EUROPEAN
COMMISSION

Brussels, 11.1.2016
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COMMISSION DECISION

of 11.1.2016

ON THE EXCESS PROFIT EXEMPTION STATE AID SCHEME
SA.37667 (2015/C) (ex 2015/NN)
implemented by Belgium

(Text with EEA relevance)

(Only the Dutch and French versions are authentic)

In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, 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.

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision(s) cited above[1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter of 19 December 2013, the Commission requested Belgium to provide information on the so-called "excess profit tax ruling system" (hereinafter: the "Excess Profit exemption" or the "contested scheme") which is based on Article 185(2)(b) of the Belgian Income Tax Code 1992 ("*Code des Impôts sur les revenus 1992*" in French or "*Wetboek van Inkomstenbelastingen 1992*" in Dutch, hereinafter: "WIB 92"). The Commission also requested a list of rulings concerning the application of the Excess Profit exemption.

[1] OJ C188, of 5.6.2015, p. 24.

(2) By letter of 21 January 2014, Belgium replied to the questions of the Commission's request for information, but 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 under the contested scheme, the Commission also requested the full text of the rulings as well as the applications requesting those rulings, plus their annexes, and – where applicable – subsequent correspondence related to those requests.

(4) On 18 March 2014, Belgium responded to the Commission's follow-up questions and provided the individual rulings requested, including applications, annexes and further correspondence related to the granting of those rulings.

(5) By letter of 28 July 2014, the Commission indicated that the Excess Profit exemption could represent incompatible State aid. The Commission also requested more information about a number of individual rulings. By letters of 1 September and 4 November 2014, Belgium replied to the request of 28 July 2014.

(6) On 25 September 2014, a meeting was held between the Commission services and the Belgian authorities.

(7) By letter of 3 February 2015, the Commission informed Belgium that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the Excess Profit exemption (hereinafter: the "Opening Decision").

(8) On 29 May 2015, following a request for a deadline extension, Belgium submitted its comments to the Opening Decision.

(9) On 5 June 2015, the Opening Decision was published in the *Official Journal of the European Union*.[2] In that decision, the Commission invited interested parties to submit their comments on the measure.

(10) On 1 and 2 July 2015, interested parties submitted comments on the Opening Decision, which were forwarded to the Belgian authorities. On 14 September 2015, Belgium informed the Commission that it had no intention to make any observations on those comments.

(11) By letter of 16 September 2015, the Commission requested Belgium to further substantiate certain points made in their written comments of 29 May 2015 on the Opening Decision. Belgium replied to that request by letter of 16 October 2015.

(12) On 20 October 2015 and 7 December 2015, meetings took place between the Commission services and the Belgian authorities.

2. DESCRIPTION OF THE CONTESTED SCHEME

2.1. The Excess Profit exemption scheme

(13) The Excess Profit exemption scheme allows Belgian resident companies that are part of a multinational group and Belgian permanent establishments of foreign resident companies that a part of a multinational group (hereinafter: "Belgian group entities") to reduce their tax base in Belgium by deducting from their actually recorded profit so-called "excess profit". That excess profit is determined by estimating the

[2] OJ C188, 2015, p.24-65.

hypothetical average profit that a standalone[3] company carrying out comparable activities could be expected to make in comparable circumstances and subtracting that amount from the profit actually recorded by the Belgian group entity in question. An advance ruling, issued by a special ruling commission ("*Service des Décisions Anticipées*" in French or "*Dienst Voorafgaande Beslissingen*" in Dutch, hereinafter: the "Ruling Commission"), is necessary to benefit from the Excess Profit exemption.

(14) According to the Belgian authorities,[4] the rationale for the Excess Profit exemption is to ensure that a Belgian group entity is only taxed on its arm's length profit by exempting from taxation the profit recorded in excess of its arm's length profit, which corresponds to synergies, economies of scale or other benefits drawn from its participation in a multinational group and which would not exist for a comparable standalone company.

(15) According to the Belgian authorities,[5] the amount of excess profit exempted under the Excess Profit exemption is determined by using a two-step approach:

– First, the arm's length prices charged in transactions between the Belgian group entity and its associated enterprises are fixed based on a transfer pricing report provided by the taxpayer. The Belgian group entity is identified as the "central entrepreneur" in that relationship and is accordingly left with the residual profit from those transactions.

– Second, according to Belgium the residual profit should not be seen as the Belgian group entity's arm's length profit, as it may exceed the profit that a comparable standalone company would have made in circumstances similar to those of the entity without being part of a multinational group. Therefore, that "excess profit" is established on the basis of a second report submitted by the taxpayer as part of its ruling request under the contested scheme and exempted from taxation.

(16) Belgium claims that the reports submitted under both steps apply the most appropriate OECD transfer pricing methods. In practice, the information provided indicates that the method used for the second step is the transactional net margin method ("TNMM"). The use of the TNMM in this context seeks to approximate the profitability of an entity within a multinational group by comparing it with the profits of comparable independent[6] (standalone) companies engaged in similar activities. The TNMM estimates the profit independent companies could be expected to make on an activity, such as the activity of selling goods, by taking an appropriate base such as costs, turnover or fixed assets – depending on functions performed, risks assumed and assets used – and applying a profit ratio ("a profit level indicator"), reflecting that observed for comparable independent companies to that base.

(17) Applying that method, a hypothetical average profit is calculated for the Belgian group entity based on a benchmark study comparing it with comparable standalone

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3 See Submission of Belgium of 29 May 2015 in response to the Opening Decision, point 30, where the term "stand-alone basis" is explained as: "*without being a member of a multinational group of associated enterprises.*"

4 See notably Submission of Belgium of 29 May 2015 in response to the Opening Decision, points 39 and 40.

5 See Submission of Belgium of 29 May 2015 in response to the Opening Decision, point 30.

6 See the glossary of the OECD TP Guidelines: "*Two enterprises are independent enterprises with respect to each other if they are not associated enterprises with respect to each other.*"

companies.[7] The hypothetical average profit is fixed as a point in the interquartile range of the chosen profit level indicator of a set of comparable standalone companies,[8] averaged over a set period of time (usually five years). That hypothetical average profit is regarded by Belgium as the profit that the Belgian group entity would have made if it had been a standalone company instead of part of a multinational group. For the purpose of this Decision, that profit is referred to as the "adjusted arm's length profit".

(18) The amount of excess profit to be exempted is then calculated as the difference between the arm's length profit estimated for the Belgian group entity following the first step (averaged over a projected time horizon) and the "adjusted arm's length profit" obtained under the second step (also averaged over the same projected time horizon). That difference is translated into an exemption percentage of pre-tax profit (of either EBIT[9] or PBT[10]) to achieve an average excess profit percentage over a projected period. That percentage represents the agreed tax base discount applied under the contested scheme to the Belgian group entity's profit actually recorded for the five years during which the ruling binds the Belgian tax administration.

(19) The Belgian authorities claim that the projected commercial results of those entities benefitting from the contested scheme are evaluated against their profit actually recorded after three years. The agreed percentage can then be adjusted if required by that evaluation. However, there is no indication that such an evaluation has ever actually resulted in an adjustment of the agreed discount percentage in any of the cases reviewed by the Commission.

(20) On the basis of Article 185(2) WIB 92, an advance ruling is a compulsory element for benefitting from the Excess Profit exemption. That provision also limits the grant of a ruling to entities forming part of a multinational group of associated companies with respect to their cross-border relations. Furthermore, according to the Belgian Law of 24 December 2002,[11] rulings are only available for new situations.[12]

(21) Because a ruling is required to obtain the benefit of the Excess Profit exemption and because a ruling can only be delivered for profit derived from a new situation, the advantage that a multinational group obtains from the contested scheme is conditioned upon the relocation or increase of its activities in Belgium and is proportional to the importance of the new activities and profit created in Belgium. The rulings issued under the contested scheme that were examined by the Commission invariably concern changes in the organisational structure of the multinational group where the description of the key facts in the ruling request underlines the planning of a relocation of activities to Belgium, new investments to be made and the creation of new jobs in Belgium.

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7 In certain cases, the Commission observed that the comparable entities selected for the benchmark study are not deemed similar standalone companies but deemed similar holding/parent companies, i.e. consolidated group, taking into account consolidated data.

8 Return on sales is the most frequently used profit level indicator to determine the taxable base of the Belgian group entity.

9 Earnings Before Interest and Tax.

10 Profit Before Tax.

11 *Loi du 24 décembre 2002 modifiant le régime des sociétés en matière d'impôts sur les revenus et instituant un système de décision anticipée en matière fiscale*, published in the Official Gazette (Moniteur Belge) nr 410, second edition, 31 December 2002, p. 58817.

12 See Recital (44) and (45).

(22) In sum, Belgian group entities that have obtained a ruling under the contested scheme may apply an annual pro-active downward adjustment of their corporate income tax base through the exemption of alleged "excess profit" from their profit actually recorded on the basis of Article 185(2)(b) WIB 92. In other words, Belgium considers that this excess profit should not be attributed to the Belgian group entity and should therefore be excluded from its Belgian tax base in accordance with Article 185(2)(b) WIB 92. Consequently, a Belgian group entity benefitting from the Excess Profit exemption is taxed on an amount resulting from the difference between its profit actually recorded and its "excess profit".

2.2. The relevant legal and regulatory framework

2.2.1. The taxation of income pursuant to the Belgian corporate income tax system

(23) The WIB 92 establishes the rules for the taxation of income by Belgium. Article 1 defines four income taxes which cover taxation of income of natural persons (Title II: Articles 3 to 178), resident companies (Title III: Articles 179 to 219), other legal persons (Title IV: Articles to 226) and non-resident taxpayers – natural persons, companies, other legal persons (Title V: Articles 227 to 248/3).

(24) Article 183 WIB 92 states that the income subject to tax according to Title III (for resident companies) is of the same type as that subject to Title II (for natural persons) and that the taxable amount is established following the rules applicable to profit. Article 24 WIB 92 clarifies that the taxable income of industrial, commercial and agricultural undertakings includes all income from entrepreneurial activities such as "*profit from all the operations handled by those undertakings or through their intermediation*" as well as "*profit from all increases in value of their assets or decrease in value of their liabilities when that profit has been realised and registered in the accounts*".

(25) Article 185(1) WIB 92 provides that companies are taxed on the total amount of their profit before distribution. Read in conjunction with Article 1, Article 24 and Article 183 WIB 92, this means that the taxable profit under Belgian tax law should at least include – as a starting point and notwithstanding possible subsequent upward/downward adjustments – the total profit registered in the taxpayer's accounts.

(26) Indeed, the establishment of the tax base under the Belgian income tax code relies on the profit actually recorded in the taxpayer's accounts as a starting point. A number of upward adjustments (such as non-deductible expenses) or downward adjustments (such as partial exemption of certain dividends received, deduction of losses carried forward, tax incentives) can be applied at subsequent steps in the establishment of the tax base. For each of those operations, taxpayers must provide information to the tax administration through their tax return (Form 275.1) and be able to give justifications for those adjustments.

(27) When Belgian tax law provides for a permanent exemption of a part of the profit actually recorded in the taxpayer's accounts as a reserve, an adjustment can notably be reflected in the calculation of the tax base in the first operation of that calculation through a so-called "increase of the initial situation of the reserves".

(28) Therefore, while the tax base may not always equal the net profit actually recorded in the taxpayer's annual accounts because of the adjustments applied to that base for tax purposes, the establishment of the tax base should nevertheless rely on the figures actually recorded in those accounts as a starting point. The establishment of the tax

base starts, for instance, with the calculation of the net increase/decrease of the taxable reserves (profit/loss of the year, profit/loss carried forward, other reserved profit, etc.) during the tax year and, whenever justified by the application of tax law provisions or following a tax audit, adjustments and corrections may be applied to the figures recorded in the taxpayer's accounts or mentioned in the taxpayer's tax return.

2.2.2. The Law of 21 June 2004 modifying the WIB 92

(29) By Law of 21 June 2004,[13] Belgium introduced new fiscal rules regarding cross-border transactions of entities which are associated in a multinational group. In particular, a second paragraph was added to Article 185 WIB 92 with the objective of transposing into Belgian tax law the internationally accepted "arm's length principle" for transfer pricing purposes.[14] Article 185(2) WIB 92 reads as follows:

> "*(...), 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 profit which – under those conditions – would have been made by one of the companies but is not because of those conditions, may be included in the profit of that company.*
>
> *(b) when profit is included in the profit of one company which is already included in the profit of another company and the profit so included is profit which should have been made by that other company if the conditions agreed between the two companies had been those which would have been agreed between independent companies, the profit of the first company is adjusted in an appropriate manner.*
>
> *The first paragraph applies by way of advance ruling without prejudice to the application of the EU Arbitration Convention or of a Double Tax Treaty.*"

(30) Although the wording is different, Article 185(2) WIB 92 is similar to Article 9 of the OECD Model Tax Convention on Income and Capital, which forms the legal basis for transfer pricing adjustments in most treaties agreed between two jurisdictions to prevent the double taxation of income derived by a resident from one of the jurisdictions (hereinafter: "Double Tax Treaty").

(31) In accordance with the last sentence of Article 185(2) WIB 92, the upward adjustment under letter a) or downward adjustment under letter b) is subject to a compulsory prior authorisation procedure via an advance ruling. The only exception to that condition is where the adjustment results from the application of the Convention on the elimination of double taxation in connection with the adjustment

[13] *Loi du 21 juin 2004 modifiant le Code des impôts sur les revenus 1992 et la loi du 24 décembre 2002 modifiant le régime des sociétés en matière d'impôts sur les revenus et instituant un système de décision anticipée en matière fiscale*, published in the Official Gazette (Moniteur Belge) of 9 July 2004 : http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&caller=summary&pub_date=04-07-09&numac=2004003278. The law entered into force on 19 July 2004.

[14] See Section 2.3.2.

of transfers of profit between associated undertakings (hereinafter: "EU Arbitration Convention")[15] or a Double Tax Treaty.

(32) The Law of 21 June 2004 also introduced an amendment to Article 235 2° WIB 92 to ensure that the transfer pricing rules established by Article 185(2) WIB 92 apply equally to Belgian permanent establishments of non-resident companies.

2.2.3. *The Memorandum to the Law of 21 June 2004 and associated guidance*

2.2.3.1. The Memorandum to the Law of 21 June 2004

(33) The Memorandum to the Law of 21 June 2004 (hereinafter: "the Memorandum") provides guidance on the objective and application of Article 185(2) WIB 92.[16] According to the Memorandum, Article 185(2) WIB 92 "*is based on Article 9 of the OECD Model Tax Convention on Income and Capital*".[17] The Memorandum further explains that "*[t]he proposed provision aligns Belgian legislation to the internationally accepted norm.*"[18] It points at the strong link between accountancy law and tax law, as a result of which a deviation from accountancy law for tax law purposes requires an explicit legal basis. The codification of the arm's length principle in the Belgian income tax code was therefore considered necessary to enable transfer pricing adjustments required under internationally agreed norms but deviating from accountancy law.

(34) As regards the downward adjustment provided for by Article 185(2)(b) WIB 92, the Memorandum explains that that provision seeks to avoid or undo a (potential) problem of double taxation. It further explains that that adjustment shall only apply to the extent that the Ruling Commission considers both the principle and the amount of the primary adjustment justified.

(35) The Memorandum also contains guidance on what is considered a multinational group of associated companies and on the task of the Ruling Commission. In particular, the Memorandum explains that 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.

2.2.3.2. The administrative Circular of 4 July 2006

(36) On 4 July 2006, an administrative Circular was published containing guidance on the application of Article 185(2) WIB 92 (hereinafter: "the Circular"), both as regards the upward and the downward transfer pricing adjustment.[19] The Circular confirms the definitions laid down in the Memorandum of group entities that are part of a

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15 OJ L 225, 20.8.1990, p. 10.

16 DOC 51, 1079/001; Chambre des Représentants de Belgique, 30 April 2004: http://www.lachambre.be/FLWB/pdf/51/1079/51K1079001.pdf

17 Discussion article by article, in respect of Article 2: « *Door de toevoeging van een tweede paragraaf aan artikel 185, WIB 92, wordt het zogenoemde arm's length principe in de fiscale wetgeving geïntroduceerd. Het is gebaseerd op de tekst van artikel 9 van het OESOmodelverdrag inzake belastingen naar het inkomen en naar het vermogen.* » / « *La notion de principe de pleine concurrence est introduite dans la législation fiscale par l'addition d'un deuxième paragraphe à l'article 185, CIR 92. Il est basé sur le texte de l'article 9 de la convention-modèle de l'OCDE en matière d'impôt sur le revenu et sur la fortune* ».

