JUDGMENT OF THE COURT (Grand Chamber)

5 December 2023 (*)

(Appeal – State aid – Article 107(1) TFEU – Tax rulings adopted by a Member State – Aid declared incompatible with the internal market – Obligation to recover that aid – Concept of 'advantage' – Determination of the reference framework – 'Normal' taxation under national law – Review by the Court of Justice of the interpretation and application of national law by the General Court of the European Union – Direct taxation – Strict interpretation – Powers of the European Commission – Obligation to state reasons – Legal classification of the facts – Concept of 'abuse of law' – Ex ante assessment by the tax authorities of the Member State concerned – Principle of legal certainty)

In Joined Cases C-451/21 P and C-454/21 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought, respectively, on 21 and 22 July 2021,

Grand Duchy of Luxembourg, represented by A. Germeaux, T. Schell and T. Uri, acting as Agents, and by J. Bracker and D. Waelbroeck, avocats, and A. Pesch, conseil (Case C-451/21 P),

Engie Global LNG Holding Sàrl, established in Luxembourg (Luxembourg),

Engie Invest International SA, established in Luxembourg,

Engie SA, established in Courbevoie (France),

represented initially by B. Le Bret, F. Pili, C. Rydzynski and M. Struys, and subsequently by M. Gouraud, B. Le Bret, F. Pili, J. Schaffner and M. Struys, avocats (Case C-454/21 P),

appellants,

the other parties to the proceedings being:

European Commission, represented by J. Carpi Badía and B. Stromsky, acting as Agents,

defendant at first instance,

Ireland,

intervener at first instance (Case C-451/21 P),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, C. Lycourgos, E. Regan, T. von Danwitz, F. Biltgen and Z. Csehi, Presidents of Chambers, M. Safjan, S. Rodin, N. Wahl (Rapporteur), J. Passer, D. Gratsias, M.L. Arastey Sahún and M. Gavalec, Judges,

Advocate General: J. Kokott,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 30 January 2023,

after hearing the Opinion of the Advocate General at the sitting on 4 May 2023,

gives the following

1 By their respective appeals, the Grand Duchy of Luxembourg (Case C-451/21 P), on the one hand, and Engie Global LNG Holding Sàrl, Engie Invest International SA and Engie SA (Case C-454/21 P) (together, 'Engie and Others'), on the other, ask the Court of Justice to set aside the judgment of the General Court of the European Union of 12 May 2021, *Luxembourg and Others* v *Commission* (T-516/18 and T-525/18, 'the judgment under appeal', EU:T:2021:251), by which the General Court dismissed their actions for annulment of 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 (OJ 2019 L 78, p. 1; 'the decision at issue').

I. Background to the dispute

2 The background to the dispute, as set out in paragraphs 1 to 98 of the judgment under appeal, may be presented as follows.

A. The companies concerned

3 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 Luxembourg, it owns, inter alia, Compagnie européenne de financement C.E.F. SA ('CEF'), which was incorporated in 1933 and became Engie Invest International in 2015.

4 CEF, the purpose of which was the acquisition of participating interests in Luxembourg and in foreign entities and the management, exploitation and control of such interests, held the entire capital of several Luxembourg companies, including, first, GDF Suez Treasury Management Sàrl ('GSTM'), now Engie Treasury Management Sàrl, second, Electrabel Invest Luxembourg SA ('EIL') and, third, GDF Suez LNG Holding Sàrl ('LNG Holding'), incorporated in 2009, now Engie Global LNG Holding.

5 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.

B. The tax rulings

6 A series of transactions within the Engie group were the subject of tax rulings issued by the Luxembourg tax authorities. Those tax rulings relate to two sets of transactions with a similar economic and legal structure that can be described as follows.

7 A company in the Engie group transfers the assets constituting its business activity to a subsidiary company ('the subsidiary'). In order to finance that purchase, the subsidiary issues to an intermediary company ('the intermediary') a bond for a term of 15 years that is mandatorily convertible into shares at maturity. That bond does not give rise to the payment of interest to the intermediary, but is converted, at its maturity, into shares. That conversion takes into account the performance, either positive or negative, of the issuer of the bond, namely the subsidiary, during the term of that bond. This type of contract is known as a *zéro-intérêts obligation remboursable en actions* (zero-interest bond repayable in shares (ZORA)).

8 The remuneration of the intermediary, which has acquired the bond, is therefore indexed to the subsidiary's performance. Thus, when the bond matures, the subsidiary must repay, by issuing shares, the nominal amount of the bond plus a 'premium' consisting of all the profit made by the subsidiary during the term of the bond, referred to as 'ZORA accretions'. The amount of that premium is reduced by the amount resulting from the application of the percentage corresponding to the taxation agreed with the Luxembourg tax authorities. If the subsidiary makes a loss in one or more financial years, that

loss is taken into account in the same way, reducing the profit for the purpose of calculating the final amount of the premium. These are referred to as 'ZORA reductions'.

9 In order to finance the bond that it has acquired, the intermediary uses a prepaid forward sale contract ('prepaid forward contract') entered into with a holding company ('the holding company'), which is the sole shareholder of both the subsidiary and the intermediary. The holding company pays to the intermediary, on entering into that contract, an amount corresponding to the nominal amount of the ZORA, in consideration for which the intermediary transfers to the holding company the rights to the shares that will be issued at the end of the ZORA, including those corresponding, where applicable, to the cumulative value of the ZORA accretions.

10 The first set of tax rulings by the Luxembourg tax authorities relates to the financing of the transfer of LNG Trading's business activities in the liquefied natural gas and gas derivatives sector to LNG Supply. Five tax ruling requests were submitted by the companies concerned by that transfer, from 9 September 2008 to 20 September 2013, to which the Luxembourg tax authorities responded with five tax rulings, adopted between 9 September 2008 and 13 March 2014.

11 In accordance with the mechanisms described in paragraphs 7 to 9 of this judgment, it is apparent from that first set of tax rulings that LNG Supply, the subsidiary, was to acquire LNG Trading's business of purchase, sale, trading on the financial markets and transportation of liquefied natural gas and gas derivatives, for an estimated price of 750 million United States dollars (USD) (approximately EUR 507 million, applying, like the other amounts referred to in this paragraph and in paragraphs 12 and 16 of this judgment, the exchange rate used in the decision at issue). LNG Supply was to finance that acquisition by means of a ZORA entered into with LNG Luxembourg, the intermediary, at the maturity of which LNG Supply was to convert the nominal amount of the ZORA, plus, where applicable, the ZORA accretions, into shares in favour of LNG Luxembourg. LNG Luxembourg, for its part, was to raise the sum required to finance the nominal amount of the ZORA by entering into a prepaid forward contract for that amount with LNG Holding, the holding company. That contract provided for the transfer to LNG Holding, on conversion of the ZORA, of the shares initially transferred to LNG Luxembourg by LNG Supply, for a value including, depending on LNG Supply's performance, the ZORA accretions.

12 It follows from the contracts signed by those various companies that, when the mechanisms validated in connection with the first set of tax rulings were implemented, the contract for the transfer by LNG Trading of the assets corresponding to its business activity to LNG Supply was signed on 30 October 2009 and was for an amount of USD 657 million (approximately EUR 444 million). That amount was paid by LNG Supply by means of two promissory notes of USD 11 million (approximately EUR 7 million) and USD 646 million (approximately EUR 437 million). On the same day, LNG Supply and LNG Luxembourg entered into a ZORA for a nominal amount of USD 646 million (approximately EUR 437 million), which was due to mature on 30 October 2024, but was partially converted early, in 2014. On 30 October 2009, LNG Luxembourg and LNG Holding entered into a prepaid forward contract for the nominal amount of the ZORA.

13 From a tax perspective, under the first set of tax rulings, the basis of assessment of LNG Supply's tax liability in a given financial year is equal to a margin agreed with the Luxembourg tax authorities, corresponding to a fraction of the value of the gross assets shown on that company's balance sheet. The difference between the profit actually made in that financial year and that taxable margin constitutes the ZORA accretions for that financial year, which are regarded as deductible expenses related to the ZORA.

14 LNG Luxembourg, for its part, has, pursuant to the first set of tax rulings, the option of either keeping the nominal value of the ZORA in its accounts or otherwise of increasing or reducing that value on account of the ZORA accretions or reductions between the time when the ZORA was entered into and the time when it was converted or repaid early. When converting the bond into shares, LNG Luxembourg may choose to apply Article 22bis of the 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 ('the LIR'), which allows the capital gain corresponding to the ZORA accretions resulting from that conversion not to be taxed.

15 The first set of tax rulings provides, in addition, that LNG Holding will record in its accounts the payment received under the prepaid forward contract as financial fixed assets, at cost price. Until the conversion of the ZORA, it will not therefore recognise any income and, thus, will not be able to deduct any expenses relating to that contract. However, provided that the conditions laid down in Article 166 of the LIR are met, all income, including dividends and capital gains, related to LNG Holding's participations in its Luxembourg subsidiaries, including, consequently, the shares in LNG Supply transferred by LNG Luxembourg after the conversion of the ZORA into shares, are exempt from income tax.

16 In practice, LNG Supply recorded the nominal amount of the ZORA as a liability from 2009 to 2013. In 2014, it reduced that amount by USD 193.8 million (approximately EUR 163.3 million) in order to take account of the early partial conversion of the ZORA into shares. LNG Holding's capital gain of USD 506.2 million (approximately EUR 425.2 million) as a result of that partial conversion was exempt from income tax pursuant to Article 166 of the LIR. LNG Supply updated the remaining nominal amount of the ZORA recorded as a liability, taking into account the ZORA reductions.

17 The second set of tax rulings relates to the transfer of CEF's treasury management and financing business to GSTM. Two tax ruling requests were submitted by the companies concerned by that transfer on 9 February 2010 and 15 June 2012, to which the Luxembourg tax authorities responded with two tax rulings, adopted on those dates.

