Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

16 September 2021 *

(Appeal – State aid – Aid scheme implemented by the Kingdom of Belgium – Excess profit exemption – Tax ruling – Consistent administrative practice – Regulation (EU) 2015/1589 – Article 1(d) – Concept of 'aid scheme' – Concept of 'act' – Concept of 'further implementing measures' – 'General and abstract' definition of beneficiaries – Cross-appeal – Admissibility – Fiscal autonomy of the Member States)

In Case C-337/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 24 April 2019,

European Commission, represented by P.-J. Loewenthal and F. Tomat, acting as Agents,

appellant,

the other parties to the proceedings being:

Kingdom of Belgium, represented by J.-C. Halleux, C. Pochet and M. Jacobs, acting as Agents, and by M. Segura and M. Clayton, avocates,

Magnetrol International, established in Zele (Belgium), represented by H. Gilliams and L. Goossens, advocaten,

applicants at first instance,

Soudal NV, established in Turnhout (Belgium),

Esko-Graphics BVBA, established in Ghent (Belgium),

represented by H. Viaene, avocat,

Flir Systems Trading Belgium BVBA, established in Meer (Belgium), represented by T. Verstraeten and C. Docclo, avocats, and by N. Reypens, advocaat,

Anheuser-Busch InBev SA/NV, established in Brussels (Belgium),

Ampar BVBA, established in Leuven (Belgium),

* Language of the case: English.

Atlas Copco Airpower NV, established in Antwerp (Belgium)

Atlas Copco AB, established in Nacka (Sweden),

represented by A. von Bonin, Rechtsanwalt, W.O. Brouwer and A. Pliego Selie, advocaten, and by A. Haelterman, avocat,

Wabco Europe BVBA, established in Brussels, represented by E. Righini and L. Villani, avvocati, S. Völcker, Rechtsanwalt, and by A. Papadimitriou, avocat,

Celio International NV, established in Brussels, represented by H. Gilliams and L. Goossens, advocaten,

interveners in the appeal,

Ireland,

intervener at first instance,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby, S. Rodin and K. Jürimäe (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 24 September 2020,

after hearing the Opinion of the Advocate General at the sitting on 3 December 2020,

gives the following

Judgment

1 By its appeal, the European Commission asks the Court of Justice to set aside the judgment of the General Court of the European Union of 14 February 2019, *Belgium and Magnetrol International* v *Commission* (T-131/16 and T-263/16, EU:T:2019:91; 'the judgment under appeal'), by which the General Court annulled Commission 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; 'the decision at issue').

2 By its cross-appeal, the Kingdom of Belgium asks the Court of Justice to set aside in part the judgment under appeal in so far as, by that judgment, the General Court rejected the first plea for annulment.

Legal context

3 Under 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):

‘For the purposes of this Regulation, the following definitions shall apply:

…

(d) “aid scheme” means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount’.

4 Article 1(e) of that regulation defines ‘individual aid’ as ‘aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme’.

Background to the dispute and the decision at issue

5 The factual background to the dispute was set out by the General Court in paragraphs 1 to 28 of the judgment under appeal. For the purposes of the present proceedings, they may be summarised as follows.

Belgian law

The CIR 92

6 In Belgium, the rules for the taxation of income are laid down in the Code des impôts sur les revenus 1992 (Income Tax Code 1992; ‘the CIR 92’). Article 1(1) of the CIR 92 establishes, inter alia, an income tax on the total income of resident companies, namely the ‘corporate income tax’.

7 With regard specifically to the taxable income subject to corporate income tax, Article 185 of the CIR 92 provides that companies are to be taxed on the total amount of their profits, including distributed dividends.

The Law of 24 December 2002

8 Article 20 of the loi du 24 décembre 2002, modifiant le régime des sociétés en matière d’impôts sur les revenus et instituant un système de décision anticipée en matière fiscal (Law of 24 December 2002 amending the corporate income tax system and establishing an advance tax ruling system) (*Moniteur belge* of 31 December 2002, p. 58815; ‘the Law of 24 December 2002’) provides that the Service public fédéral des Finances (Belgian Federal Public Service for Finance; ‘SPF Finances’) ‘may take a position by way of an advance tax ruling on all requests relevant to the application of tax law provisions’. In addition, the concept of a ‘tax ruling’ is defined as the

legal act by which SPF Finances determines, in accordance with the applicable provisions, how the law will apply to a particular situation or transaction that has not yet had tax consequences. It is also indicated that the tax ruling cannot entail exemption from or reduction of the tax.

9 Article 22 of the Law of 24 December 2002 provides that a tax ruling cannot be granted, inter alia, when the request concerns situations or transactions identical to those having already had tax consequences as regards the requesting party.

10 In addition, Article 23 of the Law of 24 December 2002 provides that, except in cases where the subject matter of the request warrants it, a tax ruling is issued for a period that may not exceed five years.

The Law of 21 June 2004

11 By the loi du 21 juin 2004, modifiant le Code des impôts sur les revenus 1992 et la loi du 24 décembre 2002 modifiant le régime des sociétés en matière d'impôts sur les revenus et instituant un système de décision anticipée en matière fiscale (Law of 21 June 2004 amending the Income Tax Code 1992 and the Law of 24 December 2002 amending the corporate income tax system and establishing an advance tax ruling system (*Moniteur belge* of 9 July 2004; 'the Law of 21 June 2004'), the Kingdom of Belgium introduced new fiscal rules concerning the cross-border transactions of associated undertakings which are part of a multinational group, providing in particular for an adjustment of the profit subject to taxation, known as a 'correlative adjustment'.

– *The Explanatory Memorandum*

12 According to the explanatory memorandum to the draft law presented by the Belgian Government before the Chambre des députés (the Chamber of Deputies, Belgium), that law is intended to amend the CIR 92 in order to include explicitly the internationally accepted 'arm's length' principle. Moreover, it is intended to amend the Law of 24 December 2002 in order to grant the Service des Décisions Anticipées en matière fiscale (the Ruling Commission; 'the SDA') the power to issue tax rulings. The arm's length principle was introduced into Belgian tax legislation by the addition of a second paragraph to Article 185 of the CIR 92, based on the text of Article 9 of the Model Tax Convention on Income and Capital of the Organisation for Economic Co-operation and Development (OECD). The purpose of Article 185(2) of the CIR 92 is to ensure that the tax base of companies subject to taxation in Belgium may be modified by adjustments to the profit resulting from intra-group cross-border transactions, where the transfer prices applied do not reflect market mechanisms and the arm's length principle. In addition, the concept of an 'appropriate adjustment' introduced by Article 185(2)(b) of the CIR 92 is justified as a means of avoiding or undoing double taxation. It is also stated that that adjustment must be carried out on a case-by-case basis in the light of the available information provided, in particular by the taxpayer, and that a correlative adjustment should be made only if the Belgian tax authorities consider both the principle and the amount of the primary adjustment made in another State to be justified.

– *Article 185(2) of the CIR 92*

13 Article 185(2) of the CIR 92 provides as follows:

'… For two companies that are part of a multinational group of affiliated companies and in respect of their reciprocal cross-border relationships:

(a) when two companies are, in the course of their commercial and financial relationships, linked by terms and conditions agreed upon or imposed on them which are different from those which would have been agreed upon between unaffiliated companies, the profit which – under those terms and conditions – would have been made by one of the companies but is not because of those terms and conditions, may be included in the profit of that company;

(b) when profit is included in the profit of one company which is already included in the profit of another company and the profit so included is profit which should have been made by that other company if the terms and conditions agreed between the two companies had been those which would have been agreed between unaffiliated companies, the profit of the first company is adjusted in an appropriate manner.'

The Circular of 4 July 2006

14 The Circulaire du 4 juillet 2006 sur l'application du principe de pleine concurrence (Circular of 4 July 2006 on the application of the arm's length principle; 'the Circular of 4 July 2006') was sent to officials of the general tax administration (Belgium), on behalf of the Minister for Finance, in order to provide guidance on, inter alia, the insertion of paragraph 2 to Article 185 of the CIR 92 and the corresponding amendments to that code. The Circular of 4 July 2006 underlines that those amendments, in force since 19 July 2004, are intended to transpose the arm's length principle into Belgian tax law and constitute the legal basis enabling the adjustment, in the light of that principle, of the taxable profit resulting from intra-group cross-border relationships between affiliated companies that are part of a multinational group.

