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Alleged State Aid in Relation to a Deduction/ Non-Inclusion Structure in Luxembourg – Opinion Statement ECJ-TF 1/2024 on the Decision of the CJEU of 5 December 2023 in *Engie* (Joined Cases C-451/21P and C-454/21P)

In this CFE Opinion Statement, submitted to the EU Institutions in February 2024, the CFE ECJ Task Force comments on the CJEU's decision of 5 December 2023 in *Engie* (Joined Cases C-451/21P and C-454/21P), which addressed alleged State aid in relation to a deduction/non-inclusion structure in Luxembourg.

1. Introduction

This is an Opinion Statement prepared by the CFE ECJ Task Force on *Engie* (Joined Cases C-451/21P and C-454/21P), in respect of which the Court of Justice of the European Union (Grand Chamber) delivered its decision on 5 December 2023.[1]

The *Engie* case concerns the question of whether or not tax rulings issued by Luxembourg to companies that form part of the French energy group Engie are compatible with primary EU law, notably rules on State aid; and, whether, and to what extent, the Commission can invoke the concept of "abuse of law" for a State aid challenge of an *ex ante* tax assessment issued by a tax authority of a Member State in the form of a tax ruling.

The Court set aside the General Court decision of 12 May 2021,[2] which initially upheld the European Commission findings on State aid. The CJEU's Grand Chamber found that the European Commission did not establish, to the appropriate legal standard, that the tax rulings related to the zero-interest convertible loan (ZORA) provided a selective advantage for the Engie entities. It did not establish the correct reference framework for an assessment of State aid by excluding the legal basis for the tax ruling practice from the reference framework itself (articles 164 and 166 of the LIR).[3] By establishing an erroneous reference framework, the Commission relied on an incorrect selectivity analysis, a key step in establishing State aid for the purposes of article 107(1) of the Treaty on the Functioning of the European Union (2007) (TFEU).[4] Finally, the Court established that the Commission cannot invoke national anti-abuse rules to establish selectivity in a situation in which the non-application of the "abuse of law" concept by tax authorities is based on a derogation from national law or an administrative practice on anti-abuse provisions comparable to the case at issue (*in concreto*). Thus, the Grand Chamber decision follows the Opinion of Advocate General Kokott delivered on 4 May 2023.[5] The Court, however, opened the door to establishing selectiv-

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1. LU: CJEU (Grand Chamber), 5 Dec. 2023, Joined Cases C-451/21 P and C-454/21 P, *Grand Duchy of Luxembourg, EngieGlobal LNG Holding Sàrl, Engie Invest International SA, Engie SA v. European Commission, Ireland*, Case Law IBFD [hereinafter *Engie* (C-451/21 P and C-454/21 P).
2. LU: General Court, 12 May 2021, T 516/18, *Grand Duchy of Luxembourg, EngieGlobal LNG Holding Sàrl, Engie Invest International SA, Engie SA v. European Commission, Ireland*, [hereinafter General Court decision in *Engie* (T-516/18)].
3. LU: *Loi du 4 décembre 1967, concernant l'impôt sur le revenu* (Law of 4 December 1967 on income tax) (Mémorial A 1967, p. 1228), as amended [hereinafter LIR].
4. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), Primary Sources IBFD.
5. LU: Opinion of Advocate General Kokott, 4 May 2023, Joined Cases C-451/21 P and C-454/21 P, *Grand Duchy of Luxembourg, EngieGlobal LNG Holding Sàrl, Engie Invest International SA, Engie SA v. European Commission, Ireland*, ECLI:EU:C:2023:383, Case Law IBFD.

ity of tax rulings, such as those in the *Engie* case, where the basis for taxation consists of a pre-agreed margin (mark-up), approved by the tax administration, rather than applying the rules of ordinary tax law, under specific conditions.

This Opinion Statement focuses on questions of law and the relevance of the case to the development of the EU State aid law doctrine applicable to tax measures. The factual and corporate law aspects are analysed to the extent relevant to the State aid analysis.

2. Background, Facts and Issues

In this case, subsidiaries of the Engie group were granted two sets of tax rulings in Luxembourg related to an intragroup financing structure.[6] Engie is a French energy group, which operates in Luxembourg via subsidiaries and holding companies, notably Compagnie Européenne de Financement C.E.F. SA (CEF).[7] CEF is a management company used to, inter alia, acquire participations in several Luxembourg companies, including (i) GDF Suez Treasury Management Sàrl (GSTM), now Engie Treasury Management Sàrl; (ii) Electrabel Invest Luxembourg SA (EIL); and (iii) GDF Suez LNG Holding Sàrl (LNG Holding), incorporated in 2009, now Engie Global LNG Holding.[8] Engie group operated a financing group structure in Luxembourg for the purpose of treasury management and financing of the group's activities.

