

COMMISSION DECISION (EU) 2015/810
of 23 January 2015
on State aid scheme SA.20326 (2013/C) (ex 2012/NN) implemented by Belgium

(notified under document C(2015) 130)

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

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 ⁽¹⁾,

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 those articles ⁽²⁾, and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter dated 7 October 2011, the European Commission informed the Belgian authorities that it was launching a monitoring exercise to look into scheme N 649/2005 'Payroll tax partial exemption measures for R&D' (hereinafter 'the scheme').
- (2) By letters dated 7 October 2011, 2 February 2012 and 6 January 2013, the Commission requested information on the implementation of the scheme. Specifically, it asked the Belgian authorities to send it a list of the companies which had benefited from aid of more than EUR 200 000 in 2009 and 2010. The Belgian authorities replied by letters dated 17 November 2011, 2 May and 4 June 2012 and 23 May 2013.
- (3) A meeting was also held between the Commission's services and the Belgian authorities on 13 June 2013.
- (4) By letter dated 4 December 2013, the Commission informed Belgium of its decision (hereinafter 'the opening decision') ⁽³⁾ to initiate the procedure laid down in Article 108(2) TFEU (hereinafter 'the formal investigation procedure').
- (5) The Belgian authorities submitted their comments and their replies to the questions raised in the opening decision by letters dated 3 March, 1 April and 4 and 27 July 2014. They provided supplementary information by e-mail on 17 September, 17 October and 21 November 2014. By 21 November 2014, the Commission had all the information it needed to examine the scheme's compatibility with the internal market.
- (6) The firm D39S SPRL submitted comments on 9 April 2014. By letter dated 16 May 2014, the Commission forwarded these comments to the Belgian authorities. They did not submit any comments in response.

2. DESCRIPTION OF THE MEASURE

2.1. Objective of the measure

- (7) The scheme was approved by Commission Decision C(2006) 2941 final of 4 July 2006 ⁽⁴⁾ (hereinafter 'the Decision').

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty, where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union', 'common market' by 'internal market' and 'Court of First Instance' by 'General Court'. The terminology used in this Decision is that of the TFEU.

⁽²⁾ OJ C 69, 7.3.2014, p. 122.

⁽³⁾ See footnote 2.

⁽⁴⁾ OJ C 209, 31.8.2006, p. 10.

- (8) The scheme provided for the following three measures:
- (a) an exemption for the employment of researchers assigned to research projects carried out in partnership with universities or higher education colleges (hereinafter 'measure 1'): 50 % exemption from payroll tax for companies paying salaries to researchers assigned to research projects carried out under partnership agreements with universities or higher education colleges based in the European Economic Area ⁽⁵⁾. The budget allocated to measure 1 was estimated at EUR 34 000 000;
 - (b) an exemption for the employment of researchers holding certain qualifications (hereinafter 'measure 2'): 25 % exemption from payroll tax for companies paying salaries to researchers holding certain scientific qualifications ⁽⁶⁾. The budget allocated to measure 2 was estimated at EUR 62 000 000;
 - (c) an exemption for young innovative companies (hereinafter 'measure 3'): 50 % exemption from payroll tax for companies qualifying as 'young innovative companies' ⁽⁷⁾ and paying the salaries of their scientific staff. The budget allocated to measure 3 was estimated at EUR 20 000 000.
- (9) Payroll tax is withheld at source on employees' salaries by all employers and paid to the State. The three measures referred to in recital 8 exempt the companies concerned from paying part of the payroll tax withheld on the salaries of the researchers identified in recital 8 points (a) and (b) and the scientific staff identified in recital 8 point (c).
- (10) In the Decision the Commission took the view that measures 1 and 2 were general measures that did not constitute State aid within the meaning of Article 107(1) TFEU.
- (11) Measure 3 did count as State aid within the meaning of Article 107(1) TFEU but on investigation was found to be compatible with the internal market in accordance with the criteria set out in Commission Regulation (EC) No 70/2001 ⁽⁸⁾.
- (12) Article 5a of Regulation (EC) No 70/2001 sets out the rules on aid for research and development. Measure 3 was qualified as aid for R&D projects whose eligible costs were personnel costs in respect of staff employed on a research project ⁽⁹⁾. The aid intensity ceiling of 35 % is the ceiling applicable to pre-competitive development projects ⁽¹⁰⁾.