15 Thus, first, the Circular of 4 July 2006 states that the upward adjustment provided for in Article 185(2)(a) of the CIR 92 allows the profit made by a resident company that is part of a multinational group to be increased in order to reflect the profit that the resident company would have made from a transaction carried out at arm's length.

16 Secondly, the Circular of 4 July 2006 states that the downward correlative adjustment, provided for in Article 185(2)(b) of the CIR 92, is intended to avoid or undo a double taxation. That circular states that no criteria may be established in that respect, since that adjustment must be carried out on a case-by-case basis in the light of the available information provided, in particular, by the taxpayer. It is also noted that a correlative adjustment should be made only if the Belgian tax authorities or the SDA consider both the principle and the amount of the primary adjustment to be justified. Moreover, it is specified that Article 185(2)(b) of the CIR 92 does not apply if the profit made in the partner State is increased such that it is greater than the profit that would have been obtained had the arm's length principle been applied.

The replies given by the Minister for Finance to parliamentary questions on the application of Article 185(2)(b) of the CIR 92

17 On 13 April 2005, in response to parliamentary questions concerning the excess profit exemption, the Minister for Finance, first of all, confirmed that Article 185(2)(b) of the CIR 92 concerned the situation in which a tax ruling was issued concerning a method intended to arrive at an arm's length profit. Next, he confirmed that the profit recorded in the Belgian financial reports of an international group active in Belgium which exceeded an arm's length profit should not be taken into account in the determination of the profit taxable in Belgium. Lastly, he approved the position that it was not for the Belgian tax authorities to determine which foreign companies should include that excess profit in their profit.

18 On 11 April 2007, in response to a further series of parliamentary questions concerning the application of Article 185(2)(a) and (b) of the CIR 92, the Minister for Finance stated that only requests for a downward adjustment had thus far been received. In addition, he stated that in determining the method for establishing the arm's length profit of a Belgian entity, in the context of tax rulings, account was taken of the tasks performed, the risks assumed and the assets used in activities that had not yet had tax consequences in Belgium. Thus, the profit recorded in Belgium in the Belgian financial reports of a multinational group which exceeded the arm's length profit should not be included in the taxable profit in Belgium. Lastly, the Minister for Finance stated that, since it was not for the Belgian tax authorities to determine to which foreign companies the excess profit ought to be attributed, it was not possible to exchange information with foreign tax administrations in that regard.

19 Lastly, on 6 January 2015, the Minister for Finance confirmed that the principle behind the tax rulings was to tax the profit corresponding to the arm's length profit of the company concerned and endorsed the replies given by his predecessor, on 11 April 2007, concerning the fact that the Belgian tax authorities did not have to establish to which foreign companies the excess profit not taxed in Belgium ought to be attributed.

The decision at issue

20 By the decision at issue, the Commission found that the exemptions granted by the Kingdom of Belgium, by means of tax rulings under Article 185(2)(b) of the CIR 92, constituted an aid scheme within the meaning of Article 107(1) TFEU that was incompatible with the internal market and had been put into effect in breach of Article 108(3) TFEU. The Commission ordered that the aid granted be recovered from the beneficiaries, a definitive list of which was to be drawn up by the Kingdom of Belgium following the decision.

21 In the first place, as regards the assessment of the aid measure (recitals 94 to 110 of the decision at issue), the Commission considered that the measure in question constituted an aid scheme, based on Article 185(2)(b) of the CIR 92, as applied by the Belgian tax authorities. That application was explained in the explanatory memorandum to the Law of 21 June 2004, the Circular of 4 July 2006 and the Minister for Finance's replies to parliamentary questions on the application of Article 185(2)(b) of the CIR 92. According to the Commission, those acts constituted the basis on which the exemptions in question were granted. In addition, the Commission considered that those exemptions were granted without further implementing measures being required, since the tax rulings were merely technical applications of the scheme at issue. Furthermore, the

Commission stated that the beneficiaries of the exemptions were defined in a 'general and abstract manner' by the acts on which the scheme was based. Those acts referred to entities that form part of a multinational group of companies.

22 In the second place, as regards the conditions for applying Article 107(1) TFEU (recitals 111 to 117 of the decision at issue), first, the Commission indicated that the excess profit exemption constituted an intervention by the State, imputable to it, and gave rise to a loss of State resources, since it resulted in a reduction of the tax liability in Belgium of undertakings benefiting from the scheme. Secondly, it considered that the scheme at issue was liable to affect trade between Member States, since the undertakings that benefited from the scheme were multinational companies operating in several Member States. Thirdly, the Commission underlined that the scheme at issue relieved the undertakings benefiting from it from a burden they would otherwise be obliged to bear and that, consequently, that scheme distorted or threatened to distort competition by strengthening the financial position of those undertakings. Fourthly, the Commission considered that the scheme at issue conferred a selective advantage on Belgian entities and thus benefited only the multinational groups to which those entities belonged.

23 In the third place, the Commission considered that the measures at issue constituted operating aid and were therefore incompatible with the internal market. Furthermore, since those measures had not been notified to the Commission pursuant to Article 108(3) TFEU, they constituted unlawful aid (recitals 189 to 194 of the decision at issue).

24 As regards the recovery of the aid (recitals 195 to 211 of the decision at issue), the Commission stated that the Kingdom of Belgium could not rely on the principle of the protection of legitimate expectations or on the principle of legal certainty in order to justify a failure to fulfil its obligation to recover the incompatible aid which was unlawfully granted and that the amounts to be recovered from each beneficiary could be calculated on the basis of the difference between the tax that would have been due, based on the profit actually recorded, and the tax actually paid as a result of the tax ruling.

The procedure before the General Court and the judgment under appeal

25 By applications lodged at the Registry of the General Court on 22 March and 25 May 2016, the Kingdom of Belgium and Magnetrol International brought actions seeking annulment of the decision at issue.

26 The Court decided to join Cases T-131/16, *Belgium* v *Commission* and T-263/16, *Magnetrol International* v *Commission* for the purposes of the oral part of the procedure and the decision closing the proceedings, in accordance with Article 68(2) of its Rules of Procedure.

27 In support of its action for annulment, the Kingdom of Belgium raised five pleas in law. The first plea alleged a breach of Article 2(6) TFEU and of Article 5(1) and (2) TEU, in that the Commission encroached upon the tax jurisdiction of the Kingdom of Belgium. The second plea alleged an error of law and a manifest error of assessment, in that the Commission wrongly classified the measures at issue as an aid scheme. That plea was divided into two parts, disputing, first, the identification of the acts on which the scheme at issue was based, and, second, the finding relating to the lack of further implementing measures. The third plea alleged a breach of Article 107 TFEU, in that the Commission considered that the excess profit exemption scheme constituted a State aid measure. The fourth plea alleged that the Commission made a manifest error of assessment regarding the

identification of the beneficiaries of the alleged aid. The fifth plea, raised in the alternative, alleged infringement of the general principle of legality and of Article 16(1) of Regulation 2015/1589, in that the decision at issue ordered recovery from the multinational groups to which the Belgian entities that were issued with a tax ruling belong.

28 In support of its action for annulment, Magnetrol International raised four pleas in law. The first plea alleged a manifest error of assessment, abuse of power and failure to provide adequate reasoning in so far as, in the decision at issue, the Commission alleged the existence of an aid scheme. The second plea alleged a breach of Article 107 TFUE and of the duty to state reasons and a manifest error of assessment in so far as, in the decision at issue, the Commission classified the scheme at issue as a selective measure. The third plea alleged a breach of Article 107 TFEU and of the duty to state reasons and a manifest error of assessment in so far as, in the decision at issue, the Commission considered that that scheme gave rise to an advantage. The fourth plea, raised 'in the alternative', alleged a breach of Article 107 TFEU, infringement of the principle of the protection of legitimate expectations, a manifest error of assessment, abuse of power, and failure to provide adequate reasoning, as regards the recovery of the aid ordered in the decision at issue, the identification of the beneficiaries and the amount to be recovered.