18 According to those tax rulings, GSTM, the subsidiary, was to acquire CEF's business described in paragraph 17 of this judgment for the amount of EUR 1 036 912 506.84. GSTM was to finance that acquisition by means of a ZORA entered into with EIL, the intermediary, at the maturity of which GSTM was to convert the nominal amount of the ZORA, plus, where applicable, the ZORA accretions, into shares in favour of EIL. EIL, for its part, was to raise the sum required to finance the nominal amount of the ZORA by entering into a prepaid forward contract for that amount with CEF – which is therefore, in connection with the second set of tax rulings, both the company transferring its business and the holding company providing the funds to the intermediary. That contract was to provide for the transfer to CEF, on conversion of the ZORA, of the shares initially transferred to EIL, for a value including, depending on GSTM's performance, the ZORA accretions.

19 Pursuant to that second set of tax rulings, GSTM entered into two ZORA contracts with EIL, on 17 June 2011 and 30 June 2014, which were due to mature on 17 June 2026 and were for an amount of EUR 1 036 912 506.84. On 17 June 2011, EIL and CEF entered into a prepaid forward contract for the issue price of the ZORA.

20 As regards the tax treatment of the second set of tax rulings, the observations relating to the first set of tax rulings, set out in paragraphs 13 to 15 of this judgment, are applicable *mutatis mutandis*. The Court merely observes that it is apparent from paragraph 64 of the decision at issue and from the statements of the Grand Duchy of Luxembourg referred to therein that the margin agreed with the tax authorities of that Member State, constituting the basis of assessment for GSTM's tax liability, was not altered, notwithstanding the request made to that effect by the Engie group.

21 It is apparent from GSTM's accounting reports and tax returns that GSTM recorded the amount of the ZORA accretions as a liability in its annual balance sheets against the corresponding expense in the profit and loss account, since it is an amount that GSTM will, once the ZORA has matured, have to convert into shares that will be transferred to EIL and then to CEF. That amount is shown, for the years 2011 to 2016, in Table 2 set out after recital 73 of the decision at issue. In recitals 74 and 75 of that decision and in the tables included therein, the European Commission set out the consequences of the second set of tax rulings for the taxation of GSTM. Like LNG Holding, CEF recorded its participations in its subsidiaries as eligible for the tax exemption under Article 166 of the LIR.

C. The administrative procedure

22 On 23 March 2015, the Commission sent the Grand Duchy of Luxembourg a request for information concerning its tax ruling practice with regard to the Engie group. The Member State concerned replied to that request on 25 June 2015. On the basis of the documents provided, the Commission informed the

Grand Duchy of Luxembourg, by letter of 1 April 2016, that it could not rule out the possibility that the tax rulings at issue may have included State aid that was incompatible with the internal market.

23 On 19 September 2016, the Commission initiated the formal investigation procedure provided for in Article 108(2) TFEU. The decision to initiate that procedure was published in the *Official Journal of the European Union* on 3 February 2017.

24 Various exchanges of correspondence took place and a meeting was held on 1 June 2017 in connection with that procedure, the details of which are set out in paragraphs 55 to 62 of the judgment under appeal.

D. The decision at issue

25 On 20 June 2018, the Commission adopted the decision at issue, by which it found, in essence, that the Grand Duchy of Luxembourg had granted, through its tax authorities, in breach of Articles 107(1) and 108(3) TFEU, a selective advantage to the Engie group, regarded as a single economic unit.

26 Without calling into question the lawfulness under Luxembourg tax law of the entire financing structure established by the Engie group in order to transfer LNG Trading's business, on the one hand, and CEF's business, on the other, the Commission disputed the effects of that structure on that group's total tax liability, on the ground, in essence, that almost all of the profit made by the Engie subsidiaries in Luxembourg had not actually been taxed, in particular as a result of the exemption provided for in Article 166 of the LIR.

27 As regards the imputability of the tax rulings at issue to the Member State, according to the Commission, imputability stems from the fact that those rulings were adopted by the Luxembourg tax authorities and resulted in a loss of tax revenue.

28 As regards the grant of an economic advantage, the Commission found that that advantage lay in the fact that the income from participations held by LNG Holding, on the one hand, and CEF, on the other, was not taxed. That income corresponds, from an economic perspective, to the ZORA accretions that LNG Supply and GSTM respectively deducted from their taxable income as expenses.

29 According to the Commission, the ZORA accretions are not taxed at the level of the subsidiaries, at the level of intermediaries or at the level of holding companies, with subsidiaries paying only tax for which the basis of assessment is a limited margin agreed with the Luxembourg tax authorities.

30 The Commission thus stated that, on account of the future conversion of the ZORAs in question, 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. Lastly, the holding companies concerned, which, under the prepaid forward contracts, hold the subsidiaries' shares once the ZORAs have matured, were also not taxed, since the income from participations which they generate from the conversion of the ZORAs is exempt, according to the tax rulings at issue, under Article 166 of the LIR.

31 In order to prove the selectivity of those tax rulings, the Commission principally relied, as is apparent, in particular, from recitals 163 to 170 and 237 of the decision at issue, on three lines of reasoning. The first two concern the existence of a selective advantage at the level of the holding companies, in the light, first of all, of a reference framework encompassing the Luxembourg corporate income tax system and, next, of a reference framework limited to the provisions of Luxembourg law on the taxation of profit distributions and the exemption of income from participations. The third line of reasoning relates to the existence of an advantage at the level of the Engie group, in the light of a reference framework encompassing the Luxembourg corporate income tax system. In addition, it is apparent from recital 289 of the decision at issue that, by a fourth line of reasoning, set out in the alternative, the Commission considered that a selective advantage resulted from the non-application by the Luxembourg tax authorities of Article 6 of the Steueranpassungsgesetz (Law on tax adjustment) of 16 October 1934

(*Mémorial* A 1934, p. 9001), on abuse of law. Furthermore, the Commission considered that there was no justification for that selective advantage.

32 As regards the first line of reasoning, the Commission stated that the tax rulings at issue conferred on the Engie group, at the level of the holding companies, a selective advantage inasmuch as those rulings derogated from the Luxembourg corporate income tax system, stemming from Articles 18, 23, 40, 159 and 163 of the LIR, 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. It found that the identification, for the purpose of defining a reference framework, of an objective that could be inferred from those provisions was consistent with the case-law of the Court and that that objective, namely the taxation of the profit of all companies subject to tax in Luxembourg, was clearly apparent from those provisions. The Commission added that the use of a reference framework encompassing the Luxembourg corporate income tax system was also consistent with that case-law, the Court having repeatedly held that, in relation to measures concerning the taxation of companies, the reference framework could be defined in the light of the corporate income tax system, and not in the light of the specific provisions applicable to certain taxpayers or certain transactions.

33 According to the Commission, by the tax rulings at issue, the Luxembourg tax authorities derogated from that framework by allowing the income from participations of the holding companies concerned, corresponding, from an economic perspective, to the ZORA accretions, not to be taxed. Those rulings also gave rise to discrimination in favour of those holding companies, since, unlike those holding companies, companies subject to corporation tax in Luxembourg are taxed on their profit, as recorded in their accounts.

34 As regards the second line of reasoning, the Commission considered that the tax rulings at issue conferred on the Engie group, at the level of the holding companies, a selective advantage inasmuch as they derogated from the reference framework limited to the provisions on the exemption of income from participations and the taxation of profit distributions, stemming from Articles 164 and 166 of the LIR. The exemption of income from participations is available to a parent company only if the distributed profit has been taxed beforehand at the level of its subsidiary. Income from participations that is exempted from tax at the level of the holding companies corresponds, from an economic perspective, to the ZORA accretions deducted by the subsidiaries from their taxable income as expenses.

35 The Commission found, in recital 212 of the decision at issue, that, from an economic perspective, having regard to the direct and clear link between the income exempted at the level of the holding companies and the ZORA accretions deducted at the level of the subsidiaries, those accretions were equivalent to profit distributions. The derogation from the limited reference framework gave rise to discrimination in favour of the holding companies concerned, since, in essence, parent companies in a legal and factual situation comparable to that of those holding companies 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.

36 The absence of an express link between Article 164 of the LIR and Article 166 thereof cannot call that finding into question, since, 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.

37 As regards the third line of reasoning, the Commission maintained that the selectivity of the tax rulings at issue was also apparent from an analysis at the level of the group comprising the holding companies, the intermediaries and the subsidiaries concerned, since, from 2015 onwards, those companies formed a single tax unit by paying their taxes on a consolidated basis. In any event, according to the Commission, since the economic effects of State measures must be analysed by reference to undertakings, the holding companies, the intermediaries and the subsidiaries must be regarded as forming part of the same undertaking for the purposes of State aid law. The Commission added that the tax ruling requests related to the tax treatment of all the entities of the Engie group involved in the transactions at issue and that the economic advantage which, in its view, that group enjoyed lay in the

combination of an exemption of income from participations at the level of the holding companies and a deduction of the ZORA accretions as expenses at the level of the subsidiaries. The selective advantage granted to the Engie group stems from the fact that the tax rulings derogate from the reference framework corresponding to the Luxembourg corporate income tax system, the aim of which is to tax companies subject to tax in Luxembourg on their profit, as recorded in their accounts.

38 The reduction in the tax burden at the level of the subsidiaries, as a result of the deduction of the ZORA accretions as expenses from the taxable income of those subsidiaries, was not offset by an increase in the tax burden at the level of holding companies or by an increase in the taxable income of the intermediaries, which, in practice, had led to a reduction in the combined taxable income of the Engie group in Luxembourg. Other groups of companies in a factual and legal situation comparable to that of the Engie group would not have been able to obtain such a reduction in their combined taxable income.

39 As regards the Commission's alternative analysis, it is based on the fact that, by the tax rulings at issue, the Luxembourg tax authorities ruled out the application of Article 6 of the Law on tax adjustment, whereas the four criteria identified by the case-law of the Luxembourg courts for establishing that there has been an abuse of law, namely the use of forms or institutions governed by private law, the reduction in the tax burden, the use of inappropriate legal means and the absence of non-tax reasons, were met.

40 Concerning the last two criteria in particular, the Commission considered that the almost total absence of taxation of the profit made by the subsidiaries in Luxembourg would not have been possible if the business sectors had been transferred using an equity instrument or a loan between the subsidiaries and the holding companies concerned. Moreover, apart from the achievement of significant tax savings, there were no genuine economic reasons for the Engie group to opt for the complex financing structures established and endorsed by the tax rulings at issue.