2.2. Grounds for initiating the formal investigation procedure

- (13) The monitoring exercise identified some irregularities in respect of both the provisions of Belgian law establishing measure 3 and its implementation. The Commission therefore initiated the formal investigation procedure in the light of the following factors:
- (a) Belgium had failed to adopt the necessary measures to bring its legislation into line with Union law. The relevant provisions of national law did not contain any reference to the categories of research laid down in the EU legislation. They were not brought into line until June 2013 ⁽¹¹⁾;
 - (b) Belgium had failed to amend the scheme to bring it into line before 1 January 2008 with the appropriate measures proposed by the Commission and accepted by Belgium ⁽¹²⁾;

⁽⁵⁾ See recital 5 of the Decision of 4 July 2006.

⁽⁶⁾ See recital 8 of the Decision of 4 July 2006.

⁽⁷⁾ See recital 12 of the Decision of 4 July 2006.

⁽⁸⁾ Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33).

⁽⁹⁾ See recital 26 of the Decision.

⁽¹⁰⁾ See Article 5a(3)(c) of Regulation (EC) No 70/2001, as amended by Commission Regulation (EC) No 364/2004 of 25 February 2004 amending Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development (OJ L 63, 28.2.2004, p. 22).

⁽¹¹⁾ See recitals 17 et seq. of the opening decision.

⁽¹²⁾ Letter from the Government of the Brussels Capital Region dated 22 February 2008, letter from the Government of the Walloon Region dated 17 March 2008 and letter from the Government of the Flemish Region dated 3 July 2007.

- (c) Belgium had failed to notify the Commission of either the amendment or the extension of the scheme and had therefore implemented unlawful aid ⁽¹³⁾; and
 - (d) during the monitoring exercise, Belgium failed to produce sufficient information on the individual aid paid out.
- (14) The Commission also examined in the opening decision the question of the applicable legal basis for analysing the compatibility with the internal market of the aid granted unlawfully under the scheme. In recital 40, it concluded that the aid should be analysed in the light of the Community framework for State aid for research and development and innovation (hereinafter 'the R&D&I Framework') ⁽¹⁴⁾.

3. COMMENTS BY THE BELGIAN AUTHORITIES

- (15) During the screening exercise, the Belgian authorities acknowledged that they had failed to amend the national legislation to include a reference to the categories of research as referred to in recital 13(a), to notify the amendments to the scheme (believing that they had been made in the spirit of the Decision) and to notify the Commission that the scheme had been extended beyond 4 July 2011.
- (16) By letters dated 3 March and 1 April 2014, the Belgian authorities sent the list of companies that had benefited from the exemption from payroll tax between 2006 and 2013 (most recent tax data available). A total of 231 companies had benefited from the scheme over the period as a whole.
- (17) The Belgian authorities also stated in their letter dated 3 March 2014 that they were looking into the compatibility of the scheme with Commission Regulation (EU) No 651/2014 ⁽¹⁵⁾ and in particular Article 25 thereof on aid to research and development projects. The Belgian authorities have not informed the Commission of the outcome of this exercise.

4. COMMENTS BY THIRD PARTIES

- (18) The firm D39S, a research and development centre in the electronics and telecommunications sector, stated that the exemption from payroll tax provided significant support to young innovative companies enabling them to hire additional staff. The exemption had allowed it to increase its research and development activity while still responding quickly to market demands.

5. ASSESSMENT OF THE AID

5.1. Existence of State aid within the meaning of Article 107(1) TFEU

- (19) According to Article 107(1) TFEU 'any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (20) For a national measure to be qualified as State aid, the following cumulative criteria therefore have to be met: (i) the measure must confer an economic advantage on its recipient; (ii) the advantage must be imputable to the State; (iii) the advantage must be selective; and (iv) the measure must distort or threaten to distort competition and be likely to affect trade between Member States.
- (21) In the case at hand, the exemption from payroll tax granted to young innovative companies is a tax measure financed by state resources. The measure is available only to companies that fall under the definition of young innovative company and, as such, it is selective. By helping to finance their research and development costs, the measure confers an economic advantage on them. Lastly, as the beneficiaries operate in markets that are open to intra-EU trade, the measure is likely to affect competition and trade between Member States.
- (22) The scheme was classed as State aid in the Decision ⁽¹⁶⁾. The Belgian authorities did not dispute this classification during the monitoring exercise.