29 In the judgment under appeal, in the first place, the General Court examined the pleas raised by the Kingdom of Belgium and Magnetrol International, alleging, in essence, that the Commission misused its powers in relation to State aid and encroached upon the Kingdom of Belgium's exclusive jurisdiction in the field of direct taxation (first plea in Case T-131/16 and first part of the third plea in Case T-263/16). In paragraph 74 of the judgment under appeal, the General Court rejected those pleas as unfounded.

30 In the second place, the General Court examined the pleas raised by the Kingdom of Belgium and Magnetrol International, alleging, in essence, that the Commission had erred in finding that there was an aid scheme within the meaning of Article 1(d) of Regulation 2015/1589, in particular on account of the incorrect identification of the acts on which the scheme at issue was based and the incorrect finding that that scheme did not require further implementing measures (second plea in Case T-131/16 and first plea in Case T-263/16).

31 In paragraphs 86 to 88 of the judgment under appeal, first of all, the General Court set out the elements defining the concept of 'aid scheme' referred to in Article 1(d) of Regulation 2015/1589. Next, first, it examined, in paragraphs 90 to 98 of that judgment, whether the key facts of the scheme at issue were apparent from the provisions identified by the Commission as being the basis of that scheme, in order to determine, inter alia, whether individual aid was granted without further implementing measures being adopted. Secondly, in paragraphs 99 to 113 of that judgment, the General Court examined whether, when issuing tax rulings on the basis of which excess profits were not taxed, the Belgian tax authorities had any discretion enabling them to influence the amount of excess profit exemptions, the key facts of that scheme and the conditions under which that exemption was granted. Thirdly, in paragraphs 114 to 119 of that judgment, the General Court assessed whether the acts on which that scheme was based defined the beneficiaries 'in a general and abstract manner'.

32 Following that analysis, the General Court found, in paragraph 120 of the judgment under appeal, that the Commission had wrongly concluded that the excess profit exemption scheme, as defined in the decision at issue, did not require further implementing measures and that that scheme therefore constituted an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589. In paragraphs 121 to 132 of that judgment, the General Court also rejected the Commission's

arguments relating to the existence of an alleged 'systematic approach' by the Belgian tax authorities, which the Commission claimed to have identified through the examination of 22 out of the 66 existing tax rulings on the excess profit exemption, and the General Court held that those arguments did not call into question the conclusion set out in paragraph 120.

33 Accordingly, in paragraph 136 of the judgment under appeal, the General Court upheld the pleas in law raised by the Kingdom of Belgium and Magnetrol International, alleging infringement of Article 1(d) of Regulation 2015/1589. Consequently, without considering it necessary to examine the other pleas raised challenging the decision at issue, the General Court annulled that decision in its entirety.

Procedure before the Court of Justice and forms of order sought

34 By its appeal, the Commission claims that the Court should:

– set aside the judgment under appeal in so far as it finds that the decision at issue wrongly classified the excess profit exemption scheme as an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589;

– refer the case back to the General Court for it to rule on the pleas in law which have not been examined; and

– reserve the costs of the proceedings at first instance and on appeal.

35 The Kingdom of Belgium, Magnetrol International and the interveners in the appeal contend that the appeal should be dismissed and that the Commission should be ordered to pay the costs.

36 Ireland, intervener at first instance, did not wish to participate in the proceedings before the Court of Justice.

37 By orders of the President of the Court of Justice of 15 October 2019, Soudal NV, Esko-Graphics BVBA, Flir Systems Trading Belgium BVBA, Anheuser-Busch InBev SA/NV, Ampar BVBA, Atlas Copco Airpower NV, Atlas Copco AB, Wabco Europe BVBA and Celio International NV (together, 'the interveners in the appeal') were granted leave to intervene in support of the form of order sought by Magnetrol International.

38 By its cross-appeal, the Kingdom of Belgium claims that the Court should:

– set aside in part the judgment under appeal in so far as the General Court rejected the first plea for annulment raised by that Member State and rule on that plea;

– uphold the judgment under appeal, in so far as it annuls the decision at issue; and

– order the Commission to pay the costs incurred in the cross-appeal.

39 The Commission contends that the Court should dismiss the cross-appeal.

The appeal

Admissibility

Arguments of the parties

40 The Kingdom of Belgium and Magnetrol International, supported by the interveners in the appeal, submit, in essence, that the appeal brought by the Commission is inadmissible.

41 In the first place, Magnetrol International, supported in that regard by Soudal, Esko-Graphics and Wabco Europe, submits that, as set out, the form of order sought in the appeal seeks to have the judgment under appeal set aside only in so far as the General Court found that the Commission had incorrectly classified the excess profit exemption scheme as an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589. According to Magnetrol International, the Commission thus sought partial annulment of an indivisible part of the operative part of the judgment under appeal, with the result that that form of order sought is inadmissible.

42 In the second place, the Kingdom of Belgium, Soudal, Esko-Graphics and Flir Systems Trading Belgium submit that, by its appeal, the Commission is asking the Court of Justice to carry out a new assessment of the facts, without, however, adducing evidence demonstrating any distortion of those facts. Furthermore, the Commission's arguments are based on new facts, which seek, in particular, to rewrite the decision at issue a posteriori.

43 In the third place, the Kingdom of Belgium, Soudal and Esko-Graphics submit that the Commission has not indicated in sufficient detail the nature of the error made by the General Court in the interpretation of Article 1(d) of Regulation 2015/1589.

44 The Commission disputes those arguments and contends that the appeal is admissible.

Findings of the Court

45 As regards, in the first place, the complaint that the form of order sought in the Commission's appeal is inadmissible, it must be noted that, under Article 169(1) of the Rules of Procedure of the Court of Justice, 'an appeal shall seek to have set aside, in whole or in part, the decision of the General Court as set out in the operative part of that decision'.

46 That provision encapsulates the basic principle applying to appeals, namely that an appeal must be directed against the operative part of the General Court's decision and may not merely seek the amendment of some of the grounds of that decision (see, to that effect, judgment of 14 November 2017, *British Airways* v *Commission*, C-122/16 P, EU:C:2017:861, paragraph 51 and the case-law cited).

47 In the present case, contrary to what Magnetrol International submits, in essence, the form of order sought by the Commission before the Court, as set out in the first indent of paragraph 34 of the present judgment, seeks to have the judgment under appeal set aside in its entirety and not in part. By upholding the pleas in law raised by the Kingdom of Belgium and Magnetrol International, alleging an incorrect classification of the excess profit scheme as an 'aid scheme'

within the meaning of Article 1(d) of Regulation 2015/1589, the General Court annulled the decision at issue and it is point 2 of the operative part of the judgment under appeal which the Commission disputes in the appeal.

48 In those circumstances, that complaint must be rejected.

49 In the second place, the argument that the Commission's appeal seeks to have the Court of Justice re-examine findings of fact made by the General Court cannot succeed.

50 First, by its single ground of appeal, the Commission raises questions of law, relating to the General Court's interpretation of Article 1(d) of Regulation 2015/1589, in order to challenge the merits of the legal solution adopted by the General Court in the judgment under appeal, in particular in so far as it considered that the excess profit exemption scheme did not satisfy the conditions to be classified as an 'aid scheme' within the meaning of that provision. Consequently, the arguments which the Commission puts forward in that regard in the four parts of that single ground of appeal are admissible.

51 Second, in that single ground of appeal, the Commission also claims that the General Court distorted several recitals of the decision at issue, in particular in so far as it disregarded the Commission's finding in that decision that the excess profit scheme was based on a consistent administrative practice by the Belgian tax authorities, consisting of a systematic *contra legem* application of Article 185(2)(b) of the CIR 92.

52 Such a line of argument, which ultimately concerns the General Court's interpretation of the decision at issue and which, moreover, is based on a distortion by that Court of the facts and evidence relied on by the Commission, must be held to be admissible.

53 In addition, that line of argument also refers to paragraphs 121 to 134 of the judgment under appeal, by which the General Court ruled on whether the Commission had proved, to the requisite legal standard, the existence of the consistent administrative practice referred to in paragraph 51 of the present judgment and which, in the Commission's view, supported the conclusion that the excess profit exemption scheme constituted an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589. The examination of such a question, which concerns the statement of reasons for the decision at issue and the principles governing evidence, is admissible at the appeal stage.

