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Judgment of the Court in Joined Cases C-885/19 P | Fiat Chrysler Finance Europe v Commission and C-898/19 P | Ireland v Commission

# Tax rulings: The Court of Justice holds that the General Court was wrong to confirm the reference framework used by the Commission to apply the arm's length principle to integrated companies in Luxembourg, in failing to take into account the specific rules implementing that principle in that Member State

*The Court thus annuls the decision of the Commission, finding that its analysis of the reference system and, by extension, the existence of a selective advantage granted to FFT is erroneous*

On 3 September 2012, the Luxembourg tax authorities adopted a tax ruling in favour of Fiat Chrysler Finance Europe ('FFT'), an undertaking of the Fiat group that provided treasury services and financing to the companies of the group established in Europe. The decision at issue approved a methodology for determining FFT's remuneration for those services, which enabled FFT to determine its corporate income tax liability to the Grand Duchy of Luxembourg on a yearly basis.

By decision of 21 October 2015, the Commission found that that tax ruling constituted State aid incompatible with the internal market within the meaning of Article 107 TFEU. It also found that Luxembourg had not notified the draft tax ruling at issue to it nor had it respected the standstill obligation, in contravention of the provisions of Article 108(3) TFEU. The Commission ordered Luxembourg to recover from FFT the unlawful and incompatible aid.

Luxembourg and FFT each lodged an appeal before the General Court seeking annulment of the Commission decision. By its judgment of 24 September 2019, the General Court dismissed the actions brought by Luxembourg and by FFT seeking annulment of the Commission decision, confirming the validity of that decision. [1] By their respective appeals, FFT (C-885/19 P) and Ireland (C-898/19 P) have requested that that judgment be set aside.

**By today's judgment, the Court of Justice sets aside the judgment delivered by the General Court on 24 September 2019 in the case *Luxembourg and Fiat Chrysler Finance Europe* v *Commission* (Joined Cases T-755/15 and T-759/15) and annuls the decision of the Commission of 21 October 2015 on the State aid granted by Luxembourg to FFT.**

As a preliminary point, the Court recalls that action by Member States in areas that are not subject to harmonisation by EU law is not excluded from the scope of the provisions of the FEU Treaty on monitoring State aid. It next recalls that the classification of a national measure as 'State aid' requires **four conditions** to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade

[1] See PR 118/19.

between the Member States. Third, it must confer a selective advantage on the beneficiary. Fourth, it must distort or threaten to distort competition.

As part of the analysis of tax measures, from the perspective of EU State aid law, the examination of the condition relating to **selective advantage** involves, as a first step, identifying the reference system, that is the 'normal' tax system applicable in the Member State concerned, then demonstrating, as a second step, that the tax measure at issue is a derogation from that reference system, in so far as it differentiates between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation, without finding any justification with regard to the nature or scheme of the system in question. For the purposes of assessing the selective nature of a tax measure, it is, therefore, necessary that the **common tax regime or the reference system applicable** in the Member State concerned be **correctly identified in the Commission decision** and examined by the court hearing a dispute concerning that identification.

In that regard, the Court concludes that, in so far as, outside the spheres in which EU tax law has been harmonised, it is the Member State concerned which determines, by exercising its own competence in the matter of direct taxation and with due regard for its fiscal autonomy, the characteristics constituting the tax, **only the national law applicable in the Member State concerned** must be taken into account in order to identify the reference system for direct taxation, that identification being itself an essential prerequisite for assessing not only the existence of an advantage, but also whether it is selective in nature.

According to the Court of Justice, the General Court committed an **error of law** in the application of Article 107(1) TFEU by failing to take account of the requirement arising from the case-law, according to which, in order to determine whether a tax measure has conferred a selective advantage on an undertaking, it is for the Commission to carry out a comparison with the tax system normally applicable in the Member State concerned, following an objective examination of the content, interaction and concrete effects of the rules applicable under the national law of that State. The General Court was wrong to endorse the approach consisting in applying an arm's length principle different from that defined by Luxembourg law, confining itself to identifying the abstract expression of that principle in the objective pursued by the general corporate income tax in Luxembourg and to examining the tax ruling at issue without taking into account the way in which the said principle has actually been incorporated into that law with regard to integrated companies in particular.

In addition, by accepting that the Commission may rely on rules which **were not part of Luxembourg law**, even though it recalled that that institution did not, at that stage of development of EU law, have the power autonomously to define the 'normal' taxation of an integrated company, disregarding national tax rules, the General Court **infringed the provisions of the FEU Treaty relating to the adoption by the European Union of measures for the approximation of Member State legislation relating to direct taxation**.

The Court concludes that the grounds of the judgment under appeal relating to the examination of the Commission's principal line of reasoning, according to which the tax ruling at issue derogated from the general Luxembourg corporate income tax system, are vitiated by an error of law **in that the General Court validated the Commission's approach**. More specifically, that error consisted, in essence, in not taking into account the arm's length principle as provided for in Article 164(3) of the Luxembourg Tax Code and specified in the related Circular No 164/2, when defining the reference system as part of the examination carried out under Article 107(1) TFEU for the purposes of determining whether the tax ruling at issue confers a selective advantage on its beneficiary.

Having regard to the foregoing, the Court sets aside the judgment under appeal, considers that the state of the proceedings so permits and, giving final judgment in the matter, annuls the decision at issue in so far as the error committed by the Commission in determining the rules actually applicable under the relevant national law and, therefore, in identifying the 'normal' taxation in the light of which the tax ruling at issue had to be assessed invalidates the entirety of the reasoning relating to the existence of an advantage. The annulment of the decision at issue cannot be avoided on account of the fact that the Commission also included in that decision, as a subsidiary point, a line of reasoning based on Article 164(3) of the Luxembourg Tax Code and the related Circular No 164/2.

The Court holds that that line of reasoning merely refers to the Commission's principal analysis of the correct reference system, so that it rectifies only in a superficial manner the Commission's error in the identification of the reference system that should have formed the basis of its analysis relating to the existence of a selective advantage.

**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 judgment is published on the CURIA website on the day of delivery.

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