The first set of tax rulings issued by the Luxembourg tax administration relates to the financing of the transfer of LNG Trading's business activities in the liquefied natural gas (LNG) and gas derivatives sector to LNG Supply. The second set of tax rulings relates to the internal transfer of Engie's treasury management entity and financing business. The structure was implemented by way of a series of transactions that centre on financing by way of a convertible loan – zero interest bond repayable in shares (ZORA). The loan was interest-free and convertible into equity (shares) when repaid/upon maturity, subject to the financial performance of the borrower.[9]

ZORA constitutes a 15-year interest-free mandatorily convertible loan, provided by a Luxembourg resident intermediary company. ZORA did not carry periodic interest, but, upon conversion, allowed the subsidiary to pay to the lender the shares that represent the ZORA nominal value plus a "bonus" (consisting of all the profits of the subsidiary during the duration of the ZORA, minus a margin agreed to with the Luxembourg tax administration). This "bonus" is referred to as "ZORA accretions" (accruals) in the relevant filings of the Engie companies and in the Luxembourg administration tax rulings. The role of the intermediary entity is critical to the ZORA structure to the extent that this entity finances the loan by way of a Forward Prepaid Contract, as entered into with a Luxembourg holding that constitutes the sole shareholder of both the intermediary entity and the subsidiary. The holding then pays an amount equal to the ZORA nominal value to the intermediary company in consideration for the acquisition of the shares that the subsidiary will issue upon conversion of the ZORA. Provided that, during the existence of the ZORA, the subsidiary realizes a profit, the holding receives the shares (upon conversion) incorporating the ZORA bonus value (the ZORA accretions). As such, the financing of the acquisition of the assets by the subsidiary is provided by the holding by means of the ZORA (and the Forward Prepaid Contract).[10] These operations can be summarized as in Figure 1.

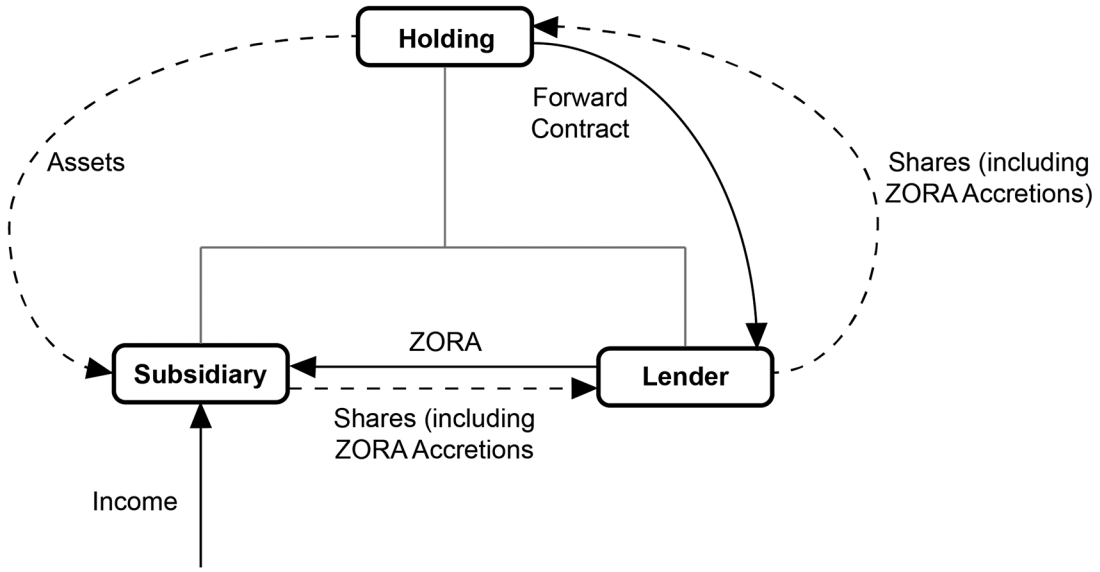
On 20 June 2018, the European Commission adopted a decision to the effect that Luxembourg had granted a selective advantage to the Engie group in breach of articles 107(1) and 108(3) of the TFEU. The Commission challenged the group financing structure, without questioning its legality, on the basis that a significant part of profits made by the Engie subsidiaries in Luxembourg had not been taxed, in particular as a result of the exemption provided for in article 166 of the LIR.[11] The income from the participations held by LNG Holding and CEF was considered by the Commission to be income not taxed in Luxembourg, resulting in an economic advantage pursuant to article 107(1) of the TFEU.[12]

As regards the income derived from the ZORA accruals that LNG Supply and GSTM deducted from their tax base, the Commission considered the non-taxation of the ZORA accruals at the level of the holding companies or the intermediary companies to be the result of a tax ruling granted to Engie by the Luxembourg tax administration that agreed to a basis of assessment based only on a limited markup, payable by the Engie subsidiaries in Luxembourg.[13] Therefore, the Commission concluded, in its analysis, that:

- the subsidiaries made accounting provisions on a yearly basis corresponding to the ZORA accretions, which were regarded as deductible expenses;
- the intermediaries were not taxed on the ZORA accretions, since, upon conversion of the ZORA, under the prepaid forward contracts concluded with the holding companies concerned, the intermediaries incurred a loss equal to those accretions; and
- the holding companies, which, under the prepaid forward contracts, hold the subsidiaries' shares once the ZORA has matured, were also not taxed, since

6. *Engie* (C-451/21 P and C-454/21 P), paras. 6-21.
7. The Engie group consists of Engie, a company established in France, and all companies directly or indirectly controlled by that company. That group is the result of a merger of the French groups Suez and Gaz de France; In 2009, the Engie group established two subsidiaries in Luxembourg, GDF Suez LNG Luxembourg Sàrl (LNG Luxembourg) and GDF Suez LNG Supply SA (LNG Supply). At the end of 2009, LNG Holding took over the control of those two subsidiaries, which had previously been exercised by another company in that group, Suez LNG Trading SA (LNG Trading). LNG Holding held the entire capital of LNG Luxembourg and LNG Supply; *Engie* (C-451/21 P and C-454/21 P), paras. 5-21.
8. Id., paras. 3-5.
9. Id., paras. 6-24.
10. Illustration of the ZORA structure set up in the contested tax rulings; Commission Decision (EU) of 20.6.2018 SA.44888 (2016/C) (ex 2016/NN) implemented by Luxembourg in favour of Engie; para. 27, figure 1 (European Commission illustration).
11. *Engie* (C-451/21 P and C-454/21 P), paras. 25-26.
12. Id., paras. 28-30.
13. Id., para. 29.

Figure 1. Illustration of the ZORA structure



the income from participations which they generate from the conversion of the ZORA is exempt, according to the tax rulings, under article 166 of the LIR.[14]

In order to prove the existence of a selective advantage for the purposes of article 107(1) of the TFEU, the Commission's primary line of reasoning consisted in establishing a selective advantage at the level of the holding companies by asserting that the reference framework for State aid purposes consisted of the Luxembourg corporate income tax system and, secondly, of a narrower reference framework related to the taxation of profit distributions and the related participation exemption.

The European Commission alleged that the tax rulings derogated from the Luxembourg corporate income tax system, i.e. articles 18, 23, 40, 159 and 163 of the LIR, according to which companies resident in Luxembourg that are liable to pay corporation tax in that state are taxed on their profit, as recorded in their accounts. The Commission further claimed that the Luxembourg tax administration derogated from the reference framework by allowing for non-taxation of the ZORA accruals, which correspond to income from participations of the holding companies. The tax rulings thus discriminated against companies subject to corporation tax in Luxembourg that are taxed on their profit, as recorded in their accounts, unlike the holding companies that had implemented the ZORA interest-free convertible loan structure.[15]

The Commission applied an economic perspective in respect of these findings: the ZORA accruals amount to a profit distribution given the direct link between the income exemption at the level of the holding companies and the ZORA accruals deducted at the level of the subsidiaries. This treatment constitutes discrimination in favour of the holding companies given that parent companies in a comparable factual and legal situation are not eligible for an exemption on their income from participations if the distributed profit has not been previously taxed at the level of their subsidiaries. If the same income could be exempted at the level of a parent company and deducted as an expense at the level of a subsidiary, it would escape all tax liability in Luxembourg, which would run counter to the objective of the Luxembourg corporate income tax system and the objective of preventing double taxation under Luxembourg law, the Commission claimed.[16]

In the alternative, the Commission invoked the "abuse of law" concept, asserting that a selective advantage resulted from the failure of the Luxembourg tax authorities to invoke article 6 of the Law on tax adjustment (*Steueranpassungsgesetz*) of 16 October 1934 (*Mémorial* A 1934, p. 9001), a general anti-abuse clause; and that there was no justification for the selective advantage thus provided to Engie. According to the Commission, the Luxembourg tax authorities should have applied the anti-abuse clause of article 6 of the Law on Tax Adjustment, considering that the four criteria identified by the Luxembourg case law for establishing "abuse of law" were fulfilled in this case: use of a form governed by private law, reduction in the tax burden, use of inappropriate structures and the absence of non-tax/commercial reasons for the structure.[17]

The Commission concluded that the structure was unlawful under article 107(1) of the TFEU and required Luxembourg to recover the State aid from the Engie group companies. The State aid, according to the Commission decision, took the form of a reduction in the tax burden resulting from the conversion in 2014 of the ZORA, concluded in favour of LNG Supply. The Commission also required that the tax rulings on the participation exemption related to the income that could have been received by LNG Holding and CEF upon full conversion of the

14. Id., para. 30.
15. *Engie* (C-451/21 P and C-454/21 P), para. 32.
16. Id., paras. 35-36
17. Id., para. 39.

ZORA, issued to LNG Supply and GSTM, be withdrawn and not applied in practice.[18]

Luxembourg and Engie filed applications to the General Court on 30 August and 4 September 2018 (*Grand Duchy of Luxembourg* (Case T-516/18) and *Engie and Others* (Case T-525/18)), respectively for annulment of the Commission Decision.[19]

Luxembourg put forward six pleas in law: (i) incorrect assessment by the Commission of the selectivity of the tax rulings at issue; (ii) infringement of the concept of "advantage"; (iii) disguised tax harmonization by that institution, contrary to articles 4 and 5 of the Treaty on European Union (TEU);[20] (iv) infringement of procedural rights; (v) in the alternative, infringement of the general principles of EU law in the context of recovery of the aid allegedly granted; and (vi) infringement of the obligation to state reasons.