18 « *Met de voorgestelde bepaling sluit de Belgische wetgeving nauw aan bij de internationaal aanvaarde norm.* » / « *La disposition proposée permet à la législation belge de s'aligner sur la norme acceptée internationalement.* ».

19 Circulaire nr. Ci.RH.421/569.019 (AOIF 25/2006) of 4 July 2007.

multinational group and of cross-border transactions covered by Article 185(2) WIB 92. The Circular further explains the role, responsibilities and competence of the Ruling Commission.

(37) The Circular refers to the compulsory intervention of the Ruling Commission for downward adjustments and its autonomy to set conditions on a case-by-case basis, which should contribute to efficiency and certainty for taxpayers improving the Belgian investment climate.

(38) The Circular confirms that, for the purpose of the calculation of the tax base, an appropriate downward adjustment of profit according to Article 185(2)(b) WIB 92 will take place by way of a so-called "increase of the initial situation of the reserves" in the company's tax return (Form 275.1).[20] Concerning the notion "appropriate" used in Article 185(2)(b) WIB 92 in relation to the downward adjustment, the Circular notes that there will be no corresponding downward adjustment[21] in cases where the primary upward adjustment in another tax jurisdiction is exaggerated. The Circular also sets out how the transfer pricing adjustments are to be recorded in the tax accounts of the Belgian company concerned. Finally, the Circular recalls that Article 185(2) WIB 92 applies as of 19 July 2004.

2.2.3.3. Replies given by the Minister of Finance to parliamentary questions on the Excess Profit exemption

(39) In reply to a parliamentary question in 2005,[22] the then Minister of Finance confirmed that the profit actually recorded by a Belgian group entity that exceeds an arm's length profit should remain untaxed in Belgium and that it is not the task of the Belgian tax authorities to determine which other foreign group entities should include that excess profit in their tax base instead.

(40) A parliamentary question in 2007 concerning rulings and international tax avoidance[23] points to the relationship between letters a) and b) of Article 185(2) WIB 92, on the one hand, and the corresponding paragraphs 1 and 2 of Article 9 of the OECD Model Tax Convention on Income and Capital, on the other. The Member of Parliament that had submitted the question noted that most Double Tax Treaties concluded by Belgium include only a provision on upward transfer pricing adjustments. In the treaties that do contain a provision on downward transfer pricing adjustments, the downward adjustment by Belgium is always a reaction to an upward adjustment by the other contracting State. The Member of Parliament further noted that few taxpayers will apply for an advance ruling concerning an upward transfer pricing adjustment, even though the requirement also legally applies to those adjustments. Finally, the Member of Parliament asked whether Belgium would make a unilateral downward adjustment conditional upon the foreign country concerned aligning its primary adjustment or being informed on the Belgian downward adjustment.

[20] See Recital (27).

[21] A corresponding adjustment is defined by the Glossary of the OECD TP Guidelines as: "*An adjustment to the tax liability of the associated enterprise in a second tax jurisdiction made by the tax administration of that jurisdiction, corresponding to a primary adjustment made by the tax administration in a first tax jurisdiction, so that the allocation of profits by the two jurisdictions is consistent.*"

[22] Minutes of the Commission on Finance and Budget of 13 April 2005, CRABV 51 COM 559 – 19.

[23] Minutes of the Commission on Finance and Budget of 11 April 2007, CRABV 51 COM 1271 – 06.

(41) The then Minister of Finance replied that, indeed, only requests for a downward adjustment had thus far been received. Moreover, the Minister stated that it is not for Belgium to specify to which country excess profit ought to be attributed and that it is therefore not possible to determine with which country the information on a Belgian downward adjustment should be exchanged.

(42) In January 2015, following press publications on the so-called "LuxLeaks" affair, several parliamentary questions were again addressed to the Minister of Finance on the (lack of) information exchange between tax administrations, the promotion of the Excess Profit exemption under the slogan "*Only in Belgium*" and the opportunities for multinationals offered by Belgium to reduce their corporate tax bill via tax rulings.[24] The Minister of Finance recalled that in the rulings concerning the Excess Profit exemption the Ruling Commission merely applies the arm's length principle and confirmed the reply given by the Minister of Finance in 2007 as regards exchanges of information.

2.2.4. The Law of 24 December 2002 introducing an advance tax ruling system

(43) The Law of 24 December 2002 allows the Ministry of Finance to take a position by way of a tax ruling on all requests relevant to the implementation of tax law provisions.[25]

(44) Article 20 of that law defines a tax ruling and establishes the principle that a ruling cannot have the effect of exempting from or reducing the tax due:

> *"Par décision anticipée, il y a lieu d'entendre l'acte juridique par lequel le Service public fédéral Finances détermine conformément aux dispositions en vigueur comment la loi s'appliquera à une situation ou à une opération particulière qui n'a pas encore produit d'effets sur le plan fiscal.*
>
> *La décision anticipée ne peut emporter exemption ou modération d'impôt."*

(45) Article 22 of the law defines the circumstances under which a tax ruling cannot be granted, for example when the request concerns situations or operations similar to those having already produced effects from a tax point of view. Article 23 of the law establishes the principle that rulings are binding on the tax administration for the future as well as circumstances in which a tax ruling is not binding on the tax administration. This is the case when it turns out that the ruling is not in conformity with the provisions of the treaties, of Union law or of domestic law.

(46) The Law of 21 June 2004 contains an amendment to the Law of 24 December 2002 on the establishment of a system of advance tax rulings, regulating the formation of an autonomous body within the Belgian administration responsible for granting such rulings.[26] On the basis of the law of 21 June 2004, the Ruling Commission was created by Royal Decree of 23 August 2004 within the central body of the Ministry of Finance competent for delivering rulings ("*Service Public Fédéral Finances*" in French or "*Federale Overheidsdienst Financiën*" in Dutch). The Ruling Commission publishes an annual report on its activities.

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[24] Minutes of the Commission on Finance and Budget of 6 January 2015, CRABV 54 COM 043 – 02.

[25] See footnote 11.

[26] See footnote 13.

2.3. Description of the OECD guidance on transfer pricing

2.3.1. The OECD Model Tax Convention and Transfer Pricing Guidelines

(47) The Organisation for Economic Cooperation and Development (hereinafter: "OECD") provides guidance on taxation for its member countries. The OECD's guidance on transfer pricing can be found in the OECD Model Tax Convention and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereinafter: "OECD TP Guidelines"),[27] which are both non-binding legal instruments.

(48) Given their non-binding nature, the tax administrations of the OECD member countries are simply encouraged to follow the Model Tax Convention and the TP Guidelines. However, in general, both instruments serve as a focal point and exert a clear influence on the tax practices of OECD member (and even non-member) countries. Moreover, in numerous OECD member countries those instruments have been given the force of law or serve as a reference for the purpose of interpreting Double Tax Treaties and domestic tax law.[28] To the extent the Commission cites the Model Tax Convention and the OECD TP Guidelines in this Decision, it does so because those instruments are the result of expert discussions in the context of the OECD and elaborate on techniques aimed to address common challenges.

(49) The OECD Model Tax Convention and its commentary provide guidance on the interpretation of Double Tax Treaties. The OECD TP Guidelines provide guidance to tax administrations and multinational enterprises on the application of the arm's length principle for the determination of transfer prices.[29] Transfer prices refer to prices charged for commercial transactions between the separate entities of the same corporate group. The relationship among members of a multinational group may permit the group members to establish special conditions in their intra-group relations, which affect transfer prices (and consequently taxable income), that differ from those that would have been established had the group members been acting as independent enterprises.[30] This can allow profit shifting from one tax jurisdiction to another and provides for an incentive to allocate as little profit as possible to jurisdictions where it is subject to higher taxation. To avoid these problems tax administrations should only accept transfer prices between intra-group companies that are remunerated as if they were agreed to by independent companies negotiating under comparable circumstances at arm's length.[31] This is known as the "arm's length principle".

[27] Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD, July 2010. The OECD TP Guidelines were adopted in their original version on 27 June 1995 by the OECD's Committee on Fiscal Affairs. The 1995 Guideline were substantially updated in July 2010. In the present Decision, when reference is made to the OECD TP Guidelines such reference refers to the 2010 OECD TP Guidelines.

[28] In Belgium, the arm's length principle was laid down in the corporate income tax law via the introduction of Article 185(2) WIB 92.

[29] Tax administrations of the OECD member countries are encouraged to follow the Model Tax Convention and the TP Guidelines. However, in general, both instruments serve as a focal point and exert a clear influence on the tax practices of OECD member (and even non-member) countries.

[30] See paragraph 6 of the preface to the OECD TP Guidelines.

[31] Tax administrations and legislators are aware of this problem and tax legislation generally allows the tax administration to correct tax declarations of associated companies that incorrectly apply transfer prices to reduce their taxable income, by substituting prices which correspond to a reliable

(50) The application of the arm's length principle is therefore based on a comparison of the conditions in a controlled (intra-group) transaction with the conditions in comparable transactions between independent companies under comparable circumstances so that none of the differences (if any) between the situations being compared could materially affect the conditions examined (e.g. price or margin), or that reasonably accurate adjustments can be made to eliminate the effect of any such differences.

(51) Both the Model Tax Convention and the OECD TP Guidelines rely on the principle adhered to by OECD member countries and wider, that the various legal entities jointly constituting a multinational group are treated as separate entities for corporate tax purposes. A consequence of this separate entity approach is that each individual entity within a multinational group is taxed on its specific income.[32] The separate entity approach has been chosen as an international taxation principle by the OECD member countries with a view to securing the appropriate tax base in each jurisdiction and avoiding double taxation, thereby minimising conflicts between tax administrations and promoting international trade and investment.

(52) Paragraph 1.10 of the OECD TP Guidelines makes an explicit reference to economies of scale and the benefits of integration (i.e. synergies) in relation to the separate entity approach that underlies the arm's length principle:

> *"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"*

2.3.2. The arm's length principle

(53) The authoritative statement of the arm's length principle is found in Article 9 of the OECD Model Tax Convention, which forms the basis of Double Tax Treaties involving OECD member countries including Belgium and an increasing number of non-member countries. Since the flexibility in the arrangement of transfer prices might lead to shifting the tax base from one jurisdiction to another, the authoritative presence of the arm's length principle in Double Tax Treaties serves the purpose of those treaties, i.e. the avoidance of double taxation and the prevention of fiscal evasion.

(54) Article 9 of the OECD Model Tax Convention sets out how and when transfer pricing adjustments of the tax base should take place in practice.

- Article 9, first paragraph, determines that a Contracting State may increase the tax base of a taxpayer resident in its territory when it believes that the transfer prices applied by it have led to a too low taxable base and allow that State to tax it accordingly. This is referred to as the "primary adjustment" and results in the tax administration increasing the taxable profit reported by a taxpayer.[33]

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approximation of those agreed to by independent companies negotiating under comparable circumstances at arm's length.

[32] See paragraph 1.5 of the OECD TP Guidelines.

[33] Article 9(1) provides: "*Where (…) conditions are made or imposed between the two [associated] 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*

– Article 9, second paragraph, aims to prevent that the profit so taxed by the Contracting State making the primary adjustment in accordance with the first paragraph is not also taxed at the level of an associated company resident in the other Contracting State.[34] It does this by committing that other Contacting State to either decrease the tax base of that associated company with the amount of adjusted profit taxed by the first Contracting State following the primary adjustment or to provide a refund of taxes already collected. Such an adjustment by the other Contacting State is, however, not automatically made. If it considers that the primary adjustment is not justified, either in principle or as regards the amount, it may and usually will refrain from making such an adjustment.[35]

The downward adjustment by the other Contracting State on the basis of Article 9, second paragraph, is referred to as the "corresponding adjustment" and, when granted, effectively prevents that the same profit is taxed twice.

(55) The OECD TP Guidelines provide five 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; (ii) the cost plus method; (iii) the resale minus method; (iv) the TNMM and (v) the transactional profit split method. The OECD TP 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 transfer pricing methods not described in those guidelines provided those methods result in arm's length transfer prices.[36]

(56) The TNMM is one of the "indirect methods" to approximate an arm's length pricing of transactions and profit allocation between companies of the same corporate group. It approximates what would be an arm's length profit for a series of controlled transactions or an entire activity, rather than for an identified transaction.

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."

34 Article 9(2) provides: "*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.*"

35 If there is a dispute between the parties concerned over the amount and character of the appropriate adjustment the mutual agreement procedure provided for in Article 25 of the OECD Model Tax Convention should be implemented, even in the absence of a provision such as Article 9(2). The competent authorities involved are under a duty merely to use their best endeavours, but not to achieve a result, so double taxation could not be solved if an arbitration clause has not be agreed in the Tax Treaty in place between Contracting States.

36 According to paragraph 2.9 of the OECD TP Guidelines: "*Such other methods should however not be used in substitution for OECD-recognised methods where the latter are more appropriate to the facts and circumstances of the case.*"

(57) When applying the TNMM, it is necessary to choose the party to the controlled transaction or series of controlled transactions for which a net profit indicator[37] is selected and tested. That choice must be consistent with the functional analysis performed. As a general rule, the tested party within a TNMM-based study is the party to which the method can be applied in the most reliable manner and for which the most reliable comparables can be found. In practice, this will be the less complex of the two parties involved based on the functional analysis while the residual profit from the controlled transaction or series of controlled transactions will be allocated to the more complex party.[38]

(58) The TNMM is therefore often applied in cases where one of the parties to a controlled transaction or series of controlled transactions makes all the complex and/or unique contributions involved in the transaction(s), while the other party performs the more standard and/or routine functions and does not make a unique contribution, for example a limited risk distributor. Conversely, the TNMM is unlikely to be reliable if each party to a transaction makes valuable, unique contributions. In such a case, the transactional profit split method is considered a more appropriate transfer pricing method.[39]

2.4. Beneficiaries of the contested scheme

(59) The Excess Profit exemption scheme has been in place since 2004 and has gradually gained in importance. According to the information provided by Belgium, the number of companies that benefitted from the contested scheme since its introduction amounts to 66 rulings granted to 55 companies.[40] The Belgian authorities indicated that they have never refused any request for a ruling to benefit from the Excess Profit exemption since the contested scheme's introduction.[41] The number of rulings granted per year, since the contested scheme's introduction in 2004, is provided in Table 1.

Table 1 - Number of excess profit rulings granted since 2004

Year	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
N° of cases	0	2	3	5	4	7	6	7	15	9	8

Source: Belgian Ministry of Finance, per 31 May 2014

(60) Belgium has provided key financial data for all 66 rulings granting an Excess Profit exemption (for details see Annex 1).

(61) Situations in which the Excess Profit exemption has been granted can be illustrated through the following examples.

(62) As a first example, the ruling request of Company A indicates that the company has the 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

[37] A net profit indicator is defined by the Glossary of the OECD TP Guidelines as: "*The ratio of net profit to an appropriate base (e.g. costs, sales, assets).*" Net profit indicators are also commonly named profit level indicators.

[38] See paragraph 3.18 of the OECD TP Guidelines.

[39] See paragraph 2.59 of the OECD TP Guidelines.

[40] Information updated per 31 May 2015.

[41] See reply of 18 March 2014 to Question 1 of the Commission's second request for information: "*Nous précisons qu'aucune décision négative n'a été rendue*".

central entrepreneurial function) of a foreign subsidiary to Belgium. The request also indicates that Company A would transfer several 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 profit in Belgium is 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 group entity by the group for free, which implies that there is no taxable income anywhere else in the group and therefore no risk for double taxation. In fact, the ruling (point 48 thereof) reiterates that "*it is not up to the Belgian tax authorities to determine which foreign companies' profit accounts must include the excess profit*".

(63) As a second example, the ruling request of Company B reads that the company intends to bring forward its expansion investments in Belgium. Company B claims that the new investment is more attractive for it as a group entity than for a standalone company. The synergies that the ruling refers to relate to advantages which arise in Belgium in the form of lower investment costs because it already has a plant in Belgium, lower operational costs because overhead costs of the site can be spread over a larger production base, and access to cheap energy.

