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Advocate General's Opinion in Case C-454/21 P | Engie Global LNG Holding and Others v Commission and C-451/21 P | Luxembourg v Commission

Tax rulings: Advocate General Kokott considers that the Commission erred in finding that Luxembourg had granted unlawful State aid to the Engie group in the form of tax advantages

First, national law alone constitutes the reference framework and, second, only manifestly incorrect tax rulings under that national law may constitute a selective advantage

The Commission found, by decision of 20 June 2018, that Luxembourg had granted the Engie group unlawful State aid in connection with restructuring operations in Luxembourg.

In the Commission's view, the group had, in tax rulings, been granted tax treatment whereby almost all profits made by two subsidiaries in Luxembourg would ultimately remain untaxed. Even though there was only low taxation at the level of the operational subsidiaries through an agreed basis of assessment, the parent companies benefited from the tax exemption for participation income (group relief). As a result, a selective advantage was granted to the Engie group in derogation from Luxembourg tax law. The Commission considered that a relevant principle of correspondence (tax exemption at the level of the parent company only after taxation at the level of the subsidiary) can be inferred from national law. Moreover, according to the Commission, the tax authorities unlawfully failed to apply an anti-abuse rule.

The General Court of the European Union, hearing the actions brought by the Engie group and Luxembourg, fully endorsed the Commission's view and dismissed the actions. [1] The Engie group and Luxembourg thereupon lodged appeals before the Court of Justice.

In her Opinion delivered today, Advocate General Juliane Kokott proposes that the Court of Justice should uphold the appeals and, consequently, set aside the judgment of the General Court and annul the Commission decision.

The Advocate General first of all emphasises that **tax rulings do not, in themselves, constitute illegal State aid**. They are an important instrument for creating legal certainty. Tax rulings are unproblematic in terms of State aid law as long as they are open to all taxpayers and are in line with the relevant **national tax law**, which forms the **sole reference framework**.

In that respect, the Commission and the General Court proceeded on the basis of an incorrect reference framework. They had assumed that the Luxembourg tax law in force at the time contained a principle of correspondence, according to which a tax exemption for participation income at the level of the parent company is

[1] Judgment of 12 May 2021, Luxembourg e.a./Commission, T-516/18 and T-525/18 (see Press Release No 80/21).

contingent on taxation of the underlying profits at the level of the subsidiary. Such a link **is not, however, apparent** and cannot simply be interpreted into Luxembourg law because it might be preferable. The EU institutions cannot use State aid law to shape an ideal tax law.

In addition, the Advocate General argues in favour of only a **restricted standard of review in respect of tax law decisions taken by the tax authorities** that is limited to a **plausibility check**. Not any incorrect tax ruling, but **only tax rulings which are manifestly erroneous in favour of the taxpayer may constitute a selective advantage and be considered an infringement of State aid law**. Otherwise, the Commission would become a de facto supreme inspector of taxes and the Courts of the European Union, by dint of reviewing the Commission's decisions, would become de facto supreme tax courts, which would impinge on the Member States' fiscal autonomy in the field of non-harmonised taxes. **In the present case, the tax rulings are not manifestly erroneous**.

The standard of review should also be reduced to a plausibility check in respect of national tax authorities' review of the application of anti-abuse rules under State aid law. A manifest misapplication can be assumed only where it is not possible to explain plausibly why the case in question should not be considered a matter of abuse. **In the present case, the existence of abuse of legal structural possibilities under Luxembourg law is** however **not obvious and has not been established by the Commission**.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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

The full text of the Opinion is published on the CURIA website on the day of delivery.

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Pictures of the delivery of the Opinion are available from "Europe by Satellite" ✆ (+32) 2 2964106