Engie put forward eight pleas in law, which in addition to the overlapping six pleas, alleged that the tax rulings could not be imputed to Luxembourg and that the Commission had incorrectly classified them as State aid.[21]

The General Court rejected all the pleas raised in the applicants' actions for annulment and dismissed the actions in their entirety.[22]

3. The Decision of the Court of Justice

The CJEU considered the appeal by Luxembourg, which sought to set aside the General Court decision of 12 May 2021, and to give final judgment on the matter; and the appeal by Engie, which sought to set aside the decision under appeal or, in the alternative, suspend the recovery of the assessed State aid.[23]

In its preliminary observations related to the appeals and arguments of the parties, the CJEU recalled settled case law on fiscal State aid. Regarding the competence issues, the CJEU reiterated that the actions of Member States in areas that are not subject to harmonization through EU law are not excluded from the scope of primary EU law, notably the provisions of the TFEU on State aid. It went on to enumerate the criteria for classifying a national tax measure as State aid:

- First, there must be an intervention by the state or through state resources.
- Second, the intervention must be liable to affect trade between the Member States.
- Third, it must confer a selective advantage on the beneficiary.
- Fourth, it must distort or threaten to distort competition.[24]

With regard to the criterion of "selective advantage", the Court confirmed that it requires a determination as to whether the national measure at issue favours certain undertakings or the production of certain goods over other entities, that are in a comparable factual and legal situation in light of the objective pursued by that tax regime, and that, as a result suffer discrimination and different treatment. In relation to establishing selectivity, the Court noted that it is incumbent upon the European Commission to start by identifying the reference system, i.e. "normal" tax system applicable in the Member State concerned and to demonstrate that the tax measure at issue is a derogation from that reference system in so far as it differentiates between operators who, in light of the objective pursued by that system, are in a comparable factual and legal situation. In the third step, the finding of aid becomes moot if the Member State is able to demonstrate that such differentiation in the tax treatment is justified due to the general structure of the system of which those measures form a part.[25]

It is therefore critical to establish what the correct reference system is and the tax regime applicable in the Member State. It is incumbent on the Commission to ascertain that the reference framework, as well as the comparative examination in the assessment of selectivity, is correct. This step follows an exchange of arguments with the Member State concerned. As a result, an error made at this stage of the State aid analysis invalidates the whole of the subsequent selectivity assessment.[26]

The CJEU continued by reiterating its prior case law related to the reference system, recalling that only the national law of the Member State is relevant in identifying the reference system for direct taxation, which includes not only the positive elements for determining the basis of assessment, i.e. the taxable event, but also the exemptions which the tax is subject to.[27]

Finally, the Court reiterated the applicability of the *Gibraltar* State aid doctrine, under which the national law of the Member State, i.e. the reference framework itself, could be found to be incompatible with primary EU law. This is the case where the design parameters of the tax system of the Member state in question are manifestly discriminatory and intended to circumvent EU State aid law.[28]

With regard to the errors of law in determining the reference framework, which is limited to articles 164 and 166 of the LIR, the Court determined that the principle of legal-

18. Id., para. 43.
19. *Grand Duchy of Luxembourg* (T-516/18) and *Engie and Others* (T-525/18).
20. Treaty on European Union of 13 December 2007, OJ C 306 (2007), Primary Sources IBFD.
21. *Grand Duchy of Luxembourg* (T-516/18) and *Engie* (T-525/18), paras. 49-51.
22. Id.
23. *Engie* (C-451/21 P and C-454/21 P), paras. 71-73.
24. Id., paras. 104-105.
25. Id., paras. 106-107; LU: ECJ (Grand Chamber), 8 Nov. 2022, Joined Cases C-885/19 P and 898/19 P, *Fiat Chrysler Finance Europe v. Commission*, para. 67, ECLI:EU:C:2022:859, Case Law IBFD.
26. *Engie* (C-451/21 P and C-454/21 P), paras. 110 -111 and *Fiat* (C-885/19 P and 898/19), para. 73.
27. Id., paras. 112-113.
28. Id., para. 114; UK: ECJ, 15 Nov. 2011, Joined Cases C-106/09 P and C-107/09 P, *European Commission and Kingdom of Spain v. Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland*, [2012] ECLI:EU:C:2011:732, Case Law IBFD.

ity of taxation, which forms part of the legal order of the European Union as a general principle of law, requires that tax obligations must be contained in the law and must be foreseeable, i.e. "any obligation to pay a tax and all the essential elements defining the substantive features thereof must be provided for by law, and the taxable person must be in a position to foresee and calculate the amount of tax due and determine the point at which it becomes payable".[29] The Court also established that the Commission must accept the interpretation of national law provided by the Member State, following the exchange of arguments, subject to the compatibility of such an interpretation with the wording of the legislation, in accordance with the duty of sincere cooperation by the Member State involved as enshrined in article 4(3) of the TEU, regarding the provision of information to the Commission. This information concerns "the interpretation of the provisions of national law that are relevant for the purpose of determining the reference framework, as derived from national case-law or administrative practice".

