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In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […].		PUBLIC VERSION This document is made available for information purposes only.

Subject: State aid SA.37667 (2015/C ex 2015/NN) – Belgium - Excess profit tax ruling system in Belgium – Art. 185§2 b) CIR92

Sir,

The Commission wishes to inform your authorities that having examined the information supplied by your authorities on the measure referred to above, it has decided to open the procedure laid down in Article 108 (2) of the Treaty on the Functioning of the European Union (TFEU).

1 PROCEDURE

(1) By letter of 19 December 2013, the Commission requested information from the Belgian State on the so-called "excess profit tax ruling system" which is based on Article 185§2b of the Belgian Income Tax Code ("Code des Impôts sur les revenus 1992" or CIR92" / Wetboek van Inkomstenbelastingen 1992" or "WIB92"). The Commission also requested a list of ruling decisions concerning the excess profit tax system.

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(2) By letter of 21 January 2014, the Belgian State answered the questions of the Commission. The Belgian State however did not provide the Commission with the requested list of rulings, indicating that providing such a list would require more time.

(3) On 21 February 2014, the Commission sent follow-up questions and repeated its request for a list of rulings. For the rulings issued in 2004, 2007, 2010 and 2013, the Commission also requested the ruling applications and all supporting documents.

(4) On 18 March 2014, the Belgian State responded to the questions of the Commission with all the ruling-related information (rulings, ruling applications, supporting documents).

(5) By letter of 28 July 2014, the Commission indicated that the excess profit system could represent incompatible State aid. The Commission also requested more information about a number of individual cases.

(6) A meeting between the Commission services and the Belgian authorities was held on 25 September 2014.

(7) By letters of 1 September and 4 November 2014, the Belgian State replied to the request of 28 July 2014.

2 DESCRIPTION OF THE MEASURE

2.1 OECD Transfer Pricing Guidelines[1]/OECD Model Tax Convention[2]

(8) This decision concerns tax rulings which validate transfer pricing arrangements, also referred to as advance pricing arrangements ("APAs"). APAs are arrangements that determine, in advance of intra-group transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time[3]. An APA is formally initiated by a taxpayer and requires negotiations between the taxpayer, one or more associated enterprises, and one or more tax administrations. APAs are intended to supplement the traditional administrative, judicial, and treaty mechanisms for resolving transfer pricing issues[4].

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[1] http://www.oecd.org/ctp/transfer-pricing/transfer-pricing-guidelines.htm

[2] http://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2010_9789264175181-en

[3] APAs differ in some ways from more traditional private rulings that some tax administrations issue to taxpayers. An APA generally deals with factual issues, whereas more traditional private rulings tend to be limited to addressing questions of a legal nature based on facts presented by a taxpayer. The facts underlying a private ruling request may not be questioned by the tax administration, whereas in an APA the facts are likely to be thoroughly analysed and investigated. In addition, an APA usually covers several transactions, several types of transactions on a continuing basis, or all of a taxpayer's international transactions for a given period of time. In contrast, a private ruling request usually is binding only for a particular transaction. See, OECD Guidelines, § 4.132.

[4] OECD Guidelines, § 4.123. Since APAs concern the remuneration for transactions that have not yet taken place, the reliability of any prediction used in an APA therefore depends both on the nature of the prediction and the

(9) In this context, transfer pricing refers to the prices charged for commercial transactions between various parts of the same corporate group, in particular prices set for goods sold or services provided by one subsidiary of a corporate group to another subsidiary of that same group. The prices set for those transactions and the resulting amounts calculated on the basis of those prices contribute to increase the profits of one subsidiary and decrease the profits of the other subsidiary for tax purposes, and therefore contribute to determine the taxable basis of both entities. Transfer pricing thus also concerns profit allocation between different parts of the same corporate group.

(10) Multinational corporations pay taxes in jurisdictions which have different tax rates. The after tax profit recorded at the corporate group level is the sum of the after-tax profits in each country in which it is subject to taxation. Therefore, rather than maximise the profit declared in each country, multinational corporations have a financial incentive when allocating profit to the different companies of the corporate group to allocate as much profit as possible too low tax jurisdictions and as little profit as possible to high tax jurisdictions. This could, for example, be achieved by artificially increasing the price of goods sold by a subsidiary established in a low tax jurisdiction to a subsidiary established in a high tax jurisdiction. In this manner, the higher taxed subsidiary would declare higher costs and therefore lower profits when compared to market conditions. This excess profit would be recorded in the lower tax jurisdiction and taxed at a lower rate than if the transaction had been priced at market conditions.

(11) Those transfer prices might therefore not be reliable for tax purposes and should, in case they are biased not determine the taxable base for the corporate tax. If the (biased) price of the transaction between entities of the same corporate group were taken into account for the assessment of the taxable profits in each jurisdiction, that would entail an advantage for the firms which can artificially allocate profits between associate companies in different jurisdictions compared to other undertakings. So as to avoid this type of advantage, it is necessary to ensure that taxable income is determined in line with market conditions.

(12) The internationally agreed standard for setting such commercial conditions between companies of the same corporate group or a branch thereof and its parent company and thereby for the allocation of profit is the “arm’s length principle”. The arm’s length principle is also reflected in Article 9 of the OECD Model Tax Convention. This provision sets out how and when adjustments of the tax base should take place in practice. The first paragraph of that Article 9 describes how a Contracting State can increase the tax base when it believes that the transfer pricing rules have led to a too low taxable base and tax it accordingly. This is referred to as the primary adjustment and results in the tax administration increasing the taxable profits reported by an enterprise. The second paragraph of Article 9 aims to prevent that the adjusted profits taxed by one State in accordance with the first paragraph are not also taxed at the level of an associated company in a second State. It does this by obliging the other State, in case a profit is already taxed in the first state, to decrease the tax base of that associated company thereby ensuring that the overall allocation of profits between the two jurisdictions is consistent.

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critical assumptions on which that prediction is based. Those critical assumptions may include amongst others circumstances which may influence the remuneration for the transactions when they eventually take place.

The second downward adjustment on the basis of Article, paragraph 2, is referred to as the corresponding adjustment. The relevant parts of Article 9 read as follows:

> "*1. Where …conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.*
>
> *2. Where a contracting State includes in the profits of an enterprise of that State – and taxes accordingly – profits on which an enterprise of the other contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other."*

(13) According to this provision, commercial and financial relations between associated enterprises should not differ from relations which would be made between independent companies. More precisely, using alternative methods for determining taxable income to prevent certain undertakings from hiding undue advantages or donations with the sole purpose of avoiding taxation must normally be to achieve taxation comparable to that which could have been arrived at between independent operators on the basis of the traditional method, whereby the taxable profit is calculated on the basis of the difference between the enterprise's income and charges.

(14) The OECD Transfer Pricing Guidelines[5] (hereinafter the "OECD Guidelines") provide five such methods to approximate an arm's length pricing of transactions and profit allocation between companies of the same corporate group: (i) the comparable uncontrolled price method (hereinafter "CUP"); (ii) the cost plus method; (iii) the resale minus method; (iv) the transactional net margin method (hereinafter "TNMM") and (v) the transactional profit split method. The OECD Guidelines draw a distinction between traditional transaction methods (the first three methods) and transactional profit methods (the last two methods). Multinational corporations retain the freedom to apply methods not described in those guidelines to establish transfer prices, provided those prices satisfy the arm's length principle.

(15) Traditional transaction methods are regarded as the most direct means of establishing whether conditions in the commercial and financial relations between associated enterprises are at arm's length[6]. All three traditional transaction methods approximate an arm's length pricing of a specific intra-group transaction, such as the price of a certain

[5] Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD, 2010.

[6] OECD Guidelines, § 2.3.

good sold or service provided to a related company. In particular, the CUP method consists in observing a comparable transaction between two independent companies and applying the same price for a comparable transaction between group companies. The cost plus method consists in approximating the income from goods sold or services provided to a group company. The resale minus method consists in approximating the costs of goods acquired from or services provided by a group company. Other elements which enter into the profit calculation (such as personal costs or interest expenses) are calculated based on the price effectively paid to an independent company or are approximated using one of the three direct methods.

