AG Kokott proposes the Court of Justice to annul the decision of the General Court concluding that the Belgian tax regime on the excess profits of MNEs did not constitute an aid scheme

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Today, Advocate General ("**AG**") Kokott issued her opinion in case C-337/19 P (*Commission v Belgium and Magnetrol International*) on the appeal lodged by the Commission against the judgement of the General Court of the European Union (the "**General Court**") issued in joined cases T-131/16 (*Belgium v Commission*) and T-263/16 (*Magnetrol International v Commission*).

The case dealt with the downwards profits adjustments made by the Belgian tax authorities, in tax years 2004 through 2014, by way of tax rulings granted to fifty-five Belgian resident entities. In particular, such rulings were granted to the requesting entities that could demonstrate the existence of a new situation, such as a reorganisation leading to the relocation of the central entrepreneur to Belgium, the creation of jobs or investments. Upon the ruling, the Belgian tax authorities determined the profits that the requesting entity, belonging to a multinational group, would have derived in excess of the profits derived by a comparable standalone entity in similar circumstances. The amount so determined in the ruling (the "*excess profits*") was then exempted from corporate income tax in Belgium.

In 2016, the Commission issued a decision by which it considered that the above-mentioned regime of excess profits exemptions constituted an unlawful aid scheme within the meaning of Article 1(d) of Regulation (EU) 2015/1589. Belgium and Magnetrol International (one of the ruling recipients) lodged an appeal before the General Court arguing that the Commission wrongly characterized the measure at stake as an aid scheme. The General Court upheld the appeals arguing that the excess profits regime was indeed not an aid scheme since none of the three cumulative requirements laid down in Article 1(d) of Regulation 2015/1589 was met, in particular (i) the existence of an act (ii) the granting of the individual aid without further implementing measures (iii) the identification of the beneficiaries in a general and abstract manner in the act concerned.

AG Kokott proposed the Court of Justice to annul the judgment and to refer back the case to the General Court in order to assess whether the excess profits scheme constitutes an unlawful State aid and whether the recovery of the alleged aid infringes, in particular, the principles of legality and of protection of legitimate expectations.

Interestingly, the AG clarified in her opinion why the constituent elements of the aid scheme definition could be found to be present in the case at stake.
With reference to the first requirement, the AG noted that, in dismissing the appeals lodged by Belgium and Magnetrol International, the General Court correctly did not rule out the possibility that an "act" under the meaning of Article 1(d) of Regulation (EU) 2015/1589 may also consist of a consistent administrative practice. In the case at stake, however, the AG argued that the General Court gave a too narrow interpretation of this requirement, and that the Commission might also use a sample of tax rulings for the purposes of demonstrating the existence of a consistent administrative practice. In this respect, the AG found that the sample of tax rulings analysed by the Commission was sufficiently representative and sufficient to demonstrate the existence a consistent administrative practice.

With reference to the second condition under Article 1(d) of Regulation 2015/1589 (namely, that no further implementing measure is necessary), the AG concluded that such a requirement was also met. Indeed, in the case of a consistent administrative practice, a further implementing measure could be found to be necessary only where the administrator retained a decision-making power that enables a deviation from the treatment actually practiced. In the specific case, however, the downwards profits adjustments were always made using the same method without exception and, thus, it concluded that the Belgian tax authorities did not exercise any independent and individual decision-making power.

Finally, with reference to the third requirement (namely, the identification of the beneficiaries in a general and abstract manner in the act concerned), the AG found that the General Court erred in concluding that the definition of beneficiaries was not general and abstract because it was based on the practice of the Belgian tax authorities, as opposed to the relevant legislative act, and that it was the very same consistent administrative practice of those authorities to be regarded by the Commission as constituting an aid scheme.

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