41 The Commission also took the view that the Member State concerned had not put forward any justification for the favourable treatment enjoyed by the holding companies. It concluded that that treatment could not be justified by the nature or general scheme of the Luxembourg tax system. In any event, it stated that a hypothetical justification based on the avoidance of economic double taxation could not, in essence, be accepted.

42 The Commission stated that, in view of the many sectors in which the Engie group was active in several Member States, the tax treatment which had been granted to it pursuant to the tax rulings at issue had relieved that group of a tax burden which it would otherwise have had to bear in the day-to-day management of its business activities. Accordingly, those tax rulings distorted or threatened to distort competition.

43 Finding that the aid granted was incompatible with the internal market and unlawful, the Commission required the Grand Duchy of Luxembourg, as regards the transactions covered by the first set of tax rulings at issue, to take immediate action to recover from LNG Holding or, failing which, from Engie or one of its successors, or from the Engie group companies, the aid which had already materialised as a result of the partial conversion in 2014 of the ZORA concluded in favour of LNG Supply. With regard to the transactions covered by the second set of tax rulings at issue, it required that Member State to refrain from applying those rulings as regards the exemption of any income from participations that could be received by LNG Holding and CEF upon full conversion of the ZORAs concluded in favour of LNG Supply and GSTM.

44 The Commission stated that such recovery did not infringe the principles of legal certainty, protection of legitimate expectations, equal treatment and good administration and rejected the complaints put forward, during the administrative procedure, by the Grand Duchy of Luxembourg and by Engie and Others, alleging procedural defects vitiating the formal investigation procedure.

II. The procedure before the General Court and the judgment under appeal

45 By applications lodged at the Registry of the General Court on 30 August and 4 September 2018 respectively, the Grand Duchy of Luxembourg (Case T-516/18) and Engie and Others (Case T-525/18)

brought actions for annulment of the decision at issue.

46 By document lodged at the Court Registry on 28 January 2019, the Grand Duchy of Luxembourg made a request, pursuant to Article 28(5) of the Rules of Procedure of the General Court then in force, that Case T-516/18 be heard and determined by a Chamber sitting in extended composition. The General Court accepted that request.

47 By order of the President of the Seventh Chamber, Extended Composition, of the General Court of 15 February 2019, Ireland was granted leave to intervene in support of the form of order sought by the Grand Duchy of Luxembourg in Case T-516/18.

48 By decision of the General Court of 16 October 2019, Case T-516/18 was assigned to the Second Chamber, Extended Composition, of the General Court pursuant to Article 27(5) of the Rules of Procedure of the General Court.

49 By order of the President of the Second Chamber, Extended Composition, of the General Court of 12 June 2020, the parties having been heard, Cases T-516/18 and T-525/18 were joined for the purposes of the oral part of the procedure, in accordance with Article 68(1) of the Rules of Procedure of the General Court. By the same order, it was decided to exclude the confidential information from the file to be made available to Ireland, in accordance with the requests for confidential treatment submitted by the Grand Duchy of Luxembourg and by Engie and Others.

50 In support of its action, the Grand Duchy of Luxembourg put forward six pleas in law, alleging (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.

51 For their part, Engie and Others put forward eight pleas in law in support of their action, six of which overlapped with those put forward by the Grand Duchy of Luxembourg. Engie and Others maintained, in addition, that the tax rulings at issue could not be imputed to the State and that, in any event, the Commission had incorrectly classified them as individual aid.

52 By the judgment under appeal, after joining Cases T-516/18 and T-525/18 for the purposes of that judgment, the General Court rejected all of the pleas raised in those actions and dismissed the actions in their entirety.

53 First of all, the General Court rejected the pleas alleging that, in adopting the decision at issue, the Commission had engaged in disguised tax harmonisation, recalling that, while direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law.

54 It stated that, according to the case-law, if tax measures in fact discriminate between companies which are in a comparable situation in the light of the objective pursued by those measures and confer on the recipients of those measures selective advantages favouring 'certain' undertakings or the production of 'certain' goods, those measures may be regarded as State aid for the purposes of Article 107(1) TFEU. Consequently, it found that, since the Commission was competent to ensure compliance with Article 107 TFEU, it could not be accused of having exceeded its powers by examining the tax rulings at issue in order to determine whether they constituted State aid and, if they did, whether they were compatible with the internal market for the purposes of Article 107(1) TFEU.

55 In that regard, it held that the Commission had not imposed its own interpretation of Luxembourg tax law when establishing the selectivity of those tax rulings, but had confined itself to setting out the provisions of that law, relying not on its own interpretation of that law but on that of the Luxembourg tax authorities.

56 As is apparent from paragraphs 138 to 153 of the judgment under appeal, the General Court held that, as part of its review of tax measures involving State aid, the Commission was able to conduct its own

assessment of national tax provisions, an assessment which might, where appropriate, be challenged by the Member State concerned or by any interested parties by means of an action for annulment before the General Court. According to the General Court, the Commission could only, in the present case, carry out an assessment of 'normal' taxation, within the meaning of Luxembourg tax law as applied by the Luxembourg tax authorities. In so doing, it did not therefore engage in any 'tax harmonisation', but merely exercised the power conferred on it by Article 107(1) TFEU.

57 Next, the General Court held that the pleas alleging errors of law and errors of assessment in the identification of a selective advantage in favour of the Engie group were unfounded. In particular, it rejected Engie and Others' plea alleging that the Commission, confusing the conditions of selectivity and advantage, had inferred the existence of such an advantage from an alleged derogation not from the provisions of the general law for determining the taxable income, but from an objective, being to tax, in all circumstances, the profit of companies liable to income tax. It held, in that regard, that although, in principle, selectivity and advantage were two separate conditions, in tax matters, however, the examination of an advantage overlapped with the examination of selectivity in so far as, for those two conditions to be satisfied, it must be shown that the tax measure at issue results in a reduction in the amount of tax which would normally have been payable by the recipient of that measure under the ordinary tax system, which applies to other taxpayers in the same situation. Moreover, the case-law made it possible to examine those two conditions together, as the 'third condition' laid down in Article 107(1) TFEU, relating to the existence of a 'selective advantage'.

58 In the present case, the General Court stated, in paragraphs 239 to 253 of the judgment under appeal, that the Commission had sought to demonstrate, irrespective of the merits of the body of reasons set out in the decision at issue, that the tax rulings at issue resulted in a reduction in the amount of tax which would normally have been payable, particularly by the holding companies concerned under ordinary tax systems and that, consequently, those measures amounted to a derogation from the tax rules applicable to other taxpayers in a comparable factual and legal situation. Having regard to the fiscal nature of those measures, the General Court held that it was consistent with the case-law for the Commission to assess simultaneously the conditions relating to the grant, by means of those measures, of selective advantages.

59 Furthermore, the General Court rejected the pleas put forward respectively by the Grand Duchy of Luxembourg and by Engie and Others alleging that the Commission had incorrectly restricted the reference framework to the provisions applicable to purely internal situations. It pointed out, in that regard, that the situation at issue was a purely internal one, since the holding companies, the subsidiaries and intermediaries concerned were established in Luxembourg. Consequently, the tax situations of those companies fell within the purview of the same tax authority, which excluded the risks of double taxation inherent in the application of different tax systems and the involvement of different tax authorities, which might exist in the case of cross-border distributions.

60 As regards the reference framework itself, the General Court, in paragraphs 288 to 301 of the judgment under appeal, also did not accept the line of argument of the Grand Duchy of Luxembourg and Engie and Others, according to which the definition of a reference framework limited to Articles 164 and 166 of the LIR alone was based on an incorrect combined reading of those two provisions. The appellants submitted, in particular, first, that a ZORA did not entail a profit distribution for the purposes of the first of those articles, and, second, that the second of those articles could not be interpreted as making entitlement to the exemption at the level of a parent company dependent on there being no tax deduction at the level of the subsidiary of the income generated during the ZORA. The General Court, in the first place, while recognising that Article 166 of the LIR does not make the grant of the exemption of income from participations at the level of a parent company formally dependent on the prior taxation of distributed profit at the level of its subsidiary, nonetheless held that the grant of such an exemption could be contemplated only if the income distributed by a subsidiary had been taxed beforehand, short of there being double non-taxation of profit in a purely internal situation. In the second place, while also accepting that the ZORA accretions are not, formally speaking, profit distributions, the General Court held, in paragraph 300 of the judgment under appeal, that the income from participations exempted at the level of LNG Holding corresponded, in essence, to the amount of those accretions, so that those accretions corresponded in practical terms, 'in the very specific

circumstances of the present case and against the background of a corporate structure involving a holding company, an intermediary company and a subsidiary, to profit distributions'.

61 The Grand Duchy of Luxembourg and Engie and Others submitted (i) that under Luxembourg law Article 164 of the LIR governs only profit distributions, not ZORAs, which are successively debt and then capital, and that there was no direct and obvious link between the deductibility of the ZORA accretions, at the level of the subsidiaries, and the exemption of income from participations, at the level of the holding companies concerned, in the present case; (ii) that the increase in value of the ZORAs was uncertain when they were issued; (iii) that Articles 164 and 166 of the LIR, considered in isolation, were applied correctly by the Luxembourg tax authorities; (iv) that the Commission did not show that the tax rulings at issue infringed those two provisions, considered in isolation; and (v) that the Commission did not establish that the Engie group received preferential treatment at the level of the holding companies concerned.

62 In that regard, first, the General Court stated that, in the present case, the income which LNG Holding had generated from the application of the prepaid forward contract actually corresponded, from an economic perspective, to the amount of the ZORA accretions made before the partial conversion of that ZORA. It noted that, although the deductibility of the ZORA accretions at the level of the subsidiaries is, formally speaking, a separate transaction from the exemption of income from participations at the level of the holding companies, there is, in fact, a direct link between those two transactions, so that the Commission was entitled to take the view that the Luxembourg tax authorities had derogated from the reference framework limited to the provisions of Articles 164 and 166 of the LIR.

63 Second, the General Court held, as regards the uncertain value of a ZORA upon issue and when the tax rulings at issue were adopted, that a measure may constitute State aid for the purposes of Article 107 TFEU even if no selective advantage has materialised on the date on which that measure is adopted. It considered that the fact that such an advantage has not materialised did not preclude the classification of that measure as State aid, but only the recovery of that aid. In the present case, the fact that there was an element of chance when the ZORAs were adopted as to whether profit would be made by the subsidiaries concerned does not preclude either the existence of a selective advantage granted to the holding companies or the existence of a derogation, by the Luxembourg tax authorities, from that limited reference framework.

