

C/2024/1523

26.2.2024

Appeal brought on 30 November 2023 by Esko-Graphics BVBA against the judgment delivered on 20 September 2023 by the General Court (Second Chamber, Extended Composition) in Cases T-201/16, T-335/16, T-357/16 and T-369/16, Soudal and Others v Commission

(Case C-735/23 P)

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*Language of the case: Dutch***Parties***Appellant:* Esko-Graphics BVBA (represented by: H. Viaene, lawyer)*Other party to the proceedings:* European Commission**Form of order sought**

The appellant claims that the Court should:

- set aside the judgment of the General Court, annul the contested decision ⁽¹⁾ and order the Commission to pay the costs both before the General Court and before the Court of Justice and, in the alternative, should the Court confine itself to following the third ground, annul the recovery order laid down in Article 2 of the contested decision and order the Commission to pay the costs of the proceedings before both the General Court and the Court of Justice;
- in the alternative, if the Court of Justice upholds the appellant's grounds of appeal, but considers that the matter has not yet been settled because the General Court did not rule on the secondary line of reasoning relating to the arm's length principle, refer the case back to the General Court, only in relation to the alternative line of reasoning relating to selectivity, and reserve the costs of the proceedings before the General Court and the proceedings before the Court of Justice and, in the further alternative, follow the third ground of appeal here, too, already at least annul the recovery order laid down in Article 2 of the contested decision.

Grounds of appeal and main arguments

The first ground alleges several errors of law and fact in finding that the Commission had correctly defined the reference framework and that it had rightly demonstrated the existence of derogations from the reference framework. This ground is divided into three parts. Each of those limbs, if upheld by the Court of Justice, is sufficient to set aside the judgment under appeal and, therefore, to annul the contested decision.

- (a) First part: in the first part, the appellant will demonstrate that the judgment under appeal must be set aside because the General Court sought to determine the reference framework on the basis of errors of law and a distortion of the facts.
- (b) Second part: in the second part, the appellant will demonstrate that the General Court erred in law and distorted Belgian law by holding that Paragraph 185(2)(b) of the WIB 92 ⁽²⁾ allows a downward adjustment in Belgium only when a corresponding or correlative upward adjustment is made by a tax administration in another country.
- (c) Third part: in the third part, the appellant will demonstrate that the General Court's findings are vitiated by errors of law and by a distortion of the facts by stating that Paragraph 185(2)(b) of the WIB 92 does not allow adjustments to be made by reference to a 'hypothetical profit'.

The second ground is based on the fact that the General Court infringed Article 61 of the Statute, has demonstrated various errors of law and fact by holding that the Commission had rightly qualified the scheme as selective. By this ground, the appellant will demonstrate that the three scenarios that demonstrate the alleged selectivity are not based on reality. Should the Court accede to rebutting all three scenarios, there is no selectivity and the judgment under appeal would have to be set aside and the contested decision annulled.

⁽¹⁾ Commission Decision 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⁾ Wetboek van de inkomstenbelastingen (Income Tax Code) 1992.

The third ground alleges that the General Court erred in law in finding that the recovery order does not run counter to the principles of legal certainty and of the protection of legitimate expectations.
