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**Subject: State Aid SA.42007 (2015/N) – Belgium
Alternative income tax regime for the wholesale diamond sector**

Sir, /Madam,

1. PROCEDURE

- (1) On 28 May 2015, the Belgian authorities notified to the Commission a draft measure introducing a specific income tax regime for the activities of wholesale trade in rough and polished diamonds (hereinafter “diamond traders”) in Belgium, hereinafter referred to as “the Initial Diamond Regime”.
- (2) On 15 July 2015, the Commission sent an information request to Belgium regarding that measure. On 10 and 23 September 2015, the Commission received Belgium’s reply. On 20 October 2015, a meeting took place between the Commission and Belgium.
- (3) On 23 October 2015, Belgium requested the suspension of the notification procedure. On 18 December 2015, another meeting took place between the

Zijne Excellentie de Heer Didier REYNDERS
Minister van Buitenlandse Zaken en Europese Zaken
Karmelietenstraat 15
B - 1000 Brussel

Commission and Belgium.

- (4) On 29 March 2016, following discussions with the Commission, Belgium substantially modified the initial notification by proposing an alternative tax regime for the activities of diamond traders (hereinafter: the “Diamond Regime”)¹.
- (5) On 3 May 2016, the Commission requested clarifications on the Diamond Regime. On 31 May 2016, a meeting took place between the Commission and Belgium. On 26 May and 11 June 2016, Belgium provided additional information to the Commission on the Diamond Regime.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. The initially notified scheme

- (6) The Initial Diamond Regime, as notified, was a specific tax regime under which the taxable income derived from the wholesale trade in rough and polished diamonds (tax base) would be determined as a fixed percentage (i.e. 0.55 %) of the yearly turnover generated through the trade in diamonds. That taxable base would be subject to either the standard Belgian corporate income tax rate (i.e. 33.99 %) or progressive personal income tax rates (ranging from 25 % to 50 %). Under the Initial Diamond Regime, neither the usual deductions of business expenses or of tax losses carried forward, nor specific tax deductions, would have applied. The percentage of 0.55 % was established on the basis of a study commissioned by the Belgian authorities to a consultancy. It was calculated to reflect the net profit margin that could be expected for diamond traders.

2.2. The modified scheme

- (7) In the Diamond Regime, the Gross Profit Margin (hereinafter: “GPM”)² and therefore the Cost of Goods Sold (hereinafter: “COGS”)³ of diamond wholesale traders is replaced by an amount calculated as a fixed percentage of their turnover. All other elements for determining the net income (i.e. corrections and deductions) follow the existing corporate taxation rules. This special regime differs from the regular income tax regime because it sets a fixed GPM and COGS percentage. It does not rely on the GPM and COGS that result from the figures registered in the diamond trader’s accounts.
- (8) Belgium intends to introduce a fixed percentage of GPM of 2.1 % as a general rule for all wholesale diamond traders, irrespective of their business model (diamond traders or diamond manufacturers that cut and polish diamonds) or of their size, to assure a maximum level of uniformity and clarity about the new regime. This means that the COGS will be fixed at 97.9 % of turnover. As a consequence, no detailed inspection by the tax administration will be necessary regarding the follow-up of the inventories and calculation of the COGS in the determination of the taxable profit.

¹ The Initial Diamond Regime was no longer part of the notification. In substance, the modification of the initial notified regime was equivalent to a new notification.

² The Gross Profit Margin corresponds to the difference between the sales (turnover) and the direct cost of the goods sold (COGS).

³ The COGS are the costs directly related to the production of the goods sold (rough or polished diamonds) in the taxable period. COGS may notably include the cost of diamonds purchased, the labor cost related to the cutting / polishing of the diamonds and the decrease (+) or increase (-) of the value of the inventory of diamonds.