By departing from the literal interpretation of Luxembourg law, the CJEU found that the General Court decision under appeal should be invalidated due to an error of law and distortion of the facts. The CJEU found that the General Court erred in endorsing the Commission's view of the existence of a conditionality link between articles 164 and 166 of the LOR. Pursuant to the Commission's interpretation, the participation exemption, at the level of a parent company, of income from the participations is dependent on the taxation of a distributed profit at the level of its subsidiary. The Commission based such an interpretation on two factors, which the General Court erroneously accepted:

- a Letter of 31 January 2018 wherein Luxembourg acknowledged that "all [income from participations] eligible for the exemption scheme under Article 166 LIR [was] also covered by the provisions of Article 164 [of the] LIR"; and
- the 1965 Opinion of the Council of State on incorporation of Article 166 into the LIR, which states that the provision intends to make possible, "for reasons of fiscal equity and economic order, to avoid double or triple taxation of distributed income, but not, in essence, to avoid the complete non-taxation of that income".[30]

On this basis, and by departing from a formalistic approach, the General Court considered each of the transactions in isolation and ignoring their legal form in seeking to understand the economic and fiscal reality of that arrangement. This assessment led the General Court erroneously to the conclusion that the ZORA accruals corresponded, in the circumstances of the present case, to profit distributions. The CJEU thus upheld the first ground of appeal and considered it unnecessary to examine the alleged errors concerning the derogation from the limited reference framework, confined to articles 164 and 166 of the LIR.[31]

The CJEU also upheld the second ground of appeal, which claims in essence that the General Court: (i) erred in law in identifying the reference framework that it used in respect of the abuse of law doctrine, (ii) based its assessment on a distortion of Luxembourg tax law, (iii) provided an inadequate and contradictory statement of reasons and (iv) made errors in proving a derogation from the reference framework. According to the CJEU's reasoning, the second ground of appeal is well founded especially given the inherent link between article 6 of the Law on Tax Adjustment and the national administrative practice related to that provision, which necessarily forms part of the assessment on the applicability of the "abuse of law" doctrine.[32] The CJEU considered the very general nature of the anti-abuse provisions of article 6[33] and found that such measures, in the context of a review of compliance with State aid law, must be examined within the context of the administrative and judicial practice of the Member State.[34]

Crucially, the CJEU stated that the competence of the Commission to conduct a State aid review of national measures does not include the ability to define what constitutes a correct or incorrect application of national anti-abuse provisions. Such competence would exceed the limits of power conferred on the Commission by the Treaty and would be incompatible with the fiscal autonomy of Member States. The Court thus held that the Commission could not conclude that the (non-)application of an anti-abuse provision constitutes a selective advantage for the taxpayer, a conclusion that was endorsed by the General Court.

Specifically, the Court found that, in view of:[35]

> […] the nature of an anti-abuse provision such as that referred to in paragraph 153 of this judgment, the Commission could not conclude that the non-application of that provision by the tax authorities in order to refuse the tax treatment sought by a taxpayer in a tax ruling request, led to the grant of a selective advantage unless that non-application departs from the national case-law or administrative practice relating to that provision. If that were not the case, the Commission would itself be able to define what does or does not constitute a correct application of such a provision, which would exceed the limits of the powers conferred on it by the Treaties in the field of State aid review and would be incompatible with the fiscal autonomy of the Member States referred to in the preceding paragraph.

In accordance with article 61 of the Statute of the CJEU, the CJEU decided to set aside the General Court decision and to grant itself final judgment on the matter. The CJEU dismissed the Commission's basis of interpretation of Luxembourg law, inferred from the Letter of 31 January 2018 and the 1965 Opinion of the Council of State, under which understanding a link is required between articles 164 and 166 LIR relating to prior taxation of income at the

29. *Engie* (C-451/21 P and C-454/21 P), para. 119.
30. Id., paras. 125 and 128-131.
31. Id., paras. 131-132.
32. Id., para. 151.
33. Id., paras. 146-148.
34. Id., paras. 152-153.
35. Id., paras. 154-156.

level of the distributing entity in order to benefit from the participation exemption.[36] The distribution was not taxed at the level of LNG Supply and GSTM, which led the Commission to find a derogation from a reference framework (consisting of the Luxembourg law on the participation exemption of income and the taxation of profit distributions). The Commission then inferred that the Luxembourg tax administration, with the tax rulings at issue, approved a derogation from the reference framework by accepting the fulfilment of the ZORA accretions at the level of LNG Holding and CEF. As such, these derogations benefited from the participation exemption under article 166 of the LIR, even though that income (the ZORA loan accruals) had been deducted from the taxable profit of LNG Supply and of GSTM.[37]

