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OPINION STATEMENT

Opinion Statement ECJ-TF 1/2024 on the decision of the CJEU of 5 December 2023 in Joined Cases C-451/21P and C-454/21P, *Engie*, on alleged State aid in relation to a deduction/non-inclusion structure in Luxembourg

Prepared by the CFE ECJ Task Force
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This is an Opinion Statement prepared by the CFE ECJ Task Force[1] on the *Engie* case, in which the Court of Justice of the EU (Grand Chamber) delivered its decision on 5 December 2023.[2]

The *Engie case* concerns the question whether tax rulings issued by Luxembourg to companies 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 *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 judgment of 12 May 2021, which initially upheld the European Commission findings of 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 selective advantage for the Engie entities. It did not establish the correct reference framework for assessment of State aid by way of excluding the legal basis for the tax ruling practice from the reference framework itself (Articles 164 and 166 LIR). By establishing an erroneous reference framework, the Commission relied on a wrongfully based selectivity analysis, a key step in establishing State aid for purposes of Article 107(1) TFEU. Finally, the Court established that the Commission cannot invoke national anti-abuse rules to establish selectivity in a situation where the non-application of the "abuse of law" concept by tax authorities unless the non-application of the anti-abuse provisions is based on derogation from national law or administrative practice on anti-abuse provisions comparable to the case at issue (*in concreto*). Thus, the Grand Chamber judgment follows the Opinion of AG Kokott delivered on 4 May 2023.[3] The Court, however, opened the door for establishing selectivity of tax rulings such as those in the Engie case, where the basis for taxation consists of pre-agreed margin (mark-up), approved by the tax administration, and not under the rules of ordinary tax law, under specific conditions.

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

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[2] LU: CJEU, Judgment of the Court (Grand Chamber) of 5 December 2023 – Grand Duchy of Luxembourg, EngieGlobal LNG Holding Sàrl, Engie Invest International SA, Engie SA v European Commission, Ireland (Joined Cases C-451/21 P and C-454/21 P), available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=282196&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2223265

[3] LU: CJEU, Opinion of Advocate General Kokott of 4 May 2023; *Engie*: ECLI:EU:C:2023:383

I. Background, Facts, and Issues

1. In this case, subsidiaries of the Engie group were granted two sets of tax rulings in Luxembourg related to an intra-group financing structure.[4] 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').[5] CEF is a management company for, inter alia, acquiring participations in several Luxembourg companies, including (a) GDF Suez Treasury Management Sàrl ('GSTM'), now Engie Treasury Management Sàrl; (b) Electrabel Invest Luxembourg SA ('EIL') and, (c) GDF Suez LNG Holding Sàrl ('LNG Holding'), incorporated in 2009, now Engie Global LNG Holding.[6] Engie group operated a financing group structure in Luxembourg, with the purpose of treasury management and financing of the group's activities.

2. 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 a series of transactions, which centre on financing by a convertible loan – zero interest bond repayable in shares (ZORA). The loan was interest-free and convertible into equity (shares) when repaid/ on maturity, subject to the financial performance of the borrower.[7]

3. ZORA constitutes a 15-year interest-free mandatorily convertible loan, which is provided by a Luxembourg resident intermediary company. ZORA did not carry period interest, but on conversion, allowed the subsidiary to pay to the lender the shares which 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 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 for the ZORA structure, to the extent that this entity finances the loan by a Forward Prepaid Contract, entered into with a Luxembourg holding, which constitutes 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, against 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 realises profit, the holding receives the shares (at conversion) incorporating the ZORA bonus value (the ZORA accretions). As such, the financing of the acquisition of the assets to the subsidiary is provided

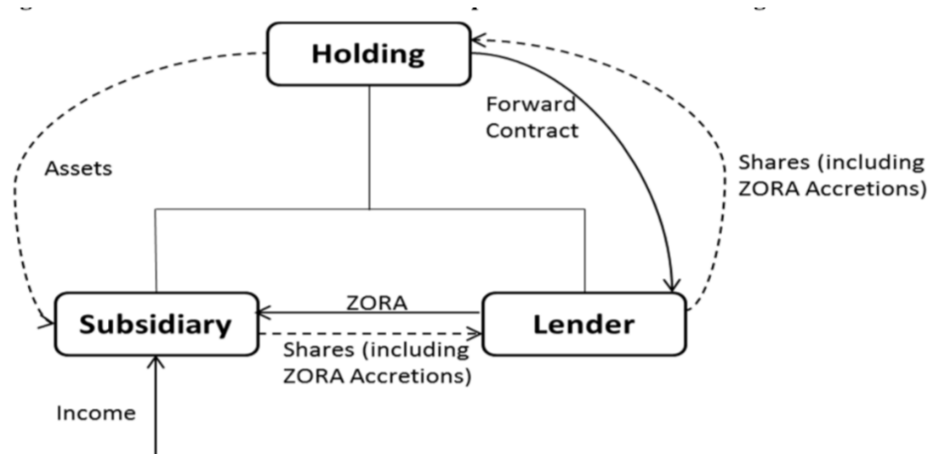
[4] CJEU, Engie, C-454/21 P and C-451/P, 5 December 2023, paras 6-21.