- (9) As regards “diamond manufacturers”, i.e. those traders who buy rough diamonds then cut and polish them, the Diamond Regime will apply under the same conditions (COGS and GPM will be set at the same percentage of turnover as for other traders), although those traders can be considered to operate under a different business model and to create more added value than those traders that are solely involved in the trading of rough or polished diamonds. However, to ensure a fair and equal treatment of all diamond traders, i.e. to take into account the fact that diamond manufacturers typically exhibit a higher margin than the default margin used in the Diamond Regime, and to avoid that, in addition, operational expenses related to diamond manufacturing would be deducted from the tax base, all costs relating to diamond processing will be considered as being non-deductible (“Dépenses non admises” / “Verworpen uitgaven”).
- (10) Further to the lump sum calculation of the GPM and COGS percentages, the Diamond Regime will also introduce a minimum floor for the net taxable income (the tax base) and a minimum director’s remuneration.
- (11) The minimum taxable income will be set at 0.55 % of turnover (cf. the Initial Diamond Regime).
- (12) The reference amounts of the minimum director’s remuneration are fixed in relation to the yearly turnover generated from the diamond trade as follows:
- EUR 19 645 for a turnover of up to EUR 1,620,720 per year;
 - EUR 32 745 for a turnover between EUR 1 620 720 and EUR 8 103 395 per year;
 - EUR 49 110 for a turnover between EUR 8 103 395 and EUR 16 207 190 per year;
 - EUR 65 485 for a turnover between EUR 16 207 190 and EUR 32 414 380 per year;
 - EUR 81 855 for a turnover between EUR 32 414 380 and EUR 48 621 570 per year;
 - EUR 98 225 for a turnover in excess of EUR 48 621 570 per year.
- (13) As the establishment of the appropriate GPM percentage is key to ensure that the tax paid under the Diamond Regime is equivalent to the tax that should have been paid under the normal tax rules, Belgium has committed to assess the appropriate character of the GPM percentage applicable under the Diamond Regime on a periodic basis (every 5 years).
- (14) Currently, diamond wholesale traders in Belgium are subject to the regular income tax rules applicable to professional income earned by individuals or companies. According to Belgium, there are no specific accounting rules or requirements that apply to diamond traders. However, a specific inspection technique (so-called “Fiscal Plan”) was designed in the 1990s in accordance with the Belgian tax code⁴ and used

⁴ In application of articles 340 and 342 of the Belgian Income Tax Code, the tax authorities are allowed, in the absence of sufficient

until now by the Belgian tax administration – more specifically a specific tax audit service located in Antwerp. The Fiscal Plan sets gross and net margin minima and is applied in the situation where it is not possible to carry out the standard invoicing and inventory follow-up technique to trace individual stones through the commercial process.

- (15) According to Belgium, the application of the normal tax rules for the establishment of the tax base, including the use of the Fiscal Plan, is cumbersome for the tax administration and inefficient to combat fraud. It implies the prior rejection of the “evidential value” of the taxpayer’s accounts and consistently leads to litigation with the taxpayers and to legal uncertainty. In practice, most of the tax audits for wholesale diamond traders rely on that inspection technique.
- (16) The verification of the taxable profit of diamond traders is complicated because of difficulties in the valuation and follow-up of individual stones in the accounts. The tracing of individual diamonds through the entire trading and treatment chain is impossible because of the nature of the products and of the trading customs in the sector. Indeed, the value of an individual diamond depends on many features and can only be assessed by experts. However, at the wholesale level, diamonds are traded as commodities and invoices between wholesalers do not mention details for individual diamonds. They are acquired as bulk goods and re-assorted and sold again in different assortments. Invoices between wholesalers do not mention details for individual diamonds, or they are cut and polished and then sold. After transformation, the stones have a different aspect and value and it is impossible to know from which rough stone they originated. As a consequence, it is practically impossible for the tax auditors to follow-up individual stones and their inventories and to assess the value of cut and polished diamonds based on the wholesalers’ accounts.
- (17) Those complications led to a systematic rejection of the accounting statements of diamond companies as a base for taxation and the use by the tax auditors of the Fiscal Plan to establish their taxable profits. The tax authorities apply minimum thresholds in terms of gross margin and in terms of net profits that a relevant diamond trader is expected to generate. Both minimum thresholds are calculated as a percentage of the turnover.
- (18) Double minimum standards are currently used for tax audit purposes. Both minimum standards apply simultaneously and can be summarised as follows:
 - A diamond trader’s gross profit margin should reach certain minima, determined as a percentage of turnover. Any shortfall would be added to the amount of the gross margin resulting from the annual accounts. The reference amounts in terms of gross profit margin were fixed as follows:
 - 3.2 % for a turnover between EUR 0 and EUR 2 475 000
 - 2.7 % for a turnover between EUR 2 475 000 and EUR 7 425 000

elements of proof (such as an acceptable set of annual accounts), to determine the amount of the taxable income on the basis of certain factual presumptions (art. 340 BITC) and/or the normal net profits of similar taxpayers, and to take into account, amongst others, the revenues or turnover generated by the taxpayer concerned (art. 342 BITC).

