

EU General Court Considers the Belgian Excess Profits Ruling to Be Unlawful State Aid

On 20 September 2023, the General Court of the European Union (GCEU) ruled for the second time in the case of the Belgian Excess Profits Ruling (Belgian EPR) (Judgment of the General Court, 20 September 2023, in case [T-131/16](#)). Contrary to its first judgment in 2019 on EPR, it now confirmed the decision of the European Commission (EC) of 11 January 2016 that the EPR constituted an unlawful tax scheme and infringed the EU State aid rules.

Facts

By an advance ruling, Belgian entities part of a multinational group were able to reduce their tax base in Belgium to reflect the belief that part of the residual profit generated through synergies, economies of scale and similar benefits of being a vertically integrated multinational group should not be attributable to the Belgian entities.

On 11 January 2016, the EC concluded that the Belgian EPR constituted unlawful State aid, giving its beneficiaries a selective advantage, for the purposes of Article 107(1) TFEU, that was incompatible with the internal market. The decision obliged the Belgian government to recover the alleged unlawful aid provided to several economic operators.

On 14 February 2019, the GCEU annulled the decision of the EC, finding that the latter had erred in qualifying the measure as an “aid scheme”.

On 16 September 2021, the European Court of Justice (ECJ) annulled the GCEU judgment and, by doing so, upheld the EC decision regarding the qualification of the Belgian EPR as an aid scheme. The ECJ then referred the case back to the GCEU.

CGEU judgment

The CGEU now rules that the EC was correct in its decision that the Belgian EPR infringes EU State aid rules. The GCEU rejects the arguments that Belgium has put forward, including the failure of the EC to take into account the tax rules applicable in Belgium. More specifically, the GCEU concluded that the EC:

- demonstrated that the EPR granted tax advantages to its beneficiaries;
- correctly concluded on the selectivity of the EPR as the members of a multinational group benefitting from it were treated differently from entities subject to the standard Belgian Corporate Income Tax regime;
- was right in finding that the EPR was not open to companies that did not make investments, centralize activities or create employment in Belgium, or were not available to members of a small group.

Takeaway

The CGEU judgment is open for appeal before the ECJ. It should however be limited to points of law. It is too early to comment on the contemplated course of action by the Belgian Government or the concerned multinational groups. Whether they will appeal the judgment on points of law is not yet known at this point in time. An appeal can be lodged within two months. In absence of any appeal, this judgment becomes the final step in the proceedings and the tax due by each impacted operator should be recalculated as if the State aid has not been granted.

This judgment illustrates the complexity of State aid rules in transfer pricing matters, particularly when assessing domestic fiscal policy incentives stemming from an era way before the OECD/G20 project on Base Erosion and Profit Shifting. The launch of the proposal for the [Transfer Pricing Directive](#) on 12 September 2023 regarding the codification of the arm's length principle in the EU demonstrates the need for clarity. Particularly relevant is the contemplated introduction of mandatory corresponding adjustments in the case of primary downward adjustments in one country. It seems to be largely inspired by the EPR case at hand.

Finally, this judgment comes at a time when the EC is actively seeking “matching” responses to fiscal incentives granted outside the EU economic bloc. These incentives aim to accelerate investment in areas such as the green agenda, digitalization, and reliable supply chains, with a focus on energy and critical raw materials. This aligns with the priorities

outlined in Executive Vice-President Dombrovskis' press release on 16 September 2023 which stresses the following priorities:

- maintain the EU's traditional openness, while shoring up our economic resilience;
- seek to maintain the EU's standing in the world marketplace and stay competitive.

Let's talk

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