[5] 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."; Idem, paras 5-21.

[6] Idem, paras 3-5.

[7] Idem, paras 6-24.

by the holding, by means of the ZORA (and the Forward Prepaid Contract).[8] These operations may be summarized as follows:



4. On 20 June 2018, the European Commission adopted the decision establishing that Luxembourg had granted a selective advantage to the Engie group in breach of Articles 107(1) and 108(3) TFEU. The Commission challenged the group financing structure, without questioning its legality, on basis that 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 LIR.[9] The fact that the income from the participations held by LNG Holding and CEF was not taxed, was considered by the Commission an income which was not taxed in Luxembourg, resulting in economic advantage for purposes of Article 107(1) TFEU.[10]

5. As regards the income is derived from the ZORA accruals that LNG Supply and GSTM deducted from their taxable base, the Commission considered this non-taxation of the ZORA accruals at the level of the holding companies or the intermediary companies to be resulting from a tax ruling granted by the Luxembourg tax administration which agreed with Engie a basis of assessment with only a limited mark-up, payable by the Engie subsidiaries in Luxembourg.[11] Therefore, the Commission concluded, in its analysis, that:

    a. The subsidiaries made accounting provisions on a yearly basis corresponding to the ZORA accretions, which were regarded as deductible expenses;
    b. 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;

[8] 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).

[9] Idem, paras 25-26.

[10] Idem, paras 28-30.

[11] Idem, para 29.

c. The holding companies, which under the prepaid forward contracts hold the subsidiaries' shares once the ZORA has matured, were also not taxed, since 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.[12]

6. In order to prove the existence of a selective advantage for the purposes of Article 107(1) TFEU, the Commission's primary lines of reasoning consisted of establishing selective advantage at the level of the holding companies, by asserting that the reference framework for State aid purposes consists 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.

7. The European Commission alleged that the tax rulings derogated from the Luxembourg corporate income tax system, Articles 18, 23, 40, 159 and 163 of the LIR[13], according to which companies resident in Luxembourg which are liable to 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 non-taxation of the ZORA accruals, which correspond to income from participations of the holding companies. The tax rulings thus discriminated companies subject to corporation tax in Luxembourg that are taxed on their profit, as recorded in their accounts, unlike the holding companies which had implemented the ZORA interest-free convertible loan structure. [14]

8. The Commission invoked an economic perspective for these findings: the ZORA accruals amount to profit distribution, given the direct link between income exemption at the level of the holding companies and the ZORA accruals deducted at the level of the subsidiaries. This treatment constitutes a 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 taxed beforehand 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 liability to tax in Luxembourg, which would run counter to the objective of the Luxembourg corporate income tax system and the objective of preventing double taxation of Luxembourg law, the Commission claimed.[15]

9. In an alternative line of reasoning, the Commission invoked the "abuse of law" concept and asserted that selective advantage resulted from the failure of the Luxembourg tax authorities to invoke Article 6 of the *Steueranpassungsgesetz* (Law on tax adjustment) 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 case-law of the Luxembourg courts for establishing "abuse of law" were fulfilled in this case: use of a forms governed by private law,

[12] Idem, para 30.

[13] Luxembourg: 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 ('LIR')

[14] Idem, para 32.

[15] Idem, paras 35-36

reduction of the tax burden, use of inappropriate structures and the absence of non-tax/ commercial reasons for the structure.[16]

10. The Commission concluded that the structure was unlawful under Article 107(1) 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 reduction of the taxable 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 participation exemption related to the income that could have been received by LNG Holding and CEF upon full conversion of the ZORA, issued to LNG Supply and GSTM, be ceased and not applied in practice.[17]

11. Luxembourg, and Engie, respectively, 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) for annulment of the Commission Decision.[18]

12. 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 harmonisation by that institution, contrary to Articles 4 and 5 TEU; (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.