- 2.2 % for a turnover between EUR 7 425 000 and EUR 24 750 000
 - 1.7 % for a turnover between EUR 24 750 000 and EUR 74 250 000
 - 1.2 % for a turnover in excess of EUR 74 250 000
- A diamond trader’s net income should also reach a certain minimum expressed as a percentage of turnover. Any shortfall would be added to the amount of net income resulting from the annual accounts. The reference amounts in terms of net income were fixed as follows:
- 0.25 % for a turnover between EUR 0 and EUR 2 475 000;
 - 0.215 % for a turnover between EUR 2 475 000 and EUR 7 425 000;
 - 0.175 % for a turnover between EUR 7 425 000 and EUR 24 750 000;
 - 0.135 % for a turnover between EUR 24 750 000 and EUR 74 250 000;
 - 0.1 % for a turnover in excess of EUR 74 250 000.
- (19) The stated purpose of the Diamond Regime is to reduce the possibility of tax fraud in the sector and to ensure a predictable tax environment and legal certainty for diamond traders. The measure is expected to avoid the difficulties related to the auditing of the value and follow-up of the inventory of wholesale traders which necessitates expertise and time, is cumbersome and generally leads to litigation.

3. POSITION OF THE BELGIAN AUTHORITIES

- (20) According to Belgium, replacing the actual COGS by a lump sum number calculated as a percentage of turnover solves the tax inspection issues. In fact, the inventory valuation and follow-up inspection difficulties are taken out of the equation for calculating the COGS.
- (21) According to Belgian Generally Accepted Accounting Principles (GAAP) principles, COGS is determined in the following manner:
- The total value of goods (stones) purchased during the accounting period (the cost of purchases reduces the margin obtained);
 - *Plus* the reduction of the value of the inventory over the accounting period (because the inventory value of the goods (stones) sold that were in the inventory at the beginning of the accounting period is also to be deducted as a cost from the turnover that was generated in the relevant accounting period);
 - *Minus* the increase in value of the inventory over the accounting period (because to the extent goods purchased during the accounting period end up in the inventory at the end of the period, they are not sold and their value should not be deducted as a cost for generating the current year’s turnover).
- (22) The inventory valuation leads to a higher or lower inventory value at the end of the period, which has an influence on the actual accounting gross margin. By introducing a lump sum COGS for income tax purposes only the impact of the actual

evaluation of the inventory in the financial accounts is eliminated, thereby eliminating the requirement to (try to) inspect the inventory valuation.

- (23) Furthermore, the impact of the value of certain specific stones on the gross margin (and, hence, the net profit) calculation is eliminated, thereby eliminating the requirement to (try to) inspect the inventory follow-up.
- (24) According to Belgium, the Diamond Regime does not amount to State Aid. In fact, this regime does not grant a financial or economic advantage to the relevant diamond traders because, as a whole, they would pay more taxes than under the normal income tax regime. It is expected that the sector would pay three times the taxes that wholesale diamond traders currently pay under the normal regime⁵.
- (25) Belgium contends that any selectivity of the Diamond Regime is justified by the nature and general scheme of the tax system because it is necessary to collect a fair amount of taxes in the diamond industry. It represents an adaptation of the general system to meet the particular characteristics of the relevant diamond traders.
- (26) The Diamond Regime is designed as a targeted measure, applying only to companies which activity actually raises inventory valuation and follow-up issues and is narrowed down to the actual turnover related to the diamond trade.
- (27) From a technical point of view, the measure is conceived in such a way so as to derogate from Belgian tax law only to a minimal extent, i.e. it only applies to certain aspects of the determination of the net taxable income, whereas the other provisions from the Belgian Income Tax Code remain unaffected.
- (28) In addition, with the Diamond Regime the taxable income would be kept as close as possible to the actual net income. Indeed, apart from the approximation of the value of the GPM (and COGS), the net taxable income would be calculated taking into account all of the (other) elements contained in the net income calculation for Belgian accounting purposes. Under the Diamond Regime almost all accounting P&L related elements will find their way into the calculation of the net taxable income.
- (29) The sole difference would be that the tax inspection difficulty in respect of the COGS, which is the main hurdle per to date, would be avoided and thereby solved, by calculating the COGS as a fixed percentage of turnover. Hence, the diamond traders would be taxed on the basis of their net accounting income, be it that for Belgian income tax purposes only one of the elements in the calculation (namely the COGS) is substituted by a fixed percentage of revenue to solve known tax inspection difficulties.
- (30) Furthermore, the Belgian authorities consider that the measure has no effect on trade because currently there is no competition between wholesale diamond traders established in Belgium and operators from other Member States, as the only trading centre for rough and polished diamonds on a wholesale basis in Europe is Antwerp.
- (31) The Belgian authorities also argue that the special regime would lead to a budgetary

