Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 16 December 2021 [1]

Case C-898/19 P

Ireland
v

European Commission

(Appeal – State aid – Aid granted by the Grand Duchy of Luxembourg – Decision declaring the aid incompatible with the internal market and unlawful and ordering its recovery – Tax ruling – Arm's length principle – Advantage – Reference framework – 'Normal' taxation – Selectivity – Presumption)

Table of Contents

[1] Original language: French.

I. Introduction

1. A 'tax ruling' or 'administrative tax ruling' is a common practice allowing undertakings to request from the tax administration an 'advance ruling' on their tax liability. The term 'ruling' refers generally to the fact that a tax administration has, usually at the request of a taxpayer, taken an official position on the application of specific legislative provisions in force with respect to a situation or to one or more transactions which have not yet had tax consequences. Taxpayers seek thereby to obtain binding assurances from the administration as to the tax treatment of their transactions.

2. From June 2014, the European Commission initiated a series of investigations aimed at ascertaining whether the practices of the tax authorities of several Member States concerning multinational undertakings, as regards, in particular, the apportionment of profits between the various States in which they operated were in conformity with the Treaty rules on State aid. One of those investigations led to the adoption of the decision relating to the aid that was allegedly granted by the Luxembourg tax authorities to the Fiat group. [2]

3. At the same time, the revelations of the 'Lux Leaks' journalistic investigation in November 2014 brought that subject to the attention of the general public, eliciting reactions mostly of outrage. [3] Following those revelations, several political leaders took actions, at both European and international level, to remedy what was now perceived as a serious breach of tax fairness. The most recent of those actions took the form of an agreement establishing a global tax on the income of multinational undertakings. [4]

4. While being conscious of the political, economic and even societal context of the present case, the Court, in its forthcoming judgment, will have to examine the issues raised by the approach adopted by the Commission in the decision at issue solely in the light of legal considerations. 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.

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 This was a joint investigation by the International Consortium of Investigative Journalists (ICIJ) and 40 other media organisations. In that regard, see, in particular, the 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 In that regard, see, inter alia, the document 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy', discussed within the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting and approved by 137 countries on 8 October 2021, 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, *Luxembourg and Fiat Chrysler Finance Europe* v *Commission* (T-755/15 and T-759/15, EU:T:2019:670; 'the judgment under appeal').

5. The innovative nature of the Commission's approach inter alia consisted in introducing the arm's length principle into the examination of the existence of an economic advantage. Owing to its contested legal basis, the introduction of that concept into the analysis required by Article 107(1) TFEU will lead the Court to question the boundary drawn by the Treaty between the fiscal autonomy of the Member States and the prohibition of State aid.

II. Background to the dispute

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

6. The tax adviser of Fiat Chrysler Finance Europe, formerly known as Fiat Finance and Trade Ltd ('FFT'), sent to the Luxembourg tax authorities on 14 March 2012 a letter requesting the approval of an advance transfer pricing agreement. In support of that request, the tax adviser also submitted to the Luxembourg tax authorities its own report analysing the transfer prices applied to the transactions carried out by FFT.

7. On 3 September 2012, the Luxembourg tax authorities issued a tax ruling in response to FFT's request ('the tax ruling at issue'). That 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 was] hereby [confirmed] that the transfer pricing analysis hereafter [had] been realised in accordance with the Circular 164/2 of the 28 January 2011 and [respected] 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 numerous exchanges between the Grand Duchy of Luxembourg and the Commission until the adoption, by that institution, on 24 March 2014, of 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 that tax ruling constitutes State aid for the purposes of Article 107(1) TFEU.

B. The decision at issue

1. Description of the main 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 stated that that ruling was 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 Income Tax Code')[7] and Circular LIR No 164/2 issued by the director of Luxembourg taxes of 28 January 2011 ('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 concluded between independent companies negotiating under comparable circumstances at arm's length. Secondly, it noted that Circular No 164/2 explained in particular how to determine an arm's length remuneration specifically where those transactions were carried out by intra-group financing companies.[8]

3. Assessment of the tax ruling at issue

12. As regards the third and fourth conditions for a finding of State aid, the Commission considered 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 regime. It reached that conclusion after a concurrent examination of advantage and selectivity, structured according to the three steps defined by the Court to establish whether a particular tax measure should be classified as selective.

