Court of Justice of the European Union
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Press and Information

Judgment in Case C-337/19 P
Commission v Belgium and Magnetrol International

Tax exemptions granted by Belgium to multinational companies by way of *rulings*: the Commission correctly found that there was an aid scheme

The Court of Justice sets aside the judgment delivered on 14 February 2019 by the General Court and refers the case back to the latter for it to rule on other aspects of the case

Since 2005, Belgium has applied a system of exemptions for the excess profit of Belgian entities which form part of multinational corporate groups. Those entities were able to obtain a tax ruling from the Belgian tax authorities, if they could demonstrate the existence of a new situation, such as a reorganisation leading to the relocation of the central entrepreneur to Belgium, the creation of jobs, or investments. In that context, profits regarded as being 'excess', in that they exceeded the profit that would have been made by comparable standalone entities operating in similar circumstances, were exempted from corporate income tax.

In 2016, the Commission found that that system of excess profit exemptions constituted a State aid scheme that was unlawful and incompatible with the internal market [1] and ordered the recovery of the aid thus granted from 55 beneficiaries, including the company Magnetrol International. Belgium and Magnetrol International brought an action before the General Court of the European Union seeking the annulment of the Commission's decision.

On 14 February 2019, the General Court annulled the Commission's decision. It found, inter alia, that the Commission had wrongly concluded that the excess profit exemption scheme did not require further implementing measures and that that scheme therefore constituted an 'aid scheme' within the meaning of Regulation 2015/1589. [2] It also rejected the Commission's arguments relating to the existence of an alleged 'systematic approach' by the Belgian tax authorities.

On 24 April 2019, the Commission brought an appeal before the Court of Justice. According to the Commission, the General Court made errors in the interpretation of the definition of an 'aid scheme'.

In today's judgment, the Court of Justice notes that, for a state measure to be classified as an aid scheme, three cumulative conditions must be satisfied. First, aid may be granted individually to undertakings on the basis of an act. Secondly, no further implementing measure is required for that aid to be granted. Thirdly, undertakings to which individual aid may be granted must be defined 'in a general and abstract manner'.

As regards, first of all, the **first** condition, the Court clarifies the concept of an 'act'. It confirms that the term may also refer to a consistent administrative practice by the authorities of a Member State where that practice reveals a 'systematic approach'.

Although the General Court found that the legal basis of the scheme at issue resulted not only from a provision of the Code des impôts sur les revenus 1992 (Income Tax Code 1992; 'CIR 92'), [3] but

[1] Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium (OJ 2016 L 260, p. 61).
[2] Article 1(d) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).
[3] Article 185(2)(b) of the CIR 92.

also from the application of that provision by the Belgian tax authorities, it did not, however, draw all the appropriate conclusions from that finding. In particular, it did not take account of the fact that the Commission inferred the application of that provision not only from certain acts, [4] but also from a systematic approach on the part of those authorities.

The General Court did, however, rely on the incorrect premise that the fact that certain key facts of the scheme at issue were not apparent from those acts, but from the *rulings* themselves, meant that those acts necessarily had to be the subject of further implementing measures.

Consequently, by limiting its analysis to only the abovementioned normative acts, **the General Court misapplied the term 'act'**.

Next, as regards the **second** condition for defining an 'aid scheme', namely that no 'further implementing measures' are required, the Court of Justice notes that that issue is intrinsically linked to the determination of the 'act' on which that scheme is based.

In the context of that examination, the General Court failed to take account of the fact that one of the essential characteristics of the scheme at issue lay in the fact that the Belgian tax authorities had systematically granted the excess profit exemption when the conditions were satisfied.

Contrary to what the General Court held, the identification of such a systematic practice was capable of constituting a relevant factor in order to establish, where applicable, that the tax authorities did not in fact have any discretion.

As regards the **third** condition defining an 'aid scheme', namely that the beneficiaries of the excess profit exemption are defined 'in a general and abstract manner', the Court of Justice notes that that issue is also intrinsically linked to the first two conditions, relating to the existence of an 'act' and the absence of 'further implementing measures'. Accordingly, the errors of law made by the General Court concerning the first two conditions vitiated its assessment of the definition of the beneficiaries of the excess profit exemption.

The Court of Justice therefore concludes that the General Court made several errors of law. Furthermore, as regards proof of the existence of a 'systematic approach', the Court of Justice finds that the sample of rulings examined by the Commission (22 selected in a weighted manner from a total of 66) is, by its nature, capable of representing a 'systematic approach' taken by the Belgian tax authorities.

The Court of Justice therefore sets aside the judgment of the General Court. However, it finds that the state of the proceedings does not permit final judgment to be given as regards the pleas alleging, in essence, the incorrect classification of the excess profit exemption as State aid, in view of, inter alia, the absence of any advantage or selectivity, and as regards the pleas in law alleging, inter alia, infringement of the principles of legality and protection of legitimate expectations, in so far as the recovery of the alleged aid was incorrectly ordered, including from the groups to which the beneficiaries of that aid belong. The Court of Justice therefore refers the case back to the General Court for it to rule on those aspects of the case.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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[4] Namely Article 185(2)(b) of the CIR 92, the explanatory memorandum to the Law of 21 June 2004, the Circular of 4 July 2006 and the replies given by the Minister for Finance to parliamentary questions on the application of Article 185(2)(b) of the CIR 92.

The full text of the judgment is published on the CURIA website on the day of delivery.

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