⁵ Currently the sector pays around EUR 20 million of income tax while with the Diamond regime it would pay more than EUR 70 million

surplus and not to a loss of fiscal revenue. Therefore, the regime would not imply the loss of State resources within the meaning of Article 107(1) TFEU.

- (32) Finally, according to the Belgian authorities, even if the special regime for wholesale diamond traders was considered to constitute State aid, it should be declared compatible with the internal market under Article 107(3)(c) TFEU because it aims at creating a level playing field between the European diamond trade and other competing centres in the world (competitiveness) to keep diamond traders in Antwerp, i.e. in the Union. Antwerp is competing with several other centres in the world. According to Belgium, currently, the European (i.e. Belgian) diamond trading centre is losing competitiveness and jobs to non-EU trading centres (Israel, Dubai and India), which operate in a more favourable tax, regulatory and supervisory environment.
- (33) According to the Belgian authorities, the regime is appropriate and necessary and has no impact on competition and trade.

4. ASSESSMENT OF THE MEASURE

- (34) According to Article 107(1) TFEU, “[s]ave as otherwise provided in the Treaties, 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.”.
- (35) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) it must confer an advantage to an undertaking; (ii) that advantage must be selective; (iii) the measure must be imputable to the State and financed through State resources; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

4.1. Advantage to an undertaking

- (36) According to the case-law of the Union Courts, the notion of aid embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking⁶. An advantage may be granted through different types of reduction in a company's tax burden and, in particular, through a reduction in the applicable tax rate, taxable base or in the amount of the tax due⁷. Although a tax reduction measure does not involve a positive transfer of resources from the State, it gives rise to an advantage by virtue of the fact that it places the undertakings to which it applies in a more favourable financial position than other taxpayers and results in a loss of income to the State⁸.

⁶ Case C-143/99 *Adria-Wien Pipeline*, EU: C: 2001:598, paragraph 38.

⁷ See Case C-66/02, *Italy v Commission*, EU: C: 2005:768, paragraph 78; Case C-222/04, *Cassa di Risparmio di Firenze and Others*, EU: C: 2006:8, paragraph 132; Case C-522/13, *Ministerio de Defensa and Navantia*, EU: C: 2014:2262, paragraphs 21 to 31. See also point 9 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation OJ C 384, of 10.12.98, p. 3.

⁸ Joined Cases C-393/04 and C-41/05, *Air, Air Liquide Industries Belgium* EU: C: 2006:403 and EU: C: 2006:216, paragraph 30 and Case

- (37) The Diamond Regime introduces a fixed percentage of 2.1 % of the turnover to calculate the GPM (respectively 97.9 % of the turnover for COGS) while all other elements for determining the net accounting income will follow the ordinary rules of income taxation in Belgium. The percentage of 2.1 % was established on the basis of a benchmarking study commissioned to a consultancy by Belgium. The benchmarking study covers 292 diamond traders out of the 928 registered traders, which represent approximately EUR 24.5 billion turnover (out of the total of EUR 28.7 billion), i.e. more than 85% of the whole diamond trade industry, which renders it statistically meaningful.
- (38) The percentage of 2.1 % corresponds to the weighted average of the upper quartile GPM of small, medium-sized and large traders in the sector for the period 2012-2014 (the median being 1.65 %). According to the study, this means that with the application of the 2.1 % GPM, at least 75% of the wholesale diamond traders covered by the study would have paid a higher amount of taxes than they did over the period 2012-2014 under the ordinary rules of income taxation. Belgium further observes that the 2.1 % of turnover to calculate the GPM is above the corrected GPM that was obtained by the Belgian tax authorities in the past when rejecting the evidential value of the accounts of diamond traders and taxing them under application of the tax inspection technique.
- (39) Nevertheless, this implies that, at individual taxpayer's level, the use of the weighted average upper quartile GPM rate means that the tax due for some of the undertakings concerned would have been lower over the period 2012-2014 under the Diamond Regime, if it had been applied, than under the ordinary rules of income taxation.
- (40) Furthermore, taking into account the fact that the Diamond Regime is based on a mere approximation of the real GPM of diamond traders, it does not exclude that some diamond traders would pay less taxes according to this regime than they would pay if their real GPM was taken into account.
- (41) It is true that the Diamond Regime does not only rely on the setting of a fixed GPM, but also features additional safeguards intended to reduce the possibilities that punctual windfall advantages materialise in such situations:
- a minimum is set for the taxable base which is established as a percentage of turnover;
 - a minimum director's remuneration is imposed and in case the minimum is not respected, the shortfall is added to the trader's tax base;
 - the cost of processing diamonds will be rejected as non-deductible expenses;
 - the upper quartile GPM rate used as the standard GPM rate will be reviewed on a regular basis based on the real GPM and COGS figures as they feature in the traders' accounts. Such revision will take place at least every five years.
- (42) However, those safeguards only reduce the possibilities of advantages for diamond