64 Third, the General Court held that there was a link, under Luxembourg law, between the exemption of income from participations at the level of a parent company and the deductibility of distributed income at the level of its subsidiary. It considered that such an exemption could not be applied without a prior examination of whether the corresponding income had been taxed at the level of the subsidiary. In the present case, the income from participations received by LNG Holding, the parent company, corresponding, from an economic perspective, to the ZORA accretions, could not normally be exempted, since those accretions were deducted as expenses by LNG Supply, its subsidiary. The General Court inferred therefrom that the Commission was correct to consider that the deductibility of income at the level of the subsidiary and its subsequent exemption at the level of the parent company derogated from the reference framework limited to Articles 164 and 166 of the LIR.

65 Fourth, it considered that, contrary to what the Grand Duchy of Luxembourg claimed in the present case, the existence of a derogation from that reference framework had to be assessed not in the light of Articles 164 and 166 of the LIR taken in isolation, but in the light of a combined reading of those provisions.

66 Fifth, the General Court responded to the argument that the Commission had not established that the Engie group received preferential treatment at the level of the holding companies concerned, whereas it should have identified specific features characteristic of the undertakings benefiting from the tax rulings, enabling them to be distinguished from the undertakings excluded from it. It recalled in that context that the condition of selectivity is satisfied where the Commission can demonstrate that a national measure conferring a tax advantage derogates from the ordinary or 'normal' tax system applicable in the Member State concerned, thereby introducing, through its actual effects, differences in the treatment of operators who are, in the light of the objective pursued by that tax system, in a comparable factual and legal situation. Moreover, according to the case-law, a tax measure could be

selective even though any undertaking could freely choose to perform the transaction governing whether the advantage provided for by that measure is granted. In the present case, according to the General Court's reasoning in paragraphs 304 to 381 of the judgment under appeal, the Commission demonstrated to the requisite legal standard that the holding companies concerned received preferential tax treatment as compared with a parent company which may receive income from participations that is not taxed upon distribution. The fact that holding companies other than CEF and LNG Holding benefited from identical tax rulings would, at most, be indicative of a possible aid scheme, not that there was no discrimination.

67 For the sake of completeness, the General Court considered, in paragraph 383 of the judgment under appeal, that it was appropriate to examine the selectivity of the tax rulings at issue in the light of the reference framework comprising Article 6 of the Law on tax adjustment, on abuse of law, in view of the unprecedented nature of the reasoning adopted in that regard by the Commission. The General Court considered, in the first place, that, contrary to what was claimed by the Grand Duchy of Luxembourg, the Commission had, as early as the decision to initiate the formal investigation procedure, drawn attention to the non-application of that provision by the Luxembourg authorities and, subsequently, made a request to the Grand Duchy of Luxembourg and the Engie group to submit additional comments on that issue. It noted, in the second place, that even though Article 6 of the Law on tax adjustment raised no difficulties of interpretation in the present case, the Commission had referred to both the administrative practice and the judicial practice in Luxembourg. It found, in the third place, that the criteria to be met under Luxembourg law in order to establish an abuse of law were met in the present case. It inferred therefrom that the Commission had demonstrated to the requisite legal standard that the Luxembourg tax authorities had derogated from the reference framework comprising Article 6 of the Law on tax adjustment.

68 The General Court also rejected the other pleas in the actions.

III. The procedure before the Court and the forms of order sought by the parties to the appeals

A. Case C-451/21 P

69 By its appeal, the Grand Duchy of Luxembourg claims that the Court should:

– set aside the judgment under appeal;

– principally, give final judgment in the matter and uphold the form of order sought at first instance by annulling the decision at issue;

– in the alternative, refer the case back to the General Court; and

– order the Commission to pay the costs.

70 The Commission contends that the Court should:

– dismiss the appeal and

– order the Grand Duchy of Luxembourg to pay the costs.

71 By order of the President of the Court of 11 October 2021, *Luxembourg* v *Commission* (C-451/21 P, EU:C:2021:858), confidential treatment was granted, vis-à-vis Ireland, intervener at first instance, to the information redacted from the non-confidential version of the appeal and Annexes 2, 3 and 11 thereto, lodged at the Court Registry by the Grand Duchy of Luxembourg on 2 August 2021, and that non-confidential version alone would be served on Ireland.

B. Case C-454/21 P

72 By their appeal, Engie and Others claim that the Court should:

– set aside the judgment under appeal;

– principally, grant the form of order sought by them at first instance or, in the alternative, annul Article 2 of the decision at issue in so far as it orders the recovery of the aid;

– in the further alternative, refer the case back to the General Court; and

– order the Commission to pay the costs.

73 The Commission contends that the Court should:

– dismiss the appeal and

– order Engie and Others to pay the costs.

IV. The appeals

74 In view of the connection between them, it is appropriate to join the present cases for the purposes of the judgment, in accordance with Article 54(1) of the Rules of Procedure of the Court.

A. Admissibility

75 The Commission contends, without formally raising a plea of inadmissibility, first, that the first ground of appeal in Case C-451/21 P and the second ground of appeal in Case C-454/21 P, by which the Grand Duchy of Luxembourg and Engie and Others respectively complain that the General Court used a reference framework that was incorrectly restricted to Articles 164 and 166 of the LIR and that the General Court erred in extending that reference framework to Article 6 of the Law on tax adjustment in order to determine whether there was a selective advantage, are inadmissible. According to the Commission, those grounds of appeal, which were put forward for the first time only at the stage of the appeals, change the subject matter of the proceedings before the General Court. The Commission contends, second, that the second ground of appeal in Case C-451/21 P and the first and second grounds of appeal in Case C-454/21 P are also inadmissible in that, by those grounds of the appeals, the parties call into question the General Court's assessments of Luxembourg law, which constitute assessments of fact and cannot therefore be examined in an appeal, failing any distortion of that law.

76 In that regard, it must be borne in mind that the jurisdiction of the Court of Justice ruling on an appeal against a decision given by the General Court is defined by the second subparagraph of Article 256(1) TFEU. That provision states that an appeal is to be on points of law only and that it must be made 'under the conditions and within the limits laid down by the Statute'. In a list setting out the grounds that may be relied upon in that context, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union states that an appeal may be based on infringement of European Union law by the General Court (judgment of 5 July 2011, *Edwin* v *OHIM*, C-263/09 P, EU:C:2011:452, paragraph 46).

77 It is true that, in principle, with respect to the assessment in the context of an appeal of the General Court's findings on national law, which, in the field of State aid, constitute findings of fact, the Court of Justice has jurisdiction only to determine whether that law was distorted (see, to that effect, judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 82 and the case-law cited). The Court of Justice cannot, however, be deprived of the possibility of reviewing whether such assessments themselves constitute an infringement of European Union law within the meaning of the case-law cited in paragraph 76 of this judgment.

78 The question whether the General Court adequately defined the relevant reference framework and, by extension, correctly interpreted the constituent provisions, is a question of law which can be reviewed by the Court of Justice on appeal. The arguments aimed at calling into question the choice of reference framework or its meaning in the first step of the analysis of the existence of a selective advantage are admissible, since that analysis derives from a legal classification of national law on the basis of a provision of EU law (see, to that effect, judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 85 and the case-law cited).

79 To concede that the Court of Justice is not in a position to determine whether the General Court made no error of law when it endorsed the definition of the relevant reference framework, the interpretation thereof and the application thereof as the decisive parameter for the purpose of examining whether there was a selective advantage would be tantamount to accepting that the General Court may have infringed a provision of primary EU law, namely Article 107(1) TFEU, without any possibility of that infringement being found in an appeal, which would contravene the second subparagraph of Article 256(1) TFEU, as pointed out in paragraph 76 of this judgment.

80 It must therefore be held that, in requesting the Court of Justice to review, first, whether the Commission's limitation of the reference framework solely to Articles 164 and 166 of the LIR or the extension of that reference framework to Article 6 of the Law on tax adjustment, as endorsed by the General Court, and, second, whether the meaning attributed to those provisions by both the Commission and the General Court corresponded to an interpretation and to an application of those provisions that would make it possible to define normal taxation with a view to analysing the existence of a selective advantage for the purposes of Article 107(1) TFEU, the Grand Duchy of Luxembourg and Engie and Others have put forward grounds of appeal which, contrary to what the Commission maintains, are admissible.

B. Substance

81 In support of its appeal in Case C-451/21 P, the Grand Duchy of Luxembourg puts forward four grounds of appeal, alleging (i) infringement of Article 107 TFEU, inasmuch as the General Court held that the Commission had established the existence of a selective advantage conferred on the holding companies by means of the tax rulings at issue in the light of the reference framework comprising Articles 164 and 166 of the LIR; (ii) infringement of Article 107 TFEU in so far as the General Court held that the Commission had established the existence of a selective advantage conferred on the Engie group by means of the tax rulings at issue on account of the non-application of Article 6 of the Law on tax adjustment; (iii) infringement of Articles 4 and 5 TEU; and (iv) infringement by the General Court of its obligation to state reasons under Article 296 TFEU.

82 In support of their appeal in Case C-454/21 P, Engie and Others rely on three grounds of appeal, alleging (i) that the General Court erred in law and distorted the facts in its review of the lawfulness of the definition of the reference framework comprising Articles 164 and 166 of the LIR; (ii) that the General Court erred in law and distorted the facts by approving the Commission's demonstration of the existence of a selective advantage in the light of Article 6 of the Law on tax adjustment; and (iii) that the General Court infringed the principles of legal certainty, protection of legitimate expectations and non-retroactivity of tax law.

1. The first ground of the appeals

(a) Arguments of the parties

83 The first ground of appeal in Case C-451/21 P consists of two parts.

84 By the first part of that ground of appeal, the Grand Duchy of Luxembourg submits, in particular, in the first place, that it is apparent from the case-law that, in tax matters, the existence of a selective advantage can be determined only by reference to 'normal' taxation. By endorsing the Commission's analysis, the General Court artificially reduced the reference framework for that comparison to two provisions, one of which, as the General Court expressly acknowledged, is not applicable to the present case. That analysis disregards other provisions concerning the determination of companies' commercial profit, whereas the case-law prohibits the Commission from relying on a reference framework consisting of some provisions that have been artificially taken from a broader legislative framework.

