



## PwC's EU Direct Tax Group

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# EU Direct Tax Newsalert

## EU Commission opens formal investigation into 39 individual excess profit exemption related tax rulings in Belgium

On 16 September 2019, the European Commission (EC) published a press release announcing the opening of a formal investigation into 39 individual tax rulings granted by the Belgian tax authorities to multinational companies in relation to the "excess profit" tax exemption.

### Background

The press release follows a chain of events that started with the EC opening an investigation in February 2015 into the Belgian "excess profit" tax provision, applicable since 2005.

The investigation concerned the Belgian tax provision, which was laid down in article 185, section 2, b) BITC, which codified the "arm's length" principle. This provision considers (cross-border) intra-group relations for assessing corporate income tax on an arm's length basis. Based on this article: (i) the taxable basis of a Belgian company can be increased to the extent it is lower than the at arm's length profit, (ii) the taxable basis can be reduced to the extent it exceeds the arm's length profit.

In January 2016, the EC concluded that the Belgian "excess profit" provision constituted a State aid scheme and amounted to unlawful State aid and required, as a result, the immediate recovery of the aid granted to the companies that benefitted from the scheme.

The Belgian State, along with many of the companies impacted by the decision, filed an appeal with the General Court of the European Union (GC). The GC annulled the EC's decision in February 2019 stating that the "excess profit" provision does not constitute a State aid scheme and that the EC's decision erred on this point. This judgment of the GC was appealed before the European Court of Justice (ECJ).

### The current formal investigation

Next to these proceedings, the EC has also decided to open individual investigations into the tax rulings granted on the basis of the "excess profit" provision. The tax rulings concerned are in fact also part of the rulings that were also within the scope of the 2016 State aid decision.

The EC takes the view that these rulings provided selective tax benefits, even if they would not pertain to a tax scheme.

### Next steps

- This step in the procedure relates to the opening of a formal investigation. The EC has thus not yet drawn a final conclusion whether also the individual rulings constitute unlawful State aid.
- At the end of the formal investigation, the EC will adopt its final decision. There are three possible outcomes: a positive decision, a conditional decision or a negative decision.
- In the event of a negative decision (i.e. if one or more of the individual rulings would constitute unlawful State aid), the Belgian Government, together with the concerned parties, will have the possibility to appeal the decision before the GC.

