European Union; Belgium

European Commission: Belgian excess profit scheme constitutes incompatible State aid

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On 11 January 2016, the European Commission held that the Belgian excess profit scheme constitutes incompatible State aid under article 107 of the Treaty on the Functioning of the EU (TFEU). For previous reporting, see European Union-2, News 3 February 2015 and European Union-1, News 8 June 2015.

(a) Facts. Under the Belgian corporate income tax rules, companies are taxed on the basis of the profit actually recorded from activities in Belgium. However, under the 2005 "excess profit" scheme, which was based on article 185(2)(b) of the Code des Impôts sur les Revenus/Wetboek Inkomstenbelastingen (CIR/WIB), multinational companies were allowed to reduce their tax base for alleged "excess profit" on the basis of a binding tax ruling. The rulings concerned were generally valid for 4 years and could be renewed.

Under those tax rulings, the actual recorded profit of a multinational was compared with the hypothetical average profit, which a stand-alone company in a comparable situation would have made.

The alleged difference in the reported and hypothetical profits was deemed to be "excess profit" by the Belgian tax authorities. The multinational's tax base was reduced proportionately. This reduction was based on a premise that multinational companies make "excess profit" as a result of being part of a multinational group, e.g. due to synergies, economies of scale, reputation, client and supplier networks, or access to new markets. In practice, the actual recorded profit of companies concerned was usually reduced by more than 50% and in some cases even up to 90%.

(b) Decision. The Commission after an in-depth investigation observed that the "excess profit" scheme derogated both from:

- the normal practice under Belgian corporate income tax rules. It provides multinationals that were able to obtain such a tax ruling a preferential, selective subsidy compared with other companies. More specifically, at least 35 companies were given an unfair competitive tax advantage over, for example, any of their stand-alone competitors. The last-mentioned were liable to pay taxes on their actual profits recorded in Belgium under the normal Belgian corporate income tax rules; and
- the "arm's length principle" under EU State aid rules. Even under the assumption that a multinational generates such "excess profits", under the arm's length principle, these profits would be shared between group companies in a way that reflects economic reality, where after those profits are taxed where they arise. However, under the Belgian "excess profit" scheme such profits are simply discounted unilaterally from the tax base of a single group company.

The Commission takes the view that the scheme's selective tax advantages cannot be justified by the argument raised by Belgium that the reductions are necessary to prevent double taxation. In fact, the adjustments were made by Belgium unilaterally and they did not correspond to a claim from another country to tax the same profits. The scheme did not require companies to demonstrate any evidence or even risk of double taxation. In reality, it, therefore, resulted in double non-taxation.

Consequently, the Commission held that the scheme provided a selective tax advantage and ordered Belgium to recover the illegal State aid, which is estimated at around EUR 700 million.

Note. Since the Commission opened its investigation in February 2015, Belgium put the "excess profit" scheme on hold. It has not granted any new tax rulings under the scheme. However, companies that had already received tax rulings under the scheme since it was first applied in 2005 continued to benefit from it.

See also

European Union-2, News 3 February 2015
European Union-1, News 8 June 2015
Belgium - Corporate Taxation - Country Surveys section 1.8.4.
Belgium - Corporate Taxation - Country Analyses section 1.11.7.