary characterization of the contested tax ruling as State aid, as laid down in the Opening Decision, stemmed from a deviation or misapplication of the arm's length principle as set out in the OECD Model Tax Convention and the OECD TP Guidelines.

(96) The Commission moreover notes that the six detailed doubts expressed in recitals 63 to 76 of the Opening Decision, and recalled in section 4 of this decision, were based on the premise of an arm's length principle derived from Article 9 of the OECD Model Tax Convention as interpreted by the OECD TP Guidelines.

(97) The Commission acknowledges, however, that, in paragraph 54 of the *Amazon* judgment, the Court of Justice stated that only principles incorporated into national law can be applied for the purposes of the determination of the reference framework in the context of the three-step test to demonstrate the presence of a selective advantage. The Court of Justice thus set out that '*…only the incorporation of that [arm's length] principle as such into national law, which as a minimum requires that that law refer explicitly to that principle, would permit the Commission to apply it in the determination of the existence of a selective advantage within the meaning of Article 107(1) of the Treaty*'.

(98) Further, in paragraph 55 of the *Amazon* judgment, the Court of Justice held that the Commission erred, in the Closing Decision, in establishing the reference framework, as the arm's length principle was not anchored in the national law. It concluded, in effect, *that '[a]s the Commission itself recognised […] it is only since 1 January 2017, namely after the adoption and extension of the tax ruling at issue, that a new article of the Law on income tax "explicitly formalises the application of the arm's length principle under Luxembourg tax law". It is therefore established that the requirement recalled by the case-law cited in the preceding paragraph was not satisfied at the time of adoption, by the Member State concerned, of the measure that the Commission found to be State aid, such that that institution could not apply that principle retroactively in the decision at issue*.'

(99) In light of this conclusion, the Commission considers that the doubts raised in the Opening Decision must be set aside. Indeed, as the contested tax ruling dates from 6 November 2003, it was adopted at a moment where the arm's length principle was not yet incorporated into the Luxembourg tax law, as follows from the *Amazon* judgment.

(100) As recalled in the *Amazon* judgment, errors in the determination of the rules actually applicable under the relevant national law and, therefore, in the identification of the 'normal' taxation in the light of which the contested tax ruling had to be assessed necessarily invalidate the entirety of the reasoning relating to the existence of a selective advantage ([23]).

([22]) The Commission referred to the State aid case C 49/2001, Luxembourg Coordination centres, OJ L 170, 9.7.2003, p. 20.
([23]) Case C-457/21 P *Commission* v *Amazon.com and others,* ECLI:EU:C:2023:985, paragraph 37.

(101) As a result, neither the specific doubts raised in the Opening Decision, nor the underlying reasoning set out therein, allow the Commission to establish that, by the contested tax ruling, Luxembourg granted a selective advantage to Amazon. In that decision, the Commission did not assess the presence of a selective advantage in light of any other reference system, nor did it raise doubts concerning the existence of aid on other grounds related to the presence of a selective advantage.

(102) In the present decision, therefore, the Commission must set aside the doubts expressed in the Opening Decision as to the existence of a selective advantage. As the criteria for finding the existence of State aid pursuant to Article 107(1) of the Treaty are cumulative, there is no need to assess the other criteria set out in that provision.

11. **CONCLUSION**

(103) In light of the foregoing, the Commission concludes that the contested tax ruling issued by Luxembourg in favour of Amazon does not constitute State aid within the meaning of Article 107(1) of the Treaty.

HAS ADOPTED THIS DECISION:

Article 1

The contested tax ruling issued by the tax administration of the Grand Duchy of Luxembourg on 6 November 2003 in favour of Amazon, of the Grand Duchy of Luxembourg did not constitute State aid within the meaning of Article 107(1) of the Treaty.

Article 2

This Decision is addressed to of the Grand Duchy of Luxembourg.

Done at Brussels, 28 November 2024.

For the Commission
Margrethe VESTAGER
Executive Vice-President