54 In the third place, the complaint alleging that the appeal is imprecise must also be rejected.

55 In the light of the foregoing, it is sufficient to state that it is clear from the appeal that the Commission maintains that the General Court misinterpreted the conditions laid down in Article 1(d) of Regulation 2015/1589 and that it distorted certain recitals of the decision at issue. In that regard, the Commission identifies precisely not only those recitals, but also the paragraphs of the judgment under appeal which it seeks to criticise, with the result that that complaint must be rejected.

56 It follows from the foregoing that the appeal is admissible.

57 As to the remainder, in so far as the Kingdom of Belgium and Magnetrol International, supported by the interveners in the appeal, submit that that appeal is based on facts which are new or which seek to rewrite the decision at issue, those arguments are, so far as necessary, examined in the context of the assessment of the merits of that appeal.

Substance

Preliminary observations

58 The single ground of appeal raised by the Commission concerns errors made by the General Court in the interpretation of Article 1(d) of Regulation 2015/1589, which defines an 'aid scheme'.

59 Pursuant to that provision, an 'aid scheme' is defined as any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner.

60 Thus, 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'.

61 The Commission's single ground of appeal is divided into four parts. In essence, the first three parts relate, respectively, to the three conditions defining an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589. The fourth part concerns a failure by the General Court to have regard to the *ratio legis* of that provision.

The first part

– *Arguments of the parties*

62 By the first part of its single ground of appeal, the Commission submits that the General Court misinterpreted and misapplied the first condition laid down in Article 1(d) of Regulation 2015/1589. In the Commission's view, that interpretation led the General Court to distort recitals 94 to 110 of the decision at issue by concluding, in paragraphs 84, 90 to 120 and 125 of the judgment under appeal, that the Commission had considered that only the legislative measures referred to in recital 99 of that decision formed the basis of the scheme at issue.

63 According to the Commission, it is apparent from recitals 94 to 110 of that decision that it considered that that scheme was based on the consistent administrative practice by the Belgian tax authorities, which consisted of systematically applying Article 185(2) of the CIR 92 and doing so *contra legem*.

64 As regards the term 'act', used in Article 1(d) of Regulation 2015/1589, the Commission submits, in the first place, that, despite the differences between the different language versions of that regulation, that term can include a consistent administrative practice by the authorities of a Member State. The Commission argues that the case-law of the Court, arising from the judgment of 13 April 1994, *Germany and Pleuger Worthington* v *Commission* (C-324/90 and C-342/90, EU:C:1994:129, paragraphs 14 and 15), supports such an interpretation.

65 According to the Commission, in the judgment under appeal, the General Court used a restrictive interpretation of that term which led it to examine the excess profit exemption scheme by drawing an incorrect distinction between, on the one hand, the administrative practice constituting that scheme and, on the other, the legislative provisions on which it was based. In the Commission's view, the General Court should have analysed whether that scheme constituted an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589, in that it was based on the consistent administrative practice by the Belgian tax authorities, consisting of a systematic *contra legem* application of Article 185(2)(b) of the CIR 92.

66 In the second place, the Commission argues that it showed, to the requisite legal standard, in recitals 94 to 110 of the decision at issue, that the excess profit exemption scheme was based on such a consistent administrative practice. For that reason, the Commission has, on several occasions, drawn a distinction between, on the one hand, tax rulings relating to excess profit based, in accordance with that consistent administrative practice, on a systematic *contra legem* application of Article 185(2)(b) of the CIR 92 giving rise to a State aid scheme and, on the other hand, the tax rulings which are granted in compliance with that provision and do not give rise to any State aid.

67 In the third place, according to the Commission, the reasons set out in recitals 94 to 110 of the decision at issue must be assessed in the light of the context in which that decision was adopted, namely the Commission decision of 3 February 2015 in Case SA.37667 (2015/C) (ex 2015/NN) on the excess profit tax ruling system in Belgium – Article 185(2)(b) CIR 92 – Invitation to submit comments pursuant to Article 108(2) [TFEU] (OJ 2015 C 188, p. 24; 'the opening decision'). In the Commission's view, it is clear from the opening decision that the Commission has always considered that the excess profit exemption scheme was based on a consistent administrative practice consisting of the misapplication of Article 185(2)(b) of the CIR 92 and the legal rules governing the matter in question.

68 The Kingdom of Belgium submits that the first part of the single ground of appeal is unfounded.

69 Magnetrol International, supported by the interveners in the appeal, is of the opinion that, by that first part, the Commission is seeking to amend a posteriori the reasoning of the decision at issue and misreads the judgment under appeal.

70 In the alternative, those parties submit that, in order to demonstrate the existence of an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589, the Commission may rely on a 'systematic approach' by the authorities of a Member State only where it does not identify any legal act capable of forming the basis of the scheme at issue. In those parties' view, such an interpretation is supported by the case-law of the Court of Justice referred to in paragraphs 79 and 122 of the judgment under appeal. In the present case, recitals 97 to 99 of the decision at issue identify the legal acts which serve as a basis for the scheme at issue. Thus, the Commission cannot rely on a 'systematic approach' to conclude that such a scheme exists.

– *Findings of the Court*

71 In so far as the Commission alleges that the General Court misinterpreted the first condition laid down in Article 1(d) of Regulation 2015/1589, it is necessary to determine, in the first place, whether, as the Commission argues, a tax provision of a Member State must be regarded as being an 'act', within the meaning of Article 1(d) of Regulation 2015/1589, where it is the subject of a systematic *contra legem* application by the tax authorities of that Member State and, in the event

of there being such an application, whether account should be taken of the consistent administrative practice by those authorities in identifying acts constituting the aid scheme based on that tax provision.

72 As regards, first, the scope of the term 'act', referred to in Article 1(d) of Regulation 2015/1589, it must be noted that, in accordance with the wording of Article 1, that term refers to any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings.

73 In that regard, it should be noted that the wording of Article 1 does not make it possible to determine whether the term 'act' is capable of covering a scheme characterised, according to the Commission, by a systematic *contra legem* application of a Member State's tax provision by the tax authorities of that Member State as part of a consistent administrative practice. As the Commission submits, the different language versions of Article 1(d) of Regulation 2015/1589 use different terms, which, depending on the context, may or may not cover such an administrative practice.

74 According to the settled case-law of the Court, for the purposes of ensuring a uniform application and interpretation of the same text, the version of which in one EU language diverges from those in other languages, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (judgment of 12 September 2019, *Commission* v *Kolachi Raj Industrial*, C-709/17 P, EU:C:2019:717, paragraph 88 and the case-law cited).

75 Thus, as regards, secondly, the context of Article 1(d) of Regulation 2015/1589, it must be noted that the concept of 'aid scheme' differs from the concept of 'individual aid' referred to in Article 1(e) of that regulation.

76 Unlike individual aid, which concerns a State aid measure requiring individual examination in the light of the criteria referred to in Article 107(1) TFEU, use of the concept of an 'aid scheme' enables the Commission to examine, in the light of that provision, a set of individual grants of aid to undertakings on the basis of a common provision which constitutes, in principle, the legal basis for it.

77 In that regard, the General Court was entitled to point out in paragraph 78 of the judgment under appeal that, in the case of an aid scheme, the Commission may confine itself to examining its characteristics in order to assess, in the grounds of the decision at issue, whether, by reason of the arrangements provided for under the scheme, the latter gives an appreciable advantage to beneficiaries in relation to their competitors and is likely to benefit in particular undertakings engaged in trade between Member States. Thus, in a decision which concerns such a scheme, the Commission is not required to carry out an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned.

78 It follows that the term 'act' in Article 1(d) of Regulation 2015/1589 refers to the measures constituting an aid scheme from which it is possible to identify the essential characteristics necessary for that act to be classified as a State aid measure, for the purposes of Article 107(1) TFEU.

79 Although, as a general rule, that term may refer to the measures which form the legal basis of the aid scheme, it cannot be ruled out, as the General Court has, moreover, pointed out, that that term may, in certain circumstances, also refer to a consistent administrative practice by the authorities of a Member State, where that practice reveals a 'systematic approach', the characteristics of which satisfy the requirements laid down in Article 1(d) of Regulation 2015/1589.

