

Client Alert

Competition – State Aid

5 February 2015

European Commission extends State aid probe into Belgian tax scheme

The European Commission ("Commission") has opened a fifth formal State aid investigation into national tax rulings. This investigation concerns the Belgian "excess profit" provision, which allows multinational groups to reduce their corporate tax liabilities. This investigation differs from the four existing investigations under the Commission tax probe in that it concerns the underlying tax provision which is applied through tax rulings, rather than specific rulings concerning individual companies (i.e., Apple in Ireland, Starbucks in the Netherlands, and Fiat and Amazon in Luxembourg). These first four investigations are expected to be concluded in the coming months. Meanwhile the Commission may yet expand its probe to other Member States: it recently requested a list of all tax rulings issued by every Member State between 2010 and 2013. When the probe was first opened it had focused its requests on Belgium, Cyprus, Ireland, Luxembourg, Malta, the Netherlands and the UK.

The Belgian investigation

The tax provision under investigation is Article 185, §2 of the Income Tax Code (*Code des Impôts sur les Revenus / Wetboek Inkomstenbelastingen*), by which a company's tax can be reduced by so-called "excess profits", which are profits registered in the accounts of the Belgian entity that allegedly result from the advantage of being part of a multinational group.

According to its press statement,¹ the Commission has doubts as to the interpretation and application of the OECD "arm's length" principle. It also has concerns that the "excess profit" being deducted significantly overestimates the actual benefits of being in a multinational group. It states that these deductions usually amount to more than 50% of the profits covered by the tax ruling and can sometimes reach 90%.

In order to show that a national measure constitutes State aid, the Commission needs to show that it confers an economic advantage, granted from State resources, to certain undertakings or sectors, affecting intra-EU trade and threatening to distort competition. The key question in tax cases is whether the measure is "selective", or whether it forms part of the general regime. This is less clear-cut for the "excess profit" provision than for the company-specific tax rulings, and is likely to be strongly contested in the Belgian investigation.

EU State Aid Team

Mark Powell
Partner, Brussels
Tel: +32 2 239 25 78
mpowell@whitecase.com

Kai Struckmann
Partner, Brussels
Tel: + 32 2 239 26 12
kstruckmann@whitecase.com

James Killick
Partner, Brussels
Tel: +32 2 239 25 52
jkillick@whitecase.com

Norbert Wimmer
Partner, Berlin
Tel: +49 30 880 911 550
nwimmer@whitecase.com

Jean-Paul Tran Thiet
Partner, Paris
Tel: +33 1 5504 1597
jptranthen@whitecase.com

Christoph Arhold
Counsel, Berlin
Tel: +49 30 880 911 590
carhold@whitecase.com

Genevra Forwood
Counsel, Brussels
Tel: +32 2 239 25 37
gforwood@whitecase.com

¹ See http://europa.eu/rapid/press-release_IP-15-4080_en.htm. The full text of the opening decision is not yet available.

What Next?

If the Commission concludes that any of the measures do indeed constitute State aid, the consequences could potentially be dramatic. In principle, State aid is prohibited unless the Commission deems it “compatible with the internal market”. Compatibility is assessed according to detailed rules and guidance documents, depending on the sector or objective pursued, but it is not clear which would apply in the present cases. Any incompatible State aid which has already been granted should in principle be recovered by the Member State, with interest. Exceptionally, the Commission may waive the recovery obligation in order to protect a company’s legitimate expectations, but such cases are rare.

It is still too early to conclude whether any of the companies involved in the current investigations will be required to repay any tax advantages. The opening of the EC formal investigation does not prejudge the outcome. Once the Commission’s opening decision is published in the Official Journal of the European Union, interested parties have one month to send comments to the Commission. The Commission will consider these, as well as comments from the Member State concerned, in its assessment of whether or not the measures involve State aid. Usually, the Commission aims to conclude formal investigations within 18 months, and Commissioner Vestager has already stated that final decisions in the first four cases may be published in the second quarter of 2015.

State aid investigations are essentially bilateral discussions between the Commission and the Member State concerned. The Luxembourg government had initially resisted complying with the Commission’s information requests and had challenged these before the EU Courts. However, Luxembourg has now acceded to demands made by the Commission for further information on its tax rulings. This move follows the leaking of documents containing hundreds of tax rulings given by Luxembourg to multinational corporations.

The Commission’s activities under the tax probe show no sign of abating; with the latest request for information sent to all Member States, the five current open investigations could be just the tip of the iceberg.

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