⁽¹³⁾ See recitals 22 to 27 of the opening decision.

⁽¹⁴⁾ OJ C 323, 30.12.2006, p. 1.

⁽¹⁵⁾ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1).

⁽¹⁶⁾ See recital 21 of the Decision of 4 July 2006.

5.2. Lawfulness of the aid

- (23) In the opening decision, the Commission found that, by failing to notify that the rate of exemption from payroll tax had been increased (from 50 % to 75 % by the Economic Recovery Act of 27 March 2009, and from 75 % to 80 % by the Act of 17 June 2013 laying down tax and financial provisions and provisions on sustainable development) and that the scheme had been extended beyond 4 July 2011 (the Decision provided for an initial duration of 5 years), Belgium had implemented unlawful aid. Belgium did not contest this finding and during the formal investigation procedure provided the data on the aid received by the beneficiaries under the scheme that the Commission needed in order to assess the compatibility of the aid.

5.3. Assessment of the compatibility of the aid with the internal market

- (24) In recital 40 of the opening decision, the Commission concluded that the compatibility of the scheme should be examined in the light of the R&D&I Framework, while leaving open the question of which section of the framework was applicable: the rules on aid for R&D projects (point 5.1 of the R&D&I Framework) or the rules on aid for young innovative enterprises (point 5.4 of the R&D&I Framework), given that the scheme appeared to target this specific category of undertaking.

5.3.1. Methodology

- (25) As indicated in recital 16 above, the Belgian authorities stated that 231 companies had benefited from the scheme during the reference period. An analysis of the data revealed that:

(a) 183 companies received aid of less than EUR 200 000 per period of 3 years over the whole reference period. This aid is covered by the *de minimis* Commission Regulation (EC) No 1998/2006⁽¹⁷⁾ and was therefore excluded from the scope of the analysis;

(b) the remaining 48 companies received aid in excess of EUR 200 000 and were therefore subject to an in-depth analysis. In respect of these companies, the Belgian authorities provided information on:

- the research categories to which the projects carried out by the beneficiaries belonged (for the purposes of verifying compliance with the conditions set out in point 5.1 of the R&D&I Framework),
- the method for calculating the aid intensity, together with examples (for the purposes of verifying compliance with the conditions set out in point 5.1 of the R&D&I Framework),
- the date on which each company was set up (for the purposes of verifying compliance with the first condition set out in point 5.4 of the R&D&I Framework),
- the percentage of company expenditure allocated to research and development (for the purposes of verifying compliance with the second condition set out in point 5.4 of the R&D&I Framework),
- of the total amount received by each company, the proportion falling under measure 3 (and thus constituting State aid) and the proportion falling under measures 1 and 2 (for the purposes of verifying compliance with the third condition set out in point 5.4 of the R&D&I Framework).

- (26) Analysis of the last item (proportion of aid falling under measure 3) reduced the scope of the assessment as the amount of aid received under measure 3 was less than the total amount communicated by the Belgian authorities (for the scheme as a whole). Of the 48 companies referred to in recital 25(b), 14 received aid under measure 3 of more than EUR 200 000 over the reference period as a whole.

5.3.2. Analysis in the light of the rules on aid for R&D projects (point 5.1 of the R&D&I Framework)

- (27) Point 5.1 of the R&D&I Framework sets out the criteria that have to be met for aid for R&D projects to be found compatible with the internal market.

⁽¹⁷⁾ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5).

- (a) According to point 5.1.1, 'the aided part of the research project must completely fall within one or more of the following research categories: fundamental research, industrial research, experimental development.'

The royal decree of 23 March 2014 ⁽¹⁸⁾ now provides that the Federal Scientific Policy Programming Department (*Service public fédéral de Programmation Politique scientifique*) is responsible, when examining the file, for checking the 'description of research or development projects or programmes in respect of which an opinion is requested' and thus for establishing whether the projects fall into one of the research categories provided for by the R&D&I Framework and the law. For each of the 48 companies subject to an in-depth review, the Belgian authorities provided a description of the research and development activities carried out and indicated which research category the projects fell into. The Commission was able to establish that the projects fell into one of the three categories laid down in the R&D&I Framework and concluded that the condition laid down in point 5.1.1 of the Framework had been met.

