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AG Kokott: Belgian Excess Profit Rulings Constitute 'State Aid Scheme'

Advocate General Kokott issued an [Opinion in Case C-337/19 P Commission v Belgium and Magnetrol International NV](#) (Belgian Excess Profit Rulings). According to AG Kokott, the Commission rightly classified the Belgian practice of downward adjustments to profits of multinational group companies as a State aid scheme. The opinion recommends that the Court of Justice sets aside the judgment of the General Court of the EU and reassess the cases brought by Belgium and the aid beneficiary.

Key issue in the appeal was whether the General Court rightfully held that the Commission had not demonstrated to the requisite legal standard the existence

of a 'consistent tax administration practice in the contested decision'. In the judgment under appeal, the General Court repealed Commission decision on grounds of failure to state reasons as to the choice of advance rulings used, in particular why 6 examples chosen by the Commission were sufficiently representative of all 66 advance rulings under scrutiny. According to the Advocate General, contrary to the view of the General Court, the Commission sufficiently demonstrated in its decision that its sample is representative and thus sufficient to indicate a consistent administrative practice of the Belgian tax administration. In addition, the General Court erred in concluding that the two further conditions for the existence of a State aid scheme were not met: that no further implementing measures are required and that the beneficiaries are defined in a general and abstract manner. AG Kokott therefore opined that the General Court erred in law by wrongly classifying the sample as not sufficiently representative to the requisite legal standard, and not sufficient to demonstrate a consistent administrative practice.

Even if the Court of Justice were to find that all the conditions for the existence of an aid scheme were met, the General Court would still have to assess the pleas in law, i.e. whether the advance tax rulings concerning the downward adjustment of profits constitute State aid, and subsequently, whether the recovery of the alleged aid infringes the principles of legality and of the protection of legitimate expectations. Therefore the Opinion advises the Court of Justice to refer the case back to the General Court.

EU Parliament Calls for Wider Scope of EU Tax Blacklist

On proposal of the Permanent Subcommittee on Tax Matters (“FISC”), European Parliament's Economic Affairs Committee adopted a [resolution](#) calling for stricter and legally binding EU rules on non-cooperative jurisdictions for tax

purposes, criticising the listing process at present as 'lenient and confusing'.

The resolution welcomes the legal link between tax good governance standards and the use of EU funds and calls for State Aid rules and Member States' national support programmes to be linked in order to ensure businesses with ties to listed jurisdictions are not eligible for support. The European Commission was criticised for failing to introduce effective measures that would reduce tax avoidance incentives. Taking into account the negotiations on Pillar II at OECD/ Inclusive Framework level, the European Parliament proposed that the Commission introduce the following measures with a separate legislative proposal:

- a) Non-deductibility of costs;
- b) Reinforced Controlled Foreign Company (CFC) rules;
- c) Withholding tax measures;
- d) Limitation of participation exemption;
- e) Switch-over rule;
- f) Reversal of the burden of proof;
- g) Special documentation requirements, especially regarding transfer pricing.

In addition, the Parliament supported screening/ inclusion of the United Kingdom in the blacklisting process once the Brexit transitional period has lapsed, thus extending the geographical scope of the process, albeit excluding the least developed countries.

Commenting, Chair of the Subcommittee on Tax Matters, Paul Tang (The Netherlands) said that EU countries are responsible for 36% of tax havens: "By calling the EU list of tax havens "confusing and inefficient", the European Parliament tells it like it is. While the list can be a good tool, it is currently lacking an essential element: actual tax havens. Countries on the list account

for just 2% of corporate tax avoidance! EU member states currently decide in secret which countries are tax havens, and do so based on vague criteria with no public or parliamentary scrutiny. This needs to change. If we focus on others, we also need to look ourselves in the mirror. And what we see is not pretty. EU countries are responsible for 36% of tax havens. The tax subcommittee commits itself to investigate and scrutinise all member states that are responsible for tax avoidance. Our work is only just starting.”

EU Leaders Reach Agreement on Longer-Term Budget

The leaders of the European Union reached an agreement on the long-term budget, effective 1 January 2021, i.e. EU's multi-annual financial framework (MFF). In addition, the agreement encompasses a recovery package for the EU. The agreement was [confirmed](#) by the European Council President Charles Michel on 10 December.

German Chancellor Angela Merkel, who holds the EU Presidency at present, was instrumental in securing a balanced outcome that satisfies the rule-of-law requirements demanded by the EU and most western Member states and the criticism of such an approach led by Poland and Hungary. According to the compromise, Poland and Hungary were able to support the budget until the European Court of Justice rules on the legality of making the use of EU budget funds contingent upon respect of rule of law by all Member states. Hungary and Poland previously vetoed the budget, demanding that the use of EU funds is not contingent on specific 'rule-of-law' requirements.

The final approval of the EU budget is subject to consent by the European Parliament and national parliaments, in addition to the required consensus for the €750 billion recovery fund to become operational. In the interim, EU leaders

requested from the European Commission to refrain from enforcing the rule-of-law requirements against Poland and Hungary pending any challenge in the Court of Justice of the European Union.

Applications Open: CFE's 2020 Albert J Raedler Medal Award

Submissions are now invited for **CFE's 2020 Albert J. Rädler Medal Award**. The award was established in 2013 in order to encourage and reward academic excellence in European taxation, as well as to recognise Professor Albert J. Rädler's esteemed contribution to the field of taxation within Europe. In order to be eligible to apply, an applicant must have completed a Master's thesis in European taxation which received a distinction in the relevant calendar year, and be 30 years or under on the 31st December of that relevant year. The thesis should be written in English or, in the alternative, an English translation must be provided. The examining panel is composed of Professors Michael Lang and Pasquale Pistone, both of the Vienna University of Economics and Business, as well as of Professor Otmar Thömmes, Tax Partner at Deloitte Munich.

The successful applicant will be announced at the virtual CFE Forum on 6 May 2021 and will be awarded with the medal at an Award Ceremony which will take place at the **CFE Professional Affairs Conference** convened in Zagreb, Croatia on 3 December 2021. In addition to the Albert J. Rädler medal itself, the recipient will be offered travel costs to Zagreb in order to attend the 2021 CFE Professional Affairs Conference, as well as a selection of premium technical literature from our partner IBFD.

Please send the applications until 15 March 2021 to the attention of Ms. Karima Baakil via email at: info@taxadviserseurope.org

2020 Global Forum on Tax Transparency Plenary Meeting

The Global Forum on Tax Transparency and Exchange of Information, an Inclusive Framework body established to support the process of strengthening the capacity of tax administrations to exchange information and fight tax evasion and avoidance, held its annual plenary meeting virtually from 9 -11 December. According to the [Peer Review of the Automatic Exchange of Financial Account Information](#) 88% of jurisdictions engaged in automatic exchange since 2017-18 with satisfactory legal frameworks in place, which denotes a significant milestone in fight against tax evasion.

“The Global Forum continues to be a game-changer. In spite of the COVID-19 crisis, it has successfully delivered on the global peer review process, offering further proof that automatic exchange is becoming the global standard. Ensuring access to financial account information for tax administrations helps ensure everyone pays their fair share of tax, boosting revenue mobilisation for countries worldwide, and particularly for developing countries.”, said OECD Secretary-General Angel Gurría.

The selection of the remitted material has been prepared by:
Piergiorgio Valente/ Aleksandar Ivanovski/ Brodie McIntosh/ Filipa Correia