



# EU Direct Tax Newsalert

## General Court of the EU judgment on the compatibility of the Belgian excess profit ruling system with EU State aid rules

### Introduction

On 14 February 2019, the General Court of the European Union (GCEU) rendered its [judgment T-131/16 and T – 263/16](#) regarding the compatibility of the Belgian excess profit ruling system (Belgian EPR) with the EU State aid rules. The GCEU annulled the final decision of the European Commission (EC) finding that the latter had erred in qualifying the measure as an ‘aid scheme’.

### Background and facts

In its [final decision](#) in the case SA 37667, adopted on 11 January 2016, the EC concluded that the Belgian EPR constituted unlawful aid under EU State aid rules. In addition, the decision obliged the Belgian government to recover the alleged unlawful aid provided to several economic operators amounting to, approximately, EUR 700 million.

The GCEU has now annulled the EC’s decision and ruled that the EC erroneously considered that the Belgian EPR constituted a so-called ‘State aid scheme’ on a number of grounds:

- First, the GCEU specifies that the Belgian tax authorities had a margin of discretion over all of the essential elements of the exemption system in question, allowing them to influence the amount and the characteristics of the exemption and the conditions under which it was granted.
- Accordingly, the granting of the contested aid could not be done automatically through the legislation but required further implementing measures by the tax authorities, which precludes the existence of an aid scheme.
- Further, as a result of the EC approaching the Belgian EPR as a State aid scheme, rather than choosing to assess each of the individual rulings involved, the GCEU noted that the EC had limited its review to only 22 out of the total of 66 rulings involved. The GCEU ruled that the EC had erred in doing so as it failed to demonstrate

why the selected sample was representative. A more detailed review would have been required for the EC to reach definitive conclusions in the view of the GCEU.

The GCEU also reiterates that, while direct taxation, as EU law currently stands, falls within the competence of the Member States, the Member States must exercise that competence consistently with EU law, including State aid law. Moreover, the GCEU holds that even though Member States can take the necessary measures to prevent situations of double taxation, this did not appear to be the objective pursued by the Belgian excess profit system.

### Takeaway

Following this decision, it is likely that one or more parties to the case (including the EC) will file an appeal against this decision of the GCEU. If the appeals are considered admissible and well-founded, the Court of Justice of the EU can, in turn, annul the GCEU’s decision and decide on the case itself, or else it must refer the case back to the GCEU. It is likely that in that case a final decision in this case can realistically only be expected in a few years from now.

This judgment is the first review by the GCEU of a series of recent EC State aid decisions assessing whether tax rulings and transfer pricing rules can be selective and unlawful State aid. Each case has its own facts and we need to await each of the individual judgments.

The EU State aid rules have meant significant uncertainty for taxpayers as to the correct application of tax rulings and transfer pricing rules within the EU. This judgment is only a first step in providing further clarity and guidance on how the State aid rules apply to tax rulings and transfer pricing.

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