(16) The transactional profit methods, by contrast, do not approximate the arm's length price of a specific transaction, but are based on comparisons of net profit indicators (such as profit margins, return on assets, operating income to sales, and possibly other measures of net profit) between independent and associated companies as a means to estimate the profits that one or each of the associated companies could have earned had they dealt solely with independent companies, and therefore the payment those companies would have demanded at arm's length to compensate them for using their resources in the intra-group transaction[7]. For this purpose, the TNMM relies on a net profit indicator which refers, in principle, to the ratio of profit weighted to an item of the profit and loss account or of the balance sheet, such as turnover, costs or equity. To this selected item, a margin is applied which is considered "arm's length" to approximate the amount of taxable profit. When the TNMM is used in combination with a net profit indicator based on costs, it is sometimes referred to as "cost plus" in exchanges between the taxpayer and the tax administration, but this should not be confused with the "cost plus method" described in the OECD Guidelines as described in the previous recital.

(17) The application of the arm's length principle is generally based on a comparison of the conditions in an intra-group transaction with the conditions in transactions between independent companies. For such comparisons to be useful, the economically relevant characteristics of the situations being compared must be sufficiently comparable. To be comparable means that none of the differences (if any) between the situations being compared could materially affect the condition being examined in the methodology (e.g. price or margin), or that reasonably accurate adjustments can be made to eliminate the effect of any such differences.[8] To establish the degree of actual comparability and then to make appropriate adjustments to establish arm's length conditions (or a range thereof), it is necessary to compare attributes of the transactions or companies that would affect conditions in arm's length transactions. The OECD Guidelines list as attributes or "comparability factors" that may be important when determining comparability: the characteristics of the property or services transferred; the functions performed by the parties, taking into account assets used and risks assumed (functional analysis); the contractual terms; the economic circumstances of the parties; and the business strategies pursued by the parties[9].

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[7] OECD Guidelines, § 1.35.

[8] OECD Guidelines, § 1.33.

[9] OECD Guidelines, § 1.36.

(18) Double taxation treaties typically contain provisions on procedures to avoid potential double taxation which could arise from an upward adjustment of the tax base by one of the States concerned. At a European level, the EU Arbitration Convention[10] establishes a procedure to resolve disputes where double taxation occurs between enterprises of different Member States as a result of an upward adjustment of the profits of an enterprise of one Member State. The Convention provides for the elimination of double taxation by agreement between the contracting states including, if necessary, by reference to the opinion of an independent advisory body.

2.2 Belgian legislative framework

(19) Article 185§1 of the Belgian Corporate Income Tax Code provides that companies are taxed on the entire amount of their profits, including distributed dividends.

(20) By Law of 21 June 2004[11], Belgium introduced new fiscal rules regarding cross-border transactions of entities which are associated to a multinational group, and notably a new Article 185§2 in the Corporate Income Tax Code. The new Article 185§2 provides that:

"[...], for two companies that are part of a multinational group of associated companies and in respect of their reciprocal cross-border relationships:

(a) when two companies are in their commercial and financial relationships linked by conditions agreed upon or imposed on them which are different from those which would have been agreed upon between independent companies, the profits which - under those conditions – would have been realized by one of the companies but are not because of those conditions, may be included in the profits of that company.

(b) when profits are included in the profits of one company which are already included in the profits of another company and the profits so included are profits which should have been realized by that other company if the conditions agreed between the two companies had been those which would have been agreed between independent companies, the profits of the first company are adjusted in an appropriate manner."

"[...], pour deux sociétés faisant partie d'un groupe multinational de sociétés liées et en ce qui concerne leurs relations transfrontalières réciproques:

a) lorsque les deux sociétés sont, dans leurs relations commerciales ou financières, liées par des conditions convenues ou imposées qui diffèrent de celles qui seraient convenues entre des sociétés indépendantes, les bénéfices qui, sans ces conditions, auraient été réalisés par l'une des sociétés, mais n'ont pu l'être à cause de ces conditions, peuvent être inclus dans les bénéfices de cette société;

[10] Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, OJ L 225, 20.8.1995, p.10-24

[11] The law entered into force on 19 July 2004.

b) *lorsque, dans les bénéfices d'une société sont repris des bénéfices qui sont également repris dans les bénéfices d'une autre société, et que les bénéfices ainsi inclus sont des bénéfices qui auraient été réalisés par cette autre société si les conditions convenues entre les deux sociétés avaient été celles qui auraient été convenues entre des sociétés indépendantes, les bénéfices de la première société sont ajustés d'une manière appropriée.".*

(21) Article 235, 2° CIR92 ensures that the rules established by Article 185§2 CIR92 also apply to Belgian permanent establishments of foreign companies, i.e. to non-resident or foreign companies.

(22) Article 4 of the law of 21 June 2004 provides that the Ruling Commission should approve every application for Article 185 §2, b), thus a compulsory prior authorization procedure exists. The Ruling Commission (Service des Décisions Anticipées or SDA, Dienst Voorafgaande Beslissingen or DVB) is the central body in the Ministry of Finance (Service Public Fédéral Finances, Federale Overheidsdienst Financiën) competent for delivering rulings.

(23) A Memorandum[12] accompanying the Law of 21 June 2004 provides additional guidance on its application. According to that Memorandum, Belgium intention in applying that law is to apply the arm's length principle in line with Article 9 of the OECD Model Tax Convention. The Memorandum defines a multinational group and provides some explanations on the task of the Ruling Commission. In particular, the Ruling Commission shall agree on a methodology which is used, establish functions performed, assets used and risks assumed which are instrumental in determining the tax base. As regards the corresponding downward correction, the Memorandum explains that when the Law refers to "*an appropriate correction*", such a correction should seek to avoid or undo a (potential) problem of double taxation.

(24) On 4 July 2006, an administrative "*circulaire*" was published, which contained further details on the excess profit tax ruling system. The *circulaire* contains explanations on the concept of group entities which are part of a multinational group and on cross-border transactions which are covered by Article 185§2 CIR92. The *circulaire* also recalls that the transfer prices used for group entities of multinational groups will be those which would have been used by independent entities.

(25) In reply to a parliamentary question in 2005[13], the then Minister of Finance confirmed that the tax base is determined on an arm's-length basis and that the profit in excess of the arm's-length profit remains untaxed. He also underlines that he believes it is not the task of the Belgian fiscal authorities to determine which other foreign group entities should then

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[12] Memorandum Law of 21 June 2004: Parliament, 2nd session of the 51st parliamentary term 2003-2004, Doc 51 1079/001 (http://www.lachambre.be/FLWB/pdf/51/1079/51K1079001.pdf)

[13] Interpellation by MP Bart Tommelein (Finance Commission 13/04/2005, question n° 6262, CRABV 51 COM 559) (http://www.lachambre.be/doc/CCRA/pdf/51/ac559.pdf)

incorporate the excess profits in their tax base. A parliamentary question in 2007[14] was answered along the same lines.

2.3 Application of the legislative framework

(26) The exemption of excess profit through the application of Article 185§2b CIR92 has gradually gained in importance. According to the information provided by Belgium, the number of companies which benefitted from the excess profit tax ruling system since its introduction amounts to 54 rulings granted to 47 companies. The number of excess profit cases (so-called Article 185 §2b decisions) since its introduction in 2004 is as follows:

Table 1 - Number of excess profit cases since introduction in 2004

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
N° of cases	0	2	3	5	4	6	6	6	13	9
Source: Belgian MoF										

(27) From the individual rulings examined resulting from the application of Article 185§2b CIR92, the Commission understands that in those rulings hypothetical savings and synergies generated by future investments or changes in the group's organization are approximated. The actual accounting profit recorded in Belgium is then disregarded and reduced by this alleged "excess profit", that is the difference between the actual profit and a profit that is estimated as sufficient, had a hypothetical transfer pricing between the different entities of the group been at arm's length. The rulings allow the applicant to apply this hypothetical transfer pricing for a so-called central entrepreneur, considering that this central entrepreneur performs the most complex function in the group so that its profitability is assumed by a residual profit approach.

(28) Reductions to the taxable profit take in most cases the form of percentage of either Earnings Before Interest and Tax (EBIT) in earlier rulings or Profit Before Tax (PBT) in more recent rulings, as illustrated in the table below that is based on information provided by the Belgium authorities.[15]

Table 2 - List of applicants and level of the agreed reduction of profit, where specified in terms of EBIT or PBT

Company	**Date of the ruling**	**EBIT deduction**	**PBT deduction**
Company No. 1	26.05.05		
Company No. 2	15.12.05		
Company No. 1	04.05.06		

[14] Interpellation by MP Carl Devlies (Finance Commission 11/04/200, question n°1071, CRABV51 COM 1271) (http://www.lachambre.be/doc/CCRA/pdf/51/ac1271x.pdf)

[15] Information missing in the table was not provided by the Belgian authorities.

