Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

12 May 2021 *

[Text rectified by order of 16 September 2021]

(State aid – Aid implemented by Luxembourg in favour of ENGIE – Decision declaring the aid incompatible with the internal market and unlawful and ordering its recovery – Tax rulings – State resources – Advantage – Combined effect of two tax measures – Participation exemption regime – Taxation of profit distributions – Abuse of law – Selectivity – Reference framework – Finding of a derogation – Comparability of situations – Parent-subsidiary arrangement – Group of companies – Recovery – Indirect harmonisation – Procedural rights – Obligation to state reasons)

In Cases T-516/18 and T-525/18,

Grand Duchy of Luxembourg, represented by T. Uri, acting as Agent, and by D. Waelbroeck, lawyer,

applicant in Case T-516/18,

supported by

Ireland, represented by J. Quaney, M. Browne and A. Joyce, acting as Agents, and by P. Gallagher and S. Kingston, Senior Counsel, as well as B. Doherty, Barrister,

intervener,

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

Engie Invest International SA, established in Luxembourg,

Engie, established in Courbevoie (France),

represented by B. Le Bret, M. Struys and C. Rydzynski, lawyers,

applicants in Case T-525/18,

v

European Commission, represented by B. Stromsky and S. Noë, acting as Agents,

* Language of the case: French.

defendant,

APPLICATION under Article 263 TFEU seeking 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 GENERAL COURT (Second Chamber, Extended Composition),

composed of M. van der Woude, President, V. Tomljenović (Rapporteur), F. Schalin, P. Škvařilová-Pelzl and I. Nõmm, Judges,

Registrar: M. Marescaux, Administrator,

having regard to the written part of the procedure and further to the hearing on 15 September 2020,

gives the following

Judgment

I. Background to the dispute

1 On 23 March 2015, the European Commission sent the Grand Duchy of Luxembourg a request for information regarding its tax ruling practice in relation to companies in the Engie group, including Engie (‘Engie SA’), Engie Global LNG Holding Sàrl and Engie Invest International SA (together, ‘Engie’).

2 By its request, the Commission asked that State to provide it with all tax rulings in force or which had been in force in the previous 10 years and which had been granted to Engie group companies between 2004 and 23 March 2015.

3 The Commission also requested that the annual accounts of the Engie group and of its constituent companies for 2011 to 2013 be sent to it together with copies of their tax returns.

A. The Engie group

4 In the light of recitals 16 to 22 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 contested decision’), the Engie group consists of Engie SA, a company established in France, and all companies directly or indirectly controlled by Engie SA, collectively referred to in the contested decision as ‘ENGIE’.

5 In Luxembourg, Engie SA controls various companies. The same is true of Compagnie européenne de financement C.E.F. SA (‘CEF’), incorporated in Luxembourg in 1933 and renamed Engie Invest International SA in 2015.

6 The purpose of the latter company is the acquisition of participating interests in Luxembourg and foreign entities and the management, exploitation and control of such interests.

7 CEF owns, first, GDF Suez Treasury Management Sàrl ('GSTM') and, secondly, Electrabel Invest Luxembourg SA ('EIL').

8 With effect from 2010, CEF transferred its financing and treasury management business to GSTM.

9 CEF also owns, thirdly, GDF Suez LNG Holding Sàrl ('LNG Holding'), incorporated in Luxembourg in 2009 and renamed Engie Global LNG Holding Sàrl in 2015.

10 The purpose of the latter company is the acquisition of participating interests in Luxembourg and foreign entities and the management of such interests.

11 At the end of 2009, LNG Holding replaced another Engie group company, Suez LNG Trading ('LNG Trading'), at the head of GDF Suez LNG Supply SA ('LNG Supply') and GDF Suez LNG Luxembourg Sàrl ('LNG Luxembourg').

12 LNG Luxembourg and LNG Supply were established in Luxembourg in 2009 for the purpose, inter alia, of ensuring, on 30 October 2009, the financing and subsequent transfer of business activities in the sector of liquefied natural gas and gas derivatives from LNG Trading to LNG Supply via LNG Luxembourg.

13 The intra-group transfer of the business of CEF and LNG Trading to their respective subsidiaries was financed within the Engie group by interest-free loans mandatorily convertible into shares, known as 'ZORAs', taken out by LNG Supply and GSTM (together, 'the subsidiaries') with LNG Luxembourg and EIL (together, 'the intermediary companies').

14 Both the transfer of CEF's financing and treasury management business to GSTM and the transfer of the business of purchase, sale and trading of liquefied natural gas and gas derivatives from LNG Trading to LNG Supply resulted in the Luxembourg tax authorities issuing two sets of tax rulings.

B. The tax rulings

15 In response to the request for information of 23 March 2015, the Grand Duchy of Luxembourg sent the Commission two sets of tax rulings (together, 'the tax rulings at issue'):

– a series of tax rulings concerning the transfer of the business of purchase, sale and trading of liquefied natural gas and gas derivatives from LNG Holding to LNG Supply and its financing by means of a loan granted by LNG Luxembourg, all companies involved being resident in Luxembourg;

– a series of tax rulings concerning the transfer of the business of financing and treasury management of assets from CEF to GSTM and its financing by means of a loan granted by EIL, all companies involved being resident in Luxembourg.

1. The tax rulings concerning the transfer of business activities to LNG Supply

16 The tax rulings relating to the transfer of business activities related to liquefied natural gas and gas derivatives to LNG Supply are set out in recitals 23 to 58 of the contested decision and are annexed to the file in Case T-516/18.

17 The first tax ruling was issued on 9 September 2008. It gives an account of the establishment of LNG Supply and thereafter of LNG Luxembourg and the plan to transfer the business of LNG Trading first to LNG Luxembourg and then to LNG Supply.

18 In broad outline, LNG Supply acquired LNG Trading's business by taking out a ZORA with LNG Luxembourg. When it was converted, LNG Supply issued shares incorporating the nominal amount of the ZORA plus/minus the loan accretions ('the ZORA accretions').

19 For tax purposes, it is apparent from the tax ruling of 9 September 2008 that LNG Supply is taxed only on a margin agreed with the Luxembourg tax authorities. That margin corresponds to a proportion [*confidential*] [1] of LNG Supply and may not be lower than [*confidential*]. The difference between the profits made each year and the margin agreed with the Luxembourg tax authorities corresponds to the ZORA accretions, which are a deductible expense.

20 By way of illustration, the Commission stated, in recital 48 of the contested decision, that, for 2011, with a turnover of [*confidential*], LNG Supply's taxable income had been set at [*confidential*], namely [*confidential*]. Consequently, LNG Supply paid corporation tax of EUR [*confidential*] in respect of 2011.

21 For its part, LNG Luxembourg finances the loan at issue by entering into a prepaid forward sale contract with LNG Trading, under which LNG Luxembourg agrees to transfer all the shares issued by LNG Supply on the conversion date in return for a price corresponding to the nominal amount of the ZORA in question.

22 For tax purposes, the Luxembourg authorities afford LNG Luxembourg the possibility, during the lifetime of the ZORA in question, not to record in its accounts any taxable income or tax-deductible expense related to that ZORA. The tax ruling also provides that the conversion of the ZORA in question, assuming that LNG Luxembourg chooses to apply Article 22*bis* of the loi modifiée concernant l'impôt sur le revenu (Amended Law on income tax; 'the LIR') of 4 December 1967, as described in recital 89 of the contested decision, will not give rise to any taxable capital gain. In other words, if the choice is made to apply Article 22*bis* of the LIR, the ZORA accretions will not be taxed on the conversion date.

23 It also follows from the tax ruling of 9 September 2008 that LNG Trading will record in its accounts the payment received under the prepaid forward sale contract as financial fixed assets and that those assets will be valued at cost price, so that, before conversion of the ZORA in question, LNG Trading will not record in its accounts any income or any deductible expense in relation to that ZORA. Furthermore, the tax authorities confirm that Article 166 of the LIR, as set out in recitals 83 to 86 of the contested decision, which allows certain participation income to be exempted from tax, applies to the participating interest purchased under the forward contract.

24 The second tax ruling was issued on 30 September 2008 and concerns the transfer of the effective management of LNG Trading to the Netherlands.

25 The third tax ruling was issued on 3 March 2009 and confirms the amendments made to the financing structure laid down in the tax ruling of 9 September 2008, in particular the replacement of LNG Trading by LNG Holding and the implementation of the ZORA taken out by LNG Supply with LNG Luxembourg and LNG Holding.

[1] Confidential information omitted.

26 The fourth tax ruling was issued on 9 March 2012 and clarifies a number of accounting terms used to calculate the margin on which LNG Supply is taxed.

27 The last tax ruling was issued on 13 March 2014 and confirms a request submitted on 20 September 2013. It concerns the tax treatment of the partial conversion of the ZORA taken out by LNG Supply. It follows from it that, upon conversion of that loan, LNG Supply will reduce its capital by an amount equal to the amount of that conversion.

28 From a tax perspective, the Luxembourg tax authorities confirm that the partial conversion in question will have no effect on LNG Luxembourg. LNG Holding will enter in its accounts a profit equal to the difference between the nominal amount of the converted shares and the amount of that conversion. Furthermore, it is provided that that profit will be covered by the participation exemption under Article 166 of the LIR.

2. The tax rulings concerning the transfer of business activities to GSTM

29 The tax rulings relating to the transfer of the financing and treasury management business to GSTM are set out in recitals 59 to 77 of the contested decision and are annexed to the file in Case T-516/18.

30 The first tax ruling, issued on 9 February 2010, endorses a structure similar to the one established by LNG Holding to finance the transfer of its business activities in the liquefied natural gas sector to LNG Supply. The structure in question is based on a ZORA taken out by GSTM with EIL and used to finance the acquisition of CEF's financing and treasury management business.

31 Like LNG Supply, GSTM is taxed during the implementation of the ZORA on a margin agreed with the Luxembourg tax authorities. That margin corresponds to a proportion [*confidential*].

32 By way of illustration, the Commission stated, in recital 74 of the contested decision, that, for 2011, with net earnings before tax and before accretions of EUR 45 522 581 and an average value of assets of EUR 3.7 billion, GSTM was taxed [*confidential*].

33 The second tax ruling, issued on 15 June 2012, endorses the tax treatment of the financing transaction and is based on an analysis identical to that set out in the tax ruling of 9 September 2008 concerning the transfer of LNG Trading's business to LNG Supply. However, it differs from the tax ruling of 9 September 2008 as regards the possible increase in the amount of the ZORA taken out by GSTM.

3. Summary of the financing structures established by the Engie group companies

34 It is apparent from recitals 23 to 77 of the contested decision that the tax rulings at issue endorse various intra-group transactions in the light of Luxembourg tax law. In addition, the Commission draws attention to the fact that it follows from those tax rulings that those transactions constitute a set implementing, for LNG Supply and GSTM, a single transaction, namely, respectively, the intra-group transfer of business activities related to liquefied natural gas and those related to financing and treasury, which were also financed within the same group. In the same vein, the Commission states that those transactions were designed from the outset to be implemented in

three successive but interdependent stages, involving the intervention of holding companies, intermediary companies and subsidiaries of the Engie group. The main features of those transactions are described below.

35 First, a holding company transfers a set of assets to its subsidiary.

36 It is apparent from recital 34 of the contested decision that the transfer of LNG Trading's business to LNG Supply resulted in the latter issuing two promissory notes in favour of the former on 30 October 2009. The first promissory note covers a claim in the amount of USD 11 million (approximately EUR 9.26 million) and the second a claim in the amount of USD 646 million (approximately EUR 544 million). Only the second claim was transferred by LNG Trading to LNG Holding.

37 It also follows from recital 61 of the contested decision that the transfer of CEF's business to GSTM resulted in the issue of a promissory note in favour of CEF. That promissory note covers a claim in the amount of EUR 1 036 912 506.84.

38 Secondly, in order to finance the assets transferred, the subsidiary takes out a ZORA with an intermediary company. Under that agreement, apart from the fact that the loan granted generates no periodic interest, the subsidiary that has taken out the ZORA is to repay the loan, upon its conversion, by issuing shares in an amount equivalent to the nominal amount of the loan, plus a premium representing all of the profits made by the subsidiary during the term of the loan, namely the ZORA accretions, minus a limited margin agreed with the Luxembourg tax authorities.

39 It follows from recital 34 of the contested decision that, on 30 October 2009, LNG Supply and LNG Luxembourg concluded a ZORA for a nominal amount of USD 646 million and a term of 15 years.

40 In addition, in accordance with recital 61 of the contested decision, two agreements – one dated 17 June 2011 and the other dated 30 June 2014 – were concluded under which GSTM took out a ZORA with EIL with a maturity date of 2026 and for a nominal amount of EUR 1 036 912 506.84.

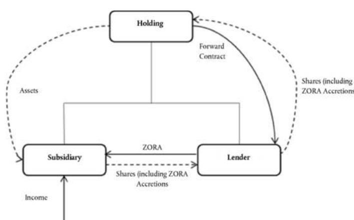
41 Thirdly, the intermediary company finances the loan granted to the subsidiary by entering into a prepaid forward sale contract with the holding company. Under that contract, the holding company is to pay to the intermediary company an amount equal to the nominal amount of the loan in exchange for the acquisition of the rights to the shares that the subsidiary will issue upon conversion of the ZORA in question. Therefore, if the subsidiary makes profits during the lifetime of the ZORA in question, the parent company will own the rights to all the shares issued, which will incorporate the value of any profits made as well as the nominal amount of the loan.

42 In practice, as is apparent from recital 34 of the contested decision, LNG Luxembourg and LNG Holding concluded a prepaid forward sale contract on 30 October 2009. That contract involves, first, the purchase by LNG Holding of all of LNG Luxembourg's rights to LNG Supply's shares for USD 646 million and, secondly, the transfer of LNG Supply's shares immediately upon issue.

43 Recital 61 of the contested decision refers to the conclusion, on 17 June 2011, of an identical prepaid forward sale contract between CEF and EIL.

44 The ZORA taken out by GSTM with EIL and that taken out by LNG Supply with LNG Luxembourg, together with the conclusion by EIL and LNG Luxembourg of a prepaid forward sale contract with, respectively, CEF and LNG Holding ('the holding companies concerned'), replace the initial financing of the transfer of the business sectors by means of the issue, by GSTM and LNG Supply, of promissory notes of which the holders were CEF and LNG Holding, respectively.

45 The diagram set out in recital 27 of the contested decision, reproduced below, illustrates those three successive transactions.



4. *Effect of the partial conversion of the ZORA concluded by LNG Supply*

46 In recitals 46, 47, 49, 53 and 57 of the contested decision, the Commission provided details of the effect of the partial conversion in 2014 of the ZORA concluded by LNG Supply, that ZORA being the only loan to have been converted before the adoption of the contested decision.

47 For the purposes of the partial conversion of the ZORA it had concluded, LNG Supply repaid part of the nominal amount of that ZORA and part of the ZORA accretions.

48 In order to do so, in September 2014 LNG Supply performed a capital increase of USD 699.9 million (approximately EUR 589.6 million), of which USD 193.8 million (approximately EUR 163.3 million) repaid part of the nominal amount of the ZORA in question and, on that date, [*confidential*] repaid part of the ZORA accretions. However, the Commission observed, in the light of LNG Supply's tax returns for 2014, that the aggregated ZORA accretions were in fact reduced [*confidential*].

49 As regards LNG Luxembourg, the partial conversion of the ZORA in question resulted in a reduction in the value of that ZORA, entered in its accounts as an asset, in the amount of USD 193.8 million and, accordingly, in a reduction in the value of the prepaid forward sale contract, entered in its accounts as a liability, in the same amount.

50 Lastly, following cancellation of the shares received under the prepaid forward sale contract, LNG Holding recorded in its accounts [*confidential*], the capital gain to which the exemption in respect of participation income was applied.

51 As regards the ZORA concluded by GSTM, the Commission stated, in recital 165 of the contested decision, that the existence of the advantage did not depend on the conversion of the ZORA, even though, for the purposes of determining the amount to be recovered, the advantage was considered to have materialised only when the income received by CEF was exempted.

C. The formal investigation procedure

52 By letter of 1 April 2016, the Commission informed the Grand Duchy of Luxembourg of its doubts as to the compatibility of the tax rulings at issue with State aid law.

53 On 23 May 2016, the Grand Duchy of Luxembourg submitted its comments to the Commission.

54 On 19 September 2016, the Commission initiated the formal investigation procedure pursuant to Article 108(2) TFEU ('the opening decision'). The opening decision was published in the *Official Journal of the European Union* on 3 February 2017.

55 By letter dated 21 November 2016, the Grand Duchy of Luxembourg submitted its comments on the initiation of the formal investigation procedure and sent the requested information.

56 On 27 February 2017, Engie submitted its comments on the opening decision.

57 By letter of 10 March 2017, the Commission forwarded Engie's comments to the Luxembourg authorities, which were given the opportunity to react to them.

58 By letter of 22 March 2017, the Commission asked the Grand Duchy of Luxembourg to provide additional information.

59 On 10 April and 12 May 2017, the Grand Duchy of Luxembourg informed the Commission that it endorsed the comments which had been forwarded to it and submitted the additional information sought.

60 On 1 June 2017, a tripartite meeting, which was recorded in minutes, was held between the Commission, the Grand Duchy of Luxembourg and Engie.

61 On 16 June 2017, following the meeting of 1 June 2017, the Grand Duchy of Luxembourg forwarded additional information.

62 By letter of 11 December 2017, the Commission made a further request for additional information, which both the Grand Duchy of Luxembourg and Engie complied with on 31 January 2018.

63 On 20 June 2018, the Commission adopted the contested decision.

II. The contested decision

64 By the contested decision, the Commission 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 an entity comprising, in accordance with recitals 16, 316 and 317 of the contested decision, all the companies in the Engie group, regarded as a single economic unit.