80 In that regard, in paragraph 79 of the judgment under appeal, the General Court rightly referred to paragraphs 14 and 15 of the judgment of 13 April 1994, *Germany and Pleuger Worthington* v *Commission* (C-324/90 and C-342/90, EU:C:1994:129), in order to state that the Court of Justice has held that, in examining an aid scheme, where no legal act establishing that scheme is identified, the Commission may rely on a set of circumstances which taken as a whole indicate the de facto existence of an aid scheme.

81 Contrary to what is argued in particular by Magnetrol International, supported in that regard by the interveners in the appeal, it does not in any way follow from that judgment of the Court of Justice that the possibility for the Commission to detect the de facto existence of an aid scheme is limited to a situation in which there is no legal provision forming the basis of that scheme. On the contrary, the guidance from that judgment of the Court supports the conclusion that, a fortiori, there is such a possibility where the aid scheme results, as the Commission claims in the present case, from the systematic *contra legem* application of a tax provision of a Member State by the tax authorities of that Member State in the context of a consistent administrative practice.

82 The taking into account of such an administrative practice, in the context of determining the 'act' which constitutes an aid scheme within the meaning of Article 1(d) of Regulation 2015/1589, makes it possible to determine the true scope of that tax provision, which could not otherwise be assessed on the basis of that provision alone.

83 Thirdly, such an interpretation of the term 'act' is supported by the objective pursued by Regulation 2015/1589, which seeks to lay down the detailed rules for the monitoring of State aid laid down in Article 108 TFEU.

84 The effectiveness of the rules on State aid would be considerably reduced if the term 'act', within the meaning of Article 1(d) of Regulation 2015/1589, were limited to referring to the formal measures constituting an aid scheme.

85 First, it must be noted that the scope of and detailed rules relating to those checks would, in such a case, necessarily depend on the form which the Member States give to State aid measures. Secondly, as the Commission submits, some of those aid measures, which are based on a *contra legem* application of a provision of national law, would necessarily be excluded from the concept of an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589, even though a set of circumstances indicates the de facto existence of such a scheme.

86 Accordingly, the Commission may conclude that an aid scheme exists where it is able to demonstrate, to the requisite legal standard, that that scheme is based on the application of a provision of a Member State, in accordance with a 'systematic approach' by the authorities of that Member State, and that the characteristics of that approach satisfy the requirements laid down in Article 1(d) of Regulation 2015/1589.

87 In the second place, it is necessary to determine whether, as the Commission submits, the General Court misapplied the term 'act', referred to in Article 1(d) of Regulation 2015/1589, and distorted the decision at issue by holding that only the acts listed in recital 99 of the decision at issue formed the basis of the scheme at issue, as identified by the Commission.

88 In that regard, it should be noted that, in paragraph 80 of the judgment under appeal, the General Court examined, first of all, the acts listed in recitals 97 to 99 of the decision at issue. It thus noted that the acts in recital 99 of that decision, namely both Article 185(2)(b) of the CIR 92 and 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 that provision by the Belgian tax authorities, constituted the acts on the basis of which the excess profit exemption at issue was granted.

89 In paragraphs 81 and 82 of the judgment under appeal, the General Court noted that the Commission's reasoning was somewhat ambivalent since the Commission did recognise that neither Article 185(2)(b) of the CIR 92 nor, indeed, any other provision of the CIR 92, required that excess profit exemption.

90 The General Court nevertheless held, in paragraph 83 of the judgment under appeal, that, following an overall analysis of the decision at issue, it had to be held that the basis of the scheme at issue was Article 185(2)(b) of the CIR 92, as applied by the Belgian tax authorities, and that such an application could be deduced from the acts referred to in paragraph 88 of the present judgment. In paragraphs 84 to 88 of the judgment under appeal, the General Court concluded, in essence, that the examination of whether the conditions laid down in Article 1(d) of Regulation 2015/1589 were satisfied therefore had to be carried out in the light of the content of those acts.

91 Thus, in paragraphs 90 to 98 of the judgment under appeal, the General Court went on to analyse, inter alia, whether the key facts of the scheme at issue, which the Commission identified in recital 102 of the decision at issue, were apparent from the acts listed in recitals 97 to 99 of that decision.

92 In that regard, in paragraph 92 of the judgment under appeal, the General Court noted, at the outset, that, in the light of the analysis in recitals 101 and 139 of the decision at issue, those key facts were not apparent from those acts, but, rather, from the sample of tax rulings analysed by the Commission. In paragraph 93 of that judgment, while acknowledging that some of those key facts did indeed emerge from those acts, it nevertheless considered that that was not the case for all of those key facts and, in particular, for the two-step method of calculating the excess profit covered by the exemption at issue, and for the condition relating to job creation, or the centralisation or increase of activities in Belgium.

93 That reasoning is vitiated by errors of law.

94 As pointed out in paragraph 90 of the present judgment, although the General Court found that the legal basis of the scheme at issue resulted not only from Article 185(2)(b) of the CIR 92, but 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 into account the recitals of the decision at issue from which it was clear that the Commission inferred that application, not only from the acts referred to in recital 99 of that decision, but also from a systematic approach on the part of those authorities that it found on the basis of the analysis of a sample of tax rulings which it examined.

95 Thus, in the context of the overall reading of the decision at issue in paragraph 83 of the judgment under appeal, the General Court should have taken account of the considerations set out in recitals 100 to 108 and 110 of that decision, from which it is apparent, in essence, that the Commission considered that one of the essential characteristics of the scheme at issue was that those authorities systematically issued decisions granting the excess profit exemption under the conditions listed in recital 102 of that decision.

96 In that context, as is apparent in particular from paragraph 98 of the judgment under appeal, the General Court, however, relied on the incorrect premiss that the fact that certain key facts of the scheme at issue were not apparent from the acts set out in recital 99 of the decision at issue, but from the tax rulings themselves, meant that those acts necessarily had to be the subject of further implementing measures.

97 Consequently, by limiting its analysis of the conditions of Article 1(d) of Regulation 2015/1589 to only the acts referred to in recital 99 of the decision at issue, the General Court misapplied the term 'act' in Article 1.

98 That error led it, first, to rule out, in principle, the possibility that an 'aid scheme' within the meaning of Article 1, may, as noted in paragraphs 80 and 86 of the present judgment, be based on a set of circumstances indicating its de facto existence and, secondly, to misread that decision as regards the examination of the first of those conditions.

99 In the light of all the foregoing considerations, it must be concluded that the first part of the single ground of appeal is well founded.

The second part

– *Arguments of the parties*

100 By the second part of its single ground of appeal, the Commission submits that the General Court misinterpreted the second condition laid down in Article 1(d) of Regulation 2015/1589 and distorted recitals 100 to 108 of the decision at issue by concluding, in paragraphs 94, 96, 98, 103 to 113, 119, 120 and 129 to 133 of the judgment under appeal, that the grant of the excess profit exemption required the adoption of further implementing measures.

101 The General Court merely reiterated the assertion that, if the key facts of the scheme at issue listed in recital 102 of the decision at issue were not set out in the legislative acts referred to in recital 99 of that decision, they would necessarily have to be the subject of further implementing measures. According to the Commission, the General Court did not examine whether, as regards the excess profit exemption, the Belgian tax authorities were in fact in a position to influence the amount of excess profit exemptions, the key facts of the scheme at issue and the conditions for that exemption to be granted in individual cases. In addition, the General Court confused the discretion enjoyed by those authorities to verify compliance with the conditions for the grant of the excess profit exemption and the ability of those authorities to influence the amount of that exemption, the key facts of the scheme at issue and the conditions for that exemption to be granted in individual cases. If the General Court had correctly interpreted and applied the concept of 'further implementing measures', it would have had to conclude that those authorities were not in a position to influence those factors.

102 The Kingdom of Belgium takes the view that there is no error in law in the General Court's reasoning relating to the second condition laid down in Article 1(d) of Regulation 2015/1589.

