

CLIENT MEMORANDUM

European Commission opens in-depth investigation into Belgian tax ruling system

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On 3 February 2015, the European Commission (the “Commission”) launched an in-depth investigation into 60 tax rulings in Belgium. The Commission suspects that these rulings might grant to undertakings an unlawful State aid within the meaning of Article 107 (1) of the Treaty on the Functioning of the European Union.

As indicated in our previous alert dated 14 November 2014, the Commission is currently investigating the legality, under State aid rules, of favorable tax rulings granted by the Luxembourg tax administration to Amazon and Fiat. Investigations were also opened regarding rulings granted by Ireland (to Apple) and the Netherlands (to Starbucks).

Following the analysis of the Commission, under Article 185, §2, b of the Belgian Tax Code a company’s tax can be reduced by so-called “excess profits”. These “excess profits” are registered in the accounts of the Belgian entity and result from the advantage of being part of a multinational group. In order for the deductions to apply, a company needs prior confirmation by the Belgian tax administration through a tax ruling.

Commission concerns

Competition Commissioner Vestager said that the Belgian “excess profit” tax system appears to grant substantial tax reductions that would not be available to purely Belgian companies only to certain multinational companies. She further notes that “*if our concerns are confirmed, this generalised scheme would be a serious distortion of competition unduly*

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benefitting a selected number of multinationals. As part of our efforts to ensure that all companies pay their fair share of tax, we have to investigate this further”.

The Commission has concerns that the “alleged ‘excess profit’ under the tax ruling, *i.e.* the deductions that a company can claim for *e.g.* intra-group synergies or economies of scale, significantly overestimates the actual benefits of being in a multinational group”.

Moreover, the Commission preliminarily concludes that the scheme in place cannot be justified by the objective of preventing double taxation because the deductions in Belgium do not correspond to a claim from another country to tax the same profit.

Having examined past administrative practice, the Commission further notes that the Belgian “excess profit” rulings are often granted to companies that have relocated a substantial part of their activities to Belgium or that have made significant investments in Belgium.

Outstanding questions

In order to conclude that a given measure is selective (a condition to the qualification of State aid), the Commission must demonstrate that this measure favors some undertakings over others.

Unlike the precedent probes (Starbucks, Apple, Fiat and Amazon), which concern specific companies, here, the Commission does not challenge the individual decisions but the tax provision itself. Recent judgments of the European courts may hamper the Commission probes. According to these judgments, for a measure to be selective, the Commission must necessarily identify a category of undertakings that benefits from the tax measure. If a measure is potentially available to all undertakings, there is no such category. In the present case, the Commission will need to show that the provision is not potentially available to all categories.

Furthermore, the fact that such rulings imply the use of “State resources” (another condition for the qualification as State aid) is also debatable. Indeed, it can be questioned whether these companies would have established themselves in Belgium absent such a regime. If not, there would be no revenue foregone and therefore no use of “State resources”.

Next steps

Even though the opening of an in-depth investigation does not have any bearing on the final outcome of the case, a negative decision could have far-reaching consequences. Indeed, all the undertakings that benefited from the tax measure could be ordered to reimburse the advantage received. Given that this tax scheme has been in place since 2004, the amounts at stake are very significant.

The opening of an in-depth investigation gives interested third parties an opportunity to submit comments to the European Commission.

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