



Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 16 December 2021¹

Case C-885/19 P

Fiat Chrysler Finance Europe

v

European Commission

(Appeal – State aid – Aid granted by the Grand Duchy of Luxembourg – Decision declaring the aid incompatible with the internal market and ordering its recovery – Tax ruling – Arm’s length principle – Advantage – Selectivity – Principle of legal certainty)

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¹ Original language: French.

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I. Introduction

1. A ‘tax ruling’ is a common practice enabling undertakings to ask the tax administration for an advance decision as to the tax they will be liable to pay. The term ‘ruling’ signifies, generally, that the tax administration is – usually at the request of the taxpayer – adopting an official position as to the application of particular legislative provisions in force in the light of a situation or one or more transactions which have not yet produced fiscal effects. The taxpayers are thus seeking binding assurances from the administration as regards the tax treatment of their transactions.

2. In June 2014, the European Commission launched a series of investigations into the conformity with Treaty rules on State aid of the practices of the tax authorities of several Member States with respect to multinational undertakings, particularly as regards the allocation of profits between the various States in which those undertakings conduct their activities. One of those investigations led to the adoption of the decision on State aid said to have been granted by the Luxembourg tax authorities to the Fiat group.²

3. In parallel with this, revelations from the investigative journalism of the ‘Lux Leaks’ project brought the subject to the attention of the general public in November 2014, mostly prompting reactions of outrage.³ Following those revelations, a number of political leaders took actions, both at European and international level, seeking to remedy what was by then perceived as an affront to fair taxation. The most recent of those actions took shape as an agreement creating a global tax on the income of multinational undertakings.⁴

4. While keeping the political, economic and even societal context of the present case in mind, the Court of Justice will, in the judgment to be given, need to carry out an examination based exclusively on legal considerations of the issues arising from the approach taken by the Commission in adopting the decision at issue. The judgment delivered by the General Court in *Luxembourg and Fiat Chrysler Finance Europe v Commission*,⁵ which endorsed that approach, is the subject of the present appeal.

5. What was novel in the Commission’s approach was, in particular, the fact that it brought the arm’s length principle into its examination of whether there was an economic advantage. In those circumstances, the Court of Justice will have the opportunity to rule, in the judgment to be given, on certain issues relating to the application of that principle, such as whether it is necessary to take account of the effects of a tax ruling on the whole of the corporate group in question, in order to determine whether there is an advantage for the purposes of Article 107(1) TFEU.

² Commission Decision (EU) 2016/2326 of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat (OJ 2016 L 351, p. 1, ‘the decision at issue’).

³ The investigation was carried out jointly by the International Consortium of Investigative Journalists (ICIJ) and 40 other media partners. In that regard, see, in particular, article published in the newspaper *Le Monde*, available at: https://www.lemonde.fr/evasion-fiscale/article/2014/11/05/evasion-fiscale-tout-sur-les-secrets-du-luxembourg_4518895_4862750.html.

⁴ On that subject see, in particular, ‘Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy’, which was discussed in the OECD/G20 Inclusive Framework on base erosion and profit shifting and approved by 136 member jurisdictions on 8 October 2021, and is available at: <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>.

⁵ Judgment of 24 September 2019 (T-755/15 and T-759/15, EU:T:2019:670, ‘the judgment under appeal’).

II. Background to the dispute

A. The tax ruling issued to FFT by the Luxembourg tax authorities and the administrative procedure before the Commission

6. On 14 March 2012, the tax adviser of Fiat Chrysler Finance Europe, formerly Fiat Finance and Trade Ltd ('FFT'), sent a letter to the Luxembourg tax authorities asking them to approve a transfer pricing agreement. In support of that request, the tax adviser also sent a report which he had produced, analysing the transfer prices applied to transactions carried out by FFT.

7. On 3 September 2012, the Luxembourg tax authorities adopted a tax ruling in accordance with FFT's request ('the tax ruling at issue'). The ruling was contained in a letter which stated that, 'with respect to [the] letter dated [14 March 2012] regarding the intra-group financing activity of [FFT], [it is] hereby [confirmed] that the transfer pricing analysis hereafter has been realised in accordance with the Circular 164/2 of the 28 January 2011 and respects the arm's length principle'.

8. On 19 June 2013, the Commission sent the Grand Duchy of Luxembourg an initial request for detailed information on its national practice regarding tax rulings. That initial request for information was followed by a lengthy exchange of correspondence between the Grand Duchy of Luxembourg and the Commission until, on 24 March 2014, the Commission adopted a decision requiring information to be provided to it by the Grand Duchy of Luxembourg.

9. On 11 June 2014, the Commission decided to initiate the formal investigation procedure under Article 108(2) TFEU in respect of the tax ruling at issue. On 21 October 2015, the Commission adopted the decision at issue, declaring that tax ruling to constitute State aid for the purposes of Article 107(1) TFEU.

B. The decision at issue

1. Description of the essential content of the tax ruling at issue

10. The Commission described the tax ruling at issue as endorsing a method for arriving at a profit allocation to FFT within the Fiat/Chrysler automobile group, which enabled FFT to determine its corporate income tax liability to the Grand Duchy of Luxembourg on a yearly basis. The Commission pointed out that the tax ruling had been binding on the tax administration for a period of five years, from the 2012 tax year until the 2016 tax year.⁶

⁶ Recitals 9 and 52 to 54 of the decision at issue.

2. Description of the relevant Luxembourg rules

11. The Commission indicated that the tax ruling at issue had been issued on the basis of Article 164(3) of the Luxembourg Income Tax Code (loi du 4 décembre 1967 concernant l'impôt sur le revenu (Law of 4 December 1967 on income tax), as amended, 'the Tax Code')⁷ and Circular L.I.R. No 164/2 of 28 January 2011, issued by the director of Luxembourg taxes ('Circular No 164/2'). In that regard the Commission noted, first, that that article established the arm's length principle under Luxembourg tax law, according to which transactions between intra-group companies were to be remunerated as if they had been agreed to by independent companies negotiating under comparable circumstances at arm's length. Second, it observed that Circular No 164/2 explained in particular how to determine an arm's length remuneration where such transactions had been carried out by intra-group financing companies.⁸

3. Description of the OECD guidelines

12. The Commission outlined the transfer pricing guidelines of the Organisation for Economic Cooperation and Development (OECD) and indicated that transfer prices referred to prices charged for commercial transactions between various entities belonging to the same corporate group. It stated that, in order to avoid a situation where multinational companies had an incentive to allocate as little profit as possible in countries where their profits are subject to higher taxation, tax administrations should only accept transfer prices between integrated companies when, in accordance with the arm's length principle, transactions are remunerated as if they were agreed to by stand-alone companies negotiating under comparable circumstances at arm's length. The Commission noted that this principle appeared in Article 9 of the OECD Model Tax Convention on Income and on Capital.⁹

13. It pointed out that the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, adopted by the OECD's Committee on Fiscal Affairs on 27 June 1995 and updated on 22 July 2010 ('the OECD Guidelines'), set out five methods for approximating an arm's length pricing of transactions and profit allocation between integrated companies.¹⁰

14. The second of these is the transactional net margin method ('TNMM'), which is an indirect method used to approximate an arm's length pricing of transactions and profit allocation between companies of the same group. The Commission described that method as one that involves estimating what would be an arm's length profit for an entire activity, rather than for specific transactions. It also explained that, in order to make that assessment, it was necessary to select a profit level indicator, such as costs, turnover or fixed investment, to which would be applied a profit ratio reflecting that observed in comparable uncontrolled transactions.¹¹

⁷ That article provides that: 'Taxable income comprises hidden profit distributions. A hidden profit distribution arises in particular where a shareholder, a stockholder or an interested party receives either directly or indirectly benefits from a company or an association which he would normally not have received if he had not been a shareholder, a stockholder or an interested party.' It should be pointed out that that provision is no longer in force, as the Grand Duchy of Luxembourg introduced new Articles 56 and 56a, relating to the arm's length principle, into the Tax Code on 1 January 2017.

⁸ Recitals 74 to 83 of the decision at issue.

⁹ Recitals 84 to 87 of the decision at issue.

¹⁰ Recitals 88 and 89 of the decision at issue.

¹¹ Recital 91 of the decision at issue.

4. *Assessment of the tax ruling at issue*

15. As regards the third and fourth conditions for a finding of State aid, the Commission concluded that the tax ruling at issue conferred a selective advantage on FFT, in so far as it had resulted in a lowering of FFT's tax liability in Luxembourg by deviating from the tax which FFT would have been liable to pay under the ordinary corporate income tax system. It reached that conclusion after examining the issues of advantage and selectivity *concomitantly*, in an analysis following the three steps defined by the Court of Justice for the purposes of establishing whether a given tax measure is to be regarded as 'selective'.

16. In the first step of its analysis, the Commission considered that the reference framework was the general Luxembourg corporate income tax system and that the *objective* of that system was to tax the profits of all companies resident in Luxembourg. The Commission did not consider that the difference in the calculation of taxable profits, as between stand-alone and integrated companies, had any bearing on that objective, given that this was to tax the profits of all resident companies, whether integrated or not. It took the same view of special provisions applicable to groups, which were intended only to put both of those types of company on an equal footing. Moreover, the aim of the tax ruling at issue, which was to determine FFT's taxable profit for the purposes of levying corporate income tax under the general Luxembourg corporate income tax system, did not differentiate FFT on the basis that it belonged to a group, and thus confirmed that that system constituted the reference framework. In that regard, the Commission concluded that integrated and non-integrated companies were in a similar factual and legal situation in the light of the objective of the general Luxembourg corporate income tax system.¹²

17. In the second step of its analysis, the Commission first stated that the issue of whether a tax measure constitutes a derogation from the reference framework will *generally coincide* with the identification of the advantage granted to the beneficiary under that measure. In its view, where a tax measure results in an unjustified reduction of the tax liability of a beneficiary who would otherwise be subject to a higher level of tax under the reference framework, that reduction constitutes both the advantage granted by that measure and the derogation from the reference framework. Furthermore, the Commission observed that, in the case of an individual measure such as the tax ruling at issue, the identification of the advantage is in principle, according to the case-law, sufficient to support the presumption that it is selective.¹³

18. As regards the determination of the advantage in the present case, the Commission observed that a tax measure which results in a group company charging transfer prices lower than would be charged between independent undertakings confers an advantage on that company, in so far as that measure results in a reduction of its taxable base and thus its tax liability under the ordinary corporate income tax system. In the Commission's view, the Court of Justice had thus accepted that the arm's length principle, or 'the principle that transactions between intra-group companies should be remunerated as if they were agreed to by independent companies negotiating under comparable circumstances at arm's length',¹⁴ is a benchmark for establishing whether a group company receives an advantage for the purposes of Article 107(1) TFEU. Accordingly, the Commission explained that it was required to verify whether the methodology accepted by the Luxembourg tax administration in the tax ruling at issue departed from a

¹² Recitals 193 to 199 of the decision at issue.

¹³ Recitals 216 to 218 of the decision at issue.

¹⁴ Recitals 225 and 226 of the decision at issue.

methodology that led to a reliable approximation of a market-based outcome, and thus from the arm's length principle. If so, the tax ruling at issue would be deemed, according to the Commission, to grant a selective advantage to FFT for the purposes of Article 107(1) TFEU.¹⁵

19. Having regard to those considerations, the Commission concluded that a number of choices concerning methodology and parameters and a number of adjustments, approved by the Grand Duchy of Luxembourg and underlying the transfer pricing analysis in the tax ruling at issue, resulted in a reduction of the corporate income tax that stand-alone companies would have been obliged to pay.¹⁶

20. First, in relation to the capital to be remunerated, the Commission did not consider the tax adviser's chosen profit level indicator, namely FFT's hypothetical regulatory capital, to be appropriate in applying the TNMM in order to estimate an arm's length remuneration for the functions performed by FFT. The Commission thus found that, by using the hypothetical regulatory capital of EUR 28.5 million, instead of the accounting equity, which was EUR 287.5 million for 2011, as the basis for applying the capital asset pricing model ('CAPM'), the tax adviser had divided FFT's taxable remuneration by 10.¹⁷

21. Second, as regards the application of the Basel II framework in order to determine the hypothetical regulatory capital, the Commission considered that the Grand Duchy of Luxembourg had made errors that led to FFT's hypothetical regulatory capital being underestimated and resulted in a lowering of FFT's tax liability.¹⁸

22. Third, the Commission found that FFT's tax adviser had made several deductions from its remaining capital that departed from a market-based outcome. In that regard it took the view, in particular, that the tax adviser's decision to isolate the equity component designated as 'equity supporting the financial investments in [Fiat Finance North America Inc. ("FFNA")] and [Fiat Finance Canada ("FFC")]', and to accord it a zero remuneration for the purpose of estimating FFT's tax base, was inappropriate.¹⁹

23. Fourth, the Commission considered that the tax adviser's choice of a beta of 0.29 when using the CAPM to determine the return on capital to be applied to FFT's hypothetical regulatory capital resulted in a profit allocation to that company which was not in line with the arm's length principle.²⁰

24. Thus, the Commission concluded, in particular: (i) that the appropriate level of remuneration for the financing and treasury functions of FFT should be established on the basis of FFT's accounting equity; (ii) that 2012 was an appropriate reference year for assessing FFT's tax base in Luxembourg; (iii) that the pre-tax return on equity of 6.05% (and the post-tax return of 4.3%) accepted by the tax ruling at issue and calculated using the CAPM was well below the required returns on capital in the financial sector, which had remained consistently at or above 10%; and (iv) that the required post-tax return on equity was 10%, applied to the full amount of the accounting equity.²¹

¹⁵ Recitals 222 to 227 of the decision at issue.

