



Press and Information

General Court of the European Union

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Judgment in Case T-648/19

Nike European Operations Netherlands and Converse Netherlands v  
Commission

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## **Tax rulings issued to Nike and Converse by the Netherlands tax administration: the General Court dismisses the action brought against the Commission's decision to initiate the formal investigation procedure**

*The Commission complied with the procedural rules, and neither failed to fulfil its obligation to state reasons nor made manifest errors of assessment*

In 2019, the Commission decided to initiate a formal investigation procedure in respect of tax rulings issued by the Netherlands tax administration to Nike European Operations Netherlands ('Nike') in 2006, 2010 and 2015, and to Converse Netherlands ('Converse') in 2010 and 2015.<sup>1</sup> Nike and Converse are two Netherlands subsidiaries of a Netherlands holding company, Nike Europe Holding, owned by Nike Inc., which is established in the United States.

Those tax rulings validate for tax purposes a transfer pricing arrangement, in particular the level of royalties payable by Nike and Converse to other Nike group companies, which are not taxed in the Netherlands, in return for the use of intellectual property rights. The royalties are tax deductible from the taxable revenue of Nike and Converse in the Netherlands.

According to the Commission's provisional assessment, those tax rulings conferred a selective advantage in that the corporate income tax for which Nike and Converse were liable in the Netherlands was calculated on the basis of an annual level of profit lower than it would have been if those companies' intra-group transactions had been priced at arm's length for tax purposes. The amount of royalties owed by Nike and Converse did not correspond to the amount that would have been negotiated under market conditions for a comparable transaction between independent companies.

It is against that background that the Commission decided, in 2019, to open a formal investigation procedure to determine whether there might be any unlawful State aid.

Nike and Converse asked the General Court of the European Union to annul the Commission's decision. They put forward arguments alleging breach of the obligation to state reasons, manifest errors of assessment and non-compliance with procedural rights. **In its judgment today, the General Court does not accept any of the arguments put forward and dismisses the action in its entirety.**

### **Breach of the obligation to state reasons**

The Court notes in this regard that the decision to initiate the formal investigation procedure brings to a close the preliminary examination stage. Accordingly, the Commission's assessment of the measures at issue is not definitive and may evolve during the formal procedure for obtaining additional information from the Netherlands and any interested parties.

According to the Court, the contested decision contains a clear and unequivocal statement of reasons; therefore the applicants cannot complain that the Commission's reasoning as regards the individual character of the measures at issue was incomplete. Consequently, the Commission did

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<sup>1</sup> Commission Decision C(2019) 6 final of 10 January 2019 on State aid SA.51284 (2018/NN) (OJ 2019 C 226, p. 31).

not fail to fulfil its obligation to state reasons by failing to set out reasons as to whether or not an aid scheme exists in the present case.

Furthermore, the statement of reasons for the contested decision, in respect of the examination of the selectivity of the measures at issue, does not contain any internal inconsistency. Likewise, the Commission satisfied its obligation to state reasons with regard to assessing the comparability of Nike's situation with that of other undertakings.

### **Manifest errors of assessment and incorrect assessment of the selective nature of the measures at issue**

As regards the argument that the tax rulings at issue are merely declaratory in nature and do not constitute a prerequisite for operating in the Netherlands or for using the arm's length principle, the Court recalls the relevant case-law. It notes that it is for the Commission to compare the taxable profit of the beneficiary with the position, as it would be if the normal tax rules under Netherlands law were applied, of an undertaking in a factually comparable situation, carrying on its activities in conditions of free competition. Against that background, although, for a given intra-group transaction, a certain level of pricing is accepted by the tax rulings, it is necessary to check whether that pricing corresponds to prices that would have been charged under market conditions.

Having regard to the difficulties inherent in such an analysis, the initiation of the formal investigation procedure cannot reasonably be challenged.

Moreover, the conditions giving rise to a provisional presumption as to the selectivity of the measures at issue were satisfied in the present case.

### **Premature initiation of the formal investigation procedure**

According to the applicants, it was not until the publication of an investigation by an international consortium of journalists in November 2017 and the ensuing political pressure that the Commission sent several further requests for information to the Netherlands and decided to target Nike unfairly. In their view, the Commission should have extended its preliminary examination to include the situation of companies to whom some 98 tax rulings similar to those of Nike were addressed, or the situation of some 700 companies that were using a company structure similar to that of Nike.

The Court recalls, however, that the aim of initiating the formal investigation procedure is to enable the Commission to obtain all the views it needs in order to be able to adopt a definitive decision. The Court finds that the Commission satisfied its obligation to initiate the formal investigation procedure when there were serious difficulties, and that it did so without making manifest errors of assessment.

The failure to extend the preliminary examination to include identification of a possible aid scheme from which the tax rulings at issue may have been derived cannot be accepted for the purposes of annulment of the contested decision. According to the Court, the Commission is entitled to treat a measure as being individual aid without being obliged to verify beforehand and as a matter of priority whether that measure may have been derived from such a scheme.

### **Principles of good administration and equal treatment**

Lastly, the Court finds that the Commission carried out its provisional assessment of the measures at issue in a diligent and impartial manner, and that it did not breach the principle of good administration. The same applies to the alleged breach of the principle of equal treatment.

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**NOTE:** An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

**NOTE:** An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If

the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery

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