

European Court of Justice decides the Belgian excess profits regime constitutes an aid scheme and refers the case back to the General Court

The decision relates to the appeal lodged by the European Commission (“Commission”) against the decision of the General Court of the European Union (“General Court”) of 14 February 2019 (cases [T-131/16](#) and [T – 263/16](#)) in which the General Court set aside the [final State aid decision](#) of the Commission of 11 January 2016 finding that the Commission had erroneously classified the Belgian excess profit ruling system as ‘an aid scheme’ (click [here](#) to have access to our previous newsalert).

The current dispute between the Belgian government, the impacted Belgian companies and the Commission has been ongoing for many years. The case relates to a provision under Belgian tax law that exempted certain income, which is considered as excess profits, i.e. profits that are - on an arm’s length basis - not considered to relate to the Belgian activities. The Belgian ruling office used to apply this provision on a case-by-case basis and deliver individual rulings confirming its correct application to the case at hand if and where appropriate (the “excess profit rulings”). In its final decision, the Commission took the view that these rulings constitute unlawful State aid as the excess profit provision provided advantages that are selective (i.e. not available to all comparable companies). Furthermore, the Commission considered that the rulings should not be assessed on a case-by-case basis to demonstrate in each case the existence of an individual aid but rather the consistent administrative practice by the Belgian tax authorities should be considered an aid scheme.

The General Court annulled the Commission’s decision, finding that the Commission made methodological errors by considering that the excess profit rulings are an aid scheme. In other words, according to the General Court, the Commission should have reviewed the specifics of each ruling to determine on a case-by-case basis the existence of an individual aid.

On 16 September 2021, the ECJ annulled the judgement of the General Court and, by doing so, upheld the final decision of the Commission regarding the qualification of the Belgian excess profit provision and consistent ruling practices as an aid scheme.

Takeaway

This decision represents the start of another stage in a legal procedural journey. The ECJ looked into the methodological aspects of the General Court’s judgement concerning the question of whether there was an aid scheme or individual aid. Having concluded that the arrangements were properly regarded as an aid scheme, the ECJ has referred the case back to the General Court to address the substantive matters in the case such as the existence of a selective advantage and the identification of the beneficiaries of the alleged aid. The final decision as to whether the Belgian excess profit rulings actually constitute unlawful State aid may still take a number of years.

Let's talk

For a deeper discussion, please contact:

Pieter Deré
PwC Belgium
+32 498 48 95 11
pieter.dere@pwc.com

Jean-Philippe Van West
PwC Belgium
+32 479 53 11 86
Jean-philippe.van.west@pwc.com

Stefaan de Baets
PwC Belgium
+ 32 491 62 36 16
stefaan.de.baets@pwc.com

Jonathan Hare
PwC United Kingdom
++44 20 7804 6772
jonathan.hare@pwc.com

Emmanuel Raingeard
PwC France
+33 155 574 014
emmanuel.raingeard@pwcavocats.com

Claudio Valz
PwC Italy
+39 347 062 2319
claudio.valz@pwc.com

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