65 Without calling into question the lawfulness under Luxembourg tax law of the entire financing structure established by the Engie group in order to transfer the two business sectors, the Commission disputed the practical effects of that structure on the group's total tax liability, the fact being that, in essence, almost all of the profits made by the subsidiaries in Luxembourg are not actually taxed.

A. Imputability to the State

66 As regards whether the tax rulings at issue are imputable to the State and whether State resources are involved, the Commission stated in recitals 156 and 157 of the contested decision that the tax rulings at issue had been adopted by the Luxembourg tax authorities and resulted in a loss of tax revenue, so that the economic advantage granted through those tax rulings was imputable to the Grand Duchy of Luxembourg and was financed out of State resources.

B. Grant of an advantage

67 As regards the grant of an economic advantage to the holding companies concerned, the Commission considered, inter alia in recitals 163 and 166 of the contested decision, that that advantage lies in the fact that, following the tax rulings at issue, those companies' participation income is not taxed, income which corresponds, from an economic perspective, to the ZORA accretions that the subsidiaries deducted from their taxable income as expenses.

68 Specifically, according to the Commission, the ZORA accretions are not taxed at the level of the subsidiaries, at the level of the intermediary companies or at the level of the holding companies concerned.

69 For tax purposes, as is apparent from recitals 35, 47 and 62 of the contested decision, the subsidiaries pay corporation tax, the basis of assessment for which is a limited margin agreed with the tax authorities.

70 The Commission observed that, on account of the future conversion of the ZORA in question, the subsidiaries made accounting provisions on a yearly basis corresponding to the ZORA accretions, which were essentially the difference between the profits actually made by the subsidiaries and the margin agreed with the tax authorities as the taxable income. The ZORA accretions are regarded as deductible expenses. Thus, according to the Commission, the contested measures in fact enabled the subsidiaries to exclude from the basis of assessment for the corporation tax for which they are liable almost all of the profits made during the term of the loan.

71 In the light of recitals 39 and 52 of the contested decision, the intermediary companies are also not taxed on the ZORA accretions.

72 Upon conversion of the ZORA, and under the prepaid share purchase contract concluded with the holding companies concerned, the intermediary companies incur a loss in their accounts equal to the ZORA accretions.

73 Lastly, the holding companies concerned, which hold the subsidiaries' shares under the prepaid share purchase contract, are also not taxed on an amount corresponding to the ZORA accretions, according to recital 56 of the contested decision, since the income generated by the cancellation of those shares is covered, under the tax rulings at issue, by Article 166 of the LIR,

exempting participation income from corporation tax. Thus, in recital 57 of the contested decision, the Commission stated that, following the partial conversion of LNG Supply's ZORA in 2014, a capital gain of [*confidential*] was generated, which remained entirely untaxed.

C. Selectivity of the tax rulings at issue

74 In order to prove the selectivity of the tax rulings at issue, the Commission principally relied, as is apparent in particular from recitals 163 to 170 and 237 of the contested decision, on three lines of reasoning. Two of those lines concern the existence of a selective advantage at the level of the holding companies, in the light, first, of a reference framework encompassing the Luxembourg corporate income tax system and, secondly, of a reference framework limited to the provisions on the taxation of profit distributions and the participation exemption. A third line of reasoning concerns the existence of an advantage at the level of the Engie group. In addition, it follows from recital 289 of the contested decision that, in the alternative, the Commission considered that a selective advantage resulted from the non-application of Article 6 of the Steueranpassungsgesetz (Law on fiscal adaptation) of 16 October 1934 (*Mémorial* A 901) ('the provision on abuse of law'). The Commission also found that there was no justification for the selective treatment arising from the tax rulings at issue.

1. Selectivity at the level of the holding companies

75 To begin with, the Commission considered, first, in recitals 171 to 199 of the contested decision, 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 Luxembourg corporate income tax system.

76 Secondly, in recitals 200 to 236 of the contested decision, 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 provisions on the participation exemption and the taxation of profit distributions. According to the Commission, those derogations could not be justified by the overall structure of the tax system.

(a) The derogation from the reference framework encompassing the Luxembourg corporate income tax system

77 Concerning the Luxembourg corporate income tax system, the Commission considered that that system was based on Articles 18, 23, 40, 159 and 163 of the LIR, as described in recitals 78 to 81 of the contested decision, according to which companies resident in Luxembourg which are liable to corporation tax in that State are taxed on their profits, as recorded in their accounts. It stated that the identification, for the purposes of defining a reference framework, of an objective or principle deriving from that system's constituent provisions was consistent with the case-law of the Court and that that objective, namely the taxation of the profits of all companies subject to tax in Luxembourg, as recorded in their accounts, was clearly apparent from Luxembourg law.

78 The Commission added that the use of a reference framework encompassing the Luxembourg corporate income tax system was also consistent with the case-law of the Court. It maintained that the Court has repeatedly held, in relation to measures concerning the taxation of companies, that 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.

79 The tax rulings at issue thus derogated from the Luxembourg corporate income tax system by endorsing the non-taxation, at the level of the holding companies, of participation income which, from an economic perspective, corresponded to the ZORA accretions.

80 The tax rulings at issue also gave rise to discrimination in favour of the holding companies. Unlike the holding companies, companies subject to corporation tax in Luxembourg are taxed on their profits, as recorded in their accounts.

(b) The derogation from the reference framework limited to the provisions on the taxation of profit distributions and the participation exemption

81 The Commission found that the tax rulings at issue also derogate from the Luxembourg provisions on the participation exemption and the taxation of profit distributions, namely Articles 164 and 166 of the LIR, as set out in recitals 82 to 87 of the contested decision.

82 According to the Commission, the participation exemption is available to a parent company only if the distributed profits have been taxed beforehand at the level of its subsidiary. Participation income 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.

83 Although the ZORA accretions do not formally correspond to profit distributions, the Commission observed that participation income exempted from tax had been recorded by LNG Holding as ‘exempted dividends’ and that, from an economic perspective, having regard to the direct and clear link between the exempted income at the level of LNG Holding and the ZORA accretions deducted at the level of LNG Supply, those accretions were equivalent to profit distributions.

84 According to the Commission, that derogation from the limited reference framework gave rise to discrimination in favour of the holding companies. In essence, parent companies which may receive participation income and which are, in that respect, in a legal and factual situation comparable to that of the holding companies are not eligible for an exemption on such income if it has not been taxed beforehand at the level of their subsidiaries.

85 According to the Commission, the absence of an express link between Articles 164 and 166 of the LIR cannot call that finding into question. 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 avoiding double taxation.

86 Furthermore, the Commission essentially stated that, although the directive in force when the tax rulings at issue were adopted, namely, first, Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), then Council Directive 2011/96/EU of

30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 2011 L 345, p. 8) (together, 'the parent-subsidiary directive'), did not intend to make the exemption of participation income at the level of a parent company formally dependent on the taxation of the income distributed at the level of its subsidiary, that system applied only in the case of cross-border profit distributions where mismatches between the tax systems of two different countries could arise and result in no tax being levied at all. Accordingly, that directive could not properly be relied on to justify, in a purely internal situation, the exemption of participation income which has not been subject to any taxation at the level of a subsidiary.

2. Selectivity at the level of the Engie group

87 Next, the Commission submitted that, without prejudice to the conclusion relating to the existence of a selective advantage at the level of the holding companies, the selectivity of the tax rulings at issue was also apparent, in the light of recitals 237 to 244 of the contested decision, from an analysis at the level of the Engie group, comprising the holding companies concerned, the intermediary companies and the subsidiaries. That approach was justified by the fact that, from 2015 onwards, the holding companies concerned, the intermediary companies and the subsidiaries formed a single tax unit. In any event, according to the Commission, since the economic effects of State measures must be analysed in relation to undertakings rather than separate legal entities, the holding companies concerned, the intermediary companies 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 and that the economic advantage which that group enjoyed at the level of the holding companies concerned lay in the combination of a participation exemption at the level of those companies and a deduction of the ZORA accretions as expenses at the level of the subsidiaries.

88 According to the Commission, the tax rulings at issue confer a selective advantage on the Engie group, inasmuch as they derogate from a 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 profits, as recorded in their accounts.

89 The Commission observed that 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 the holding companies concerned or by a genuine increase in the taxable income of the intermediary companies, which, in practice, had led to a reduction in the combined taxable income of the Engie group in Luxembourg.

90 The Commission maintained that other groups of companies in a comparable legal and factual situation were not entitled to a combined reduction in their taxable income, regardless of the type of financing instrument or contract used or the amount of the remuneration.

91 According to the Commission, the same was true for groups of companies which had recourse to a direct ZORA. Article 22*bis*(2) of the LIR, as cited in recital 89 of the contested decision, was not applicable to the ZORA accretions and, even if it were, it could result only in a deferral of tax.

3. Selectivity resulting from non-application of the provision on abuse of law

92 Lastly, and in the alternative, the Commission added, in recitals 289 to 312 of the contested decision, that the tax rulings at issue derogated from the Luxembourg tax provision on abuse of law, as cited in recital 90 of the contested decision. It maintained that the financing structure established was abusive. According to the Commission, the four criteria identified by the case-law of the Luxembourg courts in order to establish an abuse of law were met: 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 related reasons.

93 Concerning the last two criteria in particular, the Commission stated that the legal means chosen by the Engie group permitted the non-taxation of almost all the profits made by the subsidiaries in Luxembourg, which 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 offering a sufficient level of economic benefit to warrant the Engie group's decision to opt for the complex financing structures established and endorsed by the tax rulings at issue.

4. Lack of justification

94 In recitals 285 to 287 of the contested decision, the Commission stated that, since the Grand Duchy of Luxembourg had not put forward any justification for the favourable treatment endorsed by the tax rulings at issue, it had to conclude that that treatment could not be justified by the general scheme of the Luxembourg tax system. In any event, it observed that a hypothetical justification based on the avoidance of economic double taxation could not, in essence, be accepted.

D. Distortion of competition

95 In recital 160 of the contested decision, the Commission stated that, since the Engie group was active in the electricity, natural gas and liquefied natural gas sectors, in energy efficiency services and in other related markets in several Member States, the tax treatment granted on the basis of 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. By strengthening the Engie group's situation, the tax rulings at issue distorted or threatened to distort competition.

E. Beneficiary of the aid

96 In recitals 314 to 318 of the contested decision, the Commission found that the selective advantage enjoyed by the Engie group at the level of the holding companies concerned had also benefited all the companies in the Engie group, in that it had provided additional financial resources to the entire group. Although that group is split into different legal persons and the tax rulings at issue concerned the tax treatment of separate entities, the Commission considered that that group had to be regarded as one economic unit, namely a single undertaking, in receipt of State aid.

F. Recovery of the aid

97 In recitals 318 to 365 of the contested decision, the Commission stated that, since the aid granted was incompatible with the internal market and unlawful, the Grand Duchy of Luxembourg was required to take immediate action to recover from LNG Holding or, failing which, from Engie SA or one of its successors, the aid which had already materialised as a result of the partial conversion in 2014 of the ZORA concluded in favour of LNG Supply, and was also to refrain from applying the tax rulings at issue as regards the exemption of any participation income received by the holding companies concerned upon full conversion of the ZORAs concluded in favour of the subsidiaries.

98 The Commission considered that such recovery did not infringe the principles of legal certainty, protection of legitimate expectations, equal treatment and good administration. It also rejected the complaints put forward by the Grand Duchy of Luxembourg and Engie alleging procedural defects affecting the formal investigation procedure, stating that their procedural rights had been duly respected.

III. Procedure and forms of order sought

A. Written part of the procedure in Case T-516/18

99 By document lodged at the Court Registry on 30 August 2018, the Grand Duchy of Luxembourg brought the action registered under Case number T-516/18.

100 On 23 November 2018, the Commission lodged its defence.

1. Composition of the Chamber hearing the case

101 By decision of the Court of 28 September 2018, Case T-516/18 was assigned to the Seventh Chamber of the General Court, former composition.

102 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, that Case T-516/18 be heard and determined by a Chamber sitting in extended composition. By decision of the Court of 13 February 2019, formal note was taken of the Grand Duchy of Luxembourg's request and Case T-516/18 was referred to the Seventh Chamber, Extended Composition, former composition.

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

104 Since a member of the Second Chamber, Extended Composition, was unable to sit, by decision of 21 January 2020, the President of the General Court designated himself to replace that member and to assume the duties of President of the Second Chamber, Extended Composition.

2. Application for leave to intervene

105 By document lodged at the Court Registry on 20 December 2018, Ireland applied for leave to intervene, in accordance with Articles 142 and 143 of the Rules of Procedure, in support of the form of order sought by the Grand Duchy of Luxembourg.

106 By order of 15 February 2019, the President of the Seventh Chamber, Extended Composition, granted Ireland leave to intervene.

107 By document lodged at the Court Registry on 12 April 2019, Ireland lodged a statement in intervention.

3. Application for confidential treatment

108 On 30 January 2018 and 18 February 2019, the Grand Duchy of Luxembourg applied for a number of annexes to the application and to the reply to be treated as confidential with regard to Ireland.

109 Following its admission as intervener, Ireland received only non-confidential versions of the procedural documents and raised no objection to the applications for confidential treatment made with regard to it.

4. Forms of order sought

110 The Grand Duchy of Luxembourg claims that the Court should:

– principally, annul the contested decision;

– in the alternative, annul Article 2 of the contested decision;

– order the Commission to pay the costs.

111 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

112 Ireland claims that the Court should annul the contested decision, in whole or in part, in line with the form of order sought by the Grand Duchy of Luxembourg.

B. Written part of the procedure in Case T-525/18

113 By document lodged at the Court Registry on 4 September 2018, Engie brought the action registered under Case number T-525/18.

114 On 14 December 2018, the Commission lodged its defence.

115 On 4 June 2019, in accordance with Article 106(2) of the Rules of Procedure, Engie requested to be heard at a hearing.

1. Composition of the Chamber hearing the case

116 By decision of the Court of 28 September 2018, Case T-525/18 was assigned to the Seventh Chamber of the General Court, former composition.

117 By decision of the Court of 11 September 2019, Case T-525/18 was referred to the Seventh Chamber, Extended Composition, former composition, pursuant to Article 28 of the Rules of Procedure.

118 By decision of the Court of 16 October 2019, Case T-525/18 was assigned to the Second Chamber, Extended Composition, pursuant to Article 27(5) of the Rules of Procedure.

119 Since a member of the Second Chamber, Extended Composition, was unable to sit, by decision of 21 January 2020, the President of the General Court designated himself to replace that member and to assume the duties of President of the Second Chamber, Extended Composition.

2. Application for confidential treatment

120 On 3 July 2019, Engie applied to the Court for Annexes A.1 and A.9 to the application and Annex C.1 to the reply to be treated as confidential with regard to Ireland, intervener in Case T-516/18, should the present case be joined to Case T-516/18.

121 On 3 July 2019, Engie lodged confidential versions of the annexes to the application and to the reply at the Court Registry.

3. Forms of order sought

122 Engie claims that the Court should:

– principally, annul the contested decision;

– in the alternative, annul Article 2 of the contested decision;

– order the Commission to pay the costs.

123 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

IV. Law

A. Joinder of Cases T-516/18 and T-525/18 and the outcome of the applications for confidential treatment

124 By documents lodged at the Court Registry on 4 June and 25 June 2019 respectively, Engie and the Grand Duchy of Luxembourg applied for the joinder of Cases T-516/18 and T-525/18 for the purposes of the oral part of the procedure and of the decision closing the proceedings.

125 The Commission and Ireland raised no objection to the joinder of Cases T-516/18 and T-525/18.

126 By order of the President of the Second Chamber, Extended Composition, of the 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. By the same order, it was decided to exclude the confidential information from the case file to be made available to Ireland.

127 By order of the Court of 28 September 2020, the oral part of the procedure in Joined Cases T-516/18 and T-525/18 was reopened in order to ask the Commission, by way of a measure of organisation of procedure, whether the cases should be joined for the purposes of the decision closing the proceedings.

128 In view of the possible risk of extrapolation of some of the parties' arguments, the Commission expressed reservations about the joinder of Cases T-516/18 and T-525/18. However, the Court considers it appropriate, in the light of the connection between them, to join the cases for the purposes of the judgment closing the proceedings, in accordance with Article 68 of the Rules of Procedure, and again to exclude the confidential information from the case file to be made available to Ireland.

B. Substance

129 In support of its action in Case T-516/18, the Grand Duchy of Luxembourg relies, in essence, on six pleas in law:

- the first alleges that the selectivity of the tax rulings at issue was incorrectly assessed;
- the second alleges infringement of the concept of advantage;
- the third alleges disguised tax harmonisation;
- the fourth alleges infringement of procedural rights;
- the fifth, put forward in the alternative, alleges infringement of the general principles of EU law in the context of the recovery of the aid allegedly granted;
- the sixth alleges infringement of the obligation to state reasons.

130 In support of its action in Case T-525/18, Engie relies, in essence, on eight pleas in law:

– the first alleges that the tax rulings at issue cannot be imputed to the State;

– the second alleges infringement of the concept of advantage;

– the third alleges that the selectivity of the tax rulings at issue was incorrectly assessed;

– the fourth alleges that the tax rulings at issue were incorrectly classified as individual aid;

– the fifth alleges, in essence, disguised tax harmonisation;

– the sixth alleges infringement of procedural rights;

– the seventh, put forward in the alternative, alleges infringement of the general principles of EU law in the context of the recovery of the aid allegedly granted;

– the eighth alleges infringement of the obligation to state reasons.

131 For the purposes of the present judgment, the Court considers it appropriate, in the first place, to examine the merits of the pleas, first, referring to disguised tax harmonisation, since, if substantiated, the Commission would not be competent to assess the tax rulings at issue under State aid law, secondly, arguing that the Commission did not comply with its obligation to state reasons and, thirdly, relating to an alleged infringement of procedural rights.

132 In the second place, the Court will consider the pleas claiming that the tax rulings at issue cannot be imputed to the Grand Duchy of Luxembourg, that there was no selective advantage, that the tax rulings at issue were incorrectly classified as individual aid, and that the obligation to recover the aid allegedly granted was misconstrued.

