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General Court annuls the decision of the EU Commission on the Belgian excess profit regime

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Since June 2013, the EU Commission has been investigating the tax ruling practices of several EU Member States with a view to detect potential State aid concerns. Apart from the investigation in the McDonalds case, the EU Commission consistently concluded that illegal State aid was present. In all these cases, the EU Member States (and many of the taxpayers) concerned appealed against the decisions of the EU Commission.

On 14 February 2019, the General Court of the Court of Justice of the European Union ("CJEU") decided that the Belgian "excess profit regime" (case T-131/16) is not a State aid scheme. This judgment is the first judgment in the series of pending tax aid appeals against the EU Commission's recovery decisions. According to the General Court, the EU Commission had failed to demonstrate the existence of an aid scheme. Therefore, the decision of the EU Commission was annulled in its entirety.

Belgium's excess profit regime

Since 2005, Belgian tax law has provided for the possibility of advance rulings allowing a company that is a member of a multinational group to perform, in accordance with the arm's length principle, unilateral downward adjustments to its tax base for "excess profits" generated because of the taxpayer's membership of a group.

This excess profit was considered to be the profit that exceeds the profit which a comparable standalone entity operating in similar circumstances would have generated. Thus, the excess profit resulted from synergies or economies of scale arising from membership of a corporate group that could not be attributed, from a transfer pricing perspective, to the Belgian company.

In 2016, the EU Commission found that the excess profit exemptions granted, by means of advance rulings, constituted a State aid scheme that was incompatible with the internal market. Belgium and several beneficiaries of the exemption appealed against the EU Commission's decision.

Decision of the General Court

According to the General Court, the EU Commission erroneously considered that the Belgian excess profit exemption regime constituted a State aid scheme. In this regard, the General Court made the following observations:

• **The essential elements of the aid scheme at issue:** If individual aid awards are made, the essential elements of the aid scheme in question must necessarily emerge from the provisions identified as the basis for the scheme. However, the implementation of those provisions and therefore the grant of the alleged aid necessarily depended on the adoption of further implementing measures (including a case-by-case analysis by the Belgian tax authorities) which precludes the existence of an aid scheme.

• **The margin of discretion of the Belgian tax authorities:** Where the national authorities apply the provisions that allegedly constitute the prohibited State aid scheme, the national authorities cannot have any margin of discretion as regards the determination of the essential elements of the aid in question and whether it should be awarded. The power of the authorities should be limited to the technical application of the aid scheme, if necessary after verifying that the applicants meet the pre-conditions for benefiting from that scheme. However, the Belgian tax authorities examined each

request on a case-by-case basis and had a margin of discretion that went well beyond a mere technical application of the provisions identified. This also precludes the existence of an aid scheme.

• **Definition of the beneficiaries:** For State aid to exist, the beneficiaries of the aid scheme must be defined in a general and abstract manner by the acts on which the EU Commission found the scheme was based. At first sight, the excess profit regime applies to Belgian companies that are part of a multinational group (as regards their cross-border relationships with other group companies). However, the beneficiaries of the scheme, as referred to in the contested decision, cannot be identified on the sole basis of that provision, without further implementing measures.

• **The existence of a systematic approach:** The General Court stated that the EU Commission did not prove that a systematic approach (followed in all of the advance rulings concerned) was taken by the Belgian tax authorities and that the alleged scheme granted the beneficiaries a selective advantage. Notably, the advance rulings examined by the EU Commission were issued in different situations, such as the merger or restructuring of production activities, the construction of new facilities, and the increase of the production capacity of existing facilities or the internalization of supply activities.

Conclusion and outlook

With the current State aid investigations, the EU Commission has created a lack of predictability in tax matters, in particular since these investigations may have a time horizon of up to 10 years in the past.

In addition, the more recent decisions of the EU Commission seem to depart from established CJEU case law and EU State aid law. Although the concepts of “advantage” and “selectivity” are distinct requirements under State aid law, the EU Commission appears to have collapsed both concepts, as it merely examines whether the measures under investigation entailed a “selective advantage” rather than analyzing both requirements separately. Furthermore, in previous State aid investigations, the EU Commission never challenged how a Member State applied its own transfer pricing rules in granting a specific advance pricing agreement.

In all the cases in which the EU Commission decided that illegal State aid was present, the EU Member States concerned (side by side with the taxpayers involved) appealed against the decision before the CJEU. It is now for the CJEU to decide whether the EU Commission’s new way of applying the State aid concept in the field of taxation is consistent with EU Law. In the first of these cases, the General Court decided that the EU Commission erroneously considered that the excess profit regime constituted a State aid scheme.

Given that the Court did not address the EU Commission’s new theory of selectivity relating to tax rulings, this judgement has unfortunately limited predictive value for the other pending State aid cases which are not about aid schemes in general but about aid granted to individual taxpayers. The EU Commission may appeal against the decision within two months of the notification of the decision by the General Court. However, even if the EU Commission accepts the judgement, the EU Commission may still continue investigating individual cases where the excess profit regime has been applied. Therefore, the legal uncertainty surrounding the EU Commission’s State aid investigations will continue to exist for quite a while.