



Euro Tax Flash from KPMG's EU Tax Centre



[Background](#)

[Preliminary Findings](#)

[Next steps](#)

[EU Tax Centre comment](#)

European Commission investigation into individual Belgian “excess profit” tax rulings

Fiscal State Aid – Tax Rulings – Belgium – Excess profit – Selectivity

On September 16, 2019, the European Commission launched an investigation into whether the “excess profit” tax rulings granted to 39 companies by Belgium constitute State aid within the meaning of EU law (See the European Commission’s [press release](#)). This investigation is a response to the General Court’s decision in case T-131/16 annulling the Commission’s initial decision that these rulings formed part of a Belgian aid scheme that was incompatible with EU law (see [Euro Tax Flash 395](#)).

Background

Under EU law (Article 108 of the Treaty on the Functioning of the EU), the European Commission is obliged to review whether Member States give selected companies preferential treatment that is incompatible with applicable State aid rules. If the Commission finds that aid is incompatible with EU law, it is further compelled to require the Member States concerned to abolish or alter such aid within a prescribed time period, as well as demand that the latter recover the aid from the taxpayers that benefited from it. Broadly speaking, aid is incompatible with EU law if it distorts competition by, for example, favoring certain undertakings and thus affecting trade between Member States.

In February 2015, the Commission launched an investigation into alleged state aid granted by Belgium to resident entities that are part of a multinational group, by way of tax rulings allowing unilateral downward adjustments of their tax base. On January 11, 2016, the Commission concluded that the excess profit tax ruling system was a tax scheme which constituted State aid. The first observation made by the Commission was that the excess profit tax rulings system constituted an aid scheme. This was an important observation as it implied that all

rulings granted under this regime would be affected if the Commission's decision was upheld. The Commission further argued that the exemption provided for under the excess profit ruling system did not apply to all undertakings subject to Belgium corporate income tax equally and expressed concern that Belgium did not apply the arm's length principle properly. The Commission also pointed to the fact that taxpayers apparently had to make substantial investments or create employment in Belgium in order to be granted a Belgian excess profit tax ruling. As a consequence, the measure should be considered as a selective advantage for which there is no justification.

On February 14, 2019 the General Court of the CJEU rendered judgment on the Belgium v. Commission case (T-131/16) and concluded that the Commission had failed to demonstrate the existence of an aid scheme and hence, the Commission's decision of January 11, 2016 was annulled in its entirety.

Preliminary Findings

Following the General Court's decision, the European Commission opened 39 separate in-depth investigations on September 16, 2019, to assess whether the rulings granted by Belgium between 2005 and 2014 under the Belgian excess profit ruling system were in breach of EU State aid rules.

In the press release, the European Commission underlined the General Court's findings that it is within the Commission's competence to review whether tax measures reducing a corporate taxpayer's income tax base give rise to a selective advantage, and that the "excess profit" tax exemptions granted by Belgium did not appear to pursue the objective of avoiding double taxation. However, according to the General Court, the Commission wrongly concluded that the regime constituted an aid scheme. As a consequence, the Commission decided to assess each ruling individually, while also appealing the General Court judgment before the Court of Justice of the European Union (C-337/19).

The Commission's preliminary view is that by allowing unilateral downward adjustments of the beneficiaries' tax base, the tax rulings under investigation selectively misapplied the Belgian income tax code. The Commission is also concerned that the Belgian ruling practice may have discriminated against Belgian companies, which did not, or could not, receive a similar ruling.

Next steps

As part of the standard procedure in State aid investigations, the European Commission will publish a non-confidential version of each preliminary decision in the Official Journal. The opening of an in-depth investigation gives interested third parties and the Member States concerned one month from the publication date to submit comments. It does not prejudge the outcome of the investigation. There is no legal deadline for completing an in-depth investigation and its actual duration depends on many factors, including the complexity of the case, the information provided and the level of cooperation from the Member State concerned. The European Commission will reach a final decision at the end of the formal investigation.

EU Tax Centre comment

The launching of these individual investigations could be expected in light of the General Court's decision of February, which did not address the existence of an aid for individual rulings and if so whether aid was unlawful. It is however interesting to note that the Commission is pursuing all available legal avenues in this file, launching both new investigations into individual rulings and appealing the Court's decision before the Court of Justice of the European Union. It remains to be seen how the latter will rule and whether all proceedings will evolve in parallel.

Should you have any queries, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.



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