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CJEU decision on the Belgian excess profit ruling system

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On September 16, 2021 the Court of Justice of the European Union ("CJEU" or "Court") gave its [decision](#) in the Belgian "excess profit" tax ruling system case (C-337/19 P).

The CJEU ruled that the Commission was correct to conclude that the Belgian tax rulings represent an aid scheme and the CJEU therefore set aside the judgement of the General Court of 14 February 2019 which annulled the Commission decision. The Court also noted that, given the state of the proceedings, it is now up to the General Court to decide if the excess profit exemptions represent unlawful State aid, and if yes, if the recovery of the aid infringes the principles of legality and protection of legitimate expectations. Consequently, the Court ruled that the case should be referred back to the General Court.

[Background](#)

Belgian tax legislation provided for the possibility for a Belgian company that is a member of a multinational group to make unilateral downward adjustments to its taxable base for "excess profits". A ruling had to be requested prior to making such a downward adjustment. The key issue was whether the Belgian ruling practice on allowing such a downward adjustment constituted an aid scheme.

In February 2015, the Commission launched an investigation into alleged state aid granted by way of this ruling practice. On January 11, 2016, the Commission [concluded](#) that the excess profit tax ruling system was a tax scheme which constituted State aid. The Commission also

noted that Belgium is required to recover the aid granted from the beneficiaries of the tax rulings.

Several beneficiaries of the disputed system appealed the Commission's decision. The General Court joined the appeals T-131/16 by the Belgian state and T-263/16 by one of the beneficiaries of the excess profit rulings. On February 14, 2019, the General Court of the CJEU ruled that the Commission had failed to demonstrate the existence of an aid scheme and hence, the Commission's decision was annulled in its entirety – see [ETF 395](#).

The European Commission appealed the General Court's judgment to the CJEU, and in parallel opened 39 separate in-depth investigations to assess whether the (individual) "excess profit rulings" granted by Belgium between 2005 and 2014 were in breach of EU State aid rules – see [ETF 411](#).

On December 3, 2020, Advocate General (AG) Kokott of the CJEU rendered her opinion in the case and concluded that the Commission was correct to consider that the Belgian practice constitutes an aid scheme. The AG noted that the focus of the appeal at hand is not to assess if the Belgian tax rulings represent unlawful State aid. Instead, the subject of the case is whether, and under what conditions, the Commission could challenge a large number of tax rulings "as a package" as being an aid scheme. The AG observed that the General Court did not rule out that a consistent administrative practice (such as granting of tax rulings) could represent an aid scheme. Instead, the General Court only found that the Commission had not demonstrated the existence of a systematic approach indicating the *de facto* existence of a State aid scheme. However, contrary to the General Court's findings, the AG took the view that the Commission sufficiently demonstrated in its decision that the sample used for the purposes of proving a consistent administrative practice is representative overall.

The AG consequently proposed that the case is referred back to the General Court for an assessment as to whether the disputed system represents State aid, and whether its recovery infringes the principles of legality and of the protection of legitimate expectations.

The CJEU decision

In its September 16, 2021, decision the CJEU first recalled the conditions to be fulfilled cumulatively in order for a national measure to be classified as an aid scheme, i.e.:

- the aid is granted to companies individually on the basis of an act,
- no further implementing measure is required for that particular aid to be granted, and
- the beneficiaries of the individual aid have to be defined in a "general and abstract manner".

As regards the first condition, the CJEU clarified the concept of an "act", by confirming that a consistent administrative practice, applied in a "systematic approach", falls under this concept. The CJEU further noted that, as part of their decision process, the Commission took into consideration both the relevant provision from the Belgian tax code, as well the systematic approach of the tax authorities when applying that provision via the tax rulings at hand. The CJEU concluded that the General Court misapplied the term "act" by limiting their analysis to the legal provision in the Belgian tax code, which led to an incorrect premise that the legal provision needed further implementing measures (by means of rulings).

In terms of the two remaining conditions, the CJEU noted that they are intrinsically linked to the concept of an “act” on which the aid scheme is based. In the CJEU’s view, by failing to take into account that the practice of the Belgian tax authorities of granting tax rulings represents an “act”, the General Court made errors of law which also vitiated their assessment of the second and the third condition.

Moreover, the CJEU agreed with the AG’s opinion that the sample rulings examined by the Commission (i.e. 22 selected in a weighted manner from a total of 66) is representative overall for proving the existence of a “systematic approach” taken by the Belgian tax authorities.

In view of these considerations, the CJEU set aside the General Court’s decision and referred back the case so the General Court could rule on the pending aspects of the case. Specifically, the General Court would have to rule if the excess profit exemption rulings represent State aid, particularly on the plea arguing the scheme’s lack of an advantage and lack of selectivity. Additionally, the General Court would have to rule if the recovery of the aid infringes the principles of legality and of the protection of legitimate expectations.

EU Tax Centre Comment

The CJEU’s decision represents a key turning point, as it upholds the Commissions’ approach of investigating the rulings granted under this regime as a whole, rather than analyzing them individually. Nevertheless, it provides no insight into whether the aid scheme is incompatible with EU law. It also remains to be seen if, based on the current ruling, the Commission will put on hold or dismiss the individual in-depth investigations opened in 2019.

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Raluca Enache

Director, KPMG’s EU Tax Centre

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KPMG's EU Tax Centre, Laan van Langerhuize 9, 1186 DS Amstelveen, Netherlands

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