

# **National Recovery Procedures: how to guarantee an effective and immediate enforcement of the Commission's decisions. The role of national judges. Analysis of the case law of the EU courts. Belgian and Austrian Procedures (Part 1)**

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## **The difference between unlawful and incompatible state Aid. The role of the national judges in the enforcement of the Commission decisions**

The first session of the seminar on the role of national judges in the enforcement of the European Commission state aid recovery decisions was opened by Prof. Dr. Anne Van de Vijver, professor of Law at the University of Antwerp.

Prof. Anne Van de Vijver, addressed the difference between unlawful and incompatible aid. According to Article 108 (3) TFEU, where aids are granted in breach of the requirement as to the notification or in disregard of the standstill obligation the aid shall be considered as *unlawful*. Contrarily, having regards to Article 107 (1) TFEU, "Save otherwise provided in the treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threaten to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member States, be *incompatible* with the internal market". Exceptions to these main rules apply automatically with respect to certain types of aid considered ipso iure compatible with the internal market.

In principle, national courts have the power to interpret the notion of "state aid" in the meaning of art. 107 (1) TFEU and to identify whether the aid at issue is unlawful or not.

Following the ECJ decision in Lufthansa's Case (concerning allegedly unlawful benefit granted by Frankfurt airport to Ryanair) it is clear that any preliminary assessment brought on by the Commission in an opening decision as to the state aid character of a measure, is binding for national courts. These have to assume that art. 108 (3) TFEU has been infringed. In the case at hand, Lufthansa (as one of the competitors) held that Ryan Air received illegal benefits constituting illegal state aid. The European Commission's formal investigation procedure started following Lufthansa's appeal. The national court, uncertain on its competence in deciding on the *unlawfulness* of the aid, requested the ECJ for a preliminary decision. The ECJ held that article 108 TFEU had a direct effect and constituted the legal basis for national courts to prevent the granting of aid. Furthermore, as long as no formal investigation started, the national court was considered to be competent to take decisions.

Van de Vijver continued explaining that based on the case law of the ECJ, once national courts conclude for the unlawfulness of the aid, all the necessary legal consequences must be drawn.

To that end, from Lufthansa, it follows that national court may decide to suspend the implementation of the measure in question ordering the recovery of any payment already made. The national court may also decide to order provisional measures in order to safeguard both, the interests of the parties

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concerned and the effectiveness of the Commission's decision to initiate the formal examination procedure.

However, questions may arise on whether national courts are obliged to take action or not. In this respect, looking at the ECJ case law, it may be concluded that there is indeed an obligation, for national courts, to draw all the necessary legal consequences of the breach of article 108 TFEU. For instance, national courts shall ensure that illegal aids do not remain at the disposal of the beneficiaries. Looking at the *incompatibility* of the aid the Commission has exclusive competence to decide on the compatibility of the state aid. National courts do not have the power to declare a state aid measure compatible with art. 107 TFEU.

### **The role of the national courts in the enforcement of the commission recovery decision.**

In principle, the recovery of state aid requires the prior Commission decision on the incompatibility of the measure with the internal market. According to Article 16 of the procedural regulation, the Commission shall decide on the compatibility and shall order the recovery of the state aid. The consequence of the Commission recovery decision is that national authorities should put in place all the necessary measures to obtain a full and effective recovery. According to the ECJ case law, national courts must, in particular, refrain from taking decisions potentially in conflict with the Commission decision. These have no jurisdiction to invalidate an act of Community Institutions. Under the TFEU, national courts are given the possibility to ask the ECJ for a preliminary ruling in order to obtain clarifications regarding the correct application of the EU Law. Furthermore, the validity of underlying Commission decisions cannot be challenged before national courts if the claimant could have challenged this decision directly before Community courts. In order for the beneficiary to challenge the Commission decision, the action for annulment under article 263 TFEU shall be pursued within a time limit of two months.

In principle, if the beneficiary has not used this procedure, national courts could no longer be used to challenge the validity of the Commission decision.

Van de Vijver referred to the case, C-346/03, *Atenzi* [2006], to clarify that national courts shall offer legal protection in all those situations where it is not *prima facie* self-evident for the claimants to dispose of the possibility to bring the case before the EU courts. However, in these situations, national courts themselves are obliged to remit the case before the ECJ for a preliminary ruling.

