General Court decision on the Belgian excess profit ruling system

General Court – State Aid – Belgium – Excess profit ruling system – Selectivity – Advantage – Adverse effect on competition – Recovery

On September 20, 2023, the General Court of the Court of Justice of the European Union (General Court or the Court) gave its decision on the Belgian "excess profit" tax ruling system case (T-131/16 RENV).

The General Court ruled that the European Commission (the Commission or the EC) was correct to conclude that the Belgian tax rulings represented unlawful State aid. The General Court also dismissed 29 separate appeals brought by the beneficiaries of the excess profit rulings against the EC's State aid decision.

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 unlawful 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 represented an aid scheme within the meaning of the State aid rules. Secondly, the Commission held that the aid scheme offered a selective advantage to multinationals benefiting from the tax rulings. Therefore, the Commission concluded that the excess profits system constituted unlawful State aid. The Commission also noted that Belgium was 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 EuroTaxFlash 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 EuroTaxFlash 411.

On September 16, 2021, the CJEU ruled that the Commission was correct to conclude that the Belgian tax rulings represent an aid scheme and therefore set aside the judgment of the General Court. The CJEU did not, however, express any view on the compatibility of the aid scheme with EU law. Instead, the CJEU noted that, given the state of the proceedings, it was up to the General Court to decide if the excess profit rulings represented unlawful Stat aid, and if yes, if the recovery of the aid infringed the principles of legality and protection of legitimate expectations. Consequently, the CJEU referred the case back to the General Court. For more details please refer to EuroTaxFlash 455.

The General Court decision

In its decision from September 20, 2023, the General Court ruled on the following pleas in law:

- the classification of the excess profit exemption as State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (TFEU);
- the identification of the beneficiaries of the alleged aid;
- the breach of the principles of legality and of the protection of legitimate expectations, in that recovery of the alleged aid was ordered erroneously.

The qualification of the excess profit rulings as unlawful State aid

The General Court started by analyzing whether the rulings at hand represented unlawful State aid[1].

The financing of the scheme under dispute through State resources

First, the Court rejected the plaintiff's claim that the excess profits under dispute were not within Belgium's tax jurisdiction, and that consequently Belgium was not entitled to collect the related corporate income tax. The General Court recalled that, a measure by which the public authorities grant certain undertakings favorable tax treatment which, although not involving the transfer of State resources, places the recipients in a more favorable financial position than other taxpayers, amounted to State aid. In this respect, the Court noted that the scheme under dispute did involve tax exemptions, which led to a loss of tax revenue for Belgium. Moreover, under Belgian tax rules, if the beneficiaries had not made any request, the profit would have been taxed in Belgium. Therefore, in the Court's view, the excess profits also fell under Belgium's tax jurisdiction.

[1] Article 107(1) TFEU has been interpreted by the Court of Justice of the European Union (CJEU) as requiring a number of separate and cumulative criteria to be fulfilled: i) there must be an intervention by the state using state resources; ii) an economic advantage must be granted to one or more undertakings; iii) that economic advantage must be selective in that it favours certain undertakings; iv) the selective economic advantage must (potentially) threaten to distort competition; and v) there must be an effect on trade between Member States

The existence of a selective advantage granted by the scheme under dispute

The General Court continued by analyzing the plaintiffs' plea challenging the reference system[2] identified by the Commission, as well as the plea arguing the scheme's lack of an advantage and lack of selectivity.

In the Court's view, the Commission was correct in determining that the reference system should be the ordinary Belgian corporate income tax system, which aimed to tax the profits of all Belgian companies. As such, the General Court rejected the plaintiff's plea that the reference system should have included the excess profit exemption scheme. On this basis, the Court acknowledged that the excess profit exemption scheme was based on a domestic Belgian tax provision that allowed adjustments to taxable company profits. However, in the Court's view, that particular provision only allowed for correlative adjustments in the case of cross-border relationships between associated companies. In other words, adjustments could only be made where the conditions agreed between related parties are not considered to be at arm's length. Moreover, downward adjustments were allowed only when the profit was already included in other company's taxable result. The Court continued by noting that the excess profit exemption scheme was not focused on correlative adjustments (i.e. no such conditions were imposed for downward profit adjustments). Instead, the downward adjustments, that were endorsed by the tax rulings, based the exemption on a hypothetical average profit, derived from a comparison with the profit of comparable standalone companies. In light of these arguments, the Court took the view that the excess profit exemption scheme applied by the Belgian tax authorities was not an inherent part of the reference system (i.e. it was not provided for by the Belgian corporate income tax system).