85 In the second place, the Grand Duchy of Luxembourg submits that the General Court upheld a *contra legem* interpretation of the tax rules at issue. Although the General Court itself acknowledges, first, that Article 166 of the LIR does not make the grant of the exemption of income from participations at the level of the parent company formally dependent on the prior taxation of distributed profit at the level of the subsidiary and, second, that the ZORA accretions are not, formally speaking, profit distributions within the meaning of Article 164 of the LIR, it nevertheless considered that the Commission had not

erred in law in finding that there was a link between those articles and in taking the view that that exemption was applicable solely to income which has not been deducted from the taxable income of the subsidiary.

86 In so doing, the General Court incorrectly defined the reference framework, made an incorrect legal characterisation of the facts and manifestly distorted Luxembourg law. In defining that reference framework, the Commission and the General Court added a condition to those then laid down by Article 166 of the LIR. They also extended the scope of Article 164(2) of the LIR, since the ZORA accretions do not constitute profit distributions and are therefore not covered by that article, whereas they are deductible as expenses.

87 The reasoning of the Commission and of the General Court disregards Article 107 TFEU as well as the principles of legality of taxation and of strict interpretation of tax laws, which characterise both Luxembourg tax law and EU law.

88 The Grand Duchy of Luxembourg states that it is surprised that the General Court referred to the letter of 31 January 2018 that it had sent to the Commission during the administrative procedure ('the letter of 31 January 2018'). That Member State maintains that that letter in no way confirms, contrary to what the General Court asserted by citing a passage from that letter out of context, the existence of a link between Article 164 of the LIR and Article 166 thereof. A reading of that letter shows, inter alia, that those articles are 'different in scope'. The General Court's reasoning overlooks the fact that the text of the LIR is clear and must not therefore be interpreted more broadly or narrowly than the terms it contains.

89 Similarly, the opinion of 2 April 1965 of the Conseil d'État (Council of State, Luxembourg) ('the 1965 opinion of the Council of State'), concerning the provision which preceded Article 166 of the LIR in Luxembourg law, to which the General Court also referred, makes no mention of a condition of prior taxation of distributed profit for the application of the exemption scheme.

90 The reference framework approved by the General Court is therefore not only incomplete, having regard to the provisions which the General Court excludes from its scope, but also fictitious, in that it assumes the existence of a link between Article 164 of the LIR and Article 166 thereof.

91 By the second part of the first ground of appeal, the Grand Duchy of Luxembourg submits, in the first place, that the premisses on which the finding of a derogation from the reference framework comprising Articles 164 and 166 of the LIR is based are incorrect, since, first, there is no link between the exemption of income from participations at the level of a parent company and the deductibility of distributed income at the level of its subsidiary and, second, the ZORA accretions are not, formally speaking, profit distributions, as the General Court moreover acknowledged. By its unprecedented confirmation of an approach based on a 'practical correspondence' between those provisions, the General Court departed from the clear wording of the Luxembourg tax law and disregarded the requirement, recalled in the case-law of the Court of Justice, for the existence of possible aid to be assessed in the light of the relevant provisions of national law.

92 In the second place, the General Court erred in law by relying on the existence of a derogation from the reference framework stemming from the combined effect of general provisions. It did not dispute that Articles 164 and 166 of the LIR were correctly applied, nor did it consider those articles to be discriminatory as such. However, by relying on the combined effect of those provisions and referring to the 'economic and fiscal reality' of the transactions carried out, it rejected what it described as a 'formalistic approach' in order to 'go beyond the legal form'.

93 In the third place, the General Court erred in law as regards the requirement to demonstrate discrimination in relation to undertakings in a comparable situation to that of the Engie group. In particular, it acknowledged that the financing system implemented by that group was 'open to all' and that an application of the tax rules similar to that achieved by the Engie group could lawfully be achieved by other undertakings.

94 In the fourth place, the General Court also erred in law by considering to be selective for the purposes of Article 107 TFEU individual measures applying a general tax scheme, the legality of which it did not

call into question, nor did it dispute the possibility for all to access the financing system used by the Engie group. It therefore considered the tax treatment granted to that group by means of the tax rulings at issue to be selective, even though that treatment resulted from the non-selective application of national rules that are themselves not selective.

95 The first ground of appeal in Case C-454/21 P consists of four parts. The second to fourth parts of this ground of appeal, relating, respectively, to the error of law and distortion of the facts concerning the link between Article 164 of the LIR and Article 166 thereof, to the error of law and the manifest error of assessment allegedly made by the General Court in regarding the ZORA accretions as profit distributions, and to the error of law and manifest error of assessment that it also made in finding that the tax rulings at issue conferred a selective advantage, correspond, in essence, to the arguments set out in the first ground of appeal in Case C-451/21 P.

96 Engie and Others submit, in particular, that the link of dependency between Article 164 of the LIR and Article 166 thereof on which the General Court relied does not follow from the law, from the case-law or from the administrative practice. Moreover, the General Court acknowledged that the second of those articles did not make the grant of the exemption of income from participations at the level of a parent company formally dependent on the prior taxation of distributed profit at the level of its subsidiary. The General Court's assessment contradicts not only the wording of those articles but also Luxembourg tax practice, as described by the Grand Duchy of Luxembourg in the letter of 31 January 2018. In so doing, the General Court disregarded the constitutional principle of legality of taxation and distorted the reply set out in that letter, as well as the 1965 opinion of the Council of State.

97 The General Court also ignored the legal classification of ZORAs, which are convertible instruments corresponding to two successive definitions, first of all that of debt, and then that of capital, a classification which is nevertheless essential in order to determine the tax treatment of each taxable person. That constitutes an infringement of Article 107(1) TFEU, since the economic effects of a given measure must be taken into account only at the stage of demonstrating a derogation from the tax provisions that constitute the reference framework, which can be defined only according to the nature of the instruments at issue and the relevant national tax provisions.

98 The Commission disputes the first ground of each of the appeals.

99 In particular, it contends that it did not artificially define the reference framework limited to Articles 164 and 166 of the LIR. It points out, moreover, that it had, principally, adopted a primary, broader reference framework, corresponding to the Luxembourg corporate income tax system. In that broader context, the exemptions provided for in Article 166 of the LIR constitute, according to the Commission, derogations from the general principle of taxation, whereas that is no longer the case in the light of the reference framework limited to Articles 164 and 166 of that law. Nevertheless, the link between those articles is obvious. It is true that Article 166 of the LIR contains no express reference to Article 164(2) of that law. However, that is not decisive and it is important to determine whether those provisions form a system and to examine the logical link between them.

100 Moreover, a literal interpretation is not the only possible interpretation of tax law. In that regard, the Commission recalls that the Engie group itself classified the profit resulting from the cancellation of shares as a profit distribution. As regards the letter of 31 January 2018, the sentence cited by the General Court in paragraph 295 of the judgment under appeal is clearly set out in that letter and is unambiguous. The Commission acknowledges, however, that the Luxembourg authorities also argue in that letter that Article 166 of the LIR must be interpreted literally, that it must be applied as soon as the conditions which it lays down are fulfilled and, lastly, that the provisions of Article 164 of that law are not a condition *sine qua non* for the application of the scheme for the exemption of income from participations laid down in Article 166 of that law.

101 Moreover, the letter of 31 January 2018 is only one of the elements used by the Commission and the General Court to establish the link between Article 164 of the LIR and Article 166 thereof, in the same way as the 1965 opinion of the Council of State.

102 As regards the economic correspondence between the deductibility of the ZORA accretions at the level of the subsidiaries and the exemption of income from participations at the level of the holding

companies, the General Court, in accordance with the case-law according to which State aid must be assessed in relation to its effects and not its form, merely distinguished the legal appearance of the transactions at issue from their economic reality, emphasising that their formal separation could not conceal the genuine link between them.

103 Lastly, the complaint that the Commission failed to identify companies other than those of the Engie group that were addressees of tax rulings in respect of comparable arrangements is manifestly unfounded on reading recitals 205 and 215 of the decision at issue.

(b) Findings of the Court

(1) Preliminary observations

104 According to the settled case-law of the Court, action by Member States in areas that are not subject to harmonisation by EU law is not excluded from the scope of the provisions of the FEU Treaty on monitoring State aid. The Member States must thus refrain from adopting any tax measure liable to constitute State aid that is incompatible with the internal market (judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 65 and the case-law cited).

105 In that regard, it follows from the well-established case-law of the Court that the classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. 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 (judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 66 and the case-law cited).

106 So far as concerns the condition relating to selective advantage, it requires a determination as to whether, under a particular legal regime, the national measure at issue is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory (judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 67 and the case-law cited).

107 In order to classify a national tax measure as 'selective', the Commission must begin by identifying the reference system, that is the 'normal' tax system applicable in the Member State concerned, and demonstrate, as a second step, 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. The concept of 'State aid' does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned is able to demonstrate, as a third step, that that differentiation is justified, in the sense that it flows from the nature or general structure of the system of which those measures form part (judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 68 and the case-law cited).

108 As pointed out in paragraphs 78 and 79 of this judgment, the determination of the reference framework is of particular importance in the case of tax measures, since the existence of an economic advantage for the purposes of Article 107(1) TFEU may be established only when compared with 'normal' taxation.

109 Thus, determination of the set of undertakings which are in a comparable factual and legal situation depends on the prior definition of the legal regime in the light of whose objective it is necessary, where applicable, to examine whether the factual and legal situation of the undertakings favoured by the measure in question is comparable with that of those which are not (judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 69 and the case-law cited).

110 For the purposes of assessing the selective nature of a tax measure, it is, therefore, necessary that the common tax regime or the reference system applicable in the Member State concerned be correctly identified in the Commission decision and examined by the court hearing a dispute concerning that identification. Since the determination of the reference system constitutes the starting point for the comparative examination to be carried out in the context of the assessment of selectivity, an error made in that determination necessarily vitiates the whole of the analysis of the condition relating to selectivity (judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 71 and the case-law cited).