1. The fifth plea in Case T-525/18 and the third plea in Case T-516/18, alleging, in essence, the existence of disguised tax harmonisation

133 The fifth plea in Case T-525/18 can essentially be divided into two parts. By the first part, Engie alleges infringement of Articles 3 to 5 and 113 to 117 TFEU and, by the second, misuse of powers by the Commission. In Case T-516/18, the Grand Duchy of Luxembourg alleges disguised tax harmonisation in breach of Articles 4 and 5 TEU.

(a) Alleged infringement of Articles 4 and 5 TEU and Articles 3 to 5 and 113 to 117 TFEU

134 Engie submits that the Commission interfered in the Grand Duchy of Luxembourg's tax policy in so far as it classified the tax rulings at issue as State aid even though they implement general measures of direct taxation which do not give rise to discrimination and which are therefore not selective. In so doing, the Commission infringed Articles 3 to 5 and 113 to 117 TFEU.

135 It also claims that, by interpreting the concept of selectivity broadly, the Commission assumed the role of the Grand Duchy of Luxembourg in the definition and interpretation of the reference frameworks used.

136 The Grand Duchy of Luxembourg adds that, by imposing its own interpretation of Luxembourg tax law and of the objective which that law should pursue, the Commission misused the State aid rules, in disregard of the sovereign power of the Member States in the field of direct taxation and the principles governing the division of competences between the Member States and the European Union.

137 The Commission disputes the merits of all those arguments. It draws special attention to the obligation on the Member States to comply with EU law in general and with State aid law in particular in the exercise of their reserved competence in the field of direct taxation. It also emphasises that the contested decision does not in any way call into question the power of the Grand Duchy of Luxembourg to devise its own system of taxation.

138 In that regard, it should be recalled that, according to settled case-law, 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 (see judgment of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 47 and the case-law cited).

139 Thus, intervention by the Member States in areas which have not been harmonised in the European Union, such as direct taxation, is not excluded from the scope of the State aid rules. Accordingly, the Commission can classify a tax measure as State aid provided that the conditions for that classification are met (judgment of 25 March 2015, *Belgium* v *Commission*, T-538/11, EU:T:2015:188, paragraphs 65 and 66; also see, to that effect, judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 13, and of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 81).

140 If tax measures in fact discriminate between companies which are in a comparable situation in the light of the objective pursued by those tax measures and confer on the recipients of those measures selective advantages favouring ‘certain’ undertakings or the production of ‘certain’ goods, they may be regarded as State aid for the purposes of Article 107(1) TFEU (see, to that effect, 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, paragraph 104).

141 It follows from the foregoing that, since the Commission is competent to ensure compliance with Article 107 TFEU, it cannot 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.

142 Engie and the Grand Duchy of Luxembourg are therefore wrong to claim that the Commission interfered in that State’s tax policy, since, in examining whether the tax rulings at issue complied with State aid law, the Commission merely exercised its powers under Article 107 TFEU.

143 The arguments put forward by Engie and the Grand Duchy of Luxembourg cannot call that finding into question.

144 First, contrary to Engie and the Grand Duchy of Luxembourg’s submissions, the Commission did not impose its own interpretation of Luxembourg tax law when establishing the selectivity of the tax rulings at issue. The Commission strictly adhered to the provisions of Luxembourg tax law, which it set out in recitals 78 to 90 of the contested decision. It was specifically on the basis of the

provisions of Luxembourg tax law that the Commission defined, inter alia, the various reference frameworks used, as is apparent from recitals 171 to 176, 200 to 205, 245 and 292 to 298 of the contested decision.

145 Furthermore, in its examination, the Commission relied not on its own interpretation of the Luxembourg tax rules, but on that of the Luxembourg tax authorities, as demonstrated inter alia by recital 283 of the contested decision.

146 It follows that the Commission examined the tax rulings at issue in the light not of its own interpretation of the Luxembourg tax rules, but of the provisions of Luxembourg tax law, as applied by the Luxembourg tax authorities.

147 Secondly, the Commission did not disregard the competence reserved to the Member States in the field of direct taxation merely because it carried out its own examination of the tax rulings at issue having regard to the Luxembourg tax provisions, in order to ascertain whether those tax rulings conferred a selective advantage on their beneficiaries.

148 It is true that it follows from the case-law set out in paragraph 138 above that, as EU law currently stands, the Commission does not have the power autonomously to define the rules on the direct taxation of companies, disregarding national tax rules.

149 However, although ‘normal’ taxation is defined by national tax rules and the very existence of a selective advantage must be demonstrated by reference thereto, it remains the case that, as noted in paragraph 139 above, tax measures that in fact discriminate between companies which are in a comparable situation in the light of the objective pursued by those measures may fall within the scope of Article 107(1) TFEU.

150 Thus, when investigating whether the tax rulings at issue complied with the rules on State aid, the Commission could only carry out an assessment of ‘normal’ taxation, defined by Luxembourg tax law as applied by the Luxembourg tax authorities. In so doing, it did not engage in any ‘tax harmonisation’, but exercised the power conferred on it by Article 107(1) TFEU.

151 As part of its review of tax measures involving State aid, the Commission is able to conduct its own assessment of national tax provisions, an assessment which may, 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.

152 Thirdly, the alleged failure to demonstrate that there was discrimination in favour of Engie is irrelevant for the purposes of proving that the Commission lacked competence. On the contrary, that argument seeks to demonstrate that the Commission infringed Article 107 TFEU in the actual exercise of its competence.

153 In those circumstances, the Commission did not infringe Articles 4 and 5 TEU or Articles 3 to 5 and 113 to 117 TFEU by adopting the contested decision.

(b) Alleged misuse of powers

154 Engie claims that the Commission used the powers conferred on it by Articles 107 and 108 TFEU to compel the Grand Duchy of Luxembourg to change its tax policy ‘in relation to the exemption of profits’ and thus indirectly engage in tax harmonisation.

155 According to Engie, the following factors demonstrate that an underlying tax harmonisation objective was being pursued: the definition, for the purposes of establishing the selectivity of the tax rulings at issue, of the reference framework in the light of an objective determined in a discretionary manner; the Commission's failure to take into account the principle of fiscal legality, the tax treatment of cross-border situations and the specific nature of ZORAs; the Commission's interpretation of the criteria for abuse of law; and the adoption of the contested decision concomitantly with the lodging of a bill to amend Article 22*bis* of the LIR before the Luxembourg Chamber of Deputies.

156 The Commission disputes the merits of all those arguments. It contends that, since the contested decision is not a harmonisation measure, it cannot be accused of any misuse of powers.

157 In that regard, it should be borne in mind that a measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken with the exclusive or main purpose of achieving an end other than that stated or of evading a procedure specifically prescribed by the Treaty (judgments of 16 April 2013, *Spain and Italy* v *Council*, C-274/11 and C-295/11, EU:C:2013:240, paragraph 33, and of 12 July 2018, *PA* v *Parliament*, T-608/16, not published, EU:T:2018:440, paragraph 42).

158 In addition, under Article 108 TFEU, the Commission is competent to examine the compatibility with the internal market of State measures constituting State aid.

159 In the present case, the Commission cannot be accused of having misused its powers by adopting the contested decision, which, at the end of the formal investigation procedure in respect of the tax rulings at issue, found that the Grand Duchy of Luxembourg had granted State aid incompatible with the internal market by means of those tax rulings.

160 First, the contested decision cannot be regarded as a disguised tax harmonisation measure, as held in paragraph 153 above.

161 More specifically, as regards the lodging of a bill to amend Article 22*bis* of the LIR before the Luxembourg Chamber of Deputies concomitantly with the adoption of the contested decision, it should be noted that Engie has not put forward any arguments demonstrating how that legislative initiative of the Grand Duchy of Luxembourg constitutes evidence that the Commission misused its powers. The amendment of Article 22*bis* of the LIR by the Grand Duchy of Luxembourg cannot in itself be regarded as sufficient evidence of such a misuse of powers.

162 Secondly, the other evidence adduced by Engie in support of the claim of a possible misuse of powers is intended above all to challenge the Commission's assessment of the selectivity of the tax rulings at issue and is, therefore, ineffective for the purposes of establishing an alleged misuse of powers, in accordance with the case-law cited in paragraph 157 above.

163 Consequently, the argument alleging misuse of powers must be rejected as unfounded, as must, therefore, the fifth plea in Case T-525/18 and the third plea in Case T-516/18.

2. The eighth plea in Case T-525/18 and the sixth plea in Case T-516/18, alleging infringement of the obligation to state reasons

164 The Grand Duchy of Luxembourg and Engie refer to multiple deficiencies which they claim vitiate the finding, in the contested decision, that the tax rulings at issue were selective. Thus, the Commission failed to give sufficient reasons in its assessment relating to the existence of a selective advantage in favour of the holding companies concerned and in its assessment of the existence of a selective advantage as a result of the non-application by the Grand Duchy of Luxembourg of the provision on abuse of law.

165 Engie adds that the Commission failed to fulfil its obligation to state reasons by not explaining clearly why it had disregarded the fact that other undertakings received the same tax treatment as the Engie group companies.

166 More generally, the absence of reference to legislation and to administrative and judicial practice and the lack of evidence of divergent tax rulings show that the Commission failed to fulfil its obligation to state reasons.

167 The Commission disputes the merits of all those arguments. It submits that Engie and the Grand Duchy of Luxembourg have not identified any shortcomings affecting the contested decision. It also observes that Engie was in a position to understand its reasoning and to challenge that reasoning effectively before the Court.

168 In that regard, it should be borne in mind that the statement of reasons must enable the persons concerned to ascertain the reasons for the measure so that they can defend their rights and ascertain whether or not the measure is well founded and so that the EU judicature can exercise its power of review. It is not necessary for the statement of reasons to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgments of 15 June 2005, *Corsica Ferries France* v *Commission*, T-349/03, EU:T:2005:221, paragraphs 62 and 63; of 16 October 2014, *Eurallumina* v *Commission*, T-308/11, not published, EU:T:2014:894, paragraph 44; and of 6 May 2019, *Scor* v *Commission*, T-135/17, not published, EU:T:2019:287, paragraph 80).

169 In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned and it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (judgments of 15 June 2005, *Corsica Ferries France* v *Commission*, T-349/03, EU:T:2005:221, paragraph 64; of 16 October 2014, *Eurallumina* v *Commission*, T-308/11, not published, EU:T:2014:894, paragraph 44; and of 6 May 2019, *Scor* v *Commission*, T-135/17, not published, EU:T:2019:287, paragraph 80).

170 In the present case, in addition to the fact that Engie and the Grand Duchy of Luxembourg were closely involved in the formal investigation procedure, it must be stated first of all that they were, in the light of their pleadings before the Court, in a position effectively to challenge the merits of the contested decision.

171 Next, there are no lacunae in the contested decision that prevent the Court from fully exercising its power of review.

172 It is apparent from the contested decision that the Commission stated to the requisite legal and factual standard the reasons for its view that, in the present case, the tax rulings at issue constituted State aid incompatible with the internal market, within the meaning of Article 107 TFEU.

173 Specifically, as regards the third condition relating to the existence of a selective advantage in the case in point, the Commission explained, in section 6.2 of the contested decision (recitals 163 to 236 thereof), why it considered that there was a selective advantage benefiting the Engie group at the level of the holding companies.

174 In essence, the Commission found that the tax rulings at issue conferred a selective advantage on the holding companies concerned by derogating, first, from a reference framework encompassing the Luxembourg corporate income tax system and, secondly, from a reference framework limited to the Luxembourg provisions on the taxation of profit distributions and the participation exemption.

175 In section 6.3 of the contested decision (recitals 237 to 288 thereof), the Commission set out the reasons for its finding that there was a selective advantage as a result of the preferential tax treatment given to the Engie group. According to the Commission, such an advantage existed because the tax burden of the Engie group, comprising the subsidiaries, intermediary companies and holding companies, had been reduced following the tax rulings at issue, when, in principle, that tax burden should have remained constant at group level. In the Commission's view, the reduction in the group's tax burden again derogated from the Luxembourg corporate income tax system.

176 In section 6.4 of the contested decision (recitals 289 to 312 thereof), the Commission also set out the reasons for its finding that there was a selective advantage as a result of the non-application of the provision on abuse of law.

177 The Commission based its assessment on the criteria for abuse of law, as identified from administrative and judicial practice in Luxembourg, and sought to show that each of those criteria was duly met in the present case. Thus, because of the non-application of the provision on abuse of law by the Luxembourg tax authorities, the Grand Duchy of Luxembourg granted a selective advantage to the holding companies concerned.

178 Finally, neither the Commission's failure to take account of Luxembourg administrative practice in relation to tax rulings, nor its failure to take account of undertakings which potentially enjoyed the same advantage as the Engie group companies, leads to a finding that the Commission infringed its obligation to state reasons. Such an argument seeks to challenge the substance, rather than the form, of the contested decision.

179 Accordingly, the eighth plea in Case T-525/18 and the sixth plea in Case T-516/18, alleging infringement of the obligation to state reasons, must be rejected as unfounded.

3. The sixth plea in Case T-525/18 and the fourth plea in Case T-516/18, alleging infringement of procedural rights

180 Both Engie and the Grand Duchy of Luxembourg complain that the Commission infringed their procedural rights.

181 In the first place, Engie claims that the Commission infringed its procedural rights by failing to send it the Grand Duchy of Luxembourg's reply to the Commission's letter of 22 March 2017. That reply could have put Engie in a better position to defend itself, since it showed that other undertakings enjoyed the same tax treatment.

182 In particular, that information was decisive for establishing a selective advantage based on the individual application of a general law tax system, in accordance with the judgment of 12 November 2013, *MOL* v *Commission* (T-499/10, EU:T:2013:592), and the Commission's recent decision-making practice in relation to tax rulings.

183 In that regard, it follows from the case-law of the Court that interested parties other than the Member State concerned have, in the procedure for reviewing State aid, only the opportunity to send to the Commission all information intended for the guidance of the latter with regard to its future action and they cannot themselves seek to engage in an adversarial debate with the Commission in the same way as is offered to that Member State (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, paragraph 181).

184 Thus, irrespective of the arguments put forward by Engie explaining why it needed a copy of the Grand Duchy of Luxembourg's reply, it cannot seek to engage in an adversarial debate with the Commission or require the Commission to disclose the replies of the other parties to the procedure.

185 The only possibility open to interested parties other than the Member State concerned is to submit comments either on their own initiative or in reply to documents and questions raised by the Commission during the formal investigation procedure. In that regard, as stated in paragraphs 56 to 62 above, Engie availed itself of that possibility, since it submitted comments on several occasions during the formal investigation procedure.

186 In the second place, Engie and the Grand Duchy of Luxembourg submit that the Commission infringed their procedural rights by, in essence, failing to adopt a new opening decision or, at the very least, a correcting decision. Such a decision would have allowed the inaccuracies affecting the opening decision to be rectified and would have enabled the parties effectively to submit their comments during the administrative procedure on the basis of the reasoning that was ultimately adopted in the contested decision to establish the selectivity of the tax rulings at issue.

187 The changes which the Commission made to the contested decision could not have been anticipated. According to Engie, the Commission did not simply develop its reasoning, but also developed the main complaints and the subject matter of the decision itself.

188 The Grand Duchy of Luxembourg states that, by failing to adopt a new opening decision or a correcting decision, despite the circumstances requiring it to do so, the Commission infringed its rights of defence and Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9).

189 The Grand Duchy of Luxembourg adds that the Commission based the contested decision solely on the incomplete considerations mentioned in the opening decision, considerations which appeared to form part of complaints which the Commission had withdrawn. If the complaints had been sufficiently substantiated, that State would have been able to provide further information to justify a different outcome.

190 Furthermore, according to the Grand Duchy of Luxembourg, the Commission's letter of 11 December 2017, which was not a correcting decision, did not remove any of the ambiguities affecting the opening decision.

191 The Commission disputes the merits of all those arguments. It submits, by reference to the case-law, that it was entitled to modify its position between the opening decision and the final decision without having to initiate the formal investigation procedure again and adds, in essence, that the opening decision covered all the points raised in the contested decision.

192 In that regard, it should be borne in mind that, according to settled case-law, observance of the rights of defence during the formal investigation procedure conducted under Article 108(2) TFEU requires the Member State concerned to be placed in a position in which it may effectively make known its views on the truth and relevance of the facts and circumstances alleged and on the documents obtained by the Commission to support its claim that there has been an infringement of EU law, as well as on the observations submitted by interested third parties, in accordance with Article 108(2) TFEU. In so far as the Member State has not been afforded the opportunity to comment on those observations, the Commission may not use them in its decision against that State (see judgment of 13 December 2017, *Greece* v *Commission*, T-314/15, not published, EU:T:2017:903, paragraph 25 and the case-law cited).

193 In accordance with Article 6 of Regulation 2015/1589, where the Commission decides to initiate the formal investigation procedure, the opening decision may be confined to summarising the relevant issues of fact and law, to including a preliminary assessment as to the character of the State measure in issue as aid, and to setting out the doubts as to the measure's compatibility with the internal market (see, to that effect, judgment of 13 December 2017, *Greece* v *Commission*, T-314/15, not published, EU:T:2017:903, paragraph 26).

194 It should also be pointed out that the formal investigation procedure makes it possible to examine in greater depth and clarify the issues raised in the opening decision.

195 It follows from Article 9 of Regulation 2015/1589 that, at the end of the formal investigation procedure, the Commission's analysis may have changed, as it may ultimately decide that the measure does not constitute aid or that the doubts as to the compatibility of the measure have been removed. Consequently, the final decision may differ somewhat from the opening decision, without, however, those differences affecting the legality of the final decision (see, to that effect, judgment of 13 December 2017, *Greece* v *Commission*, T-314/15, not published, EU:T:2017:903, paragraph 27).

196 In the present case, it should be noted at the outset that, in the opening decision, the Commission drew the preliminary conclusion that a selective advantage existed in favour both of the subsidiaries, namely LNG Supply and GSTM, and of the Engie group as a whole.