(64) As a third example, the ruling request of Company C describes the company's intention to establish its Belgian subsidiary as the central entrepreneur by way of a restructuring of its European operations. Company C would increase its FTE in Belgium. Belgium again accepts the use of the TNMM with profit before tax obtained by standalone companies in comparable uncontrolled transactions as a profit level indicator to calculate the taxable base of the central entrepreneur. On this basis, Company C obtains a downward adjustment of around 60 % of the net profit before tax.

(65) Having reviewed a sample of 22 individual rulings, the Commission considers these three examples as representative for the entire contested scheme. Although the individual facts, amounts involved and transactions are different for each specific case, they all concern multinationals increasing their activities in Belgium and claiming and obtaining an exemption from their corporate tax base of profit actually recorded in Belgium but allegedly attributable to synergies, economies of scale or some other group-related factor. From the sample, the Commission observed that Excess Profit exemptions were not granted to small companies, nor have the Belgian authorities been able to substantiate their claim that the Excess Profit exemption could also be granted to entities that are part of a small group or for other reasons than the alleged existence of synergies or economies of scale.

(66) When asked to substantiate the availability of the Excess Profit exemption for small or medium sized entities ("SMEs"), the Belgian authorities referred to three examples of the smallest beneficiaries:

– Company D with a balance sheet total of EUR [100-120][*] million, a turnover of EUR [60-80] million and [200-250] FTE's;

– Company E with a turnover of EUR [70-90] million and [250-300] FTE's, and

[*] Covered by the obligation of professional secrecy.

– Company F with a balance sheet total of EUR [50-70] million, a turnover of EUR [70-90] million and [350-400] FTE's.

(67) When asked to substantiate the availability of the Excess Profit exemption for other reasons than the alleged existence of synergies or economies of scale, the Belgian authorities provided three examples of transfer pricing rulings in which the Ruling Commission, upon the request of the Belgian group companies, agreed to a corresponding downward adjustment at the level of those companies, on the basis of Article 185(2)(b) WIB 92, as a consequence of a primary upward transfer pricing adjustment to the profits of their associated group companies in Germany, the United Kingdom and Denmark, respectively, made by the German, United Kingdom and Danish tax administrations, respectively.

(68) The present decision does not concern such and other similar genuine corresponding transfer pricing adjustments. It only concerns rulings granting the Excess Profit exemption, which is a unilateral and pro-active reduction of the Belgian tax base without a primary upward transfer pricing adjustment made in another tax jurisdiction or any other indication of the reduced amounts being included in a foreign tax base. For the application of the Excess Profit exemption, the exempted profit does not need to have been taxed or even included in the tax base of another foreign group company. This feature distinguishes Excess Profit exemption rulings from other transfer pricing rulings granted by the Ruling Commission on the basis of Article 185(2)(b) WIB 92 that also allow for a reduction of the profit actually recorded for tax purposes, but where the reduction is the consequence of the actual taxation or a primary upward transfer pricing adjustment by a foreign tax administration.

3. GROUNDS FOR INITIATING THE PROCEDURE

(69) The Commission decided to initiate the formal investigation procedure because it took the preliminary view that the Excess Profit exemption scheme constitutes a State aid scheme prohibited by Article 107(1) of the Treaty since it is incompatible with the internal market.

(70) Firstly, the Commission expressed the preliminary view that the Excess Profit exemption scheme constitutes a State aid scheme within the meaning of Article 1(d) of Regulation No. 2015/1589,[42] which allows, without further implementing measures being required, certain Belgian group companies of multinational groups to obtain a substantial reduction of their corporate tax liability in Belgium. This was considered to be the case notwithstanding the fact that the exemption was applied via the granting of tax rulings.

(71) Secondly, the Commission took the preliminary view that the contested scheme allows for a selective advantage. The Commission considered that scheme to constitute a derogation from the reference framework since an exemption from

[42] With effect from 14 October 2015, Regulation (EU) No 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), OJ L 248, 24.9.2015, p. 9, repealed and replaced Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p.1. Any reference to Regulation (EC) No 659/1999 may be construed as a reference to Regulation (EU) No 2015/1589 and should be read in accordance with the correlation table in Annex II to the latter regulation.

corporate income tax liability was granted for a part of realised profit despite the fact that it was actually generated by and recorded in the accounts of the Belgian group entity. The Commission raised further doubts that the recognition of alleged excess profit exempted under the scheme was in line with the arm's length principle, since the recognition of such a separately identifiable profit component is highly questionable and the actual benefits of being part of a multinational group were in any case significantly overestimated.

(72) The Commission also took the preliminary view that the advantage granted by the contested scheme was selective given that it only benefited Belgian entities that are part of a multinational group. Belgian entities that were only active in Belgium could not claim similar benefits. Moreover, the beneficiaries of the scheme usually relocated a substantial part of their activities to Belgium or made significant investments in Belgium.

(73) The Commission further took the preliminary view that the Excess Profit exemption could not be justified by the objective to prevent double taxation, since it did not correspond to a claim from another country to tax the same profit.

(74) With all the other conditions of Article 107(1) of the Treaty being fulfilled and no apparent compatibility ground available, the Commission reached the preliminary conclusion that the Excess Profit exemption scheme constituted a State aid scheme which could not be found compatible with the internal market. On those grounds, the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty with respect to that scheme.

4. COMMENTS FROM BELGIUM

(75) Belgium submitted comments on the assessment framework applied in the Opening Decision, the non-application of the equality principle and finally held that the Opening Decision contains several misconceptions.

4.1. Comments from Belgium on the assessment framework and the principle of equal treatment

(76) Belgium contests that the combination of Article 185(2) WIB 92, the Circular of 4 July 2006, the annual reports of the Ruling Commission and the analysis of the rulings constitute a scheme meeting the criteria of Article 1(d) of Regulation No.2015/1589. Belgium considers that the analysis as a scheme must be limited to the legal provision, in the absence of a thorough analysis of all rulings granting the Excess Profit exemption. Belgium considers the examples provided in the Opening Decision to be selectively chosen examples providing only superficial findings.

(77) Belgium also holds that it is the only Member State against which the Commission has opened the formal investigation procedure on a ruling scheme instead of an individual case, while the majority of Member States provide for advance tax rulings. Belgium considers this conduct not to comply with the principle of equal treatment.

4.2. Comments from Belgium on misconceptions in the Opening Decision

4.2.1. The role of accounting profit and the reference framework

(78) Belgium states that the Commission assigns too much relevance to the accounting profit of Belgian companies for the identification of the reference framework. Belgian corporate tax law allows or prescribes numerous adjustments, both upward and downward, to arrive from an accounting profit to a taxable profit. According to

Belgium, those adjustments, including Article 185(2)(b) WIB 92 are an inherent part of the reference framework and apply to all taxpayers that meet the conditions for the respective adjustments.

(79) Belgium also states that the purpose of Article 185(2)(b) WIB 92 is to prevent double taxation. Since nationally organised groups or standalone entities cannot be confronted with double economic taxation, they are in a different factual and legal situation from multinational companies in the light of the aim pursued by the measure in question. Hence, Article 185(2)(b) WIB 92 is not a derogation to the general tax system.

4.2.2. The Belgian application of the arm's length principle based on Article 185(2)(b) WIB 92 does not confer an advantage

(80) Belgium states that only arm's length profit can be taxed under its corporate tax system. Moreover, since the Commission has previously accepted the arm's length principle as a principle to assess the presence of an advantage for State aid purposes, a tax ruling can only confer an advantage to a taxpayer if it is in conflict with the arm's length principle.

(81) Belgium recalls that transfer pricing does not only concern appropriate pricing of goods and services between associated parties, but also concerns the intercompany allocation of excess profit. Belgium argues that even if all intercompany transactions are accurately priced, that does not necessarily mean that the overall profit is at arm's length.[43] Belgium further states that the whole concept of transfer pricing adjustments proves that commercially booked prices cannot be relied upon for tax purposes. Consequently, the fact that commercial profit exceeds the agreed arm's length profit is of no relevance.

(82) Belgium argues that excess profit cannot be attributed to the Belgian entities under the separate entity approach that is at the basis of the arm's length principle. Excluding such profit from the tax base of Belgian entities therefore does not confer an advantage. According to Belgium, there is no international consensus on how profit caused by group synergies and/or economies of scale should be attributed to various group entities. Even if an overall non-taxation of excess profit would occur because no other tax jurisdiction taxes the excess profit exempted by Belgium, ensuring the taxation of all profits is not Belgium's responsibility.

(83) Belgium provided a description of the two-step method outlined in recital (15) as a way to determine the profit deducted under the Excess Profit exemption.

(84) Belgium considers that the origin of the excess profit is in fact irrelevant for the question whether it grants an advantage so long as Belgium taxes the total arm's length profit of the relevant entities. Belgium states that excess profit will usually result from synergies or economies of scale and refers to paragraph 1.10 of the OECD TP Guidelines to substantiate that such profit should not be attributed to Belgium.[44] If the excess profit is not attributed to any other jurisdiction and remains therefore untaxed, Belgium considers that this outcome constitutes a shortcoming of the arm's length principle.

[43] Belgium refers in that context to examples concerning non-remunerated intercompany services in paragraph. 7.12 and 7.13 of the OECD TP Guidelines.

[44] See Recital (52).

(85) Belgium denies any inconsistencies in the selection of the appropriate transfer pricing method or in selecting the tested party. Moreover, according to Belgium any observed inconsistencies cannot be generalised for the assessment of the scheme without a thorough case-by-case analysis of all rulings.

(86) Belgium states that (non-)taxation of excess profit abroad is not its responsibility. Some rulings granting an Excess Profit exemption have been published and some companies are transparent in their annual accounts. Exchanging information is not possible, since it is not for Belgium to decide where excess profit should be attributed to and taxed. If in effect that profit remains wholly untaxed, this is caused by a disparity between Belgian law and foreign law and/or a flaw in the arm's length principle.

4.2.3. The application of Article 185(2)(b) WIB 92 is not selective

(87) Referring to the case-law of the General Court,[45] Belgium states that Article 185(2)(b) WIB 92 does not favour companies that display common properties that would allow them to be distinguished from other companies, other than the fact that they can meet the conditions for the application of the provision. According to Belgium, a limitation to multinationals does not suffice to prove selectivity as that group of undertakings, in contrast with for example offshore companies, does not have common characteristics in terms of economic sector, activity, size of balance sheet, number of employees or country of establishment.

(88) Belgium also denies that the relocation of substantial activities to or the creation of investments or jobs in Belgium constitutes an implicit or explicit condition for the application of rulings granting the Excess Profit exemption. According to Belgium, there is no such condition in the law and the Ruling Commission does not have the discretion to set such conditions. It is merely a legal obligation to fully describe activities, factual background and the special situation or arrangement referred to in Article 21 of the Law of 24 December 2002, introducing advance rulings in Belgian tax law.

4.2.4. Justification

(89) Belgium considers the Excess Profit exemption justified since it is necessary and proportionate to prevent potential double taxation. Belgium underlines that it is not meant to reduce or remedy actual double taxation.

4.2.5. Recovery

(90) Belgium argues that recovery would in any case be prevented by the principles of legal certainty and legitimate expectations,[46] since previous Commission decisions on transfer pricing and State aid have led it to believe that there can be no State aid involved if Member States adhere to the arm's length principle,[47] considering that there is no harmonised legislation in this area in the Union. Moreover, Belgium refers to conclusions by the Council of Ministers on the Code of Conduct for

[45] Case T-399/11 *Banco Santander SA and Santusa Holding v Commission* ECLI:EU:T:2014:938.

[46] See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* ECLI:EU:C:2006:416, paragraphs 69 and 147.

[47] See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* ECLI:EU:C:2006:416, paragraphs 69 and 147.

business taxation[48] concerning another scheme purportedly based on the same principles as the Excess Profit exemption[49] and the fact that the Commission did not raise any State aid issue against the Excess Profit exemption scheme until 10 years after the termination of the informal capital ruling scheme. Finally, recovery would lead to exceptional complexity and double taxation and unequal treatment between Belgium and other Member States that also have a ruling practice.

5. COMMENTS FROM INTERESTED PARTIES

(91) Comments were submitted by AGC Glass Europe SA/NV on 1 July 2015 and by […] on 3 July 2015. Both companies have received rulings pursuant to Article 185(2)(b) WIB 92.

(92) AGC Glass Europe SA/NV notes in its submission that it has never applied or implemented the ruling that it obtained on the basis of Article 185(2)(b) WIB 92.

(93) […] states that it is incorrectly referred to in the Opening Decision as being one of the beneficiaries of the contested measure. […] states that it has obtained an advance pricing agreement which can lead to either an upward transfer pricing adjustment on the basis of Article 185(2)(a) WIB 92 or to a downward adjustment on the basis of Article 185(2)(b) WIB 92.[50] For that reason, it does not consider itself to be a beneficiary of the scheme and ask to be excluded from the final decision or any potential recovery actions following the final decision.

6. ASSESSMENT

6.1. Existence of a scheme

(94) The Commission considers the contested measure to constitute an aid scheme within the meaning of Article 1(d) of Regulation No. 2015/1589. Pursuant to that provision, a scheme is defined as "*any 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 (…)*".

(95) The case-law of the Union Courts does not provide guidance on the interpretation of that definition. The Commission notes, however, that the Union Courts have in the past accepted the Commission's qualification of tax measures sharing many characteristics with the contested scheme as aid schemes within the meaning of that provision.[51]

(96) The definition includes three criteria: (i) any act on the basis of which aid can be awarded; (ii) which does not require any further implementing measures; and (iii) which defines the potential aid beneficiaries in a general and abstract manner.

[48] See ECOFIN Presidency's conclusions of 19 March 2003, referring to the Code of Conduct Group's report with reference 7018/1/03 FISC 31 REV 1, available here: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/75013.pdf

[49] The so-called *informal capital ruling* scheme, referred to as scheme E002 in the Code of Conduct documents.

[50] The ruling concerned and the transfer pricing study on which the ruling is based were attached to […] submission.

[51] See, in particular, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:416 and Case C-519/07 P *Commission v Koninklijke FrieslandCampina* ECLI:EU:C:2009:556.

(97) As for the first criterion, the Excess Profit exemption is granted on the basis of Article 185(2)(b) WIB 92. That provision, which was introduced into the Belgian tax code by Law of 21 June 2004, allows downward transfer pricing adjustments to a taxpayers' tax base subject to certain conditions being met. That provision is cited in the individual rulings granting the Excess Profit exemption as the legal basis for that exemption and is mentioned by Belgium in several documents describing the exemption.[52]

(98) The application of Article 185(2)(b) WIB 92 is explained by the guidance provided in the Memorandum, the Circular and the replies of the Minister of Finance to parliamentary questions on the application of that provision. As regards the latter, those replies affirm the extended application of the Excess Profit exemption beyond the terms of that provision to profit that has not also been included in the profit of an associated group company in another tax jurisdiction. The absence of any requirement to demonstrate the inclusion of the same profit in the tax base of both associated companies (one abroad, one in Belgium) is an important element distinguishing rulings granting the Excess Profit exemption from other rulings authorising a downward transfer pricing adjustment pursuant to Article 185(2)(b) WIB 92.[53]

(99) In sum, Article 185(2)(b) WIB 92, the Memorandum, the Circular and the replies by the Minister of Finance to parliamentary questions on the application of Article 185(2)(b) WIB 92 constitute the acts on which basis the Excess Profit exemption is awarded.

(100) As for the second criterion, the Commission considers the term "implementing measures" to be understood to entail a significant degree of discretion on the part of the aid granting authority to influence the amount, the characteristics or the conditions under which aid is granted through the adoption of subsequent acts.[54] By contrast, the mere technical application of the act providing for the grant of the aid in

[52] The existence of a scheme is also supported by the reference made to rulings granting the Excess Profit exemption by the Ruling Commission in its annual reports as a specific category of rulings and by other Belgian authorities advertising the scheme; see, notably Brussels Capital Region, http://www.investinbrussels.com, « *Belgian R&D incentives unparalleled in Europe* », 18/01/13: « *Companies established in Belgium acting as the principal in a centralised business model can also apply an 'excess accounting profit' ruling, resulting in an average tax rate of between 7-9%.* »; Service Public Fédéral Finances, Cellule Fiscalité des Investissements Etrangers, slide shows « *Incitants fiscaux en Belgique* », 2009, and « *Fiscalité belge: Nouvelles mesures innovatrices* », Paris, 9 octobre 2007, available at http://finances.belgium.be/fr/sur_le_spf/structure_et_services/services_du_president/Fiscaliteit_van_de_buitenlandse_investeringen/publications/presentations

[53] Not all downward adjustments pursuant to Article 185(2)(b) WIB 92 are based on the alleged existence of excess profit. The provision is also the basis for corresponding transfer pricing adjustments where Belgium on request of the Belgian taxpayer agrees to reduce the Belgian tax base as a reaction to a primary upward transfer pricing adjustment by another tax jurisdiction. The fact that Article 185(2)(b) WIB 92 is also used as the legal basis for downward adjustments to the tax base other than the Excess Profit exemption does not prevent it from being the legal basis for the contested scheme.