traders without eliminating them.

- (43) It can therefore be concluded that the Diamond Regime may confer an economic advantage to certain traders in certain circumstances.

4.2. Selectivity

- (44) A measure is selective if it favours certain undertakings or the production of certain goods within the meaning of Article 107(1) TFEU. For fiscal schemes the Court of Justice has established that the selectivity of the measure should in principle be assessed by means of a three-step analysis.⁹ First, the common or normal tax regime applicable in the Member State is identified: “the reference system”. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure in question does not constitute a derogation from the reference system, it is not selective. If it does (and therefore is *prima facie* selective), it must be established, in the third step of the analysis, whether the derogatory measure is justified by the nature or the general scheme of the reference tax system¹⁰. If a *prima facie* selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and it will thus fall outside the scope of Article 107(1) of the Treaty.

4.2.1 *System of reference*

- (45) The reference system is the benchmark against which the selectivity of a measure is assessed. The reference system is composed of a consistent set of rules that generally apply – on the basis of objective criteria – to all undertakings falling within its scope as defined by its objective. The identification of the reference system therefore depends on elements such as the taxable persons, the taxable base, the taxable events and the applicable tax rates.
- (46) In the present case, the reference system is the ordinary rules of taxation of income under the Belgian income tax regime. Those rules have as their intrinsic objective the taxation of income of all taxpayers subject to tax in Belgium. The total income is established according to the rules laid down in the provisions to calculate the profit for individual entrepreneurs (*bénéfices / winst*) as defined in Article 24 of the Belgian Income Tax Code 1992 (“*Code des Impôts sur les revenus 1992*” in French or “*Wetboek van Inkomstenbelastingen 1992*” in Dutch)¹¹. The taxable income is calculated as income minus deductible expenses, which forms the starting point for calculating the total taxable profit under the Belgian income tax system.

4.2.2. *Derogation from the system of reference*

- (47) As a second step, it is necessary to determine whether the measure derogates from the reference system.

⁹ See, for example, Case C-279/08 P *Commission v Netherlands (NOx)* EU:C:2011:551; Case C-143/99 *Adria-Wien Pipeline* EU: C: 2001:598, Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* EU:C:2011:550 and EU:C:2010:411, Case C-308/01 *GIL Insurance* EU:C:2004:252 and EU:C:2003:481.

¹⁰ Commission Notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, p. 3-9.

¹¹ Pursuant to Article 183 of the Belgian Income Tax Code 1992, profits subject to corporate income tax are generally calculated along the same principles.

- (48) The Diamond Regime introduces a different method for calculating the COGS of diamond traders for the purposes of determining their taxable income. Under the ordinary rules of income taxation, the determination of a taxpayer's taxable income is based on the COGS registered in the accounts. Under the Diamond Regime, the COGS are determined by applying a fixed GPM as a percentage of the turnover of those traders. All other elements for determining the net accounting income follows the existing corporate taxation rules.
- (49) Since the Diamond Regime introduces specific rules for the calculation of the income tax base for a selected group of undertakings, i.e. wholesale traders in rough and polished diamonds, which differentiate from the normal rules of income taxation in Belgium, the Commission considers that the scheme is prima facie selective.