103 Magnetrol International, supported by the interveners in the appeal, argues, in essence, that, in order to conclude that there was an aid scheme, the Commission should have demonstrated in the decision at issue, in the first place, that the acts listed in recitals 97 to 99 of that decision imposed calculation methods that the Belgian tax authorities had to apply and, in the second place, that the amount of the excess profit exemption in each individual case could be established using those methods. In the third place, as regards the conditions for the granting of the aid, the Commission should have demonstrated, first, that those acts laid down the conditions under which the Belgian tax authorities could accept individual aid applications and, secondly, that it was possible to decide, on the basis of those conditions, whether the transaction proposed by the applicant for the tax ruling satisfied the 'new situation' condition.

– *Findings of the Court*

104 The second part of the single ground of appeal concerns the second condition for defining an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589, namely that no 'further implementing measures' are required for individual aid to be granted on the basis of the act constituting such a scheme.

105 As the General Court correctly pointed out in paragraph 99 of the judgment under appeal, referring in that regard to recital 100 of the decision at issue, the existence of further implementing measures entails a degree of discretion on the part of the tax authority adopting the measures in question, allowing it to influence the amount of the aid, its characteristics or the conditions under which that aid is granted. By contrast, the mere technical application of the act providing for the grant of the aid in question does not constitute a 'further implementing measure' within the meaning of Article 1(d) of Regulation 2015/1589.

106 It follows that the question of whether 'further implementing measures' are necessary for the grant of individual aid under an aid scheme is intrinsically linked to the issue of determining the 'act', within the meaning of Article 1(d) of Regulation 2015/1589, on which that scheme is based. It is in the light of that act that it must be determined whether the grant of individual aid is conditional on the adoption of such measures or whether, on the contrary, that grant may be made on the basis of that act alone.

107 As the Advocate General noted in point 100 of her Opinion, the error of law identified in paragraphs 97 and 98 of the present judgment therefore necessarily affected the General Court's assessment of whether the excess profit exemption was, in the present case, granted without there being any need to adopt further implementing measures.

108 First, as noted in paragraph 96 of the present judgment, the General Court relied on the incorrect premiss that the fact that certain key facts of the scheme at issue were not apparent from the acts set out in recital 99 of the decision at issue, but had been inferred from the tax rulings themselves, meant that those acts necessarily had to be the subject of further implementing measures.

109 Second, in the context of the examination, carried out in paragraphs 103 to 113 of the judgment under appeal, of whether, when adopting the tax rulings on the excess profit exemption, the Belgian tax authorities had a discretion enabling them to influence the amount of that exemption, the key facts of the scheme at issue and conditions under which that exemption was

granted, the General Court merely referred to the acts listed in recital 99 of the decision at issue in order to conclude, in essence, that those acts were limited to defining, in a general manner, the Belgian tax authorities' position in respect of that exemption.

110 The General Court inferred from this that, in the absence of other factors limiting that administration's decision-making power, when adopting those tax rulings, the Belgian tax authorities necessarily had discretion, therefore it could not be concluded that those authorities had carried out a technical application of the regulatory framework, but that, on the contrary, they had carried out a 'case-by-case' examination of each request.

111 In the context of that examination, however, the General Court failed to take account of the fact that, as noted in paragraph 95 of the present judgment, one of the essential characteristics of the scheme at issue, as identified by the Commission in the decision at issue, lay in the fact that the Belgian tax authorities had systematically granted the excess profit exemption when the conditions listed in recital 102 of that decision were satisfied.

112 Contrary to what the General Court held, the identification of such a systematic practice was capable of constituting a relevant factor in the assessment of all the circumstances that could indicate the de facto existence of an aid scheme, making it possible, where applicable, to show that those tax authorities did not in fact have any discretion in the application of Article 185(2)(b) of the CIR 92 and that, consequently, no 'further implementing measure' within the meaning of Article 1(d) of Regulation 2015/1589, was necessary when granting the excess profit exemption at issue.

113 Therefore, as the Commission submits, in basing its conclusion relating to the second condition laid down in Article 1(d) of that regulation on an incorrect premiss, the General Court erred in law.

114 That finding cannot be called into question by the considerations set out in paragraphs 106 and 107 of the judgment under appeal. In those paragraphs, the General Court relied on the finding that the scheme at issue did not cover all the tax rulings issued on the basis of Article 185(2)(b) of the CIR 92, but only those rulings which granted downwards adjustments without the administration having verified whether the profit concerned had been included in the profit of another company of the group established in another jurisdiction, whereas the tax rulings which granted a downwards adjustment corresponding to the upward adjustment of the taxable profit of another company of the group established in another jurisdiction did not form part of that scheme. According to the General Court, in so far as, on the basis of that provision, the Belgian tax authorities could adopt both decisions which, in the Commission's view, granted State aid, and decisions which did not grant such aid, the role of those tax authorities was not limited to the technical application of the scheme at issue.

115 As noted in paragraph 94 of the present judgment, the Commission considered that it was the *contra legem* application of Article 185(2)(b) of the CIR 92 in the context of a consistent administrative practice on the part of the Belgian tax authorities which formed the basis of the scheme at issue. That finding cannot be called into question by the mere fact that those tax authorities also applied that provision in situations which did actually fall within its scope.

116 Similarly, the existence of a preliminary phase in the procedure for obtaining an tax ruling on the excess profit exemption, referred to in paragraph 112 of the judgment under appeal, cannot constitute evidence that the Belgian tax authorities necessarily had discretion in the excess profit

exemption scheme. That discretion must be assessed solely in the light of the tax rulings issued under that scheme, so that the situations which did not give rise to the adoption of such a decision are irrelevant in that regard.

117 In the light of all the foregoing considerations, it must be concluded that the second part of the single ground of appeal is well founded.

The third part

– *Arguments of the parties*

118 By the third part of its single ground of appeal, the Commission submits that the General Court misinterpreted the third condition laid down in Article 1(d) of Regulation 2015/1589 and distorted recitals 66, 102, 103, 109, 139 and 140 of the decision at issue by concluding, in paragraphs 114 to 119 of the judgment under appeal, that the beneficiaries of the excess profit exemption were not defined 'in a general and abstract manner' by the acts constituting the basis of that scheme. In the Commission's view, if the General Court had taken due account of the consistent administrative practice by the Belgian tax authorities relating to that exemption, it would have reached the opposite conclusion.

119 The Kingdom of Belgium and Magnetrol International, supported by the interveners in the appeal, dispute that line of argument.

– *Findings of the Court*

120 The third part of the single ground of appeal concerns the third condition defining an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589, namely that the beneficiaries of such a scheme are defined 'in a general and abstract manner' in the act which forms the basis of that scheme.

121 In that regard, it follows from the links between the three conditions for classifying a measure as an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589, that the question of whether the third of those conditions is satisfied is intrinsically linked to the first two of those conditions, relating to the existence of an 'act' and the absence of 'further implementing measures'.

122 Accordingly, the errors of law made by the General Court, which have been pointed out in paragraphs 97, 98 and 113 of the present judgment and which concern the first two of those conditions, vitiated the General Court's assessment relating to the definition of the beneficiaries of the excess profit exemption.

123 In paragraphs 115 to 119 of the judgment under appeal, the General Court, while acknowledging that Article 185(2)(b) of the CIR 92 covers a general and abstract category of entities, essentially relied on an analysis of the acts referred to in recital 99 of the decision at issue in order to conclude that the beneficiaries of the scheme at issue were not defined 'in a general and abstract manner' by those acts, with the result that such a definition necessarily had to be carried out by means of further implementing measures.

124 In those circumstances, it must be concluded that the third part of the single ground of appeal is well founded.

125 In the light of all the foregoing considerations, and without it being necessary to examine the fourth part of the single ground of appeal, it must be concluded that, by holding, in particular in paragraph 120 of the judgment under appeal, that the Commission had wrongly concluded that the excess profit exemption scheme, as defined in the decision at issue, constituted an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589, the General Court made several errors of law.

The grounds included for the sake of completeness in the judgment under appeal, regarding proof of a 'systematic approach'

126 It should be noted that, in the grounds included for the sake of completeness, set out in paragraphs 121 to 134 of the judgment under appeal, the General Court examined whether the Commission had succeeded in demonstrating the existence of a 'systematic approach' on the part of the Belgian tax authorities, identified following an examination of a sample of 22 out of 66 tax rulings which had been issued in respect of the excess profit exemption.

