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The European Commission suffers its first defeat over its recent fiscal State aid decisions

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In its first judgment regarding the European Commission's recent fiscal State aid decisions, the EU General Court (***GC***) last week annulled the Commission's decision of 11 January 2016 on Belgium's so-called "excess profit rulings".

The exemption for "excess" profits

The case concerns a specific provision in Belgian tax law, which provides for the possibility to reduce the profits of Belgian entities, which form part of multinational corporate groups. According to Belgium, such reductions are justified as a means of avoiding (potential) double taxation and aim to exclude the profits of a multinational group recorded in Belgium that were realised as a result of synergies and economies of scale. On the basis of advance rulings issued by the Belgian tax authorities, such "excess" profits were exempted from corporate income tax in Belgium.

In 2016, the Commission found that these excess profit exemptions granted by Belgium constituted an unlawful State aid scheme, as they provided multinational groups with an unfair advantage vis-à-vis standalone companies. In its decision, the Commission ordered Belgium to recover approx. 700 million euros of alleged aid from a group of ca. 35 beneficiaries, amongst which were groups such as BP, BASF, Belgacom and Magnetrol International. Belgium and a number of alleged beneficiaries appealed the decision with the GC.

The General Court's judgment (Cases T?131/16 and T?263/16)

In its first plea in law, Belgium argued that the Commission exceeded its powers by using the State aid rules of EU law in order to unilaterally determine matters falling within the exclusive tax jurisdiction of a Member State. It should be recalled that, unlike indirect taxes such as VAT (which have been harmonised at EU level), Member States have retained national sovereignty in direct tax matters such as corporate income tax. The GC, however, held that although it is true that, in the absence of EU rules governing direct taxation, it falls within the competence of the Member States to designate tax bases, that does not mean that every tax measure which affects the tax base falls outside the scope of the State aid rules. Since the Commission is competent to ensure compliance with the State aid rules, it cannot be accused of having exceeded its powers by examining the measures comprising the alleged scheme at issue in order to determine whether they constituted State aid. As such, Belgium's first plea was rejected.

The GC, however, upheld the second plea in law, which alleged that the Commission incorrectly classified Belgium's approach to granting the exemptions as an "aid scheme". Under the relevant legislation, it is only possible to classify a measure as an "aid scheme" if, essentially, it concerns generally applicable legislation that grants individual aid to beneficiaries without **further implementing measures**. According to the GC, Belgium's excess profit rulings did not constitute an "aid scheme", as (inter alia) the Belgian tax authorities had a **margin of discretion** over all of the essential elements of the exemption system (such as the amount exempted and the conditions under which it was granted). On that basis, the GC held that the Commission wrongly concluded that the excess profit exemption scheme did not require further implementing measures and therefore constituted an aid scheme, and annulled the Commission decision.

What's next for Belgium and the Commission?

The judgment means that the decision is annulled for all alleged beneficiaries covered by the Commission's decision. It remains to be seen whether the Commission will appeal the judgment, which it can do within two months.

What does this mean for the other fiscal State aid cases?

This defeat is a clear setback to the Commission and limits its ability to open new cases by taking “shortcuts” (i.e. by attacking whole regimes at once instead of taking individual aid decisions). The GC said nothing less than that the Commission attacked a measure that was not State aid.

On the other hand, the GC did not address the other pleas in law raised by Belgium that were of relevance also in the other fiscal State aid cases concerning individual tax rulings (such as Starbucks, Apple, and Amazon). Accordingly, several key questions, including (i) whether or not tax rulings granted to the individual taxpayers in the other cases can amount to a selective advantage, (ii) whether or not the Commission’s reliance on an alleged EU “arm’s length principle” is justified, and (iii) the relevance of the current guidance published by the OECD in relation to past transfer pricing/profit attribution, remain unanswered.

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