Also, an action for annulment ex article 263 TFEU does not have suspensory effects (art. 278 TFEU). As said, national courts are not competent to order for the suspension of the Commission recovery decisions whereby these are binding for both, national courts and its addressee. Van de Vijver briefly referred to one exception to this rule. Accordingly, national courts can grant interim suspension measures after meeting strict legal requirement such as serious doubts regarding the validity of Community acts. Also, she referred to cases where national courts find necessary to avoid serious and irreparable damage or hold necessary to balance the community interest.

### **The aid to be recovered**

Van de Vijver continued addressing the issue arising from the determination of the amount to be recovered. She explained that the aid to be recovered pursuant a recovery decision should be sufficient to re-establish the situation existing prior to the grant, clarifying that the sums shall not be regarded as a sanction. The Commission is not obliged to quantify the aid or the individual amounts to be

recovered, but it shall provide sufficient information and guidelines to enable to calculate the amount and interest to be recovered without overmuch difficulties.

Guidance on how national courts should act in this respect can be found from the ECJ case law. She explained that guidelines in Commission recovery decision are binding for the national courts. Subsequent correspondence between the Commission and authorities concerning the calculation of individual amounts to be recovered are not binding for national courts. However, national courts should take into account the principle of loyal cooperation.

In Case C-69/13, Mediaset Case, in the Commission recovery decision the aid to be recovered was requested to be calculated on the basis of the number of additional users acquired by the company following the grant. In order to correctly assess the accuracy of the calculation, each additional user had to be asked individually. This made it practically impossible for national authorities to obtain an accurate assessment. In order to gather further information, the Commission agreed with the proposal presented by Belgium to organise an opinion poll within which certain consumers were questioned on why they did become additional consumers. Based on the opinions expressed, the recovery procedure started. Shortly after, many of the beneficiaries acted against the recovery order questioning the legitimacy of the computation method as well as the econometric model applied. In the end, the expert appointed for its review explained the invested court that indeed, the opinion poll did not represent an appropriate method to proceed. The national court remitted the matter before the ECJ, asking whether the correspondence on which basis the Commission agreed upon the method of the opinion poll was also binding. The ECJ confirmed that the Commission recovery decision was binding. Furthermore, although the subsequent correspondence was not to be considered binding, the principle of loyal cooperation between national court and the European Commission had to apply.

### **Procedural autonomy**

According to art. 16 (3) Procedural Regulation (2015), Member State are responsible for the implementation of the recovery decision. In other words, the recovery of State aid has to take place in accordance with the relevant procedural provision under national law. These differ significantly from jurisdiction to jurisdiction. Also, depending on the nature of the aid in concern, some countries apply civil law procedure or other apply administrative law procedure. In general, the applicable recovery procedure is determined by the nature of the measure underlying the granting of the aid. Fiscal state aid procedures are commonly regulated under administrative law procedures.

In some jurisdictions, the commission recovery decision is considered as a sufficient legal basis for an administrative recovery act, while, in other countries, national (constitutional) law requires a specific domestic legal basis.

Van de Vijver stressed that the recovery of state aid granted in the form of a tax exemption or tax deduction shall not be considered as a retroactive tax. This issue was raised in the Commission decision against Greece in 1993, concerning State aid granted in the form of an exemption for exporting undertakings. The measure provided for proportionally reduced tax burden on the profit corresponding to the export earnings. The Commission considered the exemption as state aid and ordered its recovery. The Greek authorities argued on the impossibility to recover the State aid, in the form a tax, because they considered that withdrawing the tax exemption would have been equal to impose retroactive taxation. According to the Greek authorities, the implementation of the Commission recovery decision would be contrary to Greek's fundamental constitutional principles and thus the recovery decision was challenged. The ECJ response was in the sense that the Greek

authorities misinterpreted the qualification of the aid to be recovered, whereby the recovery of the aid was simply the logical consequence of its unlawfulness. According to the ECJ, the question of whether the recovery was possible had not to depend on the nature of the state aid itself. Also, the argument that the recovery of the tax benefit was retroactive was rejected and considered incorrect. The Commission clarified that the recovery decision referred to sums corresponding to the tax benefit received by its beneficiaries in terms of tax exemptions. In conclusion, Van de Vijver explained that this case shows that the qualification of the aid to be recovered might also have influences on the question which national court is competent (e.g. tax courts or not). In this respect, the EU law provides that the recovery must be immediate and effective whereby the principle of effectiveness and supremacy shall be respected. In particular, the former requires States to achieve concrete outcomes in terms of recovery, e.g., that the aid has to be paid back regardless of the qualification of the amounts to be recovered.