Company No. 3	17.10.06		
Company No. 4	21.11.06	52%	
Company No. 5	30.01.07	52%	
Company No. 1	06.02.07		
Company No. 6	08.05.07		
Company No. 7	10.07.07	61%	
Company No. 8	25.11.08	64%	
Company No. 9	27.11.07		
Company No. 10	12.08.08	66%	
Company No. 11	01.07.08	72%	
Company No. 12	15.07.08	61%	
Company No. 13	13.01.09	64%	
Company No. 14	09.06.09		
Company No. 15	08.09.09		
Company No. 16	13.01.09		
Company No. 17	26.05.09		
Company No. 18	22.12.09	60%	
Company No.19	29.06.10		
Company No. 20	20.04.10		
Company No.21	20.04.10	54%	
Company No. 22	13.07.10		61%
Company No. 23	06.09.11		61%
Company No. 15	07.09.10		64%
Company No. 24	13.07.10		65 %
Company No. 25	15.02.1		
Company No. 26	22.02.11		54%
Company No.27	13.09.11		30%
Company No. 28	06.09.11		52%
Company No. 15	08.11.11		23%
Company No. 15	24.01.12		69%
Company No. 29	28.02.12		21%

Company No. 30	26.02.13		66 %
Company No. 31	*		86%
Company No. 32	06.03.12		61%
Company No. 33	03.04.12		68 %
Company No. 34	17.04.12		63%
Company No. 35	18.09.12		76. %
Company No. 36	18.09.12		57%
Company No. 37	28.08.12		87%
Company No. 38	07.11.12		69%
Company No. 39	20.11.12		71%
Company No. 40	20.11.12		44 %
Company No. 41	18.12.12		61%
Company No. 1	26.02.13		*
Company No. 1	16.04.13		*
Company No. 42	30.04.13		68%
Company No. 43	17.09.13		60%
Company No. 44	25.06.13		63%
Company No. 45	08.10.13		57%
Company No. 46	10.12.13		53%
Company No. 47	10.12.13	65%	

(29) As illustrated in Table 2, the deductions are most often agreed in the form of a percentage by which a profit level is reduced. In the case of agreements on an EBIT reduction, the percentage is applied before the payment of financial interest is deducted, whereas in the case of a PBT reduction, the percentage is applied after the interest payment. Based on the overview of the information provided, it appears that the actual percentage of the deduction is calculated based on financial projections with a multiyear time horizon. Projections are presented by the applicant. The applicant provides projections of accounting profit for each year and projections of a profit approximated by a TNMM transfer pricing method. The difference between the two profit projections i.e. accounting profit and the hypothetically sufficient profit estimated through the TNMM is averaged out over the projection time horizon and expressed in terms of percentage. This percentage is used to fix the discount on which the administration agrees. There is no indication in the file that the tax authorities would have undertaken any form of verification of the presented financial projections used to calculate the agreed discount.

* Information not provided by the Belgian authorities.

(30) The various rulings examined by the Commission present a number of similarities in their application which can be illustrated through the following examples.

(31) As a first example, the ruling application of Company No. 5[16] indicates that company's intention to increase its capacity of producing a certain [...][**] product in its Belgian-plant [...] while at the same time moving the coordination function (i.e. the so-called central entrepreneurial function) of a subsidiary [...] to Belgium.[17] Company No. 5 also indicated that it would transfer [...] posts (Full Time Equivalent posts or FTE) to Belgium. It appears from the ruling that there is no double taxation issue. The ruling indicates that the fact that the accounting profits in Belgium are higher than that of a standalone company is due to e.g. knowhow, procurement advantages, client lists etc., which existed in the group before the central entrepreneurial function was transferred to Belgium. However, the ruling adds that those "intangibles" have been made available to the Belgian entity by the group for free, which implies that there is no taxable income anywhere else in the group and therefore also no risk for double taxation. In fact, the ruling decision reiterates that "it is not up to the Belgium tax authorities to determine which foreign companies' profit accounts must include the excess profit" (point 48).

(32) As a second example, the ruling application of Company No. 15 explains that the company intends to bring forward its expansion investments in [...]. Company No. 15 claims that the new investment is more attractive for it as a group entity than for a stand-alone company. The multinational-related synergies that the ruling refers to concretely relate to advantages which physically take place in Belgium. For instance, Company No. 15 points at lower investment costs because it already has a plant in [...], to lower operational costs because overhead costs of the site can be spread over a larger production base and access to cheap energy [...].[18]

(33) As a third example, the ruling application of Company No. 43 explained the company intention to establish its Belgian subsidiary as the central entrepreneurial by way of restructuring its European operations. Company No. 43 will increase its FTE in Belgium [...]. Belgium again accepts the use of a TNMM method of profits before tax obtained by independent enterprises in comparable uncontrolled transactions to calculate the taxable base of the central entrepreneur. On this basis Company No. 43 obtains a downward adjustment of around 60 % of the net profits before tax.

(34) In many cases the rulings do not justify why the central entrepreneur should be regarded as the most complex function; this appears to be a given in the analysis. Belgium seems to systematically allow companies to rely on a favorable use of transfer pricing. While transfer pricing is to be used in the absence of reliable prices for a service or goods provided between companies of one group, in the present case the fact that observable prices and profits are available is ignored. Instead of using the profits recorded in Belgium as a tax base, the administration allows the company to recalculate an alleged arm's length

[16] Decision of 30/01/2007 in file 600.460.

[**] covered by the obligation of professional secrecy.

[17] The ruling has been implemented and prolonged.

[18] It seems that Company No.5 was indeed shopping around and had not decided on which location it would build the plant […]. It is unclear whether the construction has started and whether the ruling will be implemented.

profit which is substituted to the actual profit. Any profit above that level is attributed to the costs savings of a new investment or theoretical synergies and therefore not taxed. Consequently, on the basis of the excess profit tax ruling system, the Belgian State unilaterally grants group entities of multinationals tax base reductions.

3 POSITION OF BELGIUM

(35) The Belgian government argues that Article 185§2, b) CIR92 is the transposition of Article 9 of the OECD Model Tax convention.

(36) The Belgian State also refers to a number of paragraphs in the OECD Transfer Pricing Guidelines, in particular paragraphs 1.10[19], 7.12[20], 9.57[21] and 9.58[22] and argues that those paragraphs indicate that the attribution of synergies to individual group entities, which are only realized because a group entity is part of a larger group, is a very difficult exercise. Therefore, when analyzing the tax situation of a "tested party", Belgium adopts a stand-

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[19] "*The arm's length principle is viewed by some as inherently flawed because the separate entity approach may not always account for the economies of scale and interrelation of diverse activities created by integrated businesses. There are, however, no widely accepted objective criteria for allocating the economies of scale or benefits of integration between associated enterprises.*"

[20] "*There are some cases where an intra-group service performed by a group member such as a shareholder or coordinating centre relates only to some group members but incidentally provides benefits to other group members. Examples could be analysing the question whether to reorganise the group, to acquire new members,* or to terminate a division. These activities could constitute intra-group services to the particular group members involved, for example those members who will make the acquisition or terminate one of their divisions, but they *may also produce economic benefits for other group members not involved in the object of the decision by increasing efficiencies, economies of scale, or other synergies. The incidental benefits ordinarily would not cause these other group members to be treated as receiving an intra-group service because the activities producing the benefits would not be ones for which an independent enterprise ordinarily would be willing to pay.*"

[21] "*Business representatives who participated in the OECD consultation process explained that multinational businesses, regardless of their products or sectors, increasingly needed to reorganize their structures to provide more centralized control and management of manufacturing, research and distribution functions. The pressure of competition in a globalised economy, savings from economies of scale, the need for specialization and the need to increase efficiency and lower costs were all described as important in driving business restructuring. Where anticipated synergies are put forward by a taxpayer as an important business reason for the restructuring, it would be a good practice for the taxpayer to document, at the time the restructuring is decided upon or implemented, what these anticipated synergies are and on what assumptions they are anticipated. This is a type of documentation that is likely to be produced at the group level for non-tax purposes, to support the decision-making process of the restructuring. For Article 9 purposes, it would be a good practice for the taxpayer to document how these anticipated synergies impact at the entity level in applying the arm's length principle. Furthermore, while anticipated synergies may be relevant to the understanding of a business restructuring, care must be taken to avoid the use of hindsight in ex post analyses (see paragraph 3.74).*"

[22] "*The fact that a business restructuring may be motivated by anticipated synergies does not necessarily mean that the profits of the MNE (MultiNational Enterprise) group will effectively increase after the restructuring. It may be the case that enhanced synergies make it possible for the MNE group to derive additional profits compared to what the situation would have been in the future if the restructuring had not taken place, but there may not necessarily be additional profits compared to the pre-restructuring situation, for instance if the restructuring is needed to maintain competitiveness rather than to increase it. In addition, expected synergies do not always materialise – there can be cases where the implementation of a global business model designed to derive more group synergies in fact leads to additional costs and less efficiency.*"

alone approach, leaving out the profits from synergies or economies of scale[23]which are only realized not because of the activity itself but because the tested party is integrated in a larger group.