111 In that context, it must be stated, in the first place, that the determination of the reference framework, which must be carried out following an exchange of arguments with the Member State concerned, must follow from an objective examination of the content, the structure and the specific effects of the applicable rules under the national law of that State (judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 72 and the case-law cited).

112 In the second place, outside the spheres in which EU tax law has been harmonised, it is the Member State concerned which determines, by exercising its own competence in the matter of direct taxation and with due regard for its fiscal autonomy, 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 (see, to that effect, judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 73 and the case-law cited).

113 It follows that only the national law applicable in the Member State concerned must be taken into account in order to identify the reference system for direct taxation, that identification being itself an essential prerequisite for assessing not only the existence of an advantage, but also whether it is selective in nature (judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 74).

114 That conclusion is, however, without prejudice to the possibility of finding, as in the case that gave rise to the judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732), that the reference framework itself, as it results from national law, is incompatible with EU law on State aid, since the tax system at issue has been configured according to manifestly discriminatory parameters intended to circumvent that law (see, to that effect, judgment of 16 March 2021, *Commission* v *Hungary*, C-596/19 P, EU:C:2021:202, paragraph 49).

(2) The existence of errors of law and distortion of the facts in the determination of the reference framework limited to Articles 164 and 166 of the LIR

115 In order to determine what, under Luxembourg law, normal taxation should have been and, therefore, whether there was a selective advantage in favour of the Engie group, the Commission, as set out in paragraphs 31 to 40 of this judgment, interpreted Luxembourg law on the basis, inter alia, of the assertion that the general corporate income tax system in Luxembourg, providing for the principle of taxation of corporate income, did not permit, in the case of the Engie group, the exemption of income from participations at the level of the holding companies pursuant to Article 166 of the LIR and on the basis of the fact that a combined reading of Articles 164 and 166 of that law precluded the concurrent application of an exemption of that income at the level of those holding companies and a deduction of the corresponding sums at the level of the subsidiaries. In its line of reasoning set out in the alternative, the Commission found that that concurrent application had to be ruled out under Article 6 of the Law on tax adjustment.

116 Accordingly, in order to assess the selective nature of the measures at issue in the light of the LIR, it was for the General Court to ascertain whether the exemption of income corresponding to the ZORA accretions, granted under those measures at the level of the holding companies, derogated from the relevant provisions of the LIR in the context of the various lines of reasoning that were adopted by the

Commission in the decision at issue and challenged by the Grand Duchy of Luxembourg and Engie and Others.

117 By their first ground of appeal, the Grand Duchy of Luxembourg and Engie and Others dispute the General Court's assessment by which it upheld as well founded the Commission's second line of reasoning, according to which the interpretation of Articles 164 and 166 of the LIR led to the conclusion that the tax treatment of the ZORAs of the Engie group, by means of the tax rulings at issue, derogated from the 'normal' application of those provisions, thus conferring a selective advantage on that group.

118 In that regard, as recalled in paragraph 112 of this judgment, it is the Member State concerned which, outside the spheres in which EU tax law has been harmonised, determines, by exercising its own competence in the matter of direct taxation and with due regard for its fiscal autonomy, the characteristics constituting the tax, such as the basis of assessment, the taxable event and any exemptions to which the tax is subject, characteristics which define, in principle, the reference system or the 'normal' tax regime.

119 Moreover, 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 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 (see, to that effect, judgment of 8 May 2019, *Związek Gmin Zagłębia Miedziowego*, C-566/17, EU:C:2019:390, paragraph 39).

120 It follows that, when determining the reference framework for the purpose of applying Article 107(1) TFEU to tax measures, the Commission is in principle required to accept the interpretation of the relevant provisions of national law given by the Member State concerned in the exchange of arguments referred to in paragraph 111 of this judgment, provided that that interpretation is compatible with the wording of those provisions.

121 The Commission may depart from that interpretation only if it is able to establish, on the basis of reliable and consistent evidence that has been the subject of that exchange of arguments, that another interpretation prevails in the case-law or the administrative practice of that Member State.

122 In accordance with Article 4(3) TEU, that Member State is bound by a duty of sincere cooperation throughout the procedure for the examination of a measure by reference to the provisions of EU law on State aid (judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 83 and the case-law cited). That duty implies, in particular, that that Member State must in good faith provide the Commission with all relevant information requested by it concerning 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.

123 In the present case, as regards the tax treatment of financial instruments such as ZORAs, the General Court stated, first, in paragraph 292 of the judgment under appeal, that Article 166 of the LIR '[did] not make the grant of the [exemption of income from participations] at the level of a parent company formally dependent on the prior taxation of distributed profits at the level of its subsidiary', following the Commission, which, in recital 218 of the decision at issue, had found that there was 'no express link between Article 166 [of the] LIR and Article 164(1) and (2) [of the] LIR' and, second, in paragraph 300 of the judgment under appeal, that 'the ZORA accretions are not, formally speaking, profit distributions'.

124 The General Court thus departed from a literal interpretation of those provisions. Confirming the Commission's approach, the General Court first considered that the exemption of a holding company's income from participations could be contemplated under Luxembourg law only if the income distributed by its subsidiary had been taxed beforehand.

125 It relied in that regard, in paragraphs 295 and 296 of the judgment under appeal, on two elements identified by the Commission in the decision at issue. The first of those is the letter of 31 January 2018,

which is ‘unambiguous’, since the Grand Duchy of Luxembourg acknowledged therein that ‘all [income from participations] eligible for the exemption scheme under Article 166 [of the] LIR [was] also covered by the provisions of Article 164 [of the] LIR’. Second, the General Court referred to the 1965 opinion of the Council of State on the bill incorporating Article 166 into the LIR, in which it stated that that provision made it 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.

126 The General Court then found that it was necessary to abandon the formalistic approach consisting of taking in isolation each of the transactions comprising the financial arrangement drawn up by the companies concerned and to go beyond the legal form in order to understand the economic and fiscal reality of that arrangement, which led it to hold, in paragraph 312 of the judgment under appeal, that the ZORA accretions corresponded, in practical terms, ‘in the very specific circumstances of the present case, to profit distributions’.

127 Thus, after recalling, in paragraphs 340 to 342 of the judgment under appeal, the existence of a link, in Luxembourg law, between the exemption of income from participations at the level of a parent company and the deductibility of distributed income at the level of its subsidiary, the General Court concluded, in paragraph 343 of that judgment, that, ‘on account of that link and the consideration of the combined effect of those two transactions at the level of the holding companies concerned, the tax rulings at issue [derogated] from the … reference framework’ comprising Articles 164 and 166 of the LIR. It followed, according to the General Court’s analysis in paragraphs 344 and 345 of that judgment, first, that the Commission was fully entitled to infer from that combined effect, in recitals 208 and 209 of the decision at issue, that there was a derogation from that reference framework and, second, that that institution had not erred in law by looking at the combined effect, at the level of the holding companies, of the deductibility of income at the level of a subsidiary and the subsequent exemption of that income at the level of its parent company.

128 However, the elements on which the General Court relied, referred to in paragraph 125 of this judgment, did not permit it validly to find that – in accordance with the principles set out in paragraphs 120 to 122 of this judgment – the Commission had been able to establish to the requisite legal standard that, with regard to whether the exemption provided for in Article 166 of the LIR is made dependent on the taxation, at the level of the subsidiary companies, of the income exempted at the level of the holding companies, an interpretation prevailed in Luxembourg law other than that put forward by the Grand Duchy of Luxembourg, that interpretation being compatible with the wording of that provision, which does not formally establish such dependence.

129 In that regard, it should be noted that, as regards the letter of 31 January 2018, as Engie and Others submit, the General Court distorted the wording of that letter when it held, in paragraph 295 of the judgment under appeal, that the link of conditionality between Article 164 of the LIR and Article 166 thereof, relating to the prior taxation of income at the level of the distributing entity in order to benefit from the exemption provided for by the latter provision, was expressly apparent from the Grand Duchy of Luxembourg’s reply. It is clear that the General Court took the sentence cited from that letter in that paragraph out of context when it inferred, following the Commission, the existence of such a link. That assessment is irreconcilable with other passages of that letter, in which that Member State stated that that provision ‘does not require income from participations to be taxed beforehand in order to benefit from the exemption scheme provided for’, that Articles 164 and 166 of the LIR must not be applied ‘jointly’, and that ‘the provisions of Article 164 [of the] LIR do not constitute a condition *sine qua non* for the application of the scheme for the exemption of income from participations laid down in Article 166 [of the] LIR’.

130 As regards the 1965 opinion of the Council of State, it is sufficient to note, as the Advocate General observed in point 121 of her Opinion, that that opinion merely states that the purpose of the provision examined therein, to which Article 166 of the LIR corresponds, was to avoid multiple taxation on company profit at the level of a subsidiary and its parent company before that profit is distributed to shareholders, but does not state that that provision was also intended to avoid any situation of double non-taxation as regards income from participations of a parent company.

131 It was therefore following an analysis vitiated by an error of law and a distortion of the facts that the General Court, in paragraph 298 of the judgment under appeal, endorsed the Commission's finding that there was a link of conditionality between Article 164 of the LIR and Article 166 thereof in the sense that the exemption at the level of a parent company of income from participations is made dependent on the taxation of distributed profit at the level of its subsidiary.

132 The first ground of the appeals must therefore be upheld, without it being necessary to examine the second part of the first ground of appeal raised by the Grand Duchy of Luxembourg, alleging errors concerning the derogation from the reference framework limited to Articles 164 and 166 of the LIR.

2. The second ground of the appeals

(a) Arguments of the parties

133 The second ground of appeal in Case C-451/21 P consists of four parts, alleging (i) that the General Court adopted a manifestly incorrect premiss and that it distorted national law; (ii) that the General Court erred in law in identifying the reference framework which it used in respect of abuse of law and that the judgment under appeal is vitiated by an inadequate and contradictory statement of reasons; (iii) that there were errors in the demonstration of a derogation from that reference framework; and (iv) in the alternative, that the rights of defence of the Grand Duchy of Luxembourg were infringed.

