Article for website dated 21 March 2019 (JB)

The General Court of the European Union rules that Belgian Excess Profit Ruling Scheme is not prohibited state aid

On 14 February 2019, the Court of Justice of the European Union took a decision on the Belgian scheme of Excess Profit Rulings Scheme (see: http://curia.europa.eu/juris/liste.jsf?num=T-131/16). The court annulled the decision of the European Commission that the scheme was considered prohibited state aid (Decision 2016/1699 of 11 January 2016).

1 What are Excess Profit Rulings?

The Belgian Excess Profit Ruling Scheme was based on Article 185, §2, b of the Belgian Income Tax Code and provided for a downward profit adjustment for Belgian companies (and Belgian permanent establishments of foreign resident companies) of a multinational group. On the basis of such a ruling, they were able to make a downward adjustment of their *excess profit* (defined as the difference between the actual profit of the enterprise and the hypothetical average profit of a comparable stand-alone enterprise). This excess profit was regarded as coming from group synergies and thus, in accordance with the Belgian Office of Preliminary Rulings (better known as the Ruling Commission), not subject to Belgian corporate income tax. This was to avoid international double taxation: "*if a company is taxable on profit on which another company is also taxable, the tax situation of the first company is revised appropriately*" (Article 185, §2, b of the Belgian Income Tax Code). Application of the scheme depended on obtaining a preliminary ruling in this regard.

Many enterprises have used this scheme since 2004. After all, a favourable ruling reduced their Belgian taxable base and, in principle, provided legal certainty for 5 years.

2 Prohibited state aid according to the European Commission

The European Commission decided on 11 January 2016 that the Belgian Excess Profit Ruling Scheme should be qualified as (prohibited) state aid. After all, it concerned:

- the conferring of an advantage, i.e. reduction of the tax base by the part of the profit that can be allocated to synergy effects. Notwithstanding the fact that Article 185, §2, b) Belgian Income Tax Code made the downward adjustment dependent on the inclusion of this excess profit by another company, obtaining a positive ruling was deemed possible regardless of whether there was proof of effective taxation of this profit elsewhere; that

- was financed through state resources, i.e. the reduction in Belgian corporate tax; whereby

- competition and trade between Member States was negatively affected (Article 185, §2 of the Belgian Income Tax Code could only be applied by companies that were part of a multinational group of affiliated companies); and

- could be qualified as selective.

The Belgian State was required to abolish this tax regime and to recover the already granted state aid from the beneficiaries.

3 The General Court of the European Union annuls the European Commission decision

Together with a large number of affected beneficiaries, the Belgian State refused to accept the European Commission's decision and appealed to the General Court of the European Union.

The long-awaited verdict came on 14 February 2019. The court stated that the Scheme as such (i.e. Article 185, §2, b) Belgian Income Tax Code, the Explanatory Memorandum, the Circular of 4 July 2006 and the minister's replies to parliamentary questions) by no means constituted a set of state aid rules. Thus, for example, the Ruling Commission was able to impose additional conditions, such as job creation or additional investments in Belgium. The Ruling Commission thus had discretionary powers. Moreover, it was impossible on the basis of these (legal) provisions to determine the beneficiaries of the Excess Profit Rulings in an abstract way.

These findings prevented the Scheme, as such, from being regarded as prohibited state aid. The court therefore annulled the decision of the European Commission.

4 Conclusion

The General Court of the European Union annulled the Commission's decision that the Excess Profit Ruling Scheme was considered incompatible and illegal aid. In this, the court mainly criticised the approach taken by the European Commission. After all, it should not have examined the Excess Profit Ruling Scheme *in globo*, but rather as a series of individual measures, whereby each Excess Profit Ruling had to be subjected to an individual investigation. The judgement is a reason for optimism for Belgian enterprises that have since repaid the disputed amounts. Nevertheless, some caution is in order here. After all, the crucial question of whether any (previously granted)

Excess Profit Ruling can be regarded as state aid (on an individual basis) remains unanswered.

However, Article 185, §2, b) Belgian Income Tax Code has been amended. A downward profit adjustment for Belgian companies (and Belgian permanent establishments of foreign resident companies) is limited to those cases in which the foreign affiliated company is established in a state with which Belgium has concluded a double taxation treaty, and in which the profit involved "*has already been taxed*" with respect to this foreign company. In addition, application of this Article pursuant to a preliminary ruling was dropped.

Justine Bouckaert