197 Thus, the Commission submitted, as its principal argument, that, by permitting the non-taxation of the ZORA accretions, the tax rulings at issue derogated from the first paragraph of Article 109 and Article 164 of the LIR, which are tax rules applicable to all companies subject to tax in Luxembourg.

198 In the alternative, the Commission considered that the tax rulings at issue derogated from the provisions on the taxation of capital gains arising from a loan convertible into shares, namely Articles 22*bis* and 97 of the LIR, in so far as they endorsed the non-taxation of income generated by the subsidiaries by treating the ZORA accretions in the same way as deductible interest.

199 Furthermore, the Commission observed that the combined effect of the derogations from Articles 22*bis* and 109 of the LIR, permitting the non-taxation of the ZORA accretions, resulted in a derogation from the provision on abuse of law.

200 Those considerations having been set out, it should be noted first of all that, in the contested decision, the Commission admittedly did not reproduce all of the arguments put forward at the stage of the opening decision as regards the analysis of the selectivity of the tax rulings at issue.

201 However, that narrowing of the scope of the Commission's analysis cannot be interpreted as a modification of the subject matter of the opening decision, which continues to be the compatibility of the tax rulings at issue with State aid law.

202 Next, the assumptions underpinning the analysis that was ultimately adopted in the contested decision in respect of the selectivity of the tax rulings at issue were set out in the opening decision, and Engie and the Grand Duchy of Luxembourg do not seek to challenge them.

203 As stated in recitals 91 to 100 of the contested decision, the opening decision identified the following as factors capable of giving rise to a selective advantage: first, the possibility for a subsidiary that has taken out a ZORA to deduct the ZORA accretions as interest, under Article 109 of the LIR, and, secondly, the application to the present case of Article 22*bis* of the LIR, inasmuch as it could enable those accretions to escape tax when the ZORA in question is converted. Moreover, the combined effect of the deductibility of the ZORA accretions at the level of the subsidiaries and the non-taxation of the corresponding income at the level of the holding companies was identified.

204 In other words, the opening decision already referred to the misapplication of Article 166 of the LIR at the level of the holding companies concerned in respect of participation income corresponding, from an economic perspective, to profits not taxed at the level of the subsidiaries, as well as to the misapplication of Article 22*bis* of the LIR, which is intended only to defer taxation of the ZORA accretions to a later point in time, not to exempt them from tax for good. Similarly, the Commission had already alleged non-application of the provision on abuse of law.

205 Therefore, since the decisive arguments relied on by the Commission in the contested decision concerning the existence of a selective advantage could already be discerned from the opening decision, the Grand Duchy of Luxembourg cannot accuse the Commission of failing to place it in a position in which it could effectively make known its views on the existence of a selective advantage, in accordance with the case-law cited in paragraph 192 above.

206 It should be added that, by letter of 11 December 2017, the Commission sought to clarify its reasoning in a structured manner and to obtain comments from Engie and the Grand Duchy of Luxembourg in that regard.

207 That is clearly the case with regard to the definition of the reference frameworks used in the contested decision for the purposes of establishing the selectivity of the tax rulings at issue at the level of both the holding companies concerned and the Engie group.

208 In addition, although the Commission did not provide a summary in the letter of 11 December 2017 of its arguments regarding the non-application of the provision on abuse of law, which it had raised in the opening decision, it made a further request to the parties to submit additional comments on that matter.

209 Finally, the narrowing of the scope of the analysis of the selectivity of the tax rulings at issue between the opening decision and the contested decision stems from exchanges between the Commission's services, the Grand Duchy of Luxembourg and Engie, which illustrates, if such illustration were needed, the very purpose of the formal investigation procedure and the usefulness and effectiveness of the exchanges which take place during that procedure.

210 Accordingly, in the light of those considerations, the Commission did not infringe the procedural rights of the Grand Duchy of Luxembourg and Engie in the present case by not adopting a new opening decision or, at the very least, a correcting decision.

211 Consequently, the sixth plea in Case T-525/18 and the fourth plea in Case T-516/18 must be rejected as unfounded.

4. The first plea in Case T-525/18 alleging that there was no commitment of State resources and that the tax rulings at issue cannot be imputed to the State

212 In the first place, Engie submits that the tax rulings at issue cannot be regarded as involving an intervention by the State. They are optional and are strictly limited to drawing inferences from the application of Luxembourg tax law to a given situation.

213 According to Engie, that finding cannot be called into question by the non-application of the provision on abuse of law, inasmuch as the Commission did not in any way demonstrate that the practice of the Luxembourg authorities, which were shown in the present case at most to have refrained from intervening, would have been different in comparable situations.

214 In that regard, it should be noted that, for it to be possible to classify advantages as 'aid' within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be imputable to the State (judgment of 28 March 2019, *Germany* v *Commission*, C-405/16 P, EU:C:2019:268, paragraph 48).

215 In order to assess whether a measure is imputable to the State, it is necessary to examine whether the public authorities were involved in the adoption of that measure (judgment of 28 March 2019, *Germany* v *Commission*, C-405/16 P, EU:C:2019:268, paragraph 49).

216 In the present case, the tax rulings at issue were adopted by the Luxembourg tax authorities, as the Commission rightly pointed out in recital 156 of the contested decision.

217 Therefore, in the light of that finding alone, it cannot reasonably be disputed that those tax rulings are imputable to the Grand Duchy of Luxembourg.

218 In the second place, according to Engie, the tax rulings at issue do not involve the commitment of State resources. They do not result in a reduction in the amount of tax normally payable.

219 It follows from the case-law that it is not necessary to establish in every case that there has been a transfer of State resources for the advantage conferred on one or more undertakings to be capable of being regarded as State aid, for the purposes of Article 107(1) TFEU (judgment of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 100).

220 Thus, measures which, in various forms, mitigate the charges that are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid (judgment of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 101).

221 By the tax rulings at issue, as is apparent from recital 158 of the contested decision, the Luxembourg tax authorities made it possible for the holding companies concerned not to be taxed on some of their participation income. In other words, those tax rulings mitigate the charges that are generally included in the budget of an undertaking, in accordance with the case-law cited in paragraph 220 above.

222 Accordingly, the condition relating to the use of State resources is also met.

223 In consequence, the first plea in Case T-525/18 must be rejected as unfounded.

5. The first and second pleas in Case T-516/18 and the second and third pleas in Case T-525/18, alleging, in essence, errors of assessment and of law in the identification of a selective advantage

(a) Preliminary remarks

224 It is apparent from recitals 162, 171, 200, 237 and 289 of the contested decision that, as it confirmed in response to a question put by the Court at the hearing, the Commission demonstrated that the Engie group enjoyed a selective advantage on the basis of four lines of reasoning, one of which, in the light of recital 289 of the contested decision, was submitted in the alternative.

225 Thus, first, the Commission considered that the tax rulings at issue conferred a selective advantage on the Engie group at the level of the holding companies concerned by derogating from a reference framework encompassing the Luxembourg corporate income tax system.

226 Secondly, the Commission considered that the Engie group also enjoyed a selective advantage at the level of the holding companies concerned because the tax rulings at issue derogated from a reference framework limited to the Luxembourg provisions on the taxation of profit distributions and the participation exemption.

227 Thirdly, in the light of a reference framework encompassing the Luxembourg corporate income tax system, the Commission found that the tax rulings at issue also conferred a selective advantage on the Engie group, comprising in this instance the holding companies concerned, the intermediary companies and the subsidiaries.

228 Fourthly, and in the alternative, the Commission considered that the tax rulings at issue conferred a selective advantage on all the companies in the Engie group, collectively referred to as ‘Engie’ in the contested decision, inasmuch as they derogated from the provision on abuse of law, an integral part of a reference framework encompassing the Luxembourg corporate income tax system.

229 By their actions, Engie and the Grand Duchy of Luxembourg dispute all of the Commission’s arguments seeking to establish the existence of a selective advantage in the present case. To that end, the applicants put forward pleas in law and arguments which, although presented differently in their respective applications, display significant similarities as to their substance.

230 In that regard, it should be recalled at the outset that, where some of the grounds in a decision on their own provide a sufficient legal basis for the decision, any errors in the other grounds of the decision have no effect on its operative part (judgment of 14 December 2005, *General Electric* v *Commission*, T-210/01, EU:T:2005:456, paragraph 42).

231 Moreover, where the operative part of a Commission decision is based on several pillars of reasoning, each of which would in itself be sufficient to justify that operative part, that decision should, in principle, be annulled only if each of those pillars is vitiated by an illegality. In such a case, an error or other illegality which affects only one of the pillars of reasoning cannot be sufficient to justify annulment of the decision at issue because that error could not have had a decisive effect on the operative part adopted by the Commission (judgment of 14 December 2005, *General Electric* v *Commission*, T-210/01, EU:T:2005:456, paragraph 43).

232 Thus, in the instant case, if only one of the Commission’s lines of reasoning is well founded, the arguments put forward by Engie and the Grand Duchy of Luxembourg against the Commission’s other lines of reasoning will be ineffective.

233 For the purposes of this judgment, the Court considers it appropriate to examine, at the outset, the arguments put forward by Engie and the Grand Duchy of Luxembourg alleging that the Commission confused the conditions for finding an advantage and for finding that the tax rulings at issue were selective by failing to conduct a clear assessment of those two conditions separately.

234 Next, the Court will examine the arguments put forward to challenge the Commission’s assessment concerning the existence of a selective advantage, beginning with the finding of a derogation from the reference framework limited to the provisions on the taxation of profit distributions and the participation exemption.

(b) The alleged confusion of the conditions concerning the existence of an advantage and the selectivity of the tax rulings at issue

235 Engie and the Grand Duchy of Luxembourg allege that the Commission confused the concepts of advantage and selectivity.

236 Instead of examining the existence of an advantage first, followed by the existence of different treatment, Engie claims that the Commission inferred the existence of 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 profits of companies liable to corporation tax.

237 However, reference to the objective of a tax system can be made only at the stage of assessing the selectivity of the tax rulings at issue, and not at the stage of identifying an advantage.

238 The Commission contends that, although the condition relating to the existence of an advantage differs from the condition relating to its selectivity, the fact remains that fulfilment of one of those conditions partly overlaps with fulfilment of the other. If a tax measure derogates from a normal tax system, the condition relating to the existence of an advantage will be satisfied, as will the first two stages of the reasoning relating to its selectivity. The Commission adds in particular that, as to the alleged confusion between the rules making up the reference system and the objective of that system, the general rules of the tax system, namely the rules applicable to all undertakings, are the very reflection of the objective of the tax system.

239 In that regard, it should be borne in mind that, in principle, selectivity and advantage are two separate conditions. So far as advantage is concerned, the Commission must show that the measure improves the financial position of the recipient (see, to that effect, judgment of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 15).

240 On the other hand, so far as selectivity is concerned, the Commission must show that the advantage is not enjoyed by other undertakings in a legal and factual situation comparable to that of the recipient in the light of the objective of the reference framework (judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 49).

241 However, in tax matters, the examination of an advantage overlaps 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 the measure under the ordinary tax system, which, as such, applies to other taxpayers in the same situation. Furthermore, it is apparent from the Court's case-law that those two criteria may be examined together, as the 'third condition' laid down in Article 107(1) TFEU, relating to the existence of a 'selective advantage' (see, to that effect, judgment of 30 June 2016, *Belgium* v *Commission*, C-270/15 P, EU:C:2016:489, paragraph 32).

242 In the present case, the Commission sought to demonstrate, irrespective of the merits of the body of reasons set out in the contested decision, 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.

243 First of all, the Commission considered that, by confirming that it was possible for the holding companies concerned to be exempted from paying tax on participation income that, under the Luxembourg corporate income tax system and in the absence of the tax rulings at issue, should have been taxed, those tax rulings conferred an advantage on those companies and also derogated from the Luxembourg corporate income tax system.

244 The reference in recitals 166 and 176 of the contested decision to the objective of the Luxembourg corporate income tax system, as ascertained from Articles 18, 23, 40, 159 and 163 of the LIR, as set out in recitals 78 to 81 of the contested decision, cannot be usefully relied on to demonstrate that the Commission confused the condition of advantage and the condition of selectivity.

245 It is true that the objective of a tax system is used primarily to establish the selectivity of a tax measure, inasmuch as it is in the light of such an objective that taxpayers in a factual and legal situation comparable to that of the aid beneficiary are identified.

246 Nevertheless, the objective put forward by the Commission, in particular in recitals 166 and 176 of the contested decision, namely 'the taxation of the profit of all companies subject to tax in Luxembourg, as determined in their accounts', is more akin to a principle governing the general provisions making up the Luxembourg corporate income tax system used by the Commission than to an objective of the system in question.

247 Thus, irrespective of whether the Commission's reading of those provisions and the resulting principle is correct, if a derogation from that principle is established, the grant of an advantage is also established.

248 Next, the same finding must be made in the light not of the Luxembourg corporate income tax system, but of the Luxembourg provisions on the participation exemption and the taxation of profit distributions.

249 It follows, in particular, from recitals 208 and 209 of the contested decision that, in the absence of the tax rulings at issue, the holding companies concerned would not have been eligible for an exemption from tax on distributed income which had not been taxed at the level of their respective subsidiaries, resulting in the finding of both an advantage and a derogation from the provisions on the participation exemption and the taxation of profit distributions.

250 Lastly, the finding of a derogation from the provision on abuse of law simultaneously entails the grant of an advantage, as is apparent from recital 312 of the contested decision. In the absence of the tax rulings at issue and because of the application of the provision on abuse of law, the Commission claims, in essence, that the holding companies concerned would not have been eligible for an exemption from tax on the participation income in question.

251 Thus, in the present case, the Commission did not confuse the conditions for finding an advantage and those for demonstrating the selectivity of the tax rulings at issue, conditions which could, having regard to the fiscal nature of those tax rulings, be assessed simultaneously.

252 Therefore, the argument alleging such confusion must be rejected as unfounded.

253 Against that background, it is now necessary to determine whether the Commission was fully entitled to find that there was a selective advantage following its examination of the selectivity of the tax rulings at issue in the light of the narrow reference framework, namely a framework limited to the Luxembourg provisions on the participation exemption and the taxation of profit distributions.

(c) The alleged absence of a selective advantage at the level of the holding companies concerned in the light of the narrow reference framework

254 In recitals 200 to 235 of the contested decision, the Commission maintained that the selectivity of the tax rulings at issue could be established in the light of a narrow reference framework comprising Articles 164 and 166 of the LIR, namely provisions on the taxation of profit distributions and the participation exemption.

255 Article 164 of the LIR provides:

‘1. In determining the taxable income, it is irrelevant whether or not the income has been distributed to the parties entitled to that income.

2. Distributions of any kind, made to holders of shares, participation certificates, founders’ shares, “jouissance” shares or any other securities, including variable-yield bonds conferring entitlement to a participation in the annual profits or in the proceeds of liquidation, shall be regarded as distributions for the purposes of the preceding paragraph.

3. The taxable income shall include hidden profit distributions. A hidden profit distribution arises in particular where a shareholder, stockholder or interested party directly or indirectly receives benefits from a company or an association which he or she would not normally have received if he or she had not been a shareholder, stockholder or interested party.’

256 The first paragraph of Article 166 of the LIR provides:

‘Income from a participation held by:

1. a resident collective undertaking that its fully liable to tax and takes one of the forms listed in the Annex to paragraph 10;

2. a resident capital company that is fully liable to tax and is not listed in the Annex to paragraph 10;

3. a domestic permanent establishment of a collective undertaking referred to in Article 2 of Directive [2011/96];

4. a domestic permanent establishment of a capital company residing in a State with which the Grand Duchy of Luxembourg has concluded a convention for the avoidance of double taxation;

5. a domestic permanent establishment of a capital company or cooperative society residing in a State party to the Agreement on the European Economic Area (EEA) other than a Member State of the European Union,

shall be exempt where, on the date on which the income is made available, the recipient holds or undertakes to hold that participation for an uninterrupted period of at least 12 months and, throughout that period, the level of the participation does not fall below 10% or the acquisition price below EUR 1 200 000.’

257 It is apparent, in particular, from recitals 201 and 202 of the contested decision that a combined reading of the provisions of Article 164 and the first paragraph of Article 166 of the LIR would, under Luxembourg law, render a company receiving participation income ineligible for an exemption where that income has not previously been taxed at the level of the company which distributed it.

258 Article 164 of the LIR does not allow distributed profits to be deducted from a company’s taxable income. In other words, profits can be distributed only after tax, irrespective of the nature of the distribution. For its part, Article 166 of the LIR allows a company receiving distributed profits to be exempted from tax, provided that the income received derives from participations.

259 Thus, in recital 226 of the contested decision, the Commission concluded that, by allowing the holding companies concerned, through the tax rulings at issue, to be exempted from paying tax on participation income corresponding, from an economic perspective, to the ZORA accretions, which their respective subsidiaries had deducted as expenses, the Luxembourg tax authorities had granted a selective advantage to those holding companies.

260 Engie and the Grand Duchy of Luxembourg submit, in essence, that the Commission incorrectly defined the narrow reference framework and incorrectly identified a derogation from that framework and, in so doing, wrongly concluded that a selective advantage had been granted to the holding companies concerned.

261 Thus, it is necessary, as a first step, to examine the arguments alleging that the Commission incorrectly defined a reference framework limited to the provisions on the taxation of profit distributions and the participation exemption. The Court will then go on to consider, as a second step, the arguments challenging the section of the contested decision concerning the existence of a derogation from those provisions.

(1) The definition of the reference framework limited to the provisions on the taxation of profit distributions and the participation exemption

262 In the contested decision, the Commission assessed the selectivity of the tax rulings at issue at the level of the holding companies concerned in the light of a narrow reference framework comprising the provisions on the participation exemption and the taxation of profit distributions, namely Articles 164 and 166 of the LIR.