The CJEU also concluded that the Commission had neither examined nor demonstrated that the concept of "distributions" (article 164 of the LIR), by reference to which, "income from participations" is defined (article 166 LIR), is incompatible with the concept of "tax-deductible expense" at the level of the distributing entity. As a result, even if the ZORA accruals are considered, from an economic perspective, as a profit distribution, the tax rulings could not be presumed to derogate from Luxembourg law (article 166).[38]

Selectivity however, the CJEU concluded, could be established if the income of LNG Supply and GSTM was taxed based on a margin approved by the tax ruling and not under the rules of ordinary tax law. This *caveat* implies that ordinary taxation of a company is calculated by applying a standard tax rate to the income actually realized minus business expenses and other expenses, the CJEU notes.[39]

Given that the Commission did not claim that exemptions provided for in article 166 of the LIR itself amount to an aid scheme, the participation exemption of article 166 of the LIR forms part of the reference system and therefore must be taken into account when analysing the selectivity of the tax measure.[40] Having excluded article 166 of the LIR from the reference framework, which defines the ordinary tax system, an article of Luxembourg law that also constitutes the legal basis for the tax rulings, the Commission's analysis needed to be invalidated. This error also vitiated the selectivity analysis that encompasses the whole of the Luxembourg corporate income tax system.[41]

Consequently, the Commission Decision was annulled and the pleas that alleged errors of law in the identification of a selective advantage were upheld by the CJEU.

4. Comments

The decision of the CJEU, which largely follows the Opinion of Advocate General Kokott, provides further guidance on the applicability of article 107(1) of the TFEU to national (individual) tax measures. It is equally relevant from the perspective of competence and the overlap between national corporate tax law and primary EU law, i.e. rules on State aid), and from the perspective of the compliance of Member States fiscal autonomy with the applicable rules on State aid. This concerns, in particular, individual tax measures that are implemented by virtue of *ex ante* assessments and tax rulings.

As such, this Grand Chamber decision builds on existing (fiscal) State aid case law by providing clarity on the State aid review of intra-group tax structuring via hybrid financing arrangements, such as those in the case at issue. The Court dismissed, in its entirety, the Commission's attempt to prove that the tax rulings amounted to a selective advantage to the members of the Engie group to which those rulings were issued, and set aside the decision of the General Court that endorsed such findings of the Commission.

The decision clarifies the applicability of State aid law to purely domestic tax planning arrangements that result from the application of national tax law provisions, by a tax administration of one Member State, albeit with an effect on trade with other Member States. As noted by Advocate General Kokott, the taxation of profits under a special margin would not be targeted under the OECD and EU anti-avoidance measures, given their confinement to treatment under a purely domestic tax system.[42]

The "abuse of law" doctrine and the potential scrutiny of the non-application of anti-abuse rules from the perspective of article 107(1) of the TFEU are equally relevant to the application of national anti-abuse rules. As an incidental remark, this also provides certainty to competitors who may be able to consider a State aid challenge on the basis of similar structures that could be considered discriminatory or in favour of certain undertakings.

Article 107(1) of the TFEU, a primary EU law provision that restricts the granting of State aid, has long encompassed the granting of aid through national tax measures. As a result, areas of exclusive competence of the Member States, such as corporate taxation, must still be compliant with the State aid provisions of the Treaty. Insofar as

36. Id., para. 169.
37. Id., paras. 165-167.
38. Id., paras. 170-171.
39. Id., para. 172.
40. Id., para. 177: "[T]he reference system or the 'normal' tax regime, on the basis of which the condition relating to selectivity must be analysed, must include the provisions laying down the exemptions which the national tax authorities considered to be applicable to the present case, where those provisions do not, in themselves, confer a selective advantage for the purposes of Article 107(1) TFEU. In such a situation, in the light of the Member States' own competence in the matter of direct taxation and the regard to be had for their fiscal autonomy, referred to in paragraph 118 of this judgment, the Commission cannot establish a derogation from a reference framework merely by finding that a measure departs from a general objective of taxing all companies resident in the Member State concerned, without taking account of provisions of national law specifying the manner in which that objective is to be implemented."
41. Id., paras. 180-181.
42. AG Opinion in *Engie* (C-451/21 P and C-454/21 P), paras. 131-133, wherein she notes that the changes introduced by the Parent-Subsidiary Directive in 2014 to prevent "untaxed income" to persist are *pro futuro* and the decision to introduce a corresponding clause on the taxation of profits is a matter for Luxembourg to decide, not the European Union.