- (b) Point 5.1.2 of the R&D&I Framework gives the basic aid intensities (25 % for experimental development), which may be increased in certain cases, such as where the aid is to be given to SMEs (point 5.1.3(a) of the R&D&I Framework).

In their letter dated 3 March 2014, the Belgian authorities provided additional information on the two withholding rate increases that brought the applicable tax reduction to 80 %, in particular as regards compliance with the aid intensities laid down by the Decision. Applying the calculation method chosen by the Commission in the Decision, the Belgian authorities were able to show that an increase to an 80 % exemption from payroll tax resulted in a maximum intensity of 28,28 %. They also provided details of the intensities for the companies subject to an in-depth review. The Commission found that they were in line with point 5.1.3 of the R&D&I Framework, which lays down a ceiling of 35 % for medium-sized enterprises and 45 % for small enterprises for experimental development projects. The ceilings are higher for fundamental and industrial research.

- (c) Point 5.1.4 of the R&D&I Framework sets out the eligible costs. In recital 16 of the opening decision, the Commission noted that the relevant provisions of national law gave the categories of personnel for whom the exemption could be granted but did not specify how the tax authorities were to verify whether the staff concerned were assigned to a research and development project.

The Royal Decree of 23 March 2014 now provides that the Federal Scientific Policy Programming Department is responsible, when examining the file, for checking 'the elements that demonstrate that the staff member will be employed on research and development projects or programmes' using data provided by the applicant firms. The Commission finds that the relevant national legislation and its application by the Belgian authorities complies with point 5.1.4 of the R&D&I Framework.

For the 48 companies subject to an in-depth review, the Belgian authorities described the projects carried out by them and indicated the number and type of staff in respect of whom the exemption had been granted.

- (28) In the light of the above, the Commission concludes that the aid paid out under measure 3 meets the requirements of point 5.1 of the R&D&I Framework.

5.3.3. Analysis in the light of the rules on aid for young innovative enterprises (point 5.4 of the R&D&I Framework)

- (29) In the opening decision, the Commission indicated that, because the scheme implemented aid in favour of young innovative companies, its compatibility was also to be examined on the basis of point 5.4 of the R&D&I Framework on aid to young innovative enterprises (recital 46). However, the Commission had doubts about whether the beneficiaries of the scheme met all the conditions set out in point 5.4 (definition of small enterprise, age, percentage of expenditure allocated to R&D, amount of aid).
- (30) An analysis of the data provided by the Belgian authorities showed that at the end of 2013 only two companies met all the conditions laid down in point 5.4 of the R&D&I Framework (while also meeting the requirements of point 5.1).

⁽¹⁸⁾ Royal Decree of 23 March 2014 amending, in respect of the exemption from the payment of payroll tax to the State, AR/CIR 92, pursuant to Article 275(2) and (3) of the Income Tax Code 1992. *Belgisch Staatsblad/Moniteur Belge*, 31.3.2014.

- (31) The Commission therefore concluded that point 5.1 of the R&D&I Framework on aid for research and development projects was the appropriate legal basis.

5.3.4. Compatibility of the scheme after 1 July 2014

- (32) The R&D&I Framework, on the basis of which the scheme's compatibility was assessed, expired on 30 June 2014.
- (33) After 1 July 2014, if the conditions of Chapter 1 are met and if the requirements of Article 25 (aid for research, development and innovation) are complied with, the scheme could be covered by the exemption available under the GBER. The Belgian authorities are invited to inform the Commission of the outcome of their analysis and, if needed, to notify the prolongation of the scheme.

6. CONCLUSION

- (34) The Commission finds that Belgium has unlawfully implemented the scheme in breach of Article 108(3) TFEU. However, in the light of the above, the Commission considers that the continued application of the scheme by the Belgian authorities after 4 July 2011 and the amendments made to it are compatible with the internal market under Article 107(3)(c) TFEU until 30 June 2014,

HAS ADOPTED THIS DECISION:

Article 1

The partial exemption from payroll tax in favour of young innovative companies implemented by Belgium is compatible with the internal market under Article 107(3)(c) TFEU until 30 June 2014.

Article 2

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 23 January 2015.

For the Commission
Margrethe VESTAGER
Member of the Commission