134 By the first part of this ground of appeal, the Grand Duchy of Luxembourg submits, inter alia, that the entirety of the General Court's reasoning is based on the incorrect premiss that the same tax result as that obtained by the Engie group would not have been possible without the existence of intermediaries, which are an essential link in the financial arrangement put in place by that group. The Grand Duchy of Luxembourg recalls that it had however argued at first instance that a direct ZORA, entered into without using an intermediary, would have produced the same taxable result as that flowing from an indirect ZORA, since the creditor is in a position to benefit, initially, when converting the direct ZORA, from the fiscal neutrality allowed by Article 22bis of the LIR and, subsequently, from the exemption of a possible distribution or capital gain, pursuant to Article 166 of that law, which the General Court accepted when it held that those articles did not formally exclude such an exemption.

135 The General Court therefore erred in finding that three of the criteria for abuse of law, laid down in Article 6 of the Law on tax adjustment, were satisfied and, accordingly, that the tax rulings at issue had derogated from the reference framework.

136 By the second part of the second ground of appeal, the Grand Duchy of Luxembourg submits, in the first place, that the General Court erred in finding that it was not necessary to take account of the administrative practice, on the ground that Article 6 of the Law on tax adjustment did not give rise to any difficulties of interpretation. The General Court thus failed to have regard to the case-law of the Court of Justice, which establishes the obligation, when defining the reference framework, to carry out a detailed analysis of the law applicable in the Member State concerned and of its administrative and judicial practice. That analysis is all the more important because Article 6 of the Law on tax adjustment is drafted in general terms and therefore requires a case-by-case assessment. In that regard, the complaint alleging that the Grand Duchy of Luxembourg did not provide the Commission with examples of its administrative practice, apart from reversing the burden of proof, has no factual basis, since several examples of tax rulings have been sent to the Commission by that Member State.

137 In the second place, the reference framework adopted by the General Court is incomplete, first of all, in so far as the General Court failed to recall that the Luxembourg authorities' use of the concept of abuse of law is exceptional, next, in so far as it failed to take account of the fact that the taxpayer is entirely free to choose the form which appears to it to be the least onerous from a tax perspective and, lastly, in so far as that freedom of choice available to the taxpayer precludes the tax authorities from interfering in the options chosen by the taxpayer in the interests of its business and substituting their own assessment for that of the taxpayer.

138 In the third place, the General Court relied on a derogation from the objective of the reference tax system, not from that system itself, whereas it is settled case-law that only a derogation from the reference framework makes it possible to establish the selectivity of a measure. It is not for the

Commission or the General Court, in the context of State aid law, to define, in place of the Member State concerned, the objective of the national tax system.

139 By the third part of the second ground of appeal, the Grand Duchy of Luxembourg submits, in particular, that the General Court ignored the economic uncertainty inherent in the transactions at issue, the results of which depended on the performance of the subsidiaries. If the General Court had taken that uncertainty into account, it would inevitably have had to consider that the second criterion of abuse of law, relating to the reduction of the tax burden, was not satisfied. Moreover, the case-law of the Luxembourg courts does allow the conclusion to be drawn *ex post* that a transaction constituted an abuse of law where that transaction has previously been approved by a validly issued tax ruling.

140 By the fourth part of this ground of appeal, the Grand Duchy of Luxembourg claims that its rights of defence were infringed, since, in the decision to initiate the formal investigation procedure, the Commission referred only in passing and in a single paragraph to the existence of a possible abuse of law that was not specifically defined, but linked to the possibility for the subsidiaries of deducting the ZORA accretions. That complaint does not correspond to the complaint set out in the decision at issue.

141 The second ground of appeal in Case C-454/21 P consists of three parts, alleging (i) that the General Court made errors of law and a manifest error of assessment in determining the reference framework; (ii) that the General Court erred in law in its identification of a selective advantage in the light of Article 6 of the Law on tax adjustment; and (iii) that the General Court made a manifest error of assessment in its interpretation of Luxembourg law.

142 By the first part of this ground of appeal, Engie and Others submit that the General Court made a manifest error of assessment in finding that they had not challenged the definition of the reference framework in so far as it was extended to Article 6 of the Law on tax adjustment. In their application before the General Court, they challenged the competence of the Commission and its interpretation *in abstracto* of the criteria for abuse of law laid down by the Luxembourg administrative court, and maintained that it was necessary to take account of the administrative and judicial practice of the Luxembourg authorities in situations comparable to their own.

143 As regards the errors of law, Engie and Others contend that the General Court, following the Commission, interpreted Article 6 of the Law on tax adjustment without taking into account the applicable rules of law or the administrative and judicial practice of the Luxembourg authorities in situations comparable to theirs, in respect of similar arrangements. Moreover, it rewrote the decision at issue in that regard.

144 By the second part of the second ground of appeal, Engie and Others submit that the General Court erred in law and disregarded its own case-law in ruling that the concept of 'abuse of law', although to be interpreted strictly, must not always be assessed on a case-by-case basis.

145 By the third part of the second ground of appeal, Engie and Others submit that, even on the assumption that the reference framework comprises Article 6 of the Law on tax adjustment, the General Court made a manifest error of assessment in the interpretation and application of that provision. Thus, the General Court contradicted itself in holding that the direct conversion of the ZORA could not generate income exempted from tax for the purposes of Article 166 of the LIR in the light of the purpose of Article 22bis of that law, before accepting that those provisions did not formally exclude the exemption of income.

146 The Commission disputes the second ground of the appeals.

147 It states, inter alia, that the General Court did not distort the facts in holding that the definition of the reference framework comprising Article 6 of the Law on tax adjustment was not disputed by the Grand Duchy of Luxembourg and Engie and Others. The General Court did not, in any event, deny the need for an assessment of abuse of law on a case-by-case basis, but merely stated that the criteria for the existence of an abuse of law laid down by Luxembourg law were clear.

148 In the alternative, although the Commission does not dispute the taxpayer's freedom to choose the course of action resulting in the least taxation or the prohibition on the tax authorities from substituting

their own choice for that of the undertaking, it nevertheless considers that those principles are subject to a legal limit, in Luxembourg law, in Article 6 of the Law on tax adjustment and that any contrary interpretation of that article would deprive it of its substance.

149 As regards the General Court's reference to the fact that Article 6 of the Law on tax adjustment had already been applied, it cannot be inferred therefrom that the General Court considered that the measures at issue were selective on that ground alone, but simply that it sought to avoid the criticism that that provision remained a dead letter.

150 The Commission also states that it did not presume the existence of an abuse of law. It maintains that a direct ZORA does not have the same tax result as an indirect ZORA and that, even if that were the case, there would still be an abuse of law. In addition, it analysed the four criteria for an abuse of law in the light of the facts of the case, before concluding that those criteria were met. In that regard, the fact that economic uncertainty is inherent in the activities in question is irrelevant. All that matters is whether or not the tax treatment at issue was abusive.

(b) Findings of the Court

151 It is appropriate to examine first the argument made by the Grand Duchy of Luxembourg and by Engie and Others to the effect that the General Court erred in finding that the Commission could establish the selective nature of the tax rulings at issue in the light of the reference framework comprising Article 6 of the Law tax adjustment without taking into account the national administrative practice relating to that provision, on the ground that that provision did not give rise to any difficulties of interpretation.

152 In that regard, it should be recalled in the first place that classifying a tax measure as 'selective' presupposes not only familiarity with the content of the provisions of relevant law but also requires examination of their scope on the basis, inter alia, of the administrative and judicial practice of the Member State concerned (see, to that effect, judgment of 18 July 2013, *P*, C-6/12, EU:C:2013:525, paragraph 20).

153 In the second place, as the Advocate General stated, in essence, in points 146 to 148 of her Opinion, a provision intended to prevent abuse in tax matters horizontally, such as Article 6 of the Law on tax adjustment, is inherently particularly general in nature, and may be applied in a very wide range of contexts and situations.

154 In accordance with the case-law referred to in paragraph 112 of this judgment, the choice to lay down such a provision in national law and to define the manner in which the tax authorities are to implement it falls within the Member States' own competence in the matter of direct taxation in areas that have not been harmonised under EU law and, therefore, within their fiscal autonomy.

155 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.

156 It follows that the General Court erred in law when it held, in paragraph 409 of the judgment under appeal, that the Commission was not required to take into account the administrative practice of the Luxembourg tax authorities relating to Article 6 of the Law on tax adjustment, on the ground that that provision did not give rise to any difficulties of interpretation.

157 It is true that the General Court also noted, in that paragraph 409, that the Commission had referred in recitals 293 to 298 of the decision at issue to a circular from the Luxembourg authorities and to judicial practice in that Member State, from which it identified the four criteria for finding, under Luxembourg law, an abuse of law in tax matters within the meaning of that provision.

158 However, as the Advocate General observed in points 153 and 154 of her Opinion, the Commission confined itself, in that passage of the decision at issue, to a general examination of the conditions for the application of Article 6 of the Law on tax adjustment, without establishing that, in the tax rulings at issue, the Luxembourg tax authorities had departed, in particular, from their own practice concerning transactions comparable to those at issue.

159 The second ground of the appeals must also be upheld for that reason, without it being necessary to examine the other arguments put forward by the Grand Duchy of Luxembourg and by Engie and Others in support of that ground of appeal.

160 Since the first and second grounds of the appeals are well founded, the judgment under appeal must be set aside, without it being necessary to rule on the other grounds of the appeals. The consequence of those grounds of appeal being well founded is to render unfounded the General Court's finding in paragraph 478 of the judgment under appeal that it was sufficient, in order to establish the selectivity of the tax rulings at issue, to reject the pleas for annulment relating, in essence, to the analysis, in the decision at issue, of a reference framework limited to Articles 164 and 166 of the LIR, or of a reference framework comprising Article 6 of the Law on tax adjustment.

V. The actions before the General Court

161 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.

162 That is so in the present case, since the pleas in law of the actions seeking annulment of the decision at issue were the subject of an exchange of arguments before the General Court and examining them does not require the adoption of any additional measure of organisation of procedure or inquiry.

163 It is appropriate to examine, in the first place, the first and second pleas in law in Case T-516/18 and the second and third pleas in law in Case T-525/18, in so far as the appellants claim by those pleas that the Commission erred in concluding that the tax rulings at issue had granted selective advantages in the light of the reference framework limited to Articles 164 and 166 of the LIR and the reference framework comprising Article 6 of the Law on tax adjustment, which were analysed by the General Court in the judgment under appeal and correspond to the second and fourth lines of reasoning referred to in paragraph 31 of this judgment.