13. 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.[19]

14. With a judgment in Cases T-516/18 and T-525/18, the General Court rejected all the pleas raised in the applicants' actions for annulment and dismissed the actions in their entirety.[20]

II. The Judgment of the Court of Justice

15. The CJEU considered the appeal by Luxembourg which sought to set aside the General Court judgment of 12 May 2021, and to give final judgment on the matter; and the appeal by Engie, which sought to set aside the judgment under appeal, and in the alternative, suspend the recovery of the assessed State aid.[21]

[16] Idem, para 39.
[17] Idem, para 43.
[18] GC: Grand Duchy of Luxembourg (Case T 516/18) and Engie and Others (Case T 525/18) v European Commission; ECLI:EU:T:2021:251
[19] Idem, 49-51
[20] Idem.
[21] CJEU, Engie, C-454/21 P and C-451/P, 5 December 2023, paras 71-73.

16. 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 recalled that actions of Member states in areas which are not subject to harmonisation by EU law are not excluded from the scope of primary EU law, notably the provisions of the TFEU on State aid. It followed by enumerating the criteria for classifying a national tax measure as State aid:

    a. First, there must be an intervention by the State or through State resources.
    b. Second, the intervention must be liable to affect trade between the Member States.
    c. Third, it must confer a selective advantage on the beneficiary.
    d. Fourth, it must distort or threaten to distort competition.[22]

17. 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, which are in comparable factual and legal situation in light of the objective pursued by that tax regime, and which, 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 the light of the objective pursued by that system, are in a comparable factual and legal situation. As a 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 general structure of the system of which those measures form part of. [23]

18. It is therefore critical to establish what is the correct reference system, 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.[24]

19. The CJEU continued reiterating its prior case law related to the reference system, recalling that only the national law of the Member State is relevant to identify the reference system for direct taxation, which includes not only the positive elements for determination of the basis of assessment, i.e. the taxable event but also the exemptions to which the tax is subject to.[25]

20. 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, is incompatible with primary EU law and the rules on State aid, where the tax system has been arranged in manifestly discriminatory parameters intended to circumvent State aid law. [26]

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[22] Idem, paras 104-105

[23] Idem, paras 106-107; CJEU, Fiat Chrysler Finance Europe v Commission, C-885/19 P and C-898/19 P, 8 November 2022, para 67.

[24] Idem, para 110 -111.

[25] Idem, paras 112 – 113.

[26] Idem, para 114; CJEU, 16 March 2021, C-106/09 P and C-107/09 P, Gibraltar

21. With regard to the errors of law in determination of the reference framework, which is limited to Articles 164 and 166 of the LIR, the Court determined that the principle of legality 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 in 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"[27]. 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 compatibility of such interpretation with the wording of the legislation, in accordance with the duty of sincere cooperation by the Members State involved as enshrined in Article 4(3) 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".

22. By departing from the literal interpretation of Luxembourg law, the CJEU found that the General Court judgment under appeal was invalidated by an error of law and distortion of the facts. The CJEU found that the General Court erred in endorsing the Commission's view of existence of a conditionality link between Article 164 and Article 166 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 distributed profit at the level of its subsidiary. The Commission based such interpretation on two factors, which the General Court erroneously accepted:

    a. Letter of 31 January 2018 where 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";

    b. 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."[28]

23. On this basis, and by departing from the formalistic approach, the General Court considered in isolation each of the transactions beyond the legal form in order 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 not necessary to examine the alleged errors concerning the derogation from the limited reference framework, confined to Articles 164 and 166 LIR. [29]

24. The CJEU also upheld the second ground of appeal which claims in essence that the General Court erred in law in identifying the reference framework which it used in respect of abuse of law, based

[27] Idem, para 119.

[28] Idem, paras paras 125 and 128-131.

[29] Idem, paras 131-132

its assessment on distortion of Luxembourg tax law, that it stated inadequate and contradictory statement of reasons, and that there were errors in proving a derogation from the reference framework. Under 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.[30] The CJEU considered the very general nature of the anti-abuse provisions of Article 6,[31] found that such measures, in a context of review of compliance with State aid law, must be examined within the context of the administrative and judicial practice of the Member state.[32]

25. Crucially, the CJEU stated that the competence of the Commission to conduct State aid review of national measures, does not include the ability to define what constitutes correct or incorrect application of national anti-abuse provisions. Such a 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 concludes that the Commission could not conclude that the (non)application of an anti-abuse provision constitutes selective advantage for the taxpayer, a conclusion which was endorsed by the General Court.