(i) The failure to extend the reference framework to include the parent-subsidiary directive

263 The Grand Duchy of Luxembourg and Engie submit that the Commission incorrectly restricted the reference framework to the provisions applicable to purely internal situations. Instead, it should also have referred to situations falling within the scope of the parent-subsidiary directive.

264 Engie observes that, under the parent-subsidiary directive, in force when the tax rulings at issue were adopted, the Grand Duchy of Luxembourg did not make the eligibility of parent companies resident in Luxembourg for the exemption provided for in the parent-subsidiary directive subject to the requirement that the profits of their subsidiaries established in other Member States must have been taxed beforehand in those subsidiaries' State of residence.

265 Engie and the Grand Duchy of Luxembourg add that the Commission was not entitled, in the light of the Court's case-law, to limit the exemption solely to cross-border situations without any condition linked to the prior taxation of profits at the level of the subsidiary.

266 Relying on the judgment of 13 November 1990, *Marleasing* (C-106/89, EU:C:1990:395), Engie argues that Article 166 of the LIR must be interpreted in the light of EU law, in particular the parent-subsidiary directive in force when the tax rulings at issue were adopted.

267 Furthermore, a failure to align the tax treatment of cross-border profit distributions and purely internal distributions gives rise to reverse discrimination at the level of parent companies and subsidiaries resident in Luxembourg. Accordingly, the Commission cannot dispute the choice made by the Luxembourg legislature regarding the participation exemption scheme, irrespective of whether internal distributions or cross-border distributions are concerned.

268 Moreover, according to Engie and the Grand Duchy of Luxembourg, such a failure to align tax treatment infringes Article 107 TFEU, as is apparent from the judgments of 22 December 2008, *Les Vergers du Vieux Tauves* (C-48/07, EU:C:2008:758), and of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981).

269 The Commission essentially justifies not extending the reference framework to include cross-border situations by stating that the sole objective of the parent-subsidiary directive is to prevent cross-border situations being penalised as compared with purely internal situations, and not to provide grounds for extending the preferential treatment of cross-border situations to include purely internal situations.

270 In that regard, it should be borne in mind that the examination of the selectivity condition implies, in principle, the determination, as a first step, of the reference framework within which the measure concerned falls, that determination being of greater importance in the case of tax measures, since the very existence of an advantage may be established only when compared with 'normal' taxation (judgments of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 56, and of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 55).

271 The selectivity of a tax measure cannot be assessed on the basis of a reference framework consisting of some provisions that have been artificially taken from a broader legislative framework (judgment of 28 June 2018, *Germany* v *Commission*, C-209/16 P, not published, EU:C:2018:507, paragraph 99).

272 The Commission cannot be criticised for not having taken account, in the present case, of the tax treatment of cross-border dividend distributions under the parent-subsidiary directive, in force when the tax rulings at issue were adopted.

273 First, the situation at issue here is a purely internal one. The holding companies concerned, the subsidiaries and the intermediary companies are established in the Grand Duchy of Luxembourg. In this instance, the tax situations of those companies fall within the purview of the same tax authority. Therefore, 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, cannot arise in a purely internal situation such as that at issue in the present case.

274 Secondly, under the parent-subsidiary directive, in force when the tax rulings at issue were adopted, the prior taxation of distributed profits at the level of the subsidiaries was indeed not a formal prerequisite for entitlement to the participation exemption.

275 Article 4 of the parent-subsidiary directive provided, inter alia, that the Member State of residence of the parent company in receipt of dividends from a non-resident subsidiary could refrain from taxing those dividends.

276 The fact remains that such an exemption scheme, which was not formally dependent on the taxation of distributed profits at the level of the non-resident subsidiary, was intended above all, in accordance with the third recital of the parent-subsidiary directive, to facilitate the grouping together of companies at EU level and to address any divergences that might exist between the tax laws of two different Member States. Obviously, that logic cannot be transposed to the situation of companies established in one and the same Member State.

277 The judgments of 13 November 1990, *Marleasing* (C-106/89, EU:C:1990:395); of 22 December 2008, *Les Vergers du Vieux Tauves* (C-48/07, EU:C:2008:758); and of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981), do not call that finding into question.

278 First of all, the judgment of 13 November 1990, *Marleasing* (C-106/89, EU:C:1990:395), cannot be interpreted in the manner intended by Engie. In that case, the Court ruled that, in a dispute falling within the scope of a directive which should have been transposed into domestic law, the national court was required to interpret its national law in the light of the wording and the purpose of that directive. There is no question here of interpreting Article 166 of the LIR in a situation falling within the scope of the parent-subsidiary directive, namely where profits are distributed between companies established in different Member States.

279 Next, the judgment of 22 December 2008, *Les Vergers du Vieux Tauves* (C-48/07, EU:C:2008:758), also cannot serve as a basis for requiring the Grand Duchy of Luxembourg to bring the tax treatment of cross-border distributions into line with that of purely internal distributions.

280 In that case, the only question which arose was whether the concept of ‘holding’, within the meaning of the parent-subsidiary directive, included the holding of shares under a usufruct agreement (not with full title), a question which the Court answered in the negative.

281 However, the Court also intended to point out that a Member State could not treat cross-border situations less favourably than purely internal situations. Thus, in the case which gave rise to the judgment of 22 December 2008, *Les Vergers du Vieux Tauves* (C-48/07, EU:C:2008:758), the Court held that, if a Member State were to exempt from tax dividends received by a company which held shares in a subsidiary under a usufruct agreement, the same should apply in a cross-border situation. The purpose of EU law is not to combat reverse discrimination, but to ensure that cross-border situations are not treated less favourably than purely internal situations, and not vice versa.

282 Lastly, the same finding must be made as regards the judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981). Contrary to what the Grand Duchy of Luxembourg claims, the Commission cannot accuse it of having granted State aid by treating cross-border distributions of dividends more favourably than purely internal distributions.

283 The condition relating to the imputability of such a measure to the State is not satisfied where the measure at issue stems from an EU act, such as a directive (see, to that effect, judgment of 5 April 2006, *Deutsche Bahn* v *Commission*, T-351/02, EU:T:2006:104, paragraphs 99 to 104). In the present case, the participation exemption scheme derives from the parent-subsidiary directive.

284 In any event, the parent-subsidiary directive, in force when the tax rulings at issue were adopted, does not preclude a link being established and required between the taxation of distributed profits at the level of a subsidiary and the subsequent exemption of participation income at the level of a non-resident parent company (see, to that effect, judgment of 22 December 2008, *Les Vergers du Vieux Tauves*, C-48/07, EU:C:2008:758, paragraphs 36 and 37).

285 That directive seeks to avoid cases of double taxation, which implicitly but necessarily suggests that it is based on the assumption that the Member State of residence of the subsidiary has taxed the profits made by the subsidiary before their distribution (see, to that effect, judgment of 22 December 2008, *Les Vergers du Vieux Tauves*, C-48/07, EU:C:2008:758, paragraphs 36 and 37).

286 Moreover, irrespective of its temporal application, such an interpretation is borne out by Article 1 of Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96 (OJ 2014 L 219, p. 40), in that the exemption of income from cross-border participations is possible only if that income is not deductible by the subsidiary.

287 Thus, in the present case, the Commission was not required to extend the reference framework to include the system established by the parent-subsidiary directive, which could not, moreover, preclude a link between the participation exemption and the taxation of profit distributions, at least in purely internal situations.

(ii) The combined reading of Articles 164 and 166 of the LIR

288 The Grand Duchy of Luxembourg and Engie submit that the definition of a narrower reference framework, in the light of Articles 164 and 166 of the LIR alone, is based on an incorrect combined reading of those two provisions.

289 Apart from the fact that a ZORA does not entail a profit distribution for the purposes of Article 164 of the LIR, the Grand Duchy of Luxembourg and Engie maintain that Article 166 of the LIR cannot 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.

290 The Grand Duchy of Luxembourg also criticises the fact that the Commission ignored the comments contained in its letter of 31 January 2018, which clearly explained that Articles 164 and 166 of the LIR were different in scope and that compliance with Article 164 of the LIR was not a prerequisite for the application of Article 166 of the LIR.

291 The Commission stresses, in particular, that the complementarity between Article 166 and the first and second paragraphs of Article 164 of the LIR is essential in order to ensure the coherence of the Luxembourg tax system, which, moreover, is confirmed by legal literature in the tax field.

292 In that regard, it is true that Article 166 of the LIR does not make the grant of the participation exemption at the level of a parent company formally dependent on the prior taxation of distributed profits at the level of its subsidiary.

293 Nevertheless, the grant of the participation exemption may be contemplated only if the income distributed by a subsidiary has been taxed beforehand, short of there being double non-taxation of profits in a purely internal situation.

294 In broad outline, Article 164 of the LIR provides for the taxation of income generated by a company, irrespective of whether that income is distributed. Pursuant to the third paragraph of Article 164 of the LIR, that income also includes hidden profit distributions. Article 166 of the LIR exempts participation income subject to certain conditions, enabling double taxation to be avoided. Distributed profits which have been taxed at the level of the subsidiary are, in principle, recorded as taxable income at the level of the parent company.

295 The link between the two provisions is expressly apparent from the Grand Duchy of Luxembourg's reply of 31 January 2018. According to the text reproduced in recital 202 of the contested decision and appearing in footnote 223, which is unambiguous, the Grand Duchy of Luxembourg acknowledged that 'all participation income eligible for the exemption scheme under Article 166 of the LIR [was] also covered by the provisions of Article 164 of the LIR'.

296 [As rectified by the order of 16 September 2021] The link between those two provisions is particularly clear from the opinion of the Conseil d'État (Council of State, Luxembourg) of 2 April 1965 on the bill incorporating Article 166 into the LIR, to which the Commission rightly referred in footnotes 139 and 238 of the contested decision. As the Conseil d'État (Council of State) pointed out, Article 166 of the LIR makes 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 all liability to tax in respect of that income.

297 In other words, the participation exemption is applicable solely to income which has not been deducted from the taxable income of the subsidiary.

298 Accordingly, the Commission did not err in law in finding, in recital 204 of the contested decision, that there was a link between Articles 164 and 166 of the LIR, namely between the exemption of participation income at the level of a parent company and the taxation of distributed profits at the level of its subsidiary.

299 Furthermore, the Grand Duchy of Luxembourg and Engie submit that a ZORA does not entail a profit distribution for the purposes of Article 164 of the LIR, with the result that the reference to that article, in particular in recitals 204 and 210 et seq. of the contested decision, is incorrect.

300 Although the ZORA accretions are not, formally speaking, profit distributions, the participation income exempted at the level of LNG Holding corresponds, in essence, to the amount of those accretions, so that, as the Commission correctly stated in recitals 210 to 212 of the contested decision, those accretions correspond 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. The Commission was therefore fully entitled to rely, in order to define the narrow reference framework, on Articles 164 and 166 of the LIR, which govern, under national law, the taxation of participation income.

301 Accordingly, the Court must reject the argument alleging an incorrect combined reading of Articles 164 and 166 of the LIR and, consequently, all of the arguments seeking to challenge the Commission's definition of the narrow reference framework.

(2) The derogation from the provisions on the taxation of profit distributions and the participation exemption

302 In recitals 208 to 226 of the contested decision, the Commission considered that, by the tax rulings at issue, the Luxembourg tax authorities had derogated from the provisions on the taxation of profit distributions and the participation exemption inasmuch as they had allowed the holding companies concerned to be exempted from paying tax on participation income corresponding, from an economic perspective, to the ZORA accretions, deducted as expenses at the level of their respective subsidiaries.

303 First of all, it should be noted that, as stated in paragraphs 247 and 248 above, the establishment of a derogation from the Luxembourg provisions on the participation exemption and the taxation of profit distributions, if substantiated, results in the finding of an advantage.

304 According to the Court's settled case-law, the assessment of the constitutive condition of the concept of 'State aid' for the purposes of Article 107(1) TFEU, relating to the selectivity of the advantage granted, requires a determination whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' over others 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 (see judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54 and the case-law cited).

305 The Grand Duchy of Luxembourg and Engie submit, in essence, that no finding of derogation can be made in the present case, arguing (i) that Article 164 of the LIR does not govern ZORAs 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 participation income, at the level of the holding companies concerned; (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; (iv) that the Commission did not show that those two provisions, considered in isolation, were infringed; and (v) that it has not been shown that the Engie group received preferential treatment at the level of the holding companies concerned.

(i) The application of Article 164 of the LIR to a ZORA and the existence of a link between the deductibility of the ZORA accretions, at the level of the subsidiaries, and the exemption of participation income, at the level of the holding companies concerned

306 The Grand Duchy of Luxembourg and Engie state that, under Luxembourg law, Article 164 of the LIR governs only profit distributions, not ZORAs, which are hybrid debt/capital instruments.

307 Thus, the Commission disregarded the convertible nature of ZORAs, which renders Article 164 of the LIR inapplicable to the present case, with the result that no finding of a derogation from that provision could be made. The Commission based its analysis on a purposive interpretation of Luxembourg tax law, thereby infringing the principle of fiscal legality, under which tax laws must be interpreted strictly.

308 There is also no such derogation inasmuch as, according to Engie, no direct and obvious link can be found between the gain made by LNG Holding and the ZORA accretions deducted as expenses at the level of LNG Supply. The Commission was also wrong to connect the performance of the

prepaid forward sale to the subsequent capital reduction of LNG Supply, a transaction which, moreover, was not envisaged when the tax rulings at issue were adopted. In the absence of such a link, the tax rulings at issue did not derogate, in essence, from the reference framework used.

309 Similarly, Engie states that the ZORA accretions were recorded as a taxable gain in LNG Luxembourg's accounts, with the result that, even if a link was established between the amount of accretions deducted as expenses at the level of LNG Supply and the amount exempted from tax at the level of LNG Holding, the exemption would not apply, in essence, to an amount which has not been subject to any tax at all.

310 The Commission disputes the merits of all those arguments. It contends, in particular, that, if the same amount of profit could be deducted as expenses at the level of the distributing entity and be exempted as income at the level of the recipient, that profit would escape all liability to tax in the Grand Duchy of Luxembourg, which, in the present case, indeed demonstrates the existence of a derogation from the narrow reference framework applicable to the holding companies.

311 In that regard, in contrast to a formalistic approach, whereby each of the transactions making up the sophisticated financial arrangement are considered in isolation, it is important, as the Commission did, to go beyond the legal form in order to understand the economic and fiscal reality of the arrangement. In order to determine whether State measures can constitute State aid, regard must primarily be had to the effects of those measures on the undertakings favoured (see judgment of 13 September 2010, *Greece and Others* v *Commission*, T-415/05, T-416/05 and T-423/05, EU:T:2010:386, paragraph 212 and the case-law cited).

312 Although the ZORA accretions are not, formally speaking, profit distributions, the participation income exempted at the level of LNG Holding corresponds, in essence, to the amount of those accretions, so that, as the Commission correctly stated in recitals 210 to 212 of the contested decision, those accretions correspond in practical terms, in the very specific circumstances of the present case, to profit distributions.

313 The tax rulings at issue endorse various transactions which constitute a system for implementing, in a circular and interdependent fashion, the transfer of a business sector and its financing between three companies belonging to the same group. Those transactions were designed to be implemented in three successive but interdependent stages, involving the intervention of a holding company, an intermediary company and a subsidiary.

314 It is true, first, that the ZORA accretions were recorded as a taxable gain in the accounts of the intermediary companies.

315 However, in reply to a question put by the Court at the hearing, the Grand Duchy of Luxembourg and Engie expressly confirmed that that gain had been offset, at the level of the intermediary companies, by a loss of the same amount at the time of performance of the prepaid forward sale contract concluded between the intermediary companies and the holding companies concerned.

316 Moreover, pursuant to that contract, the holding companies concerned automatically became the owners of the shares issued upon conversion of the ZORA in question, shares which incorporated the nominal amount of the loan granted and the profits made by the subsidiaries.

317 In other words, the true position is that the prepaid forward sale contracts concluded between the holding companies concerned and the intermediary companies made it possible to offset the taxable gain at the level of the intermediary companies, while transferring ownership of the shares issued upon conversion of the ZORA in question to those holding companies.

318 Thus, the holding companies concerned became the owners of those shares, the value of which includes the ZORA accretions.

319 It is true, secondly, that performance of the prepaid forward sale contract is also a wholly separate transaction from the subsequent cancellation of a proportion of the subsidiaries' shares received.

320 However, in this instance, in LNG Holding's case, the income generated at the level of that company under the prepaid forward sale contract and, a fortiori, that generated following the cancellation of LNG Supply's shares actually corresponded, from an economic perspective, to the amount of the ZORA accretions made before the partial conversion of that ZORA, which the Grand Duchy of Luxembourg expressly acknowledged at the hearing in reply to a question from the Court.

321 That finding cannot be called into question by the argument that the tax rulings at issue did not take a view on the subsequent cancellation of a proportion of the subsidiaries' shares received, but only on the performance of the prepaid forward sale contract.

322 It is clear from the request for a tax ruling sent on 20 September 2013, in accordance with the text reproduced in recital 43 of the contested decision, that it was indeed envisaged, before conversion of the ZORA in question, that a proportion of the subsidiaries' shares received would subsequently be cancelled at the level of the holding companies concerned.

323 Thus, it is stated in recital 43 of the contested decision that, 'due to the capital reduction by [LNG Supply], [LNG Holding] will recognise a profit equal to the difference between the nominal amount of shares converted and the conversion amount' and that 'this profit will be visible in the books of [LNG Holding] and is covered, as previously confirmed by the tax authorities, by the participation exemption'.

324 The express reference to the Luxembourg tax authorities' previous confirmation in that regard demonstrates, in essence, that the income received by LNG Holding resulting from the capital reduction of LNG Supply was the income in respect of which the application of Article 166 of the LIR had been requested, in particular in the request for a tax ruling of 9 September 2008, a request which the Grand Duchy of Luxembourg granted.

325 It is true, thirdly, that the deductibility of the ZORA accretions at the level of the subsidiaries is, formally speaking, a separate transaction from the exemption of participation income at the level of the holding companies.