[54] For example where a public body is empowered to use different instruments to promote the local economy and grants several aid measures in pursuit thereof, that implies the use of considerable discretion as to the amount, characteristics or conditions and purpose for which the aid is granted, and is therefore not to be regarded as an aid scheme; see, Commission Decision of 13.07.2011 in Case SA.21654 (ex NN-69/2007 and C-6/2008) *Public Commercial Property Åland Industrihus*; OJ L 125, 12.5.2012 p. 33, paragraph 110.

question does not constitute an implementing measure within the meaning of Article 1(d) of Regulation No. 2015/1589.

(101) The Commission considers the Excess Profit exemption to be granted without further implementing measures being required within the meaning of that provision. The elements necessary to benefit from the Excess Profit exemption can be described *in abstracto*. The existence of those elements reveal the existence of a consistent approach to granting the aid observed in the sample of rulings reviewed by the Commission and described by Belgium in its comments to the Opening Decision.

(102) Those elements are that a tax exemption will be provided:

– to entities of a multinational undertaking;

– which obtain a compulsory prior authorisation via a ruling from the Ruling Commission, as a consequence of which the aid can only be granted for profit related to a new situation which has not yet produced effects from a tax perspective, e.g. a reorganisation leading to the relocation of a central entrepreneur to Belgium, the increase of activities or new investments in Belgium;[55]

– on the profit that they make that exceeds the profit that would be made by comparable standalone entities operating in similar circumstances;

– without the need for an initial primary adjustment in another Member State.

(103) Indeed, as indicated in recital (65), the Commission has assessed a sample of 22 individual rulings that can be considered as representative for the contested scheme. Even though the individual facts, amounts involved and transactions are different for each specific ruling, they all concern multinationals of a considerable size, increasing their activities in Belgium, and claiming and obtaining an exemption from their corporate tax base of profit actually recorded in Belgium but allegedly attributable to synergies, economies of scale or some other group related factor.

(104) Contrary to what Belgium has claimed, the fact that the Commission refers to common elements found in a sample of the rulings does not imply that it considers the State aid elements to stem from individual rulings rather than from a scheme. The Commission considers that the rulings are an instrument through which the scheme is applied, as mandated by the law on which the scheme is based, and that the description of certain individual rulings in the Opening Decision only serves as an illustration of how the scheme has been implemented in practice. In any event, the Commission made clear in Section 4.1 of its Opening Decision why it considered, at that stage, that the measure constituted an aid scheme, so that Belgium could not harbour any illusions that the Commission considered the State aid elements to stem from the individual rulings instead of from a scheme.

(105) The requirement to obtain an individual ruling to benefit from the Excess Profit exemption does not constitute an implementing measure, but a technical application of the scheme, confirming the fulfilment of the conditions set by the scheme and

[55] Whereas a transfer pricing study should be produced by the taxpayer, the Excess Profit exemption applies, as a matter of principle, without it being required to demonstrate the existence of double taxation. Moreover, the exemption always relies on the assumption that the excess profit corresponds to synergies, economies of scale or other benefits drawn from the participation in a multinational group.

vetting the method chosen by the taxpayer to determine the amount of alleged excess profit to be exempted.[56]

(106) The fact that the Ruling Commission enjoys a limited margin of discretion to agree the exact percentage of the downward adjustment to the tax base subject to the information provided by the taxpayer or to assess the fulfilment of some of the conditions under which that deduction can be awarded (e.g. the existence of a new situation that has not yet had tax consequences), does not affect that conclusion. Indeed, the existence of a special Ruling Commission with exclusive competence on rulings to assess the reliability of the approximation of the amount of excess profit claimed by the taxpayer under the second step, necessarily requires a limited margin of discretion on the part of the Ruling Commission. However, this merely ensures a consistent application of that exemption.

(107) The Ruling Commission has consistently issued rulings granting the Excess Profit exemption where the above conditions were met. Moreover, as confirmed by Belgium, no request for a ruling granting an Excess Profit exemption has ever been rejected by the Ruling Commission.[57]

(108) The Commission therefore concludes that the Excess Profit exemption does not require any further implementing measures.

(109) As for the third criterion, the act on the basis of which the Excess Profit exemption is granted defines the potential beneficiaries in a general and abstract manner. The application of Article 185(2)(b) WIB 92, which forms the legal basis for the rulings necessary to benefit from the exemption, is limited to entities that form part of "a multinational group of associated companies".

(110) In conclusion, the Excess Profit exemption, as it is consistently applied by the Ruling Commission, meets the criteria laid down in Article 1(d) of Regulation No. 2015/1589 for classification as an aid scheme. According to the case-law of the Court of Justice, in the case of an aid scheme the Commission may confine itself to examining the general characteristics of the scheme in question without being required to examine each particular case in which it has been applied.[58]

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56 See, by way of analogy, Commission Decision of 17.02.2003 on the Foreign Income aid scheme implemented by Ireland, OJ L 204, 13.8.2003, p. 51 (in particular, recital 30 of that decision); Commission Decision of 17.02.2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium, OJ L 282, 30.10.2003, p. 25 (in particular recital 13 of that decision: a coordination centre needed to be individually approved by Royal Decree to benefit from special tax status under the scheme); Commission Decision of 17.02.2003 on the State aid implemented by the Netherlands for international financing activities OJ L 180, 18.7.2003, p. 52 (in particular recital 16 of that decision: permission to establish a risk reserve under the scheme leading to a tax exemption had to be granted by the Dutch tax administration); Commission Decision of 16.10.2002 on the State aid scheme in Case C49/2001 implemented by Luxembourg for coordination centres established in Luxembourg, OJ L 170, 9.7.2003, p. 20 (in particular recital 9 of that decision: prior administrative approval was necessary to benefit from special tax status under the coordination centre scheme); and Commission Decision of 22.08.2002 in Case C 48/2001 (ex NN 43/2000) on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya, OJ L 31, 6.2.2003, p.26 (in particular recital 14 of that decision: to qualify for the coordination centres scheme, an undertaking must obtain the prior approval of the tax authorities, which is granted for a period of up to five years).

57 See Recital (59).

58 See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:416, paragraph 82; Case 248/84 *Germany v Commission* ECLI:EU:C:1987:437, paragraph 18; and Case C-75/97 *Belgium v Commission* ECLI:EU:C:1999:311, paragraph 48.

6.2. Existence of aid

(111) According to Article 107(1) of the Treaty, 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 provision of certain goods shall be incompatible with the internal market, in so far as it affects trade between Member States.

(112) According to settled case-law, for a measure to qualify as aid within the meaning of Article 107(1) of the Treaty, all the conditions set out in that provision must be fulfilled.[59] It is thus well-established that, for a measure to be qualified as State aid, first, there must be an intervention by the State or through State resources; second, that intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on an undertaking and, fourth, it must distort or threaten to distort competition.[60]

(113) As regards the first condition for a finding of State aid, the Excess Profit exemption finds its basis in the application of Article 185(2)(b) WIB 92 and all the guidance documents supporting the interpretation made by the Belgian authorities of that provision for granting that exemption. Moreover, the exemption is granted by means of compulsory advance tax rulings delivered by the Ruling Commission, an organ of the Belgian tax administration, and binding on the Belgian tax administration. Accordingly, the Excess Profit exemption is imputable to the Belgian State.

(114) As regards the scheme's financing through State resources, the Court of Justice has consistently held that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a positive transfer of State resources, places those undertakings in a more favourable financial situation than other taxpayers constitutes State aid.[61] The Commission will demonstrate in Section 6.3 that the Excess Profit exemption results in a lowering of the tax liability in Belgium of undertakings that have obtained a ruling under the contested scheme by deviating from the tax that those undertakings would otherwise have been obliged to pay according to the ordinary system of taxation of corporate profits absent the scheme. Consequently, the Excess Profit exemption gives rise to a loss of State resources, since any reduction of tax for the undertakings benefitting from the contested scheme results in a loss of tax revenue that would otherwise have been available to Belgium.

(115) As regards the second condition for a finding of State aid, the undertakings benefiting from the contested scheme are multinational companies operating in several Member States, so that any aid in their favour is liable to affect intra-Union trade. Moreover, because a ruling to benefit from the exemption can only be granted for profit derived from a new situation, which entails the relocation or increase of the undertaking's activities in Belgium, and because the benefit of the exemption is proportional to the importance of the new activities and profit created by the undertaking in Belgium, the scheme is liable to influence the choices made by

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59 See Case C-399/08 P *Commission v Deutsche Post* ECLI:EU:C:2010:481, paragraph 38 and the case-law cited therein.

60 See Case C-399/08 P *Commission v Deutsche Post* ECLI:EU:C:2010:481, paragraph 39 and the case-law cited therein.

61 See Joined Cases C-106/09 P and C-107/09 P *Commission v. Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, paragraph 72 and the case-law cited therein.

multinational groups as to the location of their investments within the Union and thus to affect intra-Union trade.

(116) Similarly, a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipients compared to other undertakings with which they compete.[62] To the extent that the contested scheme relieves the undertakings benefitting from it from a burden they would otherwise be obliged to bear by reducing their tax liability under the ordinary system of taxation of corporate profits, that scheme distorts or threatens to distort competition by strengthening the financial position of those undertakings, so that the fourth condition for a finding of State aid is also met.

(117) As regards the third condition for a finding of State aid, the Commission will demonstrate in the following section how the contested scheme confers a selective advantage to the Belgian group entities admitted to that scheme, as well as to the multinational groups to which those entities belong. It does so by applying a unilateral downward adjustment to their tax base resulting in a reduction of their corporate tax liability in Belgium as compared to the taxes those undertakings would otherwise have had to pay under the ordinary system of taxation of corporate profits.

6.3. Existence of a selective advantage

(118) According to settled case-law, "*Article 107(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*".[63]

(119) In fiscal cases, the Court of Justice has devised a three-step analysis to determine whether a particular tax measure is selective.[64] First, the common or normal tax regime applicable in the Member State is identified: "the reference system". Second, it is determined whether the tax measure in question constitutes a derogation from that system, in so far as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable legal and factual situation. If the measure constitutes a derogation from the reference system, it is then established, in the third step of the analysis, whether that measure is justified by the nature or the general scheme of the reference system. A tax measure which constitutes a derogation to the application of the reference system may be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of that tax system.[65] If that is the case, the tax measure is not selective. The burden of proof in that third step lies with the Member State.

6.3.1. Determination of the reference system

(120) For the purpose of the selectivity analysis a reference system is composed of a consistent set of rules that apply on the basis of objective criteria to all undertakings falling within its scope as defined by its objective.

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62 See Case 730/79 *Phillip Morris* ECLI:EU:C:1980:209, paragraph 11 and Joined Cases T-298/97, T-312/97 etc. *Alzetta* ECLI:EU:T:2000:151, paragraph 80.

63 Case C-172/03 *Heiser* ECLI:EU:C:2005:130, paragraph 40.

64 See Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 49 and 63.

65 See Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 65.

6.3.1.1. The reference system is the Belgian corporate income tax system

(121) In the present case, the Commission considers the reference system to be the ordinary system of taxation of corporate profits under the general Belgian corporate income tax system,[66] which has as its objective the taxation of profit of all companies subject to tax in Belgium. The Belgian corporate income tax system applies to companies resident in Belgium as well as Belgian branches of non-resident companies. Companies resident in Belgium[67] are liable to corporate income tax on their worldwide profit,[68] unless a tax treaty applies. Non-resident companies are only taxable on specific Belgium-sourced income.[69] In both cases, Belgian corporate income tax is payable on the total profit, either worldwide or Belgian sourced. In general, therefore, all undertakings generating income in Belgium are considered to be in a similar legal and factual situation from the perspective of corporate income taxation.

(122) The total profit is established according to the rules for profit determination laid down in the provisions to calculate the profit for individual entrepreneurs as defined in Article 24 WIB 92. The total profit is calculated as income minus deductible expenses, which are typically recorded in the accounts, so that the profit actually recorded forms the starting point for calculating the total taxable profit under the Belgian corporate income tax system.[70]

6.3.1.2. The Excess Profit exemption is not an inherent part of the reference system

(123) Under the Belgian corporate income tax system, the profit actually recorded is subject to a number of upward and downward adjustments laid down in Belgian tax law to obtain the total taxable profit.[71] In this regard, Belgium argues that all adjustments to the profit actually recorded prescribed by the WIB 92, including the Excess Profit exemption, are an inherent part of the reference system.

(124) The Commission does not agree that the Excess Profit exemption is an inherent part of the reference system for the following reasons.

(125) First, the Excess Profit exemption is not prescribed by any provision of the WIB 92. Indeed, the Commission notes that Article 185(2)(b), the provision on the basis of which the Excess Profit exemption is actually granted, refers to specific transactions or arrangements between two related group entities. The non-arm’s length character of the conditions agreed for those transactions or arrangements may lead to a transfer pricing adjustment on the basis of that provision, but it does not allow or prescribe an abstract unilateral exemption of a fixed part or percentage of the profit actually recorded by a Belgian entity forming part of a multinational group. Rather, that provision requires the identification of a transaction or arrangement (or series of transactions) with a specific associated foreign group counterparty. Indeed, only Article 185(2)(a) WIB 92, which concerns upward transfer pricing adjustments,

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66 See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* ECLI:EU:C:2006:416, paragraph 95.

67 I.e. companies having their registered seat, main establishment or actual management in Belgium, Article 2(1) 5° WIB 92.

68 See Article 185(1) WIB 92.

69 This includes income from real estate located in Belgium, income from certain Belgian based assets or capital and profit realised through a permanent establishment located in Belgium (Article 227 – 229 WIB 92)

70 See Recital (25).

71 See Recitals (26) to (28).

allows the Belgian tax administration to make a unilateral primary transfer pricing adjustment if the conditions agreed for a transaction or arrangement differ from those that would have been agreed under arm's length conditions. By contrast, the application of Article 185(2)(b) WIB 92, which concerns downward transfer pricing adjustments, contains the additional condition that the profit from the transaction or arrangement to be exempted must also have been included in the profit of the foreign counterparty to that transaction or arrangement.

(126) Second, the objective of the Belgian corporate income tax system is to tax all corporate taxpayers on their actual profits, whether they are a standalone or group company, whether they form part of a domestic or multinational group, whether they form part of a large or small multinational group, and whether they have recently established operations in Belgium or whether they have operated in Belgium for many years. In other words, all those taxpayers are in a comparable legal and factual situation in light of the objective pursued by the corporate tax system to tax all corporate taxpayers on their actual profits. Indeed, Belgian law lists the entities in Belgium that are subject to corporate income tax and it includes any company, association, establishment or institution that is duly founded, has legal personality and exploits an enterprise or otherwise engages in profitable activities.[72] Neither the legal form of the undertaking, nor its structure (group of undertakings or not) constitute a determinant criterion for the imposition of corporate income tax in Belgium. Consequently, while adjustments to the profit actually recorded that are available to all of those taxpayers are of a general nature and, for that reason, not selective for the purposes of Article 107(1) of the Treaty,[73] the Excess Profit exemption differentiates between those taxpayers, since only Belgian entities forming part of a multinational group of a sufficient size with recently established operations in Belgium can benefit from the contested scheme, as will be explained in Section 6.3.2.

(127) Third, the difference in determining the taxable profit of standalone and group companies has no bearing on the objective of the Belgium corporate income tax system, which is to tax the profit of all companies resident or operating through a permanent establishment in Belgium, whether standalone or integrated. While the determination of taxable profit in the case of non-integrated/domestic standalone companies that transact on the market is rather straightforward, as it is based on the difference between income and costs determined in a competitive market, the determination of taxable profit in the case of integrated multinational group companies, requires the use of proxies. That is, integrated multinational group companies will have to set the prices they apply to those intra-group transactions for determining their taxable profit instead of those prices being dictated by the market. Even if certain strategic decisions could be expected to be taken in the best interest of a group as a whole, Belgian corporate income tax is levied on individual entities, not on groups. The contested scheme relates only to the taxable profit of Belgium group companies, so that any reduced tax revenue is based individually on those companies' results. While it may be true that Belgium tax law contains certain special provisions applicable to groups, these generally aim at putting on equal

[72] Article 179 jo. Article 2(1) 5° WIB 92.