(37) As regards those synergies, Belgium refers to centralisations, capacity expansions, restructurings etc. Concretely, if a group were to put in place a "principal" (a.k.a. "central entrepreneur") or a "master-distributor" or would make the supply chain more efficient, this would lead to important synergies or economies of scale. By definition, a stand-alone entity would never have access to such synergies or to such a degree of integration and is also more limited in terms of volume.

(38) Belgium points out that the different OECD transfer pricing methods lead to a range of potential tax bases rather than to a specific estimate to the point.

(39) Belgium explains that there is only one of the five OECD transfer pricing methods i.e. the profit split method, which allocates the company's profits in a coherent manner over the different group entities. Belgium however argues that this method is not widely used as it assumes that all entities involved in the group transactions make unique and high value-added contributions. Belgium underlines that all other methods are so-called unilateral methods, which provide a range of values for an arm's length profit for one participant in the transactions (the so-called "tested-party"). As a consequence, Belgium claims that it can happen that the OECD transfer pricing methods lead to an arm's length tax base for all the tested parties individually, while the sum of all those arm's length results does not necessarily coincide with the consolidated result of the same transactions.

(40) Belgium attaches high importance to paragraph (1.10) of the Transfer Pricing Guidelines which notes that it is very difficult to find an objective method to allocate synergies which are linked to being part of a larger group to individual group entities. Belgium notes that this uncertain situation could both lead to a situation of double taxation or double non-taxation, depending on the way the States concerned apply the arm's length principle. Belgium argues that only the systematic use of the profit split method – which in the eyes of Belgium would be contrary to the arms' length principle and the OECD principles – or the obligation for companies to systematically use Advance Multilateral Agreements would allow avoiding such divergences.

(41) Belgium explains that the objective of Article 185 §2 b is to introduce pro-actively a corresponding adjustment in order to avoid a double taxation, which relates to a profit which is included in the accounting result in Belgium, but which – as a result of the arm's length principle – is not attributable to the Belgian entity.

(42) Belgium underlines that the Ruling Commission -which is responsible for evaluating all requests based on Article 185§2, b) CIR92 - applies the arm's length principle in full. In order to make its analysis, the Ruling Commission takes into account a fully-fledged

[23] For the purpose of the present decision, the terms "*synergies and economies of scale*" will encompass other sources of group efficiencies possibly identified by the Belgian authorities as leading to an excess profit in the books of the Belgian entity of the group, liable to be deducted from the corporate income tax base on the basis of Article 185§2, b) CIR92.

functional analysis of the entity concerned, a detailed motivation of the chosen transfer pricing method and of the chosen data which are used, a detailed analysis of the peer group selection and of the choice of the interquartile points.

(43) Belgium also considers that, in view of the State aid analysis, Article 185§1 CIR92 is not a correct system of reference because Belgian entities that belong to a multinational group of associated companies are not in the same legal and factual situations as stand-alone companies or as entities of purely Belgian groups.

(44) Belgium claims that the central entrepreneurial function is the most complex function, so that residual profits should be allocated to this central entrepreneurial function (in Belgium). Belgium uses a TNMM method (based on a sales margin with a few corrections) to calculate the taxable base of the central entrepreneur function.

4 ASSESSMENT

4.1 The exemption of excess profit is a scheme

(45) At this stage, the Commission regards Article 185§2 b) CIR92 introduced by Law of 21 June 2004 as a tax scheme, insofar as it stipulates the granting of unilateral downward adjustments of the tax base to certain undertakings in respect of so-called excess profits allegedly realized by the Belgian entity as a consequence of it being part of a multinational group.

(46) Pursuant to Article 1(d) of Regulation 659/1999 a scheme is to be considered as an act *"on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner"*.

(47) First, Article 185§2b CIR 92 can be considered as the basis for "*unilateral downward adjustments*". It provides multinational companies a right of a reduced tax base without that being a response to a primary adjustment that another State has made or claimed to make in respect of the tax base of an associated entity of the same multinational group. This is evidenced in the answers of the Finance Minister to the questions of the Members of the Belgian Parliament Tommelein and Devlies which are systematically quoted in the decisions delivered by the SDA.[24]

(48) Second, the right to obtain an adjustment to the profits in an appropriate manner is indicated in the law itself. The fact that the Ruling Commission enjoys a certain margin of manoeuvre to negotiate the exact percentage of appropriate downward adjustment by approximating the excess profit to be deducted from the tax base based on the information provided by the taxpayer or to assess the fulfillment of some of the conditions under which

[24] See for example Decision of 26/02/2013 in file 2011.569, § 89; Decision of 15/12/2005 in file 500.249, § 21; Decision of 30/01/2007 in file 600.460, § 48. In addition, it should also be noted that Belgian law does not require that another State, where the group is located and actually integrated the profits into the profits of an enterprise in that State, actually taxes them , while to Article 9 (2) of the OECD Model Tax convention requires that the company in the other State not only has found the profits in the accounts of the other company but has actually "taxed them accordingly",

such deduction can be awarded (relocation of activities, investment, …) does not affect that conclusion.

(49) Third, the administrative practice of the "*unilateral downward adjustment*" is based on a consistent interpretation given to Article 185§2 b) CIR92 by the Belgian authorities in the Memorandum of the Law of 21 June 2004 and the administrative regulation (*circulaire*[25]) of 4 July 2006 and recalled in the SDA's annual reports. The "unilateral downward adjustment" practice is also referred to separately as a specific subject for rulings in annual reports published by the SDA[26].

(50) Indeed, an analysis of the rulings itself reveals the existence of a "Belgian interpretation of the arm's length principle"[27] (as well as a number of unwritten key conditions on which the authorization relies such as the link to the relocation of activities to Belgium and/or to the extension of the activities in Belgium accompanied by substantial new investments and/or the creation of new jobs) which can be observed consistently throughout all the rulings that have so far been analysed.

(51) Finally, the fact that the companies have to go through a compulsory tax ruling procedure does not contradict the existence of the scheme as the rulings do not put into question the granting of the downward adjustment but merely vet its calculation. To the contrary the existences of a special ruling commission ensures a consistent application of Article 185§2 CIR92 as this central body exclusively competent for delivering rulings ensures consistency in the application of the tax rules even if such rules are not explicitly laid down in the secondary legislation.

(52) In sum, the tax rulings procedure as it is applied by the specialised tax authorities thus meets the criteria laid down in Article 1(d) of Regulation 659/1999. Therefore the Commission considers at this stage that it can base its analysis on a scheme resulting from the legal provisions, the circulaire and the consistent application in the tax ruling procedure.

4.2 Existence of aid within the meaning of Article 107(1) TFEU

(53) According to Article 107(1), TFEU "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*".

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25 Circulaire n° Ci.RH.421/569.019 (AFER 25/2006) dd. 04.07.2006

26 See Annual report SDA 2009, pp.39 & 45.

27 See for example Decision of 26/02/2013 in file 2011.569, paragraph 85.

(54) State aid rules only apply to aid granted to undertakings involved in economic activities. On top of that, the criteria laid down in Article 107, paragraph 1 TFEU are cumulative. Therefore, the measures under assessment constitute State aid within the meaning of the Treaty if all the above mentioned conditions are fulfilled. Namely, the financial support should:

- be granted by the State and through State resources,
- favour certain undertakings or the production of certain goods,
- distort or threaten to distort competition, and
- affect trade between Member States.

4.2.1 Undertakings within the meaning of Article 107 TFEU

(55) The beneficiaries of Article 185§2, b) CIR92 are companies[28]. They are industrial, commercial or agricultural undertakings subject to the Belgian corporate income tax[29] law in respect of the total amount of their profits[30].

