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EU Commission announces a final decision on its state aid investigation into Belgian excess profit tax rulings

State Aid – Excess profit tax rulings - Belgium

On January 11, 2016 the European Commission announced its final decision (see the [European Commission's Press Release](#)) on the state aid investigations into the Belgian so-called "excess profit" tax rulings system. The decision confirms the Commission's preliminary view that the tax system in question constitutes state aid, incompatible with the internal market. As a result, Belgium has to recover the aid from the beneficiaries. It is now open to both Belgium and the companies concerned to appeal the decisions before the General Court (and possibly later the Court of Justice of the European Union (CJEU)).

Background

In February 2015, the Commission opened an in-depth investigation into alleged state aid granted by Belgium to resident entities that are part of a multinational group, by way of tax rulings allowing unilateral downwards adjustments of their tax base.

Today's decision follows similar investigations into transfer pricing rulings granted by the Netherlands and Luxembourg to Starbucks and Fiat, respectively (see [ETF 262](#)). Also in line with these investigations, the Commission is currently reviewing tax rulings obtained by Amazon, Apple and McDonald's on their compatibility with EU state aid rules.

The launch, by the Commission of multiple investigations into the Member States' tax rulings (primarily APAs) is part of the EU initiatives in the areas of tax transparency and tackling harmful tax competition between Member States and tax avoidance.

Under EU law, the Commission is obliged to review state aid granted by EU Member States. If it finds that the aid is not compatible with EU law, it is further compelled to require the Member States concerned to abolish or alter such aid within a prescribed time period, as well as force the latter to recover the aid from the taxpayers that have benefited. Broadly speaking, aid is incompatible with EU law if it distorts competition by, for example, favoring certain undertakings and thus affecting trade between Member States. However, certain aid is specifically considered compatible with EU law, such as certain regional aid granted to promote economic development.

The Decision

In its earlier decision to open a formal investigation ([C\(2015\) 563](#)) and in today's press release, the Commission first observes that the "excess profit" tax rulings constitute a scheme. This is an important element as this implies that all rulings granted under this regime are affected.

The Commission then broadly defines the Belgian "excess profit" tax rulings as allowing multinational companies to reduce their tax base for alleged "excess profit" on the basis of the comparison between the actual recorded profit of a multinational and the hypothetical average profit a stand-alone company in a comparable situation would have made.

The Commission then argues that the exemption provided for under this "excess profit" ruling system does not apply to all undertakings subject to Belgium corporate income tax equally and that Belgium does not apply the arm's length principle properly. As a consequence, the measure is considered as a selective advantage for which there is no justification.

On this basis, the Commission estimates that at least 35 multinationals have benefited from this aid and that the amount to be recovered could reach € 700 million.

Next Steps

This decision forms part of the standard state aid investigation procedure. The non-confidential parts of the decision are expected to be published in the next few months. It is now open to both Belgium and the companies in question to appeal the decisions before the General Court (and possibly later the CJEU).

EU Tax Centre Comment

This decision has to be seen in the light of the comprehensive state aid investigation process the Commission has intensified in December 2014 and is another indication that they are continuing to challenge the transfer pricing tax practices of certain EU Member States.

At this point in time it is difficult to draw conclusions since the text of the decision is not yet public. It should be noted that the decision can

be appealed by Belgium and the companies in question and only becomes final either if not appealed or if confirmed by the CJEU in the case of an appeal.

Should you require further assistance in this matter, please contact the EU Tax Centre or, as appropriate, your local KPMG tax advisor.

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