



DIRECT TAX NEWS

JUDGEMENT OF THE EUROPEAN COURT OF JUSTICE: ENGIE GLOBAL LNG HOLDING AND OTHERS V COMMISSION

On 5 December 2023, the European Court of Justice (“ECJ”) ruled in favor of Engie and stated that the European Commission was wrong in claiming that Luxembourg granted State aid to the Engie Group.

I. Background and summary of the facts

- ▶ In 2018 the European Commission claimed that Luxembourg granted unlawful State aid via two series of tax rulings as part of complex corporate and financial arrangements within the Engie group. The decision of the European Commission was originally confirmed by the General Court of the European Union in 2021, requesting thereby Engie to reimburse taxes for EUR 120 million to the State of Luxembourg.
- ▶ The Commission, via its Commissioner, assessed that the Engie Group put in place a complex hybrid convertible loan structure involving three group companies by virtue of which that loan instrument was treated as debt from the perspective of the issuing company and as an investment in return of shares from the point of view of the Luxembourg beneficiary company. As a result, the Luxembourg issuing company was able to claim a deduction on such debt, whereas the beneficiary company exempted the income it received based on the Luxembourg participation exemption regime.
- ▶ The Commission and the General Court concluded that these tax rulings constituted State aid incompatible with the internal market and had to be recovered by the Luxembourg authorities from the beneficiaries.
- ▶ Engie and Luxembourg appealed the above decision to the ECJ. Following this appeal, Advocate General at the ECJ Kockott concluded on 4 May 2023 that the decision of the General Court was wrong.
- ▶ On 5 December 2023, The ECJ overturned the European Commission’s decision to force Engie to pay EUR 120 Million in taxes in Luxembourg.



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II. Arguments

- ▶ The ECJ reminds that, in order to determine whether a national measure constitutes State aid, the Commission must notably demonstrate a selective advantage has been granted to the Luxembourg company of the Engie group. In order to assess whether a tax measure is “selective”, it must first identify the reference tax system, i.e, the “normal” tax regime applicable in the State involved.
- ▶ In a second step to determine whether a tax measure is selective, the Commission must demonstrate that the measure at stake derogates from this reference system because it introduces a differentiation between companies in a comparable situation.
- ▶ According to the ECJ, the General Court wrongly defined and misinterpreted the Luxembourg reference tax system, including the provisions of the tax law and also the Luxembourg tax practice. In this respect, the ECJ stressed on the autonomy of each Member State, mentioning that « outside the spheres in which EU tax law has been harmonised, it is the Member State concerned which determines, by exercising its own competence in the matter of direct taxation and with due regard for its fiscal autonomy, the characteristics constituting the tax, which define, in principle, the reference system or the ‘normal’ tax regime, from which it is necessary to analyse the condition relating to selectivity”.
- ▶ The Commission should have therefore accepted Luxembourg’s interpretation of the provisions of its national law : in the Engie case, Luxembourg notably argued that the provisions of its tax law could not be interpreted as making entitlement to the exemption at the level of a parent company dependent on there being no tax deduction at the level of the subsidiary of the income generated (under the convertible loan agreement put in place).



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III. Court conclusion

- ▶ The Court considers that the Commission erred in its various analyses of the reference frameworks defining the normal taxation system. In addition, the Court ruled that the Commission cannot establish a derogation from a reference framework merely by finding that a measure departs from a general objective of taxing all companies resident in the Member State concerned, without taking account of provisions of national law specifying the manner in which that objective is to be implemented
- ▶ The Court affirms that the errors made by the Commission and the General Court vitiated the entire selectivity analysis, and annulled the Commission's decision.

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