326 However, there is, in fact, a direct link between those two transactions in the present case. The income exempted at the level of LNG Holding pursuant to Article 166 of the LIR corresponds, in essence, to the ZORA accretions deducted at the level of LNG Supply, as the Grand Duchy of Luxembourg confirmed at the hearing.

327 Accordingly, the Commission was right to set out the interrelationships between several transactions which, although formally separate, were substantively similar, and found that, by confirming the exemption of participation income at the level of the holding companies, income corresponding, from an economic perspective, to the amount of the ZORA accretions, deducted as expenses at the level of the subsidiaries, the Luxembourg tax authorities had derogated from the reference framework comprising Articles 164 and 166 of the LIR.

(ii) The uncertain value of a ZORA upon issue

328 The Grand Duchy of Luxembourg and Engie submit that the Commission could not have been unaware of the fact that the increase in value of the ZORAs was uncertain when they were concluded and when the tax rulings at issue were adopted. According to the Grand Duchy of Luxembourg, that is precisely the case as regards CEF, particularly since the ZORA which GSTM took out was not converted.

329 The Grand Duchy of Luxembourg and Engie maintain that the uncertainty, when the tax rulings at issue were adopted, as to whether the subsidiaries that took out the ZORA in question would make a profit in the future essentially precludes the finding of a derogation from the narrow reference framework.

330 It should be recalled that measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or which fall to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 21).

331 Moreover, a measure may constitute State aid even if the amount of the aid, and a fortiori the finding of an advantage, depends on circumstances unrelated to the tax system.

332 Thus, a measure may constitute State aid for the purposes of Article 107 TFEU even if the advantage has not yet materialised on the date on which the measure at issue is adopted. The mere probability that the advantage will materialise in the future is sufficient. The fact that the advantage has not materialised precludes only the recovery of the aid, not its classification as such.

333 In the present case, it is true that the advantage and, ultimately, the derogation from the reference framework become fully apparent where the subsidiaries make a profit during the lifetime of the ZORA in question. However, the fact that there was an element of chance when the ZORA in question was adopted as to whether a profit would be made at the level of the subsidiaries does not preclude a selective advantage being granted to the holding companies concerned and the finding of a derogation from the narrow reference framework.

334 When the tax rulings at issue were adopted, the Luxembourg tax authorities were, having regard to the financial arrangement submitted to them, in favour of the exemption of participation income at the level of the holding companies concerned, income which could, from an economic perspective, correspond to income deducted as expenses at the level of the subsidiaries.

335 Thus, the Commission did not err in finding that, by laying down special tax rules for the holding companies concerned, the Luxembourg tax authorities had defined a legal framework allowing those companies to be granted an advantage and, in so doing, had derogated from the narrow reference framework.

(iii) The finding of a derogation based on the combined effect of general provisions

336 Engie submits that the Commission was not entitled to look at the combined effect, not provided for by law, of the deductibility of the ZORA accretions at the level of the subsidiaries and the exemption of participation income at the level of the holding companies. According to Engie, the application of two provisions of a general nature to a specific case cannot confer an advantage where the provisions concerned are of general application and the application of each of those provisions, taken in isolation, is consistent with their normal application.

337 Engie claims that the Commission departed from its decision-making practice, as illustrated by Decision 2014/200/EU of 17 July 2013 on the aid scheme SA.21233 C/11 (ex NN/11, ex CP 137/06) implemented by Spain – Tax scheme applicable to certain finance lease agreements also known as the Spanish Tax Leasing System (OJ 2014 L 114, p. 1; 'the decision on the Spanish tax leasing system'), under which each tax measure, taken individually, was required to derogate from the normal application of the tax provisions in question. Such a requirement is even more important in the case of several taxable persons, as in the present case.

338 Engie adds that the view taken by the Commission in the contested decision was based on the assumption that, in accordance with a principle of coherence, the application of tax provisions to a taxable person was conditional on the tax treatment of another taxable person under other general provisions. The Commission also disregarded 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), which limited the circumstances in which the effects of a tax system may be taken into account to the situation where the design of that system was clearly arbitrary or biased.

339 Such an argument cannot succeed.

340 As is apparent from paragraphs 306 to 327 above, a link must be established, under Luxembourg law, between the exemption of participation income at the level of a parent company and the deductibility of distributed income at the level of its subsidiary.

341 The application of such an exemption cannot therefore be envisaged without a prior examination of whether the income exempted from tax has been taxed. The tax treatment of the company receiving distributed income depends, so far as Article 166 of the LIR is concerned, on the tax treatment of the distributing company.

342 There is also a link in the present case, in accordance with paragraphs 312 to 327 above, between the deductibility of the ZORA accretions at the level of LNG Supply and the exemption of participation income at the level of LNG Holding, income corresponding, from an economic perspective, to those accretions. That link stems from the actual financing structure established by Engie and the various contracts between the Engie group companies, as endorsed by the tax rulings at issue. LNG Supply's shares incorporating the value of the ZORA accretions are thus routed, through the ZORA, from LNG Supply to LNG Luxembourg and, through the prepaid forward sale contract, from LNG Luxembourg to LNG Holding, which ultimately generates a tax-exempt capital gain by cancelling the shares received. The same applies to GSTM and CEF, even though the ZORA taken out by the former was not converted.

343 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 derogate from the narrow reference framework. The exemption, in the present case, of participation income at the level of LNG Holding, income corresponding, from an economic perspective, to the ZORA accretions, could not be envisaged, since those accretions were deducted as expenses at the level of LNG Supply.

344 Based on that combined effect, the Commission was fully entitled to find, in recitals 208 and 209 of the contested decision, that there was a derogation from the reference framework comprising Articles 164 and 166 of the LIR.

345 Therefore, in the light of such links, the Commission did not err 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.

346 That conclusion cannot be called into question by the decision on the Spanish tax leasing system, mentioned in paragraph 337 above.

347 It should be borne in mind that, according to settled case-law, the Commission's decision-making practice in other cases does not affect the validity of the contested decision, which falls to be assessed solely having regard to the objective rules of the Treaty (see judgment of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven* v *Commission*, T-696/17, EU:T:2019:652, paragraph 68 and the case-law cited).

348 Furthermore, irrespective of the observation that the Commission cannot be bound by its previous decision-making practice, it is apparent in particular from recitals 131 and 140 of the decision on the Spanish tax leasing system that, although the tax arrangement in that case was the result of several separate tax measures combined, the Commission did not seek to make the finding in that case that the Spanish tax leasing system was selective dependent on the selectivity of each of the measures comprising that scheme considered in isolation. In the same vein, the Spanish tax leasing system was made up of five measures, the combined application of which did not follow, either formally or substantively, from a legislative provision. That is not the case here, which concerns Articles 164 and 166 of the LIR, the complementarity of which is apparent, in essence, from a combined reading of those articles.

349 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), cannot be interpreted as meaning that the effects of a measure may be taken into account only if the measure was 'arbitrary or biased' in nature.

350 First, it must be noted that the cases which 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), differed significantly from the present case, in that the system at issue was itself the reference framework from which the preferential treatment of offshore companies had been identified.

351 Secondly, Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims, but defines them in relation to their effects, and thus independently of the techniques used. The case-law relied on by Engie can be invoked only in

disputes similar to those in the cases which 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).

(iv) No infringement of Articles 164 and 166 of the LIR, considered in isolation

352 The Grand Duchy of Luxembourg claims that, in a case where Articles 164 and 166 of the LIR were applied in accordance with national law, the onus was on the Commission to demonstrate that the tax rulings at issue infringed those articles.

353 It argues that, in the light of the judgment of 12 November 2013, *MOL* v *Commission* (T-499/10, EU:T:2013:592), the Commission should have established the selectivity of the tax rulings at issue by reference to the provisions on which they were based, demonstrating that those provisions had been infringed.

354 The Commission stresses that the selectivity of the tax rulings at issue was not conditional both on a finding that the provisions on the basis of which those tax rulings were adopted had been misapplied and on the selectivity of those provisions.

355 In that regard, it should be noted that, contrary to what the Grand Duchy of Luxembourg claims in the present case, the finding of a derogation from the narrow reference framework was not dependent on the finding of an infringement of Articles 164 and 166 of the LIR, each taken in isolation. On the contrary, the derogation fell to be assessed in the light of Articles 164 and 166 of the LIR taken together, comprising the narrow reference framework, under which participation income could not be exempted at the level of a parent company if that income had not been taxed at the level of its subsidiary, and vice versa.

356 It is apparent from recitals 212 and 213 of the contested decision that the tax rulings at issue derogate from the narrow reference framework inasmuch as, pursuant to those rulings, the Engie group received, at the level of the holding companies concerned, an income tax exemption corresponding, in economic terms, to distributed profits not taxed at the level of their subsidiaries. That was specifically the case as regards the ZORA issued to LNG Supply. LNG Holding was exempted from paying tax on participation income which corresponded, from an economic perspective, to income deducted as expenses by LNG Supply.

357 The obligation to demonstrate that the tax rulings at issue infringed Articles 164 and 166 of the LIR also does not follow in any way from the judgment of 12 November 2013, *MOL* v *Commission* (T-499/10, EU:T:2013:592). Contrary to the Grand Duchy of Luxembourg's assertions, that judgment serves only to illustrate that the selectivity of an aid measure may arise from a discretionary power conferred on the authorities by a text of general application, irrespective of the actual exercise of that discretion. It also states that, where such a power is not exercised, reference must be made to the content of the measure to ascertain whether it confers a selective advantage on the recipient.

358 In those circumstances, it is necessary to reject the arguments alleging failure to demonstrate an infringement of Articles 164 and 166 of the LIR, taken in isolation.

(v) The preferential treatment of the Engie group at the level of the holding companies concerned

359 According to Engie and the Grand Duchy of Luxembourg, supported by Ireland, the Commission did not demonstrate that the tax rulings at issue accorded preferential treatment to the Engie group as compared with other companies or groups of companies in a situation comparable to the Engie group.

360 According to Engie, the Commission failed to adduce evidence of the existence of divergent tax rulings and of a refusal by the Luxembourg tax authorities to adopt such a ruling in respect of an undertaking in a comparable situation, or evidence of the existence of a tax adjustment affecting undertakings that had established the structure contemplated in the tax rulings at issue.

361 Only a finding of de facto discrimination could be made in the present case, with the result that, in the light of the judgments 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), and of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981), the Commission should have, in the case of an individual measure applying a general scheme, identified specific features characteristic of the undertakings benefiting from the tax rulings, enabling them to be distinguished from the undertakings excluded from those rulings.

362 If not, the Commission should have shown that, notwithstanding their general appearance, the tax provisions applied by the tax rulings at issue were in themselves liable to favour certain undertakings on account of their specific features as compared with other undertakings in a comparable situation.

363 The Grand Duchy of Luxembourg, supported by Ireland, also submits that, if every taxpayer were able to create a financing structure similar to the one examined in the tax rulings at issue, as the Commission acknowledged, the Commission should not have argued that those rulings were selective.

364 Ireland stresses that, since any taxable person could receive the same tax treatment as Engie by establishing a financial arrangement similar to the one considered in the tax rulings at issue, there was very little scope for a finding of discrimination or exclusion. According to Ireland, the Commission should have shown that another group of companies had been excluded, *de jure* or de facto, from receiving the same tax treatment, despite establishing a similar financial arrangement. In the absence of such a finding, it cannot be said that a distinction was introduced by national law; the only difference was in the way in which, individually, taxpayers chose to organise their affairs.

365 The Commission contends that the fact that a financing structure is, in principle, open to all operators on a market exclude the selectivity of the tax rulings at issue.

366 In that regard, it should be recalled that the appropriate criterion for establishing the selectivity of a measure consists in determining whether that measure introduces, between operators that are, in the light of the objective pursued by the general tax system concerned, in a comparable factual and legal situation, a distinction that is not justified by the nature and general structure of that system (judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 60).

367 Specifically, 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, although the operators who qualify for the tax advantage and those who do not are, in the light of the objective pursued by that Member State's tax system, in a comparable factual and legal situation (see, to that effect, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 67).

368 It is also apparent from the case-law that a finding that a derogating tax measure is selective cannot be made subject to the identification of a particular category of undertakings which can be distinguished owing to specific properties. Such identification is, on the other hand, relevant in the case of a measure which does not take the form of a tax advantage that derogates from an ordinary tax system, but involves the application of a 'general' tax scheme based on criteria that are, in themselves, also general (see, to that effect, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 71 to 78).

369 Where a tax measure derogates from an ordinary system, a finding of selectivity does not necessarily result from the fact that it is impossible for certain undertakings to qualify for the advantage provided for by the measure at issue on account of legal, economic or practical restrictions preventing them from performing the transaction governing whether that advantage is granted, but may arise merely from the finding that a transaction exists which, although comparable to the transaction governing whether the advantage in question is granted, does not give rise to an entitlement to that advantage. It follows that a tax measure may be selective even though any undertaking may freely choose whether to perform the transaction governing whether the advantage provided for by that measure is granted (see, to that effect, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 80 to 88).

370 In the present case, it follows from recitals 205 and 215 of the contested decision that the Commission considered that the holding companies concerned enjoyed more favourable tax treatment than companies which received participation income and which, unlike those holding companies, were therefore subject to the rules relating to the participation exemption and the taxation of profit distributions.

371 While the exemption of participation income at the level of a parent company can be envisaged, in a purely internal situation, only if the distributed income has been taxed at the level of its subsidiary, the holding companies concerned qualify, in the present case, for the participation exemption in respect of income corresponding, from an economic perspective, to the amount of the ZORA accretions, deducted as expenses at the level of their respective subsidiaries. For the same comparable transaction, namely the receipt of participation income following an investment in the capital of a subsidiary, some parent companies are excluded from the tax advantage enjoyed by the holding companies concerned.

372 Accordingly, 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 participation income that is not taxed upon distribution.

373 The arguments put forward by Engie and the Grand Duchy of Luxembourg cannot call that finding into question.

374 First, in the case of a financing system open to all, which the holding companies concerned relied on, Engie claims that, in order to establish the selectivity of the tax rulings at issue, the Commission was required to demonstrate that other companies in a comparable situation had been refused identical tax treatment.

375 Even if holding companies received tax treatment similar to that given to CEF and LNG Holding, in the case of financing transactions also involving the issue of a ZORA by an intermediary company, the existence of identical tax rulings would, at most, be indicative of a possible aid scheme, not that there was no discrimination.

376 Furthermore, Engie's reasoning is based on the incorrect premiss that the reference framework used by the Commission comprises the special tax rules for the holding companies concerned resulting from the tax rulings at issue. Requiring the Commission to identify companies which had been refused identical tax treatment in respect of the same financial arrangement in order for a finding of discrimination to be made would imply that the Commission had adopted the special tax rules as a reference framework.

377 On the contrary, the reference framework comprises Articles 164 and 166 of the LIR, which govern the taxation of profit distributions either at the level of the subsidiary or at the level of the parent company, from which the tax rulings at issue derogate.

378 Secondly, the argument relating to the Commission's failure to identify a particular category of undertakings to which the Engie group companies belong, on the basis of properties specific to them as a privileged category, also cannot succeed.

379 In accordance with paragraph 368 above, the identification of such a category is required only in the context of a general tax system which alone constitutes the reference framework used.

380 That is not the case here, since, in order to establish the selectivity of the tax rulings at issue, the Commission relied on the unequal treatment arising from them, inasmuch as they confer an advantage on the holding companies concerned, and not on other companies which are in a comparable situation in the light of the objective of the narrow reference framework, from which the tax rulings at issue derogate.

381 Accordingly, the Commission was fully entitled to rely, in the contested decision, on the preferential tax treatment received by the holding companies concerned. The Court must therefore reject as unfounded the arguments raised against the finding of a derogation from the provisions on the taxation of profit distributions and the participation exemption and, in consequence, the arguments disputing the selectivity of the tax rulings at issue.

(vi) Conclusion on the grant of a selective advantage to the Engie group, at the level of the holding companies concerned, in the light of the narrow reference framework

382 Since, first, the Commission demonstrated the selectivity of the tax rulings at issue with its four lines of reasoning, one of which was submitted in the alternative, and, secondly, the arguments seeking to challenge the merits of one of those lines, namely the existence of a selective advantage at the level of the holding companies concerned in the light of the narrow reference

framework, have been rejected as unfounded, it is appropriate, in principle, in the interests of procedural economy and in so far as they have become inoperative, to dispense with an examination of the arguments raised against the other remaining lines of reasoning, in accordance with the case-law cited in paragraphs 230 and 231 above.

383 However, in view of the unprecedented nature of the reasoning put forward to demonstrate the selectivity of the tax rulings at issue in relation to the reference framework including the provision on abuse of law, the Court considers it appropriate also to examine the merits of the arguments raised against that reasoning.

(d) The alleged absence of a selective advantage in the light of the provision on abuse of law

384 In recitals 289 to 312 of the contested decision, the Commission submits that the tax rulings at issue confer a selective advantage on Engie as a result of the non-application of the provision on abuse of law. As recital 290 of the contested decision makes clear, that provision forms part of the Luxembourg corporate income tax system.

385 Under the provision on abuse of law, ‘tax obligations cannot be circumvented or restricted by abuse of the forms and possibilities afforded by civil law’ and, ‘in the event of abuse, taxes must be levied in the same way as they would be in a legal structure suited to transactions, facts and circumstances of an economic nature’.

386 The reference to ‘Engie’, in particular in recital 162 of the contested decision, to designate the entity at the level of which selectivity as a result of the non-application of the provision on abuse of law falls to be assessed, refers, in accordance with recital 16 of the contested decision, to Engie SA and to the companies under its direct and indirect control, namely, in Luxembourg, the holding companies concerned, the intermediary companies and the subsidiaries.