4.2.2 Existence of a selective advantage

(56) According to settled case-law, "*Article 107, paragraph 1 of the Treaty requires it to be determined whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by the scheme in question, are in a comparable legal and factual situation. If it is, the measure concerned fulfils the condition of selectivity*"[31].

(57) In order to classify a domestic tax measure as conferring a selective advantage, it is first necessary to identify and examine the common or 'normal' regime applicable in the Member State concerned. It is in relation to this reference tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation[32]. Third, a measure which constitutes an exception to the application of the general tax system may be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system[33]. If a deviation from the reference tax system is justified by the nature and general

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[28] Article 2§1er, 5° CIR92 reads as follows: "*On entend par: a) société: toute société, association, établissement ou organisme quelconque régulièrement constitué qui possède la personnalité juridique et se livre à une exploitation ou à des opérations de caractère lucratif.*"

[29] For the purpose of this decision, corporate income tax refers both to the rules applying to resident companies and to non-resident or foreign companies.

[30] As defined in Article 24 CIR92.

[31] See judgment of the Court of Justice of 3.03.2005 in case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40.

[32] Judgement of the Court in Joined Cases C-78/08 to C-80/08 *Paint Graphos*, recital 49.

33 Judgement of the Court in Joined Cases C-78/08 to C-80/08 *Paint Graphos*, recital 65

scheme of that tax system, the derogation is not selective. The burden of proof in that third step lies with the Member State.

4.2.2.1 Reference tax system and guiding principles

(58) At this stage, the Commission has identified the Belgian corporate income tax as the appropriate reference system for the analysis of the existence of an advantage and of a prima facie selectivity of the scheme. Indeed, all resident and Belgian permanent establishments of foreign (non-resident) companies as defined under Article 2(5), 179 and 227(2) CIR92 are subject to income tax in respect of the total amount of their profits pursuant to Article 185§1 CIR92. The calculation of the tax base takes the corporate accounting profit as a starting point[34], which is at first sight a general and neutral way to determine the tax base for income taxation. If the amendments (additions or deductions) provided by the tax law in subsequent phases of the determination of the tax base are not of general application, i.e. if they only apply to certain undertakings, this should be regarded as a derogation to the principle that companies are taxable on the total amount of their profits and analysed as a possible source of selective advantage.

(59) From the State aid assessment perspective, there is however one specific situation where a derogation can be justified in order to avoid that an advantage is granted to certain companies. In particular, as explained in paragraphs 10 and 11 above, multinationals are able to artificially reduce their tax base in certain jurisdictions by fixing biased prices in their intragroup transactions. In those jurisdictions, it therefore appears justified to apply an upward correction of the tax base to restore the tax base at the level it would have had, had the prices been set at market conditions. In turn, if that adjustment in one jurisdiction implies that the same profits are taxed in two jurisdictions, this would also justify a derogation – a downwards adjustment of the tax base of an associated company – in that other jurisdiction.

(60) This derogation is exceptional and strictly limited to the situation where the application of the general rule would allow the taxpayer to abuse the tax system.

(61) In the context of the implementation of such derogation, tax administrations can refer to Article 9 of the OECD Model Tax Convention and the general transfer pricing principles such as the arm's length principle and the guidance documents developed by the OECD[35].

(62) On the contrary, other types of derogations enable certain taxpayers to reduce their tax base without being justified by an anti-abuse purpose and may confer a selective advantage tantamount to State aid. It is the case, for example, when such an exemption takes place, without that being a response to a claim by another jurisdiction to tax the same profit.

4.2.2.2 Article 185§2, b) CIR92 is a derogation from the reference system

(63) Article 185§2 CIR92 is one source of corrections applied to the accounting profits by the corporate income tax law with a view to establishing the tax base of a company. In this

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[34] To which additions and deductions of general application provided by the law are applied.

[35] See Recital 12 to 14 above.

case, unilateral downward adjustments authorised pursuant to Article 185§2, b) CIR92 allow the beneficiaries to reduce their tax base and the amount of tax paid in comparison with a situation where those adjustments would not take place and all profits registered in the accounts of the beneficiaries would be taken into account when applying Article 185§1 CIR92. The reduction in the amount of tax due is an economic advantage within the meaning of Article 107(1) TFEU.

(64) Belgium argues that the State aid assessment carried out by the Commission should not take the accounting profit as a reference but the tax base after application of all the amendments and especially of the amendments (such as provided by Article 185§2 CIR92) relating to the application of the arm's length principle. .

(65) The Commission disagrees at this stage with that position. Indeed, all the rules of corporate income tax law leading to the determination of the tax base (or of other elements of taxation) should be of general application and ensure that all undertakings in the same legal and factual situation in view of the objectives of the corporate income tax law are treated in a consistent manner. As already mentioned, the reference to the accounting profit of a company as a starting point appears to be of general application. If the amendments (additions or deductions) provided by the tax law in subsequent phases of the determination of the tax base are not of general application, i.e. if they only apply to certain undertakings, this should be regarded as a derogation to the principle that companies are taxable on the total amount of their profits and analysed as a possible source of selective advantage.[36]

(66) Belgium also argues that multinationals are not in a similar legal and factual situation in respect of their revenues from cross-border activities as Belgian stand-alone companies or Belgian groups of associated entities. This argument implies however, that Article 185§2 CIR92 is the correct reference system, not Article 185§1 CIR92.

(67) The Commission disagrees with Belgium on that point and maintains that the correct reference system is the general rule of Art. 185§1 CIR92 that has the objective to tax all companies on the entire amount of their profits, including distributed dividends. According to that provision the Belgian entities of multinational groups of associated companies are in the same legal and factual situation as Belgian stand-alone companies or Belgian groups of associated entities with respect to the requirement of Article 185§1 CIR92 : They should be subject to tax in Belgium on the total amount of their profits. As mentioned above, the calculation of the taxable profits starts from the profits as they are registered in the accounts and the Commission does not see why a derogation to that principle would be warranted for Belgian entities of multinational groups of associated companies. The fact that multinationals – contrary to Belgian stand-alone companies or entities of a Belgian group of associated companies – are the only ones whose revenues can originate in cross-border activities and be subject to international

[36] In any case, even if, quod non, all the rules of determination of the corporate income tax base – including all the additions and deductions applied to the accounting profits of the company – had to be regarded as part of the reference system, it would not prevent the Commission from assessing whether the design of the system as such could confer a selective advantages, see Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI: EU:C:2011:732 at para 87.

double taxation does not, in light of the objective of the tax system, put the Belgian entity of such a multinational group in a different legal and factual situation with respect to the application of Article 185§1 CIR92.

(68) If one were to accept the argument of Belgium that the reference tax system should include Article 185§2 CIR92 because one of the objectives of the tax system is to prevent double taxation, the Commission considers that until an actual situation of double taxation arises, multinational groups of associated companies are not in a different legal and factual situation justifying a derogation to Article 185§1 CIR92 in the form of unilateral downward adjustments. It should also be underlined that unilateral downward adjustments pursuant to Article 185§2, b) CIR92 only apply to revenues from synergies, economies of scale or other types of intragroup efficiencies. The Commission observes that the profits of stand-alone companies and of entities of a Belgian group could also include revenues possibly attributed to synergies, economies of scale or from other types of organizational efficiencies and that those revenues are however included in the tax base pursuant to the application of the Belgian tax system and more specifically of Article 185§1 CIR92.

(69) Belgium considers that no economic advantage is granted because the full amount of the arm's length profit of the companies concerned is taxed. The Commission disagrees with that argumentation.

(70) First, it is not sufficient to conclude – as Belgium suggests – that the full arm's length profit of the Belgian entity is subject to tax in Belgium to exclude the existence of an advantage in relation to the exemption from the excess profit rulings. Indeed, the unilateral application of the derogation introduced by Article 185§2, b), CIR92 does not correspond to one of the exceptional situations described above where a derogation to the application of Article 185§1 CIR92 and the reference to the arm’s length principle is necessary to prevent a possible abuse of the general rule of Article 185§1 CIR92 by multinational companies.

(71) Second, the Commission at this stage considers that Belgium does not apply the arm's length principle properly by excluding from the tax base profits resulting from synergies and economies of scale.

(72) Belgium claims that even after the deduction the full arm's length profit of the Belgium entity is subject to tax in Belgium.

