Judgement of the Court of Justice (Fourth Chamber) of September 16, 2021 Commission v Belgium and Magnetrol International, in the Case C-337/19 P (ECLI:EU:C:2021:741). Concepts of "aid scheme", "act", "further implementing measures", "General and abstract" definition of beneficiaries and "Systematic approach". Fiscal autonomy of the Member States. The term "Act" in Article 1(d) of Regulation 2015/1589 includes a systematic *contra legem* application by the tax authorities of that Member State. To decide about the need or not of "further implementing measures" it must be determined whether the grant of individual aid is conditional on the adoption of such measures or whether, on the contrary, that grant may be made on the basis of that act alone. The contra legem practice of the tax authorities, in the case, to grant to the beneficiary the excess profit exemption was granted without there being any need to adopt further implementing measures. (JIRP)

CONTEXT:

By its appeal, the European Commission asks the Court of Justice to set aside the judgment of the General Court of the European Union of 14 February 2019, Belgium and Magnetrol International v Commission (T‑131/16 and T‑263/16, EU:T:2019:91; 'the judgment under appeal'), by which the General Court annulled Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium (OJ 2016 L 260, p. 61; 'the decision at issue'). The single ground of appeal raised by the Commission concerns errors made by the General Court in the interpretation of Article 1(d) of Regulation 2015/1589, which defines an 'aid scheme'. The Commission's single ground of appeal is divided into four parts. In essence, the first three parts relate, respectively, to the three conditions defining an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589. The fourth part concerns a failure by the General Court to have regard to *the ratio legis* of that provision.

KEYWORDS: State aid, aid scheme, act, further implementing measures, beneficiaries.

DOCTRINE:

Aid Scheme

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

60 Thus, for a State measure to be classified as an aid scheme, three cumulative conditions must be satisfied. First, aid may be granted individually to undertakings on the basis of an act. Secondly, no

further implementing measure is required for that aid to be granted. Thirdly, undertakings to which individual aid may be granted must be defined 'in a general and abstract manner'.

Act

71 In so far as the Commission alleges that the General Court misinterpreted the first condition laid down in Article 1(d) of Regulation 2015/1589, it is necessary to determine, in the first place, whether, as the Commission argues, a tax provision of a Member State must be regarded as being an 'act', within the meaning of Article 1(d) of Regulation 2015/1589, where it is the subject of a systematic contra legem application by the tax authorities of that Member State and, in the event of there being such an application, whether account should be taken of the consistent administrative practice by those authorities in identifying acts constituting the aid scheme based on that tax provision.

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

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

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

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

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

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

required to carry out an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned.

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

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

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

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

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

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

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

85 First, it must be noted that the scope of and detailed rules relating to those checks would, in such a case, necessarily depend on the form which the Member States give to State aid measures. Secondly, as the Commission submits, some of those aid measures, which are based on a contra legem application of a provision of national law, would necessarily be excluded from the concept of an 'aid scheme' within the

meaning of Article 1(d) of Regulation 2015/1589, even though a set of circumstances indicates the de facto existence of such a scheme.

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

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

88 In that regard, it should be noted that, in paragraph 80 of the judgment under appeal, the General Court examined, first of all, the acts listed in recitals 97 to 99 of the decision at issue. It thus noted that the acts in recital 99 of that decision, namely both Article 185(2)(b) of the CIR 92 and the explanatory memorandum to the Law of 21 June 2004, the Circular of 4 July 2006 and the replies given by the Minister for Finance to parliamentary questions on the application of that provision by the Belgian tax authorities, constituted the acts on the basis of which the excess profit exemption at issue was granted.

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

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

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

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

93 That reasoning is vitiated by errors of law.

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

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

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

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

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

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

Further implementing measures

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

105 As the General Court correctly pointed out in paragraph 99 of the judgment under appeal, referring in that regard to recital 100 of the decision at issue, the existence of further implementing measures entails a degree of discretion on the part of the tax authority adopting the measures in question, allowing it to influence the amount of the aid, its characteristics or the conditions under which that aid is granted. By contrast, the mere technical application of the act providing for the grant of the aid in

question does not constitute a 'further implementing measure' within the meaning of Article 1(d) of Regulation 2015/1589.

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

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

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

109 Second, in the context of the examination, carried out in paragraphs 103 to 113 of the judgment under appeal, of whether, when adopting the tax rulings on the excess profit exemption, the Belgian tax authorities had a discretion enabling them to influence the amount of that exemption, the key facts of the scheme at issue and conditions under which that exemption was granted, the General Court merely referred to the acts listed in recital 99 of the decision at issue in order to conclude, in essence, that those acts were limited to defining, in a general manner, the Belgian tax authorities' position in respect of that exemption.

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

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

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

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

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

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

116 Similarly, the existence of a preliminary phase in the procedure for obtaining an tax ruling on the excess profit exemption, referred to in paragraph 112 of the judgment under appeal, cannot constitute evidence that the Belgian tax authorities necessarily had discretion in the excess profit exemption scheme. That discretion must be assessed solely in the light of the tax rulings issued under that scheme, so that the situations which did not give rise to the adoption of such a decision are irrelevant in that regard.

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

Definition of the beneficiaries 'in a general and abstract manner' by the acts constituting the basis of the State aid scheme.

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

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

122 Accordingly, the errors of law made by the General Court, which have been pointed out in paragraphs 97, 98 and 113 of the present judgment and which concern the first two of those conditions,

vitiated the General Court's assessment relating to the definition of the beneficiaries of the excess profit exemption.

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

The Court (Fourth Chamber):

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

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

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

4. Reserves the costs.