The General Court also found that the Commission was correct to state that the scheme under dispute was selective in that it differentiated between companies that were in a comparable factual and legal situation. Furthermore, the Court agreed with the EC's observations that the scheme at issue was selective in so far as it was not open to companies that chose not to invest, centralize activities, or create employment in Belgium. Additionally, only entities within sufficiently large multinational groups had an incentive to apply for individual tax rulings. In the Court's view, it was primarily within such groups that significant profits, justifying the ruling request, could be generated. In light of these factors, the Court ruled that the Commission correctly concluded that the excess profit exemption scheme deviated from the ordinary Belgian corporate income tax system and was not available to all entities in similar legal and factual circumstances.

The Court also rejected the justification brought forward by Belgium, which had argued that the purpose of the scheme under dispute was to prevent either real or potential double taxation.

Distortion of competition

The Court recalled that, based on settled case-law, any aid granted to a company undertaking activities in the internal market is liable to cause distortion of competition and affect trade between Member States. The Court further noted that the excess profit exemption scheme had the potential to influence the actions of Belgian entities and their related parties. The General Court explained that this influence could extend to investment choices, business location, employment creation, and intra-group transactions.

In light of the above, the General Court concluded that the Commission did not make an error of law when concluding that the tax rulings under dispute represented unlawful State aid. Namely, the Court confirmed that the scheme was financed through State resources, that the reference system selected by the EC was the correct one and that the scheme at issue granted a selective advantage to the beneficiaries. Additionally, in the Court's

[2] It is settled CJEU case-law that the analysis of whether a national measure constitutes unlawful State aid requires several steps, including for the EC to demonstrate that the measure conferred a selective advantage on the beneficiary. For this purpose, the Commission is tasked with (i) identifying the reference system, i.e. the ordinary tax system applicable in that Member State in a factually comparable situation (by reference to the objectives of that regime), and (ii) demonstrating that the disputed tax measure – in this case the tax rulings – is a derogation from that 'normal' system.

view, the scheme at hand resulted in a distortion of competition and was not justified by the nature or general scheme of the Belgian tax system.

Identification of the beneficiaries of the unlawful State aid

The Court also rejected the plaintiff's plea that the Commission incorrectly included both the Belgian entities with individual rulings and the multinational groups they were part of as beneficiaries. In this respect, the Court acknowledged that – in State aid matters, separate legal entities could be viewed as forming one economic unit, especially if they were connected through control relationships.

In that regard, the Court determined that the Commission accurately identified factors supporting its conclusion that there were indications of control links within the multinational corporate groups to which the Belgian entities with individual rulings belonged.

Recovery of the aid granted under the tax rulings under dispute

The Court continued by rejecting the plaintiff's plea that the Commission had failed to provide adequate reasons for identifying the beneficiaries and determining the recovery amounts. The Court noted that in the area of State aid the Commission is not required to analyze individual aid granted to each beneficiary under the unlawful aid scheme. However, the Commission's decision should be sufficiently justified to allow national authorities to implement it. Coming back to the facts of the case, the Court held that, in their view, the Commission properly identified the beneficiaries of the scheme and sufficiently explained the calculation method for recovering the aid.

ETC Comment

The findings of the General Court are largely in line with settled State aid case-law. In terms of next steps, the plaintiff has the option to appeal the decision before the CJEU. It also remains to be seen if, based on the current court decision, the Commission will put on hold or dismiss the individual in-depth investigations opened in 2019.

The current court decision is the latest in a series of cases involving the Commission' inquiries into the compatibility of the tax ruling practices of Member States with EU law. Whilst the European Commission investigations concluded that State aid was present in a majority of key investigations, the General Court has generally ruled in favor of the taxpayer. Several landmark cases are currently pending before the CJEU, namely, the joined cases C-451/21 P and C-454/21 P – see EuroTaxFlash 511 and C-457/21 P - see EuroTaxFlash 515.

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