26. Specifically, the Court found, in view of "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." [33]

27. In accordance with Article 61 of the Statute of the CJEU, the CJEU decided to set aside the General Court judgment and to give itself the final judgment on the matter. The CJEU dismissed Commission's basis for interpretation of Luxembourg law inferred from the Letter of 31 January 2018 and the 1965 Opinion of the Council of State that there was a link between Articles 164 and 166 LIR, relating to prior taxation of income at the level of the distributing entity to benefit from participation exemption.[34] 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 tax rulings at issue approved a derogation from the reference framework by accepting that 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.[35]

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[30] Idem, para 151.

[31] Idem, paras 146-148.

[32] Idem, paras 152-153.

[33] Idem, paras 154-156.

[34] Idem, para 169.

[35] Idem, paras 165-167.

28. The CJEU also concluded that the Commission had neither examined nor demonstrated that the concept of 'distributions' (Article 164 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 economically as profit distribution, the tax rulings could not be presumed to derogate from Luxembourg law (Article 166).[36]

29. Selectivity however, the CJEU concluded, could be established if the income of LNG Supply and GSTM was taxed 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 realised minus business expenses and other expenses, the CJEU notes.[37]

30. Given that the Commission did not claim that exemptions provided for in Article 166 LIR itself amounts to an aid scheme, the participation exemption of Article 166 LIR forms part of the reference system, and therefore must be taken into account when analysing the selectivity of the tax measure.[38] Having excluded Article 166 LIR from the reference framework which defines the ordinary tax system, an article of Luxembourg law which also constitutes the legal basis for the tax rulings, the Commission's analysis is invalidated by this error. This error also vitiated the selectivity analysis which encompasses the whole of the Luxembourg corporate income tax system.[39]

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

III. Comments

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

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[36] Idem, paras 170-171.

[37] Idem, para 172.

[38] Idem, 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."

[39] Idem, paras 180-181.

33. As such, this Grand Chamber judgment 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 selective advantage to the members of the Engie group to which those rulings were issued, and set aside the judgment of the General Court which endorsed such findings of the Commission.

34. The judgment clarifies the applicability of State aid law to purely domestic tax planning arrangements that result from application of national tax law provisions, by a tax administration of one Member state, albeit with an effect on trade to other Member states. As noted by AG Kokott, the taxation of profits under a special margin would not be targeted under the OECD and EU anti-avoidance measures, given the confinement to a treatment under purely domestic tax system.[40]

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

36. Article 107(1) TFEU, a primary EU law provision which restricts the grant of State aid, has long encompassed granting of aid through national tax measures. As a result, areas of exclusive competence to Member states, such as corporate taxation, must still be compliant with the State aid provisions of the Treaty. Insofar as the measures distort competition and cross-border trade within the Single Market, they are liable to compliance with Article 107(1) TFEU and potentially, certain measures may need to be previously notified to the European Commission pursuant to Article 108 TFEU of the Treaty, unless *ex lege* exempt from the notification obligation or covered under the *de minimis* aid exceptions.[41] 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 basis of the legal or other form of the national measure in question.[42]

37. 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.[43] However, aid may be granted by exercise of administrative discretion by the tax authority, and the threshold developed by the CJEU is lower than establishing arbitrary conduct of the tax administration. The margin of discretion must be transparent and applied in a non-discriminatory

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[40] Opinion of AG Kokott, Engie, para 131-133, where the AG 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 correspondence clause on taxation of profits is matter of Luxembourg, not of the European Union.

[41] Article 108 TFEU establishes different procedures depending whether the State aid is existing or new. Under Article 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 Article 108(1) TFEU existing aid may be lawfully implemented as long as the Commission has made no finding of incompatibility (Case C-262/11 Kremikovtzi [2012] ECR, para. 49; Case C-6/12 P Oy [2014], para. 36

[42] Case Italy v Commission [1974] ECR 709, para 13; Case British Aggregates Commission [2006], ECR II-2789, para 106.