127 In order to determine whether the errors of law identified in paragraph 125 of the present judgment are capable of leading to the setting aside of the judgment under appeal, it is necessary to examine whether, in the context of those grounds, the General Court was correct to reject the Commission's arguments based on the existence of such a 'systematic approach'.

– *Arguments of the parties*

128 In its arguments relating to the first three parts of the single ground of appeal, the Commission put forward specific arguments seeking to challenge the General Court's reasoning in paragraphs 121 to 134 of the judgment under appeal, at the end of which the General Court held that the Commission had not demonstrated to the requisite legal standard the existence of a 'systematic approach' on the part of the Belgian tax authorities when granting the excess profit exemption.

129 In the first place, the Commission submits that, contrary to what the General Court held in paragraphs 127 and 128 of the judgment under appeal, the Commission sufficiently set out the factors which led it to conclude that there was such a 'systematic approach'.

130 As regards, first of all, the choice of sample of the 22 tax rulings on the basis of which the Commission inferred the existence of a consistent administrative practice, the Commission accepts that that choice is not apparent from recitals 94 to 110 of the decision at issue. However, in the Commission's view, the General Court failed to take into account recital 3 of that decision, which refers to the Commission's request for information made to the Kingdom of Belgium in respect of the tax rulings issued in 2004, 2007, 2010 and 2013. According to the Commission, those decisions are none other than the 22 tax rulings forming the sample from which it inferred the existence of a consistent administrative practice.

131 Next, as regards the representativeness of that sample, the Commission states that, first, the tax rulings were selected from four of the nine years in which the scheme at issue applied. Secondly, the years chosen are three years apart, covering the beginning, middle and end of the period

during which the Belgian tax authorities issued such tax rulings. Thirdly, the 22 tax rulings represent a third of all the rulings issued during that nine-year period and, fourthly, those 22 rulings cover a third of all the beneficiaries of the scheme at issue, which necessarily means that the sample was representative and that no specific explanation was necessary in that regard. In any event, the Kingdom of Belgium never disputed the Commission's provisional conclusions in the context of the opening decision and did not submit any tax ruling demonstrating that the key facts of the scheme at issue were not the result of a consistent administrative practice.

132 Furthermore, the Commission considers that it was not necessary for it to describe the individual rulings in the decision at issue, after concluding, on the basis of its examination of the 22 tax rulings, that those rulings formed part of a consistent administrative practice. By contrast, in the Commission's view, it is for the Kingdom of Belgium and the beneficiaries to challenge its conclusion that the excess profit exemption was granted under an aid scheme, which they have not succeeded in doing.

133 Finally, as regards the six tax rulings described in recitals 62 to 64 and in footnote 80 to the decision at issue, recital 61 of the decision at issue states that the three examples given in those recitals merely illustrate the tax rulings issued in connection with the implementation of the scheme at issue by the Belgian tax authorities.

134 In the second place, according to the Commission, the distortion of recitals 94 to 110 of the decision at issue led the General Court to err in law in finding, in paragraphs 127 and 128 of the judgment under appeal, that the Commission had not demonstrated the existence of a systematic approach.

135 The Kingdom of Belgium and Magnetrol International, supported by the interveners in the appeal, dispute that line of argument.

– *Findings of the Court*

136 The Commission complains that the General Court erred in finding that the Commission had not been able to demonstrate the existence of a 'systematic approach' satisfying the requirements laid down in Article 1(d) of Regulation 2015/1589.

137 In that regard, in the first place, it should be noted that the General Court held, in essence, in paragraph 125 of the judgment under appeal, that such a 'systematic approach' could not form the very basis of the scheme at issue, on the ground that it was not the basis relied on in the decision at issue, in particular, in recital 99 of that decision.

138 In view of the error of law stated in paragraphs 97 and 98 of the present judgment, that ground is also incorrect in law.

139 In the second place, the General Court held, in paragraph 126 of the judgment under appeal, that, even if the key facts of the scheme at issue were apparent from a 'systematic approach' identified from the sample of tax rulings analysed by the Commission, the latter had not been able to demonstrate the existence of such an approach.

140 First of all, in paragraph 127 of the judgment under appeal, while noting that that sample consisted of 22 out of the 66 tax rulings concerned, the General Court held that the Commission had not explained in the decision at issue the choice of that sample or why it had to be regarded as representative.

141 As the Commission submits, in essence, as regards the choice of sample of the tax rulings which it analysed, it follows, however, from an overall reading of the recitals of the decision at issue and, in particular, from a combined reading of recitals 3 and 59 of that decision, that that sample consisted of tax rulings issued in 2005 (no ruling having been issued in 2004), 2007, 2010 and 2013 in order to cover the rulings issued at the beginning, in the middle, and at the end of the period of the scheme at issue.

142 As regards the representativeness of that sample, as the Advocate General pointed out, in essence, in point 86 of her Opinion, it is clear from the choice of 22 out of the total of 66 tax rulings issued in respect of the scheme at issue that that sample represents a third of those rulings.

143 In that regard, it must be noted that such a proportion of tax rulings, selected in a weighted manner from among all the rulings issued in respect of the excess profit exemption for the period under consideration, is, by its nature, capable of representing a 'systematic approach' taken by the Belgian tax authorities. Precisely because of the 'systematic' nature of such a practice, the Commission could reasonably assume that, in the absence of proof to the contrary, the elements identified in the sample of tax rulings which it examined would necessarily be found in all of the tax rulings issued in respect of the excess profit exemption.

144 In those circumstances, the General Court was not entitled to find that the Commission had not explained in the decision at issue the choice of that sample and the elements in respect of which it had to be regarded as representative.

145 Moreover, that conclusion is not called into question by the finding made in paragraph 128 of the judgment under appeal that the Commission did not explain the choice of the six tax rulings referred to in recitals 62 to 64 of the decision at issue. As is apparent from recital 61 of that decision and as the Commission submits, those six rulings serve only to illustrate the way in which the excess profit exemption was granted by the Belgian tax authorities, therefore those rulings cannot be taken into account for the purposes of determining whether the Commission demonstrated to the requisite legal standard the existence of a 'systematic approach' in the decision-making practice of the Belgian tax authorities.

146 Next, in paragraph 129 of the judgment under appeal, the General Court relied on the considerations set out in paragraphs 103 to 112 of the judgment under appeal, relating to the existence of a discretion on the part of the Belgian tax authorities and the need for further implementing measures. According to the General Court, those considerations in themselves undermine the existence of the 'systematic approach' alleged by the Commission.

147 In so far as that conclusion is based on the incorrect premiss that the only acts referred to in recital 99 of the decision at issue constituted the basis of the scheme at issue, it must be held that, for the same reasons as those set out in paragraphs 97, 98 and 113 of the present judgment, the conclusion in paragraph 129 of the judgment under appeal is incorrect in law.

148 Finally, in paragraphs 131 to 133 of the judgment under appeal, the General Court noted that, in any event, the tax rulings which formed the sample examined by the Commission did not all concern situations in which a 'central entrepreneur' structure had been put in place by the Belgian entity in question and that the two-step method for calculating the excess profit identified by the Commission had not been systematically followed.

149 However, as the Commission submits, the findings made by the General Court in those paragraphs are based on a distortion of recital 102 of the decision at issue, in which the Commission listed the key facts of the scheme at issue which it identified by analysing the sample of the 22 tax rulings representing the consistent administrative practice of the Belgian tax authorities.

150 Thus, it is apparent from recital 102 that, contrary to the findings made by the General Court in paragraph 132 of the judgment under appeal, the Commission did not consider that the relocation of a 'central entrepreneur' in Belgium was the only condition for obtaining an excess profit exemption, but that such a situation constituted, on the contrary, a mere example of a more general condition relating to the existence of a new situation which had not yet produced effects from a tax perspective.