### **Absence of recovery title under National Law**

Van de Vijver continued explaining that in some countries Commission recovery decisions are considered to be a sufficient legal basis for issuing administrative recovery acts. Contrarily, based on the Constitutional Law of other jurisdictions, recovery orders may only be issued on the basis of existing domestic legislation. She continued addressing the question on what national judges should do if recovery procedures are not supported by domestic legal basis but rather by mere administrative legal acts. In this sense, the ECJ has repeatedly held that the absence of a domestic legal basis shall not be accepted as a valid argument to prevent the recovery of State aids. National courts must guarantee an immediate and effective recovery, leaving unapplied procedural provisions of national law that prevent an immediate and/or effective recovery.

The 2010 Commission decision against Italy concerns a measure in the form of a reduced CIT rate for companies newly registered on the stock exchange. The Commission ordered recovery. The Italian authorities first tried to pass legislation to have a domestic legal basis. This attempt was not successful. In a second stage, the Italian authorities decided to issue recovery orders to taxpayers through administrative channels. One of the beneficiaries of the scheme, (the main beneficiary), challenged this administrative recovery order before the national court arguing for the absence of legal basis. Also, according to the Italian Government, the recovery through an administrative act was not possible due to the absence of national legislation and to the conflict with Constitutional principles. The Italian national tax court suspended the recovery procedure. Consequently, according to the EC, the Italian authorities did not fulfil the recovery obligations. On this background, the case was remitted before the ECJ. The European Court of Justice agreed with the position taken by the Commission holding that Italy did not fulfil its recovery obligations. In conclusion, the absence of a recovery title was not accepted as an argument not to recover the aid.

Van de Vijver also referred to the case *Commission vs Germany*. According to this case, in the event that civil law rules do not allow for the effective recovery of the aid in question, it may be necessary, in view of the circumstances of the case, for national rules to be left unapplied [ ... ] and to recur to other measures, since other measures cannot be excluded on grounds relating to national law. Therefore, in principle, courts are free to determine the more appropriate form for the state aid recovery unless the procedure does not endure for an excessive period of time preventing the effective recovery of the aid. In the aforementioned case indeed, the litigation before the German court lasted

for an excessive period of time. Hence, the European Commission argued, and the ECJ confirmed, that in such a case the State must try to use other measures than the one applied.

Referring to the French Case C-232/05, *Scott* 2006, Van de Vijver addressed the suspensory effect of the plaintiff appeal before national courts. In the case of reference, the State aid was granted in the form of concessions at a preferential rate. After the Commission recovery order, the City of Orléan issued an assessment for its implementation. As a reaction, the beneficiary of the measure challenged this assessment before an Administrative Court. Based on French procedural rules, any appeal before administrative Courts shall produce the automatic suspension of national acts, including those issued for the recovery of state aid. The Commission brought the Case before the ECJ to declare the non-compliance of French Authorities with its recovery obligations. In conclusion, the ECJ ruled that the National rules that prevent the immediate execution of recovery orders, as in the case at hand, must be *ex officio* un-applied by the national courts.

Van de Vijver continues addressing the two landmark cases *Luccini* and *Commission vs Slovak Republik*. She held that these proceedings well explain wherever the principle of *res judicata* may prevent the recovery of State aid. In principle, the European Commission considers that National provisions should be interpreted, as far as possible, in line with EU Law. Furthermore, European Union law restrains the national *res judicata* principle that prevents recovery. In *Commission vs Slovak Republik*, the matter related to domestic bankruptcy legislation; the scheme allowed companies in financial difficulties to enter into agreements with creditors to negotiate a solution. Interestingly, the State appeared among the creditors and agreed to a partial waiver of the credits claimed. The validity of those agreements was confirmed by the competent national court. The European Commission held that the debt waiver qualified as State aid making its recovery necessary. At that stage, on the one hand, while the tax authorities asked for the recovery of the sums, on other hand, the companies involved refused to repay the amounts.

