COURT OF JUSTICE
OF THE EUROPEAN UNION

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Judgment of the Court in Joined Cases C-451/21 P | Luxembourg v Commission and C-454/21 P | Engie Global LNG Holding and Others v Commission

The European Commission's review of the tax rulings granted by Luxembourg to the Engie group infringed EU law

The European Commission decided that Luxembourg had granted State aid to the Engie group in connection with tax rulings on intra-group financing transactions. The Commission nevertheless erred in determining the reference system constituting the starting point for the comparative examination to be carried out in the assessment of the selectivity of those tax measures and thus of their classification as prohibited State aid. The 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, in so far as they do not manifestly discriminate between undertakings, do not, in themselves, confer a selective advantage within the meaning of EU law. The Commission cannot therefore establish a derogation from a reference framework merely by finding, as it did in the present case, 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.

By decision of 20 June 2018 [1], the Commission found that the Luxembourg tax authorities had issued two sets of tax rulings in connection with complex corporate and financial arrangements within the Engie group. According to the Commission, that tax treatment had enabled that group to avoid taxation on almost all of the profit made by the subsidiaries established in Luxembourg. The Commission concluded that those tax rulings constituted State aid that was incompatible with the internal market and had to be recovered by the Luxembourg authorities from the beneficiaries of that aid.

The Engie group and Luxembourg brought actions before the General Court of the European Union, which dismissed their actions [2]. Engie and Luxembourg then brought an appeal before the Court of Justice.

The Court recalls that, in order to determine whether a national measure constitutes State aid, the Commission must, inter alia, **demonstrate that the measure confers a selective advantage** on the beneficiary. In order to classify a tax measure as 'selective', the Commission must begin by **identifying the reference system**, that is the 'normal' tax system applicable in the State concerned. Next, the Commission must demonstrate that the measure at issue **derogates from that reference system** because it **differentiates between undertakings in a comparable situation**.

The provisions of Luxembourg law at issue do not expressly make the exemption of income from participations at the level of a parent company dependent on the taxation of distributed profit at the level of its subsidiary. That was the interpretation of those provisions put forward by Luxembourg. In the present case, the Commission departed from that interpretation, finding that it was incompatible with the general objective of taxing all resident companies. The Court notes, however, that the Commission is in principle required to accept the interpretation of provisions of national law given by the Member State during an exchange of arguments, provided that that interpretation is

compatible with the wording of those provisions. In the present case, nothing put forward by the Commission invalidates the interpretation put forward by Luxembourg, which is, moreover, compatible with the wording of those provisions. The General Court therefore erred in upholding the Commission's finding as to the existence of such a link of conditionality between those two tax treatments.

Moreover, the General Court erred in holding that the Commission was not required to take into account the administrative practice of the Luxembourg tax authorities relating to a national provision on abuse of law. In order to support its decision, the Commission should have established that, in the tax rulings at issue, the Luxembourg tax authorities departed from their own practice concerning transactions comparable to those at issue.

Lastly, ruling on the actions for annulment itself, the Court considers that **the Commission made errors in its various analyses** of the reference frameworks defining the normal tax system. The Court considers, in particular, that the fiscal competence and autonomy of the Member States in areas that have not been harmonised at EU level would be disregarded if the Commission could define a reference framework exclusively on the basis of the general objective pursued by national law of taxing all resident companies, and thus without including in that framework, in particular, the provisions providing for exemptions. Those errors **vitiated the whole of the selectivity analysis** and **the Commission's decision is therefore annulled.**

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

The full text and, as the case may be, an abstract of the judgment are published on the CURIA website on the day of delivery.

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Pictures of the delivery of the judgment are available from 'Europe by Satellite' ✆ (+32) 2 2964106.

[1] Commission Decision (EU) 2019/421 of 20 June 2018 on State aid SA.44888 (2016/C) (ex 2016/NN) implemented by Luxembourg in favour of Engie.

[2] Judgment of 12 May 2021, *Luxembourg and Others* v *Commission*, T-516/18 and T-525/18 (see Press Release No 80/21).