[73] See Case C-6/12 *P Oy* ECLI:EU:2013:525, paragraph 18; Joined Cases C-106/09 P and C-107/09 P *Commission v. Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, paragraph 73.

footing non-integrated companies and economic entities structured in the form of groups, but not at treating groups more favourably.

(128) Finally, if the Commission were to accept Belgium's argument on this point, that would allow a Member State to easily evade the application of the Union State aid rules merely by introducing the exemption into its tax code.

6.3.1.3. Conclusion on the reference system

(129) In conclusion, the reference system against which the Excess Profit exemption must be assessed to determine whether it is selective is the Belgian corporate income tax system, which has as its objective the taxation of profits of all companies resident or operating through a permanent establishment in Belgium in the same manner. Indeed, since the aim of the contested scheme is to adjust the company's taxable profit for the purpose of levying Belgian corporate income tax on that profit under the Belgian corporate income tax system, it is that system that constitutes the reference system against which the scheme should be examined to determine whether its beneficiaries have benefitted from a selective advantage.

6.3.2. The Excess Profit exemption is a derogation from the reference system

(130) Having determined that the Belgian corporate income tax system constitutes the reference system against which the contested scheme should be assessed, it is necessary to establish whether the Excess Profit exemption constitutes a derogation from that reference system, leading to unequal treatment between companies that are legally and factually in a similar situation in light of the objective pursued by that system.

(131) In relation to that second step of the selectivity analysis, whether a tax measure constitutes a derogation from the reference system will generally coincide with the identification of the advantage granted to its beneficiaries under that measure. Indeed, where a tax measure results in an unjustified reduction of the tax liability of beneficiaries who would otherwise be subject to a higher level of tax under the reference system, that reduction constitutes both the derogation from the system of reference and the advantage granted by the tax measure.

(132) The Commission considers the Excess Profit exemption granted pursuant to Article 185(2)(b) WIB 92 to constitute a derogation from the Belgian corporate income tax system and not the mere application of it. As will be demonstrated in the following two subsections, the Commission considers that derogation to confer a selective advantage on the beneficiaries of the contested scheme.

(133) First and foremost, the Excess Profit exemption departs from the ordinary system of taxation of corporate profits under the Belgian corporate income tax system, according to which corporate entities resident or operating through a permanent establishment in Belgium are taxed on their total profit, i.e. their profit actually recorded, not on a hypothetical level of profit arrived at by estimating an "adjusted arm's length profit" for the entity in question. The Excess Profit exemption grants Belgian group entities benefitting from the contested scheme a selective advantage for the purposes of Article 107(1) of the Treaty by exempting a part of their profit actually recorded from Belgian corporate income tax.[74]

[74] See Section 6.3.2.1.

(134) In addition and without prejudice to the previous recital, regardless of whether the reference system could be said to include a general rule according to which multinational group companies resident or operating through a permanent establishment in Belgium should not be taxed on profit actually recorded that exceeds an arm's length profit, which it does not,[75] the Commission considers the Excess Profit exemption to constitute a misapplication of and thus a deviation from the arm's length principle, which forms a part of that system.[76]

6.3.2.1. The contested scheme grants a selective advantage to its beneficiaries by derogating from the general Belgian corporate income tax system,

(135) An economic advantage may be granted through different types of reduction in an undertaking's tax burden and, in particular, through a reduction in the tax base or in the amount of tax due.[77] As explained in Section 2.1, the Excess Profit exemption scheme allows entities resident or operating through a permanent establishment in Belgium that are part of a multinational group to reduce their corporate tax liability in Belgium by deducting from their profit actually recorded so-called "excess profit". That excess profit is determined by estimating the hypothetical average profit that a standalone company carrying out comparable activities could be expected to make in comparable circumstances. The difference between that entity's profit actually recorded and that hypothetical average profit is then translated into an exemption percentage of pre-tax profit to achieve an average excess profit percentage over a projected period. That percentage represents the agreed tax base discount for the beneficiary under the contested scheme for the five years during which the ruling binds the Belgian tax administration.

(136) The Excess Profit exemption is not, however, available to all corporate entities that are in a similar legal and factual situation, which, in light of the objective of the Belgian corporate income tax system to tax corporate profits, consists of all companies subject to corporate tax in Belgium. Indeed, the Belgian corporate income tax system contains no principle or rule according to which profit actually recorded exceeding a hypothetical level of arm's length profit is exempt from taxation.[78] Article 185(2)(b) WIB 92, which is relied upon by Belgium to grant the Excess Profit exemption under the contested scheme, does not have that meaning or effect. Rather, the contested scheme constitutes a derogation from the general rule under Belgian tax law according to which profit actually recorded is taxed.

(137) Accordingly, the Commission confirms its view, expressed at recital (89) of the Opening Decision, that the contested scheme is selective on several levels and for several reasons.

(138) First, the Excess Profit exemption is only available to entities that are part of a multinational group, not to standalone entities or entities forming part of domestic corporate groups. Indeed, since the contested scheme is based on Article 185(2)(b)

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75 See Section 6.3.1.2.

76 See Section 6.3.2.2.

77 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. See also Commission Decision of 17.02.2003 on the Foreign Income aid scheme implemented by Ireland, OJ L 204, 13.8.2003, p. 51, recitals 33 to 35.

78 See Recital (125).

WIB 92, which restricts the application of the exemption and the grant of an advance ruling necessary to benefit from the exemption to entities engaged in cross-border transactions, only Belgian entities forming part of a multinational group may benefit from the Excess Profit exemption. In other words, the economic advantage provided to beneficiaries under the contested scheme is *de jure* selective because it is exclusively available to entities forming part of a multinational group, and not available to standalone entities or entities forming part of a domestic corporate group. In particular, entities forming part of a domestic corporate group could also operate as a central entrepreneur following a national reorganisation and could therefore also claim that their profit actually recorded after that reorganisation exceeds a hypothetical average profit that a standalone company carrying out comparable activities could be expected to achieve due to the (alleged) creation of national synergies or economies of scale. However, unlike the Belgium-based central entrepreneurs of their international competitors that deal with foreign associated group companies, those entities cannot obtain the tax base discount for excess profit under the contested scheme because those entities are not within the scope of Article 185(2)(b) WIB 92.

(139) Second, to benefit from the Excess Profit exemption under the contested scheme the prior authorisation of the Ruling Commission by way of an advance ruling is needed, which can only be obtained in respect of future situations or operations that have not yet had tax effects, not for existing situations. This results from the fact that the advance ruling system, introduced into the Belgian tax code by the Law of 24 December 2002, contains the rule that a ruling can only be granted with respect to "*a special situation or arrangement that has not yet had tax consequences*" for the taxpayer concerned.[79] More precisely, a taxpayer is not eligible to apply for a ruling covering the tax implications of its current situation, only the tax implications of a "new situation" can be covered by an advance ruling. Those conditions equally apply to rulings granting an Excess Profit exemption under the contested scheme. Indeed, in the sample of rulings granting an Excess Profit exemption that the Commission has analysed, each ruling contained references to substantial investments and/or the creation of employment and/or the relocation of activities to Belgium.[80] Those

[79] See Recital (44).

[80] 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.*"

elements are not explicitly listed as conditions for the granting of the Excess Profit exemption under Article 185(2)(b) WIB 92, but do constitute key elements to be eligible for an advance ruling, which is compulsory for the application of the Excess Profit exemption. The "new situation"-requirement caused by the requirement to apply for a ruling in advance to benefit from the Excess Profit exemption,[81] therefore results in *de jure* selectivity between multinational groups that amend their business model by establishing new operations in Belgium and any other economic operator (including multinational groups) that continue to operate under existing business models in Belgium.

(140) Third, the Excess Profit exemption scheme exempts profit which – allegedly – results from synergies, economies of scale or from other benefits related to being part of a multinational group. While all corporate groups can lay claim to such benefits, only entities belonging to a multinational group of a size that is sufficiently large to generate significant profit from synergies, economies of scale or other intragroup benefits have an incentive to obtain a ruling under the contested scheme. That is because the process for obtaining a ruling requires a detailed request presenting the new situation justifying the exemption, detailing the presence of the entity in terms of employment and providing a full excess profit study, which is clearly more cumbersome for small corporate groups than for large corporate groups. The synergies and cost savings invoked in the ruling requests effectively require a certain scope and size of operations that is sufficiently large to justify the request for a ruling. Indeed, in response to a request by the Commission, Belgium was unable to provide a single example where the Excess Profit exemption was requested by and granted to a Belgian group entity that is part of a small multinational group. In other words, the contested scheme is also *de facto* selective since only Belgian entities forming part of a large or at best medium-sized multinational group can effectively benefit from the Excess Profit exemption, not entities that are part of a small multinational group.

(141) In conclusion, since the contested scheme allows only Belgian entities forming part of a sufficiently large multinational group establishing new operations in Belgium to reduce their tax base by deducting from their profit actually recorded so-called "excess profit", that scheme should be considered to grant a selective advantage to those entities for the purposes of Article 107(1) of the Treaty. Indeed, by reducing the amount of tax normally due under the under the ordinary system of taxation of

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§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 entrepôt de stockage (…) ce qui conduirait à la création de nouveaux emplois*".

81 For rulings other than those concerning the application of the Excess Profit exemption, this requirement would not raise selectivity concerns. Normal rulings merely provide legal certainty for a tax treatment under rules that are equally applicable to all companies, with or without a ruling. Consequently, outside the Excess Profit exemption, in principle the profit subject to tax will be the same whether agreed ex ante in a ruling or ex post in a tax return. The ruling granting the Excess Profit exemption, however, effectively works as a prior authorisation. By law, the discount for excess profit allegedly exceeding the arm's length profit must be established via a ruling and cannot be claimed ex post in a tax return. As a consequence, a company actually recording high (excess) profit in its normal course of business cannot benefit from the Excess Profit exemption. As a result two companies in the same legal and factual situation, where this situation in one case arises from a restructuring and in another case follows the normal course of business will be treated differently because only the first company is eligible to apply for a ruling granting an Excess Profit exemption.

corporate profits, the Excess Profit exemption relieves those Belgian entities from a cost they should normally bear from their budget and thus confers a selective advantage upon them.

(142) Belgium justifies the difference in treatment afforded by the contested scheme by referring to the General Court's judgment of 7 November 2014 in Case T-399/11 and arguing that limiting a tax measure to multinationals does not suffice for a showing of selectivity since that group of companies, in contrast with, for example, offshore companies, does not have common characteristics in terms of economic sector, activity, size of balance sheet, number of employees or country of establishment.[82] However, not only is the judgment to which Belgium refers under appeal,[83] that judgment is not applicable to the contested scheme since it concerned the question whether a tax benefit linked to particular financial transactions was selective, whereas the contested scheme concerns benefits granted to particular categories of undertakings. Indeed, in the judgment to which Belgium refers, the General Court held that a tax measure which favours the acquisition of foreign subsidiaries over the acquisition of domestic subsidiaries does not entail a selective advantage for the purposes of Article 107(1) of the Treaty since it did not *a priori* exclude any category of undertaking from taking advantage of it. By contrast, only certain categories of undertakings can benefit from the Excess Profit exemption scheme, namely entities that are part of a sufficiently large multinational group establishing new operations in Belgium.

(143) The Commission also does not agree, as claimed by Belgium, that that selective advantage results from the absence of taxation abroad of the profit exempted in Belgium, as it is Belgium that unilaterally reduces the tax base of the Belgian group entity benefitting from the contested scheme irrespective of any actual or claimed taxation of the same profit by another Member State. In any event, Article 107(1) of the Treaty prohibits the grant of State aid by a Member State. Therefore, the assessment of whether a particular scheme gives rise to an advantage should be made having regard to the actions of the Member State in question, namely Belgium. That assessment need not take into account a possible neutral or negative impact of the scheme at the level of other group companies as a result of their treatment by other Member States.

6.3.2.2. The contested scheme grants a selective advantage by deviating from the arm's length principle

(144) Regardless of whether the Belgian corporate income tax system could be said to contain a general rule according to which profit actually recorded by multinational group entities that exceeds an arm's length profit should not be taxed, which the Commission contests,[84] the Excess Profit exemption constitutes a derogation from the reference system since both the rationale for that exemption and the methodology used to establish excess profit under the contested scheme contravene the arm's length principle, which forms part of that system.

[82] Case T-399/11 *Banco Santander SA and Santusa Holding v. Commission* ECLI:EU:T:2014:938.
[83] Case C-21/15 P *Commission v Banco Santander and Santusa*.
[84] See Section 6.3.1.2 and Recital (136).

(a) The arm's length principle under Article 107(1) of the Treaty

(145) The Court of Justice has already held that a reduction in the taxable base that results from a tax measure that enables a taxpayer to employ transfer prices in intra-group transactions that do not resemble prices which would be charged in conditions of free competition between independent undertakings negotiating under comparable circumstances at arm's length confers a selective advantage on that taxpayer, by virtue of the fact that its tax liability under the ordinary tax system is reduced as compared to independent companies which rely on their actually recorded profit to determine their taxable base.[85]

(146) In its judgment on the Belgian tax regime for coordination centres,[86] the Court of Justice assessed a challenge to a Commission decision which concluded, *inter alia*, that the method for determining taxable income under that regime conferred a selective advantage on those centres.[87] Under that regime, taxable profit was established at a flat-rate amount which represented a percentage of the full amount of operating costs and expenses, from which staff costs and financial charges were excluded. According to the Court, "*in order to decide whether a method of assessment of taxable income such as that laid down under the regime for coordination centres confers an advantage on them, it is necessary, (…), to compare that regime with the ordinary tax system, based on the difference between profit and outgoings of an undertaking carrying on its activities in conditions of free competition.*" The Court then held that "*the effect of the exclusion of [staff costs and the financial costs] from the expenditure which serves to determine the taxable income of the centres is that the transfer prices do not resemble those which would be charged in conditions of free competition*", which the Court found to "*[confer] an advantage on the coordination centres*".[88]

(147) The Court has thus accepted that a tax measure which results in a group company charging transfer prices that do not reflect those which would be charged in conditions of free competition – that is, prices negotiated by independent undertakings negotiating under comparable circumstances at arm's length – confers a selective advantage on that group company, in so far as it results in a reduction of its taxable base and thus its tax liability under the ordinary corporate income tax system. This principle, that transactions between intra-group companies should be remunerated as if they were agreed to by independent companies negotiating under comparable circumstances at arm's length, is generally referred to as the "arm's length principle".

(148) The purpose of the arm's length principle is to ensure that transactions between group companies are treated for tax purposes by reference to the amount of profit that would have arisen if the same transactions had been executed by independent companies. Otherwise, group companies would benefit from a favourable treatment under the ordinary corporate income tax system when it comes to the determination

[85] See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* ECLI:EU:C:2006:416.

[86] See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* ECLI:EU:C:2006:416.

[87] Commission Decision 2003/757/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium; OJ 2003 L 282, p. 25.

[88] See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission*, ECLI:EU:C:2006:416, paragraphs 96 and 97.

of their taxable profit that is not available to standalone companies, leading to unequal treatment between companies that are factually and legally in a similar situation in light of the objective of that system, which is to tax the profit of all companies falling under its tax jurisdiction.

(149) The Commission's assessment of whether Belgium granted a selective advantage under the contested scheme must consist in verifying whether the methodology accepted by Belgium for determining the adjusted arm's length profit under the second step of that scheme departs from a methodology that leads to a reliable approximation of a market-based outcome and thus from the arm's length principle. In so far as that methodology results in a lowering of the Belgian entity's tax liability under the general Belgian corporate income tax system as compared to undertakings in a comparable legal and factual situation, that scheme will be deemed to confer a selective advantage for the purposes of Article 107(1) of the Treaty.