13. In the first step of its analysis, the Commission considered that the reference framework was the general Luxembourg corporate income tax regime and that the objective of that regime was to tax the profits of all companies resident in Luxembourg. The difference in determining the taxable profits of stand-alone companies and integrated companies, according to the Commission, had no bearing on that objective, in so far as it required the taxation of the profits of all resident companies, whether integrated or non-integrated. The same was true of the special provisions applicable to groups, which were aimed solely at putting those two types of companies on equal footing. Moreover, the objective of the tax ruling at issue, namely to determine FFT's taxable profits for corporate income tax purposes under that regime, confirmed that that regime constituted the reference framework, in that that objective did not differentiate FFT on the basis that it belonged to a group. In that respect, the Commission considered that integrated and non-integrated companies were in a similar factual and legal situation in light of the objective of Luxembourg's general corporate income tax regime.[9]

14. In the second step of its analysis, the Commission first of all indicated that the question whether a tax measure constitutes a derogation from the reference framework generally coincides 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

7 According to that article: 'Taxable income comprises hidden profit distributions. A hidden profit distribution arises in particular when a shareholder, a stockholder or an interested party receives either directly or indirectly benefits from a company or an association which he or she normally would not have received if he or she had not been a shareholder, a stockholder or an interested party.' It should be noted that that provision has not been in force since the Grand Duchy of Luxembourg introduced into the Income Tax Code new Articles 56 and 56a relating to the arm's length principle on 1 January 2017.

8 Recitals 74 to 83 of the decision at issue.

9 Recitals 193 to 199 of the decision at issue.

framework, that reduction constitutes both the advantage granted by the tax measure and the derogation from the reference framework. The Commission also recalled that, in the case of an individual measure, such as the tax ruling at issue, the identification of the economic advantage is, in principle, according to the case-law, sufficient to support the presumption that it is selective. [10]

15. With regard to the determination of the advantage in the present case, the Commission recalled that a tax measure resulting in a group company charging transfer prices that are lower than those which would be charged between independent undertakings confers an advantage on that company, in that that measure results in a reduction of its taxable base and thus its tax liability under the general corporate income tax regime. According to the Commission, the Court has thus accepted the arm's length principle, namely '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', [11] as the benchmark for establishing whether a group company receives an advantage for the purposes of Article 107(1) TFEU. Consequently, the Commission explained that it was required to verify whether the methodology accepted by the Luxembourg tax authorities in the tax ruling at issue departed from a methodology that led to a reliable approximation of a market-based outcome, and thus from the arm's length principle. In such a case, the tax ruling at issue would be deemed, according to the Commission, to confer a selective advantage on FFT for the purposes of Article 107(1) TFEU. [12]

16. In the light of those considerations, the Commission took the view that several choices of methods and parameters and several 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. [13]

17. As a subsidiary point, the Commission found that, in any event, the tax ruling at issue granted a selective advantage also under the more limited reference framework, invoked by the Grand Duchy of Luxembourg and by FFT, consisting of Article 164(3) of the Income Tax Code and Circular No 164/2, which laid down the arm's length principle in Luxembourg tax law. [14] 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 authorities under Circular No 164/2 and, in particular, to the tax rulings granted to other financing and treasury companies that the Grand Duchy of Luxembourg sent to the Commission as part of a representative sample of its tax ruling practice. [15]

18. In the third step of its analysis, the Commission noted that neither the Grand Duchy of Luxembourg nor FFT had advanced any ground for justifying the preferential treatment of FFT as a result of the tax ruling at issue and that, in any event, it had not been possible to identify any

10 Recitals 216 to 218 of the decision at issue.

11 Recitals 225 and 226 of the decision at issue.

12 Recitals 222 to 227 of the decision at issue.

13 Recitals 234 to 301 of the decision at issue.

14 Recitals 315 to 317 of the decision at issue.

15 Recitals 318 to 336 of the decision at issue.

ground that could be said to derive directly from the intrinsic, basic principles of the reference framework or that was the result of inherent mechanisms necessary for the functioning and effectiveness of that framework. [16]

19. The Commission considered, in conclusion, that the tax ruling at issue had granted a selective advantage to FFT and that that ruling therefore constituted State aid for the purposes of Article 107(1) TFEU.

20. The beneficiary of that aid was, according to the Commission, the Fiat/Chrysler group as a whole, in so far as FFT formed an economic entity with the other entities of that group and the reduction of FFT's tax liability had necessarily reduced the pricing conditions of the intra-group loans granted by FFT. [17]

C. The procedure before the General Court and the judgment under appeal

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

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

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

24. 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. Moreover, the parties having been heard at the hearing, the General Court decided that Cases T-755/15 and T-759/15 should be joined for the purposes of the decision closing the proceedings, on account of the connection between them, in accordance with that same provision.

25. In support of their actions, FFT and the Grand Duchy of Luxembourg advanced five series of pleas, which alleged, 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 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, notably on the ground that that tax ruling did not comply with the arm's length

16 Recitals 337 and 338 of the decision at issue.

17 Recitals 341 to 345 of the decision at issue.

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 found 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, infringement of the principle of legal certainty and 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).

