Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber, Extended Composition)

14 February 2019*

(State aid – Aid scheme implemented by Belgium – Decision declaring the aid scheme incompatible with the internal market and unlawful and ordering recovery of the aid granted – Tax ruling – Excess profit exemption – Fiscal autonomy of the Member States – Concept of an aid scheme – Further implementing measures)

In Cases T-131/16 and T-263/16,

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

applicant in Case T-131/16,

supported by

Ireland, represented initially by E. Creedon, G. Hodge and A. Joyce, subsequently by K. Duggan, M. Browne and A. Joyce and lastly by A. Joyce and J. Quaney, acting as Agents, and by P. Gallagher, M. Collins, Senior Counsel, B. Doherty and S. Kingston, Barristers,

intervener in Case T-131/16,

Magnetrol International, established in Zele (Belgium), represented by H. Gilliams and J. Bocken, lawyers,

applicant in Case T-263/16,

v

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

defendant,

APPLICATION pursuant to Article 263 TFEU for annulment of 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 GENERAL COURT (Seventh Chamber, Extended Composition),

composed of M. van der Woude, President, V. Tomljenović (Rapporteur), E. Bieliūnas, A. Marcoulli and A. Kornezov, Judges,

* Language of the case: English.

Registrar: S. Spyropoulos, Administrator,

having regard to the written part of the procedure and further to the hearing on 28 June 2018,

gives the following

Judgment

Background to the dispute

Legal context

The Income Tax Code 1992

1 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'.

2 With regard specifically to the base of the 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

3 On 24 December 2002, 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 fiscale (Law amending the corporate income tax system and establishing an advance tax ruling system; 'the Law of 24 December 2002') was enacted. Article 20 of that law provides that the Service public fédéral des Finances (the Belgian Federal Public Service for Finance) may take a position by way of an advance tax ruling on all requests relevant to the application of tax law provisions. In addition, an 'advance ruling' is defined as the legal act by which the Federal Public Service for Finance 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 advance ruling cannot entail exemption from or reduction of the tax.

4 Article 22 of the Law of 24 December 2002 provides that an advance 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.

5 In addition, Article 23 of the Law of 24 December 2002 provides that, except in cases where the subject matter of the request so justifies, an advance ruling is issued for a period that may not exceed five years.

The Law of 21 June 2004 amending the CIR 92

6 By the loi du 21 juin 2004, modifiant le CIR 92 et la loi du 24 décembre 2002 (Law of 21 June 2004, amending the CIR 92 and the Law of 24 December 2002; 'the Law of 21 June 2004'), the Kingdom of Belgium introduced new fiscal rules concerning the cross-border transactions of affiliated entities 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*

7 According to the explanatory memorandum to the draft law presented by the Government of the Kingdom of Belgium before the Chambre des députés (the Belgian Chamber of Deputies), 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 ('the Ruling Commission') the power to issue advance 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 (potential) 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 tax administration considers both the principle and the amount of the primary adjustment made in another State to be justified.

– *Article 185(2) of the CIR 92*

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

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

(a) when two companies are in their commercial and financial relationships linked by conditions agreed upon or imposed on them which are different from those which would have been agreed upon between independent companies, the profit which – under those conditions – would have been made by one of the companies but is not because of those 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 conditions agreed between the two companies had been those which would have been agreed between independent companies, the profit of the first company is adjusted in an appropriate manner.'

The Circular of 4 July 2006

9 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, on behalf of the Belgian Minister for Finance, in order to provide guidance on, inter alia, the insertion of Article 185(2) of the CIR 92 and the corresponding amendments to that code. The circular 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.

10 Thus, the circular 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 include the profit that the resident company would have made from a transaction carried out at arm's length.

11 In addition, the circular notes that the downward correlative adjustment, provided for in Article 185(2)(b) of the CIR 92, is intended to avoid or undo a (potential) double taxation. It is indicated 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 tax administration or the Ruling Commission considers 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

12 On 13 April 2005, in response to parliamentary questions concerning the excess profit exemption, the Belgian Minister for Finance, first of all, confirmed that Article 185(2)(b) of the CIR 92 concerned the situation in which an advance 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.

13 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 Belgian 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 advance rulings, account was taken of the functions 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 Belgian 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.

14 Lastly, on 6 January 2015, the Belgian Minister for Finance confirmed that the principle behind the advance 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 contested decision

15 By 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 contested decision'), the European Commission found that the exemptions granted by the Kingdom of Belgium,

by means of advance 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.

16 Furthermore, 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. The annex to the contested decision contained an indicative list of 55 beneficiaries – including Magnetrol International, the applicant in Case T-263/16 – identified on the basis of information provided by the Kingdom of Belgium in the course of the administrative procedure.

17 In the first place, as regards the assessment of the aid measure (recitals 94 to 110 of the contested decision), 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 administration. That application is 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 constitute 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 advance 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.

18 In the second place, as regards the conditions for applying Article 107(1) TFEU (recitals 111 to 117 of the contested decision), 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 intra-Union trade, 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.

19 As regards, specifically, the existence of a selective advantage, the Commission considered that the excess profit exemption was a derogation from the reference system, identified as the Belgian corporate income tax system, since the tax was not applied to the total profit actually recorded by the company concerned but to an adjusted arm's length profit (recitals 118 to 134 of the contested decision).

20 In that regard and primarily (recitals 135 to 143 of the contested decision), the Commission considered that the scheme at issue was selective, first of all, because it was available only to entities that were part of a multinational group, not to standalone entities or entities forming part of domestic corporate groups. Next, the scheme at issue resulted in selectivity between, on the one hand, multinational groups that amended their business model by establishing new operations in Belgium and, on the other hand, any other economic operators that continued to operate under existing business models in Belgium. Lastly, the scheme at issue was de facto selective since only Belgian entities forming part of a large or medium-sized multinational group could effectively benefit from the excess profit exemption, not entities that were part of a small multinational group.

21 As a secondary point (recitals 144 to 170 of the contested decision), the Commission stated that, even if it were accepted that the Belgian corporate income tax system contained a rule according to which the profit recorded by multinational group entities that exceeded an arm's length profit should not be

taxed, which the Commission disputed, the excess profit exemption constituted a derogation from the reference system, since both the rationale for that exemption and the methodology used to establish the excess profit contravened the arm's length principle. That methodology comprised two steps.

22 In the first step, the arm's length prices charged in transactions between the Belgian entity of a group and the companies with which it is associated were fixed based on a transfer pricing report provided by the taxpayer. Those transfer prices were determined by applying the transactional net margin method (TNMM). A residual or arm's length profit was thus established, which, according to the Commission, corresponded to the profit actually recorded by the Belgian entity.

23 In the second step, on the basis of a second report submitted by the taxpayer, the Belgian entity's adjusted arm's length profit was established by determining the profit that a comparable standalone company would have made in comparable circumstances. The difference between the profit arrived at following the first and second steps (namely the residual profit minus the adjusted arm's length profit) constituted the amount of excess profit which the Belgian tax authorities regarded as being the result of synergies or economies of scale arising from membership of a corporate group and which, accordingly, could not be attributed to the Belgian entity.

24 Under the scheme at issue, that excess profit was not taxed. According to the Commission, that non-taxation granted the beneficiaries of the scheme a selective advantage, particularly since the methodology for determining the excess profit departed from a methodology that leads to a reliable approximation of a market-based outcome and thus from the arm's length principle.

25 In addition, the Commission considered that the scheme at issue could not be justified by the nature and the general scheme of the Belgian tax system (recitals 173 to 181 of the contested decision). Contrary to the assertions of the Kingdom of Belgium, the scheme at issue did not pursue the objective of avoiding double taxation, since it was not necessary, in order to benefit from the excess profit exemption, to demonstrate that that profit was included in the tax base of another company.

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

27 As regards the recovery of the aid (recitals 195 to 211 of the contested decision), the Commission stated that the Kingdom of Belgium could not rely on the principle of the protection of the beneficiaries' legitimate expectations or on the principle of legal certainty in order to justify a failure to fulfil its obligation to recover the incompatible aid 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 advance ruling.

28 The operative part of the contested decision is worded as follows:

'Article 1

The Excess Profit exemption scheme, based on Article 185(2)(b) of the [CIR 92], pursuant to which [the Kingdom of] Belgium granted tax rulings to Belgian entities of multinational corporate groups authorising those entities to exempt part of their profit from corporate income taxation constitutes aid within the meaning of Article 107(1) [TFEU] that is incompatible with the internal market and that was unlawfully put into effect by Belgium in breach of Article 108(3) [TFEU].

Article 2

(1) [The Kingdom of] Belgium shall recover all incompatible and unlawful aid referred to in Article 1 from the recipients of that aid.

(2) Any sums that remain unrecoverable from the recipients of the aid, following the recovery described in the paragraph 1, shall be recovered from the corporate group to which the recipient belongs.

(3) The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

(4) The interest on the sums to be recovered shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

(5) [The Kingdom of] Belgium shall stop granting the aid referred to in Article 1 and shall cancel all outstanding payments of such aid with effect from the date of adoption of this decision.

(6) [The Kingdom of] Belgium shall also reject all requests for an advance ruling concerning the aid referred to in Article 1 submitted to the Ruling Commission and pending on the date of the adoption of this decision.

Article 3

(1) Recovery of the aid granted referred to in Article 1 shall be immediate and effective.

(2) [The Kingdom of] Belgium shall ensure that this Decision is fully implemented within four months following the date of notification of this Decision.

Article 4

(1) Within two months following notification of this Decision, [the Kingdom of] Belgium shall submit the following information:

(a) the list of beneficiaries that have received the aid referred to in Article 1 and the total amount of aid received by each of them;

(b) the total amount (principal and recovery interests) to be recovered from each beneficiary;

(c) a detailed description of the measures already taken and planned to comply with this Decision;

(d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

(2) [The Kingdom of] Belgium shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 5

This Decision is addressed to the Kingdom of Belgium.'

Procedure and forms of order sought

Procedure and forms of order sought by the parties in Case T-131/16

29 By application lodged at the Court Registry on 22 March 2016, the Kingdom of Belgium brought an action seeking the annulment of the contested decision.

30 By a separate document, lodged at the Court Registry on 26 April 2016, the Kingdom of Belgium brought an application for interim measures, in which it claimed that the President of the General Court should suspend the operation of Articles 2 to 4 of the contested decision until the General Court has delivered its judgment on the main action. By order of 19 July 2016, the President of the General Court dismissed the application for interim measures and reserved the costs.

31 On 11 July 2016, the Court requested the Kingdom of Belgium to reply to a question. The Kingdom of Belgium complied with that request by letter of 19 July 2016.

32 By document lodged at the Court Registry on 11 July 2016, Ireland applied for leave to intervene in support of the form of order sought by the Kingdom of Belgium. By decision of 25 August 2016, the President of the Fifth Chamber of the General Court granted Ireland's application to intervene. Ireland lodged its written submissions and the main parties lodged their observations on those submissions within the prescribed periods.

33 Following a change in the composition of the Chambers of the General Court on 21 September 2016, pursuant to Article 27(5) of the Rules of Procedure of the General Court, the Judge Rapporteur was assigned to the Seventh Chamber, to which the present case was accordingly allocated.

34 By document lodged at the Court Registry on 26 January 2017, the Kingdom of Belgium requested that the case be decided by a Chamber sitting in extended composition. On 15 February 2017, the Court took formal note, in accordance with Article 28(5) of the Rules of Procedure, of the fact that the case had been allocated to the Seventh Chamber, Extended Composition.

35 As a Member of the Seventh Chamber, Extended Composition, was unable to sit in the present case, by decision of 28 March 2017, the President of the General Court designated the Vice-President of the General Court to complete the Chamber.

36 Acting on a proposal from the Judge-Rapporteur, the President of the Seventh Chamber, Extended Composition, decided, on 12 December 2017, pursuant to Article 67(2) of the Rules of Procedure, to give the present case priority over others.

37 Acting on a proposal from the Judge-Rapporteur, the General Court (Seventh Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure, requested the Kingdom of Belgium and the Commission to reply to a number of questions in writing. The parties complied with those requests within the prescribed periods.

38 By order of 17 May 2018, after hearing the parties, the President of the Seventh Chamber, Extended Composition, of the General 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, pursuant to Article 68(2) of the Rules of Procedure, and granted Magnetrol International's request for confidential treatment vis-à-vis Ireland.

39 The parties presented oral argument and answered questions put to them by the Court at the hearing on 28 June 2018.

40 The Kingdom of Belgium claims that the Court should:

– annul the contested decision;

– in the alternative, annul Articles 1 and 2 of the operative part of the contested decision;

– order the Commission to pay the costs.

41 Ireland requests the General Court to annul the contested decision, as specified in the form of order sought by the Kingdom of Belgium.

42 The Commission contends that the General Court should:

– dismiss the action;

– order the Kingdom of Belgium to pay the costs.

Procedure and forms of order sought by the parties in Case T-263/16

43 By application lodged at the Court Registry on 25 May 2016, Magnetrol International brought an action seeking the annulment of the contested decision.

44 On 20 June 2016, the Commission applied for proceedings to be stayed pending judgment in Case T-131/16, *Belgium* v *Commission*, to which the applicant objected on 26 July 2016. By decision notified to the main parties on 9 August 2016, the President of the Fifth Chamber of the General Court rejected the Commission's request for the proceedings to be stayed.

45 Following a change in the composition of the Chambers of the General Court on 21 September 2016, pursuant to Article 27(5) of the Rules of Procedure of the General Court, the Judge Rapporteur was assigned to the Seventh Chamber, to which the present case was accordingly allocated.

46 Acting on a proposal from the Seventh Chamber, the General Court decided, on 12 March 2018, pursuant to Article 28(3) of the Rules of Procedure, to assign the case to a Chamber sitting in extended composition.

47 As a Member of the Seventh Chamber, Extended Composition, was unable to sit in the present case, by decision of 15 March 2018, the President of the General Court designated the Vice-President of the General Court to complete the Chamber.

48 Acting on a proposal from the Judge-Rapporteur, the President of the Seventh Chamber, Extended Composition, decided, on 16 April 2018, pursuant to Article 67(2) of the Rules of Procedure, to give the present case priority over others.

49 Acting on a proposal from the Judge-Rapporteur, the General Court (Seventh Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure, requested Magnetrol International and the Commission to reply to a number of questions in writing. The parties complied with those requests within the prescribed periods.

50 By order of 17 May 2018, after hearing the parties, the President of the Seventh Chamber, Extended Composition, of the General 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, pursuant to Article 68(2) of the Rules of Procedure, and granted Magnetrol International's request for confidential treatment vis-à-vis Ireland.

51 As noted in paragraph 39 above, the parties presented oral argument and answered questions put to them by the Court at the hearing on 28 June 2018.

52 Magnetrol International contends that the General Court should:

– annul the contested decision;

– in the alternative, annul Articles 2 to 4 of the contested decision;

– in any event, annul Articles 2 to 4 of the contested decision in so far as those articles, first, require any recovery from entities other than the entities that have been issued an advance ruling and, secondly, require the recovery of an amount equal to the beneficiary's tax savings, without allowing the Kingdom of Belgium to take into account an actual upwards adjustment by another tax administration;

– order the Commission to pay the costs.

53 The Commission claims that the General Court should:

– dismiss the action;

– order Magnetrol International to pay the costs.

Law

54 After hearing the views of the parties in that regard at the hearing, the Court has decided to join the present cases for the purposes of the judgment also, in accordance with Article 68 of the Rules of Procedure.

Preliminary observations

55 In support of its action, the Kingdom of Belgium raises five pleas in law. The first plea alleges 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 alleges an error of law and a manifest error of assessment, in that the Commission classified the measures as an aid scheme. It is divided into two parts disputing, first, the identification of the acts on which the alleged aid scheme at issue is based and, secondly, the finding relating to the lack of further implementing measures. The third plea alleges a breach of Article 107 TFEU, in that the Commission considered that the excess profit ruling system constituted a State aid measure. The fourth plea alleges 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', alleges infringement of the general principle of legality and of Article 16(1) 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), in that the contested decision orders recovery from the multinational groups to which the Belgian entities that were issued an advance ruling belong.

56 In support of its action, Magnetrol International raises four pleas in law. The first plea alleges a manifest error of assessment, excess of power and failure to provide adequate reasoning in so far as the contested decision alleges the existence of an aid scheme. The second plea alleges a breach of Article 107 TFEU and of the duty to state reasons and a manifest error of assessment in so far as the contested decision classifies the purported scheme as a selective measure. The third plea alleges a breach of Article 107 TFEU and of the duty to state reasons and a manifest error of assessment in so far as the contested decision asserts that the purported scheme gives rise to an advantage. The fourth plea, raised 'in the alternative', alleges a breach of Article 107 TFEU, infringement of the principle of the protection of legitimate expectations, a manifest error of assessment, excess of power, and failure to provide adequate reasoning, as regards the recovery of the aid ordered in the contested decision, the identification of the beneficiaries and the amount to be recovered.

57 It follows from the presentation of all of the above pleas that the Kingdom of Belgium and Magnetrol International raise, albeit in a different order, pleas in law alleging, in essence:

– first, that the Commission exceeded its powers in relation to State aid 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 alleged scheme was said to be based and the erroneous finding that the aid 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 regarding advance 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 law in Case T-131/16 and third plea in law 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 law in Case T-131/16 and the fourth plea in law in Case T-263/16).

58 The General Court will examine the pleas in law in the order set out in paragraph 57 above.

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

59 The Kingdom of Belgium and Magnetrol International submit, in essence, that the Commission exceeded its powers by using the State aid rules of EU law in order to determine unilaterally matters falling within the exclusive tax jurisdiction of a Member State. The determination of taxable income remains an exclusive competence 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 advance rulings on excess profit as State aid because they are not in line with what the Commission considers to be the correct application of the arm's length principle is tantamount to forced harmonisation of rules relating to the determination of taxable income, which does not fall within the competences of the European Union.

60 Ireland submits, in essence, that the contested decision seriously disturbs the balance of competences between the European Union and the Member States established, inter alia, by Article 3(6) TEU and Article 5(1) and (2) TEU, and confirmed by settled case-law.

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

62 In that respect, it must be noted that, according to settled case-law, while direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law (see judgment of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 47 and the case-law cited). On the other hand, it is undisputed that the Commission is competent to ensure compliance with Article 107 TFEU.

63 Thus, interventions by Member States in areas which have not been harmonised in the European Union, such as direct taxation, are not excluded from the scope of the State aid rules. Accordingly, the Commission may find that a tax measure constitutes State aid provided that the conditions for making such a finding are met (see, to that effect, judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 13; of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 81; and of 25 March 2015, *Belgium* v *Commission*, T-538/11, EU:T:2015:188, paragraphs 65 and 66). The Member States must therefore exercise their competence in the field of taxation consistently with EU law (judgment of 3 June 2010, *Commission* v *Spain*, C-487/08, EU:C:2010:310, paragraph 37). Accordingly, they must refrain from adopting any measure, in that context, liable to constitute State aid incompatible with the internal market.

64 It is true that, in the absence of EU rules governing the matter, it falls within the competence of the Member States to designate tax bases and to spread the tax burden across the different factors of production and economic sectors (see, to that effect, 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).

65 However, that does not mean that every tax measure which affects inter alia the tax base taken into account by the tax authorities falls outside the scope of Article 107 TFEU. If such a measure in practice discriminates between companies that are in a comparable situation with regard to the objective of the measure in question and thereby grants the beneficiaries of the measure selective advantages which favour 'certain' undertakings or the production of 'certain' goods, it may be regarded as State aid for the purpose of Article 107(1) TFEU (see, to that effect, 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 104).

66 In addition, a measure by which the public authorities grant certain undertakings advantageous tax treatment which – although it does not involve the transfer of State resources – places the beneficiaries in a more favourable position than other taxpayers is capable of constituting State aid for the purpose of Article 107(1) TFEU. On the other hand, advantages resulting from a general measure applicable without distinction to all economic operators do not constitute State aid for the purpose of Article 107(1) TFEU (see judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 56 and the case-law cited).

67 It follows from the foregoing that, since the Commission is competent to ensure compliance with Article 107 TFEU, it cannot be accused of having exceeded its powers by examining the measures comprising the alleged scheme at issue in order to determine whether they constituted State aid and, if they did, whether they were compatible with the internal market, within the meaning of Article 107(1) TFEU.

68 That conclusion is not called into question by the Kingdom of Belgium's arguments concerning, first, its lack of tax jurisdiction in respect of the taxation of the excess profits and, secondly, its own competence to adopt measures to avoid double taxation.

69 The Kingdom of Belgium submits that, since the excess profits cannot be attributed to Belgian entities subject to tax in Belgium, those profits do not fall within the Belgian tax jurisdiction. Accordingly, the Commission cannot question the non-taxation of those profits in Belgium.

70 In so far as those arguments are to be understood as challenging the Commission's competence to examine the measures in question, it should be noted that those measures concern advance rulings, issued by the Belgian tax authorities in the context of their competence in the field of direct taxation. In that respect, the case-law cited in paragraph 65 above should be borne in mind, according to which any tax measure that meets the conditions for the application of Article 107(1) TFEU constitutes State aid. It follows that the Commission, in the exercise of its competence relating to the application of Article 107(1) TFEU, must be able to examine the measures in question in order to determine whether they meet those conditions.

71 As regards the arguments concerning the Kingdom of Belgium's competence to adopt measures in order to avoid double taxation, it indeed follows from the case-law that it is for the Member States to take the measures necessary to prevent situations of double taxation, by applying, in particular, the apportionment criteria followed in international tax practice (see, to that effect, judgment of 14 November 2006, *Kerckhaert and Morres*, C-513/04, EU:C:2006:713, paragraph 23). However, as noted in paragraph 63 above, the Member States must exercise their tax competences in accordance with EU law and refrain from adopting any measure liable to constitute State aid incompatible with the internal market. Accordingly, the Kingdom of Belgium cannot invoke the need to avoid double taxation as an objective pursued by the Belgian tax authorities' practice as regards excess profit, in order to justify an exclusive competence in that respect, the exercise of which would fall outside the scope of the Commission's power to verify compliance with Article 107 TFEU.

72 Moreover, and in any event, it must be noted that, in the present case, it does not appear that the non-taxation of excess profit, as applied by the Belgian tax authorities, pursued the objective of avoiding double taxation. The application of the measures at issue was not subject to the condition that it be demonstrated that the excess profit in question had been included in the profit of another company. Nor was it necessary to demonstrate that that excess profit had actually been taxed in another country.

73 Article 185(2)(b) of the CIR 92 provides for a downward adjustment of a company's profit only if that profit has been included in the profit of another company. However, the Kingdom of Belgium has not denied the findings made by the Commission in recitals 173 to 181 of the contested decision concerning the practice of the Belgian tax authorities – as explained, inter alia, by the Minister for Finance's replies, mentioned in paragraphs 12 to 14 above – according to which the downward adjustment of the tax base of a company requesting an advance ruling was carried out without it being verified whether the profit deducted from that company's tax base, as excess profit, was actually included in the profit of another company.

74 In the light of the foregoing considerations, the plea alleging that the Commission encroached upon the tax jurisdiction of the Kingdom of Belgium must be rejected as unfounded.

The existence of an aid scheme, within the meaning of Article 1(d) of Regulation 2015/1589

75 The Kingdom of Belgium and Magnetrol International submit, in essence, that the Commission incorrectly identified the acts on the basis of which the excess profit system allegedly constituted an aid scheme and wrongly found that those acts did not require further implementing measures, within the meaning of Article 1(d) of Regulation 2015/1589. They also submit that the conclusion concerning the existence of an aid scheme is based on contradictory reasoning.

76 The Commission contends, in essence, that it followed a consistent line of reasoning throughout the contested decision, in that it considered that the excess profit scheme was based on Article 185(2)(b) of the CIR 92, as applied by the Ruling Commission, in the light of the interpretation given by 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 that provision. Those acts show a systematic and consistent approach by which the Belgian tax authorities exempted so-called excess profit from tax, without further implementing measures being required.

77 Under Article 1(d) of Regulation 2015/1589, '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 or for an indefinite amount.

78 It follows from the case-law that, in the case of an aid scheme, the Commission may confine itself to examining the characteristics of the scheme at issue in order to assess, in the grounds for its decision, 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 (see judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 63 and the case-law cited).

79 In addition, it has been 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 (see, to that effect, 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).

80 It must be borne in mind that, in the contested decision, first of all, in recital 97 thereof, it is indicated that the excess profit exemption was granted on the basis of Article 185(2)(b) of the CIR 92. Next, in recital 98 of that decision, it is indicated that the application of Article 185(2)(b) of the CIR 92 by the Belgian tax administration is 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 that provision. Lastly, in recital 99 of the contested decision, the Commission concluded that 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 Minister for Finance's replies to parliamentary questions on the application of Article 185(2)(b) of the CIR 92 constitute the acts on the basis of which the excess profit exemption is granted.

81 However, in recital 125 of the contested decision, it is indicated that no provision of the CIR 92 provides for an abstract unilateral exemption of a fixed part or percentage of the profit actually recorded by a Belgian entity forming part of a group. It is also indicated that Article 185(2)(b) of the CIR 92 allows downward transfer pricing adjustments subject to the condition that the profit to be exempted, generated by the international transaction or arrangement in question, has been included in the profit of the foreign counterparty to that transaction or arrangement.

82 It is true that the Commission's reasoning appears somewhat ambivalent, since, on the one hand, it refers to all of the acts listed in recital 99 of the contested decision as the acts on which the scheme at issue is based, whereas, on the other hand, in its analysis of the reference system, in the course of examining whether there is a selective advantage, it states that no provision of the CIR 92 prescribes an exemption such as that applied by the Belgian tax authorities.

83 However, it follows from a reading of the contested decision in its entirety that Article 185(2)(b) of the CIR 92, as applied by the Belgian tax authorities, constitutes the basis for the alleged aid scheme at issue and that the application of that provision may be deduced from 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 that provision.

84 Accordingly, it must be examined whether the alleged aid scheme, based on the acts identified by the Commission, requires further implementing measures within the meaning of Article 1(d) of Regulation 2015/1589.

85 The following observations may be made on the basis of the definition of an aid scheme in Article 1(d) of Regulation 2015/1589, set out in paragraph 77 above, as interpreted by the case-law.

86 First, if individual aid awards are made without further implementing measures being adopted, the essential elements of the aid scheme in question must necessarily emerge from the provisions identified as the basis for the scheme.

87 Secondly, where the national authorities apply that scheme, those authorities cannot have any margin of discretion as regards the determination of the essential elements of the aid in question and whether it should be awarded. For the existence of such implementing measures to be precluded, the national authorities' power should be limited to the technical application of the provisions that allegedly constitute the scheme in question, if necessary after verifying that the applicants meet the pre-conditions for benefiting from that scheme.

88 Thirdly, it follows from Article 1(d) of Regulation 2015/1589 that the acts on which the aid scheme is based must define the beneficiaries in a general and abstract manner, even if the aid granted to them remains indefinite.

89 It is therefore necessary to assess the extent to which the elements highlighted above emerge from the acts identified by the Commission as the basis for the aid scheme at issue, so that the alleged aid measures, namely the excess profit exemptions, could be granted on the basis of those acts without it being necessary to adopt further implementing measures.

The essential elements of the aid scheme at issue

90 In recitals 13 to 22 of the contested decision, the Commission describes the aid scheme at issue as consisting of an exemption of excess profit and sets out the elements which, in essence, constitute the essential elements for the grant of that exemption, which are summarised in recital 102 of the contested decision. Thus, first, the fact that the Belgian entities concerned are entities of a multinational group is taken into account. Secondly, account is taken of the fact that the entities concerned have obtained an advance ruling by the Ruling Commission, which is linked to a new situation, such as a reorganisation leading to the relocation of a central entrepreneur to Belgium, the creation of jobs, or investments. Thirdly, the existence of profit in excess of the profit that would have been made by comparable standalone entities operating in similar circumstances is taken into consideration. Fourthly, on the other hand, no account is taken of whether a primary upward adjustment was carried out in another Member State.

91 In that respect, it must be examined whether the essential elements of the alleged aid scheme, indicated above, emerge from the acts that the Commission referred to as the basis of the excess profit exemption system.

92 At the outset, it must be underlined that the Commission stated, in recitals 101 and 139 of the contested decision, that the essential elements of the alleged aid had been identified on the basis of an analysis of a sample of advance rulings. Thus, the Commission itself acknowledged that those essential elements did not emerge from the acts on which it considered the scheme was based, but from the advance rulings themselves or, rather, from a sample of those rulings.

93 In any event, although some of the essential elements of the scheme identified by the Commission may emerge from the acts identified in recitals 97 to 99 of the contested decision, that is not the case however for all of those essential elements.

94 As the Kingdom of Belgium and Magnetrol International have rightly submitted, neither the two-step methodology for calculating the excess profit nor the requirement of investments, the creation of jobs or the centralisation or increase of activities in Belgium follow, even implicitly, from the acts referred to by the Commission in recitals 97 to 99 of the contested decision as the basis of the scheme at issue. If those elements which, according to the Commission itself, constitute essential elements of the alleged aid scheme do not feature in the acts that supposedly constitute the basis of the scheme, the implementation of those acts and thus the grant of the alleged aid necessarily depends on the adoption of further implementing measures, with the result that there is no aid scheme within the meaning of Article 1(d) of Regulation 2015/1589.

95 First, the acts identified in recitals 97 to 99 of the contested decision, set out in paragraph 80 above, do not mention the two-step methodology, including the TNMM, for the calculation of excess profit. It follows from the contested decision, in particular from Section 6.3.2 thereof (recitals 133, 144 and 152 to 168 of that decision), that that methodology was applied systematically and constitutes an essential element of the scheme, since it is precisely the application of that methodology that makes the scheme selective.

96 Accordingly, without prejudging the question as to whether the determination of the excess profit using the two-step methodology, described in the contested decision, could lead to a selective advantage, it must be held that that constituent element of the scheme at issue nevertheless does not stem from the acts on which that scheme is based and could not therefore be applied without further implementing measures.

97 Secondly, as regards investments, the creation of jobs or the centralisation or increase of activities in Belgium by applicants for advance rulings, it should be noted that, in Section 6.3.2.1 of the contested decision, the Commission stated that, even though those elements were not listed as conditions for the grant of the excess profit exemption under Article 185(2)(b) of the CIR 92, they were essential in order to be eligible for an advance ruling, which was compulsory for the application of the exemption in question.

98 As the Commission itself recognised, inter alia in recital 139 of the contested decision, those elements do not emerge from the acts on which the scheme at issue is based, but from the advance rulings themselves, according to the sample that the Commission examined. Accordingly, as the Kingdom of Belgium and Magnetrol International rightly submit, if those elements do not emerge from the acts which, according to the Commission, constitute the basis of the aid scheme, those acts must necessarily be the object of further implementing measures. If, as the Commission submits, such investments are taken into account by the Belgian tax authorities for the purpose of granting the excess profit exemption, that will necessarily entail an analysis and a specific evaluation of the investments proposed by the Belgian entities concerned, as regards inter alia the nature and amount of those investments, or other details concerning the manner in which they would be made. Such an analysis could be carried out only on a case-by-case basis and would therefore require further implementing measures.

The margin of discretion of the Belgian tax authorities

99 As the Commission rightly noted, in recital 100 of the contested decision, the existence of further implementing measures, within the meaning of Article 1(d) of Regulation 2015/1589, entails a degree of discretion on the part of the tax authority adopting the measures in question, allowing it to influence the amount or the characteristics of the aid or the conditions under which it is granted. The Commission considers, by contrast, that 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.

100 It should be noted that the fact that a prior request for approval must be submitted to the competent tax authorities in order to benefit from an aid does not imply that those authorities have a margin of discretion, when they merely verify whether the applicant meets the requisite criteria in order to benefit from the aid in question (see, to that effect and by analogy, judgment of 17 September 2009, *Commission* v *Koninklijke FrieslandCampina*, C-519/07 P, EU:C:2009:556, paragraph 57).

101 In the present case, it is undisputed that the non-taxation of excess profit is subject to the grant of an advance ruling. In that respect, it must be noted that Article 20 of the Law of 24 December 2002 defines an 'advance ruling' as the legal act by which the Federal Public Service for Finance 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.

102 It must therefore be examined whether, in issuing such advance rulings, that service had a margin of discretion allowing it to influence the amount and the essential elements of the excess profit exemption and the conditions under which it was granted.

103 First, it is apparent from the explanatory memorandum to the Law of 21 June 2004 amending the CIR 92 (as summarised in paragraph 7 above) and from the Circular of 4 July 2006 (as described in paragraphs 9 to 11 above) that the downward adjustment provided for in Article 185(2)(b) of the CIR 92 must be carried out on a case-by-case basis in the light of the available information provided, in particular, by the taxpayer. In addition, it is indicated that no criteria may be established in respect of that adjustment, since the latter must be carried out on a case-by-case basis. However, it is stated that a correlative adjustment should be made only if the tax administration or the Ruling Commission considers both the principle and the amount of the primary adjustment to be justified. Furthermore, the Minister for Finance's replies to parliamentary questions on the application of Article 185(2)(b) of the CIR 92 (as summarised in paragraphs 12 to 14 above) merely refer in general terms to the position of the Belgian tax administration as regards excess profit and the arm's length principle.

104 It may be inferred from a combined reading of the acts mentioned in paragraph 103 above that, when the Belgian tax authorities issued advance rulings on excess profit, they did not carry out a technical application of the applicable regulatory framework, but, rather, carried out a qualitative and quantitative assessment of each request on a 'case-by-case' basis, in the light of the reports and evidence provided by the entity concerned, in order to decide whether it was justified to grant the downward adjustment provided for in Article 185(2)(b) of the CIR 92. Accordingly, contrary to the Commission's assertions, inter alia in recital 106 of the contested decision, and in the absence of any other instructions that would limit the decision-making power of the Belgian tax administration, that administration necessarily enjoyed a genuine margin of discretion in deciding whether it was appropriate to grant such downward adjustments.

105 Secondly, as indicated in paragraph 73 above, Article 185(2)(b) of the CIR 92 provides for a downward adjustment of a company's profit only if that profit has been included in the profit of another company. In practice however, as explained, inter alia, by 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, the downward adjustment was carried out by the Ruling Commission without it having been determined to which foreign companies the excess profit should be attributed.

106 In addition, it follows from recitals 67 and 68 of the contested decision that the scheme at issue does not cover all the advance rulings issued on the basis of Article 185(2)(b) of the CIR 92. It concerns only advance rulings which granted downward 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. By contrast, advance rulings which, in accordance with the wording of Article 185(2)(b) of the CIR 92, grant a downward adjustment corresponding to an upward adjustment of the taxable profit of another company of the group established in another jurisdiction do not form part of the aid scheme at issue.

107 Accordingly, as the Kingdom of Belgium and Magnetrol International rightly submit, if, on the basis of that provision, the Belgian tax administration may adopt both decisions which, according to the Commission, grant State aid and decisions which do not grant such aid, it cannot reasonably be maintained that the role of that administration is limited to the technical application of the scheme at issue.

108 Thirdly, on the basis of the information provided by the Kingdom of Belgium to the Commission concerning the operation of the Ruling Commission, it is necessary to examine how the Ruling Commission determined, in its individual examination of requests for advance rulings, whether there was a situation giving rise to excess profit, whether a downward adjustment should be carried out under Article 185(2)(b) of the CIR 92 and what the characteristics, the amount and the conditions of that adjustment should be.

109 As regards the characteristics of the excess profit exemption and the conditions in which it is granted, it suffices to recall the considerations set out in paragraphs 90 to 98 above, according to which certain essential elements of the alleged scheme do not emerge from the acts on which, according to the Commission, that scheme is based.

110 As regards the amount to be exempted, it should be noted that the percentage of profit considered to be excess profit is not defined in the acts on which the alleged aid scheme is based. Indeed, it is not possible to deduce from those acts a specific percentage, a range or even a ceiling, and no specific element is provided concerning the method of calculation to be applied. On the contrary, it can be seen from the contested decision (recital 103 thereof) that the individual facts, the amounts involved and the transactions to be taken into account differ from one advance ruling to another. Likewise, the description of excess profit, in recital 15 of the contested decision, shows that determining that profit requires an assessment, on a case-by-case basis, of studies submitted by the tax payer as regards, first, the company's residual profit, generated from transactions with companies in the same group, and, secondly, the excess profit generated because of that company's membership of a group, which is deducted from the residual profit, as calculated in the first step.

111 More specifically, as the Kingdom of Belgium and Magnetrol International rightly submit, the parameters for calculating the excess profit and the instructions necessary for the purpose of taking account, when issuing advance rulings, of synergies, investments, the centralisation of activities and the creation of jobs in Belgium are not set out in the acts on which, according to the Commission, the scheme at issue is based. It is therefore the Ruling Commission which (i) determined the essential elements that were required in order to obtain a downward adjustment and (ii) verified whether that requirement was met where it agreed to grant that adjustment. It cannot therefore be maintained that the margin of discretion of the Belgian tax authorities was limited to the mere technical application of the provisions identified in recital 99 of the contested decision.

112 Fourthly, it must be noted that the procedure before the Ruling Commission includes a preliminary phase during which the requests for an advance ruling are analysed and at the end of which some of the requests are officially taken into account. It is apparent from the annual reports of the Ruling Commission identified by the Kingdom of Belgium, in particular the 2014 report, that only around half of open files at the pre-notification stage result in an advance ruling. That is an indication that, contrary to the Commission's submissions, the Ruling Commission has a margin of discretion which it actually exercises when granting or rejecting requests relating to excess profit, including at the pre-notification stage.

113 Lastly, it should be noted that, in recital 106 of the contested decision, the Commission indicates that the Ruling Commission has a limited margin of discretion to agree the exact percentage of the downward adjustment. However, it follows from the considerations set out in paragraphs 101 to 112 above that, in the present case, the Belgian tax authorities had a margin of discretion over all of the essential elements of the alleged aid scheme.

Definition of the beneficiaries

114 As regards the definition of the beneficiaries, it should be noted that, in recital 109 of the contested decision, the Commission refers to Article 185(2)(b) of the CIR 92. That article, the wording of which is set out in paragraph 8 above, provides that it applies to companies which are part of a multinational group, as regards their reciprocal cross-border relationships.

115 It could indeed be considered that Article 185(2)(b) of the CIR 92 covers a general and abstract category of entities, namely companies forming part of a multinational group in the context of their reciprocal cross-border relationships. However, the beneficiaries of the scheme, as referred to in the contested decision, cannot be identified on the sole basis of that provision, without further implementing measures.

116 In the present case, the beneficiaries of the scheme, as the latter is found to exist by the Commission, correspond to a much more specific category than that of companies forming part of a multinational group in the context of their reciprocal cross-border relationships. According to the Commission's assessments, inter alia in recital 102 of the contested decision, relating to the essential elements of the aid scheme at issue, that scheme applies to companies forming part of a multinational group which, on the basis of transfer pricing reports and the existence of excess profit calculated using those reports, seek the exemption of that profit by a request for an advance ruling and which, moreover, make investments, create jobs or centralise activities in Belgium.

117 In addition, it should be noted that the other acts on which the Commission found the scheme was based do not provide any additional details as regards the definition of the beneficiaries of the scheme at issue.

118 As regards, specifically, the Law of 24 December 2002, although Article 20 thereof sets out the requirement for a particular situation or transaction that has not yet had tax consequences, that law does not contain provisions intended to define the beneficiaries of the alleged scheme. Nor do the Circular of 4 July 2006 or the Minister for Finance's replies of 13 April 2005, 11 April 2007 and 6 January 2015 provide details concerning the beneficiaries of the alleged scheme. Moreover, it must be noted that the latter acts were adopted after 2004, the year from which, according to the Commission, the scheme in question was applied.

119 Accordingly, it cannot be concluded that the beneficiaries of the alleged aid scheme are defined in a general and abstract manner by the acts on which the Commission found the scheme was based. Further implementing measures therefore necessarily have to be taken in order to define such beneficiaries.

120 It follows from the foregoing considerations that the Commission wrongly concluded that the excess profit exemption scheme, as defined by the Commission in the contested decision, did not require further implementing measures and therefore constituted an aid scheme, within the meaning of Article 1(d) of Regulation 2015/1589.

The existence of a systematic approach

121 The conclusion in paragraph 120 above cannot be called into question by the Commission's arguments alleging the existence of a systematic approach, which it identified by examining a sample of 22 of the 66 existing advance rulings.

122 It is necessary to bear in mind the case-law, cited in paragraph 79 above, according to which, 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 (see, to that effect, 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).

123 Accordingly, it cannot be ruled out that the Commission may conclude that there is an aid scheme where it is able to demonstrate, to the requisite legal standard, a systematic approach, the characteristics of which meet the requirements set out in Article 1(d) of Regulation 2015/1589.

124 However, the Commission has not succeeded in demonstrating that the approach that it had identified met the requirements set out in Article 1(d) of Regulation 2015/1589.

125 In the first place, as regards the arguments put forward by the Commission inter alia at the hearing, according to which a systematic approach may constitute the very basis of the aid scheme, it suffices to note that it is not the basis of the scheme relied on in the contested decision. As noted in paragraph 80 above, in recitals 97 to 99 of the contested decision, the Commission stated that Article 185(2)(b) of the CIR 92, as applied by the Belgian tax administration, formed the basis of the alleged aid scheme at issue and that that application could be deduced from 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 concerning the application of that provision.

126 In the second place, even if the Commission's arguments are to be understood as meaning that the essential elements of the aid scheme emerge from a systematic approach which, in turn, is said to emerge from the sample of advance rulings that it examined, it must be pointed out that, in the contested decision, the Commission was not able to demonstrate to the requisite legal standard the existence of such a systematic approach.

127 First of all, it must be noted that, in recitals 65 and 103 of the contested decision, the Commission acknowledged that it examined a sample of 22 of the 66 advance rulings concerned. As the Kingdom of Belgium and Magnetrol International rightly submit, the Commission did not explain, in the contested decision, either the choice of that sample or why it had been considered to be representative of all of the advance rulings. In response inter alia to a written question from the Court, which response was also clarified at the hearing, the Commission indicated that it had requested the advance rulings issued in 2005 (no ruling having been issued in 2004), 2007, 2010 and 2013 so that its examination would cover rulings issued at the beginning, middle and end of the period during which the Ruling Commission had issued such rulings.

128 In addition, the contested decision contains, in recitals 62 to 64 and footnote 80, references to 6 of the 66 advance rulings concerned, which are described briefly and referred to as examples capable of illustrating all of the advance rulings. However, no explanation is given in the contested decision as to

why those 6 examples were chosen, why those examined advance rulings are sufficiently representative of all 66 advance rulings or why those 6 examples are sufficient to justify the Commission's conclusion regarding the existence of a systematic approach by the Belgian tax authorities.

129 Next, it is necessary to recall the considerations set out in paragraphs 103 to 112 above, according to which the Belgian tax authorities examined each request on a case-by-case basis and had a margin of discretion that went well beyond a mere technical application of the provisions identified in recital 99 of the contested decision, when they issued each advance ruling following that examination, which, in itself, undermines the systematic nature of the approach allegedly followed by the Belgian tax authorities. In addition, the existence of a systematic approach is called into question by the finding made in paragraph 98 above, concerning the further implementing measures necessary in order to implement the excess profit exemption system at issue in the present case.

130 Lastly, the Kingdom of Belgium and Magnetrol International submit that several advance rulings did not incorporate the essential elements of the alleged aid scheme identified by the Commission in the contested decision, in particular because the advance rulings did not all concern the role of central entrepreneur as taken into consideration by the Commission, a centralisation or recentralisation of activities did not take place in every case and the calculation of the excess profit was carried out on a case-by-case basis and not always according to the two-step calculation methodology criticised by the Commission.

131 In that respect, it must be noted that the deficiencies identified in paragraphs 127 and 128 above cannot be remedied by the additional information provided by the Commission in response to the Court's questions, mentioned in paragraph 49 above, concerning the sample of advance rulings that it had analysed. The Court cannot, without exceeding the limits of its power to review the legality of the contested decision, rely, in order to reject a plea for annulment submitted to it, on grounds which did not form part of that decision (see, to that effect, judgment of 22 April 2016, *Ireland and Aughinish Alumina* v *Commission*, T-50/06 RENV II and T-69/06 RENV II, EU:T:2016:227, paragraph 145).

132 In any event, and as the Kingdom of Belgium and Magnetrol International rightly submit, it follows from the additional information submitted by the Commission in response to the Court's questions that the advance rulings in the sample examined by the Commission show individual responses given by the Belgian tax authorities to various situations before them. The information provided concerning the 22 rulings show that those rulings were issued in different situations, such as the merger or restructuring of production activities, the construction of new facilities, the increase of the production capacity of existing facilities or the internalisation of supply activities. Thus, contrary to recital 15 of the contested decision and to the reasoning followed by the Commission in order to prove that the alleged scheme granted the beneficiaries a selective advantage (Section 6.3.2.2 of the contested decision), the advance rulings in the sample examined do not all concern situations in which the Belgian entity concerned operated as a 'central entrepreneur'.

133 In addition, it follows from the information provided by the Commission in its reply to the Court's questions, referred to in paragraph 49 above, that the two-step approach to calculating the excess profit –– identified by the Commission as one of the essential elements of the alleged aid scheme and described by the Commission in recital 15 of the contested decision –– involving inter alia the use of transfer pricing reports and the TNMM, was not followed systematically.

134 Accordingly, apart from the deficiencies identified in paragraphs 127 and 128 above, which would undermine the arguments concerning the existence of a systematic approach on the part of the Belgian tax authorities, the sample to which the Commission refers in the contested decision cannot necessarily prove that such a systematic approach actually existed and that it was followed in all of the advance rulings concerned.

Conclusion on the classification of the measures in question as an aid scheme

135 It follows from the foregoing considerations that the Commission erroneously considered that the Belgian excess profit system at issue, as presented in the contested decision, constituted an aid scheme.

136 Accordingly, it is necessary to uphold the pleas raised by the Kingdom of Belgium and Magnetrol International, alleging the infringement of Article 1(d) of Regulation 2015/1589, as regards the conclusion set out in the contested decision regarding the existence of an aid scheme. Consequently, without it being necessary to examine the other pleas raised against the contested decision, that decision must be annulled in its entirety, inasmuch as it is based on the erroneous conclusion concerning the existence of such a scheme.

Costs

137 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay, in addition to its own costs, those incurred by the Kingdom of Belgium, including those relating to the proceedings for interim measures, and by Magnetrol International, in accordance with the forms of order sought by them.

138 Under Article 138(1) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs. Ireland must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Seventh Chamber, Extended Composition)

hereby:

1. **Joins Cases T-131/16 and T-263/16 for the purposes of the present judgment;**

2. **Annuls 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;**

3. **Orders the European Commission to pay, in addition to its own costs, those incurred by the Kingdom of Belgium, including those relating to the proceedings for interim measures, and by Magnetrol International;**

4. **Orders Ireland to bear its own costs.**

Van der Woude Tomljenović Bieliūnas

Marcoulli Kornezov

Delivered in open court in Luxembourg on 14 February 2019.

E. Coulon
Registrar

V. Tomljenović
President

Table of contents