387 In accordance with recitals 292 to 298 of the contested decision, the financial arrangement established by Engie meets the four criteria laid down in the case-law of the Luxembourg courts, as brought to the attention of the Commission by the Grand Duchy of Luxembourg in its reply of 31 January 2018 to the letter of 11 December 2017, in order to find that there has been an abuse of law, namely, first, the use of a legal form governed by private law, secondly, the reduction in the tax burden, thirdly, the use of inappropriate legal means and, fourthly, the absence of non-tax related reasons.

388 In addition to the finding that the ZORA accretions were not taxed at the level of the subsidiaries, the intermediary companies or the holding companies concerned, the Commission considered, in recitals 304 to 310 of the contested decision, under the criterion relating to the use of appropriate legal means, that other means of financing were available and consistent with the Luxembourg legislature’s intention, such as equity or lending instruments, inasmuch as they did not result in the non-taxation of the income generated by the subsidiaries.

389 According to the Commission, the lending instruments available include a ZORA issued directly by a parent company to its sole subsidiary, without the involvement of an intermediary company. The Commission interprets Article 22*bis* of the LIR as meaning that, even if it applied to the ZORA accretions, it would allow only for the taxation of those accretions to be deferred.

390 Point 1 of Article 22*bis*(2) of the LIR, in force when the tax rulings at issue were adopted, and the interpretation of which by the Commission is disputed, provides as follows:

'2. By way of derogation from Article 22(5), the exchange transactions referred to in points 1 to 4 below shall not result in the realisation of the capital gains related to the assets exchanged unless, in the cases referred to in points 1, 3 and 4, either the creditor or the shareholder waives the application of this provision:

1. upon conversion of a loan: the allocation to the creditor of securities representing the debtor's share capital. In the event of conversion of a convertible capital loan, the capitalised interest in respect of the business year preceding the conversion shall be taxable at the time of the exchange;

…'

391 In accordance with recitals 278 to 284 of the contested decision, the Commission submitted that point 1 of Article 22*bis*(2) of the LIR – which provides, in essence, that, where a loan is converted, the allocation to the creditor of securities representing the debtor's share capital is not to result in the realisation of capital gains unless the creditor or the shareholder waives the application of that provision – does not apply to the ZORA accretions. Article 22*bis* of the LIR states that, in the event of conversion of a convertible capital loan, the capitalised interest in respect of the business year preceding the conversion is to be taxable at the time of the exchange. Even if Article 22*bis* of the LIR applied to the ZORA accretions, the Commission contends that that article would not have the effect of permanently exempting the ZORA accretions from tax, but only of deferring their taxation.

392 Under the criterion relating to the absence of non-tax related reasons, the Commission stated, in recitals 306 to 313 of the contested decision, that a possible limitation of the subsidiaries' risk profile or the enhancement of the performance and flexibility of the group could not be a reason for financing the transfer of the business sectors by means of a ZORA issued by an intermediary company combined with a prepaid forward contract concluded with a holding company. The only objective pursued was the achievement of significant tax savings.

393 According to the Commission, the advantage conferred on Engie as a result of the non-application of the provision on abuse of law is selective inasmuch as, in accordance with recitals 311 and 312 of the contested decision, finding that the law had not been applied in circumstances where the conditions for its application were nevertheless met, that advantage is not, as a matter of principle, available to any other undertaking.

(1) Preliminary remarks

394 In the contested decision, the Commission assessed the selectivity of the tax rulings at issue in the light of the provision on abuse of law, as an integral part of the Luxembourg corporate income tax system.

395 According to the Commission, since the tax rulings at issue could not be issued because the criteria justifying the application of the provision on abuse of law were met, the Grand Duchy of Luxembourg conferred a selective advantage on Engie. That advantage, which lies in the non-application of the law in circumstances where the conditions for its application were nevertheless met, is 'by definition, … not available to any other undertakings'.

396 In that regard, it should first of all be observed that, by their arguments, the Grand Duchy of Luxembourg and Engie do not dispute the definition of the reference framework used by the Commission in order to demonstrate the selectivity of the tax rulings at issue in the light of the provision on abuse of law.

397 It is true that, in recitals 290 and 291 of the contested decision, the Commission mentioned, as a reference system, the 'Luxembourg corporate income tax system', the main objective of which is 'the taxation of corporate profit' and which includes the provision on abuse of law.

398 However, in recitals 299 to 312 of the contested decision, the Commission identified a derogation from the sole provision on abuse of law by verifying whether the four cumulative criteria were met in the present case.

399 In other words, the arguments raised by Engie and the Grand Duchy of Luxembourg in their respective pleadings against the Commission's demonstration, in recitals 171 to 199 of the contested decision, of the selectivity of the tax rulings at issue at the level of the holding companies concerned, using a reference framework encompassing the 'Luxembourg corporate income tax system', cannot succeed for the purposes of disputing, in the context of the present pleas, the derogation established by the Commission from the sole provision on abuse of law. That applies in particular to the arguments by which the Grand Duchy of Luxembourg and Engie accuse the Commission of having identified a derogation not from the provisions comprising the Luxembourg corporate income tax system, as set out in recitals 78 to 81 of the contested decision, but from an alleged objective of that reference framework.

400 The 'fundamental objective of the Luxembourg corporate income tax system', to which the Commission refers in recital 305 of the contested decision, in the section on abuse of law, is cited with a view not to identifying a derogation from that 'objective', but to determining whether the tax treatment endorsed by the tax rulings at issue is consistent with the intention of the Luxembourg legislature. Thus, the reference to that 'objective' forms part of a different approach to the one underlying recitals 171 to 199 of the contested decision.

401 On the other hand, the Grand Duchy of Luxembourg and Engie dispute, first, the assessment of the criteria to be met for a finding, under Luxembourg law, of abuse of law and, secondly, the existence of preferential treatment. However, before determining whether the arguments raised in that respect are well founded, it is necessary to consider those submitted by the Grand Duchy of Luxembourg, challenging the admissibility of the reasoning based on the provision on abuse of law.

(2) The alleged novelty of the reasoning based on the provision on abuse of law

402 The Grand Duchy of Luxembourg submits that the reasoning by which the Commission maintains that a selective advantage was granted as a result of a derogation from the provision on abuse of law is 'inadmissible'. It claims that the Commission merely raised that complaint during the administrative procedure and did not expand on it.

403 According to the Grand Duchy of Luxembourg, for the purposes of applying the provision on abuse of law, the opening decision referred not to the exemption of participation income at the level of the holding companies, but to the deductibility of the accretions at the level of the subsidiaries. Moreover, the Commission's letter of 11 December 2017 did not in any way remedy the shortcomings of the opening decision on that point.

404 In that regard, it must be pointed out that, as early as the opening decision, the Commission drew attention to the non-application of that provision, as is apparent from paragraph 204 above. Moreover, although the Commission did not provide a summary, in the letter of 11 December 2017, of its arguments regarding the non-application of the provision on abuse of law, it nevertheless made a further request to the parties to submit additional comments on that matter.

405 Accordingly, the argument put forward by the Grand Duchy of Luxembourg claiming that the Commission's reasoning based on the provision on abuse of law was novel and seeking to challenge the 'admissibility' of that reasoning must be rejected as unfounded.

(3) The derogation from the provision on abuse of law

406 The Grand Duchy of Luxembourg and Engie dispute the application of the provision on abuse of law in the present case. Apart from the fact that, in order to establish selectivity in that regard, the Commission should have referred to the administrative practice of the Luxembourg tax authorities, the Grand Duchy of Luxembourg and Engie claim that the Commission made various errors of assessment in applying the criteria to be satisfied under Luxembourg law in order to justify the application of the provision on abuse of law. They submit that, since the criteria were not met, the Luxembourg authorities could not conclude that an abuse of law had occurred and, consequently, no finding of derogation could be made. In any event, even if the provision on abuse of law were applicable, the Grand Duchy of Luxembourg and Engie assert, first, that the Commission did not demonstrate that the Engie group companies received preferential treatment and, secondly, that prohibiting the financial arrangement on account of its allegedly abusive nature would infringe the freedom of establishment.

407 The Commission contends, in particular, that the four criteria deriving from Luxembourg practice for a finding of abuse of law were satisfied in the present case. It is clear that the companies in the group which participated in the arrangement were exempted from paying tax on their profits, whereas economically equivalent transactions carried out without the same arrangement were taxed.

(i) The alleged failure to take account of the administrative practice of the Luxembourg tax authorities

408 It should be noted at the outset that it does not at all follow from the files in Joined Cases T-516/18 and T-525/18 that the Grand Duchy of Luxembourg and Engie informed the Commission during the administrative procedure of the administrative practice in Luxembourg which might have been necessary in order to rule out, in that respect, the selectivity of the tax rulings at issue.

409 Notwithstanding that observation, it must be held that the Commission was right to refer, as is apparent from recitals 293 to 298 of the contested decision, both to a circular of 1989 from the Luxembourg authorities and to judicial practice in Luxembourg, from which it identified the four criteria to be met in order to find an abuse of rights under Luxembourg law. Moreover, there was no need to take administrative practice into account, since the provision on abuse of law raised no difficulties of interpretation in the present case.

(ii) Assessment of the criteria justifying the application of the provision on abuse of law

410 The parties agree on the criteria to be met for a finding of abuse of law under Luxembourg law. In the light of recitals 301 to 306 of the contested decision and the judgment of the Cour administrative (Higher Administrative Court) of the Grand Duchy of Luxembourg of 7 February 2013, annexed to the application in Case T-516/18, such a finding is conditional on four criteria being met, 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 related reasons.

411 As regards the first criterion, it is not disputed here that Engie used forms governed by private law, endorsed by the tax rulings at issue. As pointed out in paragraph 34 above, the tax rulings at issue refer to various intra-group transactions constituting a set implementing, for LNG Supply and GSTM, a single transaction, namely, respectively, the intra-group transfer of business activities related to liquefied natural gas and the intra-group transfer of activities related to financing and treasury, which were also financed within the same group. Those transactions were designed from the outset to be implemented in three successive but interdependent stages, involving the intervention of the holding companies concerned, the intermediary companies and the subsidiaries.

412 By contrast, Engie and the Grand Duchy of Luxembourg dispute the assessment of the three other criteria to be met for a finding of abuse of law under Luxembourg law.

– *The criterion relating to the reduction in the tax burden*

413 Concerning the second criterion, the Grand Duchy of Luxembourg and Engie claim that the tax rulings at issue did not result in a reduction in the tax burden of the subsidiaries, the intermediary companies and the holding companies concerned.

414 It must be pointed out, as the Commission did in recital 302 of the contested decision, that that arrangement in fact results in the ZORA accretions not being taxed either at the level of the subsidiaries, the intermediary companies or the holding companies concerned.

415 While the subsidiaries may, first of all, deduct the ZORA accretions from their taxable income, with the exception of a margin agreed with the tax authorities, the intermediary companies are not subsequently taxed on those accretions in that, under the prepaid forward sale contract concluded with the holding companies concerned, they incur a loss of the same amount when the ZORA in question is converted, which offsets, in their accounts, the capital gain corresponding to those accretions.

416 Lastly, in the light of the tax rulings at issue, the holding companies concerned qualify for the exemption attaching to participation income, which, in the present case, was applied to income corresponding, from an economic perspective, to the ZORA accretions, as the Grand Duchy of Luxembourg confirmed at the hearing.

417 In order to achieve that tax result, the intermediary companies play a decisive role. Although they may appear, from the standpoint of the financing transaction, to be a superfluous link in the financial arrangement established by Engie, from a tax perspective, they are an essential link in that arrangement, contrary to what is claimed by the Grand Duchy of Luxembourg and Engie.

418 From the standpoint of the financing transaction, in their dealings with the subsidiaries, the intermediary companies finance the ZORA in question and receive, when it is converted, shares the value of which incorporates the nominal amount of the ZORA and the ZORA accretions.

419 In their dealings with the holding companies concerned, the intermediary companies receive, when the ZORA in question is issued, the nominal amount of that ZORA and ensure, when it is converted, the transfer of ownership of the shares issued by the subsidiaries, the value of which incorporates the nominal amount and the ZORA accretions.

420 Thus, the intermediary companies perform solely the financing transaction decided on by the holding companies concerned with a view to transferring the business sectors to the subsidiaries.

421 From a tax perspective, first, the intermediary companies are not actually taxed on the ZORA accretions at all. While, when the ZORA is converted, the intermediary companies record a capital gain corresponding to the ZORA accretions, at the same time they incur, under the prepaid forward sale contract, a loss of the same amount as those accretions.

422 That was the situation when the ZORA issued to LNG Supply was partially converted. Because it did not choose to apply Article 22*bis* of the LIR, LNG Luxembourg recorded a capital gain in its accounts, which, as the Grand Duchy of Luxembourg confirmed at the hearing, was offset by a loss of the same amount as a result of the implementation of the prepaid forward sale contract concluded with LNG Holding. In the absence of the prepaid forward sale contract, the intermediary companies would therefore have had to be taxed on the ZORA accretions.

423 Secondly, thanks to the intermediary companies, the profits made by the holding companies concerned as a result of the cancellation of a proportion of the shares received under the prepaid forward sale contract can be conveniently dissociated, at least ostensibly, from the profits corresponding to the ZORA accretions and the application of Article 166 of the LIR can be triggered. Since the ZORA accretions could not be treated as participation income for the purposes of Article 166 of the LIR, the ZORA could not serve as a basis for any right to an exemption in respect of those accretions.

424 In other words, in the light of the ZORA taken out by LNG Supply, the intervention of LNG Luxembourg, as an intermediary company, enables LNG Holding to disguise the revenue generated by the cancellation of LNG Supply's shares as participation income, even though that income corresponds, in essence, to the ZORA accretions. That result could not have been achieved in the case of a ZORA concluded directly between LNG Supply and LNG Holding.

425 As the Commission submitted in recital 304 of the contested decision, and contrary to what is claimed by the Grand Duchy of Luxembourg and Engie, the conclusion of a ZORA between two companies cannot give the same tax result as that obtained by the intervention, in the financing structure at issue, of the intermediary companies.

426 It is true that, in the case of a ZORA concluded between a subsidiary and its parent company, the ZORA accretions would have been deductible at the level of the subsidiary, with the exception of a margin agreed with the Luxembourg tax authorities.

427 However, at the level of the parent company, the accretions would have been taxed either upon conversion of the ZORA in question or, at a later stage, in accordance with the choice provided in Article 22*bis* of the LIR.

428 First, although, when a ZORA is converted, the company which owns the converted shares may choose to apply Article 22*bis* of the LIR so as not to be taxed at the time of the conversion and thereby ensure the fiscal neutrality of the transaction, that article cannot be interpreted as meaning that the capital gain realised will not be taxed at all in the future.

429 That interpretation is confirmed by a circular issued by the Luxembourg tax authorities on 27 November 2002, according to which, in the light of recital 283 of the contested decision and the text reproduced in footnote 288, 'the aim of Article 22*bis* of the LIR is to specify which security exchange transactions may be carried out in a fiscally neutral manner' and '[that article] is not, however, intended definitively to exempt capital gains which would otherwise have been taxed in the hands of the transferor, but rather to defer their taxation in time'.

430 Furthermore, the bill of 17 July 2018 transposing into Luxembourg law Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ 2016 L 193, p. 1), to which Engie refers in its pleadings, states that 'the aim [of Article 22*bis* of the LIR] is to allow taxpayers to defer in time the taxation of capital gains arising from an exchange of securities in defined circumstances'. While that bill indeed postdates the contested decision, it is nonetheless illustrative of the position of the Luxembourg legislature as to the meaning to be given to that article.

431 Secondly, any income received by a parent company in the case of a direct ZORA after cancellation of a proportion of the shares could not generate income exempted from tax under Article 166 of the LIR, even though that is not formally precluded by Articles 166 and 22*bis* of the LIR.

432 Any contrary interpretation would be at variance with the purpose of Article 22*bis* of the LIR, which, as the Luxembourg tax authorities pointed out in the circular of 27 November 2002, is to defer in time the taxation of any capital gains, and not to enable them to escape all liability to tax.

433 That interpretation moreover follows, in essence, from the clarifications provided during the administrative procedure by the Grand Duchy of Luxembourg in its letter to the Commission of 31 January 2018.

434 As to whether a ZORA is a participation instrument for the purposes of Article 166 of the LIR, and a security for the purposes of Article 164 of the LIR, the Grand Duchy of Luxembourg clearly stated that 'ZORAs issued by [LNG Supply] and [GSTM] respectively [had to] retain their classification as a loan agreement and [were] de facto excluded from the scope of Articles 164 and 166 of the LIR applicable to participation income'.

435 In other words, although, as the Grand Duchy of Luxembourg maintained during the administrative procedure, a ZORA must retain its classification as a loan agreement, it follows that any income received under such an agreement cannot qualify for a tax exemption on the basis of Article 166 of the LIR, which is concerned with participation income.

436 Accordingly, the Commission did not err in finding that the criterion relating to the reduction in the tax burden was met in this case.

– *The criterion relating to the use of inappropriate legal means*

437 As regards the third criterion, namely the use of inappropriate legal means, the Grand Duchy of Luxembourg and Engie argue that it was appropriate in the present case to have recourse to an indirect ZORA, namely one involving the intervention of an intermediary company, in order to finance the transfer of the business sectors concerned to the subsidiaries.

438 Contrary to what the Commission contends, the financing structure is suitable and cannot be equated to other means of financing, such as debt financing or equity financing. Engie states that, if a capital contribution had been performed, the subsidiaries would have been over-capitalised, which would have prevented them from enjoying a leveraging effect and a reasonable negotiating margin vis-à-vis third-party investors. Similarly, in the case of a loan, the subsidiaries would have been required to make repayment in cash, unlike under the ZORA.

439 In any event, Engie claims that it has the right to choose the least onerous means of financing and complains that the Commission, in order to conclude that the financing structure was inappropriate, imposed its own interpretation of the Luxembourg legislature's intention by incorrectly referring to the objective of the Luxembourg corporate income tax system.

440 In that regard, it should be noted at the outset that, in accordance with the letter of the Grand Duchy of Luxembourg of 31 December 2018, mentioned in recital 297 of the contested decision, the criterion relating to the use of inappropriate legal means refers to the legal situation where a taxpayer chooses means which are in direct conflict with the clear intention of the legislature, which corresponds to the aim or spirit of the law.