The Slovak court dismissed the action of Slovak tax authorities to order the repayment of unlawful aid on the ground that the arrangement with creditors had acquired the force of *res judicata*. However, according to the ECJ, in this case, the existence of a *res judicata* did not set a limit to recovery obligation. On the contrary, in the opposite situation where the national court decision acquires the status of *res judicata* prior to the ECJ decision to intervene on the qualification of the measure as state aid, it is more difficult, as there is not a clear position of the ECJ in that respect.

The next situation addressed by Van de Vijver related to national limitation periods. She explained that according to art. 17 of the procedural regulation, the recovery of state aid shall be subject to a limitation period of ten years. Furthermore, according to the ECJ case law, shorter national limitation periods are not considered as a justification not to recover.

She also referred to national provisions of insolvency loss and bankruptcy, explaining that these are very often applicable in State aid procedures because of the recurring financial difficulties in which aid beneficiaries find themselves. The ECJ case law provides guidance in the sense that the Member States are required to immediately register recovery claims and proceedings whereby the competent Courts shall allow it with no delay. Also, in all these cases, based on the EU case law, national courts shall not allow the continuation of the business activity in the absence of full recovery.

In principle, the length of National litigation procedures cannot be put forward as an argument for the impossibility to recover illegal aids. The Commission itself held that if the length of national procedure constitutes a serious problem for the recovery of the aid, the State should get in contact with the Commission to agree on any viable alternative solution. In this respect, Van de Vijve explained that reference could be made to provisional implementation method within which the Court could order for the amount of the aid to be put on a frozen bank account in order to allow the national litigation to continue in its natural course.

According to the ECJ, the failure to implement the Commission's recovery decisions can be the result of the behaviour, of either legislative or juridical organs. Indeed, in all those cases where national courts do not take the necessary measure to implement the Commission decision to recover the unlawful aid, the European Commission can bring the case before the ECJ asking for the imposition of a penalty payment.

Generally, the amount of the penalty payment should be quantified on the basis of the characteristic of the infringement. The matter in question is well explained by an Italian Case concerning the region of Sardinia within which illegal aid was granted to some local hotel companies. In 2008 the Commission decided in order for the recovery of aids for an amount equal to €15.000.000. In 2012, the first decision from the ECJ intervened confirming the existence of a problem concerning the suspension of the recovery order by an Italian Court. In 2015, a solution for the ongoing issue was still missing hence the Commission re-brought the case before the ECJ asking for a penalty payment of €20.000.000 plus a daily penalty equal to €150.000. It is self-evident how the national court may play a key role.

### **Belgian Recovery Procedure**

The third session of the seminar was opened by Prof. Bruno Peeters. He focused on the State Aid recovery procedures.

As regards Belgium, Peeters explained the absence of any explicit general legislation regulating the recovery of unlawful aid or more specifically fiscal aid. Also, he showed that the Belgian legislation does not provide for the existence of a central Government Body entitled to control and review state aid recovery processes. Belgium being a federal State, federal, regional and local bodies, as well as public entities, may be involved in the State aid recovery procedures.

In its intervention, Prof. Peeters differentiated between state aid procedures involving individual taxpayers, e.g., the non-issuance of tax assessment on the basis of a legal exemption, and cases engaging a large number of recipients. In the latter case the Belgian legislator has already issued specific legislation in order to facilitate the recovery of the unlawful state aid.

Peeters also drew a line between national recovery procedure before, and after the intervention of a European Commission decision.

If the European Commission has not yet issued recovery decisions, the substantive law applicable shall be determined by reference to the characteristics of the measure underlying the granting of the aid. National authorities have no discretion to determine if administrative or civil laws rules have to be applied.

Furthermore, as regards Belgian recovery procedures, he explained that if Civil Law rules are applicable, reference shall be made to Article 6 of the Belgian Civil Code. This provision establishes

that special laws cannot be detrimental to the law of public policy, whereas, according to Peeters, European State Aid law qualifies as a rule of public order. Indeed, from the combined reading of Articles 6, 1131 and 1133 of the Belgian Civil Code, it emerges that an obligation without or with an unauthorised cause, cannot have legal effect. In this sense, Article. 1133 of the Civil Code states that the cause is unauthorised when prohibited by law or when standing against public order. Therefore, according to Bruno Peeters, the combined reading of these provisions provide for the legal basis for the annulment of government's contra legem acts granting unlawful fiscal state aid.