(73) In this respect the Commission observes that the arm's length profit is the profit that arises through transactions with unrelated parties, whereas there is first of all no indication in this case that the profit of the Belgium entity (before deduction) was not achieved through transactions with unrelated parties. Belgium invokes that this profit would not have arisen between unrelated parties because alleged synergies and economies of scale are not accounted for. The Commission does moreover not follows this logic as Belgium does not require that such synergies and economies of scale are either clearly identified or that the amount of the benefit is estimated.

(74) Indeed, the Commission observes that Belgium refers to the arm's length principle enshrined in Article 9 of the OECD Model Tax treaty and in the OECD Transfer Pricing Guidelines but relies on paragraph 1.10 of such Guidelines to justify the excess profit ruling

practice (see Section *3 Position of Belgium* above). Paragraph 1.10 of the Guidelines refers to views expressed by some – and apparently endorsed by Belgium – that the arm's length principle would be flawed because profits resulting from synergies and economies of scale are difficult to allocate. In that respect, the Commission would like to point out first that the double reference (to the arm's length principle and to assertions that it is flawed) would appear to be contradictory and second, that as announced in paragraph 1.10 *in fine*, section C of the OECD Guidelines discusses an alternative approach to the arm's length principle and rejects it (see paragraph 1.32). The Commission observes that, contrary to what Belgium seems to suggest, the position expressed in paragraph 1.10 of the Guidelines is not supported by the OECD member States.

(75) Paragraph 1.10 of the Guidelines only suggests that profits from synergies, economies of scales or of other efficiencies are difficult to allocate but not that they should not be allocated to any entity of the group nor that they should be allocated to an undetermined "rest of the group"[37] which in this case would not be subject to tax in any jurisdiction.

(76) In addition, the Commission observes that the interpretation given by Belgium to the arm's length principle implies that only the profits that would be generated in Belgium by a reference (average) stand-alone company should be subject to Belgian corporate income tax. The Commission concludes that a general application of that interpretation of the OECD principles by all the States hosting entities of multinational groups would necessarily lead to the conclusion that profits of group resulting from intragroup synergies or economies of scale should not be taxed in any of those States.

(77) In concrete, as indicated above the actual profit recorded in Belgium is disregarded and reduced by the difference between the actual profit and a profit that is estimated as sufficient, had a hypothetical transfer pricing between the different entities of the group been at arm's length. However this seems to be an inappropriate and unduly favourable reading of the arm's length principle. The accounting profit of the Belgian entity reflects one allocation made, by the multinational company among the different entities, of its revenues including all savings and synergies generated within the group. If the multinational group considered that adjustments needed to be made to this allocation, this should in principle be translated into payments to remunerate services or benefits provided by the group, or the use of identified intangible assets by other group entities. In the case at stake, transfer pricing is not being used in the absence of reliable prices for a service or goods provided between companies of one group, but despite the existence of observable prices and profits. Instead of using the profits recorded in Belgium as a tax base, the administration allows the company to recalculate an alleged arm's length profit that allegedly comparable companies receive.[38] Any profit above that level is attributed to the

[37] See decision 600.460 of 30 January 2007, §23 and 24: "*(…) the total profit of the (…) business is attributed under the central Entrepreneur model in Belgium to the (…) company with its registered office in Belgium (…).*" "*This total residual profit consists of a portion of profit that may be regarded as a royalty for the entrepreneur functions (…) on the one hand, and on the other hand consists of a residual portion of profit that may be regarded as "excess profit" as a result of having the know-how, procurement advantages, customer lists sales organisation advantages etc. at its disposal that the (…) Group in general and not just or not especially the shareholder of the Central Entrepreneur company, possesses.*"

[38] In fact, the Commission observes that this practice creates an incentive to multinationals to disregard the principles enshrined in the OECD Transfer pricing Guidelines when they establish their own transfer prices

costs savings or theoretical synergies related to a new investment and simply deducted from the tax base. The Commission does not understand why, if such a deduction was justified by the arm's length principle, the deduction should only be awarded in respect of profits related to the relocation of activities to Belgium or to new investments made and jobs created in Belgium.

(78) Given that the tax rulings seem to allow taxpayers to use improper transfer pricing methods for calculating taxable profits, or at best not to use the most appropriate transfer pricing methods the Commission has serious doubts about the principle of making such a correction.

(79) Assuming that there would be a reason to proceed to a downward adjustment from the accounting profit of the company with additions and deduction of general application provided by the tax law in the first place, quod non, doubts about using the most appropriate methods derive notably from the fact that Belgium is allowing the Belgian part of the group to be systematically the most complex party in the group so that adequate profitability is estimated by a residual profit approach. This residual profit is calculated by identifying the arm's length pricing of less complex function, albeit it is not often clear whether the Belgian entities, selected as tested parties, are really the ones to which a transfer pricing method can be applied in the most reliable manner[39]. In addition, it seems that analysis is performed solely with a view of reducing the profits in Belgium without any understanding of the company's global business processes and a comprehensive analysis of where the most complex function is located.[40]

(80) Not only it seems at this stage that there is no reason to proceed to the deduction, but the Commission has an additional methodological concern regarding the way it is calculated. In fact, Belgium relies, on projections of accounting profit on the one hand and projections of profit estimated by application of the TNMM method on the other hand. .Each year at the moment of the determining the tax liability payable the information about the actual profit of the Belgian entity would be available to the tax authorities. Therefore the Commission does not understand why the tax authorities resort to projections rather than the actual

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(prior to the tax authorities) and to claim afterwards – and obtain a tax advantage on that basis – that they have not correctly applied those principles. In the absence of any possibility for any other country where an entity of the group is established to tax the amounts exempted in Belgium or to challenge the methods or calculations presented to the Belgian authorities, this practice would also appear to create an incentive to artificially inflate the so-called excess profits (often expressed as a percentage of total accounting profits).

[39] See paragraph 3.18 of the OECD transfer pricing guidelines.

[40] This concern is also expressed by the OECD in paragraph 6.130 of the OECD Guidance on Transfer Pricing Aspects of Intangibles states with respect to intangibles that "it is important not to simply assume that all residual profit, after a limited return to those providing functions, should necessarily be allocated to the owner of intangibles. The selection of the most appropriate transfer pricing method should be based on a functional analysis that provides a clear understanding of the MNE's global business processes and how the transferred intangibles interact with other functions, assets and risks that comprise the global business. The functional analysis should identify all factors that contribute to value creation, which may include risks borne, specific market characteristics, location, business strategies, and MNE group synergies among others. The transfer pricing method selected, and any adjustments incorporated in that method based on the comparability analysis, should take into account all of the relevant factors materially contributing to the creation of value, not only intangibles and routine functions".

profits in their calculation of tax deduction. At this stage, no justification has been provided on the fact that the discount to profit is fixed in advance.

(81) The fact that the discount is calculated based on projections, rather than on a realised profit indicator[41] implies that the stated objective of estimating an arm's length pricing would not be met whenever the financial projections do not materialize.

(82) Finally, the Commission understands that excess profits can only be generated in Belgium when the actual prices set for the intragroup transactions involving the Belgian entity are not in line with the arm's length principle and that this is what would justify the unilateral adjustment applied under Belgium's interpretation of the arm's length principle. On the contrary, when the transfer pricing policy of a group is in line with the arm's length principle, no adjustment would appear to be needed[42]. Indeed, if companies are able to tell the Belgian administration that their transfer pricing policy is not in line with the arm's length principle, the Commission concludes that they would automatically have avoided any risk of possible double taxation, had they adjusted the transfer prices with the arm's length principle in the first place.

(83) The Commission therefore at this stage does not find that the Belgian excess profit ruling practice relying on the "*Belgian interpretation of the arm's length principle*" is in line with the objectives pursued by the arm's length principle that approximates a market outcome and as reflected in the OECD Guidelines and Article 9 of the OECD Model Tax treaty. Consequently the measure confers an economic advantage on the beneficiaries, because the company is allowed to make a sizeable deduction from the tax base that seems not in line with the arm's length principle.

(84) The Commission considers that the downward adjustment resulting from the application of Article 185§2, b) CIR92 confers an advantage in derogation from the principle that all profits should in principle be subject to the corporate income tax in Belgium. As indicated above such derogation confers selective economic advantages to certain companies benefitting from the tax reduction and not to others, which have to compete on their merits. It further seems at this stage to be prima facie selectively for the following reasons.

- First and most importantly, in derogation to Article 185§1 CIR92, the benefits of Article 185§2 b) CIR92 are only available to international / multinational companies. In addition, unilateral downward adjustments based on Article 185§2 b) CIR92 are only available to large companies as small companies are unlikely to generate

[41] I.e. in relation to costs or assets or any other profit level indicator considered as appropriate.