151 As regards the two-step calculation method referred to in paragraph 133 of the judgment under appeal, it is apparent from the third indent of recital 102 of the decision at issue that, contrary to the General Court's findings, the Commission did not rely on the application of such a method as being an essential element of the scheme at issue, but, in essence, on the fact that the amount exempt under the excess profit exemption systematically corresponded to the difference between the profit actually recorded by the beneficiary and a hypothetical profit generated if the beneficiary had operated independently of the group, irrespective of the method used to lead to that finding.

152 Consequently, it must be held that paragraphs 130 to 133 of the judgment under appeal cannot form the basis of the General Court's conclusion that the Commission had not established that the excess profit exemption was granted according to a 'systematic approach'.

153 It follows from all of the foregoing grounds that the General Court's conclusion that the Commission had not demonstrated the existence of a 'systematic approach' is incorrect in law.

154 Accordingly, without it being necessary to examine the fourth part of the single ground of appeal, it must be concluded that that ground of appeal is well founded.

155 In those circumstances, without it being necessary to examine the cross-appeal, the judgment under appeal must be set aside.

The dispute at first instance

156 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.

157 In the present case, as the General Court noted in paragraph 57 of the judgment under appeal, in support of their actions, the Kingdom of Belgium and Magnetrol International raise pleas in law alleging, in essence:

– first, that the Commission exceeded its powers by encroaching upon the exclusive tax jurisdiction of the Kingdom of Belgium in the field of direct taxation (first plea in Case T-131/16 and first part of the third plea in Case T-263/16);

– secondly, that the Commission erred in finding a State aid scheme in the present case, within the meaning of Article 1(d) of Regulation 2015/1589, inter alia because of the incorrect identification of the acts on which the scheme at issue was said to be based and the erroneous finding that that scheme did not require further implementing measures (second plea in Case T-131/16 and the first plea in Case T-263/16);

– thirdly, that the Commission erred in classifying tax rulings in relation to excess profit as State aid, given inter alia the lack of an advantage and the lack of selectivity (third plea in Case T-131/16, and second and third parts of the third plea in Case T-263/16);

– fourthly, that the Commission infringed, inter alia, the principles of legality and of the protection of legitimate expectations in that it erroneously ordered the recovery of the alleged aid, including from the groups to which the beneficiaries of that aid belong (fourth and fifth pleas in Case T-131/16 and the fourth plea in Case T-263/16).

158 In the light, in particular, of the fact that the pleas referred to in the first and second indents of the preceding paragraph of the present judgment were the subject of an exchange of arguments before the General Court and that the examination of those pleas does not require any further measure of organisation of procedure or inquiry to be taken in the case, the Court of Justice considers that the state of proceedings in Cases T-131/16 and T-263/16 is such that it may give final judgment on those pleas in that regard (see, to that effect, judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 130).

The Commission's alleged encroachment upon the exclusive jurisdiction of the Kingdom of Belgium in the field of direct taxation

Arguments of the parties

159 The Kingdom of Belgium and Magnetrol International, argue, in essence, as Ireland submitted in its observations at first instance, that the Commission exceeded its powers by using EU law on State aid in order unilaterally to determine matters falling within the exclusive tax jurisdiction of a Member State. They argue that the determination of taxable income remains an exclusive jurisdiction of the Member States, as does the manner of taxing profits generated by cross-border transactions within groups of undertakings, even if it leads to 'double non-taxation'. The Commission's position of regarding tax rulings on excess profit as State aid when those rulings are not in line with what the Commission considers to be a correct application of the arm's length principle is tantamount to forced harmonisation of the rules on the calculation of taxable income, which does not fall within the jurisdiction of the European Union.

160 The Commission contends, in essence, that, although the Member States enjoy fiscal autonomy in the field of direct taxation, any fiscal measure adopted by a Member State must comply with EU rules on State aid.

Findings of the Court

161 It should be noted that, according to the settled case-law of the Court of Justice, action by Member States in areas that are not subject to harmonisation by EU law is not excluded from the scope of the provisions of the FEU Treaty on the monitoring of State aid (judgments of 16 March 2021, *Commission* v *Poland*, C-562/19 P, EU:C:2021:201, paragraph 26, and of 16 March 2021, *Commission* v *Hungary*, C-596/19 P, EU:C:2021:202, paragraph 32 and the case-law cited).

162 The Member States must exercise their competence in the field of direct taxation in compliance with EU law and, in particular, the rules established by the FEU Treaty on State aid. They must therefore refrain, in the exercise of that competence, from adopting measures which may constitute State aid incompatible with the internal market within the meaning of Article 107 TFEU (see, to that effect, judgment of 4 March 2021, *Commission* v *Fútbol Club Barcelona*, C-362/19 P, EU:C:2021:169, paragraph 105 and the case-law cited).

163 It is apparent from the case-law referred to in the preceding paragraphs of the present judgment that the Commission could not be accused of having exceeded its powers when it examined the measures constituting the scheme at issue and when it ascertained whether those measures constituted State aid and, if so, whether those measures were compatible with the internal market within the meaning of Article 107(1) TFEU.

164 That conclusion cannot be called into question by the Kingdom of Belgium's arguments concerning, first, the lack of tax jurisdiction for the taxation of excess profits and, secondly, its own competence to adopt measures to avoid double taxation.

165 Even if the rulings issued by the Belgian tax authorities in the context of the scheme at issue were intended to define the scope of the Kingdom of Belgium's tax jurisdiction, that does not mean that the Commission was not entitled to examine whether those rulings complied with EU law on State aid.

166 Although it is true that, in the absence of EU rules governing the matter, it falls to the Member States to designate the taxable bases and to allocate the tax burden among the different factors of production and economic sectors (judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 97), it is apparent from the case-law cited in paragraph 162 of the present judgment that, in exercising that competence, the Member States must refrain from adopting measures which may constitute State aid, the monitoring of which falls within the Commission's competence. The same is true of the adoption by the Member States, in the exercise of their powers in the field of taxation, of measures necessary to prevent double taxation situations.

167 In the light of all of the foregoing considerations, the first plea in law in Case T-131/16 and the first part of the third plea in law in Case T-263/16 must be rejected as unfounded.

The existence of an aid scheme within the meaning of Article 1(d) of Regulation 2015/1589 and the other pleas for annulment

168 It is apparent from the grounds set out in the analysis of the first to third parts of the single ground of appeal that the second plea in law in Case T-131/16 and the first plea in law in Case T-263/16 which, as is apparent from the second indent of paragraph 157 of the present judgment, allege, in essence, that there was an incorrect conclusion that an aid scheme existed in the present case, must be rejected as unfounded.

169 However, 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 within the meaning of Article 107(1) TFEU, in view of, inter alia, the absence of any advantage or selectivity (third plea in law in Case T-131/16, and second and third parts of the third plea in law in Case T-263/16), and as regards the pleas in law alleging, inter alia, infringement of the principles of legality and of the 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 (fourth and fifth pleas in law in Case T-131/16, and fourth plea in law in Case T-263/16).

170 As is apparent from paragraph 136 of the judgment under appeal, the General Court considered that, since the pleas in law raised by the Kingdom of Belgium and Magnetrol International alleging infringement of Article 1(d) of Regulation 2015/1589 had been upheld, it was not necessary to examine the other pleas raised against the decision at issue. Those pleas involve complex factual assessments, in respect of which the Court of Justice considers that it does not have available to it all the necessary facts.

171 Consequently, the case must be referred back to the General Court for it to rule on the pleas in law referred to in paragraph 169 of the present judgment.

Costs

172 Since the case is being referred back to the General Court, it is appropriate to reserve the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union of 14 February 2019, *Belgium and Magnetrol International* v *Commission* (T-131/16 and T-263/16, EU:T:2019:91);**

2. **Rejects the first and second pleas in law in Case T-131/16, and the first plea in law and the first part of the third plea in law in Case T-263/16;**

3. **Refers the case back to the General Court of the European Union for a ruling on the third to fifth pleas in law in Case T-131/16 and on the second plea in law, the second and third parts of the third plea in law, and the fourth plea in law in Case T-263/16.**

4. **Reserves the costs.**

Vilaras Piçarra Šváby

Rodin Jürimäe

Delivered in open court in Luxembourg on 16 September 2021.

A. Calot Escobar
Registrar

M. Vilaras
President of the Fourth Chamber