He continued clarifying that according to the Article 1382 of the Belgian Civil Code, aequilian responsibility can be at stake when state aid measures are not notified and the aid is granted with disrespect of the standstill obligation. In those situations a third party, like a competitor or another interested third party, can claim from the authority that has granted the aid, compensation for the damages occurred. .

Prof. Peeters explained that in the Belgian State aid recovery cases, Belgian authorities use to follow the general Belgian civil rules relating to debts recoveries. Generally, debt recovery procedures require the creditor (in this case the relevant Belgian authority responsible for the recovery of unlawful aid), to send a letter of formal notice to the debtor (in this case the beneficiary of the aid) where the debtor is formally requested to pay its debts (the unlawful aid).

Where the beneficiary of the aid does not comply with the formal request, the relevant Belgian authority may bring an action before the civil courts asking for a judgment commanding the beneficiary to ultimately pay its debt (in case of unlawful aid).

The first instance of the judgment, (in general before the commercial court), can be appealed before the Court of Appeal and then appealed before the Supreme Court. By virtue of the provision pursuant article 1398 of the Belgian Judicial Code, despite the appeal against the decision taken by the court of the first instance, the first instance judge itself shall order, the provisional recovery of the alleged illegal aid In the opinion of Bruno Peeters that judge has full powers and even the obligation to do so,.

The Belgian authority can lose the appeal against the recovery in the first instance and be asked to repay the sums previously recovered from the beneficiary in addition to the possible damages and interest accrued. Belgian Civil Judges can also require the Belgian authority to submit a bank guarantee upon their solvency.

Bruno Peeters continued referring to the legal dimension of unilateral tax measures in state aid recovery procedures before Belgian national courts. He referred to tax rulings, explaining that in Belgium these are regarded as individual, unilateral, administrative legal acts. In this sense, the Belgian Law of 24 December 2002, explicitly states that individual rulings are not binding when infringing European Union law (esp. Art. 23, alinea 2, 4°).

It is on this basis that if rulings breach European Union state aid rules, these have to be disregarded or withdrawn ex officio by national courts. Also, national tax judges dealing with state aid measures granted in the form of tax assessments might ignore these rulings when deciding on the legality and the violation of state aid rules. The same should apply for judges confronted with other forms of unilateral tax measures violating EU state aid rules. Judges are obliged, ex officio, to ignore those tax measures and to decide whether these constitute State aid or not.

Peeters also stated that State aid measures, with a more general scope, can be subject to an annulment procedure before the Council of State. If the State aid measure has the form of a federal law, or a

decree of a region, the annulment can also be requested before the Belgian Constitutional Court. This conclusion derives from the combined reading of Articles 170 of the Belgian Constitution on legality principle and Article 172 on the non-discrimination principle in connection with the EU state aid rules.

Bruno Peeters continued explaining that up to now, in order to provide effective State aid recoveries, the Belgian legislator intervened twice with the enactment of special legislation. In both situations, the recovery of State aid concerned several beneficiaries. The Maribel Case, concerned approximately two-thousand companies and the excess profit ruling case involved 35 companies. The Maribel bis/ter legislation concerned parafiscal State aid in terms of social security contributions. The excess profit ruling case instead concerned fiscal state aids.

As regards the Maribel bis/ter cases, the parafiscal scheme was first introduced in 1981 with the aim of providing reduction for the security contribution for firms employing manual workers. The scheme seemingly constituted a generally applicable measure. However, the amendments introduced in 1993 and 1994, accordingly, Maribel bis and ter, granted larger reduction restricted to certain firms particularly exposed to international competition.

In March 1996, the Commission decided to initiate a proceeding in respect of those amendments, considered, without any doubt, incompatible aid. Belgium reacted bringing the case before the ECJ, though, the arguments alleged for the appeal were all rejected. In this respect, Peeters emphasized the importance of consideration 86 of the ECJ judgment. The document clearly shows the ECJ's reluctance to consider any argument advanced by Belgium concerning the so-called impossibility or difficulties to fulfil the obligations to recover the aid.

