The Belgian Excess Profits Case - A State Aid Anticlimax

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The applicants' arguments

In 2004, the Belgian Kingdom and Magnetrol International (one of the alleged aid beneficiaries) took the Commission to task for its decision regarding the Belgian tax measures (2004/C 315/01) which, in the Commission's view, failed to comply with the obligations under the Treaty. The applicants' arguments were threefold. First, they asserted that the Commission had incorrectly characterized the relevant Belgian measures as constituting an 'aid scheme'. The consequence was that the Commission's conclusions into question, so the absence of all three was a devastating blow to its decision's

The natural legal background and the alleged aid measures

The case for the annulment of the decision in the Belgian Excess Profits Case was based on Article 107 of the Treaty, which specifies that the Member States can only grant aid to undertakings if it does not affect trade between Member States in a significant manner and thereby distort competition. The Commission's reasoning was based on a number of assumptions: that the Belgian tax measure was a general measure, and that it was a measure that constituted an aid scheme. The conclusion was that the Commission had incorrectly characterized the relevant Belgian measures as constituting an 'aid scheme'. The consequence was that the Commission's conclusions into question, so the absence of all three was a devastating blow to its decision's

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Third plea, which concerned the fulfillment of the substantive state aid conditions and the existence of a ‘selective advantage’, did not receive any attention. This is regrettable, because it concerns the single most controversial assertion made by the Commission in its recent fiscal state aid crusade. As a result, we are none the wiser on whether an EU law arm’s length principle exists and ‘necessarily forms part of the Commission’s assessment under Article 107(1) of the Treaty’ as maintained by the Commission in paragraph 150 of its now annulled decision on the Belgian excess profits regime.

Still, we will hopefully receive an answer when the General Court rules on the validity of the Commission’s final decisions in the Fiat and Starbucks cases, where the same argument is put forward by the Union’s competition watchdog. The ongoing fiscal state aid wave started off with these two cases (plus the Apple case) in June 2014, and they were also the first cases to be decided by the Commission in October 2015. It is, perhaps, fitting that they will also be the first cases to allow us to discern where the Court stands on these questions.

Conclusion

Compared to how important this judgment could have been, had it touched upon the most contested issues in this area of law, the General Court’s ruling in Cases T-131 & 263/16 could be said to be rather anticlimactic. So be it. In any case, both disappointment and celebrations by the parties are premature at this point in time; the real battle is to be fought on another day.