441 Although the complex financial arrangement established by Engie, considered in the tax rulings at issue, does indeed make it possible to finance the transfer of the business sectors to the subsidiaries concerned, the fact is that it also results, as the Commission rightly observed in recitals 304 and 305 of the contested decision, in the non-taxation of the ZORA accretions.

442 Thus, Engie's chosen means of financing cannot be regarded as appropriate in so far as they are in direct conflict with the intention of the Luxembourg legislature, which cannot reasonably be, in tax matters, the promotion of complex financial arrangements resulting, in real terms, in the double non-taxation of distributed income at the level of a subsidiary and of its parent company.

443 In that regard, the Commission did not commit any error of assessment in stating, in recital 305 of the contested decision, that the tax treatment endorsed by the tax rulings at issue was in direct opposition to the objective of the Luxembourg corporate income tax system, under which profits made by a company, as recorded in its accounts, must, in principle, be taxed. That objective follows from a combined reading of the provisions comprising the Luxembourg corporate income tax system, referred to in recitals 78 to 81 of the contested decision.

444 Accordingly, it cannot be claimed that the Commission arbitrarily defined the objective of the Luxembourg corporate income tax system and essentially substituted its intention for that of the Luxembourg legislature.

445 Easy access existed to other means of financing which, as the Commission rightly pointed out in recitals 304 and 310 of the contested decision, not only ensured that the transfer of the business sectors concerned to the subsidiaries was financed, but also generated a profit that was taxable at the level of the subsidiaries, the intermediary companies or the holding companies concerned, where appropriate.

446 First of all, if an equity instrument had been used, the subsidiaries could have received additional equity in an amount identical to that instrument, in this instance, the nominal amount of the ZORA in question. In that situation, in the light in particular of Articles 164 and 166 of the LIR, the profits made by the subsidiaries would have been taxed either at the level of those subsidiaries or at the level of the holding companies concerned.

447 Next, if the transfer of the business sector had been financed by a non-capital loan taken out with a group company, the profits made by the subsidiaries during the lifetime of the loan would also have been taxed at the level of those subsidiaries. Furthermore, although the interest on the loan would indeed have been deductible at the level of the subsidiaries, it would have been taxable at the level of either the intermediary companies or the holding companies concerned, depending on which of them were the creditor companies in that case.

448 Lastly, that would also have been the case, in the light of paragraphs 425 to 435 above, if a direct ZORA had been concluded between the subsidiaries and the holding companies concerned, as the Commission rightly stated in recital 304 of the contested decision, and contrary to the submissions of the Grand Duchy of Luxembourg and Engie.

449 Therefore, other legal means could be regarded as appropriate for the purposes of financing the transfer of the business sectors to the subsidiaries in the present case.

– *The criterion relating to the absence of non-tax related reasons*

450 Concerning the last criterion, the Grand Duchy of Luxembourg and Engie submit that the financing transaction did not pursue a purely tax-related aim and that it was motivated by valid economic reasons. According to Engie, there was an economic justification for financing the activity through an indirect ZORA.

451 Besides the fact that it was only as a result of a reform that took place in 2015 that an anti-abuse clause was inserted into the parent-subsidiary directive, it follows from the anti-abuse clause in Directive 2016/1164 that a transaction cannot be regarded as abusive if it was put in place for valid commercial reasons reflecting economic reality.

452 Likewise, the Commission cannot rely solely on the involvement of the intermediary companies and on the use of complex financial products in order to find that a transaction is abusive. That is particularly true since a ZORA implemented between two companies, without the involvement of an intermediary company, may, according to the Grand Duchy of Luxembourg and Engie, produce the same result under Article 22*bis* of the LIR.

453 In that regard, the Grand Duchy of Luxembourg and Engie struggled at the outset to demonstrate that the provision of financing by means, inter alia, of a capital contribution would not have been a valid financing instrument because it would have increased the financial risk of the subsidiaries. During the proceedings before the Court, those parties did not adduce any evidence to show that

the alternative means contemplated by the Commission in recitals 304, 309 and 310 of the contested decision, including the capital contribution, would have increased the risks borne by the subsidiaries under the arrangement endorsed by the tax rulings at issue.

454 If a capital contribution had been performed in the nominal amount of the ZORA in question, the subsidiary could, a priori, have financed the business transferred, while bearing a risk equivalent to that borne had the ZORA accretions been negative.

455 In the case of a capital increase, the subsidiaries could have received equity in an amount equivalent to the loan they received under the ZORA issued by the intermediary companies.

456 That capital contribution would also have been accompanied by a new share issue, just like repayment of the ZORA. Furthermore, the shares issued after conversion of the ZORA in question, if the accretions are positive, include the nominal amount of the loan together with those accretions, unlike a mere capital increase which would have had as its upper limit the nominal amount of the loan, so that the argument based on a risk of over-capitalisation cannot reasonably succeed.

457 Similarly, as the Commission correctly stated in recital 309 of the contested decision, the initial capital of a subsidiary is affected in the same way by potential losses, whether in the context of a capital contribution or a ZORA, if the losses exceed the amount of the contribution or the nominal amount of the ZORA.

458 In addition, the financial risk borne by the holding companies concerned is the same in the case of a capital contribution as in the case of the indirect issue of a ZORA, as here. Where a capital contribution is made and the losses exceed that contribution, the value of the corresponding shares will drop and, where the accretions under a ZORA are negative, the issuing entity will bear the risk of its claim being reduced and, depending on the circumstances, falling to a value lower than the nominal amount of the ZORA in question.

459 Thus, while a taxpayer cannot be criticised for choosing the least onerous legal means, that does not apply where other appropriate means are available but the legal means chosen have an exclusively tax-related aim and actually result in no tax being levied.

460 The argument based on a financing choice remunerated on the basis of the subsidiaries' performance must also be rejected.

461 While it is true that, under a ZORA, the remuneration received by the issuing company is proportional to the profits made by the company that took out the ZORA, such performance-based remuneration may also be obtained where financing is provided in the form of a capital contribution, reflected simply in higher distributable profits.

462 Similarly, even assuming that recourse to a ZORA was justified solely by the desire to choose a financing instrument remunerated on the basis of the subsidiaries' performance, such an objective could also be achieved by a direct ZORA, rather than by an indirect ZORA, which, as is apparent from paragraphs 448 and 449 above, resulted, unlike the former, in the ZORA accretions of the subsidiaries escaping almost all liability to tax.

463 Accordingly, the arguments put forward in order to demonstrate the presence of non-tax related reasons must be rejected as unfounded.

– *The preferential treatment of the Engie group companies*

464 The Grand Duchy of Luxembourg and Engie submit in any event that, even if the provision on abuse of law were applicable, the Commission did not in any way demonstrate that the Engie group companies received preferential treatment as compared with other companies in a comparable factual and legal situation.

465 Similarly, according to the Grand Duchy of Luxembourg, prohibiting the financial structure on account of its allegedly abusive nature would infringe the freedom of establishment enshrined in Article 49 TFEU.

466 In that regard, it should be recalled that the appropriate criterion for establishing the selectivity of a measure consists in determining whether that measure introduces, between operators that are, in the light of the objective pursued by the general tax system concerned, in a comparable factual and legal situation, a distinction that is not justified by the nature and general structure of that system (judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 60).

467 Specifically, 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, although the operators who qualify for the tax advantage and those who do not are, in the light of the objective pursued by that Member State's tax system, in a comparable factual and legal situation (judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 67).

468 Since the criteria for establishing an abuse of law were met in the present case, it cannot reasonably be disputed that the Engie group received preferential tax treatment as a result of the non-application of the provision on abuse of law in the tax rulings at issue, as the Commission rightly pointed out in recital 312 of the contested decision.

469 In the light of the objective pursued by the provision on abuse of law, namely to combat abusive practices in tax matters, Engie and, in particular, the holding companies concerned are in a factual and legal situation comparable to that of all Luxembourg taxpayers, who cannot reasonably expect to benefit as well from the non-application of the provision on abuse of law in circumstances where the conditions for its application have been met.

470 The existence of discrimination is all the more obvious inasmuch as the Luxembourg authorities have already applied the provision on abuse of law in the past. Thus, in a judgment delivered on 7 February 2013, annexed to the application in Case T-516/18, the Cour administrative (Higher Administrative Court) of the Grand Duchy of Luxembourg upheld a judgment delivered at first instance in a dispute between the head of direct taxes and a company concerning the application to that company of the provision on abuse of law.

471 The Luxembourg tax authorities thus reserved the non-application of the provision on abuse of law for the Engie group.

472 Accordingly, the Commission demonstrated to the requisite legal standard that there was a derogation from the reference framework comprising the provision on abuse of law.

– *The alleged infringement of freedom of establishment*

473 The Grand Duchy of Luxembourg submits that prohibiting the financial arrangement on account of its allegedly abusive nature would infringe freedom of establishment within the meaning of Article 49 TFEU.

474 It must be pointed out that, since the situation at issue is a purely internal one, Article 49 TFEU does not, in principle, apply. Moreover, even if freedom of establishment were applicable, the finding of a possible restriction could be justified by the need to combat abuse of law (see, to that effect, judgment of 26 February 2019, *N Luxembourg 1 and Others*, C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 177).

475 In EU law, there is a general legal principle that EU law cannot be relied on for abusive or fraudulent ends. That principle seeks, inter alia, to prevent purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefiting from an improper advantage (judgment of 26 February 2019, *N Luxembourg 1 and Others*, C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraphs 96 and 125).

476 That is precisely the case where an artificial arrangement has been established under which, on account of the involvement of a conduit entity in the structure of the group between a company distributing income and the company which is its beneficial owner, payment of income tax is avoided (see, to that effect, judgment of 26 February 2019, *N Luxembourg 1 and Others*, C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 127).

477 Accordingly, the Commission was fully entitled to demonstrate the selectivity of the tax rulings at issue by reference to the fact that they derogated from the application of the provision on abuse of law in circumstances where the conditions for the application of that provision were nevertheless met.

478 Consequently, the Court must reject as unfounded the first and second pleas in Case T-516/18 and the second and third pleas in Case T-525/18, alleging that the Commission was wrong to find that the tax rulings at issue were selective in the light of the narrow reference framework and the provision on abuse of law, without there being any need, in any event, to rule on the merits of the arguments raised against the other lines of reasoning.

6. The fourth plea in Case T-525/18, alleging that the tax rulings at issue were incorrectly classified as individual aid

479 Engie submits that the selectivity of an individual tax ruling can be established only by reference to the legislation and administrative practice applicable to the tax measure at issue.

480 According to Engie, had the Commission taken account of the legislation and administrative practice applicable to the tax rulings at issue, it would have had to identify an aid scheme, as it did in Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium (OJ 2016 L 260, p. 61).

481 Engie states that, under identical tax rulings, other undertakings benefit from the same financing structure, as confirmed by the statements of the Member of the Commission responsible for competition matters.

482 Moreover, the Commission acknowledged in the contested decision that the financing structures endorsed by the tax rulings at issue were ‘open to any group in Luxembourg’ and that it was possible that ‘a specific category of undertakings – groups of undertakings using a direct ZORA – could also benefit from the same tax treatment’.

483 In the reply, Engie adds that the Commission should have established that, notwithstanding their general nature, the provisions on which the tax rulings at issue are based were in themselves liable to result in the grant of a selective advantage.

484 As regards the existence of a possible aid scheme, the Commission contends that groups of companies using a direct ZORA are not entitled to the same tax treatment as the Engie group, as is expressly clear from the contested decision. It also maintains that it cannot be prevented from finding that individual aid exists, even though that aid was part of a broader scheme. The reference to the decision delivered in the case concerning the excess profit exemption scheme in Belgium and to the Commission’s approach in that decision is therefore wholly irrelevant.

485 In that regard, irrespective of whether identical tax rulings exist, it should be noted that the Commission is able to consider a measure applying a general scheme as individual aid without first being required to demonstrate that the provisions on which that scheme is based constitute an aid scheme, even if that is the case (see, by analogy, judgment of 9 June 2011, *Comitato ‘Venezia vuole vivere’ and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 63).

486 Moreover, it is clear from paragraphs 382 and 477 above that the Commission demonstrated to the requisite legal standard that the tax rulings at issue granted a selective advantage to the holding companies concerned, inasmuch as they derogated from Articles 164 and 166 of the LIR and from the provision on abuse of law.

487 Accordingly, the Commission did not err in law in considering the tax rulings at issue to be individual aid.

488 In consequence, the fourth plea in Case T-525/18 must be rejected as unfounded.

7. The seventh plea in Case T-525/18 and the fifth plea in Case T-516/18, alleging, in the alternative, an error of law as regards the obligation to recover the aid allegedly granted

489 According to the Grand Duchy of Luxembourg and Engie, the Commission infringed the general principles of legal certainty and the protection of legitimate expectations by ordering, under Article 2 of the contested decision, recovery of the aid.

490 First of all, the Commission’s approach, based on the finding that the combination of two tax measures created an advantage, was not foreseeable for either the Grand Duchy of Luxembourg or for Engie due to its novel nature.

491 The novelty of that approach is all the more apparent from, first, the examination of the selectivity of the tax rulings at issue in the light of the objective of the reference framework comprising the provisions on which the Luxembourg corporate income tax system is based and, secondly, the non-application of the provision on abuse of law.

492 Thus, according to Engie, the unforeseeability of the contested decision called for a derogation from the obligation to recover the aid, in accordance with the principles of legal certainty and the protection of legitimate expectations.

493 Next, the Grand Duchy of Luxembourg and Engie state that the Commission's practice has been to qualify the obligation to recover aid where 'the complexity of the analysis of the tax measures in the light of the State aid rules leads to legal uncertainty'.

494 Lastly, according to Engie, the Commission undermined legal certainty by carrying out a disguised tax harmonisation of the Luxembourg provisions, which were clear and precise and left the Luxembourg authorities no discretion in the adoption of tax rulings.

495 The Commission disputes the merits of all those arguments. It maintains that it did not in any way infringe the principle of legal certainty by ordering recovery of the aid granted, adding that the complexity alleged by Engie results not from its reasoning, but from the tax arrangement established by Engie and endorsed in the tax rulings at issue by the Luxembourg tax authorities. Furthermore, its reasoning is not at all unprecedented and is based on conventional State aid principles.

496 In that regard, it should be borne in mind that, under Article 16 of Regulation 2015/1589, where negative decisions are taken in cases of unlawful aid, the Commission is to decide that the Member State concerned must take all necessary measures to recover the aid from the beneficiary, unless recovery would be contrary to a general principle of EU law.

497 In the present case, the Commission did not commit any error of law by ordering the Grand Duchy of Luxembourg, under Article 2 of the contested decision, to recover the aid. Contrary to what is claimed by the Grand Duchy of Luxembourg and Engie, such an obligation does not infringe either the principle of legal certainty or the principle of mutual trust.

498 In the first place, the principle of legal certainty – which is one of the general principles of EU law – requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law (judgment of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraph 100).

499 In other words, the persons concerned must be able to know precisely the extent of the obligations which EU rules impose on them and ascertain unequivocally what their rights and obligations are and take steps accordingly (judgment of 11 December 2012, *Commission* v *Spain*, C-610/10, EU:C:2012:781, paragraph 49).

500 In the present case, although the reasoning followed by the Commission indeed applied to a tax ruling, it was not at all unprecedented in decision-making practice.

501 Similarly, the way in which the Commission demonstrated the selectivity of the tax rulings at issue is based on its standard reasoning and on settled case-law in the field of State aid.

502 Moreover, as the Commission rightly points out, the real complexity that may be observed in the present case concerns the tax arrangement established by the Engie group and approved by the Grand Duchy of Luxembourg in order to finance the transfer of the business sectors to the Engie group's subsidiaries.

503 Accordingly, the Commission did not infringe the principle of legal certainty by ordering recovery of the aid.

504 In the second place, the same finding must be made as regards the principle of the protection of legitimate expectations.

505 The principle of the protection of legitimate expectations, which is a fundamental principle of EU law, allows any trader in regard to whom an institution has given rise to justified expectations to rely on those expectations (judgment of 22 April 2016, *France* v *Commission*, T-56/06 RENV II, EU:T:2016:228, paragraph 42).

506 In view of the mandatory nature of the review of State aid by the Commission, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure provided for in Article 108 TFEU (judgment of 12 September 2007, *Italy* v *Commission*, T-239/04 and T-323/04, EU:T:2007:260, paragraph 154).

507 Similarly, by its conduct, the Commission did not create any expectation that the tax rulings at issue were lawful under State aid law.

508 Accordingly, the Commission did not infringe the principle of the protection of legitimate expectations by ordering recovery of the aid.

509 Therefore, the seventh plea in Case T-525/18 and the fifth plea in Case T-516/18 must be rejected as unfounded and, in consequence, the actions must be dismissed in their entirety.

V. Costs

A. Case T-516/18

510 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Grand Duchy of Luxembourg has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission, in accordance with the form of order sought by the Commission.

511 Under Article 138(1) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs. Ireland must therefore bear its own costs.

B. Case T-525/18

512 Since Engie has been unsuccessful, it must be ordered, pursuant to Article 134(1) of the Rules of Procedure, to bear its own costs and to pay those incurred by the Commission, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. **Joins Cases T-516/18 and T-525/18 for the purposes of the judgment;**

2. **Dismisses the actions;**

3. **Orders the Grand Duchy of Luxembourg to bear its own costs and to pay those incurred by the European Commission in Case T-516/18;**

4. **Orders Engie Global LNG Holding Sàrl, Engie Invest International SA and Engie to bear their own costs and to pay those incurred by the Commission in Case T-525/18;**

5. **Orders Ireland to bear its own costs.**

Van der Woude Tomljenović Schalin

Škvařilová-Pelzl Nõmm

Delivered in open court in Luxembourg on 12 May 2021.

[Signatures]

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