¹⁶ Recitals 234 to 301 of the decision at issue.

¹⁷ Recitals 248 to 266 of the decision at issue.

¹⁸ Recitals 267 to 276 of the decision at issue.

¹⁹ Recitals 277 to 291 of the decision at issue.

²⁰ Recitals 292 to 301 of the decision at issue.

²¹ Recitals 302 to 311 of the decision at issue.

25. As a subsidiary point, the Commission found that, in any event, the tax ruling at issue also conferred a selective advantage under the more limited reference framework invoked by the Grand Duchy of Luxembourg and by FFT, consisting of Article 164(3) of the Tax Code and Circular No 164/2, which laid down the arm's length principle in Luxembourg tax law.²² Moreover, the Commission rejected FFT's argument that, in order to prove selective treatment benefiting FFT as a result of the tax ruling at issue, the Commission should have compared that ruling to the practice of the Luxembourg tax administration based on Circular No 164/2 and, in particular, to the tax rulings granted to other financing and treasury companies that the Grand Duchy of Luxembourg provided to the Commission as part of a representative sample of its tax ruling practice.²³

26. In the third step of its analysis, the Commission observed that neither the Grand Duchy of Luxembourg nor FFT had advanced any possible justification for the preferential treatment of FFT resulting from the tax ruling at issue and that, in any event, it had not been possible to identify any justification that could be regarded as deriving directly from the basic principles of the reference framework or resulting from inherent mechanisms necessary for the functioning and effectiveness of the system.²⁴

27. The Commission concluded that the tax ruling at issue had conferred a selective advantage on FFT and that it therefore constituted State aid within the meaning of Article 107(1) TFEU.

28. It found that the beneficiary of that aid was the entire Fiat/Chrysler automobile group, inasmuch as FFT formed an economic unit with the other entities of that group, and that the reduction in the tax payable by FFT necessarily had a downward effect on the price conditions of the intra-group loans it made.²⁵

C. Procedure before the General Court and the judgment under appeal

29. By application lodged at the General Court Registry on 30 December 2015, the Grand Duchy of Luxembourg brought the action in Case T-755/15, seeking annulment of the decision at issue.

30. By application lodged at the General Court Registry on 29 December 2015, FFT brought the action in Case T-759/15, also seeking annulment of the decision at issue.

31. By orders of 25 May 2016 and 18 July 2016, the President of the Fifth Chamber of the General Court granted the applications of Ireland and the United Kingdom to intervene in Cases T-755/15 and T-759/15. The United Kingdom withdrew its intervention by document lodged at the General Court Registry on 9 December 2016, and was removed as intervener from both cases by order of the President of the Seventh Chamber, Extended Composition, of 15 December 2016.

32. By order of the President of the Seventh Chamber, Extended Composition, of the General Court of 27 April 2018, the parties having been heard, Cases T-755/15 and T-759/15 were joined for the purposes of the oral part of the procedure, in accordance with Article 68(1) of the Rules of Procedure of the General Court. Furthermore, having heard the parties at the hearing, the General

²² Recitals 315 to 317 of the decision at issue.

²³ Recitals 318 to 336 of the decision at issue.

²⁴ Recitals 337 and 338 of the decision at issue.

²⁵ Recitals 341 to 345 of the decision at issue.

Court decided that it was appropriate for Cases T-755/15 and T-759/15 to be joined for the purposes of the decision closing the proceedings, on account of the connection between them, in accordance with that provision.

33. In support of their actions, FFT and the Grand Duchy of Luxembourg advanced five series of pleas, alleging, in essence:

- in the first series, infringement of Articles 4 and 5 TEU, in so far as the Commission’s analysis would lead to tax harmonisation in disguise (third part of the first plea in Case T-755/15);
- in the second series, infringement of Article 107 TFEU, of the obligation to state reasons laid down in Article 296 TFEU and breach of the principles of legal certainty and protection of legitimate expectations, in so far as the Commission considered that the tax ruling at issue conferred an advantage, particularly on the ground that that tax ruling did not comply with the arm’s length principle (second part of the first plea and first part of the second plea in Case T-755/15, second and third complaints in the first part of the first plea, first part of the second plea, third plea and fourth plea in Case T-759/15);
- in the third series, infringement of Article 107 TFEU, in so far as the Commission found that that advantage was selective (first part of the first plea in Case T-755/15 and first complaint in the first part of the first plea in Case T-759/15);
- in the fourth series, infringement of Article 107 TFEU and of the obligation to state reasons laid down in Article 296 TFEU, in so far as the Commission determined that the measure at issue restricted competition and distorted trade between Member States (second part of the second plea in Case T-755/15 and second part of the first and second pleas in Case T-759/15);
- in the fifth series, breach of the principle of legal certainty and infringement of the rights of the defence, in so far as the Commission ordered that the aid at issue be recovered (third plea in Case T-759/15).

34. By the judgment under appeal, the General Court rejected all of those pleas, and accordingly dismissed the actions in Cases T-755/15 and T-759/15 in their entirety.

35. As regards the second series of pleas, and in particular the pleas alleging an error in the application of the arm’s length principle in the monitoring of State aid, the General Court noted first of all that, in the context of determining the fiscal position of an integrated company, the pricing of intra-group transactions is not determined under market conditions. It went on to hold that, in determining whether there is an advantage within the meaning of Article 107(1) TFEU, the Commission may compare the fiscal burden of such an integrated undertaking resulting from the application of a fiscal measure with the fiscal burden resulting from the application of the normal rules of taxation under the national law of an undertaking carrying on its activities under market conditions, where national tax law does not make a distinction between integrated undertakings and stand-alone undertakings for the purposes of their liability to corporate income tax, and thus seeks to tax the profits of integrated undertakings as though they had arisen from transactions carried out at market prices.²⁶

²⁶ Paragraphs 140 and 141 of the judgment under appeal.

36. Against that background, the arm's length principle is, according to the General Court, a 'tool' or 'benchmark' which makes it possible to check whether the pricing of intra-group transactions accepted by the national authorities corresponds to pricing under market conditions, in order to determine whether an integrated company is receiving, pursuant to a tax measure determining its transfer pricing, an advantage within the meaning of Article 107(1) TFEU.²⁷

37. The General Court went on to observe that, in the present case, the tax ruling at issue concerns the determination of FFT's taxable profits under the Luxembourg Tax Code, and that the objective of that code is to tax the profit resulting from the economic activity of such an integrated undertaking as if it had resulted from transactions carried out at market prices. On that basis, it held that the Commission had been entitled to compare FFT's taxable profit as a result of the application of the tax ruling at issue with the taxable profit, as it would be if the normal tax rules under Luxembourg law were applied, of an undertaking in a factually comparable situation, carrying on its activities in conditions of free competition.²⁸

38. Lastly, the General Court rejected the arguments of the Grand Duchy of Luxembourg and FFT seeking to cast doubt on that conclusion.

39. As regards the arguments that the Commission had failed to provide any legal basis for its arm's length principle and had not defined the content of that principle, the General Court stated, in relation to the legal basis, that the Commission had made clear, first, that the arm's length principle necessarily formed part of the examination, under Article 107(1) TFEU, of tax measures granted to group companies, and second, that it was a general principle of equal treatment in taxation which fell within the application of that article of the Treaty.²⁹ As to the content of the arm's length principle, the General Court considered that it was apparent from the decision at issue that that principle was a tool for checking that intra-group transactions are remunerated as though they had been negotiated between stand-alone undertakings.³⁰

40. As regards the argument that the arm's length principle applied in the decision at issue was extraneous to Luxembourg tax law and that it thus resulted, ultimately, in a disguised harmonisation by the Commission of direct taxation, contrary to the fiscal autonomy of the Member States, the General Court held that this was unfounded, on the basis that the use of that principle was justified by the fact that the Luxembourg tax rules provided that integrated companies were to be taxed in the same way as stand-alone companies.³¹

41. As to the argument that the Commission had wrongly asserted, in the decision at issue, that there was a general principle of equal treatment in taxation, the General Court held that that wording was not to be taken out of context and could not be interpreted as recognition on the part of the Commission that there was a general principle of equal treatment in relation to tax inherent in Article 107(1) TFEU.³²

42. As to the plea based on errors in the method of calculation used to determine FFT's remuneration, the General Court held that, in the decision at issue, the Commission had correctly found, first, that FFT's capital should have been taken into account in its entirety for the purposes

²⁷ Paragraph 143 of the judgment under appeal.

²⁸ Paragraphs 145 and 148 of the judgment under appeal.

²⁹ Paragraph 150 of the judgment under appeal.

³⁰ Paragraph 155 of the judgment under appeal.

³¹ Paragraphs 156 to 158 of the judgment under appeal.

³² Paragraphs 160 and 161 of the judgment under appeal.

of calculating the remuneration for its intra-group financing and treasury activities;³³ second, that the Grand Duchy of Luxembourg should not have used the hypothetical regulatory capital of FFT as a base for calculating the risk remuneration;³⁴ and third, that the Grand Duchy of Luxembourg had wrongly excluded part of FFT's capital, equal to its shareholdings in its subsidiaries, from the capital to be taken into consideration for the purpose of determining FFT's remuneration for its intra-group financing and treasury activities.³⁵ The General Court consequently held that the methodology approved by the Luxembourg tax authorities had minimised FFT's remuneration, on the basis of which FFT's tax liability had been determined, and thus conferred an economic advantage on that company, and that it was unnecessary to consider the complaint put forward by the Grand Duchy of Luxembourg in relation to the error committed by the Commission in identifying the rate of return.

D. Procedure before the Court of Justice and forms of order sought by the parties to the appeal

43. By its appeal, Fiat Chrysler Finance Europe asks the Court of Justice:

- to set aside the judgment under appeal;
- to annul the decision at issue or, in the alternative, if and to the extent that the Court of Justice should be unable to make a final decision, to refer the case back to the General Court; and
- to order the Commission to pay Fiat Chrysler Finance Europe's costs of the appeal proceedings and of the proceedings before the General Court.

44. The Commission asks the Court of Justice:

- to dismiss the appeal; and
- to order Fiat Chrysler Finance Europe to pay the costs.

45. Ireland asks the Court of Justice:

- to set aside the judgment under appeal;
- to annul the decision at issue; and
- to order the Commission to pay the costs.

46. Fiat Chrysler Finance Europe, Ireland, the Grand Duchy of Luxembourg and the Commission presented oral argument to the Court of Justice at a hearing of both cases (C-885/19 P and C-898/19 P) which was held on 10 May 2021.

³³ Paragraphs 209 to 251 of the judgment under appeal.

³⁴ Paragraphs 252 to 264 of the judgment under appeal.

³⁵ Paragraphs 265 to 278 of the judgment under appeal.

III. The appeal

47. FFT, which is supported by Ireland, advances three grounds of appeal. Under the first ground, it is argued that the General Court infringed Article 107(1) TFEU in that it made a number of errors in its analysis of whether the applicant had received an economic advantage. Under the second ground, it is argued that the General Court infringed the obligation to state reasons in that its analysis of the legal basis for the arm's length principle is inadequate and contradictory. Under the third ground, it is argued that the General Court infringed the principle of legal certainty by (i) endorsing the ill-defined 'arm's length' principle without addressing its scope or content, and (ii) holding that the presumption of selectivity applied to the tax ruling at issue. In the interests of clarity and consistency, I shall begin with FFT's second ground of appeal.

A. The second ground of appeal

1. *Arguments of the parties*

48. By the first part of the second ground of appeal, FFT maintains that the judgment under appeal is vitiated by inconsistent and contradictory reasoning in its analysis of the legal basis for the Commission's arm's length principle. It argues that, while endorsing the Commission's recommended approach, the General Court blatantly contradicts it by making the application of the arm's length principle conditional on its incorporation into the laws of the relevant Member State, without any trace of logic or explanation. Furthermore, the General Court states that the Commission's arm's length principle is not derived from national law or OECD sources, and instead is part of Article 107 TFEU as a principle of equal treatment in taxation, but at the same time that Article 107 does not encompass any principle of equal treatment in taxation. FFT submits that this is a scrambled and incoherent line of argument which vitiates the reasoning of the judgment.

49. By the second part of the second ground of appeal, FFT maintains, first, that the General Court was wrong to endorse, as it did in paragraph 142 of the judgment under appeal, the reference in the decision at issue to the judgment in *Forum 187*³⁶ in support of the contention that the arm's length principle applies regardless of whether it has previously been incorporated into national law. In that regard, FFT submits, furthermore, that the General Court failed to take account of the effect of the change of stance regarding the applicability of the judgment in *Forum 187*. Second, FFT submits that the General Court's reasoning in the judgment under appeal gives a contorted picture of the basis of the arm's length principle. It follows that that reasoning is manifestly erroneous, incoherent and contradictory, and breaches the General Court's obligation to state reasons.