In reaction to the EC decision and also due to the ECJ position, the Belgian authorities adopted a new scheme, the Maribel quater scheme. This scheme was approved by the Commission in April 1997 with the aim of putting an end to the unlawfulness of Maribel bis and ter.

However, the effects of the previous (unlawful) schemes still needed to be regulated, while the Belgian government still held for the absolute difficulty to recover the unlawful state aid. One of the arguments concerned accounting difficulties due to the large number of beneficiaries for which the reduction should have been calculated quarter by quarter on the basis of the number of workers employed.

To overcome those difficulties, the Belgian government put forward a proposal to the EC. This concerned a flat rate calculation without any specific details on how that same calculation should have taken place. The proposal also addressed the calculation of the set up between the amount to be paid and the amount of the new reduction under Maribel quater scheme. The Belgian Tax authorities also introduced a *de minimis* rule, exempting those undertakings with no more than fifty employers from the recovery.

In 1997, this proposal produced an immediate reaction from the EC. In principle, although there has been no formal rejection, the Commission asked for a concrete proposal for the effective recovery of the aid in concern.

The Commission did not receive any answer from the Belgian Government; this brought to the start of a supplementary procedure before the ECJ to be initiated.

At the end of 2001, in the Case ECJ 3 July 2001 C-378/98 - Belgium v. Commission, the ECJ stated that "by failing to adopt, within the period prescribed, the measure necessary to recover the aid from the beneficiary undertakings the aid provided for under the Maribel bis and Maribel ter scheme which were declared unlawful and incompatible with the common market by the Commission decision 97/239/EC of 4 December 1996 concerning aid granted by Belgium under the Maribel bis/ter scheme, the Kingdom of Belgium has failed to fulfil its obligations under the fourth paragraph of Article 189 of the EC Treaty (now fourth paragraph of Article 249 EC) and Article 2 and 3 of the said decision".

Pending this court's decisions, the Belgian authorities once again tried to react by releasing a protocol, approved by the law of the 24 December 1999 focusing on two main points:

The possibility of spreading the recovery among a three year period, applying a *de minimis* rule through an automatic and generalized deduction of EUR 100 000 from the sum each undertaking was required to pay, and,

The ambiguity in the law itself, which appeared to allow the undertakings concerned for a double tax deduction from the sum to be repaid. In other words, the reduction of the contribution to be recovered for reason of tax deductibility.

After having calculated the amount to be recovered, the Belgian tax Authorities held that if the enterprises had complied correctly with their obligation to pay social security contribution, these sums would have been tax deductible to its 59,83% (given that at that time the CIT rate was 40,17%).

Objection from the EC on these two main issues did not get long to arrive. The Commission first addressed the ambiguities in the *de minimis* rule, allowing for an automatic and generalized deduction of EUR 100.000 from the sum which each undertaking was required to repay. Also, concerns were raised on the vagueness of the law itself which ultimately, appeared to allow the undertakings concerned for a double tax deduction from the sum to be repaid.

In 2001, the Belgian Legislator reacted introducing Article 46 Program Law 30 December. This provision focused on the issues of the qualification of the State aid. The law provided for an explicit equalization method. Also, article 46 provided for the recovery of the 44.17% (to neutralize the prior tax deduction) and for the no tax deductibility of the repaid sums.

Besides the reaction of the Belgian legislator, the Belgian Tax Authority wrote a letter to the European Commission to disagree with the objections against the *de minimis* rule. In reaction to that letter, in April 2002, the European Commission issued a reasoned opinion to the Belgian authorities for failing to comply with the judgment which ordered to recover the "Maribel" aid. With a law of 2 August, 2002, and the Royal Decree 3 October 2002, the Belgian legislator showed its reaction to the EC position and finally complied with its remarks.

## **Excess Profit Rulings Scheme**

Prof. Bruno Peeters continued addressing the Excess Profit Ruling Scheme. He explained that until 2014, the Belgian authorities carried on a worldwide publicity campaign aimed at attracting foreign investments in Belgium. This included the offer of "unic" tax incentives for lowering the effective (average) Corporate Income Tax. Prior to the Excess Profit rulings scheme, the Belgian effective nominal tax rate was 39% plus 3% of additional contribution (for the financing of the ongoing economic crisis). In 2004, this nominal tax rate was reduced to 33%, plus 3 % of additional contribution. The system worked in the sense that tax deductions were deducted from the taxable base

while the excess profit did not appear among the tax deductions. Contrarily, those had to be calculated at the level of the taxable profits. More specifically, the correction of the taxable profits needed to take place prior to the calculation of all other tax deductions.