164 As regards the second line of reasoning on selectivity referred to in paragraph 31 of this judgment, it is common ground that the Commission included Article 166 of the LIR in the reference framework limited to the provisions of Luxembourg law on the taxation of profit distributions and the exemption of income from participations. That institution nevertheless considered that the tax rulings at issue stemmed from an incorrect application of that provision.

165 Thus, in recital 202 of the decision at issue, the Commission, after finding that the concept of 'income from participations', within the meaning of Article 166 of the LIR, was not defined in the law, relied, in order to define that concept, on the letter of 31 January 2018, in which the Grand Duchy of Luxembourg stated that 'all the participations the income of which can benefit from the exemption under Article 166 [of the] LIR are covered by the provisions of Article 164 [of the] LIR'. It inferred therefrom that the concept of 'income from participations', benefiting from the exemption provided for in Article 166 of the LIR, consisted of 'distributions' to holders of securities, as referred to in Article 164 of the LIR, while specifying that those profit distributions had to have been taxed at the level of the distributing entity. It emphasised, in recitals 204 and 213 of the decision at issue, that the latter condition was applicable irrespective of whether the income in question is classified as a profit distribution or a capital gain.

166 In addition, in recital 212 of the decision at issue, the Commission expressly acknowledged that, from an economic perspective, the income received by LNG Holding and CEF from the conversion of the ZORAs was equivalent to such a profit distribution.

167 However, since that distribution was not taxed at the level of LNG Supply and GSTM, the Commission found that there was a derogation from a reference framework comprising the rules of Luxembourg law on the exemption of income from participations and the taxation of profit distributions. More specifically, it inferred that derogation from the fact that the Luxembourg tax authorities, by means of the tax rulings at issue, accepted that the realisation of the ZORA accretions at the level of LNG Holding and CEF would benefit from the exemption of income from participations under Article 166 of the LIR, even though those accretions had been deducted from the taxable profit of LNG Supply and of GSTM.

168 That analysis is, however, vitiated by an error which, in accordance with the case-law referred to in paragraph 110 of this judgment, vitiates the whole of the second line of reasoning on selectivity referred to in paragraph 31 of this judgment.

169 In that regard, first, it follows from the analysis of the first grounds of the appeals, in particular from paragraphs 128 to 131 of this judgment, that the Commission erred in believing that it was possible to infer from the letter of 31 January 2018 and from the 1965 opinion of the Council of State that there was a link of conditionality between Article 164 of the LIR and Article 166 thereof, relating to the prior taxation of income at the level of the distributing entity in order to benefit from the exemption provided for by the latter provision.

170 Second, the Commission has not examined whether, let alone demonstrated that, in Luxembourg law, the concept of 'distributions' within the meaning of Article 164 of the LIR, by reference to which, according to the Grand Duchy of Luxembourg, 'income from participations' within the meaning of Article 166 of that law must be defined, is incompatible with the concept of 'tax-deductible expense' at the level of the distributing entity.

171 Consequently, even if, as the Commission stated in recital 212 of the decision at issue, the ZORA accretions covered by the tax rulings at issue constituted, from an economic perspective, a profit distribution within the meaning of Article 164 of the LIR, those rulings could not, however, derogate from Article 166 of that law by classifying those accretions as income from participations for LNG Holding and CEF and, accordingly, by exempting that income under the latter provision. It must therefore be held that, as regards the second line of reasoning, the Commission did not comply with the principles set out in paragraphs 120 to 122 of this judgment.

172 That being so, such a conclusion is without prejudice to an examination of the potentially selective nature of the tax rulings at issue in the light of the finding that the income of LNG Supply and of GSTM in each financial year concerned was, in return for the deduction of the ZORA accretions as expenses, taxed on the margin agreed with the Luxembourg tax authorities and not under the rules of ordinary tax law, from which it follows that the tax burden borne by a company is, in principle, calculated by applying a standard tax rate to the income actually realised minus business expenses and other expenses.

173 As regards the fourth line of reasoning referred to in paragraph 31 of this judgment, it is apparent from paragraphs 153 to 158 of this judgment that the Commission's analysis relating to a selective advantage resulting from the non-application of Article 6 of the Law on tax adjustment, relating to abuse of law, is also legally flawed in that the Commission failed to establish that the Luxembourg tax authorities had departed, in the tax rulings at issue, from their own practice concerning transactions comparable to those at issue.

174 It is appropriate to examine, in the second place, the first and second pleas in law in Case T-516/18 and the second and third pleas in law in Case T-525/18, in so far as the appellants claim by those pleas that the Commission erred in concluding that the tax rulings at issue had conferred selective advantages on LNG Holding and on CEF or on the Engie group in the light of a reference framework encompassing the Luxembourg corporate income tax system, corresponding to the first and third lines of reasoning referred to in paragraph 31 of this judgment.

175 In that regard, as regards the first line of reasoning referred to in paragraph 31 of this judgment, it should be noted that, as is apparent from recitals 166 and 196 of the decision at issue, the Commission did not consider that the exemptions provided for by the Luxembourg corporate income tax system and,

in particular, the exemption provided for in Article 166 of the LIR constituted in themselves an aid scheme, but that their application by means of the tax rulings at issue had conferred a selective advantage on the Engie group for the purposes of Article 107(1) TFEU. Thus, the Commission has neither alleged nor established that the latter provision was infringed on account of the very existence of the relevant provisions of Luxembourg tax law.

176 Consequently, the situation referred to in paragraph 114 of this judgment, in which the reference framework itself, as it results from national law, is considered by the Commission to be incompatible with EU law on State aid, does not correspond to the present case.

177 As is apparent from paragraphs 112 and 118 of this judgment, 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 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.

178 In the present case, taking as a basis a reference framework encompassing the Luxembourg corporate income tax system, the Commission, as is apparent from recitals 171 to 176 of the decision at issue, did not include Article 166 of the LIR in that framework.

179 In recitals 179, 182, 184, 185, 187, 188, 190 and 192 of that decision, the Commission found that Article 166 of the LIR was not relevant on the ground, in essence, that the application of that provision could not call into question the conclusion that the combined effect of the deductibility of the ZORA accretions at the level of LNG Supply and GSTM and the exemption of the corresponding income at the level of LNG Holding and CEF derogated from the objective of the general Luxembourg corporate income tax system, consisting of taxing the profit of all companies subject to tax in Luxembourg. It was on the basis of such an analysis that the Commission concluded, as is apparent from recitals 192 and 193 of that decision, that the derogation from that reference framework had taken the form of an exemption of the income received by LNG Holding and CEF as holding companies of LNG Supply and GSTM respectively.

180 In the light of what is set out in paragraph 177 of this judgment, it must be held that that conclusion is legally flawed. Article 166 of the LIR, which constitutes the legal basis of the tax rulings at issue, should have formed part of the reference framework defining the 'normal' tax system, since the Commission did not consider that that provision, in itself, conferred a selective advantage for the purposes of Article 107(1) TFEU.

181 That error, in accordance with the case-law referred to in paragraph 110 of this judgment, also necessarily vitiated the whole of the selectivity analysis carried out by the Commission on the basis of a reference framework encompassing the Luxembourg corporate income tax system.

182 As regards, lastly, the third line of reasoning referred to in paragraph 31 of this judgment, the errors found in paragraphs 168 to 171 and 180 of this judgment also vitiate the Commission's analysis relating to the effects of the tax rulings at issue at the level of the Engie group.

183 First, in recitals 252 to 254 of the decision at issue, concerning the exemption of income from participations under Article 166 of the LIR, the Commission reproduced, in essence, the analysis carried out in connection with the second line of reasoning, taking as basis a reference framework limited to the provisions of Luxembourg law on the taxation of profit distributions and the exemption of income from participations, and referred in that regard, inter alia, to recital 202 of that decision. It follows that that analysis is vitiated by the same error as that found in paragraphs 168 to 171 of this judgment.

184 Second, it is apparent from recital 245 of the decision at issue that, for the purposes of that analysis, the Commission took into account, as a reference framework, the Luxembourg corporate income tax system, as described in recitals 171 to 190 of that decision. As set out in paragraphs 180 and 181 of this judgment, that definition of the reference framework is incorrect in that it does not include Article 166 of the LIR.

185 Moreover, for the reasons set out in paragraph 177 of this judgment, the Commission could not validly establish a derogation from the 'normal' tax system in connection with that third line of reasoning by reference solely to a general objective of the Luxembourg system to tax the profit of companies resident in Luxembourg, as it did in recital 256 of the decision at issue.

186 It follows from all those considerations that the first and second pleas in law in Case T-516/18 and the second and third pleas in law in Case T-525/18, alleging, in essence, errors of assessment and of law in the identification of a selective advantage, must be upheld. Consequently, the decision at issue must be annulled, without it being necessary to examine the other pleas of the actions for annulment.

VI. Costs

187 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs.

188 Article 138(1) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 184(1) thereof, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

189 In the present case, as regards the appeal brought in Case C-451/21 P, since the Grand Duchy of Luxembourg has been successful, it is appropriate, in accordance with the form of order sought by it, to order the Commission to bear its own costs and to pay those incurred by the Grand Duchy of Luxembourg.

190 As regards the appeal brought in Case C-454/21 P, since Engie and Others have been successful, it is appropriate, in accordance with the form of order sought by them, to order the Commission to bear its own costs and to pay those incurred by Engie and Others.

191 Furthermore, since the actions before the General Court have been upheld, the Commission is ordered to pay all the costs relating to the proceedings at first instance.

On those grounds, the Court (Grand Chamber) hereby:

1. Joins Cases C-451/21 P and C-454/21 P for the purposes of the judgment;

2. Sets aside the judgment of the General Court of 12 May 2021, *Luxembourg and Others* v *Commission* (T-516/18 and T-525/18, EU:T:2021:251);

3. Annuls 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;

4. Orders the European Commission to pay the costs of the appeals in Cases C-451/21 P and C-454/21 P;

5. Orders the European Commission to pay the costs of the proceedings at first instance.

[Signatures]

* Language of the case: French.