[43] Case C-66/02, Italy v Commission [2005] ECR I-10901, para 99.;

manner.[44] As such, the standard of review has been an issue in the fiscal aid case-law, in particular where the aid could have potentially been granted via an *ex ante* assessment, such as a tax ruling.;[45]

38. In respect of the standard of review, the Court did not explicitly address the notion of mere plausibility check as advocated by AG Kokott[46], 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. [47]

39. However, the Court pointed the Commission to another direction for challenging individual tax ruling such as those in the Engie case on State aid basis, where the basis of taxation consists of pre-agreed margin (mark-up), approved by the tax administration, and not under the rules of ordinary tax law.[48] Also under this reasoning, the Commission, bound by the principle of legality, would still have to examine and demonstrate the existence of derogation from the ordinary rules and demonstrate *in concreto*.[49] It appears that the Court's reference to the rules of ordinary taxation corresponds to the recent *Fiat* judgment. In *Fiat*, the Court stated that under the assumption that there is a 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 with external references, provided these are part of national law.[50]

40. In respect of the validity of the Gibraltar discrimination doctrine, the CJEU noted that it does not correspond to the present case. [51] This doctrine means that the reference framework itself, as it

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[44] Case C-241/94, France v Commission [1996] ECR I-4551, paras 23-24; P Oy, *op.cit.*

[45] Cf. CJEU Case C-6/12 P Oy [2014], paras 22-24; The mere requirement to ask for certainty or authorisation from the tax authorities could not be seen as *prima facie* State aid: In *P Oy*, the application to the tax administration for loss carry forward which was considered by the Finish tax administration was not seen by CJEU as selective advantage, considering that the tax authorities had only a degree of latitude limited by objective criteria; In addition, 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

[46] Opinion AG Kokott, Engie, para 101: 101. "…[I]n 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."

[47] CJEU, Engie, C-454/21 P and C-451/21 P, 5 December 2023, paras 120- 121.

[48] CJEU, Engie, C-454/21 P and C-451/21 P, 5 December 2023, para 172.

[49] Idem, paras 170-171; Cf. …[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", CJEU, Fiat, C- C-885/19 P and C-898/19 P, para 97.

[50] CJEU, Fiat, C- C-885/19 P and C-898/19 P, para 96.

[51] CJEU, Engie, C-454/21 P and C-451/21 P, 5 December 2023, para 176; Cf. CJEU, C-106/09P & C-107/09P, Commission v Government of Gibraltar [2011], ECR I-1113, 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

results from national law, is incompatible with EU law on State aid, if the tax system at issue has been configured according to manifestly discriminatory parameters intended to circumvent that law.[52] As indicated in the CJEU judgment, 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.[53]

41. Concerning identifying the relevant reference framework, the Commission cannot restrict itself to the general objective 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 independently of the reference framework which is based on provisions of national law, taking into account the manner in which the objective is implemented.[54] To do so, the Commission is obliged to base the assessment on "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."[55] 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.[56]

42. In that regard, in Engie, the CJEU points out that, at 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 in the area of direct taxation and not harmonised under EU law. The Commission therefore „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."[57] However, the Court has noted this changes when the matter has been „harmonised under EU law".[58] This raises the obvious question how the Court would proceed now that the GAAR under Article 6 ATAD is relevant and has been implemented by Member States. Can we assume that the matter of abuse has now "been harmonised under EU law"? Here, the criteria to finding abuse are harmonised by the ATAD, but the ATAD itself refers to the „object or purpose of the applicable tax law" and hence upholds Member States' ability to define the reference framework, as decided in the present case.

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their causes or their aims but defines them in relation to their effects, and thus independently of the techniques used"; Also see British Aggregates v Commission, paras 85 and 89 and Case C-279/08 P Commission v Netherlands [2011] ECR I-0000, para 51

[52] CJEU, Engie, C-454/21 P and C-451/P, 5 December 2023, para 114.

[53] CJEU, Engie, C-454/21 P and C-451/P, 5 December 2023, para 58.

[54] CJEU, Engie, C-454/21 P and C-451/P, 5 December 2023, para 177

[55] CJEU, Engie, C-454/21 P and C-451/P, 5 December 2023, para 112.

[56] CJEU, Fiat Chrysler Finance Europe v Commission, C-885/19 P and C-898/19 P, EU:C:2022:859, para 73.

[57] CJEU, Engie, C-454/21 P and C-451/P, 5 December 2023, paras 154-155.

[58] CJEU, Engie, C-454/21 P and C-451/P, 5 December 2023, para 112.

IV. The Statement

43. CFE Tax Advisers Europe welcomes the clarification and further guidance on the applicability of Article 107(1) TFEU to national (individual) tax measures provided by the Grand Chamber of the CJEU in this judgment. 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.

44. Following the *Fiat* and *Engie* judgments, the 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 to another direction for challenging individual tax ruling such as those in the Engie case, where the basis of taxation consists of pre-agreed margin (mark-up), approved by the tax administration, and not under the rules of ordinary tax law. Therefore, the Luxembourg tax rulings practice may be under further investigation after this decision, albeit on a different basis.