4.2.3. *Justification by the nature and general scheme of the tax system*

- (50) A measure which derogates from the reference system is non selective if it is justified by the nature or general scheme of that system. This is the case where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system¹². It is for the Member State to provide such justification.
- (51) According to Belgium, the determination of the tax base under the ordinary rules of income taxation, based on the COGS registered in the accounts, heavily depends on the value of the inventory of diamonds. That value can easily be manipulated by the taxpayer and it is difficult for the tax administration to assess and correct that value through tax audits. As a consequence, the application of the ordinary rules to wholesale diamond traders would not ensure that they pay their fair share of taxes. By applying a fixed percentage of GPM, the tax inspection difficulty related to the assessment of the amount of the COGS would be avoided while addressing the fraud issue. The Diamond regime therefore removes the possibility to manipulate – and thus the need to check in detail – the value of the inventory.
- (52) In addition, Belgium claims that, based on 2012-2014 figures and the benchmarking study, the application of the Diamond Regime is expected to bring a surplus tax contribution of the sector of at least EUR 50 million on an annual basis. Therefore, as a whole, the wholesale diamond sector would pay more than three times the taxes they used to pay under the normal income tax regime.¹³
- (53) The Diamond Regime is intended to increase the tax paid by wholesale diamond traders, with a special focus on those taxpayers who, with the application of the ordinary rules of income taxation, might not pay their fair share of tax.
- (54) The fact that, despite all safeguards, certain undertakings could be taxed less in a specific year because their true GPM would exceed 2.1 %, is justified by the nature and general scheme of the tax system, i.e. the efficiency of tax audits and fight against fraud. Indeed, the Diamond Regime is a response to specific difficulties experienced by the tax administration in the diamond wholesale sector to verify and establish the correct income tax base.

¹² See for example Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* EU: C: 2011; 550 and EU: C: 2010:411, paragraph 69.

¹³ Currently the sector pays around EUR 20 million and the expected tax revenue with the Diamond Regime is EUR 70 million.

- (55) On the one hand, the provision of a fixed GPM rate ensures that the vast majority of diamond traders will pay more taxes than under the ordinary rules of income taxation, i.e. the reference system. It also saves the most cumbersome audit verifications – in particular, the valuation and follow-up of the diamond inventories – as well as the uncertainty linked to taxpayers challenging the tax bill. On the other hand, it implies that a few taxpayers may pay less tax if their actual GPM rate exceeded that fixed rate. The Commission considers that the advantage that could be granted in such situations is inherent to the functioning of the Diamond Regime and justified by the objectives pursued by the tax system.
- (56) As regards the treatment of diamond manufacturers, the rejection of the direct costs related to the processing of the stones is appropriate to neutralise the use of the 2.1 % GPM (instead of a higher GPM). Indeed, this rejection adds to their tax base all costs relating to the diamond processing which are at the source of their higher GPM. As such, it ensures a fair and equal treatment of all diamond traders and is therefore justified by the nature and general scheme of the system.
- (57) The Commission further considers that the design of the Diamond Regime, i.e. the application of the weighted average upper quartile GPM percentage to all wholesale diamond companies and the additional safeguards provided, is an adequate and proportionate means to ring-fence the Diamond Regime in such a way that it limits the number of possible beneficiaries of windfall tax benefits to the minimum in accordance with the Diamond Regime's antifraud objective. The Commission considers that any such advantage would in fact be inherent to the functioning of the Diamond Regime. Indeed, fixing the GPM at a certain level – be it as high as the upper quartile of the distribution – entails the risk that certain taxpayers, in certain years, exhibit a true GPM in excess of the fixed rate.
- (58) Consequently, the Commission considers the derogation from the reference system by the Diamond Regime to be justified by the nature or general scheme of that system.

4.3. Conclusion on the existence of aid

- (59) The Commission concludes that the Diamond Regime is designed in such a way that it limits to the minimum the possibility of an advantage and that, if an advantage is nevertheless granted to certain undertakings, this is inherent to the functioning of the measure and justified by the nature and general scheme of the Belgian income tax system. On this basis, the Commission considers that the Diamond Regime will not grant a selective advantage to certain companies within the meaning of Article 107(1) TFEU.
- (60) Since the presence of a selective advantage is not established, all the cumulative conditions laid down by Article 107(1) TFEU are not met. Therefore, Commission considers that it is not necessary to assess whether the other conditions for a measure to constitute State aid are fulfilled and concludes that the Diamond Regime does not constitute State aid within the meaning of that provision.

5. CONCLUSION

In light of the foregoing, the Commission concludes that the measure introducing an alternative income tax regime for the wholesale diamond sector does not constitute State aid

within the meaning of Article 107(1) TFEU.

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European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission