

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

20 September 2023 (*)

(State aid – Aid scheme put into effect by Belgium – Decision declaring the aid scheme incompatible with the internal market and unlawful and ordering recovery of the aid granted – Tax ruling – Taxable profit – Excess profit exemption – Advantage – Selectivity – Adverse effect on competition – Recovery)

In Case T-131/16 RENV,

Kingdom of Belgium, represented by C. Pochet and M. Jacobs, acting as Agents, and by M. Segura and M. Clayton, lawyers,

applicant,

supported by

Ireland, represented by M. Browne, A. Joyce, D. O'Reilly and J. Quaney, acting as Agents, and by P. Gallagher, M. Collins and C. Donnelly, Senior Counsel, and B. Doherty and D. Fennelly, Barristers-at-Law,

intervener,

v

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

defendant,

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of A. Marcoulli, President, S. Frimodt Nielsen, V. Tomljenović (Rapporteur), R. Norkus and W. Valasidis, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written part of the procedure,

having regard to the judgment of 16 September 2021, *Commission v Belgium and Magnetrol International* (C-337/19 P, EU:C:2021:741),

further to the hearing on 8 February 2023,

gives the following

Judgment

- 1 By its action under Article 263 TFEU, the Kingdom of Belgium seeks the 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 contested decision’).

I. Background to the dispute

- 2 The facts of the dispute and the legal background were set out by the General Court in paragraphs 1 to 28 of the judgment of 14 February 2019, *Belgium and Magnetrol International v Commission* (T-131/16 and T-263/16, EU:T:2019:91), and by the Court of Justice in paragraphs 1 to 24 of the judgment of 16 September 2021, *Commission v Belgium and Magnetrol International* (C-337/19 P, EU:C:2021:741). For the purposes of the present proceedings, they may be summarised as follows.
- 3 By an advance ruling issued by the ‘service des décisions anticipées’ (Advance Ruling Commission) of the service public fédéral des finances belge (Belgian Federal Public Service for Finance) under Article 185(2)(b) of the Code des impôts sur les revenus 1992 (Income Tax Code 1992; ‘the CIR 92’), read in conjunction with 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 fiscale (Law of 24 December 2002 amending the corporate income tax system and establishing an advance tax ruling system) (*Moniteur belge*, 31 December 2002, p. 58817; ‘the Law of 24 December 2002’), Belgian resident companies that were part of a multinational group and Belgian permanent establishments of foreign resident companies that were part of a multinational group could reduce their tax base in Belgium by deducting what was considered to be ‘excess’ profit from the profit which they had recorded. Under that system, part of the profit made by the Belgian entities benefiting from an advance ruling was not taxed in Belgium. According to the Belgian tax authorities, that excess profit arose from the synergies, economies of scale or other benefits resulting from membership of a multinational group and, accordingly, was not attributable to the Belgian entities in question.
- 4 Following an administrative procedure that was initiated on 19 December 2013 with a letter by which the European Commission requested the Kingdom of Belgium to provide information on the system of excess profit tax rulings, which were based on Article 185(2)(b) of the CIR 92, the Commission adopted the contested decision on 11 January 2016.
- 5 By the contested decision, the Commission found that the excess profit exemption scheme that was based on Article 185(2)(b) of the CIR 92, pursuant to which the Kingdom of Belgium had issued advance rulings to Belgian entities of multinational groups of undertakings, granting those entities an exemption in respect of part of their profit, constituted a State aid scheme giving its beneficiaries a selective advantage, for the purposes of Article 107(1) TFEU, that was incompatible with the internal market.
- 6 Thus, the Commission argued, principally, that the scheme at issue granted beneficiaries of the advance rulings a selective advantage, since the excess profit exemption applied by the Belgian tax authorities was a departure from the ordinary Belgian corporate income tax system. In the alternative, the Commission found that the excess profit exemption could confer a selective advantage on beneficiaries of the advance rulings, in so far as that exemption was not in line with the arm’s length principle.
- 7 Having found that the scheme at issue had been put into effect in breach of Article 108(3) TFEU, the Commission ordered that the aid thus granted be recovered from its beneficiaries, a definitive list of which was to be drawn up by the Kingdom of Belgium following the decision.

A. The original judgment

- 8 Following the adoption of the contested decision, the Kingdom of Belgium and several companies identified by that decision or which had benefited from an advance ruling under the scheme at issue brought actions for the annulment of that decision.
- 9 By the judgment of 14 February 2019, *Belgium and Magnetrol International v Commission* (T-131/16 and T-263/16, EU:T:2019:91; ‘the original judgment’), in the first place, the General Court rejected as unfounded the pleas in law alleging, in essence, that the Commission had misused its powers in relation to State aid and encroached upon the Kingdom of Belgium’s exclusive jurisdiction in the field of direct taxation.
- 10 In the second place, the General Court held that, in this case, the Commission had incorrectly found that there was an aid scheme, in breach of 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), and, consequently, the General Court annulled the contested decision without considering it necessary to examine the other pleas that had been put forward against it.

B. The judgment on appeal

- 11 Following the appeal brought against the original judgment, the Court of Justice delivered its judgment of 16 September 2021, *Commission v Belgium and Magnetrol International* (C-337/19 P, EU:C:2021:741; ‘the judgment on appeal’).
- 12 In the judgment on appeal, the Court of Justice held that the original judgment was vitiated by errors of law in so far as it had been held that the Commission had wrongly concluded that there was an aid scheme in this case.
- 13 On the basis of the errors identified by the Court of Justice, the original judgment was set aside.
- 14 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice decided to give final judgment on certain pleas in law where it considered that the state of the proceedings was such as to permit it to do so, namely those concerning the Commission’s encroachment upon the exclusive jurisdiction of the Kingdom of Belgium in the field of direct taxation, and those relating to the existence of an aid scheme.
- 15 Thus, first of all and like the General Court, the Court of Justice rejected the pleas relating to the Commission’s encroachment upon the exclusive jurisdiction of the Kingdom of Belgium in the field of direct taxation.
- 16 Next, the Court of Justice concluded that the excess profit exemption scheme could be considered an aid scheme within the meaning of Article 1(d) of Regulation 2015/1589, and that, therefore, the pleas in law relating to the existence of an aid scheme had to be rejected as being unfounded.
- 17 Lastly, with regard to the other pleas for annulment relied on by the Kingdom of Belgium, the Court of Justice considered that the state of the proceedings was not such as to permit final judgment to be given, and referred the case back to the General Court in order for it to rule on those pleas.

II. Procedure and forms of order sought

- 18 Following the judgment on appeal and in accordance with Article 216(1) of the Rules of Procedure of the General Court, the present case was assigned to the Second Chamber (Extended Composition) of the General Court on 20 October 2021.
- 19 In accordance with Article 217(1) of the Rules of Procedure, the parties lodged statements of written observations within the time limits prescribed. Supplementary statements of written observations were also lodged by the main parties in accordance with Article 217(3) of the Rules of Procedure.
- 20 The Kingdom of Belgium claims that the General Court should:
- annul the contested decision;
 - in the alternative, annul Articles 1 and 2 of the contested decision;
 - order the Commission to pay the costs.
- 21 Ireland claims that the General Court should annul the contested decision, as requested by the Kingdom of Belgium.
- 22 The Commission contends that the General Court should:
- dismiss the action;
 - order the Kingdom of Belgium to pay the costs.

III. Law

23 In support of its action, the Kingdom of Belgium raises five pleas in law. Following the judgment on appeal, in which the Court of Justice ruled on the first two pleas in law, the first of which related to the Commission's encroachment upon the exclusive jurisdiction of the Kingdom of Belgium, and the second, to the existence of an aid scheme, the General Court must give a new ruling on the third to fifth pleas, the third relating to the incorrect classification of the excess profit exemption as State aid within the meaning of Article 107(1) TFEU, the fourth, to the incorrect identification of the beneficiaries of the alleged aid, and the fifth, to breach of the principles of legality and of the protection of legitimate expectations, in that recovery of the alleged aid was ordered erroneously.

A. Plea in law alleging infringement of Article 107 TFEU and a manifest error of assessment, in that the Commission considered that the excess profit system constituted a State aid measure

24 The Kingdom of Belgium submits, in essence, that the fact that the excess profit exemption, as a consistent administrative practice, constitutes a scheme does not mean that it can be concluded that it fulfils all the criteria laid down in Article 107(1) TFEU for a measure to qualify as State aid. Thus, in support of that plea, the Kingdom of Belgium puts forward arguments, in several parts and sub-parts, by which it challenges the Commission's findings in relation to those criteria set out in Article 107(1) TFEU, that is to say, the financing of the scheme at issue through State resources, the existence of a selective advantage and a distortion of competition.

25 The Commission contends that the plea put forward by the Kingdom of Belgium should be rejected.

1. The financing of the scheme at issue through State resources

26 The Kingdom of Belgium, supported in that regard by Ireland, submits, in essence, that a State can only renounce tax revenue if it is entitled to collect the corresponding contributions. In the present case, the excess profit corresponds to the profit generated by the corporate groups concerned and cannot, therefore, be attributed to the Belgian entities. For that reason, that profit does not fall within the tax jurisdiction of the Kingdom of Belgium, which would not be entitled to tax it.

27 It should be recalled that it is settled case-law that the definition of 'aid' is more general than that of a subsidy, given that it includes not only positive benefits, such as subsidies themselves, but also State measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the term, are similar in character and have the same effect as them. Accordingly, a measure by which the public authorities grant certain undertakings favourable tax treatment which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than other taxpayers amounts to State aid within the meaning of Article 107(1) TFEU (see 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, paragraphs 71 and 72 and the case-law cited).

28 First, in recital 114 of the contested decision, the Commission claimed that the scheme at issue involved the exemption of excess profit, which constituted a reduction of tax for the undertakings benefiting from that scheme and, therefore, a loss of tax revenue that would otherwise have been available to the Kingdom of Belgium. Therefore, contrary to the Kingdom of Belgium's contention, the Commission did in fact identify the State resources involved in the alleged aid scheme, namely the tax revenue which would have been available to the Kingdom of Belgium, according to the Commission, in the absence of that scheme.

29 Secondly, under Article 185(1) of the CIR 92, the total amount of the recorded profit of resident companies is taxable in Belgium. Accordingly, that profit must be regarded as falling within the tax jurisdiction of the Kingdom of Belgium even if it may be adjusted, specifically under the Belgian tax rules applicable, such as Article 185(2)(b) of the CIR 92.

30 Thirdly, in so far as the present case concerns tax charge reductions that were granted by the Advance Ruling Commission, admittedly in accordance with an administrative practice, but only in response to a request made by the beneficiary, it cannot be maintained that the exempted profit was, fundamentally,

profit that was not taxable in Belgium. In fact, in the absence of a request in that regard, that profit would have been taxed in Belgium. Accordingly, the Kingdom of Belgium cannot maintain that that profit does not fall within its tax jurisdiction.

- 31 Fourthly, contrary to Ireland's contention, it must be noted that the reason why the Commission found that State resources were involved in the present case is precisely that, under the ordinary system of taxation of corporate profits in Belgium, which includes Article 185(1) of the CIR 92, the total amount of profit recorded by resident companies is, fundamentally, taxable in Belgium. Thus, it is by taking into account the choice made by the Belgian legislature, in the exercise of the tax jurisdiction of the Kingdom of Belgium, that the Commission was able to conclude that, to the extent that the excess profit was not taxed, when it was fundamentally taxable profit, such non-taxation resulted in a loss of resources that belonged to that State.
- 32 In the light of the above, the Court must reject the arguments of the Kingdom of Belgium, supported by Ireland, challenging the Commission's conclusion as to the financing of the scheme at issue through State resources.

2. The existence of a selective advantage granted by the scheme at issue

- 33 The Kingdom of Belgium disputes the Commission's findings concerning the existence of an advantage granted by the scheme at issue and its selectivity. More specifically, as regards selectivity, in reliance on the case-law concerning assessment for the purposes of classifying a tax measure as 'selective', the Kingdom of Belgium challenges the Commission's identification of the reference system, that is to say, the ordinary or 'normal' tax system applicable, its finding that the scheme at issue constitutes a derogation from that reference system, and its rejection of the Kingdom of Belgium's justification for the scheme, based on the nature and general scheme of the Belgian tax system.
- 34 In this case, it is appropriate to begin by examining the Kingdom of Belgium's arguments challenging the identification of the reference system against which the existence or non-existence of an advantage must be assessed, as well as the possible selectivity of such an advantage. The Court will then go on to consider the Kingdom of Belgium's arguments challenging the Commission's findings in relation to both the existence of an advantage and the selective nature of that advantage because of the existence of a derogation from the reference system and, also, in relation to the lack of justification based on the nature and general scheme of the Belgian tax system.

(a) Identification of the reference system

- 35 The Kingdom of Belgium submits, in essence, that the Commission erred in identifying the reference system, because it failed to take into account the fact that that system also included the excess profit scheme. The Kingdom of Belgium further maintains that the Commission erred in law by invoking Article 24 of the CIR 92, relating to the taxable income of natural persons, which is not, as regards the determination of taxable profit, entirely applicable to companies that belong to an international group.
- 36 Ireland submits that the Commission did not take into account the rules applicable in Belgium, although the reference system cannot extend beyond the national tax system and each State has absolute discretion to define the tax base within its system. Accordingly, it is not relevant how the profits from a transaction would be treated in other tax systems.
- 37 It must be recalled that the determination of the reference system is of particular importance in the case of tax measures, since the existence of an economic advantage for the purposes of Article 107(1) TFEU may be established only when compared with 'normal' taxation. Thus, determination of the set of undertakings which are in a comparable factual and legal situation depends on the prior definition of the legal regime in the light of whose objective it is necessary, where applicable, to examine whether the factual and legal situation of the undertakings favoured by the measure in question is comparable with that of those which are not (see judgment of 8 November 2022, *Fiat Chrysler Finance Europe v Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 69 and the case-law cited).
- 38 In that context, it has been held that the determination of the reference system, which must be carried out following an exchange of arguments with the Member State concerned, must follow from an

objective examination of the content, the structure and the specific effects of the applicable rules under the national law of that State (see judgment of 6 October 2021, *World Duty Free Group and Spain v Commission*, C-51/19 P and C-64/19 P, EU:C:2021:793, paragraph 62 and the case-law cited).

- 39 In addition, it is apparent from settled case-law that, while the Member States must thus refrain from adopting any tax measure liable to constitute State aid that is incompatible with the internal market, the fact remains that outside the spheres in which EU tax law has been harmonised, it is the Member State concerned which determines, by exercising its own competence in the matter of direct taxation and with due regard for its fiscal autonomy, the characteristics constituting the tax, which define, in principle, the reference system or the ‘normal’ tax regime, from which it is necessary to analyse the condition relating to selectivity. This includes, in particular, the determination of the basis of assessment and the taxable event (see judgment of 8 November 2022, *Fiat Chrysler Finance Europe v Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraphs 65 and 73 and the case-law cited).
- 40 It follows that only the national law applicable in the Member State concerned must be taken into account in order to identify the reference system for direct taxation, that identification being itself an essential prerequisite for assessing not only the existence of an advantage, but also whether it is selective in nature.
- 41 Furthermore, in order to determine whether a tax measure has conferred a selective advantage on an undertaking, it is for the Commission to carry out a comparison with the tax system normally applicable in the Member State concerned, following an objective examination of the content, the structure and the specific effects of the applicable rules under the national law of that State. Parameters and rules external to the national tax system at issue cannot therefore be taken into account in the examination of the existence of a selective tax advantage within the meaning of Article 107(1) TFEU and for the purposes of establishing the tax burden that should normally be borne by an undertaking, unless that national tax system makes explicit reference to them (see, to that effect, judgment of 8 November 2022, *Fiat Chrysler Finance Europe v Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraphs 92 and 96).
- 42 In the present case, the Commission set out in recitals 121 to 129 of the contested decision its position concerning the reference system.
- 43 Thus, in recitals 121 and 122 of the contested decision, the Commission stated that the reference system was the ordinary system of taxation of corporate profits under the general Belgian corporate income tax system, which had as its objective the taxation of profit of all companies subject to tax in Belgium. The Commission noted that the Belgian corporate income tax system applied to companies resident in Belgium as well as to Belgian branches of non-resident companies. Under Article 185(1) of the CIR 92, companies resident in Belgium were liable to corporate income tax on the total amount of their profit, unless a double taxation treaty applied. Moreover, under Articles 227 and 229 of the CIR 92, non-resident companies were only taxable on specific Belgium-sourced income. The Commission also stated that, in both cases, Belgian corporate income tax was payable on the total profit, which was established according to the rules on calculating profit as defined in Article 24 of the CIR 92. Under Article 185(1) of the CIR 92, read in conjunction with Articles 1, 24, 183, 227 and 229 of the CIR 92, the total profit was calculated as corporate income, minus deductible expenses which were typically recorded in the accounts, so that the profit actually recorded formed the starting point for calculating the total taxable profit, without prejudice to the subsequent application of upward and downward adjustments provided for by the Belgian corporate income tax system.
- 44 In recitals 123 to 128 of the contested decision, the Commission explained that the excess profit exemption scheme applied by the Belgian tax authorities was not an inherent part of the reference system.
- 45 More specifically, in recital 125 of the contested decision, the Commission found that that exemption was not prescribed by any provision of the CIR 92. Article 185(2)(a) of the CIR 92 allowed the Belgian tax administration to make a unilateral primary adjustment of a company’s profits where transactions or arrangements with associated companies were concluded on terms that differed from arm’s length conditions. By contrast, Article 185(2)(b) of the CIR 92 provided for the possibility of making

downward adjustments of a company's profit from an intra-group transaction or arrangement, subject to the additional condition that the profit to be adjusted had to have been included in the profit of the foreign counterparty to that transaction or arrangement.

46 In addition, in recital 126 of the contested decision, the Commission recalled that the objective of the Belgian corporate income tax system was to tax corporate taxpayers on their actual profits, irrespective of their legal form or size and of whether or not they formed part of a multinational group of undertakings.

47 Furthermore, in recital 127 of the contested decision, the Commission noted that, for the purposes of determining taxable profit, integrated multinational group companies were required to set the prices they applied to their intra-group transactions instead of those prices being dictated by the market, which is why Belgian tax law contained certain special provisions applicable to groups, which were generally aimed at putting non-integrated companies and economic entities structured in the form of groups on an equal footing.

48 In recital 129 of the contested decision, the Commission concluded that the reference system to be taken into consideration was the Belgian corporate income tax system, which had as its objective the taxation of profits of all companies resident or operating through a permanent establishment in Belgium in the same manner. That system included the applicable adjustments under the Belgian corporate income tax system, which determined the company's taxable profit for the purpose of levying Belgian corporate income tax.

49 It should be noted at the outset that the parties are agreed on the starting point: that the ordinary Belgian corporate income tax system constitutes the reference system.

50 However, the Kingdom of Belgium takes issue with the Commission's view of the scope of that ordinary system, as regards the determination of taxable profit, the relevance of Article 24 of the CIR 92, the possibility of adjusting the profits recorded by taxable companies and the question as to whether or not that system includes the excess profit exemption scheme applied by the Belgian tax authorities.

(1) Taking national law into account

51 As a preliminary point, it must be noted that, for the purpose of establishing what the ordinary or 'normal' tax system applicable in Belgium is, the Commission relied on the legal provisions applicable, in particular the CIR 92, as is apparent from paragraphs 42 to 48 above. Indeed, on the basis of the information provided by the Kingdom of Belgium in the context of the administrative procedure, the Commission described the legislative framework applicable and set out, in particular in recitals 23 to 28 of the contested decision, the Belgian corporate income tax system, as laid down by the CIR 92. Specifically, as stated in paragraph 43 above, the Commission expressly referred to Articles 1, 24, 183 and 185 of the CIR 92.

52 It follows that, contrary to Ireland's contention, for the purpose of identifying the reference system, the Commission relied on the tax rules applicable in Belgium.

(2) The determination of taxable corporate profits and the relevance of Article 24 of the CIR 92

53 With regard to the Kingdom of Belgium's arguments challenging the findings of the Commission in relation to the determination of taxable corporate profits in Belgium and the relevance of Article 24 of the CIR 92, it must be recalled that, in recital 122 of the contested decision, the Commission indicated that the total profit was established according to the rules for profit determination laid down in the provisions on calculating taxable profit as defined in Article 24 of the CIR 92.

54 Article 24 of the CIR 92 provides that the taxable income of industrial, commercial and agricultural undertakings includes all income from entrepreneurial activities such as profit from 'all the operations handled by those undertakings or through their intermediation' as well as profit from 'all increases in value of their assets ... or decrease in value of their liabilities ... when that profit has been realised and registered in the accounts'.

55 It follows that the taxable profit, for the purposes of the application of the CIR 92, consists, fundamentally, of all profits recorded by undertakings subject to taxation in Belgium, since those profits constitute the starting point for calculating that tax.

56 It is true that Article 24 of the CIR 92 forms part of Title II of that code, which concerns taxation of natural persons, and is within Chapter II thereof, which concerns the tax base; more specifically, it is included in Section IV, Subsection I, of that chapter, which relates to taxable income. However, according to Article 183 of the CIR 92, which concerns the corporate tax base, ‘the income subject to or exempted from corporate income tax is, by its nature, the same as that envisaged by the personal income tax of natural persons[,] the taxable amount [being] fixed according to the rules applicable to profit’. That provision makes no distinction as regards companies that are part of multinational groups of undertakings.

57 Accordingly, so far as taxation of corporate profit is concerned, including for the purposes of establishing the tax base, the CIR 92 refers back to the provisions covering the taxation of income of natural persons.

58 In those circumstances, the Kingdom of Belgium’s arguments challenging the Commission’s reliance on Article 24 of the CIR 92 for the purpose of determining taxable corporate profits in Belgium, in the context of its examination of the normal taxation of companies in Belgium, must be rejected.

(3) The possibility of making adjustments to the profit recorded by taxable companies

59 The Kingdom of Belgium claims that the Commission failed to take into account the fact that recorded profits merely formed the starting point for calculating taxable profit.

60 In that regard, it must be noted that it is apparent from the information provided by the Commission in recital 123 of the contested decision that it took into consideration the fact that the basis for calculating taxable profit was the total profit recorded by the entity in question, which was subject to the downward and upward adjustments provided for by the Belgian corporate income tax system.

61 More specifically, the Commission noted in recital 125 of the contested decision that the upward and downward adjustments laid down in Article 185(2)(a) and (b) of the CIR 92 were special tax provisions applicable to situations in which the conditions agreed for a transaction or an arrangement differed from those that would have been agreed between independent companies.

62 Therefore, contrary to what is claimed by the Kingdom of Belgium, the Commission did take into account the fact that, in the tax system applicable in Belgium, specifically as regards the taxable base for the taxation of corporate profit, it was possible to make upward and downward adjustments to the profits recorded. For the same reasons, the Kingdom of Belgium’s claims that the Commission disregarded the fact that there was a difference in the Belgian tax system between the accounting profit and the taxable profit cannot be upheld.

(4) The non-inclusion of the excess profit scheme in the reference system

63 The Kingdom of Belgium submits that the Commission incorrectly excluded the excess profit scheme from the reference system.

64 In the first place, it should be pointed out that the Commission did not exclude Article 185(2)(b) of the CIR 92 from the reference system. However, it did find that the excess profit scheme applied by the Belgian tax authorities was not laid down by that provision and, therefore, did not form part of the reference system. Thus, contrary to the Kingdom of Belgium’s contention, there is no contradiction between the conclusion regarding the existence of an aid scheme based on Article 185(2)(b) of the CIR 92 and the finding that the excess profit scheme does not form part of the reference system.

65 In the second place, in order to determine whether the Commission correctly concluded that the excess profit scheme was not provided for by Article 185(2)(b) of the CIR 92, it is necessary to examine, on the one hand, the scope of that provision and, on the other, the excess profit scheme as applied by the Belgian tax authorities.

(i) *The scope of Article 185(2) of the CIR 92*

66 It must be noted that the Commission based its analysis of Article 185(2) of the CIR 92 on the wording of that provision and the texts that accompanied its entry into force. In recitals 29 to 38 of the contested decision, the Commission described in detail, first, the text of Article 185(2) of the CIR 92, introduced by the loi du 21 juin 2004, modifiant le [CIR 92] et la loi du 24 décembre 2002 (Law of 21 June 2004 modifying the CIR 92 and the Law of 24 December 2002) (*Moniteur belge*, 9 July 2004, p. 54623; ‘the Law of 21 June 2004’); secondly, the explanatory memorandum to the draft of that law, presented to Belgium’s Chamber of Representatives by the Belgian Government on 30 April 2004 (‘the Memorandum to the Law of 21 June 2004’); and, thirdly, the circular of 4 July 2006 concerning Article 185(2) of the CIR 92 (‘the Circular of 4 July 2006’).

67 In its arguments in the context of the present action, the Kingdom of Belgium itself relied on those texts, which are part of the case file.

68 First of all, in the version applicable to the present case, Article 185(2) of the CIR 92, to which reference is made in recital 29 of the contested decision, is worded as follows:

‘Without prejudice to the second paragraph, for two companies that are part of a multinational group of associated companies and in respect of their reciprocal cross-border relationships:

...

(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 first paragraph applies by way of advance ruling without prejudice to the application of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/436) of 23 July 1990 or of a Convention for the avoidance of double taxation.’

69 Next, the Memorandum to the Law of 21 June 2004, referred to in recital 34 of the contested decision, states that Article 185(2)(b) of the CIR 92 provides for an appropriate correlative adjustment in order to avoid or undo a (potential) double taxation, and that a correlative adjustment should be made only if the tax administration or the Advance Ruling Commission considers both the principle and the amount of the primary adjustment to be justified.

70 Moreover, the Memorandum to the Law of 21 June 2004 makes clear that that provision does not apply if the profit made in the partner State is increased in such a way that it is greater than the profit that would have been obtained had the arm’s length principle been applied, since the Belgian tax authorities are not obliged to accept the consequences of an arbitrary or unilateral adjustment in the partner State.

71 Lastly, the Circular of 4 July 2006, referred to in recital 38 of the contested decision, reiterates that such a downward adjustment does not apply in cases where the primary upward adjustment in another tax jurisdiction is exaggerated. That circular, moreover, largely reproduces the text of the Memorandum to the Law of 21 June 2004, in that it recalls that the corresponding downward adjustment is informed by the arm’s length principle, that its objective is to avoid or undo a (potential) double taxation and that it must be made in an appropriate manner, that is, that the Belgian tax authorities can make that adjustment only if both the principle and the amount of that adjustment are justified.

72 Accordingly, it is apparent from the wording of Article 185(2)(b) of the CIR 92 that the downward adjustment is envisaged in the context of cross-border relationships between two associated companies and that it must be a correlative adjustment, in the sense that it is applicable only if the profit that is to be adjusted is already included in the profit of the other 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.

73 In that regard, it should be recalled that the Kingdom of Belgium itself asserted, in paragraph 95 of the application, that Article 185(2) of the CIR 92 was designed to determine the profits of a Belgian entity that are taxable in Belgium and those falling outside its jurisdiction, on the basis of an allocation of those profits between the Belgian entity and the associated companies involved in the intra-group cross-border relationships in question.

74 That finding is confirmed both by the Memorandum to the Law of 21 June 2004 and by the Circular of 4 July 2006, which make clear that both the principle and the amount of the correlative adjustment must be appropriate and that that adjustment should not be made if the profit made in another State is increased in such a way that it is greater than the profit that would have been obtained had the arm's length principle been applied. Those texts indicate that the downward adjustment provided for by Article 185(2)(b) of the CIR 92 requires a correlation between the profit adjusted downwards in Belgium and profit included in another group company established in another State.

(ii) The excess profit scheme

75 The Commission describes the excess profit scheme, as applied by the Belgian tax authorities, in recitals 13 to 22 of the contested decision. In addition, in recitals 39 to 42 of the contested decision, the Commission took into account the replies given by the Belgian Minister for Finance on 13 April 2005, 11 April 2007 and 6 January 2015 to parliamentary questions on the application of Article 185(2)(b) of the CIR 92. Those replies explain the administrative practice of the Belgian tax authorities relating to excess profit.

76 It is apparent from those replies that, in the context of the excess profit scheme applied by the Belgian tax authorities, the downward adjustment of profit enabling that excess profit to be deducted from the tax base was not conditional upon the exempted profit having been included in the profit of another company and that profit being profit which should have been made by that other company if the conditions agreed between them had been those which would have been agreed between independent companies. The Kingdom of Belgium confirmed that aspect of the scheme at issue at the hearing.

77 It is, moreover, apparent from the explanations given by the Kingdom of Belgium, as set out in particular in recitals 15 to 20 of the contested decision, that the exemption applied by the Belgian tax authorities under the scheme at issue was based on an exemption percentage, calculated on the basis of a hypothetical average profit for the Belgian entity, obtained using a profit level indicator derived from a comparison with the profit of comparable standalone companies and fixed as a point in the interquartile range of the chosen profit level indicator of a set of comparable standalone companies. That exemption percentage would have been applicable for a number of years, that is to say, during the period of validity of the advance ruling. Thus, the resulting starting point for the taxation of Belgian entities was not the full profit actually recorded, within the meaning of Articles 1, 24, 183 and Article 185(1) of the CIR 92, to which the adjustments provided for by law in the case of groups of undertakings would have been applied under Article 185(2) of the CIR 92; rather, it was a hypothetical profit that disregarded the total profit made by the Belgian entity in question and the adjustments provided for by law.

78 Furthermore, the fact that the objective of that provision is to avoid potential double taxation, as the Kingdom of Belgium emphasised, cannot eliminate the condition expressly laid down, relating to the fact that the profit to be adjusted must already have been included in the profit of another company and that that profit is profit which should have been made by that other company if the conditions agreed between them had been those which would have been agreed between independent companies. Indeed, it is precisely where the profit of a Belgian entity is already included in the profit of another company, established in another State, that the possibility of double taxation can arise.

(iii) Conclusion on the non-inclusion of the excess profit scheme in the reference system

79 It follows from the above that, while Article 185(2)(b) of the CIR 92 requires, for the purposes of a downward adjustment, that the profit to be adjusted should already have been included in the profit of

another company and be 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 excess profit scheme was applied by the Belgian tax authorities without those conditions being taken into consideration.

80 Accordingly, contrary to the Kingdom of Belgium's contention, the Commission was right to find that the excess profit exemption applied by the Belgian tax authorities under the scheme at issue did not form part of the reference system.

81 In those circumstances, the Court must reject all of the arguments of the Kingdom of Belgium challenging the Commission's identification of the reference system in the contested decision.

(b) The existence of an advantage as a result of the scheme at issue

82 The Kingdom of Belgium complains, in essence, that the Commission did not separately assess whether the excess profit system entailed the grant of an economic advantage to the beneficiaries. The Kingdom of Belgium also submits that the Commission did not consider or determine what tax advantage was gained by Belgian entities belonging to an international group in comparison with other competing standalone companies.

(1) Identification of the advantage granted by the scheme at issue

83 As a preliminary point, as noted in paragraphs 45 to 47 above, it should be recalled that, in recital 125 of the contested decision, the Commission indicated that the excess profit exemption applied by the Belgian tax authorities was not provided for by the Belgian corporate income tax system. Furthermore, in recital 126 of the contested decision, the Commission highlighted the fact that that exemption was calculated in disregard of the total profit actually recorded by the Belgian entity and the adjustments provided for by law. In recital 127 of the contested decision, it stated that although the Belgian system contained certain special provisions applicable to groups, these were aimed at putting integrated multinational group entities and standalone entities on an equal footing.

84 In that context, in recital 133 of the contested decision, the Commission indicated that, under the Belgian corporate income tax system, corporate entities resident or operating through a permanent establishment in Belgium were taxed on their profit actually recorded, not on a hypothetical level of profit, which was why the excess profit exemption conferred an advantage on Belgian group entities benefiting from the scheme at issue.

85 In recital 135 of the contested decision, the Commission recalled the case-law according to which an economic advantage may be granted through a reduction in an undertaking's tax burden and, in particular, through a reduction in the tax base or in the amount of tax due. Thus it found that, in the present case, the scheme at issue allowed corporate beneficiaries of advance rulings to reduce their tax liability by deducting a so-called 'excess' profit from their profit that was actually recorded. That excess profit was determined by estimating the hypothetical average profit of comparable standalone undertakings, so that the difference between the profit actually recorded and that hypothetical average profit was then translated into an exemption percentage underpinning the calculation of the tax base agreed for the five years of the advance ruling's application. In so far as that tax base, thus determined on the basis of the advance rulings granted under the scheme at issue, was lower than it would have been had those advance rulings not been issued, an advantage would have arisen.

86 In those circumstances, it should be noted that the contested decision discloses the factors which the Commission took into account in considering the existence of an advantage. The recitals highlighted, notably in paragraphs 83 to 85 above, make it possible to understand that the advantage identified by the Commission consisted in the non-taxation of the excess profit of corporate beneficiaries, and in the taxation of their profit calculated on the basis of a hypothetical average profit that disregarded the total profit made by those companies and the adjustments provided for by law, in accordance with advance rulings under the scheme at issue. According to the Commission, such taxation represented a lowering of the tax burden of the beneficiaries of the scheme, in comparison with the burden that would have arisen from normal taxation, under the Belgian corporate income tax system, which would have covered all profits actually recorded, after applying the adjustments provided for by law.

(2) *The joint analysis by the Commission of the criteria of advantage and selectivity*

- 87 At the outset, it should be borne in mind that selectivity and advantage are two separate criteria. So far as advantage is concerned, the Commission must show that the measure improves the financial situation of the recipient (see, to that effect, judgment of 2 July 1974, *Italy v Commission*, 173/73, EU:C:1974:71, paragraph 15). However, so far as selectivity is concerned, the Commission must show that the advantage does not benefit other undertakings that are in a factual and legal situation comparable to that of the recipient in the light of the objective of the reference system (see, to that effect, judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 49).
- 88 In that regard, according to the case-law, the requirement as to selectivity under Article 107(1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage, in that, where the Commission has identified an advantage, understood in a broad sense, as arising directly or indirectly from a particular measure, it is also required to establish that that advantage specifically benefits one or more undertakings (judgment of 4 June 2015, *Commission v MOL*, C-15/14 P, EU:C:2015:362, paragraph 59).
- 89 It must however be stated that, according to the case-law of the Court of Justice, those two criteria may be examined together as a ‘third condition’ laid down in Article 107(1) TFEU, requiring there to be a ‘selective advantage’ (see, to that effect, judgment of 30 June 2016, *Belgium v Commission*, C-270/15 P, EU:C:2016:489, paragraph 32).
- 90 In the contested decision, the Commission’s reasoning with regard to the advantage is set out in its analysis of the existence of a selective advantage, that is, in Section 6.3, entitled ‘Existence of a selective advantage’. In that context, as has just been noted in paragraphs 83 to 85 above, the Commission did indeed consider the advantage criterion. Next, the actual analysis of the selectivity of that advantage is set out in recitals 136 to 141 of the contested decision, under Section 6.3.2.1, so far as concerns the reasoning as to selectivity put forward by the Commission as part of its principal case, based on the existence of a derogation from the general Belgian corporate income tax system. Moreover, selectivity is also analysed in recitals 152 to 170 of the contested decision, under Section 6.3.2.2, so far as concerns the Commission’s subsidiary line of reasoning as to selectivity, based on the existence of a derogation from the arm’s length principle.
- 91 Accordingly, the fact that, in terms of form, the analysis of advantage was included in a section that also covers the examination of selectivity does not reveal a failure to carry out a substantive examination of both concepts, in so far as the existence of an advantage, on the one hand, and the existence of its selective nature, on the other, are in fact assessed (see, to that effect, judgment of 24 September 2019, *Netherlands and Others v Commission*, T-760/15 and T-636/16, EU:T:2019:669, paragraph 129).

(3) *The existence of an advantage favouring the beneficiaries of the scheme at issue*

- 92 It should be noted that, according to settled case-law, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or which fall to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (see judgment of 2 September 2010, *Commission v Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 40 and the case-law cited, and judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 21).
- 93 In the case of tax measures, the very existence of an advantage may be established only when compared with ‘normal’ taxation (judgment of 6 September 2006, *Portugal v Commission*, C-88/03, EU:C:2006:511, paragraph 56). Therefore, such measures confer an economic advantage on their recipients if the measures mitigate the burdens normally included in the budget of an undertaking and, accordingly, without being subsidies in the strict meaning of the word, are similar in character and have the same effect (judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 22).

- 94 Consequently, in order to determine whether there is a tax advantage, the position of the recipient as a result of the application of the measure at issue must be compared with the recipient's position in the absence of that measure, and under the normal rules of taxation (see judgment of 24 September 2019, *Netherlands and Others v Commission*, T-760/15 and T-636/16, EU:T:2019:669, paragraph 147 and the case-law cited).
- 95 Furthermore, in the case of an aid scheme, the Commission need only demonstrate that the tax scheme at issue is such as to favour its beneficiaries, by ascertaining that the scheme, taken as a whole, is, given its particular characteristics, capable of resulting, at the time of its adoption, in the tax liability being lower than it would have been if the general tax regime had been applied (see judgment of 2 February 2023, *Spain and Others v Commission*, C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60, paragraph 63 and the case-law cited).
- 96 In the present case, as indicated in paragraphs 83 to 86 above, the Commission noted in recitals 125 to 127 and 133 to 135 of the contested decision that, following the advance rulings issued under the scheme at issue, the Belgian entities that were part of a multinational group and that had requested it had been able to reduce their corporate tax liability in Belgium, by deducting from their tax base a percentage of their profit, as 'excess' profit, for the five years of the advance rulings' validity.
- 97 First of all, it is not disputed that the scheme at issue was designed as a system which consisted in the non-taxation of part of the profit recorded by Belgian entities that were part of a multinational group. Also undisputed is the fact that, under Article 2 of the Law of 21 June 2004, it is only through an advance ruling issued by the Advance Ruling Commission in response to a request made by the Belgian entities concerned that part of the profit of those entities could be classified as excess profit under Article 185(2)(b) of the CIR 92 and that the exemption percentage in question could be applied to the tax base of those entities, so that only part of that tax base was taxed.
- 98 Next, it should be recalled that it is apparent from Article 185(1) of the CIR 92 that resident companies in Belgium are to be taxed on the total amount of their profit. Furthermore, it is apparent from Article 24 of the CIR 92, as examined in paragraph 54 above, that the starting point for the taxable profit of undertakings is all the profit realised or registered in the accounts.
- 99 Lastly, as indicated in paragraphs 66 to 74 above, it is apparent from Article 185(2)(b) of the CIR 92 that the tax base can be adjusted downwards where the profit of the company in question is already included in the profit of another company of the same group and it is profit which should have been made by that other company if the conditions agreed between them had been those which would have been agreed between independent companies.
- 100 Consequently, under the normal rules of taxation in Belgium, Belgian entities were taxed on all of their profit, as registered in their accounts, subject to any adjustments, such as that provided for in Article 185(2)(b) of the CIR 92. However, in so far as the scheme at issue consisted in an exemption of 'excess' profit for which, as noted in paragraph 80 above, no provision was made in Article 185(2)(b) of the CIR 92, that scheme was capable of resulting in a reduction of the tax which the entities that requested those rulings would otherwise have had to pay, pursuant to the rules on corporate income tax in Belgium.
- 101 In the circumstances, the Commission cannot be criticised for having found that the tax scheme at issue was such as to favour its beneficiaries, in so far as that scheme, taken as a whole and given its particular characteristics, was capable of resulting in the tax liability being lower than it would have been if the normal rules of corporate taxation in Belgium had been applied.
- 102 None of the other arguments of the Kingdom of Belgium and Ireland is such as to call that finding into question.
- 103 First, as regards the Kingdom of Belgium's argument that the Commission did not determine what tax advantage the Belgian entities belonging to an international group benefited from in comparison with other competing standalone companies, it must be borne in mind, as is apparent from the case-law cited in paragraph 94 above, that the concept of 'economic advantage' means that the position of the recipient as a result of the application of the measure at issue must be compared with the recipient's

position in the absence of that measure and under the normal rules of taxation. Thus, in its analysis of the advantage, the Commission was not required to compare the position of the beneficiaries of the advance rulings with that of standalone undertakings. Furthermore, contrary to the Kingdom of Belgium's contention, when considering whether there was an advantage that had been conferred by an aid scheme, the Commission was not required to carry out an analysis of the individual situation of each beneficiary or to calculate the gap between the tax burden of the Belgian entities which had obtained an advance ruling and the tax burden which they would have had to bear in the absence of such rulings (see, to that effect, 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).

104 Secondly, as regards the argument challenging the Commission's finding that the advantage flowed from the gap between the taxable profit, based on the arm's length principle arising from Article 107 TFEU, accepted by the Commission, and the taxable profit determined in accordance with the arm's length principle as laid down by Belgian legislation, it should be noted that it is only in the context of the analysis of the selectivity of the scheme at issue that the Commission considered, in the alternative, the extent to which that scheme derogated from the arm's length principle. That argument is, therefore, entirely irrelevant in the context of the examination of the Commission's assessment of the existence of an advantage.

105 Thirdly, Ireland submits that advance rulings simply apply the law to the facts of each request and, therefore, that they do not place the taxpayer in a better economic position than that taxpayer would otherwise have been in. In that regard, it should be noted that, admittedly, under Article 20 of the Law of 24 December 2002, the Belgian Federal Public Service for Finance determines by means of advance rulings any request relating to the application of the tax laws to a particular situation or transaction which has not yet had tax effects and, under Article 2 of the Law of 21 June 2004, Article 185(2)(b) of the CIR 92 may be applied only by an advance ruling. However, the excess profit scheme was not provided for by Article 185(2)(b) of the CIR 92; rather, the Advance Ruling Commission implemented the scheme at issue in practice, by departing from the conditions laid down by that provision. In that context, on the basis of requests for advance rulings, the Advance Ruling Commission validated the calculation of excess profit proposed in those requests and determined the exemption percentage that could be applied by the Belgian entities in question during the period of validity of the advance rulings. Consequently, the advance rulings covered by the scheme at issue cannot be considered simply to apply the law to the facts in respect of each request.

106 In those circumstances, the Court must reject the arguments of the Kingdom of Belgium concerning a manifest error of assessment as regards the finding that there is an advantage as a result of the scheme at issue.

(c) The selective nature of the advantage as a result of a derogation from the reference system that differentiates between operators who are in a comparable situation

107 The Kingdom of Belgium claims, in essence, that the Commission made an error of assessment by concluding that the excess profit system conferred a selective advantage on its beneficiaries in that it constituted a derogation from the reference system, which is understood as being the general Belgian corporate income tax system.

108 First, the Kingdom of Belgium submits that the excess profit scheme is based on Article 185(2)(b) of the CIR 92, a provision which is part of the Belgian corporate income tax system, and, therefore, that that scheme cannot be regarded as derogating from the reference system as accepted by the Commission.

109 Secondly, the Kingdom of Belgium submits that the excess profit exemption scheme does not lead to unequal treatment of companies in a comparable factual and legal situation, given the objective of the reference system.

110 In that regard, it must be noted that, according to the case-law, in examining the selectivity of a tax measure, after first identifying and examining the common or 'normal' tax regime applicable in the Member State concerned, that is to say, the reference system, it is necessary, secondly, to assess and

determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in the light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation (see judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 49 and the case-law cited).

- 111 In the contested decision (Section 6.3.2.1), the Commission found, principally, that the Belgian excess profit exemption scheme conferred a selective advantage on its beneficiaries by derogating from the general Belgian corporate income tax system, in so far as that system provided for companies to be taxed on their total profit, that is, their profit actually recorded, not on a hypothetical average profit that disregarded the total profit made by those companies and the adjustments provided for by law.
- 112 Thus, the Commission concluded, in recital 136 of the contested decision, that Article 185(2)(b) of the CIR 92, on which the Kingdom of Belgium relied as the basis for the scheme at issue, did not have the meaning or effect suggested by that scheme and accordingly that that scheme constituted, rather, a derogation from the general rule under Belgian tax law according to which profit actually recorded is taxed. The Commission also pointed out that that scheme was not available to all entities in a similar legal and factual situation in the light of the objective of the Belgian corporate income tax system, which was to tax the profits of all companies subject to tax in Belgium.
- 113 The Commission then went on, in recitals 137 to 141 of the contested decision, to develop its reasons for considering that the scheme at issue differentiated between operators who, in the light of the objective assigned to the Belgian tax system, were in a comparable legal and factual situation.

(1) The existence of a derogation from the reference system

- 114 It should be recalled at the outset that what the Commission regarded as not forming part of the reference system and thus derogating from it is the excess profit scheme, that is to say, the downward adjustment, as applied by the Belgian tax authorities to a certain part of the taxable profit, referred to as the ‘excess’.
- 115 However, as indicated in paragraphs 79 and 80 above, in the light of the wording of Article 185(2)(b) of the CIR 92, the downward adjustment of the taxable profit is conditional on the profit of a given company that is to be deducted having already been included in the profit of another company, and that profit being profit which should have been made by that other company if the conditions agreed between them had been those which would have been agreed between independent companies. By contrast, the Belgian tax authorities’ practice of making a unilateral downward adjustment without the need to establish that the profit that is to be adjusted has already been included in the profit of another company and that it is profit which would have been made by that other company if the relevant transactions had been between independent companies is not provided for in Article 185(2)(b) of the CIR 92.
- 116 In fact, contrary to the Kingdom of Belgium’s contention and as the Court of Justice confirmed in the judgment on appeal, even though the tax rulings formally invoked Article 185(2)(b) of the CIR 92, the excess profit exemption scheme, which the Commission classified as a State aid scheme, was based on the Belgian tax authorities’ consistent administrative practice. As has just been established in paragraph 115 above, that practice differed from what was provided for in Article 185(2)(b) of the CIR 92.
- 117 Accordingly, the Commission was right to find that the excess profit exemption, as applied by the Belgian tax authorities, constituted a derogation from the reference system accepted by the Commission, that is to say, the ordinary Belgian corporate income tax system, which included, in particular, Article 185(2)(b) of the CIR 92, as has been noted in paragraph 64 above.

(2) Whether there is differentiation, as a result of the derogation from the reference system, between economic operators who are in a comparable situation

118 As regards the Commission's finding that the scheme at issue differentiates between the beneficiaries of the exemptions and other operators who are in a comparable situation, it should be noted that, in recitals 138 to 140 of the contested decision, the Commission put forward three alternative grounds for its conclusion. It is appropriate to examine each of these in turn, for the sake of completeness.

(i) Different treatment of beneficiaries forming part of a multinational group of undertakings

119 In recital 138 of the contested decision, the Commission asserted that the scheme was selective because it was only open to entities that were part of a multinational group of undertakings.

120 It is true that Article 185(2)(b) of the CIR 92 is intended to apply to integrated multinational group companies. However, as the Kingdom of Belgium argues, the purpose of Article 185(2) of the CIR 92 is precisely to put associated and unrelated undertakings on an equal footing.

121 In that regard, as stated in paragraph 49 above, it must be recalled that the objective of the ordinary Belgian corporate income tax system, as is apparent from recital 129 of the contested decision, is the taxation of all the taxable profits of entities subject to Belgian corporate income tax, whether they are standalone entities or form part of a multinational group of undertakings. In addition, as stated in paragraph 54 above, according to the normal rules of taxation in Belgium, the starting point for the taxable profit of undertakings is all the profit realised or registered in their accounts.

122 By contrast, the excess profit exemption applied by the Belgian tax authorities, in so far as it derogates from Article 185(2) of the CIR 92, granted a tax reduction to the beneficiaries concerned, on the ground that they were part of a multinational group of undertakings, by allowing them to deduct part of their recorded profit from their tax base, without that exempted profit having been included in the profit of another group company.

123 Therefore, entities forming part of a multinational group which benefited under the scheme at issue from an excess profit exemption, in the form of an exemption percentage calculated on the basis of a hypothetical average profit that disregarded the total profit made by those companies and the adjustments provided for by law, would be treated differently from other entities, whether standalone or forming part of a group of undertakings, which would have been taxed in accordance with the normal Belgian rules of corporate income tax on their total profit actually recorded, where appropriate, in the case of integrated entities, after adjustment pursuant to Article 185(2)(b) of the CIR 92 under the conditions laid down in that provision.

124 Accordingly, the Commission cannot be criticised for having stated that the entities forming part of a multinational group which benefited from the excess profit exemption pursuant to the scheme at issue, as an adjustment which is not as such provided for by law, were treated differently from other entities in Belgium that did not benefit from it, although those entities were in a comparable factual and legal situation, in the light of the objective of the ordinary Belgian corporate income tax system, which is the taxation of all taxable profits of all companies resident or operating through a permanent establishment in Belgium.

(ii) Different treatment in comparison with undertakings that have not made investments, created employment or centralised activities in Belgium

125 In recital 139 of the contested decision, the Commission stated that the scheme at issue was selective in so far as it was not open to companies that may have decided not to make investments, create employment or centralise activities in Belgium. The Commission noted that Article 20 of the Law of 24 December 2002 made the adoption of advance rulings conditional on the existence of a situation or of a transaction that had not had tax consequences and that an advance ruling was necessary in order to benefit from the excess profit exemption.

126 The Commission also noted that, in the sample of advance rulings granting an excess profit exemption that it had analysed, each ruling contained references to substantial investments, centralisation of activities or the creation of employment in Belgium. Accordingly, it found that the 'new situation' requirement that was a prerequisite for requests for advance rulings by which requesting parties sought to benefit from the excess profit exemption resulted in multinational groups that amended their

business model by establishing new operations in Belgium being treated differently from any other economic operators, including multinational groups, that continued to operate under their existing business models in Belgium.

- 127 In that regard, it should be recalled that, in paragraphs 142 to 144 of the judgment on appeal, the Court of Justice confirmed that the choice of a sample consisting of 22 advance rulings, issued in 2005, 2007, 2010 and 2013, was appropriate and sufficiently representative.
- 128 It should also 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. Moreover, Article 22 of that law makes clear that an advance ruling cannot be issued, in particular, when the request concerns situations or transactions identical to those having already had tax consequences as regards the requesting party.
- 129 Admittedly, it cannot be inferred from the provisions referred to in paragraph 128 above that the making of investments, creation of employment or centralisation of activities in Belgium is explicitly required as a condition for obtaining an advance ruling.
- 130 However, it is apparent from the sample of advance rulings analysed by the Commission in the contested decision that those rulings were in fact granted following requesting parties’ proposals to invest, to relocate certain operations or to create a certain number of jobs in Belgium. Indeed, the three examples described in footnote 80 to the contested decision, in which the parties requesting the advance rulings in question described their plans for investment and for recentralisation of activities in Belgium, show that, in practice, the condition for the issue of an advance ruling, that there should be a situation that had not had tax consequences, was satisfied by investments, by the centralisation of activities or by the creation of employment in Belgium.
- 131 In that regard, it should be borne in mind that, in the present case, it is precisely the administrative practice of the Belgian tax authorities – consisting in exempting profits by advance rulings – that has been considered to derogate from what is provided for in Article 185(2)(b) of the CIR 92. As a result of those advance rulings, their beneficiaries obtained an advantage consisting in a reduction in their tax base, because of the exemption of ‘excess’ profit. By contrast, entities that did not amend their business model in order to create new tax situations – which, in the light of that practice, consisted systematically in investments, centralisation of activities or creation of employment in Belgium – and therefore did not request an advance ruling were taxed on all of their taxable profits. Consequently, the scheme at issue resulted in companies that were in a comparable factual and legal situation being treated differently, in the light of the objective of the ordinary Belgian corporate income tax system.
- 132 In those circumstances, the Commission cannot be criticised for having stated, in recital 139 of the contested decision, that the system at issue was selective because it was not open to companies that had decided not to make investments, centralise activities or create employment in Belgium.

(iii) Different treatment in comparison with undertakings that are part of a small group

- 133 In the present case, the Commission stated, in recital 140 of the contested decision, that the scheme at issue was selective since only Belgian entities forming part of a large or medium-sized multinational group could effectively benefit from the excess profit exemption.
- 134 Indeed, in recital 140 of the contested decision, the Commission indicated that only entities belonging to a sufficiently large multinational group had an incentive to obtain an advance ruling, given that it was only within large corporate groups that synergies, economies of scale and other benefits were likely to generate a significant profit that would justify the request for an advance ruling. The Commission also noted that the process for obtaining such a ruling required a detailed request presenting the new situation that justified the exemption together with excess profit studies, which was more cumbersome for small corporate groups than for large corporate groups.
- 135 In that regard, it is not disputed that, within the sample of 22 advance rulings under the scheme at issue that was reviewed by the Commission, as described in recital 65 of the contested decision, and which

was considered appropriate and representative in paragraphs 142 to 144 of the judgment on appeal, none of those rulings concerned entities belonging to small groups of undertakings.

136 Furthermore, as indicated in recital 66 of the contested decision, it is undisputed that, during the administrative procedure, following that finding by the Commission on the basis of the sample of 22 advance rulings and in response to a request by the Commission to that effect, the Kingdom of Belgium was unable to substantiate its claim that the exemption had also been granted to undertakings belonging to small corporate groups.

137 Consequently, in the light of the administrative practice referred to by the Commission, it is undertakings forming part of large and medium-sized groups that relied on the excess profit exemption scheme, to the exclusion of undertakings forming part of a small corporate group.

138 That finding cannot be called into question by the Kingdom of Belgium's arguments. Contrary to what is claimed by the Kingdom of Belgium, it is apparent from the case-law that the fact that only one operator took advantage of a State measure is not sufficient to establish the selective nature of that measure, since that may result from, inter alia, lack of interest on the part of any other operator (see, to that effect, judgment of 4 June 2015, *Commission v MOL*, C-15/14 P, EU:C:2015:362, paragraph 91). As it is, it is apparent from the circumstances of the case that the Commission did indeed conclude on the basis of an appropriate and representative sample that the advance rulings had been systematically issued in respect of undertakings forming part of large or medium-sized groups.

139 In those circumstances, the Commission cannot be criticised for having stated, in recital 140 of the contested decision, that the system at issue was selective because it was not open to undertakings that were part of a small group.

140 In any event, even if the Commission had erred in relying on that ground relating to different treatment in comparison with undertakings forming part of a small group, that would not affect the validity of the other two grounds put forward by the Commission, which have been examined, respectively, in paragraphs 119 to 124 and 125 to 132 above.

(3) Conclusion on the Commission's primary line of reasoning

141 In the light of the above, the Commission did not err in stating, after setting out its primary line of reasoning, that the excess profit exemption scheme derogated from the ordinary Belgian corporate income tax system. Moreover, the Commission did not err when it pointed out that that scheme was not available to all entities in a similar legal and factual situation in the light of the objective of the Belgian corporate income tax system, which was to tax the profits of all companies subject to tax in Belgium.

142 In those circumstances, it is not necessary to examine the merits of the Kingdom of Belgium's arguments against the subsidiary line of reasoning with regard to selectivity which the Commission set out in Section 6.3.2.2 of the contested decision.

(d) Whether there is any justification based on the nature and general scheme of the Belgian tax system

143 The Kingdom of Belgium submits, in essence, that the general Belgian corporate income tax system has as its objective the taxation of profit of all companies subject to tax in Belgium, excluding profits which fall outside its jurisdiction. The exemption of the latter is therefore aimed at avoiding potential double taxation. Accordingly, even if the excess profit exemption scheme is selective, it would be justified by the nature and general scheme of the tax system.

144 It should be noted that, in recitals 173 to 181 of the contested decision, the Commission concluded, in essence, that the Kingdom of Belgium had not been able to establish that the measures at issue actually served the purpose of avoiding double taxation. According to the Commission, in so far as Article 185(2)(b) of the CIR 92 provided for a downward adjustment of a company's profit if it had been included in the profit of another company, the exemption applied by the Belgian tax authorities, without it being necessary to prove that the excess profit to be exempted had been included in the tax base of another company, could not be justified by the general scheme of the system. Thus, the

Commission concluded that the unilateral exemption at issue did not address situations of double taxation in a necessary and proportionate manner.

- 145 In that regard, it must be noted that, according to the case-law, a measure which constitutes an exception to the application of the general tax system may be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system. In that context, it is necessary to distinguish between, on the one hand, the objectives attributed to a particular tax regime and which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives. Thus, tax exemptions which are the result of an objective that is unrelated to the tax system of which they form part cannot circumvent the requirements under Article 107(1) TFEU (see, to that effect, judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraphs 64, 65, 69 and 70).
- 146 In the present case, it has been determined, notably in paragraph 115 above, that the excess profit exemption applied by the Belgian tax authorities was not conditional on it being demonstrated that that profit had been included in the profit of another company. Nor was that excess profit required actually to have been taxed in another State. Accordingly, it must be held that the measures at issue were not conditional on there being a situation of actual or possible double taxation.
- 147 In those circumstances, it cannot be maintained that the excess profit exemption, as applied by the Belgian tax authorities, was intended to avoid either actual or possible double taxation. Therefore, the Commission was right to conclude that such an exemption did not address situations of double taxation in a necessary and proportionate manner.
- 148 That conclusion cannot be called into question by the Kingdom of Belgium's arguments to the effect that the general scheme of the Belgian tax system allows only profits falling within its jurisdiction to be taxed. As has been established in paragraphs 114 to 117 above, the Belgian tax authorities' exemption of excess profit was not provided for by the ordinary Belgian corporate income tax system. Consequently, notwithstanding its exemption under the scheme at issue, that profit was, fundamentally, taxable in Belgium under that system, and it cannot therefore be considered not to fall within the tax jurisdiction of the Kingdom of Belgium.
- 149 In the light of the above, the Court must reject the arguments of the Kingdom of Belgium alleging that the Commission incorrectly found that there was no justification based on the nature and general scheme of the Belgian tax system, as well as all of the arguments by which the Kingdom of Belgium takes issue with the Commission's conclusion that the scheme at issue was capable of granting a selective advantage to its beneficiaries.

3. The existence of a distortion of competition

- 150 By this part of its case, the Kingdom of Belgium seeks a declaration that the Commission incorrectly found that there was a distortion of competition as a result of the measures at issue.
- 151 In recitals 187 and 188 of the contested decision, the Commission pointed out that the scheme at issue granted a selective advantage to its beneficiaries as well as to the multinational groups to which they belonged and that that advantage had led to a reduction of charges that should normally be borne by the beneficiaries in the course of their business operations. Therefore, the Commission found that the scheme at issue constituted operating aid for its beneficiaries and for the multinational groups to which they belonged. Accordingly, the Commission concluded that the scheme at issue distorted or threatened to distort competition and was liable to affect intra-Union trade.
- 152 In that regard, reference should be made to the case-law concerning the condition relating to distortion of competition, according to which, in principle, aid intended to release an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities distorts the conditions of competition (judgment of 26 October 2016, *Orange v Commission*, C-211/15 P, EU:C:2016:798, paragraph 66).
- 153 In particular, the case-law states that any grant of aid to an undertaking pursuing its activities in the internal market is liable to cause distortion of competition and affect trade between Member States (see

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 113 and the case-law cited).

- 154 First, in the present case, as has been held in paragraphs 100 and 101 above, the exemption of excess profits of companies benefiting from advance rulings, as provided for by the measures at issue, constituted an advantage which placed those companies in a more favourable economic position than they would have been in had an advance ruling not been issued.
- 155 Secondly, it has been held in paragraph 141 above that, in so far as those measures derogated from the reference system, they represented an advantage available only to the beneficiaries of advance rulings and, therefore, were selective.
- 156 Thirdly, it must be noted that the excess profits exempted under the measures at issue came from Belgian entities that were part of multinational groups engaging in transactions with other group companies, established in other States. Consequently, in the present case, the aid in question necessarily resulted in a distortion of competition within the internal market. The excess profit exemption system was liable to alter the activities of those Belgian entities and of the companies within the groups of undertakings concerned, in particular in terms of investments, location of business operations and creation of employment, as well as the flow of intra-group transactions. As it is, within those groups of undertakings, such decisions were liable to be taken in such a way that the Belgian entity would make profits that would subsequently be exempt in Belgium. Such a dynamic was therefore liable to distort competition within the internal market.
- 157 In those circumstances, the Commission cannot be criticised for having found that the aid granted under the scheme at issue was liable to affect trade between the Member States and to distort or threaten to distort competition.
- 158 Accordingly, the arguments put forward by the Kingdom of Belgium in the context of the fourth part of the third plea in law, relating to the non-existence of any distortion of competition in the present case, must be rejected.

4. Conclusion on the plea in law alleging infringement of Article 107 TFEU and a manifest error of assessment of the scheme at issue as a State aid measure

- 159 It is apparent from the findings in paragraphs 32, 81, 106, 141, 149 and 157 above that the Commission did not make an error of law or a manifest error of assessment in the contested decision when it concluded that the scheme at issue was financed through State resources, that the reference system was the ordinary system of taxation of corporate profits and that it did not cover the excess profit exemption applied by the Belgian tax authorities, that the scheme at issue granted its beneficiaries a selective advantage, which was not justified by the nature or general scheme of the Belgian tax system, and that that scheme had resulted in a distortion of competition.
- 160 Accordingly, the plea in law alleging infringement of Article 107 TFEU and a manifest error of assessment, in that the Commission considered that the excess profit system constituted a State aid measure, must be rejected.

B. Plea in law alleging an error of assessment by the Commission regarding the identification of the beneficiaries of the alleged aid

- 161 The Kingdom of Belgium argues that the Commission made an error of assessment in identifying, as beneficiaries of the alleged aid scheme, both the Belgian entities that had obtained advance rulings and the multinational groups to which they belonged.
- 162 The Commission contends that the plea put forward by the Kingdom of Belgium should be rejected.
- 163 In the present case, the Commission indicated, in recital 183 of the contested decision, that the Belgian entities that had obtained an advance ruling enabling them to deduct profit considered to be excess profit, for the purpose of determining their taxable profit, were the beneficiaries of the State aid at issue.

- 164 In addition, in recital 184 of the contested decision, the Commission recalled that, in matters of State aid, separate legal entities could be considered to form one economic unit, which was capable of being considered to be the beneficiary of the aid. It thus found that, in the present case, the Belgian entities benefiting from the aid at issue had operated as central entrepreneurs for the benefit of other entities within their corporate groups which they often controlled. It also noted that the Belgian entities were, in turn, controlled by the entity managing the corporate group as a whole. The Commission thus inferred from this that the multinational group as a whole could be seen as the beneficiary of the aid measure.
- 165 Moreover, in recital 185 of the contested decision, the Commission stated that it was the group as a whole, irrespective of the fact that it was organised in different legal entities, that would have taken the decision to centralise certain activities in Belgium and to make the necessary investments there in order to benefit from advance rulings.
- 166 Thus, in recital 186 of the contested decision, it concluded that, in addition to the Belgian entities that had been allowed to benefit from the scheme at issue, the multinational groups to which those entities belonged had to be considered beneficiaries of the aid scheme within the meaning of Article 107(1) TFEU.
- 167 First of all, it must be recalled that in a decision which concerns an aid 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, to that effect, judgments of 7 March 2002, *Italy v Commission*, C-310/99, EU:C:2002:143, paragraphs 89 and 91; 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 of 13 June 2019, *Copebi*, C-505/18, EU:C:2019:500, paragraphs 28 to 33).
- 168 In addition, according to established case-law, the Commission has a broad discretion when it is called upon to determine, in the context of the application of State aid provisions, whether, for the purposes of the application of those provisions in particular, separate legal entities form an economic unit (see, to that effect, judgments of 16 December 2010, *AceaElectrabel Produzione v Commission*, C-480/09 P, EU:C:2010:787, paragraph 63, and of 25 June 1998, *British Airways and Others v Commission*, T-371/94 and T-394/94, EU:T:1998:140, paragraph 314).
- 169 Thus, it has been held that the Commission was entitled to consider, for the purpose of assessing the beneficiaries of State aid and the appropriate conclusions to be drawn from a decision ordering recovery of that aid, that there was an economic unit among a number of separate legal entities, in particular where they were linked by a relationship of control (see, to that effect, judgments of 14 November 1984, *Intermills v Commission*, 323/82, EU:C:1984:345, paragraph 11, and of 16 December 2010, *AceaElectrabel Produzione v Commission*, C-480/09 P, EU:C:2010:787, paragraph 64).
- 170 In recitals 184 to 186 of the contested decision, the Commission highlighted the fact that, in the context of the scheme at issue, there were links of control between the Belgian entity and the other entities of the group to which they belonged. Thus, the Commission noted the fact that the Belgian entity performed core functions for other entities of the group, which were often controlled by that entity. Moreover, the Commission pointed out that the decisions within the multinational corporate groups regarding the arrangements that gave rise to the exemptions in question, namely the centralisation of activities in Belgium or investments made in Belgium, were taken by entities within the group and were necessarily taken by those which controlled the group. Furthermore, it is apparent from the Kingdom of Belgium's description of the excess profit scheme, as set out in particular in recital 14 of the contested decision, that the excess profit exempted was supposedly generated by synergies and economies of scale as a result of the Belgian entities' membership of a multinational corporate group.
- 171 It follows that, in the contested decision, the Commission highlighted elements that supported its conclusion that there were, in principle, links of control within the multinational corporate groups to which the Belgian entities that had obtained advance rulings belonged. In view of those elements of the scheme at issue, it cannot be concluded that the Commission exceeded the limits of its discretion when

