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Tax State Aid: The European Commission concludes Belgian 'excess profit' rulings illegal

On January 11 2016, the European Commission (the Commission) again used Tax State Aid arguments to combat tax planning by multinationals when it announced its final decision in the formal state aid investigation into the Belgian 'excess profit' rulings. It concluded that the excess profit rulings constitute illegal state aid and estimated that Belgium needs to recover around €700 million in total from at least 35 multinationals. Belgium can appeal this decision.

The Commission concluded that the rulings only benefit multinational groups whilst Belgian companies only active in Belgium could not claim similar benefits. The rulings, therefore, represented a distortion of competition within the EU's Single Market.

The Commission conducted similar Tax State Aid investigations last year into tax deals struck by Luxembourg and the Netherlands with Fiat and Starbucks respectively. As a result, both member states were held to have violated Tax State Aid rules and were ordered to recoup tens of millions of euros from each of those companies.

Further major investigations and decisions into other multinationals are likely to be announced in early 2016.

The Rulings

Under the rulings, a multinational's Belgian tax base could be reduced proportionately. The rulings are based on a premise that multinational companies make 'excess profit' due to, for example, being part of a multinational group, synergies, economies of scale, reputation, client and supplier networks etc.

The Commission held that the rulings derogated from normal practice under Belgian company tax rules and from the arm's length principle under EU state aid rules. The rulings could not be justified as necessary to avoid double taxation. The 'excess profits' are discounted unilaterally, i.e. they do not correspond to a claim from another country to tax those same profits.

As a result of the preliminary decision in February 2015, Belgium had not granted any new tax rulings. The Commission now requires Belgium to recover all the unpaid tax from the multinational companies that have benefitted from the rulings. As noted, this is estimated at around €700 million.

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