the measures distort competition and cross-border trade within the Single Market, they are subject to compliance with article 107(1) of the TFEU and, potentially, certain measures may need to be notified first to the European Commission pursuant to article 108 of the TFEU, unless *ex lege* exempt from the notification obligation or covered under the *de minimis* aid exceptions.[43] This is a direct result of the "effects" doctrine developed by the EU courts, under which State aid is defined by its effects, not on the basis of the legal or other form of the national measure in question.[44]

State aid will ordinarily arise where a tax measure does not apply equally and without discrimination to all undertakings in a comparable factual and legal situation, and, therefore, could not be considered a measure of general application, attributable to national fiscal policy.[45] However, aid may be granted through the exercise of administrative discretion by the tax authority, and the threshold developed by the CJEU is lower than that applicable to establishing arbitrary conduct of the tax administration. The margin of discretion must be transparent and applied in a non-discriminatory manner.[46] As such, the standard of review has been an issue in the fiscal aid case law, in particular where the aid could potentially have been granted via an *ex ante* assessment, such as a tax ruling.[47]

In respect of the standard of review, the Court did not explicitly address the notion of a mere plausibility check as advocated by Advocate General Kokott[48] and therefore has not endorsed that approach. The CJEU stated that the Commission is, in principle, obliged to follow the Member State's interpretation of national law, unless the Commission is able to prove, after an exchange of arguments with the Member State concerned, that another interpretation of national law prevails in the case law or administrative practice of that Member State.[49]

However, the Court pointed the Commission in another direction to challenge individual tax rulings, such as those in the *Engie* case, on a State aid basis, where the basis of taxation consists in a pre-agreed margin (markup), approved by the tax administration, and does not fall under the ordinary rules of tax law.[50] Also based on this reasoning, the Commission, bound by the principle of legality, would still have to examine and demonstrate the existence of a derogation from the ordinary rules and demonstrate this *in concreto*.[51] It appears that the Court's reference to the rules of ordinary taxation corresponds to the recent *Fiat* decision. In *Fiat*, the Court stated that, assuming there is consensus in the field of international taxation that transactions between economically linked companies, in particular intra-group transactions, must be assessed for tax purposes as if they had been concluded between economically independent companies, these still must be defined within the context of national tax law, or in light of external references, provided these are part of national law.[52]

In respect of the validity of the Gibraltar discrimination doctrine, the CJEU noted that it does not correspond to the present case.[53] This doctrine means that the reference framework itself, resulting from national law, is incompatible with EU law on State aid if the tax system at issue has been configured applying manifestly discriminatory parameters intended to circumvent that law.[54] As indicated in the CJEU decision, the Commission asserted that the tax rulings in question gave rise to discrimination in favour of the holding companies, an argument accepted by the General Court, given that the holding companies paid less tax than what would have been payable under the rules of the ordinary tax system applicable to other companies, in the absence of tax rulings.[55]

Concerning identifying the relevant reference framework, the Commission cannot restrict itself to the general objec-

43. Art. 108 TFEU establishes different procedures that depend on whether the State aid is existing or new. Under art. 108(3) TFEU new aid must be notified to the Commission and may not be implemented until that procedure has led to a final Commission decision. Under art. 108(1) TFEU, existing aid may be lawfully implemented as long as the Commission has made no finding of incompatibility: BG: Judgment of the Court (Second Chamber), 29 Nov. 2012, Case C-262/11, *Kremikovtzi*, [2012] ECR, para. 49; FI: ECJ, 18 July 2013, Case C-6/12, *P Oy*, para. 36, Case Law IBFD (accessed 5 Apr. 2024).
44. IT: ECJ, 2 July 1974, Case 173/73, *Italy v. Commission*, para 13, ECLI: EU:C:1974:71; and UK: ECJ, 22 Dec. 2008, Case C-487/06 P, *British Aggregates Association v. Commission of the European Communities*, para. 106, Case Law IBFD (accessed 5 Apr. 2024).
45. IT: ECJ, 15 Dec. 2005, Case C-66/02, *Italy v. Commission*, ECLI: EU:C:2005:768, para. 99.
46. FR: ECJ, 26 Sept. 1996, Case C-241/94, *French Republic v. Commission of the European Communities (Kimberly Clark Sopalin)*, [1996] ECR I-04551, paras 23-24; *P Oy* (C-6/12).
47. *See P Oy* (C-6/12), paras. 22-24: The mere requirement to ask for certainty or authorization from the tax authorities could not be seen as *prima facie* State aid: In *P Oy*, the application to the tax administration for a loss carry-forward, which was considered by the Finnish tax administration, was not seen by the CJEU as a selective advantage, considering that the tax authorities had only a degree of latitude limited by objective criteria; in addition, the CJEU held that a justification may still be available to the Member State, i.e. an exception to the application of the general tax system may be justified if the Member State can show that that measure results directly from the basic or guiding principles of its tax system.
48. AG Opinion in *Engie* (C-454/21 P and C-451/21 P), para. 101: "… individual tax assessments (whether normal tax assessments or advance tax rulings) should be reviewed only on the basis of a restricted standard of review that is limited to a plausibility check. That will mean that not every error in the application of national tax law is evidence of a selective advantage. Thus, only the manifest derogation in favour of the taxpayer of a tax ruling (or tax assessment) from the reference framework encompassing the national tax law can constitute a selective advantage. In the absence of such a manifest derogation, the tax assessment may be unlawful, but a possible derogation from the reference framework does not by itself mean that it constitutes State aid within the meaning of Article 107 TFEU".
49. *Engie* (C-454/21 P and C-451/21 P), paras. 120- 121.
50. Id., para. 172.
51. Id., paras. 170-171; See …[T]he principle of legality of taxation, which forms part of the legal order of the European Union as a general principle of law, requiring that any obligation to pay a tax and all the essential elements defining the substantive features thereof must be provided for by law, the taxable person having to be in a position to foresee and calculate the amount of tax due and determine the point at which it becomes payable". *See also Fiat* (C-885/19 P and C-898/19 P), at para. 97.
52. *Fiat* (C-885/19 P and C-898/19 P), para. 96.
53. *Engie* (C-454/21 P and C-451/21 P), para. 176; Gibraltar (C-106/09P and C-107/09P), para 87: "It is appropriate to recall that the Court has consistently held that Article 87(1) EC does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects, and thus independently of the techniques used"; *See also British Aggregates* (C-487/06 P), paras. 85 and 89 and NL: ECJ, 8 Sept. 2011, Case C-279/08 P, *European Commission v. Kingdom of the Netherlands*, [2011] ECLI:EU:C:2011:551, para. 51.
54. *Engie* (C-454/21 P and C-451/21 P), para. 114.
55. Id., para. 58.