(150) The arm's length principle therefore necessarily forms part of the Commission's assessment under Article 107(1) of the Treaty of tax measures granted to group companies, independently of whether a Member State has incorporated this principle into its national legal system and in what form. It is used to establish whether the taxable profit of a group company for corporate income tax purposes has been determined on the basis of a methodology that approximates market conditions, so that that company is not treated favourably under the ordinary corporate income tax system as compared to standalone companies whose taxable profit is determined by the market. Thus, for any avoidance of doubt, the arm's length principle that the Commission applies in its State aid assessment is not that derived from Article 9 of the OECD Model Tax Convention and the OECD TP Guidelines, which are non-binding instruments, but a general principle of equal treatment in taxation falling within the application of Article 107(1) of the Treaty, which binds the Member States and from whose scope the national tax rules are not excluded.[89]

(151) In the present case, the Commission considers the methodology for determining the "adjusted arm's length profit" under the second step of the contested scheme described at recital (15) to deviate from the arm's length principle, leading to the grant of a selective advantage in favour of entities benefitting from that scheme. According to the description of the contested scheme by the Belgian authorities and consistent with the information presented in the sample of individual rulings reviewed by the Commission,[90] Belgian group entities benefitting from the Excess Profit exemption are considered to manage and assume the most complex functions within their multinational group (either overall or limited to a business line or geographic territory). As explained in the following subsection, the Commission therefore considers that the total residual profit resulting from intra-group transactions concluded between those entities and their associated group companies should be attributable to the Belgian group entities as their arm's length profit (under the first step). There is no room in the application of the arm's length principle for a general separate recognition for and allocation of profit from synergies and economies of scale in a transfer pricing assessment (under the second step).

[89] See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* ECLI:EU:C:2006:416, paragraph 81. See also Case T-538/11 *Belgium v. Commission* EU:T:2015:188, paragraphs 65 and 66 and the case-law cited.

[90] See Recital (65).

(b) *The residual profit is the arm's length profit of the Belgian group entity operating as "central entrepreneur"*

(152) The Belgian authorities describe the contested scheme as being based on the notion that the Belgian group entities operate as "*central entrepreneurs*".[91] According to the Belgian authorities, the main responsibilities for strategic and tactical decision-making and the group's most complex functions – either overall or limited to a business line or geographic territory – are consolidated within those Belgian group entities. The associated group entities transacting with those Belgian group entities should then be contract or toll manufacturers, contract researchers, limited risk distributors, commissionaires/agents[92] or other entities performing "routine" functions and possessing limited responsibilities.

(153) As explained at recital (15), the Excess Profit exemption is granted following a two-step process. Under the first step of that process, the Belgian group entity estimates its arm's length profit as a residual profit, which implies the use of a one-sided transfer pricing method. In practice, the TNMM is the most used one sided method.[93] The TNMM is sometimes considered an appropriate transfer pricing method to establish the prices and conditions for controlled transaction between entities performing complex functions and entities performing less complex functions. The tested party in the application of the TNMM is, as a general rule, the party to the transaction to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be found, *i.e.* it will most often be the one that has the less complex functional analysis.[94] In the application of the TNMM, the tested party's net profit is examined relative to an appropriate base such as costs, sales or assets.[95] Conversely, the residual profit (or eventually the residual loss) resulting from the series of controlled transactions in the application of the TNMM will be for the non-tested party, e.g. as a general rule the entity with the more complex profile.

(154) Without prejudice to the appropriateness of using a one-sided transfer pricing method to determine the arm's length profit of the Belgian group entity under the first step in each particular case in which a ruling has been granted under the contested scheme,[96]

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[91] The OECD TP Guidelines do not define the term "central entrepreneur". Paragraph 9.2 of those guidelines introduces the term "principal" as the counterparty to a foreign associated enterprise acting as a limited risk distributor, agent, commissionaire or toll/contract manufacturer for the principal, but those guidelines do not further define the term "principal". Other examples where an entity is referred to as the principal within a controlled transaction are given in paragraph 9.26 and 9.27 of the OECD TP Guidelines. In a group structure, a separation of functions whereby, for example, one entity ensures strategic business decisions and another entity ensures production or execution functions may be economically rational. To this end, such a structure must be in line with market conditions in order to comply with the arm's length principle.

[92] A description of contract manufacturing is given in paragraph 7.40 of the OECD TP Guidelines. Limited risk distribution is described in paragraph 9.127 and a reference to the term "agent" can be found in paragraph 6.37 of the OECD TP Guidelines.

[93] The other one sided methods are the cost plus and the resale minus.

[94] See recital (57).

[95] See footnote 37 and paragraph 2.58 et seq. of the OECD TP Guidelines.

[96] The 1995 OECD TP Guidelines, which were in force when the contested scheme was set up, declare an express preference for traditional transaction methods, such as the CUP, over transactional methods, such as the TNMM, as a means to establish whether transfer pricing is at arm's length (see paragraph 3.49 of the 1995 OECD TP Guidelines). Paragraph 2.3 of the 2010 OECD TP Guidelines provides in this regard: "*As a result, where, taking account of the criteria described at paragraph 2.2, a traditional*

the Commission considers that the Belgian group entity, as the central entrepreneur responsible for strategic and tactical decision-making within the group and managing and assuming the most complex functions within the multinational group, should be compensated by an increase in the expected return to ensure an outcome in line with market conditions.[97] Conversely, its low-risk associated group counterparties would receive a limited remuneration in return for being protected against entrepreneurial risks and connected losses.[98] In other words, as a result of the transfer pricing exercise conducted under the first step, the Belgian group entity, as "central entrepreneur", is left with the residual profit from intra-group transactions. This residual profit therefore equals the arm's length profit of the Belgian group entity under the Belgian corporate income tax system and, in the case of the Excess Profit scheme, also equals its profit actually recorded.

(155) However, under the second step of the process described at recital (15), the Belgian group entity estimates the profit that a comparable standalone company would have made in comparable circumstances to arrive at an "adjusted arm's length profit" by applying the TNMM, this time with the Belgium group entity as the tested party. The difference between the profit arrived at following the first and second steps (residual profit from step one minus "adjusted arm's length profit" from step two) constitutes the amount of "excess profit", which is exempted from taxation under the contested scheme. [99] According to Belgium, the rationale for the second step of the process is that the Belgian entities of a multinational group should only be taxed on the "adjusted arm's length profit" and, therefore, profit actually recorded that exceeds this "adjusted arm's length profit" may be disregarded for taxation purposes as constituting "excess profit".

(156) The Commission does not consider the second step to be in line with the arm's length principle. As explained at recital (154), the whole of the residual profit resulting from intra-group transactions should, as a rule, be considered the central entrepreneur's arm's length profit, in line with the entrepreneurial risks and connected costs borne by it (i.e. costs, if any, of managing or mitigating the risk, costs that may arise from the realisation of the risk), as central entrepreneur in the group structure. Consequently, the part of the profit that is considered by Belgium to be "excess profit" is in fact just a component of the residual profit that is attributable to the Belgian group entity as central entrepreneur within its multinational group. Exempting any of that profit from the central entrepreneur's tax base therefore constitutes an unjustified derogation from a market-based outcome, which is contrary to the arm's length principle, and leads to the grant of a selective advantage in favour of entities benefitting from the contested scheme since it results in a lowering of their tax liability under the Belgian corporate income tax system.

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transaction method and a transactional profit method can be applied in an equally reliable manner, the traditional transaction method is preferable to the transactional profit method."

[97] See paragraph 1.45 of the OECD TP Guidelines. In addition, paragraph 9.39 of those guidelines states: "*In general, the consequence for one party of being allocated the risk associated with a controlled transaction (…) is that such party should: (…) c) Generally be compensated by an increase in the expected return.*"

[98] Provided that the economic rationale for the central entrepreneur structure can be established. See also paragraph 1.47 of the OECD TP Guidelines.

[99] The residual profit therefore equals the sum of the hypothetical average profit of a deemed comparable standalone company described in recital (17), also referred to as the "adjusted arm's length profit", and the "excess profit".

(157) Belgium argues that the Belgian group entities record a part of the residual profit not because of their individual functions, risks and assets, but because they belong to a multinational group. Belgium refers to that part of the profit as profit from synergies or economies of scale and claims that such profit should not be attributed to the Belgian central entrepreneur under the arm's length principle. The Commission does not agree with that line of reasoning.

(158) First, the arm's length principle does not support a general downward adjustment for profit from synergies or economies of scale. On the contrary, the arm's length principle requires the whole residual profit resulting from transactions between associated group companies to be attributed to a group company operating as the central entrepreneur in light of its unique contribution to that group as demonstrated by the functions performed, risks assumed and asset used by it.[100] It is the allocation of functions, risks and assets between related parties in controlled transactions that determines which entity is entitled to a residual profit and to what extent under the arm's length principle, including those from synergies or economies of scale, if they arise.

(159) The Commission considers, in this regard, that what Belgium refers to as "excess profit", even if (partly) connected to synergies and economies of scale, should not be reattributed, but taxed where it arises.[101] Profit from synergies or economies of scale is not separately identified, remunerated or attributed under the arm's length principle. Its attribution automatically follows from the transfer prices and conditions agreed between associated enterprises for all intercompany transactions and arrangements. If those conditions and prices are in line with the arm's length principle, the profit arising from synergies and economies of scale and the way in which it is shared among the group entities will automatically follow those conditions and prices. It should therefore be taxed where it arises.

(160) Thus, even when benefits arising from synergies and economies of scale in groups could be considered relevant, such benefits of group membership need not to be separately compensated or specifically (re)attributed among members of the multinational group. Those benefits are automatically shared among related parties as a consequence of the application of the arm's length principle in the transfer prices set for controlled intercompany transactions and services.[102]

(161) Second, the manner in which the adjusted arm's length profit is arrived at under the second step of the process described at recital (15) is inherently inconsistent with whatever transfer pricing methodology is applied to arrive at the initial arm's length profit under the first step of that process. Indeed, since only entities operating as the central entrepreneur can benefit from the Excess Profit exemption, any transfer pricing methodology applied under the first step must consider them as the most

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[100] See recital (154).

[101] This is also confirmed in paragraph 1.158 of the OECD's report *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10-2015 Final Reports*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris (hereinafter: "OECD Report on BEPS") which provides further guidance on synergies in relation to paragraph 7.13 of the OECD TP Guidelines: "*(…) when synergistic benefits or burdens of group membership arise purely as a result of membership in an MNE group and without the deliberate concerted action of group members or the performance of any service or other function by group members, such synergistic benefits of group membership need not be separately compensated or specifically allocated among members of the MNE group.*"

[102] See also the examples given in paragraphs 1.168 and 1.169 of the OECD Report on BEPS.

complex and high risk party in a series of controlled transactions. Under the second step, that same entity is, however, invariably treated as the tested party and the less-complex part of the transaction in the application of the TNMM.

(162) However, the TNMM is only considered a reliable method to approximate an arm's length remuneration for the party performing the simple, less complex functions and bearing limited risk in a transaction or series of transactions with an associated entity that performs the complex functions and bears the entrepreneurial risks.[103] If the Belgian group entity is the central entrepreneur, then the less complex parties within the multinational group are the foreign associated entities of that Belgian group entity. Since those associated entities should be compensated with a routine return for the routine functions they perform, the Belgian group entity should be entitled, in line with market conditions, to a residual, not a routine profit, for the complex functions it performs with the corporate group. By testing both parties to controlled transactions with a one-sided transfer pricing methodology such as the TNMM at different steps of the transfer pricing assessment, as the contested scheme ultimately does, the combined operating profit of the related transactions between the associated parties does not equal the sum of the profits obtained through the application of the TNNM on both parties, thus creating an untaxed tax base in contravention of the arm's length principle.

(163) In other words, assuming the arm's length principle has been properly applied following the first step, the conditions and prices under which the Belgian group entities transact with associated group entities should be reflected in its profit actually recorded. The proper application of that principle leads to routine profit being attributable to and actually recorded by the associated entities abroad and residual profit being attributable to and actually recorded by the Belgian group entities.

(164) Paragraph 1.10 of the OECD TP Guidelines,[104] upon which Belgium relies to justify the Excess Profit exemption, does not allow for profit from synergies or economies of scale to be disregarded or exempt from taxation, without reattributing that profit to one or more group members.[105] Although that paragraph mentions the difficulty and lack of consensus in attributing profit from synergies or economies of scale to the separate entities of a multinational group, it by no means recommends that those profits not be attributed or taxed, in the exceptional case that synergies can be ascertained.

(165) Nor is the unilateral and abstract tax adjustment as provided by the contested scheme supported by the OECD Model Tax Convention, which forms the basis for many Double Tax Treaties between OECD and non-OECD members. Indeed, the unilateral adjustment by Belgium to the group entity's profit actually recorded inevitably means that the excess profit exempted under that scheme cannot and will not be

[103] See paragraph 3.18 of the OECD TP Guidelines: "As a general rule, the tested party is the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be found, *i.e.* it will most often be the one that has the less complex functional analysis."

[104] See Recital (52).

[105] Otherwise, the interpretation given by Belgium to the arm's length principle implies 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 profit of group resulting from intragroup synergies or economies of scale should not be taxed in any of those States.

taxed by another jurisdiction for the simple reason that those other jurisdictions do not recognise the right to tax any profit emerging specifically from synergies or economies of scale because those profits pertain only to Belgium, the tax jurisdiction in which they are actually recorded.

(166) Third, to benefit from the Excess Profit exemption under the contested scheme, the existence of synergies or economies of scale does not need to be proven or quantified under the second step. Instead, the existence of synergies or economies of scale is assumed *in abstracto* and measured as the difference between the arm's length profit obtained by the Belgian entity following the first step of the process described at recital (15) (as reflected in its profit actually recorded) and an adjusted arm's length profit arrived at following the second step.

(167) Belgium does not require Belgian group entities to substantiate the presence and/or origin of profit from synergies or economies of scale to benefit from the contested scheme. However, it is possible that synergies from a business restructuring, expected to lead to an increase in the profit of the multinational group, do not effectively 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.[106] In those cases, the application of the contested scheme would nevertheless result in a deduction of "excess profit" from the Belgian group entity's profit actually recorded.

(168) In addition and contrary to OECD recommendations,[107] the Belgian authorities automatically accept that the excess profit, which is part of the whole residual profit emerging from combined transactions, is due to synergies, economies of scale or undefined group-related elements/factors. That profit is therefore completely disconnected from the analysis of functions, risks and assets of the parties involved in controlled transactions, which forms the basis of every transfer pricing exercise. That excess profit has therefore been entirely removed from the profit allocation exercise, which forms the rationale underpinning the arm's length principle.

(c) Conclusion on the existence of a selective advantage

(169) In light of the above, the Commission concludes that the methodology for determining the taxable profits of Belgian group entities under that scheme departs from a methodology that leads to a reliable approximation of a market-based outcome and thus from the arm's length principle. Since the application of that methodology results in a discount being applied to those entities' profit actually recorded, which should form the starting point for calculating their total taxable profit under the Belgian corporate income tax system,[108] that scheme should be considered to grant a selective advantage to those entities for the purpose of Article 107(1) of the Treaty.

(170) By deviating from the arm's length principle, the contested scheme reduces the tax liability of its beneficiaries under the Belgian corporate tax system as compared to standalone companies whose taxable profit is determined by the market. That deviation from the arm's length principle also confers a selective advantage on those beneficiaries as compared to entities forming part of a domestic corporate group and

106 See paragraph 9.58 of the OECD TP Guidelines.
107 See Recital (159)(159).
108 See Recital (25).

entities forming part of a multinational group that continue to operate under existing business models in Belgium,[109] neither of which can request the advance ruling necessary to benefit from that scheme, since those entities are taxed on the basis of their profit actually recorded. Finally, that deviation confers a selective advantage on its beneficiaries as compared to entities forming part of a small multinational group, since those entities will also be taxed on the basis of their actually recorded profit.[110]

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

(171) A measure which derogates from the reference system may still be found to be non-selective if it is justified by the nature or general scheme of that system. This is the case where a measure derives directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system.[111]

(172) Belgium considers the contested scheme justified to prevent potential double taxation. Double taxation refers to situations in which the same profit is taxed twice in respect of the same taxpayer (also referred to as legal double taxation) or in respect of two different taxpayers (i.e. economic double taxation). While the need to avoid double taxation may constitute a possible justification for derogating from the ordinary corporate income tax system,[112] Belgium has not demonstrated that the contested scheme actually serves that purpose. Belgium has even acknowledged that the scheme is not meant to reduce or remedy actual double taxation, but only potential double taxation.[113] Consequently, the Excess Profit exemption cannot be said to derive directly from the intrinsic basic or guiding principles of the reference system or to be the result of inherent mechanisms necessary for the functioning and effectiveness of that system.