50. The Commission submits that the second ground of appeal should be rejected as ineffective. In any event, it argues, both the first and the second part of this ground should be rejected on their merits. As regards the first part, the Commission contends that it is based on a selective and distorted reading of the judgment under appeal and should therefore be rejected. As to the second part, the Commission submits *inter alia* that the General Court was entitled to regard the judgment in *Forum 187* as supporting its conclusion on the legal basis of the arm's length principle.

³⁶ Judgment of 22 June 2006, *Belgium and Forum 187 v Commission* (C-182/03 and C-217/03, EU:C:2006:416, 'the judgment in *Forum 187*').

2. Effectiveness of the second ground of appeal

51. The Commission submits that the second ground of appeal is ineffective inasmuch as, even if it were upheld, it could not result in the setting aside of the judgment under appeal. This ground is based on the assertion that the General Court erred in law in endorsing the Commission's use of a *sui generis* arm's length principle in support of its principal finding as to the existence of a selective advantage. However, even if that assertion were correct (which the Commission disputes), the decision at issue contains a subsidiary line of reasoning with a different legal basis, namely Article 164(3) of the Tax Code and Circular No 164/2. That line of reasoning was approved by the General Court and has not been challenged by FFT.

52. In that regard, I should first point out that a subsidiary line of reasoning is set out in recitals 315 to 317 of the decision at issue, according to which the tax ruling at issue also grants FFT a selective advantage in the context of the more limited reference framework composed of all integrated companies which apply transfer pricing and to which the national provisions referred to above are applicable. This line of reasoning was, in essence, endorsed by the General Court in paragraphs 287 to 299 of the judgment under appeal.

53. It is clear that the issue of the legal basis of the arm's length principle was considered by the General Court principally in paragraphs 140 to 148 of the judgment under appeal, which may give the impression that upholding the present ground of appeal would not affect the subsidiary examination carried out by the General Court in paragraphs 287 to 299 of that judgment. However, a closer reading of the judgment under appeal reveals that that examination cannot be regarded as *severable and autonomous* from the General Court's principal line of reasoning, as set out in paragraphs 140 to 148 of that judgment.

54. In its analysis of the Commission's subsidiary line of reasoning, the General Court recognised that the Commission had – correctly – carried over some aspects of its principal line of reasoning. In particular, it observed, in paragraphs 292 and 294 of the judgment under appeal, that the Commission's subsidiary line of reasoning was based on its principal examination of the tax ruling at issue, and particularly on Section 7.2.2 of the decision at issue – which, it seems to me, contains the Commission's arguments on the legal basis and scope of the arm's length principle and the application of that principle to the present case.³⁷ Given that the legal basis of the Commission's subsidiary line of reasoning, as approved by the General Court, is derived from its principal examination, its validity in law must depend on that of the principal examination. In other words, if the second ground advanced by FFT were to be upheld, thus invalidating the use of the arm's length principle, the subsidiary line of reasoning would also be vitiated by an error of law, such that the conclusion drawn from it in the decision at issue, as affirmed by the judgment under appeal, could not stand.

55. For those reasons I do not consider that the second ground of this appeal can be declared to be ineffective.

³⁷ See Section 7.2.2.1 of the decision at issue ('Selective advantage resulting from a deviation from the arm's length principle').

3. *Substance of the first part*

56. As a preliminary remark, I would observe that, according to settled case-law, the statement of the reasons on which a judgment of the General Court is based must clearly and unequivocally disclose its thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review.³⁸

57. The Court of Justice will therefore need to determine whether the reasoning of the judgment under appeal, as regards the legal basis of the arm's length principle, conforms with the requirements of that case-law. To my mind that question should be answered in the affirmative, for the reasons which follow.

58. First, I would note that the criticisms raised by FFT in its appeal are mainly directed against paragraphs 149 to 162 of the judgment under appeal. In my view, however, it is clear that the essential part of the General Court's reasoning as to the legal basis of the arm's length principle applied in the decision at issue is to be found in paragraphs 140 to 148 of that judgment.

59. As I have already observed, the General Court essentially stated, in paragraph 140 of the judgment under appeal, that the fiscal burden of any integrated company is not determined in accordance with the logic of the market, as the pricing of intra-group transactions is agreed between companies belonging to the same group. It went on, in paragraph 141 of the judgment under appeal, to state that where a fiscal measure is granted to an integrated undertaking, the Commission may determine whether there is an economic advantage by comparing the fiscal burden resulting from the application of that measure with that resulting from the application of the 'normal' rules of taxation under national law, as borne by an undertaking placed in a comparable situation.

60. Before giving that description of the content of the arm's length principle used in the decision at issue, the General Court had stated, in the same paragraph, that that principle is applicable 'where national tax law does not make a distinction between integrated undertakings and stand-alone undertakings for the purposes of their liability to corporate income tax', given that, in such circumstances, 'that law is intended to tax the profit arising from the economic activity of such an integrated undertaking as though it had arisen from transactions carried out at market prices'. Thus, the judgment under appeal clearly indicates that the legal basis of the arm's length principle lies in national law, and more specifically in the fact that that law reflects the intention of the national legislature to treat integrated companies, for tax purposes, in the same way as stand-alone companies with respect to corporate income tax. While the General Court did refer, in paragraph 142, to the judgment in *Forum 187*, this was simply to support the conclusions it had drawn.

61. The legal basis of the arm's length principle thus having been set out, after describing, in paragraphs 143 and 144 of the judgment under appeal, the role of that principle in determining whether there is an advantage within the meaning of Article 107(1) TFEU, the General Court held, in paragraph 145 of that judgment, that that principle was applicable in the present case because the Luxembourg Tax Code was specifically intended to tax integrated and stand-alone companies in the same way with regard to corporate income tax. In paragraph 147 of the

³⁸ See judgment of 29 April 2021, *Achemos Grupė and Achema v Commission* (C-847/19 P, not published, EU:C:2021:343, paragraph 60 and the case-law cited).

judgment under appeal, the General Court added that, although the Commission was not bound by the OECD Guidelines in implementing the arm's length principle, those guidelines had 'a real practical significance in the interpretation of issues relating to transfer pricing'.

62. Having regard to those considerations, the General Court's reasoning in paragraphs 149 to 162 of the judgment under appeal, which were added to address certain arguments advanced by FFT and the Grand Duchy of Luxembourg at first instance, is not inconsistent or inherently contradictory.

63. In that regard it should be observed, first, that there is no contradiction between the statement that the arm's length principle as described in the decision at issue exists 'independently of the incorporation of that principle into the national legal system' – which follows from recitals 228 and 229 of that decision and was essentially approved by the General Court in paragraph 149 et seq. of the judgment under appeal – and the idea that that principle is applicable in the present case because it is 'inherent in the ordinary system of taxation as provided for by national law', as the Commission put it at the hearing before the General Court and as that Court restated in paragraph 152 of the judgment under appeal.

64. To my mind, the words of paragraph 152 of the judgment under appeal have to be assimilated with those of the first sentence of paragraph 141 of that judgment. In other words, it would be a mistake to understand them, as FFT does, as meaning that the General Court made the possibility of using the arm's length principle applied in the decision at issue conditional on its prior incorporation into national law. On the contrary, the General Court was indicating that the arm's length principle is applicable irrespective of whether it has been *expressly codified* in national law, provided it can be seen that the national system of corporate taxation *seeks to* treat integrated companies, for tax purposes, in the same way as stand-alone companies, which is entirely consistent with the contents of paragraph 149 of the judgment under appeal.

65. Second, I do not consider that the clarity and coherence of the General Court's reasoning as to the legal basis of the arm's length principle are compromised, as FFT argues, by the fact that, in paragraphs 147 and 149 of that judgment, the General Court endorsed the Commission's statement that the arm's length principle which was applied in the decision at issue was distinct from the OECD principle. In that regard I would emphasise that it is apparent from the reasoning, considered as a whole, that the General Court did not hold that the legal basis of that arm's length principle lay in a codified legal standard, which – necessarily – would have been introduced in order to transpose the arm's length principle developed within the OECD into national tax law.

66. Third, and last, I would observe that the inconsistency which FFT claims exists between paragraphs 150 and 161 of the judgment under appeal is based on a misunderstanding of those paragraphs. It is therefore useful to examine their wording.

67. In paragraph 150 of the judgment under appeal, the General Court stated that the Commission had indicated, in recital 228 of the decision at issue, that the arm's length principle was 'a general principle of equal treatment in taxation, *which fell within the application of Article 107 TFEU*'.³⁹ In paragraph 161 of that judgment, the General Court dealt with a

³⁹ Emphasis added.

submission advanced by Ireland and FFT, indicating that this wording could not be interpreted as asserting that there was a ‘general principle of equal treatment in relation to tax *inherent in Article 107(1) TFEU*’.⁴⁰

68. Contrary to FFT’s contention, recital 228 of the decision at issue, as reproduced in paragraph 150 of the judgment under appeal, does not necessarily mean that the arm’s length principle is derived from Article 107(1) TFEU. On the contrary, it seems to me that, in paragraph 161 of the judgment under appeal, the General Court rejected such an interpretation of that recital, in a manner entirely consistent with the conclusion it had reached, in paragraph 141 of that judgment, that the legal basis of the arm’s length principle lay in national law, and more specifically in the fact that that law reflected the intention of the national legislature to treat integrated companies, for tax purposes, in the same way as stand-alone companies with respect to corporate income tax. The issue of whether such a legal basis is consistent with the relevant case-law does not arise under this ground of appeal.

69. Since the General Court’s reasoning with regard to the legal basis of the arm’s length principle meets the requirements of clarity and consistency imposed by the case-law, it would be appropriate in my opinion for the Court of Justice to dismiss the first part of the present ground of appeal.

4. *Substance of the second part*

70. The second part of the second ground of appeal also relates to FFT’s contention that the reasoning of the judgment under appeal is incoherent and contradictory.

71. By its first complaint, FFT maintains that the corresponding infringement of the obligation to state reasons arose out of a misunderstanding of the effect of the judgment in *Forum 187*.

72. In that regard, it should be recalled that, in the decision at issue, the Commission had taken the judgment of the Court of Justice in *Forum 187* to endorse the use of the arm’s length principle in order to establish whether a tax measure based on a method of calculating the taxable profit of a group company gives rise to a selective advantage for the purposes of Article 107(1) TFEU.⁴¹

73. FFT submits that the General Court took paragraph 95 of the judgment in *Forum 187* out of context when it stated, in paragraph 142 of the judgment under appeal, that the Court of Justice had recognised the need to compare a regime of derogating aid with the ‘ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition’. It argues that this phrase ignores the legal context in question, in which the ‘ordinary tax system’ (national tax law) expressly requires such an assessment.

74. I should consider whether that position can be upheld.

75. In the case giving rise to the judgment in *Forum 187*, the Court of Justice considered a decision in which the Commission had concluded that the Belgian tax regime for approved coordination centres was a State aid scheme which was incompatible with the common

⁴⁰ Emphasis added.

⁴¹ See, in that regard, recital 225 of the decision at issue.

market.⁴² Amongst numerous economic advantages available to such coordination centres under that tax regime was a method for determining their taxable income. The taxable profits were set at a flat rate using the ‘cost plus’ method and represented a percentage of the amount of operating costs and expenses, excluding (amongst other things) staff costs and financial charges. In the absence of any information concerning the activity carried out, the percentage of profits to be taken into account was set at 8%. The profit thus established was taxed at the normal rate of corporation tax.

76. In order to decide whether that tax regime conferred an advantage on the coordination centres, the Court of Justice considered it necessary, as it stated in the passage cited by the General Court in paragraph 142 of the judgment under appeal, to compare that tax regime with the ordinary tax system, in which the taxable income of any undertaking carrying on its activities in conditions of free competition corresponded to the difference between the income and outgoings of that undertaking.⁴³ Thus, the Court of Justice had concluded that the effect of excluding staff costs and financial charges – which made a major contribution to enabling the coordination centres to earn revenue – from the expenditure which served to determine the taxable income of those centres was that ‘the transfer prices [did] not resemble those which would [have been] charged in conditions of free competition’.⁴⁴

77. There is no doubt, according to the Commission, that in reaching that conclusion the Court of Justice was applying the arm’s length principle. Although that principle is not mentioned in paragraphs 95 and 96 of the judgment in *Forum 187*, the Commission considers that the use of the phrase ‘carrying on its activities in conditions of free competition’, in paragraph 95, and the term ‘transfer prices’, in paragraph 96, leaves no room for any other interpretation.

78. As regards the legal basis for applying that principle, the Commission – like FFT – points out that in the judgment in *Forum 187* the Court of Justice compared the tax treatment of coordination centres with the ordinary rules of Belgian law. It adds however that the reason why the Court of Justice took the tax treatment of stand-alone companies as the benchmark for the purposes of determining that an advantage had been conferred on those centres was the same as that given by the General Court in paragraphs 141 and 145 of the judgment under appeal, namely that the ultimate objective of the national tax regime at issue was to ensure that the tax base of an integrated company was assessed in the same way as that of a stand-alone company.

79. I do not find that interpretation of the judgment in *Forum 187* convincing.

80. At no point in that judgment is it stated that Member States are required to implement the arm’s length principle where their national law does not incorporate that principle. To my mind that is not surprising, given that this was not the legal question to which the Court’s interpretation related.