tive of taxing all companies resident in the Member State concerned. In line with Member States' sovereignty in matters of direct taxation, the Commission cannot establish a derogation independent of the reference framework that is based on provisions of national law, taking into account the manner in which the objective is implemented.[56] To do so, the Commission is obliged to base the assessment on:[57]

> […] 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, the taxable event and any exemptions to which the tax is subject.

This finding confirms the approach taken by the CJEU in *Fiat* in relation to establishing a reference framework that corresponds to the ordinary rules of taxation as established by the Member State.[58]

In that regard, in *Engie*, the CJEU pointed out that, during the relevant taxable years (2009-2013), Member States were free to choose to lay down a general anti-abuse provision, such as section 6 of the Luxembourg Law on Tax Adjustment, in their national law, and to define the manner in which the tax authorities are to implement it. This clearly fell within the Member States' competence, being an area of direct taxation not harmonized under EU law. The Commission therefore:[59]

> […] could not conclude that the non-application of that provision by the tax authorities in order to refuse the tax treatment sought by a taxpayer in a tax ruling request led to the grant of a selective advantage unless that non-application departs from the national case-law or administrative practice relating to that provision.

However, the Court has noted this changes when the matter has been "harmonized under EU law".[60] This raises the obvious question how the Court would proceed now that the GAAR under article 6 of the ATAD[61] is relevant and has been implemented by Member States. Can we assume that the matter of abuse has now "been harmonized under EU law"? Here, the criteria applicable to a finding of abuse are harmonized by the ATAD, but the ATAD itself refers to the "object or purpose of the applicable tax law" and hence upholds the Member States' ability to define the reference framework, as decided in the present case.

5. The Statement

CFE Tax Advisers Europe welcomes the clarification and further guidance on the applicability of article 107(1) of the TFEU to national (individual) tax measures provided by the Grand Chamber of the CJEU in this decision. It is equally relevant from a perspective of competence (overlap of national corporate tax law and primary EU law, i.e. rules on State aid), and from the perspective of compliance of Member States' fiscal autonomy with the applicable rules on State aid. Following *Fiat*, the CJEU confirmed that the Commission is, in principle, obliged to follow the Member State's interpretation of national law, unless the Commission is able to prove, after an exchange of arguments with the Member State concerned, that another interpretation of national law prevails in the case law or administrative practice of that Member State. The Court's decision contributes to the dynamic balance of powers in the European Union's legal order.

Following the *Fiat* and *Engie* decisions, a review of national tax measures remains possible but under strict conditions. The CJEU did not endorse a mere "plausibility check". However, the Court pointed the Commission in another direction for challenging individual tax rulings, such as those in the *Engie* case, where the basis of taxation consists of a pre-agreed margin (markup), approved by the tax administration, and not under the rules of ordinary tax law. Therefore, the Luxembourg tax rulings practice may be subject to further investigation after this decision, albeit on a different basis.

56. Id., para. 177
57. Id., para. 112.
58. *Fiat* (C-885/19 P and C-898/19 P), at para. 73.
59. *Engie* (C-454/21 P and C-451/21 P), paras. 154-155.
60. *Engie* (C-454/21 P and C-451/21 P), para. 112.
61. Council Directive 2016/1164 of 12 July 2016 Laying down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, OJ L 193/1 (2016), Primary Sources IBFD.