[42] Examples seem to contradict that conclusion however. In a ruling application report of 30 September 2005, the beneficiary of the decision in file 500.249 states on the one hand that it applies "*conditions to intercompany transactions that are comparable with the conditions that would apply to similar transactions between unrelated companies in line with the methods and principles defined in the OECD Transfer Pricing Guidelines (cf. Section 5) to establish an arm's length transfer pricing policy* (…)" and describes how such transfer pricing policy translated into Engineering Services Agreement, Technical Service Agreements in respect of the construction of two lines of production as well as a Licence agreement for the use of the technology and trade mark transferred by the mother company that all foresee a remuneration. On the other hand, it request the application of article 185 §2, b) CIR92 in respect of a transfer for free of a new technology and of a guarantee for free that other group companies would purchase the Belgian entity's extra production.

synergies and economies of scale to an extent that will justify the cost related to the ruling request.

- Second, the authorization of Article 185§2 b) CIR92 by the SDA appears to be closely connected and strictly conditioned on the relocation to Belgium of substantial activities and/or to the realisation of substantial investments / the creation of jobs in Belgium which constitutes a further distinguishing element.

(85) First, the deduction is not available to all companies established in Belgium because it only applies to Belgian entities of multinational groups. It is neither applicable to entities of a purely Belgian group nor to Belgian stand-alone companies.

(86) Belgium considers that it is sufficient to be established in Belgium and in one other State to be regarded as a multinational and access the excess profit rulings in respect of intragroup cross-border activities. However, the Commission notes at this stage that not every company is in the position to set up a multinational company.[43]

(87) In addition, the Belgian practice of unilateral downward adjustments pursuant to Article 185§2 CIR92 is also selective because synergies, economies of scale or similar efficiencies can only be invoked by multinational groups. In practice, smaller companies – even when established on both sides of the Belgian border – do not appear to have access to the excess profit deduction because they don't have the necessary scale to invoke the existence of synergies, economies of scale or similar types of scale induced efficiencies.

(88) Second, the Commission notes that the excess profit ruling decisions it has analysed systematically contain references to substantial investments and/or the creation of employment and or the relocation of activities to Belgium[44]. Those elements appear to

[43] That the difference in treatment of multinationals is selective was established in Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI: EU:C:2011:732

[44] See decision of 26/02/2013 in file 2011.569, § 42: "*Le programme d'investissement lié à ces projets est le suivant: (…) mise en place d'une troisième ligne de production: investissement de USD 2.2 millions (…) mise en place d'une quatrième et cinquième ligne de production: complément d'investissement d'au moins USD 5 millions (…)*"; §43: "*En terme de création d'emplois, de tels investissements devraient résulter en une augmentation du nombre de travailleurs du groupe en Belgique d'au-moins 30 à 40 équivalents temps plein*"; , §83: *"(…) (La demandeuse) s'engage à augmenter ses capacités de production en Belgique. (…)*" and §91: *"(la demandeuse) réalisera un bénéfice supérieur en Belgique du fait des économies d'échelles et des synergies dont elle bénéficiera en raison de l'augmentation de sa capacité de production suite à la décision d'investissement additionnel par le groupe*"; decision of 30/01/2007 in file 600.460, §15: *"(…) the business intends to relocate the Central Entrepreneur company from (abroad) to Belgium in the course of 2007*"; §18: "*The Entrepreneur activities that are currntly carried out (abroad) require the employment of 15 positions. All these positions will be transferred to Belgium*".; decision of 15/12/2005 in file 500.249 §6: "*De totale investering bedroeg circa EUR 109,5 miljoen. De geraamde extra banentoename als gevolg van deze nieuwe investering (…) wordt geraamd op 25 mensen*".; decision of 10/12/2013 in file 2013.540, Section 2: Impact sur le niveau d'emploi en Belgique (…) §68: "Grâce à la création de la centrale d'achat et du bureau de qualité en Belgique, 20 nouveaux emplois pourront être créés ou préservés en Belgique. Le recrutement de 4 personnes supplémentaires est également envisagé à moyen terme, après 2015." §69: *"(…) le nombre de points de vente en Belgique ainsi que la surface commerciale (…) devraient augmenter. On peut dès lors s'attendre à la création d'emplois supplémentaires dans le réseau belge de distribution.*" §70: "*Il convient également de mettre en évidence (qu')en cas de faillite le nombre d'emplois perdus au sein de (l'entreprise reprise).se serait élevé à (…) 300 équivalents temps plein.*" § 71-72: "Il est à noter que (la demandeuse) envisage également (…) de créer un nouvel entreprôt de stockage (…) ce qui conduirait à la création de nouveaux emplois"

constitute key elements on which the validity of the ruling relies. This seems to be further confirmed by the fact that in case of expansion of existing activities the excess profit ruling only applies in respect of the increment in activities, not to the whole profits generated by the activity[45].

(89) The Commission therefore considers at this stage that the measure favours multinational companies that are large enough to invoke the existence of synergies, economies of scale or similar efficiencies and that can afford making and actually make substantial new investments, create employment or relocate substantial parts of their activities to Belgium.

4.2.2.3 Absence of a justification by the nature and general scheme of the tax system

(90) For the reasons set out below, the Commission considers at this stage that those elements of selectivity cannot be justified by the internal logic of the Belgian Corporate income tax system – so-called nature and general scheme of the tax system.

(91) The Commission has doubts that the Belgian practice of proactive downward adjustment of the tax base is justified by the nature and general scheme of the Belgian tax system. Indeed, the downward adjustment does neither appear to be necessary – nor proportionate to – the alleged objective of the derogation to avoid double taxation. As explained above, it is underlined that multinational groups can apply the arm's length principle to set their transfer prices. Transfer pricing Guidelines also help multinationals in that respect. Multinational companies can therefore reduce the risk that such transfer prices are challenged by some tax jurisdiction, i.e. the risk of double taxation. Several bilateral and multilateral instruments of international law also exist that allow multinationals and Contracting States to prevent or solve possible double taxations.

(92) The Commission notes that the Belgian authorities do not appear to request from the Applicants to demonstrate that the profits exempted in Belgium *are already included in the profits of another company* or even that they run a risk of double taxation on those profits. On the contrary, the Commission notes that the replies to the Members of the Parliament Tommelein and DeVries and the consistent reference to those replies in the rulings provides reassurance that Belgium will not communicate the downward adjustment to any other States. By virtually ensuring a double non taxation, this practice appears to go beyond what is necessary and proportionate to avoid cases of unresolved double taxation.

(93) In conclusion, contrary to its stated objective, the scheme does not prevent double taxation but leads to double non taxation, which is neither intended by the arm's length principle nor by the OECD Transfer pricing guidelines.

(94) The Commission considers that Article 9 of the OECD Model Tax convention, a model for bilateral instruments to prevent double taxation, cannot be used to justify unilateral downwards adjustments which in view of the context only appears to ensure double non taxation. Indeed, Belgium does not apply the unilateral downward adjustments in the

[45] See decision of 26/02/2013 in file 2011.569, §103: "*Dans la mesure où l'ajustement ne sera effectif que sur le profit additionnel éventuel lié à l'augmentation de la capacité de production de (la demandeuse), le profit excédentaire a été évalué à 66.30% du NBPT additionnel.*"

context of bilateral discussion to resolve possible double taxation and does not request from the multinational company to demonstrate that double taxation has taken place or is likely to take place and has clearly indicated[46] that it would not inform other countries of the downward adjustments. It is also relevant to note in that respect that – contrary to Article 185§2, b) CIR92 – Article 9 of the OECD Model Tax Treaty applies if is established that the same profits are included in the tax base of two different companies established in different countries, and have been – or are at risk of being – "*taxed accordingly*" by both jurisdictions.

(95) Moreover, it can be observed that some of the requirements of the scheme such as to make investments in Belgium or to create employment are not related in any way to the alleged objective of avoiding double taxation or otherwise justified in light of the founding principles of the Belgian corporate tax system.[47] According to constant case practice of the Court, even where the competent authorities have discretion to determine *inter alia* the conditions under which a tax advantage can be granted, such discretion is only not selective where the relevant criteria are intrinsically related to the tax system.[48]

4.2.3 Transfer of State resources and imputability to the State

(96) The selective advantage identified in Section 4.2.2 above results from the application of a tax law provision, applied in the context of a compulsory advance tax ruling. The legal provision of Article 185§2 CIR92 as well as all the documents clarifying the interpretation made by the Belgian authorities and the rulings effectively determining the amount of excess profit that can be exempted all find their origin in the action of the Belgian State. They are therefore imputable to the Belgian State.