In principle, foreign investors were attracted by offering advantageous tax rulings. These should have increased confidence and legal certainty also because were issued as binding agreements, although in breach of the law (Domestic, European and International law).

According to the Belgian Tax Authorities, these schemes would have allowed Belgian companies and Belgian permanent establishments to reduce their tax base by exempting their excess profit from CIT. The investors were given the possibility to describe the facts, allowing the tax administration to determine, in advance, how the tax law was to apply on a case by case basis. This would have ensured a legally binding accurate forecast of all the tax implications of any investment project.

To be more specific, the Excess Profits Rulings allowed Belgian resident companies part of a multinational group and Belgian permanent establishment of foreign resident companies part of a multinational group, to reduce their tax base by exempting their excess profit. In order to benefit from this exemption, an advanced ruling issued by a special ruling commission was necessary. The request from the beneficiary represented the *conditio-sine-qua-non* for the granting of the ruling (of course not everyone knew about the possibility to get the ruling).

Peeters explained that the ratio legis underlying the excess profit exemption was to ensure that Belgian group entities were only subject to tax at arm's length by exempting them from taxation exceeding profits. Excess profits are normally those arising from synergies, economic of scales or other benefit stemming from the being part of a multinational group.

Since 2004, a large number of rulings were concluded. The scheme was promoted to the extent that the European Commission started an investigation into the matter. The first conclusion from the Commission was in the sense that Belgium granted substantial advantages to multinationals in breach of substantive State aid rules. Within its investigation activity, the Commission underlined how the excess profit regime had not to be considered as forming part of the Belgian reference system (Belgian Income Tax Law). In conclusion, according to the Commission, all the conditions for the qualification of the measure as State aid were met.

One of the main difficulties of the Commission remained to identify the effective beneficiaries of the measure. Indeed, although the direct beneficiaries of the scheme were identified in those effectively obtaining the exemption, the scheme also granted undoubted benefit to the multinational group considered as a whole. It has been on this basis thereto the Commission qualified the entire multinational group as the ultimate beneficiary of the scheme.

According to the Commission decision, the situation existing prior to the introduction of the Excess Profit Scheme needed to be restored. In concreto, the Commission asked Belgium to recalculate the amounts of taxes effectively due by the beneficiaries of the measure plus interest, from the moment the aid was granted.

Bruno Peeters explained that after 2014, following the Commission's decision, new requests for rulings had not to be accepted. Meanwhile, the recovery of State aids should have taken place effective immediately. The Commission was to keep the proceeding under constant review. Within four months from the starting of the recovery procedure, Belgium was asked to provide the Commission with information on the implementation status. Also, within two months from the

notification, Belgium had to communicate the Commission the complete list of beneficiaries and other relevant elements on the strategy to pursue to obtain an effective and complete recovery of the unlawful aid.

This Commission decision was notified to Belgium in May 2016 and was made public in September 2016. Belgium reacted asking for its suspension. However, the president of the General Court dismissed the request. On 24 December 2016, Belgium issued specific legislation for the recovery of the unlawful aid. The ratio legis was indeed the lack of a general legal framework for the recovery of fiscal state aid and the inadequacy of the existing rules for the achievement of an effective recovery.

Peeters explained that the excess profit scheme left many open issues related, in particular, to the legal qualification of the aid and its possible deductibility. He noted that the programme law does not provide for an explicit qualification of the aid to be recovered in terms of a tax. However, it is stated that for some reasons, those state aid may be qualified as a tax. He held that it is possible to observe that there is only a partial equalization of the excess profit exemption state aid with taxes. Although the text of the law does not state that the recovery of the state aid is a tax, for some reason these state aid can be qualified as a tax. For instance, recalling the Maribel case, the tax deductibility of the recovery aid was considered a related issue.

On this matter, Peeters underlined the presence, in the programme law, of an explicit disposition on tax deductibility. Therein, the equalization of the state aid for tax deductibility purposes is not allowed. Furthermore, according to the Belgian income tax law, if the recovery of state aid should be considered as a tax, the sum to be recovered should not be considered as deductible.