

General Court of the European Union annuls Commission's decision on Belgian excess profit rulings

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Background

By Decision (EU) 2016/1699 of 11 January 2016,¹ the European Commission (the Commission) found that the excess profit rulings issued by Belgium constituted an illegal aid scheme in breach of the European Union (EU) State aid rules.² Furthermore, the Commission³ ordered that the aid granted be recovered from the beneficiaries.

Accordingly, by the Program Law of 25 December 2016, a recovery procedure was introduced in Belgian Tax law. The amount of aid to be recovered was essentially the amount of taxes not paid due to the rulings, plus accumulated interest from the date the alleged aid was given until the date of effective repayment. The amount was to be calculated for every taxable period as from the period in which the aid was obtained through the taxable period relating to tax year 2015.

The Court's ruling

The General Court of the European Union (the General Court) has now ruled⁴ that the Commission incorrectly qualified the Belgian excess profit ruling system as a broader "scheme" rather than examining the 66 tax rulings individually. According to the General Court, the fact that the Belgian tax authorities had a margin of discretion over all of the essential elements of the excess profit rulings,

allowing them to influence the amount and the characteristics of the tax exemption and the conditions under which the exemption was granted, precludes the existence of an aid scheme. This was also precluded by the fact that excess profit exemptions did not follow automatically from Belgian tax law, but necessarily depended on the adoption of further implementing measures (i.e., tax rulings) by the Belgian tax authorities. Finally, the General Court, notes that there was not a systematic approach on the part of the Belgian tax authorities and that the taxpayers eligible for an excess profit ruling were not defined in a general and abstract manner.

Based on the General Court's decision, the Commission has to decide whether to appeal the judgment to the Court of Justice of the European Union. Moreover, the Commission will have to decide whether to start examining individual excess profit rulings in light of the General Court's finding. If the Commission files an appeal against the General Court's judgment, it may well await the outcome of that appeal

(which may take another two-three years) before potentially looking into individual excess profit rulings. If there is an appeal by the Commission, the Belgian tax authorities are unlikely to repay any of the recovered aid before the Court of Justice rules on the appeal.

Where the Commission in other State aid cases typically challenged individual rulings, it only adopted such a general approach in the Belgian excess profit case. The General Court now gives a clear message that the Commission has gone too far by claiming that as a general rule the excess profit exemption is illegal State aid. Where other countries have been gradually changing their tax legislation to align with the Organisation for Economic Co-operation and Development Base Erosion and Profit Shifting recommendation and EU Directives, Belgium has been forced to claim back taxes from a large group of taxpayers. This judgment will likely present a call for more cooperation and forward looking policy change.

Endnotes

1. Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667, <https://publications.europa.eu/en/publication-detail/-/publication/14f06582-8439-11e6-b076-01aa75ed71a1/language-en>.
2. See EY Global Tax Alert, [*EU Commission finds Belgium granted illegal state aid and orders recovery*](#), dated 13 January 2016.
3. EU Commission, press release, [IP/16/42](#).
4. Judgment of the General Court, 14 February 2019, <http://curia.europa.eu/juris/document/document.jsf?sessionId=57177CDBB93A04857674E974E707792A?text=&docid=210761&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13546940>.

For additional information with respect to this Alert, please contact the following:

EY Brussels

- ▶ Steven Claes steven.claes@be.ey.com
- ▶ Peter Moreau peter.moreau@be.ey.com
- ▶ Arne Smeets arne.smeets@be.ey.com

EY Antwerp

- ▶ Werner Huygen werner.huygen@be.ey.com

Ernst & Young LLP, Belgian Tax Desk, New York

- ▶ Jean-Charles van Heurck jean-charles.van.heurck1@ey.com

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