it found that those groups constituted an economic unit with those entities, benefiting from State aid under that scheme, within the meaning of Article 107(1) TFEU.

172 In the light of the above considerations, the plea alleging that the Commission made an error of assessment in identifying the aid beneficiaries must be rejected.

C. Plea in law, in the alternative, alleging breach of the general principle of legality and of Article 16(1) of Regulation 2015/1589 in so far as the Commission ordered the recovery of the alleged aid

173 The Kingdom of Belgium submits that the principle of legal certainty requires that its application must be combined with that of the principle of legality. In that regard, it claims that the recovery ordered under the contested decision does not have any basis in law and, therefore, is contrary to the principle of legality and Article 16(1) of Regulation 2015/1589.

174 The Kingdom of Belgium claims, in essence, first, that the contested decision fails to provide adequate reasons for the identification, as beneficiaries, of the multinational groups to which the Belgian entities belong and for the determination of the amounts to be recovered; and, secondly, breach of the principles of legal certainty and legality as a result of the recovery ordered to be made from those groups.

175 As regards the complaints relating to the failure to state reasons, it should be noted that, according to the case-law cited in paragraph 167 above, in decisions which concern aid schemes, 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 for the Member States to look at the individual situation of each undertaking concerned. However, the Commission's decision must be supported by sufficient grounds to permit its implementation by the national authorities.

176 In the present case, as stated in paragraph 163 above, it should be noted that, in recital 183 of the contested decision, the Commission identified the beneficiaries of the aid at issue as being the Belgian entities that had deducted excess profit from their taxable profit pursuant to an advance ruling. In addition, as stated in paragraphs 164 to 166 above, in recitals 184 to 186 of the contested decision, the Commission indicated the reasons for its conclusion that there was an economic unit that was formed by those Belgian entities and the associated companies within the groups to which they belonged, in the light of the case-law.

177 Moreover, as regards the amounts to be recovered, it must be noted that, in recitals 207 to 211 of the contested decision, the Commission provided explanations as to the method of calculating the aid to be recovered. Thus, the Commission indicated that it was necessary to calculate the amount of the tax which should have been paid if the excess profit exemption had not been granted, taking into account the amount of tax saved as a consequence of all advance rulings delivered to the beneficiary concerned and the cumulated interest on that amount calculated as from the moment the aid was granted, that is to say, the date on which the tax saved would have been due in each tax year in the absence of the advance ruling. In addition, information was included on making the adjustments corresponding to the various deductions applicable. Lastly, it was noted that the amount to be recovered could be further refined subsequently in correspondence between the Kingdom of Belgium and the Commission.

178 It follows that the Commission provided explanations enabling the Kingdom of Belgium to look at the individual situation of each undertaking concerned as regards the beneficiaries from which the aid was to be recovered and the amount to be recovered. In addition, in the light of the complaints put forward in the context of the present action and the above considerations, it must be held that the Commission has provided sufficient explanations to enable the Kingdom of Belgium to ascertain the reasons for the Commission's decision and the General Court to exercise its power of review.

179 With regard to the alleged breach of the principles of legal certainty and legality, the Kingdom of Belgium relies on the fact that aid was ordered to be recovered from the multinational groups to which the Belgian entities that had obtained an advance ruling belonged, when only those Belgian entities could have benefited from the exemptions in question.

- 180 In that regard, it is sufficient to recall the considerations set out in paragraphs 163 to 170 above and the conclusion drawn in paragraph 171 above, according to which the Commission was right to find that the multinational groups to which the Belgian entities belonged constituted an economic unit with those entities benefiting from State aid under that scheme within the meaning of Article 107(1) TFEU.
- 181 In the light of the above considerations, the Court must reject the fifth plea relied on by the Kingdom of Belgium, alleging breach of the general principle of legality and of Article 16(1) of Regulation 2015/1589, in so far as the Commission ordered the recovery of aid granted under the scheme at issue.
- 182 Since none of the pleas put forward by the Kingdom of Belgium is well founded, the action must be dismissed in its entirety.

IV. Costs

- 183 In accordance with Article 219 of the Rules of Procedure, in decisions of the General Court given after its decision has been set aside and the case referred back to it, the General Court is to decide on the costs relating to the proceedings instituted before it and to the proceedings on the appeal before the Court of Justice. Given that, in the judgment on appeal, the Court of Justice reserved the costs, it is for the General Court to decide also on the costs relating to the appeal proceedings.
- 184 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 Kingdom of Belgium has been unsuccessful, it must be ordered to pay the costs incurred by the Commission in the original proceedings before the General Court in Case T-131/16 and in the present proceedings following referral in Case T-131/16 RENV, in accordance with the form of order sought by the Commission.
- 185 As regards the costs relating to the appeal proceedings, in view of the fact that those proceedings concerned the original judgment in Joined Cases T-131/16 and T-263/16, the Kingdom of Belgium must be ordered to pay one half of the costs incurred by the Commission in the appeal proceedings in Case C-337/19 P.
- 186 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 shall therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition),

hereby:

- 1. Dismisses the action;**
- 2. Orders the Kingdom of Belgium to bear its own costs and to pay those incurred by the European Commission, comprising those incurred in the original proceedings before the General Court in Case T-131/16, those incurred in the present proceedings following referral in Case T-131/16 RENV, and one half of those incurred in the appeal proceedings in Case C-337/19 P;**
- 3. Orders Ireland to bear its own costs.**

Marcoulli

Frimodt Nielsen

Tomljenović

Norkus

Valasidis

Registrar

President

Table of contents

I. Background to the dispute

- A. The original judgment
- B. The judgment on appeal

II. Procedure and forms of order sought

III. Law

A. Plea in law alleging infringement of Article 107 TFEU and a manifest error of assessment, in that the Commission considered that the excess profit system constituted a State aid measure

- 1. The financing of the scheme at issue through State resources
- 2. The existence of a selective advantage granted by the scheme at issue
 - (a) Identification of the reference system
 - (1) Taking national law into account
 - (2) The determination of taxable corporate profits and the relevance of Article 24 of the CIR 92
 - (3) The possibility of making adjustments to the profit recorded by taxable companies
 - (4) The non-inclusion of the excess profit scheme in the reference system
 - (i) The scope of Article 185(2) of the CIR 92
 - (ii) The excess profit scheme
 - (iii) Conclusion on the non-inclusion of the excess profit scheme in the reference system
 - (b) The existence of an advantage as a result of the scheme at issue
 - (1) Identification of the advantage granted by the scheme at issue
 - (2) The joint analysis by the Commission of the criteria of advantage and selectivity
 - (3) The existence of an advantage favouring the beneficiaries of the scheme at issue
 - (c) The selective nature of the advantage as a result of a derogation from the reference system that differentiates between operators who are in a comparable situation
 - (1) The existence of a derogation from the reference system
 - (2) Whether there is differentiation, as a result of the derogation from the reference system, between economic operators who are in a comparable situation
 - (i) Different treatment of beneficiaries forming part of a multinational group of undertakings
 - (ii) Different treatment in comparison with undertakings that have not made investments, created employment or centralised activities in Belgium
 - (iii) Different treatment in comparison with undertakings that are part of a small group
 - (3) Conclusion on the Commission's primary line of reasoning
 - (d) Whether there is any justification based on the nature and general scheme of the Belgian tax system
- 3. The existence of a distortion of competition
- 4. Conclusion on the plea in law alleging infringement of Article 107 TFEU and a manifest error of assessment of the scheme at issue as a State aid measure

B. Plea in law alleging an error of assessment by the Commission regarding the identification of the beneficiaries of the alleged aid

C. Plea in law, in the alternative, alleging breach of the general principle of legality and of Article 16(1) of Regulation 2015/1589 in so far as the Commission ordered the recovery of the alleged aid

IV. Costs

* Language of the case: English.