(173) While the terms of Article 185(2)(b) WIB 92 indicate that that provision applies to situations involving two (identified or identifiable) companies and that the tax administration may apply a (corresponding) downward adjustment on the taxable profit of a Belgian company if the same profit is also included in the taxable profit of a foreign associated company, the replies given by the Minister of Finance to the parliamentary questions on the application of that provision clearly affirm the extended application of the Excess Profit exemption beyond the terms of that provision to profit that has not been recorded by or included in the tax base of an associated foreign group entity in another tax jurisdiction. While the limitation of a corresponding downward adjustment to companies that are part of a multinational group in line with the exact terms of Article 185(2)(b) WIB 92 may be justified by the nature or general scheme of the system, this is not the case for the Excess Profit exemption.

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109 See Recitals (138) and (139).

110 See Recital (123).

111 See, for example, Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 69.

112 See, by way of analogy, Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 71, in which the Court referred to the possibility of relying on the nature or general scheme of the national tax system as a justification for the fact that cooperative societies which distribute all their profits to their members are not taxed themselves as cooperatives, provided that tax is levied on the individual members.

113 See Recital (89).

(174) The absence of any requirement to demonstrate the inclusion of the same profit in the tax base of both associated companies (one abroad, one in Belgium) is an important element distinguishing rulings granting the Excess Profit exemption from other transfer pricing rulings authorising a downward transfer pricing adjustment pursuant to Article 185(2)(b) WIB 92. For the latter type of rulings, the downward adjustment responds to a situation in which the profit recorded in Belgium and exempted has also been declared as taxable profit by an associated group entity in another tax jurisdiction or where a primary upward adjustment was carried out by a foreign tax administration on the taxable profit of that associated foreign entity.[114] By contrast, the Excess Profit exemption provides a unilateral exemption granted in advance that does not require the exempted profit to have been or to be included in the tax base of an associated foreign group entity in another tax jurisdiction, nor that that profit is effectively taxed by that jurisdiction.

(175) Consequently, the Excess Profit exemption also cannot be said to address situations of double taxation in a necessary and proportionate manner.[115] The contested scheme clearly goes beyond what is necessary and proportionate to achieve the objective of preventing double taxation and therefore cannot be justified by the nature or general scheme of that system.

(176) In addition, the Commission does not consider the arm's length principle, and in particular Article 9 of the OECD Model Tax Convention which translates that principle in relation to double taxation, to justify the unilateral downward adjustment to a taxpayer's tax base granted by the Excess Profit exemption scheme.

(177) The Commission recalls that the application of the arm's length principle by tax administrations is primarily meant to prevent companies that are part of an international group from being able to influence transfer prices and thus profit allocation between them, a possibility that standalone companies do not have. The normal application of the arm's length principle therefore provides tax administrations with the right to increase the tax base of companies engaging in intra-group transactions to ensure equal treatment with taxpayers that only transact under market conditions.

(178) While the arm's length principle allows tax administrations to make unilateral upward adjustments to the tax base of group companies that do not respect that principle in their transfer pricing, a downward transfer pricing adjustment leading to a tax reduction is only foreseen (not required) under the arm's length principle in the exceptional situation where it is a corresponding adjustment following a primary adjustment in another tax jurisdiction, i.e. on a symmetrical basis. As explained in section 6.3.2.2, a unilateral precautionary downward adjustment of the profit actually

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114 The Commission observes that Belgium has provided three examples of rulings based on Article 185(2)(b) WIB 92 which indeed aim at solving actual situations of double taxation (see recital (67)). Those rulings are, however, clearly different from the rulings granting the Excess Profit exemption. Indeed, for rulings authorising a downward transfer pricing adjustment, the downward adjustment will lead to a symmetric recording of profit in the accounts of companies involved in the controlled transaction. A downward adjustment of the tax base would therefore be justified by the nature and general scheme of the tax system and therefore not amount to State aid provided it is motivated by the desire to compensate for an upward adjustment in another tax jurisdiction. The Excess Profit exemption, by contrast, cannot be justified on similar grounds, because of the absence of another tax jurisdiction claiming the profit, so that double taxation concerns do not arise.

115 See Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 75.

recorded does not follow from the proper application of the arm's length principle in general, nor does it in the specific case of the Excess Profit exemption.

(179) Indeed, Article 9 of the OECD Model Tax Treaty only applies if it is established that the same profit has been included in the tax base of two different companies established in different tax jurisdictions, and has been – or is at risk of being – "*taxed accordingly*" by both jurisdictions.

(180) Finally, concerns about double non taxation due to transfer pricing adjustments were also expressed by the EU Joint Transfer Pricing Forum,[116] which adopted a Report in 2014 to address the practical issues arising from the adjustment, at a later point of time, of transfer prices set at the time a transaction took place, so-called "compensating adjustments".[117] That report stresses the importance of profit of related enterprises with respect to the commercial or financial relations between them needing to be calculated symmetrically. Companies participating in a transaction should use the same price for the respective transactions. As a result, the Member States were invited to accept compensating adjustments to the extent only that the adjustment is made symmetrically in the accounts of both entities involved and that the adjustment is made before filing the tax return to avoid double non taxation.

(181) In conclusion, the Commission concludes that the Excess Profit exemption cannot be said to derive directly from the intrinsic basic or guiding principles of the reference system or to be the result of inherent mechanisms necessary for the functioning and effectiveness of that system. The Commission also concludes that the contested scheme goes beyond what is necessary and proportionate to achieve the objective of preventing double taxation and therefore cannot be justified by the nature or general scheme of that system.

6.3.4. Conclusion on the existence of a selective advantage

(182) For all the foregoing reasons, the Commission concludes that the contested scheme confers a selective advantage on Belgian entities forming part of a multinational group by applying an unilateral downward adjustment to their tax base, since that adjustment leads to a lowering of their tax liability in Belgium as compared to the taxes those undertakings would otherwise have been obliged to pay according to the ordinary system of taxation of corporate profits under the general Belgian corporate income tax system.

6.3.5. Beneficiaries of the contested scheme

(183) The beneficiaries of the contested scheme are Belgian entities forming part of a multinational group that have requested and obtained a tax ruling on the basis of

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116 The EU Joint Transfer Pricing Forum (JTPF) was formally established by Decision 2007/75/EC to assist and advise the European Commission on transfer pricing tax matters. The JTPF has one representative from each Member State's tax administrations and 18 non-government organisation members. It is chaired by an independent chairperson.

117 Report on Compensating Adjustments which was welcomed by the Council of the European Union in its conclusions from 10 March 2015. In the Glossary of the OECD TP Guidelines the term "compensating adjustment" is defined as "*an adjustment in which the taxpayer reports a transfer price for tax purposes that is, in the taxpayer's opinion, an arm's length price for a controlled transaction, even though this price differs from the amount actually charged between the associated enterprises. This adjustment would be made before the tax return is filed.*" The Report, more generally, refers to taxpayer-initiated transfer pricing adjustments made at a later point of time (usually at the end of the year) of transfer prices set at the time of a transaction or series of transactions took place or before.

Article 185(2)(b) WIB 92 and for which a unilateral downward adjustment has effectively been applied to the profit actually recorded in their accounts for the determination of their taxable profit under the general Belgian corporate income tax system. The Commission notes that those entities form part of a multinational group and that the exemption of excess profit generated as a result of being part of a multinational group constitutes the stated rationale for the contested scheme.

(184) For the purpose of the application of State aid rules, separate legal entities may be considered to form one economic unit. That economic unit is then considered to be the relevant undertaking benefitting from the aid measure. As the Court of Justice has previously held, "*[i]n competition law, the term 'undertaking' must be understood as designating an economic unit (…) even if in law that economic unit consists of several persons, natural or legal.*"[118] To determine whether several entities form an economic unit, the Court of Justice looks at the existence of a controlling share or functional, economic or organic links.[119] In the present case, the Belgian entities benefitting from the contested scheme are considered the central entrepreneurs which manage and control a (separate entrepreneurial activity within a) corporate group. Those entities therefore often control associated group entities and are, in turn, controlled by the entity managing the corporate group as a whole. Accordingly, the multinational group as a whole should be seen as the undertaking benefitting from the aid measure.

(185) Moreover, it is the multinational group as a whole which will have taken the decision to relocate part of their activities to Belgium or to make significant investments in Belgium, which is a requirement to benefit from the contested scheme. In other words, where transfer pricing is required to set prices for products and services within various legal entities of one and the same group, the effects of setting a transfer price affects by its very nature more than one group company (a price increase in one company affects the profit of the other).

(186) Thus, notwithstanding the fact that corporate groups are organised in different legal personalities, the companies forming part of such a group must be considered as a single group benefitting from the contested aid scheme.[120] Consequently, in addition to the Belgian entities admitted to the contested scheme, the Commission considers the multinational groups to which those entities belong as benefitting from State aid under that scheme within the meaning of Article 107(1) of the Treaty.

6.4. Conclusion on the existence of aid

(187) In light of the foregoing, the Commission concludes that the Excess Profit exemption scheme, based on Article 185(2)(b) WIB 92 and introduced by Law of 21 June 2004,

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118 Case C-170/83 *Hydrotherm* ECLI:EU:C:1984:271, paragraph 11. See also Case T-137/02 *Pollmeier Malchow v Commission* ECLI:EU:T:2004:304, paragraph 50.

119 Case C-480/09 P *Acea Electrabel Produzione SpA v Commission* ECLI:EU:C:2010:787 paragraphs 47 to 55; Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others* ECLI:EU:C:2006:8, paragraph 112.

120 See, by analogy, Case 323/82 *Intermills* ECLI:EU:C:1984:345: paragraph 11 "*It is clear from the information supplied by the applicants themselves that following the restructuring both SA Intermills and the three manufacturing companies are controlled by the Walloon regional executive and that , following the transfer of the plant to the three newly constituted companies, SA Intermills continues to have an interest in those companies . It must therefore be accepted that, in spite of the fact that the three manufacturing companies each has a legal personality separate from the former SA Intermills, all those undertakings together form a single group , at least as far as the aid granted by the Belgian authorities is concerned (…).*"

grants a selective advantage to the beneficiaries of the scheme as well as to the multinational groups to which they belong, that is imputable to Belgium and financed through State resources, and distorts or threatens to distort competition and is liable to affect intra-Union trade. The contested scheme therefore constitutes State aid within the meaning of Article 107(1) of the Treaty.

(188) Since the contested scheme gives rise to a reduction of charges that should normally be borne by the beneficaries in the course of their annual business operations, the contested scheme should be considered as granting operating aid to the beneficaries and the multinational groups to which they belong.

6.5. Compatibility of the aid

(189) State aid shall be deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2) of the Treaty[121] and it may be deemed compatible with the international market if it found by the Commission to fall within any of the categories listed in Article 107(3) of the Treaty. However, it is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Articles 107(2) or 107(3) of the Treaty.

(190) Belgium has not invoked any of the grounds for a finding of compatibility of the state aid scheme

(191) Moreover, as explained in recital (188), the contested scheme should be considered as granting operating aid. As a general rule, such aid can normally not be considered compatible with the internal market under Article 107(3) of the Treaty in that it does not facilitate the development of certain activities or of certain economic areas, nor are the tax incentives in question limited in time, digressive or proportionate to what is necessary to remedy to a specific economic handicap of the areas concerned.

(192) Consequently, the Excess Profit exemption scheme is incompatible with the internal market.

6.6. Unlawfulness of the aid

(193) According to Article 108(3) of the Treaty, Member States are obliged to inform the Commission of any plan to grant aid (notification obligation) and they may not put into effect any proposed aid measures until the Commission has taken a final position decision on the aid in question (standstill obligation).

(194) The Commission notes that Belgium did not notify the Commission of any plan to grant aid through the contested scheme, nor did it respect the standstill obligation laid down in Article 108(3) of the Treaty. Therefore, in accordance with Article 1(f) of Regulation (EU) No. 2015/1589,[122] the Excess Profit exemption scheme constitutes an unlawful aid scheme, put into effect in contravention of Article 108(3) of the Treaty.

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[121] The exceptions provided for in Article 107(2) of the Treaty 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, none of which apply in the present case.

[122] Regulation (EU) No. 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9.)

7. RECOVERY

(195) Article 16(1) of Regulation No. 2015/1589 establishes an obligation on the Commission to order recovery of unlawful and incompatible aid. That provision also provides that the Member State concerned shall take all necessary measures to recover unlawful aid that is found to be incompatible with the internal market. Article 16(2) of Regulation No. 2015/1589 establishes that the aid is to be recovered, including interest from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its effective recovery. Commission Regulation (EC) No 794/2004 elaborates the methods to be used for the calculation of recovery interest[123]. Finally, Article 16(3) of Regulation No. 2015/1589 states, that "*recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow for the immediate an effective execution of the Commission decision*".

7.1. Legitimate expectations and legal certainty

(196) Article 16(1) of Regulation No. 2015/1589 also provides that the Commission shall not require recovery of the aid if this would be contrary to a general principle of law.

(197) Belgium argues, first, that recovery should be prevented by the principles of legitimate expectations and legal certainty, since previous Commission decisions on transfer pricing and State aid have led it to believe that there can be no State aid involved in a particular fiscal measure if the Member State adheres to the arm's length principle. It further argues that recovery should be prevented because the aid amount is difficult to quantify and because recovery might lead to double taxation.

(198) As regards Belgium's reliance on the principle of legitimate expectations, the Commission recalls that, according to the case-law of the Union courts,[124] a Member State whose authorities have granted aid in breach of the procedural rules laid down in Article 108(3) of the Treaty may not plead the legitimate expectations of an aid beneficiary to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it were allowed to do so, Articles 107 and 108 of the Treaty would be deprived of all practical force, since national authorities would thus be able to rely on their own unlawful conduct to render decisions taken by the Commission under those provisions of the Treaty ineffective. Thus, it is not for the Member State concerned, but for the recipient undertaking, to invoke the existence of exceptional circumstances on the basis of which it had entertained legitimate expectations, leading it to decline to repay the unlawful aid.[125] Since none of the beneficiaries of the contested scheme claimed a legitimate expectation as to the lawfulness of that scheme, the Commission considers Belgium's reliance on that principle ineffective for the purposes of recovery under the present Decision.

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[123] Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

[124] See Case C-5/89 *Commission v Germany*, ECLI:EU:C:1990:320, paragraph 17, and Case C-310/99 *Italy* v *Commission* ECLI:EU:C:2002:143, paragraph 104.

[125] See Case T-67/94 *Ladbroke Racing v Commission* ECLI:EU:T:1998:7, paragraph 183; See also Joined Cases T-116/01 and T-118/01, *P&O European Ferries (Vizcaya) SA and Diputacion Floral de Vizcaya v Commission* ECLI:EU:T:2003:217, paragraph 203.

(199) In any event, for a claim of legitimate expectations to succeed, the expectation must arise from prior Commission action in the form of precise assurances.[126] No such precise assurance have been given to Belgium with respect to the Excess Profit exemption scheme. In particular, beyond the fact that the Code of Conduct group's Report on which the Presidency based its conclusions of 19 March 2003 has not been published, the Court has confirmed that the conclusions of the Council of Ministers endorsing an agreement reached by the Member States in the context of the review of national tax measures by the Code of Conduct group do not constitute such precise assurances.[127] The Court notably confirmed that "*the conclusions of the Council express an aspiration of a political nature and cannot, by reason of their contents, produce legal effects on which parties could rely before the Court. Furthermore, those conclusions could in no event bind the Commission in the exercise of its own powers, which are conferred on it by the Treaty in State aid matters*".

(200) As regards Belgium's reliance on the principle of legal certainty and, in particular, the Commission's previous decision-making practice accepting the arm's length principle, the Commission recalls, as a preliminary matter, that it is not bound by its decision-making practice. Each potential aid measure must be assessed on the basis of its own merits under the objective criteria of Article 107(1) of the Treaty, so that even if a contrary decision-making practice were shown to exist, that could not affect the findings of the present decision.[128]

(201) The Commission further observes that according to the decisions cited by Belgium, the Commission has previously concluded that a deviation from the arm's length principle for determining a group entity's taxable profit will constitute State aid where it leads to a reduction of that entity's tax liability under the ordinary system of taxation of corporate profits.[129] In addition, the Commission recalls that it clearly concluded in the context of its investigation into the new Coordination Centres scheme proposed by Belgium that profit accrued to a Belgian entity in excess of a profit determined according to a cost plus method should be subject to tax in Belgium even though the cost plus method led to a profit deemed to be at arm's length.[130] That conclusion has been confirmed by the Court of Justice.[131] Considering that the Excess Profit exemption scheme constitutes a deviation from the arm's length principle, as demonstrated in Section 6.3.2.2, Belgium cannot rely on those decisions to claim that recovery would be contrary to the general principle of legal certainty. On the contrary, Belgium should have been aware that a tax scheme that leads to a favourable treatment for the beneficiaries under that scheme in terms of

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126 See Case T-290/97 *Mehibas Dordtselaan v Commission* ECLI:EU:T:2000:8, paragraph 59 and Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:416, paragraph 147.

