



Dear Sir/Madam,

The CFE ECJ Task Force has issued an [Opinion Statement](#) on the decision of the CJEU of 5 December 2023 in Joined Cases C-451/21P and C-454/21P, *Engie*, on alleged State aid in relation to a deduction/non-inclusion structure in Luxembourg.

The *Engie* case concerns the question whether tax rulings issued by Luxembourg to companies part of the French energy group Engie are compatible with primary EU law, notably rules on State aid; and, whether, and to what extent, the Commission can invoke the concept of “abuse of law” for a State aid challenge of *ex ante* tax assessment issued by a tax authority of a Member state in the form of a tax ruling.

The Court set aside the General Court judgment of 12 May 2021, which initially upheld the European Commission findings of State aid. The CJEU’s Grand Chamber found that the European Commission did not establish to the appropriate legal standard that the tax rulings related to the zero-interest convertible loan (ZORA) provided selective advantage for the Engie entities. It did not establish the correct reference framework for assessment of State aid by way of excluding the legal basis for the tax ruling practice from the reference framework itself (Articles 164 and 166 LIR). By establishing an erroneous reference framework, the Commission relied on a wrongfully based

selectivity analysis, a key step in establishing State aid for purposes of Article 107(1) TFEU. Finally, the Court established that the Commission cannot invoke national anti-abuse rules to establish selectivity in a situation where the non-application of the “abuse of law” concept by tax authorities unless the non-application of the anti-abuse provisions is based on derogation from national law or administrative practice on anti-abuse provisions comparable to the case at issue (*in concreto*). Thus, the Grand Chamber judgment follows the Opinion of AG Kokott delivered on 4 May 2023.

The Court, however, opened the door for establishing selectivity of tax rulings such as those in the *Engie* case, where the basis for taxation consists of pre-agreed margin (mark-up), approved by the tax administration, and not under the rules of ordinary tax law, under specific conditions.

This Opinion Statement focuses on questions of law and the relevance for the development of the European Union State Aid law doctrine applicable to tax measures. The factual and corporate law aspects are analysed to the extent relevant for the State aid analysis.

CFE Tax Advisers Europe welcomes the clarification and further guidance on the applicability of Article 107(1) TFEU to national (individual) tax measures provided by the Grand Chamber of the CJEU in this judgment. It is equally relevant from a perspective of competence (overlap of national corporate tax law and primary EU law, i.e. rules on State aid), and from the perspective of compliance of Member States’ fiscal autonomy with the applicable rules on State aid.

Following *Fiat*, the CJEU confirmed that the Commission is in principle obliged to follow the Member state’s interpretation of national law, unless the Commission is able to prove, after an exchange of arguments with the Member State concerned, that another interpretation of national law prevails in the case-law or administrative practice of that Member State. The Court’s decision contributes to the dynamic balance of powers in the European Union’s legal order.

Following the *Fiat* and *Engie* judgments, the review of national tax measures remains possible but under strict conditions. The CJEU did not endorse a mere “plausibility check”. However, the Court pointed the Commission to another

direction for challenging individual tax ruling such as those in the *Engie* case, where the basis of taxation consists of pre-agreed margin (mark-up), approved by the tax administration, and not under the rules of ordinary tax law. Therefore, the Luxembourg tax rulings practice may be under further investigation after this decision, albeit on a different basis.

We invite you to read the [Opinion Statement](#) and remain available for any queries you may have.

Kind regards,

The Office Team at CFE Tax Advisers Europe