81. The structure of the Court’s reasoning in that judgment makes this clear. First of all, the Court sets out, in paragraphs 91 to 93, the essential features of the method used to determine taxable profits under the tax regime provided for by arrêté royal No°187, du 30 décembre 1982, relatif à la création des centres de coordination (Royal Decree No 187 of 30 December 1982 concerning

⁴² Commission Decision 2003/757/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ 2003 L 282, p. 25).

⁴³ Judgment in *Forum 187*, paragraph 95.

⁴⁴ Judgment in *Forum 187*, paragraph 96.

the establishment of coordination centres).⁴⁵ It then states, in paragraph 94, that that method ‘is based on the so-called cost-plus method recommended by the [OECD] for the taxation of services provided by a subsidiary or a fixed establishment on behalf of companies belonging to the same international group and established in other States’, before holding, in essence, in paragraphs 95 and 96, that it was necessary to compare the amount of taxable income resulting from the application of that tax regime with that resulting from the application of the ordinary tax system.

82. It follows that the Belgian legislature had incorporated into its national law a method analogous to the ‘cost-plus’ method, which is one of the transfer pricing methods recommended by the OECD for indirectly determining the arm’s length price of an intra-group transaction. However, as had been pointed out by Advocate General Léger in point 257 of his Opinion in that case, the applicant had not challenged the fact that whether or not an advantage exists fell to be assessed on the basis of the criterion underlying the OECD’s ‘cost-plus’ method, namely that the transfer prices must be set at a level which results in them being the same as those which would apply at arm’s length.⁴⁶ Furthermore, it is apparent from the Commission’s decision that the Belgian administration was obliged to refer, when determining those prices, to the OECD reports.⁴⁷

83. Thus, it seems to me that the legal issue being decided by the Court of Justice was logically predicated on the arm’s length principle having been integrated into national law. Once a Member State has chosen to incorporate into its national law a method for determining the taxable profits of integrated companies that is analogous to the OECD ‘cost-plus’ method, *and therefore has the objective of taxing such companies on a basis comparable to that on which they would be taxed under the ordinary system*, that State confers an economic advantage on such companies where it includes, within that method, provisions which have the effect of reducing the tax burden as compared to that which those companies would normally bear under that system.

84. Nevertheless, I do not consider that the General Court’s reasoning as to the legal basis of the arm’s length principle can be said to be incoherent or contradictory simply on the basis of the mistaken reference to the judgment in *Forum 187*, inasmuch as that reference does not constitute the necessary support for the reasoning developed in the judgment under appeal.

85. As regards the second complaint, I would make the preliminary remark that FFT refers to paragraphs 152 and 153 of the judgment under appeal, in which the General Court held, in essence, that what had been claimed to be a changed stance adopted by the Commission at the hearing (‘that [the arm’s length principle] ... was inherent in the ordinary system of taxation as provided for by national law’) could not, in any event, have affected the finding that it was apparent from the decision at issue that the arm’s length principle ‘was being applied in the context of the examination of a national tax measure under Article 107(1) TFEU’.

86. As regards the lack of consideration of the impact of the Commission’s change of stance on the validity of the reference to the judgment in *Forum 187* in support of a conclusion largely analogous to that reached in the decision at issue as regards the legal basis of the arm’s length principle, I would observe that FFT cannot contend, as it seeks to, on the one hand, that the

⁴⁵ *Moniteur Belge* of 13 January 1983.

⁴⁶ Opinion in *Belgium and Forum 187 v Commission* (C-182/03 and C-217/03, EU:C:2006:89).

⁴⁷ Recital 95 of Decision 2003/757. In that regard, the Commission refers to item 26/48 in the commentary to the code des impôts sur les revenus 1992 (Income Tax Code 1992, Belgium).

Commission has retreated from the stance it adopted in the decision at issue, and on the other, that the General Court was wrong to ignore that argument. I agree with the analysis in paragraph 153 of the judgment under appeal, according to which the Commission cannot change the stance taken in the decision at issue at the hearing stage.⁴⁸ It follows that the General Court could not have incorporated the argument advanced at the hearing into its reasoning.

87. As to the contorted picture of the origin of the arm's length principle which is said to emerge from the judgment under appeal, it seems to me that FFT is referring not only to paragraphs 152 and 153 of that judgment, but also to paragraphs 150, 151 and 161 thereof. On those grounds, the General Court held that the arguments based on the failure to identify the legal basis of the arm's length principle in the decision at issue, and on the imprecise description of that principle as 'a general principle of equal treatment in taxation', could not invalidate the reasoning set out in paragraphs 140 to 148 of the judgment under appeal.

88. In particular, the General Court observed that the decision at issue had described the arm's length principle as a 'tool' which could be used in the context of the examination carried out under Article 107(1) TFEU, and as a general principle of equal treatment in taxation which 'fell within the scope of' (not 'was inherent in') that provision of the Treaty.

89. It seems to me that paragraphs 150 to 153 and 161 are entirely consistent with the observations made by the General Court about the legal basis of the arm's length principle, particularly in paragraph 141 of the judgment under appeal. In conclusion, and in so far as the General Court's reasoning in this case cannot be criticised as incoherent or contradictory, I do not consider that the second complaint can be upheld.

90. In the light of all of those considerations, the second part of the second ground of appeal should, in my view, be rejected.

B. The first ground of appeal

1. Arguments of the parties

91. Under the first part of the first ground of appeal, FFT maintains that the General Court misapplied the legal test for determining whether the tax ruling at issue had approved a transfer pricing methodology that went beyond the inaccuracies inherent in that methodology.⁴⁹ FFT submits that the alleged errors in the method for calculating its remuneration used in the tax ruling at issue are based on a fundamental misunderstanding of the TNMM used to determine the hypothetical arm's length profits of FFT for the activities to which the ruling related. In particular, it argues, it is important to bear in mind that the TNMM does not relate to everything a company does, but only to the activity for which an arm's length profit is sought. In so far as FFT carries out other activities, therefore, those activities have no relevance to the application of the TNMM.

⁴⁸ Contrary to FFT's submissions, paragraph 117 of the judgment of 25 June 1998, *British Airways and Others v Commission* (T-371/94 and T-394/94, EU:T:1998:140), to which the General Court refers, in support of that conclusion, in paragraph 153 of the judgment under appeal, in no way states that oral statements made by the Commission at the hearing, altering the reasoning of the decision at issue, can nevertheless be adopted as part of the reasoning of the General Court.

⁴⁹ On that basis, FFT challenges the General Court's analysis in paragraphs 188 to 286 of the judgment under appeal, relating to the Commission's primary line of argument, and that in paragraphs 287 to 299 of that judgment, relating to its secondary line of argument.

92. FFT submits that it was not open to the General Court to conclude that the tax ruling at issue approved a methodology that went beyond the broad margin of appreciation which must necessarily be allowed in this area, having regard to the complexity of the financial transactions and the element of subjectivity inherent in the TNMM. It contends that the Commission is required to demonstrate that the supposed methodological errors cause a significant divergence from an arm's length outcome.

93. It submits that, by failing to take account of the breadth of the margin of appreciation to be afforded in the drafting of the tax ruling at issue, the General Court made an error of law in its examination of the first, second and fourth errors alleged by the Commission, in endorsing the Commission's criticisms and thus concluding that the ruling conferred an advantage on FFT.

94. As regards the first alleged error, which related to the possibility of segmenting the capital of an integrated company by reference to its various activities, FFT submits, in essence, that the General Court made numerous errors in adopting the Commission's conclusions and holding that FFT ought to have included the entirety of its accounting equity when applying the TNMM. As regards the second alleged error, which related to the use of hypothetical regulatory capital as the profit level indicator for remuneration of the risks linked to FFT's intra-group financing and treasury activities, FFT submits that the fact that regulatory capital does not constitute a right to the profits of the entity concerned, or to the remuneration of the risks borne by that entity is irrelevant. As regards the fourth alleged error, which related to the fact that FFT's shareholdings in FFNA and FFC were not taken into consideration in calculating the remuneration for FFT's intra-group financing and treasury activities, FFT submits that there are two errors of law in the General Court's analysis in paragraph 274 of the judgment under appeal, namely a reversal of the burden of proof and the statement that excluding FFT's shareholdings in those subsidiaries did not enable an appropriate comparison to be made of FFT with other undertakings operating on the market.

95. In response, the Commission submits that the first part of the first ground of appeal must be declared inadmissible. It also disputes all the substantive arguments advanced by FFT, and therefore submits that that part should be rejected.

96. Under the second part of the first ground of appeal, FFT submits that the General Court erred in taking account only of the tax effects on FFT, in order to determine whether the tax ruling at issue conferred an advantage for the purposes of Article 107(1) TFEU. In taking that approach, the General Court failed adequately to consider the intra-group and cross-border dimension of the effects of that ruling on the Fiat/Chrysler group. The judgment under appeal, and more specifically paragraphs 317 and 318 of that judgment, thus contain two series of errors. First, FFT submits, the General Court was wrong to conclude that FFT had not demonstrated that the advantage had been 'neutralised' at group level. Second, the General Court was wrong to hold that group effect could be ignored in determining whether there was an economic advantage. In this last regard, FFT submits that, in ignoring group effect, the General Court adopted a position inconsistent with its own assertion that any advantage to FFT is an advantage for the whole Fiat/Chrysler group.

97. The Commission submits that the second part of the first ground of appeal should be declared ineffective, or in any event that it should be rejected on its merits, as none of the arguments advanced by FFT in support of it can be accepted.

2. *The first part*

(a) *Admissibility*

98. The Commission submits that the whole of the first part of the first ground of appeal is inadmissible, on the basis that FFT is seeking a reassessment of the methodological errors that the Commission identified in the transfer pricing agreement established by the tax ruling at issue on the basis of a new fact or a new line of reasoning.

99. In that regard, the Commission observes that FFT's main criticism is that the General Court failed to take account, in its assessment of the Commission's analysis in the decision at issue, of the fact that FFT was carrying out two distinct activities, namely the bearing of risks associated with its financing and treasury roles, and the provision of intra-group finance services and treasury functions. While accepting that the Grand Duchy of Luxembourg argued at length, before the General Court, that the Commission's methodological objections to the application of the TNMM in the transfer pricing agreement were unjustified, the Commission contends that that Member State never made a distinction between those activities. It follows, the Commission submits, that in the present appeal FFT is not raising a legal issue relating to a misapplication of the legal test for verifying whether there is an advantage in the present case; rather it is challenging the application of that test based on an *alleged fact* that was never presented to the General Court.

100. Even if it could be argued that this alleged fact was apparent from the documents before the General Court, it would have to be concluded, according to the Commission, that this part of the first ground of appeal is based on reasoning which is not merely an amplification of an argument raised in the proceedings before the General Court, but an entirely new argument.

101. As a preliminary matter, I should briefly set out the principles to which the Court of Justice will need to have regard in ruling on the Commission's objection of inadmissibility.

102. The Commission's position is based, in essence, on the settled case-law according to which the jurisdiction of the Court of Justice is limited to assessing the findings of law on the pleas and arguments put before the General Court, and accordingly, in principle, a party cannot put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court, since that would allow that party to bring before the Court of Justice a wider case than that heard by the General Court.⁵⁰

103. As FFT observes in the reply, the Court of Justice has also repeatedly stated that an appellant is entitled to rely on pleas which arise from the judgment under appeal itself and which seek to criticise, in law, its correctness.⁵¹ It is thus entirely possible for the legal argument advanced on appeal to differ from that advanced at first instance,⁵² given that, in such circumstances, the grounds of appeal are formulated not by reference to the Commission's decision, but by reference to the General Court's judgment.

⁵⁰ Judgment of 4 March 2021, *Commission v Fútbol Club Barcelona* (C-362/19 P, EU:C:2021:169, paragraph 47 and the case-law cited).

⁵¹ Judgment of 19 March 2020, *ClientEarth v Commission* (C-612/18 P, not published, EU:C:2020:223, paragraph 15).

⁵² See judgment of 19 June 2014, *FLS Plast v Commission* (C-243/12 P, EU:C:2014:2006, paragraphs 47 and 48).

104. In the present case, even supposing that, as the Commission maintains, the first part of the first ground of appeal is based on a ‘new fact’ or a ‘new line of reasoning’, compared to the facts relied on and reasoning developed in the proceedings at first instance, that would not be sufficient in itself to declare it inadmissible.

105. It is apparent on reading this part of the first ground of appeal that FFT contends that the General Court was wrong to endorse the conclusion in the decision at issue that the tax ruling at issue had approved a transfer pricing methodology *going beyond the inaccuracies inherent in such a methodology*. More specifically, FFT submits that the General Court’s analysis of the alleged errors in the determination of transfer prices at issue is based on a fundamental misunderstanding of the TNMM. The objective of that method is not to establish the profit level for the *overall* activity of an undertaking, but only for the activity of that undertaking *for which an arm’s length profit is sought*. It is against that background that FFT advances its argument that the General Court failed to distinguish between the two activities carried out by that company.

106. In other words, under this part of the first ground of appeal FFT is putting forward arguments which arise from the judgment under appeal itself⁵³ and which seek to criticise, in law, its correctness. More specifically, it is challenging the application by the General Court of the legal test for determining whether a tax ruling such as that at issue confers an economic advantage. It is settled case-law that the question whether the General Court has correctly applied a legal test, such as the arm’s length principle, is a question of law which can be reviewed by the Court of Justice on appeal.⁵⁴

107. In the light of the considerations set out above, I do not consider that the entirety of the first part of the first ground of appeal should be rejected at the outset, and therefore invite the Court of Justice to declare it admissible inasmuch as it relates to an error made by the General Court in approving the reasoning of the decision at issue with regard to the application of the TNMM in the present case.