127 See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:416, paragraph 150-152.

128 See C-138/09 *Todaro Nunziatina & C.* ECLI:EU:C:2010:291, paragraph 21.

129 See Commission Decision of 11 July 2001 in Case C 47/2001 (ex NN 42/2000) – Germany: Control and coordination centres of foreign companies, OJ C 304, of 30.10.2001, p. 2. Commission Decision 2003/501 of 16 October 2002 on the State aid scheme C 49/2001 (ex NN 46/2000) – Coordination Centres – implemented by Luxembourg, OJ L 170, of 9.7.2003, p. 20.

130 See Commission Decision of 8 September 2004 concerning the aid scheme which Belgium is proposing to implement for coordination centres, a.o., recitals 22, 34 and 37 as well as Article 1, point b), OJ L 125 of 18.5.2005, p.10.

131 Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* ECLI:EU:C:2006:416.

artificially lowering their tax base, could lead to a violation of the State aid rules and should therefore, in case of doubt, have notified the contested scheme to the Commission before putting it into effect.

(202) As regards the alleged difficulty to quantify the aid amount under the scheme, the Commission sees no difficulty in quantifying that amount. Since the Excess Profit exemption corresponds to a percentage of pre-tax profit applied to the Belgian group entity's profit actually recorded, all that is needed to eliminate the selective advantage granted by the measure is the repayment of the difference between the tax due on the profit actually recorded and the tax effectively paid as a result of the contested scheme plus the cumulated interest on that amount as from the moment that the aid was granted.

(203) Finally, as regards Belgium's argument that recovery might lead to double taxation, the Commission refers to Section 6.3.3 and recalls that double taxation can only occur in situations where the same profit is included in the tax base of the Belgian group entity as well as in the tax base of an associated foreign entity. The Excess Profit exemption, however, concerns a unilateral adjustment that is not granted in response to the prior taxation of the same profit in another tax jurisdiction. In any event, even if double taxation were a legitimate concern, it could be solved through the normal resolution mechanisms put in place pursuant to Double Tax Treaties, the EU Arbitration Convention or the proper application of Article 185(2)(b) WIB 92 itself. Indeed, as explained in recital (172), downward adjustments applied by the Belgian tax administration in response to the taxation of the same profit in another tax jurisdiction (following their declaration by the taxpayer or a primary upward adjustment applied by the foreign jurisdiction) would then be justified by the nature and general scheme of the tax system and would not constitute State aid.

(204) In conclusion, none of Belgium's arguments for preventing or limiting recovery of aid granted through the application of the contested scheme can be accepted.

7.2. Methodology for recovery

(205) In accordance with the Treaty and the established case-law of the Court of Justice, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market. The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation. In this context, the Court has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored.

(206) No provision of Union law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to quantify the exact amount of the aid to be recovered. Rather, it is sufficient for the Commission's decision to include information enabling the addressee of the decision to work out that amount itself without overmuch difficulty.[132]

(207) In relation to unlawful State aid in the form of tax measures, the Notice on business taxation provides in point (35) thereof that the amount to be recovered should be

[132] See Case C-441/06 *Commission v France* ECLI:EU:C:2007:616, paragraph 29 and the case-law cited.

calculated on the basis of a comparison between the tax actually paid and the amount which should have been paid if the generally applicable rule had been applied. In order to arrive at an amount of tax which should have been paid if the generally applicable rules would have been complied with, that is, if the Excess profit exemption had not been granted, the Belgium tax administration must reassess the tax liability of the entities benefitting from the contested scheme for each year that they benefitted from that scheme. The amounts of aid to be recovered from each beneficiary[133] shall take into account:

– the amount of tax saved as a consequence of all rulings delivered to that beneficiary, as well as

– the cumulated interest on that amount calculated as from the moment the aid is granted.

The aid is deemed granted on the day the tax saved would have been due in each tax year in the absence of the ruling.

(208) The amount of tax saved in a specific year in respect of a specific ruling shall be calculated as:

– the profit effectively deducted from a positive tax base,

– multiplied by the corporate tax rate applicable in the tax year concerned.

(209) In principle, the Excess Profit deduction claimed by the taxpayer in its annual tax return should be taken into account, possibly after correction by the Belgian tax administration in the context of a tax audit, for the purposes of determining the amount of tax saved.

(210) If the deduction to which the beneficiary was entitled in a specific year could not (fully) take place in that year because of an insufficient positive tax base, and if the amount not effectively deducted was carried forward to a subsequent tax year, then the aid shall be deemed attributed in the subsequent year(s) when the amounts of excess profit could effectively be deducted from a positive tax base.

(211) Bearing in mind that recovery should ensure that the tax ultimately due by the beneficiary of the scheme is the tax that would have been due in the absence of the Excess Profit exemption scheme, the methodology described above can be further refined in cooperation with the Belgian authorities during the recovery stage to establish the actual amount of the tax advantage enjoyed by the beneficiaries in the light of their individual situation. The tax that would have been due in the absence of the Excess Profit exemption scheme must be calculated on the basis of the general scheme applicable in Belgium at the time of the granting of the aid and in respect of the actual factual and legal situation of the beneficiary, not in respect of hypothetical alternative situations based on different operational and legal circumstances that the beneficiary could have chosen in the absence of the Excess Profit exemption.

133 The list of beneficiaries provided by Belgium and annexed to this decision is only regarded by the Commission as illustrative. It in no way restricts the obligation of Belgium to identify all the beneficiaries of aid under the contested scheme and recover from them the full amount of aid they were granted, including beneficiaries that have received tax advantages under the scheme that are not listed in the Annex and new tax advantages granted under the scheme to beneficiaries listed in the Annex.

8. CONCLUSION

(212) In conclusion, the Commission finds that Belgium has unlawfully implemented the Excess Profit exemption scheme in breach of Article 108(3) of the Treaty. By virtue of Article 16 of Regulation No 2015/1589 Belgium is required to recover all aid granted to the benficaries of the scheme,

HAS ADOPTED THIS DECISION:

Article 1

The Excess Profit exemption scheme, based on Article 185(2)(b) of the Belgian Income Tax Code 1992, pursuant to which Belgium granted tax rulings to Belgian entities of multinational corporate groups authorising those entities to exempt part of their profit from corporate income taxation constitutes an aid scheme within the meaning of Article 1(d) of Regulation (EU) No. 2015/1589 and aid within the meaning of Article 107(1) of the Treaty that is incompatible with the internal market and that was unlawfully put into effect by Belgium in breach of Article 108(3) of the Treaty.

Article 2

(1) Belgium shall recover all incompatible aid granted under the scheme referred to in Article 1 from the recipients of that aid.

(2) Any sums that remain unrecoverable from the recipients of the aid granted under the scheme, following the recovery described in the paragraph 1, shall be recovered from the corporate group to which the recipient belongs.

(3) The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

(4) The interest on the sums to be recovered shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and to Regulation (EC) No 271/2008.

(5) Belgium shall stop granting the benefit of the scheme referred to in Article 1 and shall cancel all outstanding payments of aid under the scheme referred to in Article 1 with effect from the date of adoption of this decision.

(6) Belgium shall also reject all requests for an advance ruling to benefit from the scheme referred to in Article 1 submitted to the Ruling Commission and pending on the date of the adoption of this decision.

Article 3

(1) Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.

(2) Belgium shall ensure that this Decision is fully implemented within four months following the date of notification of this Decision.

Article 4

(1) Within two months following notification of this Decision, Belgium shall submit the following information:

(a) the list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme;

(b) the total amount (principal and recovery interests) to be recovered from each beneficiary;

(c) a detailed description of the measures already taken and planned to comply with this Decision;

(d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

(2) Belgium shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 5

This Decision is addressed to the Kingdom of Belgium.

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Done at Brussels, 11.1.2016

For the Commission

Member of the Commission
Margrethe VESTAGER

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

EUROPEAN
COMMISSION

Brussels, 11.1.2016
C(2016) 9837 final

ANNEX 1

ANNEX

to the Commission Decision

of 11.1.2016

ON THE EXCESS PROFIT EXEMPTION STATE AID SCHEME
SA.37667 (2015/C) (ex 2015/NN)
implemented by Belgium

ANNEX

to the Commission Decision

of 11.1.2016

ON THE EXCESS PROFIT EXEMPTION STATE AID SCHEME
SA.37667 (2015/C) (ex 2015/NN)
implemented by Belgium

Annex 1 – List of rulings granted under the contested scheme

(Source: Submission by the Belgian authorities of 29 May 2015, following the Opening Decision)

Nr. decision	Date	Company	start Ruling	end Ruling	EBIT exemption	NPBT exemption	Total excess profit in tax return 2005-2014
500.117	26.05.05	BASF Antwerpen	periode van 3 jaar				[…]
500.249	15.12.05	Eval Europe NV	01/04/2004	2009			[…]
500.343	04.05.06	BASF Antwerpen	periode van 4 jaar				[…]
600.144	17.10.06	Celio International NV	01/02/2007	2012			[…]
600.279	21.11.06	[…][**]	01/01/2007	2012	[40-60]%		
600.460	30.01.07	BP Aromatics Limited NV	01/01/2007		[40-60]%		[…]
600.469	06.02.07	BASF Antwerpen	periode van 5 jaar en 3 jaar				[…]

[**] According to information received from Belgium, these companies had not reported any excess profit amounts in their corporate tax returns until fiscal year 2013.

Nr. decision	Date	Company	start Ruling	end Ruling	EBIT exemption	NPBT exemption	Total excess profit in tax return 2005-2014
700.064	08.05.07	[…][**]	08/05/2007	2012			
700.075	10.07.07	The Heating Company	10/07/2007	2012	[60-80]%		[…]
700.357	25.11.08	LMS International	01/01/2008	2013	[60-80]%		[…]
700.412	27.11.07	[…][**]	01/01/2007	2012			
800.044	12.08.08	[…][**]	01/01/2008	2013	[60-80]%		
800.122	01.07.08	Tekelec International sprl	01/06/2008	2013	[60-80]%		[…]
800.225	15.07.08	VF Europe bvba	01/01/2010	2015	[60-80]%		[…]
800.231	13.01.09	Noble International Europe bvba	01/09/2007	2012	[60-80]%		[…]
800.346	09.06.09	[…][**]	01/05/2010	2015			
800.407	08.09.09	[…][**]	01/01/2011	2015			
800.441	11.03.09	Eval Europe NV	11/03/2009	2013			[…]
800.445	13.01.09	Bridgestone Europe NV	01/01/2006	2011	>OM [1-4]%		[…]
900.161	26.05.09	St Jude Medical CC bvba	01/01/2009	2014	>OM [1-4]%		[…]
900.417	22.12.09	Trane bvba	01/01/2010	2015	[40-60]%		[…]
900.479	29.06.10	[…][**]	01/01/2010	2015			

[**] According to information received from Belgium, these companies had not reported any excess profit amounts in their corporate tax returns until fiscal year 2013.

Nr. decision	Date	Company	start Ruling	end Ruling	EBIT exemption	NPBT exemption	Total excess profit in tax return 2005-2014
2010.054	20.04.10	[…][**]	01/03/2010	2015	>OM [1-4]%		
2010.106	20.04.10	Luciad NV	01/01/2009	2014	[40-60]%(2009-2011) [40-60]% (2012-2013)		[…]
2010.112	13.07.10	[…][**]	01/01/2011	2016		[60-80]%	
2010.239	06.09.11	Ontex bvba	01/01/2011	2016		[60-80]%	[…]
2010.277	07.09.10	[…][**]				[60-80]%	
2010.284	13.07.10	[…][**]	01/01/2010	2015		[60-80]%	
2010.488	15.02.11	Dow Corning Europe SA	01/01/2010	2015	>OM [1-4]%		[…]
2011.028	22.02.11	Soudal NV	01/01/2010	2015		[40-60]%	[…]
2011.201	13.09.11	Belgacom Int. Carrier Services	01/01/2010	2015		[20-40]%	[…]
2011.326	06.09.11	Atlas Copco Airpower NV	01/01/2010	2015		[40-60]%	[…]
2011.337	08.11.11	Evonik Oxena Antwerpen NV	01/01/2012	2017		[20-40]%	[…]
2011.469	13.12.11	BP Aromatics Limited NV	01/01/2012				[…]
2011.488	24.01.12	[…][**]	01/01/2015	2020		[60-80]%	
2011.542	28.02.12	Chep Equipment Pooling NV	01/07/2010	2015		[20-40]%	[…]
2011.569	26.02.13	Nomacorc	01/01/2012	2016		[60-80]%	[…]
2011.572	18.12.12	[…][**]					

[**] According to information received from Belgium, these companies had not reported any excess profit amounts in their corporate tax returns until fiscal year 2013.

Nr. decision	Date	Company	start Ruling	end Ruling	EBIT exemption	NPBT exemption	Total excess profit in tax return 2005-2014
2012.031	25.09.12	Pfizer Animal Health SA	01/12/2012	2017		[80-100]%	[…]
2012.038	06.03.12	Kinepolis Group NV	01/01/2012	2016		[60-80]%	[…]
2012.062	24.05.12	Celio International NV	01/02/2012	2017			[…]
2012.066	03.04.12	[…][**]	01/01/2013	2018		[60-80]%	
2012.101	17.04.12	[…][**]	01/01/2014	2019		[60-80]%	
2012.180	18.09.12	FLIR Systems Trading Belgium bvba	01/08/2012			[60-80]%	[…]
2012.182	18.09.12	[…][**]	31/07/2013	2015		[40-60]%	
2012.229	28.08.12	ABI	01/01/2011	2016		[80-100]%	[…]
2012.229	29.08.12	AMPAR				[80-100]%	[…]
2012.355	06.11.12	Knauf Insulation SPRL	01/01/2013	2017		[60-80]%	[…]
2012.375	20.11.12	Capsugel Belgium NV	01/01/2012	2017		[60-80]%	[…]
2012.379	20.11.12	Wabco Europe BVBA	01/01/2012	2017		[40-60]%	[…]
2012.446	18.12.12	[…][**]	01/01/2015	2020		[60-80]%	
2012.468	26.02.13	BASF Antwerpen	periode van 6 jaar				[…]
2013.052	16.04.13	[…][**]	periode van 3 jaar				
2013.111	30.04.13	Delta Light NV	31/08/2012	2016		[60-80]%	[…]

[**] According to information received from Belgium, these companies had not reported any excess profit amounts in their corporate tax returns until fiscal year 2013.

Nr. decision	Date	Company	start Ruling	end Ruling	EBIT exemption	NPBT exemption	Total excess profit in tax return 2005-2014
2013.138	17.09.13	[…]**	01/01/2012	2017		[60-80]%	
2013.156	25.06.13	Punch Powertrain NV	01/01/2013	2017		[60-80]%	[…]
2013.331	08.10.13	Puratos NV	01/01/2013	2018		[40-60]%	[…]
2013.443	10.12.13	Omega Pharma International	01/01/2013	2018		[40-60]%	[…]
2013.540	10.12.13	[…]**	01/01/2014	2019		[60-80]%	
2013.579	28.01.14	Esko Graphics BVBA	01/01/2012	2017		[60-80]%	[…]
2013.612	25.02.14	Magnetrol International NV	01/01/2012	2016		[60-80]%	[…]
2014.091	01.04.14	Mayckawa Europe NV	31/12/2013	2018		[60-80]%	[…]
2014.098	10.06.14	[…]**	01/01/2014	2019		[60-80]%	
2014.173	13.05.14	[…]**	01/01/2012	2016		[60-80]%	
2014.185	24.06.14	[…]**				[60-80]%	
2014.288	05.08.14	[…]**	01/07/2014	2019		[60-80]%	
2014.609	23.12.14	[…]**	01/01/2014	2019		[60-80]%	
		TOTAL excess profit					**[< 2,100,000,000***]**

** According to information received from Belgium, these companies had not reported any excess profit amounts in their corporate tax returns until fiscal year 2013.
*** This amount represents the total excess profit reported by the companies in their tax returns but does not provide any indication of the State aid granted.