Jean Claude Juncker and the “Luxleaks”

Jean Claude Juncker, the new President of the European Commission whose term started on 1 November, wanted his institution to become more “political”. This wish was fulfilled earlier than he expected: the same week, the world press published a detailed inquiry by the ‘International Consortium of investigative journalists’, on extraordinary tax breaks offered by the Finance Ministry of his country, Luxemburg, to multinational companies with headquarters there.

The scandal was called “Luxleaks” because the information came from files “leaked” from a Luxemburg office of Price Waterhouse Cooper (PWC); they related to ‘rulings’ negotiated between these companies and the Luxemburg tax authorities between 2002 and 2010. The way they were presented to the general public generated an immediate uproar: reckless multinationals manage to avoid paying taxes at the time when the ordinary citizen is the victim of austerity policies “imposed” by the European Commission - whose new President was the initiator of these tax breaks in his country of origin!

Luxemburg is indeed a well-known fiscal paradise and by far the richest country in the European Union. Jean Claude Juncker, who was Prime Minister for 18 years, is credited for this success and his zeal in defending his country’s tax regime was well known by his colleagues in the European Council: when the G 20 advocated tax transparency during the financial crisis, together with Austria, he stubbornly resisted for years the application at the EU level of the principle of automatic exchange of information between tax authorities.

Curiously, this weakness did not prevent the major political groups in the European Parliament to endorse him as their candidate for President of the Commission. But ghosts of the past always come back to haunt politicians: Juncker, ‘poacher turned gamekeeper’, should have expected this; instead, he apparently suffered so emotionally from the attack that for a number of days he disappeared from public eye. But when he came back, on 13 November, he managed to regain the initiative by making proposals to address the problem which were immediately supported by the major political groups in the European Parliament - demonstrating thus that he, indeed, is a good politician.

‘Rulings’, are a well-known and perfectly legal practice used by tax authorities in many countries to inform (wealthy) taxpayers of the amount of taxes they will have to pay, in order to help them anticipate it in their accounting. The problem is that it has also become a way for skilled intermediaries - like PWC - to negotiate on behalf of their clients the most attractive tax regimes.

The information leaked from PWC exposes, among other evidence, how the 'rulings' were used to confirm transfer pricing arrangements between a firm and its subsidiaries, resulting in a very low rate of taxation for the Luxemburg subsidiary where the tax was levied.

But this was not really news: The EU Commission had already started to investigate some of these schemes in 2013, used to the benefit of four companies in three different Member States: Apple in Ireland, Fiat and Amazon in Luxemburg and Starbucks in the Netherlands.

What will be the consequences of the "Luxleaks"?

From a political point of view, 76 MEP from the extreme right (including UKIP, Cinque Stelle and Marine Le Pen's Front National) deposed a 'motion of censure' in the European Parliament against the European Commission, which will be voted on Thursday 27 November. It stands no chance of reaching the two thirds majority required - but it will allow the populist Euro sceptics to mobilize attention, a day after Juncker will have presented his famous 300 Billion Euros investment plan aimed at reviving the EU economy. The extreme left did not want to join the motion presented by the extreme right, but will undoubtedly also make its voice heard.

Juncker himself announced, when he came back from his short 'escape', that the Commission will soon propose a directive on automatic exchange of information about tax rulings negotiated between national administrations and multinationals; it will be presented in January by Commissioner Moscovici, in charge of tax issues.

Juncker also promised that the Commission would rework its proposal for a common consolidated corporate tax base (CCCTB). The proposal, presented in 2011 has since been 'bogged down' in the Council (according to the Commission's spokesman) but, even revised, it has little chance of being approved due to the unanimity rule still applicable to tax matters in the EU.

The most interesting way of dealing with the problem is to address it through the EU rules on State aid, as the Commission had already started to do.

Indeed, EU law provides that any selective advantage granted by an EU Member State to an individual company is prohibited - and needs to be reimbursed - if it distorts competition on the European internal market.

In tempore non suspecto - two weeks before the leaks were published - Covington had circulated an Alert on this issue (link : "*European State Aid and Investigations Into Tax Rulings"*)

The new Commissioner in charge of competition, Danish Margrethe Vestager, told the press on 20 November that she "*admired the journalistic work*" on this issue and that the Commission considered the Luxleaks as "*market information*" and would "*evaluate whether or not it will lead us to opening new cases*".

As mentioned above, indeed several cases - Apple in Ireland, Starbucks in the Netherlands, Fiat and Amazon in Luxembourg - are already under investigation by the European Commission. The four investigations relate to tax rulings validating transfer pricing agreements ('Advance pricing agreements' or APAs) , this is agreements on the prices charged for commercial transactions between parts of the same corporate group. The investigation centres on the calculation methods for these APAs and their compatibility with internationally agreed standards. The OECD Transfer Pricing Guidelines will be used as the reference point to assess potential state aid.

Vestager insisted that bringing these four cases to a conclusion will remain a priority and that the verdict could come by spring next year. But the Commission has also asked for detailed information on other cases to the authorities of several EU countries: *"we don't want every single tax ruling but we do want to look at a list if there are certain patterns in the use of tax rulings"*, said Vestager.

A quick start therefore also for the Danish commissioner, who was chosen for the competition post because of her skills as Minister for the Economy in her country.