(b) Substance

(1) Preliminary observations

108. By way of preliminary observations, I would point out that, in determining whether the tax ruling at issue conferred an advantage on FFT, the General Court stated, in paragraph 141 of the judgment under appeal, that ‘the Commission may compare the fiscal burden of such an integrated undertaking resulting from the application of that fiscal measure with the fiscal burden resulting from the application of the normal rules of taxation under the national law of an undertaking placed in a comparable factual situation, carrying on its activities under market conditions’. It went on to state, in paragraph 143 of that judgment, that although, through the fiscal measure under consideration, the national authorities had accepted a certain level of pricing for an intra-group transaction, ‘Article 107(1) TFEU allows the Commission to check whether that pricing corresponds to pricing under market conditions, in order to determine whether, as a result, charges normally included in the budget of the undertaking concerned are mitigated, thus conferring on that undertaking an advantage within the meaning of that article’. The arm’s length principle is thus, in the view of the General Court, a ‘tool’ or ‘benchmark’

⁵³ I would point out that each of the arguments advanced by FFT refers to a specific paragraph of the judgment under appeal.

⁵⁴ See, in relation to the private creditor test, judgment of 20 September 2017, *Commission v Frucona Košice* (C-300/16 P, EU:C:2017:706, paragraphs 10 to 31).

enabling the Commission to establish whether an integrated company is receiving, pursuant to a tax measure determining its transfer pricing, an advantage for the purposes of Article 107(1) TFEU.

109. As is apparent from paragraph 196 of the judgment under appeal, the Commission's application of the arm's length principle led, in this case, to a finding that an advantage arose as a result of several errors, relating both to the amount of capital to be remunerated and to the rate of return to be applied, in the method used to calculate FFT's remuneration, as approved by the Luxembourg tax authorities.

110. The General Court stated, in paragraphs 197 to 199 of that judgment, that the five errors identified by the Commission related, respectively, first, to the decision to segment the capital into three categories to be subject to different rates of return; second, to the use of hypothetical regulatory capital as a profit level indicator; third, assuming that that use is permitted, to the application by analogy of the Basel II framework, for the purpose of determining the level of FFT's hypothetical regulatory capital; fourth, to the deduction of the FFNA and FFC shareholdings; and, fifth, to the level of the rate of return on capital to be remunerated, which had been calculated at 6.05%, using the CAPM.

111. Lastly, in paragraphs 264 to 284 of the judgment under appeal, the General Court examined the arguments advanced by the Grand Duchy of Luxembourg in relation to the first, second and fourth errors identified by the Commission. In the light of the conclusions of that examination, the General Court held that it was not necessary for its analysis to extend to the merits of the arguments relating to the third and fifth errors identified by the Commission.

112. The Court of Justice will therefore need to determine, in the judgment to be given, whether the General Court was right to confirm the Commission's conclusions on the first, second and fourth of the errors it had identified.

113. In that regard I should point out, first of all, that the dispute between the parties does not relate either to the objective or to the content of the methodology used by the Commission in the present case. It is common ground that the TNMM is intended to determine transfer pricing for *transactions* entered into between two integrated companies, and that it is a three-stage method. At the first stage, the *activity* for which the arm's length price is sought is defined. At the second stage, an appropriate base, known as a *profit level indicator*, is selected. At the third stage, a *rate of return* is applied to that indicator, reflecting the observed rate of return of comparable transactions on the open market.

114. The parties are in disagreement as to the choice of the relevant profit level indicator, however. While FFT submits that the regulatory capital required of a banking institution was rightly taken, in the tax ruling at issue, as the profit level indicator, the General Court confirmed the first, third and fourth errors identified in the decision at issue on the basis that it was the entirety of FFT's accounting equity, which also included its capital holdings in certain group subsidiaries, that ought to be used for that purpose. FFT submits that, in taking that approach, the General Court failed to have due regard for the margin of appreciation accorded to the Luxembourg tax administration in approving transfer prices.

(2) *Appraisal*

115. Before turning to the analysis of the merits of the criticisms levelled by FFT at the General Court on the basis that it failed to have due regard for the margin of appreciation available to national authorities in the application of methods such as the TNMM, I think it is necessary to clarify two points.

116. As regards the nature of the judicial review carried out by the General Court, that Court held, in paragraph 207 of the judgment under appeal, that its review consisted in ‘verify[ing] whether the errors identified in the [decision at issue], and on the basis of which the Commission found there to be an advantage, *go beyond the inaccuracies inherent in the application of a method designed to obtain a reliable approximation of a market-based outcome*’.⁵⁵ In other words, the task of the General Court was to verify whether the Commission had demonstrated that the methodological errors it had identified prevented a reliable approximation of an arm’s length outcome from being obtained, because they reduced the taxable profits in comparison with the tax burden resulting from the application of the normal rules of taxation under national law. In my view, that description of the review carried out by the General Court should be endorsed, inasmuch as it strikes an appropriate balance between the need to ensure that the classification of a measure as State aid depends exclusively on the effects of the State measure in question, and the need to allow the national tax authorities a margin of appreciation, bearing in mind that transfer pricing methods are approximate.

117. As to the margin of appreciation accorded to the national tax authorities in the context of that review, the General Court stated, in paragraph 204 of the judgment under appeal, that ‘the Member State has a margin of appreciation in the approval of transfer pricing’ and that ‘that margin of appreciation cannot lead to the Commission being deprived of its power to check that the transfer pricing in question does not lead to the grant of a selective advantage within the meaning of Article 107(1) TFEU’, going on to say that ‘*in that context*, the Commission must take into account the fact that the arm’s length principle allows it to verify whether the transfer pricing accepted by a Member State corresponds to a reliable approximation of a market-based outcome and whether any variation that may be identified in the course of that examination does not go beyond the inaccuracies inherent in the methodology used to obtain that approximation’.⁵⁶

118. It therefore seems to me that the interpretation given to that paragraph by FFT in its appeal, according to which a national tax administration necessarily has a *broad* margin of appreciation in adopting tax rulings, and this inevitably involves an element of subjectivity with regard to the manner in which transfer pricing methodologies are applied in each individual case, has to be refuted. In my view, the correct interpretation of paragraph 204 is simply that the national tax authorities have a margin of appreciation – which is in no way described as ‘broad’ in the judgment under appeal – because of the *approximate nature* of transfer pricing methodologies.

119. That having been stated, I should consider the substance of FFT’s complaint that the General Court was wrong to hold that the three errors which, according to the Commission, were allegedly made by the Luxembourg tax administration in implementing the TNMM prevented a reliable approximation of an arm’s length outcome from being obtained.

⁵⁵ Emphasis added.

⁵⁶ Emphasis added.

120. As regards the first error, which related to the decision to segment FFT's capital into three categories, the General Court approved the Commission's conclusions on two grounds. First, the segmentation of capital was not likely to satisfy the requirement to differentiate the various functions of FFT.⁵⁷ Second, it was based on an entirely artificial analysis of the use of FFT's equity.⁵⁸

121. In relation to those grounds, FFT's main criticism is directed at paragraph 235 of the judgment under appeal, where the General Court pointed out that 'the three categories of capital validated by the tax ruling at issue relate, respectively, to risk remuneration, remuneration for holding activities and functions remuneration', going on to conclude from this that 'this [last] segment therefore corresponds to *all* the activities of FFT that are covered by the tax ruling at issue'.⁵⁹ According to FFT, the General Court ignored the fact that it carries out *two distinct activities* which would be remunerated in two different ways, namely, first, holding third-party assets (remunerated through the 'risk remuneration') and, second, lending within the Fiat/Chrysler group (remunerated through the 'functions remuneration'), and thus wrongly concluded that FFT's capital should not have been segmented for the purposes of calculating arm's length remuneration. In so far as FFT carries out two distinct activities, the General Court was equally not entitled to hold, as it did in paragraphs 238 and 239, that all of FFT's equity should be remunerated in full, without any segmentation, on the ground that the entirety of that equity was exposed to risk and available to support the company's solvency.

122. There is no doubt that FFT's reasoning conforms, in principle, to the logic of the TNMM. As stated above, the parties to the present appeal are in agreement that the first stage of that methodology involves defining the *activity* in respect of which an arm's length price is sought. I consider however that the premiss of this argument – that FFT carries out two distinct activities – has not been proved to the required legal standard.

123. In that regard, I should note that it is apparent from the documents on the file that FFT has obvious difficulties in defining the activity of 'holding third-party assets' referred to in its appeal. If, as seems to me to be the case, the intended reference is to an activity consisting in the bearing of risks through the provision of financing and treasury services to other group companies, I agree with the Commission that there is no distinction to be drawn between such an activity and the provision of those same financing and treasury services, as these are two aspects of a single activity (or 'function', to use the terminology of the OECD guidelines): that of intra-group financing and treasury.

124. In my view, therefore, FFT's main argument is unfounded, as are the arguments logically linked to it.

125. As regards the ground that the segmentation of FFT's capital was based on an entirely artificial analysis of the use of its equity, FFT submits that the General Court was wrong to state, in paragraph 241 of the judgment under appeal, that 'the segmentation of capital by reference to the activities of FFT takes no account of the fact that its taxable profits will vary according to its borrowing costs, which depend, in particular, on the size of its capital'. It contends that the General Court ignored the fact that, as the amount of a borrower's capital increases beyond a level reasonably sufficient to cover its risks, any incremental reduction in borrowing costs from having increased capital is minimal or zero. The General Court ought to have disapproved the

⁵⁷ Paragraphs 231 to 236 of the judgment under appeal.

⁵⁸ Paragraphs 237 to 246 of the judgment under appeal.

⁵⁹ Emphasis added.

decision at issue in so far as it did not contain any analysis by the Commission of whether the capital held by FFT in excess of the hypothetical regulatory capital would in fact increase its return. In advancing this argument it seems to me that FFT is simply making a generic statement which, in my view, can hardly be regarded as sufficient, in itself, to demonstrate that paragraph 241 of the judgment under appeal is based on a false premiss. The argument should therefore be rejected.

126. FFT also disputes the additional argument used by the General Court in support of the conclusion that the second segment of FFT's capital (shareholdings in FFNA and FFC), as endorsed by the tax ruling at issue, could not be distinguished from the first for the purposes of calculating arm's length remuneration. More specifically, FFT submits that it is not correct to state that the shares which a parent company holds in its subsidiaries might be designed, as the General Court stated in paragraph 245 of the judgment under appeal, as a form of capital injection as an alternative to the grant of an intra-group loan. In my view, given that FFT is not challenging the *principal* finding, in paragraph 244 of the judgment under appeal, on which that conclusion was based – that FFT's shareholdings in FFNA and FFC could not be separated from the first segment because they would also be exposed to risks in the event of FFT's insolvency, this point must be regarded as ineffective.

127. As regards FFT's argument that it was inappropriate to use the accounting equity as the profit level indicator, because it can easily be manipulated, I agree with the Commission that that argument is inadmissible because it is not directed at the judgment under appeal.

128. As regards the second error, which related to the use of hypothetical regulatory capital as the profit level indicator, FFT submits that the General Court was wrong to hold that that capital could not be used for that purpose on the ground that it 'does not constitute a right to the profits of the entity concerned, or to the remuneration of the risks borne by that entity'.⁶⁰ If that were the case, many of the profit level indicators accepted by the OECD Guidelines,⁶¹ such as sales, operating expenses and operating assets, would be disqualified. However, I consider that the beginning of the following paragraph of the judgment under appeal ('In the second place, as regards the Commission's assessment, principally, that choosing to take FFT's hypothetical regulatory capital into consideration ... is wrong ...'),⁶² is simply an introductory remark relating to the assessment made by the General Court in paragraph 255 of that judgment. It does not seem to me that the General Court intended, by that remark, to lay down a condition which must be fulfilled by any 'profit level indicator'. Accordingly, this argument must, in my view, be rejected as unfounded.

129. FFT also challenges the assessment made by the General Court, in paragraph 255 of the judgment under appeal, that hypothetical regulatory capital is not an appropriate profit level indicator because it 'has no connection with the profits that an investor would claim from the company in which he invests'. FFT submits that under the TNMM, there is no requirement for the profit level indicator to have a 'connection' with such profits, and that all that is required is a reasonably reliable 'correlation'.⁶³

⁶⁰ Paragraph 254 of the judgment under appeal.

⁶¹ In that regard, FFT refers to paragraph 2.87 of the OECD Guidelines.

⁶² Paragraph 255 of the judgment under appeal.

⁶³ The *Larousse* dictionary defines the French word 'corrélation' as the 'relation entre deux faits liés par une dépendance nécessaire' (literally, the relationship between two facts connected by a necessary dependence).

130. The distinction between ‘connection’ and ‘correlation’ is artificial and cannot, in my view, invalidate the General Court’s assessment, especially bearing in mind that – as the Commission pointed out in its response – paragraph 2.87 of the OECD Guidelines seems to indicate that the profit level indicator should reflect the value of the functions performed by the entity concerned and therefore the profit which that entity is able to generate. Accordingly, this argument is no more persuasive.

131. Lastly, as regards the fourth error, which was the failure to take the capital represented by FFT’s shareholdings in FFC and FFNA into account in calculating the remuneration for its intra-group financing and treasury activities, FFT challenges, first, the General Court’s statement in paragraph 273 of the judgment under appeal that, because it is fungible, the whole of the equity is exposed to risks and must therefore be taken into consideration in the calculation of such remuneration. Contrary to FFT’s submissions, it is very much apparent on reading the section of the appeal which deals with the first error that FFT has not advanced any argument in support of its claim that the fungible nature of equity does not prevent its segmentation.

132. Furthermore, FFT submits that there are two errors of law in the General Court’s statement, in paragraph 274 of the judgment under appeal, that the Grand Duchy of Luxembourg had not established that the other companies with which the Commission compared FFT had deducted their shareholdings in subsidiaries from their capital, or that it was not common for financial institutions operating on the market to have such shareholdings.

133. First, according to FFT, that statement reverses the burden of proof, given that it was for the Commission to show that the comparators used by the Luxembourg tax administration were inappropriate, and not for the Member State to justify their use. I do not subscribe to that analysis. As the Commission notes in its response, paragraph 274 of the judgment under appeal constitutes the response to an argument that had been advanced by the Grand Duchy of Luxembourg in its application at first instance, seeking to challenge, on the basis of consolidated data of 28 systemic banks compiled by that Member State, the finding in the decision at issue that FFT was not sufficiently capitalised for any deduction to be legitimately made.⁶⁴ In that paragraph, the General Court was merely endorsing the Commission’s approach of relying on the average leverage ratio determined by the European Banking Authority. Since no reversal of the burden of proof can thus be established, I do not consider that this argument can be upheld.

134. Second, FFT challenges the premiss of the finding in paragraph 274 of the judgment under appeal: that it is not possible to assess the profitability of an activity carried out by a comparable stand-alone company on a consolidated basis, where the data are available only on a consolidated basis. On the contrary, it submits, there is nothing to prevent such an assessment. I do not consider that this argument can be upheld, as it is reasonable to take the view – expressed by the Commission in its response – that consolidated data can be used for that purpose only where all the subsidiaries of the comparable company perform the same functions within the same activity.

135. In the light of the foregoing, I suggest that the Court of Justice should reject the first part of the first ground of appeal in its entirety, inasmuch as the General Court did not make any error of law in holding that the three errors in the calculation of the remuneration of FFT’s financing and treasury activity, as identified by the Commission in the decision at issue, prevented a reliable approximation of an arm’s length outcome from being obtained, and could therefore form the basis for a finding of advantage for the purposes of Article 107(1) TFEU. In that regard, I

⁶⁴ See recitals 285 to 287 of the decision at issue.

emphasise that FFT does not challenge the General Court’s statement, in paragraph 283 of the judgment under appeal, that if it is the rate of return envisaged by the Grand Duchy of Luxembourg that is to be applied, the amount of FFT’s resulting remuneration would still be considerably higher than that accepted by the tax ruling at issue, given that that rate would be applied to the full amount of the capital, which represents an amount 10 times greater than that to which that rate was applied pursuant to the tax ruling at issue.

3. *The second part*

(a) *Effectiveness*

136. The Commission submits that the second part of the first ground of appeal is ineffective, on the basis that it is not directed at paragraph 316 of the judgment under appeal, which sets out the General Court’s main reason for rejecting the argument that the Commission was required to demonstrate an advantage at group level.

137. I should point out that, in paragraph 316 of the judgment under appeal, the General Court first of all stated that the Grand Duchy of Luxembourg had not put forward any argument ‘to establish that the Fiat/Chrysler group and FFT do not constitute an economic unit for the purposes of State aid law’. It then held that, in any event, FFT was fully controlled by Fiat SpA, which in turn controlled the Fiat/Chrysler group. Lastly, the General Court concluded that ‘any advantage that would benefit FFT would benefit that group as a whole, in particular if it involves ... conditions of loans granted by FFT to other group companies that are more advantageous because of the lowering of FFT’s tax burden’.

138. It is true that, in its appeal, FFT does not challenge those conclusions of the General Court. Nevertheless, I do not think it follows that the present ground of appeal is ineffective. Unlike the Commission, I see no reason to interpret the General Court’s reasoning in paragraphs 316, 317 and 318 of the judgment under appeal such that the first of those paragraphs contains the main reason and the latter two contain purely subsidiary observations. As has just been seen, in paragraph 316 of the judgment the General Court affirmed the Commission’s finding that FFT and the Fiat/Chrysler group were the beneficiaries of the aid in question, and went on to hold, in paragraphs 317 and 318 of that judgment, that the Commission was not to be criticised for not assessing whether there was an economic advantage at group level. These then are two necessary components of a *single line of reasoning* intended to demonstrate that the Commission had not made any error of law in determining that FFT and the Fiat/Chrysler group had benefited from an advantage for the purposes of Article 107(1) TFEU. It does not seem to me that this reading is contradicted by the use of the words ‘in addition’ and ‘furthermore’ at the beginning of paragraphs 317 and 318 of the judgment, as the Commission contends.⁶⁵

139. In its appeal, FFT criticises the General Court for failing to take into account ‘group effect’ in determining whether there was an economic advantage, submitting that this required an analysis of the economic effects of a tax ruling concerning transfer pricing on the entirety of the group in question. As, it submits, the Commission recognised in recital 343 of the decision at issue, ‘setting a transfer price affects by its very nature more than one group company (a price increase in one company reduces the profit of the other)’. It thus seems to me to be clear that, if this part of the

⁶⁵ I also note that the expressions ‘in any event’ and ‘assuming’, in paragraph 317 of the judgment under appeal, and ‘even if that were the case’, in paragraph 318 of that judgment, appear to relate solely to the logical relationship between those two paragraphs, to the exclusion of paragraph 316.

first ground of appeal were upheld, it would invalidate the General Court's conclusion that the Commission had been right to find that FFT and the Fiat/Chrysler group had received an economic advantage, which would lead to the judgment under appeal being set aside.

140. In those circumstances, I consider that the second part of the first ground of appeal should be declared to be effective.

(b) Substance

141. I would reiterate that, in paragraph 317 of the judgment under appeal, the General Court observed that, assuming it to be a relevant factor in the determination of whether there is an economic advantage, neither the Grand Duchy of Luxembourg nor FFT 'ha[d] established that the tax reductions from which FFT benefits in Luxembourg [were] "neutralised" by higher taxes in other Member States'. It went on to state, in paragraph 318 of that judgment, that even if such 'neutralisation' had taken place, this would not permit the inference that FFT or the Fiat/Chrysler group had not benefited from an advantage, inasmuch as the existence of an advantage is 'determined by reference to normal taxation rules, so that the tax rules of another Member State are not relevant'. It follows, according to the General Court, that 'where it has been established that an integrated undertaking benefits, under a tax measure granted by a Member State, from a reduction of the tax burden that it would otherwise have had to bear in accordance with the normal rules of taxation, the tax situation of another undertaking of the same group in another Member State has no bearing on the existence of an advantage'. For the same reason, the General Court rejected FFT's argument that, in any event, its income was taxed either in Italy or in Luxembourg, so that it did not benefit from any advantage.

142. I shall first address the argument directed at paragraph 317 of the judgment under appeal, which seeks in essence to challenge the General Court's conclusion that FFT had not demonstrated group level tax neutralisation of the advantage conferred on it, and then turn to the argument directed at paragraph 318 of that judgment, which disputes the *relevance* of that conclusion to the assessment of whether there is an advantage for the purposes of Article 107(1) TFEU.

143. As regards the argument that the General Court held that FFT had not demonstrated that the advantage alleged to have been conferred had been neutralised at group level, FFT submits, first, that in paragraph 317 of the judgment under appeal, the General Court reversed the burden of proof by requiring it to demonstrate that there was not an advantage, contrary to the established case-law under which it is for the Commission to prove that there is an advantage.

144. In my view it is only necessary to consider the structure of the judgment under appeal in order to see that this is not the case. I would point out that paragraph 317 belongs to Section 4 of Title D of the judgment. Title D, which is headed 'Second series of pleas, alleging the absence of an advantage' is made up of four sections, namely Section 1 ('Preliminary observations'), Section 2 ('The Commission's principal line of reasoning, that the tax ruling at issue derogated from the general Luxembourg corporate income tax system'), Section 3 ('The Commission's subsidiary line of reasoning according to which the tax ruling at issue derogated from Article 164(3) of the Tax Code and from [Circular No 164/2]'), and Section 4 ('Plea alleging the lack of any advantage at group level'). Sections 2 and 3, which respectively contain principal and subsidiary lines of reasoning, reach the same conclusion, namely that the Commission was entitled to find that the

tax ruling at issue conferred an advantage on FFT.⁶⁶ Thus, the Commission had discharged its burden of proving that there was an advantage for the purposes of Article 107(1) TFEU. In those circumstances, it was for FFT and the Grand Duchy of Luxembourg – and this did not involve a reversal of the burden of proof – to demonstrate that that advantage had been neutralised at group level, on the basis that the reduction in FFT’s tax burden in Luxembourg had been fully offset by an increase in the tax burden of another group company in another Member State. Accordingly, I cannot accept the first argument advanced by FFT.

145. Second, FFT submits that in paragraph 317 of the judgment under appeal, the General Court merely declared that it had not put forward any evidence to demonstrate tax neutralisation at the level of the Fiat/Chrysler group, without taking into account its numerous submissions showing the errors and inaccuracies which had led the Commission to that conclusion.⁶⁷ FFT argues that this resulted in a breach of the General Court’s obligation to state reasons.

146. According to FFT, it had produced a tax audit report from the Italian Tax Police and two notices of assessment of corporate income tax from the Italian revenue agency indicating that FFT had overstated its taxable profit and, therefore, paid too much corporate income tax in Luxembourg as a result of the excessively high interest received on intra-group loans it had made to one of its subsidiaries (Fiat Chrysler Finance SpA, ‘FCF’). It is thus clear that there is an indisputable connection between the profits of FFT and those of FCF, in the sense that if FFT’s revenue rises (due to the receipt of higher interest) then FCF’s revenue will fall (due to the payment of higher interest), and vice versa. Furthermore, it is apparent from the mutual agreement procedures under the arbitration convention between Italy and Luxembourg on the elimination of double taxation that a higher level of taxable income in Luxembourg necessarily entails a lower level of taxable income in Italy.

147. By this argument, it seems to me that FFT is criticising the General Court for *not considering* evidence adduced at first instance in support of the proposition that the advantage allegedly granted to FFT was neutralised at the level of the Fiat/Chrysler group. If my understanding of FFT’s argument is correct, it is necessary to examine the relevant sentence of paragraph 317 of the judgment under appeal, which reads as follows: ‘... it must be noted that neither the Grand Duchy of Luxembourg nor FFT has *established* that the tax reductions from which FFT benefits in Luxembourg are “neutralised” by higher taxes in other Member States’.⁶⁸ To my mind, the verb ‘establish’, which seems to me to have been carefully chosen by the General Court, clearly implies that the evidence presented by FFT was examined, even if it was considered insufficient to support FFT’s argument. In those circumstances, the argument under consideration cannot be accepted, given that, as is apparent from settled case-law of the Court of Justice,⁶⁹ the General Court is not required to give express reasons for its assessment of the value of each piece of evidence presented to it, in particular where it considers that that evidence is unimportant or irrelevant to the outcome of the dispute, subject to its obligation to observe general principles and the rules of procedure relating to the burden of proof and the adducing of evidence and not to distort the true sense of the evidence.⁷⁰

⁶⁶ See paragraphs 286 and 299 of the judgment under appeal.

⁶⁷ It seems clear that this is a typographical error, and that FFT’s intended reference was in fact to a conclusion of the Commission that the effect on the Fiat/Chrysler group *was not* neutral. I would observe, in any event, that in reality the Commission did not adopt any position on the issue of tax neutralisation at group level. See, in particular, recital 314 of the decision at issue.

⁶⁸ Emphasis added.

⁶⁹ See, in particular, judgment of 26 January 2017, *Commission v Keramag Keramische Werke and Others* (C-613/13 P, EU:C:2017:49, paragraph 39 and the case-law cited).

⁷⁰ I should note, in that regard, that FFT does not allege any distortion of the evidence in the present case.

148. Having regard to the foregoing, I suggest that the Court of Justice should reject the first complaint raised under the second part of the first ground of appeal.

149. As regards the complaint relating to the relevance of taking into account tax neutralisation at group level, I would first point out that the General Court held that the existence of an advantage is to be determined by reference to normal taxation rules, which means that the tax rules of another Member State cannot be taken into account in order to assess the effect of a tax measure on the position of the entire group.

150. I would note that the General Court referred, in support of this position, to the judgment in *Spain v Commission*.⁷¹ In the case which gave rise to that judgment, the measures at issue consisted in tax advantages relating to the transfer of certain land, and subsidies relating to loan interest and guarantees, granted to Spanish agricultural operators in order to mitigate the effects of a significant worldwide increase in the price of diesel. In defence of its measures, the Kingdom of Spain argued amongst other things that they could not be regarded as State aid because the advantage thus granted was below the level of that available to agricultural operators in other Member States under measures introduced by those States in order to reduce tax on fuel in their territories. The Court of Justice rejected that plea, stating that ‘the concept of advantage granted to beneficiaries of State aid ... is to be determined by comparison with other undertakings of *the same Member State*, and not with undertakings of other Member States’.⁷²

151. FFT argues that that judgment does not support the General Court’s conclusion. While it is clear from the judgment that the determination of whether there is an advantage cannot involve a comparison between the tax situation of FFT and that of other taxpayers established in other Member States, it cannot be read as meaning that group effect can be ignored in making that determination. In that regard FFT argues, in essence, that the fact – noted by the Commission in recital 343 of the decision at issue – that ‘setting a transfer price affects by its very nature more than one group company’ underlines the need to take group effect into account.

152. The question therefore arises whether, contrary to what the General Court held in the judgment under appeal, the Commission was required to take account of the *intra-group and cross-border dimension* of the effects of the tax ruling at issue when determining whether that ruling conferred an advantage for the purposes of Article 107(1) TFEU. If the Commission had done so, FFT submits, it would have found that the benefit was reduced or neutralised at group level, so that the amount of the *actual* advantage was either lower than that of the immediately apparent advantage, or eliminated altogether.

153. It seems to me that, in order to answer that question, it is necessary to recall one of the limits on the applicability of the State aid rules.

154. It is well known that Article 107(1) TFEU prohibits Member States from granting any undue advantage. The rationale of that prohibition has to be equated with that of the EU rules on free movement. Like those rules, it is to be explained in terms of the gradual abolition of regulatory measures which are liable to impede the free movement of economic actors.⁷³

⁷¹ Judgment of 11 November 2004 (C-73/03, not published, EU:C:2004:711).

⁷² Judgment of 11 November 2004, *Spain v Commission* (C-73/03, not published, EU:C:2004:711, paragraph 28). Emphasis added.

⁷³ See, in particular, Biondi, A., ‘The Rationale of State Aid Control: A Return to Orthodoxy’, vol. 12, CYELS, 2010, pp. 35 to 52.

155. More specifically, the objective of the State aid rules is, as is well known, to avoid a subsidies war between the Member States of the European Union, which would lead to the creation of obstacles to the free movement of companies and of goods, services, workers and capital.⁷⁴

156. The prohibition on State aid thus covers measures – including tax measures – adopted by a Member State and liable to impede access to its national market. It is self-evident that the rules governing the activity of companies on that market, referred to as the ‘normal rules of taxation’ when they are of a fiscal nature, can only belong to the legal system of that Member State.

157. In those circumstances, the General Court was right, in my view, to hold that the rules in force in other Member States are not relevant in determining whether there is an economic advantage in the present case, even if those rules have the potential to reduce or neutralise the benefit at the level of the group, and thus the actual advantage obtained by the group as a whole.

158. It seems to me that two observations support that interpretation.

159. First, I take it as self-evident that the autonomy of a Member State in direct tax matters, as recognised in a consistent line of case-law,⁷⁵ cannot be fully ensured if the normal rules of taxation which are taken into account in carrying out the examination under Article 107(1) TFEU have not been *exclusively* laid down by the legislature of the Member State in question.

160. Second, it is easy to see that if they were required to consider the effect of the tax rules of other Member States, the tax authorities of a Member State would have great difficulty in being able to assess whether proposed tax rulings would confer an economic advantage and therefore constitute State aid within the meaning of Article 107(1) TFEU. In those circumstances, I do not think it is inconceivable that those authorities would respond by notifying the text of all such tax rulings to the Commission, which – to say the least – would then have an excessive workload.

161. I do not consider that the other arguments advanced by FFT in favour of taking account of group effect cast doubt on the interpretation proposed above.

162. FFT argues that taking group effect into account would be consistent with the principle stated by the General Court in paragraph 47 of the judgment in *Fútbol Club Barcelona v Commission*,⁷⁶ according to which the issue of whether there is an economic advantage must be assessed on the basis of the effects of the measure, which must be considered in their entirety. I am fully aware of the existence of that case-law. Indeed it was in the judgment given at the appeal stage that the Court of Justice recently reiterated that, in order to determine whether a State measure constitutes State aid, ‘it is necessary to consider all points of law or fact which are attached to that measure, in particular, the profits and costs resulting therefrom ... and, therefore, to carry out an assessment of that measure as a whole, taking into account all its characteristics’.⁷⁷

⁷⁴ See Buendía Sierra, J.L., and Smulders, B., ‘The Limited Role of the “Refined Economic Approach” in Achieving the Objectives of State Aid Control: Time for Some Realism’, *EC State Aid Law: Liber Amicorum Francisco Santaolalla Gadea*, Kluwer, Alphen aan den Rijn, 2008.

⁷⁵ See, for example, judgment of 12 July 2012, *Commission v Spain* (C-269/09, EU:C:2012:439).

⁷⁶ Judgment of 26 February 2019 (T-865/16, EU:T:2019:113).

⁷⁷ Judgment of 4 March 2021, *Commission v Fútbol Club Barcelona* (C-362/19 P, EU:C:2021:169, paragraph 63 and the case-law cited).

163. I should point out, nevertheless, that neither in that case nor in the cases which gave rise to the judgments referred to by the Court of Justice⁷⁸ did the ‘points of law’ attaching to the State measure at issue include the tax rules of another Member State. It follows that the fact that the Commission is required to carry out an overall assessment does not, in the present case, require consideration of whether the reduction in the amount of corporate income tax paid by FFT in Luxembourg which results from the adoption of the tax ruling at issue is offset, in whole or in part, by an increase in the amount of tax paid by other Fiat/Chrysler group companies by way of corporate income tax in other Member States.

164. FFT also argues that taking group effect into account would be consistent with seven judgments by which the Court of Justice established that the possible offsetting of an advantage is irrelevant only to the extent that such offsets stem from charges that are ‘different from’ and ‘unconnected’ with the tax measure that gives rise to State aid.⁷⁹ I do not consider that that case-law is relevant to the present case. The charges relied on by the beneficiaries of the tax measures examined in those judgments as offsetting the economic advantage resulting from those measures did not, in any way, arise from the application of tax rules belonging to the legal system of another Member State.

165. FFT submits that its argument is supported by the fact that not taking account of the effects produced by the tax ruling at the level of the Fiat/Chrysler group is, it claims, incompatible with the General Court’s statement that any advantage to FFT would have benefited the group as a whole.⁸⁰ The limited reading proposed in the appeal could indeed be regarded as consistent with that assertion.

166. This further argument equally does not lead me to change the answer which I propose the Court of Justice should give to the second part of the first ground of appeal.

167. FFT does not challenge the observation made by the General Court in paragraphs 313 and 316 of the judgment under appeal, that the beneficiary of the favourable tax treatment given to FFT was the Fiat/Chrysler group as a whole, because FFT and the Fiat/Chrysler group formed an economic unit. On the contrary, it accepts the General Court’s identification of the beneficiary as if it were a presupposition.

168. In my view, the second part of the first ground of appeal must therefore be rejected.

169. In the light of those considerations, I suggest that the Court of Justice should reject the first ground of appeal in its entirety.

⁷⁸ These are the judgments of 15 November 2011, *Commission and Spain v Government of Gibraltar and the United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732), and of 8 December 2011, *France Télécom v Commission* (C-81/10 P, EU:C:2011:811).

⁷⁹ These are the judgments of 23 February 1961, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* (30/59, EU:C:1961:2); of 2 July 1974, *Italy v Commission* (173/73, EU:C:1974:71); of 5 October 1999, *France v Commission* (C-251/97, EU:C:1999:480); of 11 November 2004, *Spain v Commission* (C-73/03, not published, EU:C:2004:711); of 8 December 2011, *France Télécom v Commission* (C-81/10 P, EU:C:2011:811); of 30 November 2009, *France and France Télécom v Commission* (T-427/04 and T-17/05, EU:T:2009:474); and of 16 September 2013, *British Telecommunications and BT Pension Scheme Trustees v Commission* (T-226/09 and T-230/09, not published, EU:T:2013:466).

⁸⁰ Paragraph 316 of the judgment under appeal.

C. The third ground of appeal

1. *Arguments of the parties*

170. By the first part of the third ground of appeal, FFT maintains that the General Court simply gave a blanket endorsement of the Commission's novel, ill-defined arm's length principle. It argues that the immediate consequence of this approach is to enable the Commission to shape the scope of that principle at will, creating significant legal uncertainty both for the Member States and for undertakings. That uncertainty is exacerbated by the quasi-retroactive nature of the Commission's application of the arm's length principle to individual tax rulings. Accordingly, the General Court's inadequate analysis of the scope of the principle severely undermines an undertaking's ability to foresee and plan for its tax liabilities.

171. The Commission replies that this part of the third ground of appeal should be rejected as ineffective. On the merits, the Commission also submits that this part is essentially a restatement of the second ground of appeal and should be dismissed. In that regard, the Commission argues, amongst other things, that the scope and content of the arm's length principle is abundantly clear, the General Court having indicated that, under Luxembourg tax law, transactions between related economic operators should be assessed for tax purposes as if they had been concluded at arm's length between unrelated economic operators.

172. Under the second part of the third ground of appeal, FFT claims that the General Court infringed the principle of legal certainty in endorsing, in paragraphs 339 to 359 of the judgment under appeal, the presumption of selectivity that the Commission applied to the contested measure. In the present case, there is nothing to indicate that that measure constituted individual aid and that the presumption of selectivity identified in the case-law of the Court of Justice is applicable. FFT submits that endorsing the application of that presumption to advance tax rulings leads to considerable legal uncertainty for undertakings and Member States.

173. The Commission replies that this part of the third ground of appeal should also be rejected as ineffective. It also submits that it is unfounded, inasmuch as FFT has not advanced any argument in support of the complaint that the General Court infringed the principle of legal certainty by invoking a presumption of selectivity in relation to individual tax measures. The Commission argues, in the light of the case-law of the Court of Justice, that an individual transfer pricing tax ruling cannot be considered to be granted under a general aid scheme, and that this was confirmed by the General Court in the judgment under appeal.

2. *The first part*

(a) Effectiveness

174. The Commission submits that the first part of the third ground of appeal is ineffective inasmuch as, even if it were upheld, it could not result in the setting aside of the judgment under appeal. This ground is based on the assertion that the General Court erred in law in endorsing the Commission's use of an ad hoc arm's length principle, the legal basis of which is misconceived, in support of its principal finding as to the existence of a selective advantage. However, even if that assertion was correct (which the Commission disputes), the decision at issue contains a

subsidiary line of reasoning with a different legal basis, namely Article 164(3) of the Tax Code and Circular No 164/2. That reasoning was approved by the General Court and has not been challenged by FFT.

175. For my part, I consider, unlike the Commission, that the first part of the third ground of the present appeal cannot be declared ineffective for the same reasons as those set out in points 52 to 54 of this Opinion.

(b) Substance

176. I should state at the outset that, by this part of the third ground of appeal, FFT submits in essence that the General Court erred in law in not disapproving the Commission's inadequate characterisation of the *scope* of the arm's length principle on the basis that it constituted an infringement of the principle of legal certainty. Thus, contrary to what the Commission submits, the first part of that ground must be distinguished from the second ground in that, unlike the second ground, it does not seek to challenge the *legal basis* of the arm's length principle as defined in the judgment under appeal.

177. That having been stated, I should set out some preliminary observations on the principle of legal certainty.

178. The principle of legal certainty, which is a general principle of EU law and thus applies to the acts of the institutions, bodies, offices and agencies of the European Union, requires, according to settled case-law, that rules of law must be clear and precise and that they must be foreseeable.⁸¹ More specifically, that principle requires an assessment of whether an EU legal act enables those concerned to know precisely and unequivocally the extent of their rights and obligations and to take steps accordingly.⁸² This requirement must be observed all the more strictly in the case of an act liable to have financial consequences.⁸³

179. It is apparent from the case-law of the Court of Justice that the principle of legal certainty is intrinsically linked to the development of legal standards by the European Union, and by national authorities when they implement EU law, and that it permits judicial review of flaws liable to result in unpredictable application of the legal act in question.⁸⁴

180. The principle of legal certainty is narrower in scope with regard to an administrative decision, as is apparent from the case-law on State aid. In that area, the Court of Justice has found the principle of legal certainty to have been infringed only where the conduct in question had been engaged in by the Commission before or during the *procedure* leading to the adoption of a decision to recover State aid.⁸⁵

181. In the present case, the principle of legal certainty is relied on in opposition to the use, for the purposes of determining whether the requirement for an advantage was fulfilled, of the arm's length principle, *on the ground that the scope of that principle was not defined*. In other words, what is challenged is the substantive validity of an assessment made by the Commission in

⁸¹ Judgment of 11 September 2019, *Călin* (C-676/17, EU:C:2019:700, paragraph 50 and the case-law cited).

⁸² Judgment of 29 March 2011, *ThyssenKrupp Nirosta v Commission* (C-352/09 P, EU:C:2011:191, paragraph 81).

⁸³ Judgment of 23 September 2020, *Spain and Others v Commission* (T-515/13 RENV and T-719/13 RENV, EU:T:2020:434, paragraph 194).

⁸⁴ See Puissochet, J., and Legal, H., 'Le principe de sécurité juridique dans la jurisprudence de la Cour de justice des Communautés européennes', *Les Cahiers du Conseil constitutionnel*, No 11, 2001.

⁸⁵ See, in particular, judgment of 8 December 2011, *France Télécom v Commission* (C-81/10 P, EU:C:2011:811, paragraphs 99 to 108).

relation to the *characterisation of a State measure as State aid*. However, the substantive validity of such an assessment cannot be challenged on the basis of conformity with the principle of legal certainty. To hold otherwise would be to prohibit the Commission from conceiving new approaches in the application of rules of law, leaving it frozen in its current position. In particular, such an interpretation would mean that the Commission is prevented from using any novel benchmark to guide its assessment of whether there is an advantage for the purposes of Article 107(1) TFEU.

182. Having regard to the case-law referred to above and to the fact that FFT's criticism relates, ultimately, to the finding of advantage made for the purposes of characterising the tax ruling at issue as State aid, I must conclude that the principle of legal certainty cannot be legitimately relied on in the present case. Thus, no error of law can be attributed to the General Court on the basis that it did not disapprove the characterisation of the scope of the arm's length principle which emerges from the decision at issue. I therefore consider that the first part of the third ground of appeal must be rejected.

183. In any event, the General Court was right to hold, in response to the arguments advanced respectively by FFT and the Grand Duchy of Luxembourg and set out in paragraphs 155 and 176 of the judgment under appeal, that the Commission had sufficiently defined the scope and content of the arm's length principle applied in the decision at issue, and that that definition was thus not open to criticism on the basis that the discretion left to the Commission in applying that principle was overly broad. I am thinking particularly of the General Court's observations that the arm's length principle is 'a tool for checking that intra-group transactions are remunerated as though they had been negotiated between independent undertakings' and that the examination in the light of that principle 'consists ... in examining whether the methodology for the determination of transfer pricing accepted in the tax ruling at issue can result in a reliable approximation of a market-based outcome'.

184. As regards FFT's argument that an overly broad discretion on the part of the Commission results from the fact that – as the General Court stated in paragraph 413 of the judgment under appeal – the OECD Guidelines are 'not binding on the Commission' and have 'no bearing' on its analysis, it is difficult to see how that argument could support an allegation that the Commission has infringed the principle of legal certainty in an individual decision such as the decision at issue. In fact, the Commission referred broadly, in its analysis of whether there was an economic advantage, to the methods of applying the arm's length principle envisaged by those guidelines, as the General Court confirmed in paragraph 176 of the judgment under appeal.

185. It cannot therefore be argued that the General Court ought to have disapproved the decision at issue on the ground that the Commission had not specified the scope or content of the arm's length principle.

186. It does not seem to me that that conclusion is undermined by FFT's argument that the General Court ought to have taken account of the 'quasi-retroactive' nature of the Commission's application of the arm's length principle to individual tax rulings. This quasi-retroactive nature of the Commission's application of that principle is to be explained, FFT submits, in terms of the fact that under Article 107 TFEU, the Commission may reopen and investigate such individual tax rulings to assess whether they might constitute illegal State aid, with the result that both the national tax authorities and the beneficiary undertakings are unable to assess and reasonably foresee whether a tax ruling will or will not be successfully challenged by the Commission.

187. In that regard, I would observe that such a characterisation may, *prima facie*, evoke a legal situation of incompatibility with the principle of legal certainty. That principle generally precludes the retroactive application of EU rules of substantive law by authorising such application only where it clearly follows from their terms, their objectives or their general scheme that retroactive effect must be given to them.⁸⁶ It is clear however that the Commission's application of the arm's length principle is characterised by FFT as 'quasi-retroactive' on the sole ground that it involves the examination of tax agreements *already concluded* by the national tax administration with the undertakings concerned. Not only is such application entirely unrelated to retroactivity, but it is typical of the exercise of the function of review of State aid entrusted to the Commission. Where a State measure of economic support is granted to an undertaking without prior notification of that measure to the Commission, the Commission is empowered to examine it under Articles 107 and 108 TFEU.

188. I have not lost sight of the fact that the purpose of the tax agreements in question is precisely to provide legal certainty as regards the amount of tax payable by the relevant undertaking. It does not seem to me, however, that that observation can justify an exception to the rule, established in the case-law, that undertakings benefiting from State measures of economic support cannot rely on a legitimate expectation – the 'subjective face of the objective principle of legal certainty'⁸⁷ – of their lawfulness if they have not been granted in compliance with the procedure for notification of State aid.⁸⁸

189. In those circumstances, I do not consider that the first part of the third ground of appeal can be upheld.

3. *The second part*

(a) *Effectiveness*

190. As to the second part of the third ground of appeal, the Commission argues that this must also be rejected as ineffective. It submits that the decision at issue also established that the tax ruling at issue was selective under the three-step analysis applicable to aid schemes, and that this was endorsed by the General Court in paragraphs 360 to 366 of the judgment under appeal. Since, it argues, FFT does not challenge those paragraphs of the judgment in its appeal, the conclusion on the selectivity of the tax ruling at issue would remain valid even if the second part of the third ground of appeal were upheld.

191. It should be noted that, in the decision at issue, selectivity is not assessed solely through the application of a presumption, but also through the three-step analysis described earlier in this Opinion. This alternative analysis was approved by the General Court in paragraphs 360 to 366 of the judgment under appeal.

192. On that subject, I should point out, as did the General Court in paragraph 361 of the judgment under appeal, that the first two steps of that analysis, relating respectively to the determination of the reference framework and to whether there was a derogation from that framework, were considered *concurrently* with economic advantage, and that the question

⁸⁶ In that regard, see, in particular, judgment of 6 October 2015, *Commission v Andersen* (C-303/13 P, EU:C:2015:647).

⁸⁷ Simon, D., 'La confiance légitime en droit communautaire: vers un principe général de limitation de la volonté de l'auteur de l'acte?', *Le rôle de la volonté dans les actes juridiques. Études à la mémoire du professeur Alfred Rieg*, Bruylant, Brussels, 2000, p. 733.

⁸⁸ See judgment of 22 April 2008, *Commission v Salzgitter* (C-408/04 P, EU:C:2008:236, paragraph 104 and the case-law cited).

whether the tax ruling derogated from the reference framework, either in being broader or in being narrower, *coincided* with the identification of the advantage granted to the beneficiary undertaking.

193. With that in mind, I would simply observe that the alternative analysis could not retain its validity if the Court of Justice were to decide, in the judgment to be given, to strike down the General Court's conclusions as to the basis of the arm's length principle, as I suggest in my Opinion in Case C-898/19 P *Ireland v Commission and Others* that it should, as the effect of this would be to invalidate the entirety of its examination of selective advantage, with regard to both the principal and the subsidiary lines of reasoning.

194. I therefore suggest that the Court of Justice should declare that the second part of the third ground of appeal is not ineffective.

(b) Substance

195. I should point out, as a preliminary remark, that the presumption of selectivity was invoked for the first time in the judgment in *Commission v MOL*, where the Court of Justice stated that 'the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid', adding that 'in the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective'.⁸⁹ This is a rebuttable presumption which applies where two conditions are met: there must be an advantage for the purposes of Article 107(1) TFEU and the measure in question must be an individual measure.

196. It seems to me that the second part of the third ground of appeal contains two separate complaints. As regards the first, FTT alleges an infringement of the principle of legal certainty on the basis that, as a result of the General Court's approval of the presumption of selectivity, the characterisation of the tax ruling at issue as State aid came to depend solely on the determination as to whether there was an economic advantage, which was made through the application of a principle – the arm's length principle – the legal basis of which is unclear and the scope of which is poorly defined. In that regard, I need only point out that this complaint rests on premisses – uncertainty as regards the legal basis of the arm's length principle and failure to define the scope of that principle – which have already been rejected in this Opinion, in the course of the analysis of the first part of the second ground of appeal and the first part of the third ground of appeal. In my opinion, therefore, this complaint should be rejected.

197. As to the second complaint, which relates to the lawfulness of applying the presumption of selectivity in the present case, I should note that the General Court made the finding that the tax ruling at issue was individual in nature following an analysis, set out in paragraphs 342 and 343 of the judgment under appeal, which was based on the definitions of 'individual aid' and 'aid scheme' appearing, respectively, in Article 1(e) and Article 1(d) of Regulation (EU) 2015/1589.⁹⁰

198. The first of those provisions essentially characterises individual aid as aid which is not awarded on the basis of an aid scheme, while the second makes the characterisation of a State measure as an aid scheme subject to three cumulative conditions. The first of these is that aid

⁸⁹ Judgment of 4 June 2015 (C-15/14 P, EU:C:2015:362, paragraph 60).

⁹⁰ Council Regulation of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9).

can be granted individually to undertakings on the basis of an act. The second is that no further implementing measure is required for that aid to be granted. The third is that the undertakings to which individual aid can be granted must be defined ‘in a general and abstract manner’.⁹¹ As the General Court stated in paragraphs 346 and 347 of the judgment under appeal and as the Court of Justice has very recently confirmed, in order for the conditions set out above to be met it is necessary, in particular, for the essential elements of an aid scheme to be apparent from the provisions identified as constituting the legal basis of that scheme, and for the national tax authority adopting the measure not to have a discretion which allows it to influence the amount of the aid, its characteristics or the conditions under which it is granted.⁹²

199. I note, as did the Commission, that FFT has put nothing forward in support of its argument that the tax ruling at issue is not an individual measure. It follows in my view that the second part of the third ground of appeal cannot be upheld.

200. In any event, the General Court’s conclusion that the tax ruling at issue was to be characterised as an ‘individual measure’ is not, in my view, open to criticism. In particular, it seems correct to hold, as the General Court did in paragraph 352 of the judgment under appeal, that in giving a tax ruling, the Luxembourg tax administration ‘has a margin of appreciation in evaluating, in the light of the circumstances of each case, the best method for calculating the taxable amount of each company submitting a request for a tax ruling’. Furthermore, it seems difficult to challenge the identification in paragraph 351 of the judgment under appeal of the essential elements of the aid with the elements constituting the economic advantage, namely ‘the approval of a methodology for determining FFT’s remuneration on the basis of the segmentation of the capital and the application of different rates of return by reference to that segmentation’. If that premiss is accepted, there is no doubt that those elements are apparent, in this case, solely from the tax ruling at issue, and not from the provisions of national law on the basis of which the tax ruling was adopted, namely Article 164(3) of the Tax Code and Circular No 164/2. I therefore suggest that the Court of Justice should reject the second part of the third ground of appeal.

201. There is one matter which, it seems to me, needs to be clarified for the sake of completeness. When they argued, before the General Court, that the tax ruling at issue should be regarded as aid granted pursuant to an aid scheme, the applicants at first instance did not claim that that scheme was based on Article 164(3) of the Tax Code and Circular No 164/2, in conjunction with a *consistent practice of the Luxembourg tax administration* in relation to tax rulings granted to financing and treasury companies other than FFT. If the existence of such a consistent administrative practice had been confirmed, that might well have conflicted with the answer I proposed at the end of the preceding point of this Opinion.

202. This would be the consequence of applying the interpretation of the concept of an ‘aid scheme’, as employed in Article 1(d) of Regulation 2015/1589, recently provided by the Court of Justice in the judgment in *Commission v Belgium and Magnetrol International*, in relation to tax exemptions on excess profits granted by the Belgian authorities in the form of tax rulings. In considering whether the first condition laid down by that article was met, the Court stated that the ‘act’ which provides the basis for individual aid to be granted under the scheme may equally well be a consistent administrative practice of the tax authorities of a Member State ‘where that practice reveals a “systematic approach”, the characteristics of which satisfy the requirements laid down [in that article]’, and that it is not the case that such an administrative practice can only be taken into account in situations in which there is no legal provision forming the basis of

⁹¹ Judgment of 16 September 2021, *Commission v Belgium and Magnetrol International* (C-337/19 P, EU:C:2021:741, paragraph 60).

⁹² Judgment of 16 September 2021, *Commission v Belgium and Magnetrol International* (C-337/19 P, EU:C:2021:741, paragraph 105).

the scheme in question.⁹³ As is apparent from that judgment, the existence of such an administrative practice generally implies that the other conditions are also met, given that the conditions laid down in Article 1(d) of Regulation 2015/1589 are regarded by the Court as being ‘intrinsically linked’.⁹⁴

203. In the light of the foregoing, I suggest that the Court of Justice should reject the third ground of appeal in its entirety.

D. Conclusion on the appeal

204. In the light of those considerations, I propose to the Court of Justice that it should dismiss the appeal in its entirety.

IV. Costs

205. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs.

206. Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. As the Commission did apply for costs in its pleadings, FFT must be ordered to pay the costs incurred by the Commission in the present appeal.

207. In accordance with Article 140(1) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs. Ireland, having intervened in the proceedings, must therefore bear its own costs of the present appeal.

V. Conclusion

208. In the light of those considerations, I propose to the Court of Justice that it should:

- (1) Dismiss the appeal;
- (2) Order Fiat Chrysler Finance Europe to bear its own costs and to pay the costs incurred by the European Commission in the present appeal;
- (3) Order Ireland to bear its own costs of the present appeal.

⁹³ Judgment of 16 September 2021 (C-337/19 P, EU:C:2021:741, paragraphs 80 and 81).

⁹⁴ See, in particular, judgment of 16 September 2021, *Commission v Belgium and Magnetrol International* (C-337/19 P, EU:C:2021:741, paragraphs 106 and 121).