(97) The Commission also concludes that the measure involves State resources as the State allows for a deduction of the identified excess profit from the taxable base that would normally result from the application of the corporate tax rules and in particular of Article 185§1 CIR92. That deduction translates into a reduction of the amount of corporate income tax collected by the State which thereby foregoes State resources.

(98) The Commission considers that the economic advantage results from the fact that Belgium on request of the beneficiary disregards the allocation of profits resulting from the transfer pricing policy of the group to which it belongs and from the absence of taxation of the exempted "excess profits" in Belgium. That advantage is clearly imputable to the Belgian State and involves the transfer of the Belgian State's resources. The Commission does not consider, as claimed by Belgium, that the advantage results from the possible absence of taxation abroad of the profits exempted in Belgium, as it is the Belgium State that unilaterally reduces its tax base independently of what the other Contracting State does.

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[46] See replies by the Minister of Finance to parliamentary questions of Mr Tommelein and Mr Devlies mentioned above in FN 13 and 14.

[47] Case C-6/12 *P* ECLI:EU:C:2013:525, §27.

[48] Case C-6/12 *P* ECLI:EU:C:2013:525, §27.

4.2.4 Distortion of competition and effect on trade

(99) In comparison with their competitors, the undertakings benefiting from the exemption of a substantial part of their profits in Belgium by virtue of the excess profit rulings delivered by the tax administration were relieved from costs which they should otherwise have borne or passed on to their customers. Therefore, tax exemption improved their economic situation vis-à-vis other undertakings competing in the markets where they are trading thereby distorting or risking to distort competition.

(100) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid[49]. It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition[50]. The beneficiaries are multinationals trading in sectors characterized by intense competition between operators from different Member States and global operators. The Commission also observes that there are many international players which are active in the market segments of the beneficiaries of the excess profit rulings, and that the reasons put forward to justify the new investments or relocations subject to the rulings often refer to increased competitiveness on the European or worldwide markets. The tax exemptions are therefore liable to affect trade on the internal market.

4.2.5 Beneficiary

(101) The beneficiaries are certain Belgian entities (Belgian incorporated companies or Belgian permanent establishment of foreign companies) of multinational groups that have filed a request for a tax ruling on the basis of Article 185§2, b) CIR92 and for which a unilateral downwards adjustment has been awarded.

4.2.6 Conclusion

(102) In conclusion, the Commission's preliminary view is that Article 185§2 b) CIR92 introduced by Law of 21 June 2004 forms a tax scheme which constitutes State aid within the meaning of Article 107(1) TFEU.

4.3 Compatibility of the aid

(103) As the measure appears to constitute State aid, it is therefore necessary to determine if such aid is compatible with the internal market. State aid measures can be considered compatible on the basis of the exceptions laid down in Article 107(2) and 107(3) TFEU.

(104) So far, the Commission has doubts as to whether the measures in question can be considered compatible with the internal market. The Belgian authorities did not present any argument to indicate that any of the exceptions provided for in Article 107(2) and 107(3)

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[49] See in particular, Case 730/79 Philip Morris v Commission [1980] ECR 2671, paragraph 11, Case C-53/00 Ferring [2001] ECR I-9067, paragraph 21, and Case C-372/97 Italy v Commission [2004] ECR I-3679, paragraph 44.

[50] Case T-214/95 Het Vlaamse Gewest v Commission [1998] ECR II-717 ECLI:EU:T:1998:77.

TFEU, under which State aid may be considered compatible with the internal market, applies in the present case.

(105) The exceptions provided for in Article 107(2) TFEU, which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not seem to apply in this case.

(106) Nor does the exception provided for in Article 107(3) (a) TFEU apply, which allows aid to promote the economic development of areas where the standard of living is abnormally low or where there is a serious unemployment, and for the regions referred to in Article 349 TFEU, in view of their structural, economic and social situation. Such areas are defined by the Belgian regional aid map. This provision does not seem to apply in this case.

(107) As regards the exceptions laid in Article 107 (3) (b) and (d) TFEU, the aid in question is not intended to promote the execution of an important project of common European interest nor to remedy to a serious disturbance in the economy of Belgium, nor is it intended to promote culture or heritage conservation.

(108) Aid granted in order to facilitate the development of certain economic activities or of certain economic areas could be considered compatible where it does not adversely affect trading conditions to an extent contrary to the common interest, according to Article 107(3) (c) TFEU. As noticed above, the validity of the excess profit ruling decisions analysed by the Commission systematically contain references to substantial investments and/or the creation of employment and or the relocation of activities to Belgium. At this stage however, Belgium has not claimed that the tax advantages granted by the measure under examination are related to specific investments, to job creation or to specific projects eligible to receive aid under the State aid rules and guidelines. In addition, in the absence of any element to support the compatibility of such pursuant to Article 107(3) (c) TFEU, the Commission concludes at this stage, that the measures in issue seem to constitute a reduction of charges that should normally be borne by the entities concerned in the course of their business, and should therefore be considered as operating aid. According to the Commission practice, such aid cannot be considered compatible with the internal market in that it does not facilitate the development of certain activities or of certain economic areas, nor are the incentives in question limited in time, digressive or proportionate to what is necessary to remedy to a specific economic handicap of the areas concerned.

In light of the foregoing considerations, the Commission's preliminary view is that Article 185§2 b) CIR92 introduced by Law of 21 June 2004 as a tax scheme constitutes State aid within the meaning of Article 107(1) TFEU and the Commission has doubts at this stage as to the scheme`s compatibility with the internal market. The Commission has therefore decided to initiate the procedure laid down in Article 108(2) TFEU with respect to that measure

The Commission further requests Belgium to submit its comments and to provide all such information as may help to assess the aid/measure, within one month of the date of receipt of this letter. In particular, it is asked

– for each of the rulings delivered with respect to requests for unilateral downward adjustments, to provide information about the actual amounts of taxable base exempted for

each of the taxable years concerned, as well as the dates when the tax in the relevant taxable years was due.

- to submit information with respect to any additional rulings that have been delivered in the meantime
- to submit information with respect to requests for unilateral downward adjustments that have been rejected by the ruling commission
- to confirm that the Belgium tax authorities do not request the Applicants to bring any type of evidence that the revenues included in the accounting profits of the Belgian entity are also included in the taxable profits of other entities of the group abroad, or that the taxation of those revenues in Belgium would imply a serious risk of double taxation. If such evidence does not exist, please indicate why, in view of other means to prevent and resolve double taxation, they regard the unilateral downward adjustment as a necessary and proportional method to prevent double taxation.
- to give reasons why rulings have only been delivered in situations where the Applicant commits to the relocation of activities to Belgium and/or to the extension of the activities in Belgium accompanied by substantial new investments and/or the creation of new jobs and to explain on which basis those conditions are imposed
- to explain for what reasons the adjustments only apply in respect to the profits generated by additional investments or to the activities relocated to Belgium as opposed to the profits generated by the previously existing activities.

The Commission also invites interested third-parties:

- to inform the Commission whether they consider that the actual transfer prices set for the intragroup transactions or relationships on the basis of which they requested a unilateral downwards adjustments are at arm's length? If yes, then why do they consider that the requested unilateral downward adjustment is warranted? If not, why do they not apply the arm's length principle in the determination of their actual transfer prices in the first place?
- to inform the Commission about how the profits exempted in Belgium were actually allocated to the other entities of the group, and treated both from an accounting point of view and from a tax point of view?

Belgium is requested to forward a copy of this letter to the potential beneficiaries of the aid immediately.

The Commission wishes to remind Belgium that Article 108(3) TFEU has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999[51], which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Belgium that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publishing a notice in the EEA Supplement to the Official Journal of the European Union, and

[51] OJ L 83 of 27.3.1999, p. 1, last amended by Regulation 734/2013 of 22 July 2013 OJ L 204 of 31.7.2013, p.15.

will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

http://ec.europa.eu/competition/elojade/isef/index.cfm;

Your request should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
Place Madou, 1 / Madouplein, 1
B-1049 Brussels
Fax No: (+32)-2-296.12.42

Yours faithfully,
For the Commission

Margrethe VESTAGER
Commissioner