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

27. As regards the second series of pleas, and in particular the pleas alleging misapplication of the arm's length principle to 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 next considered that, in order to determine the possible existence of an advantage for the purposes of Article 107(1) TFEU, the Commission may compare the fiscal burden resulting from the application of a fiscal measure for such an integrated undertaking 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 is thus intended to tax the profit of integrated undertakings as though they had arisen from transactions carried out at market prices. [18]

28. In that context, the arm's length principle is, according to the General Court, a 'tool' or a 'benchmark' for verifying whether the pricing of intra-group transactions accepted by the national authorities corresponds to pricing under market conditions, in order to establish 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. [19]

29. The General Court next observed that, in the case at hand, the tax ruling at issue concerns the determination of FFT's taxable profits under the Income Tax Code and that that code is intended to tax the profit resulting from the economic activity of that integrated undertaking as if it had resulted from transactions carried out at market prices. On that basis, it considered that the Commission could indeed compare FFT's taxable profit as a result of the application of the tax ruling at issue with the taxable profit that would be made by an undertaking in a factually comparable situation and carrying on its activities in conditions of free competition, if the normal tax rules under Luxembourg law were applied. [20]

18 Paragraphs 140 and 141 of the judgment under appeal.

19 Paragraph 143 of the judgment under appeal.

20 Paragraphs 145 and 148 of the judgment under appeal.

30. Finally, the General Court rejected the arguments of the Grand Duchy of Luxembourg and of FFT seeking to call that conclusion into question.

31. As regards the arguments that the Commission had provided no legal basis for its arm's length principle and had not defined its content, the General Court stated, with respect to the legal basis, that the Commission had indeed indicated, 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, secondly, that that principle was a general principle of equal treatment in taxation, falling within the application of that article of the Treaty. [21] As for the content of the arm's length principle, the General Court considered that it was apparent from the decision at issue that that principle is a tool for establishing that intra-group transactions are remunerated as though they had been negotiated between independent undertakings. [22]

32. As regards the argument that the arm's length principle applied in the decision at issue is a criterion that is extraneous to Luxembourg tax law and that it thus enabled the Commission to achieve, ultimately, harmonisation in disguise of direct taxation in breach of the fiscal autonomy of the Member States, the General Court considered that it was unfounded since the use of that principle was permitted by the fact that the Luxembourg tax rules provided that integrated companies were to be taxed on the same terms as stand-alone companies. [23]

33. In respect of 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 considered that the Commission's wording must not be taken out of context and could not be interpreted as meaning that the Commission had asserted that there was a general principle of equal treatment in relation to tax inherent in Article 107(1) TFEU. [24]

D. The procedure before the Court and the forms of order sought by the parties to the appeal

34. By its appeal, Ireland claims that the Court should:

– set aside the judgment under appeal;

– annul the decision at issue, and

– order the Commission to pay the costs.

35. The Commission contends that the Court should:

– dismiss the appeal, and

– order Ireland to pay the costs.

21 Paragraph 150 of the judgment under appeal.

22 Paragraph 155 of the judgment under appeal.

23 Paragraphs 156 to 158 of the judgment under appeal.

24 Paragraphs 160 and 161 of the judgment under appeal.

36. Fiat Chrysler Finance Europe submits that the Court should:

– allow the appeal, and

– order the Commission to bear Fiat Chrysler Finance Europe's costs relating to the response and to Fiat Chrysler Finance Europe's subsequent participation in the appeal proceedings.

37. The Grand Duchy of Luxembourg submits that the Court should:

– grant the form of order sought by Ireland;

– set aside the judgment under appeal;

– annul the decision at issue, and

– order the Commission to pay the costs incurred by it.

38. Ireland, Fiat Chrysler Finance Europe, the Grand Duchy of Luxembourg and the Commission presented their oral observations to the Court at a joint hearing for Cases C-885/19 P and C-898/19 P held on 10 May 2021.

III. The appeal

39. In support of its appeal, Ireland, joined by the Grand Duchy of Luxembourg and FFT, raises five grounds of appeal. By its first, third, fourth and fifth grounds of appeal, Ireland challenges in several respects the analysis carried out by the General Court to determine whether there was an economic advantage, in particular from the perspective of the rules applicable to State aid (first ground), the obligation to state reasons (third ground), the principle of legal certainty (fourth ground) and respect for the division of competences between the European Union and the Member States (fifth ground). I shall begin by examining those grounds of appeal before considering Ireland's second ground of appeal, by which Ireland criticises the examination of the selectivity of the measure at issue carried out in paragraphs 351 to 355 of the judgment under appeal.

A. The first, third, fourth and fifth grounds of appeal

1. Effectiveness

40. The Commission considers that the first, third, fourth and fifth grounds of appeal are ineffective in so far as none of those grounds of appeal, even if upheld, could lead to the setting aside of the judgment under appeal. Those grounds of appeal are all based on the claim that the General Court erred in law by endorsing the Commission's use of an ad hoc arm's length principle, the legal basis of which is erroneous, in support of its main finding concerning the existence of a selective advantage. However, even if that claim were correct, which the Commission disputes, the decision at issue contains a subsidiary line of reasoning having a different legal basis, namely Article 164(3) of the Income Tax Code and Circular No 164/2, a line of reasoning that was endorsed by the General Court without being challenged by Ireland.

41. In that regard, it should first of all be recalled that recitals 315 to 317 of the decision at issue set out a subsidiary line of reasoning according to which the tax ruling at issue also confers a selective advantage on FFT when it is examined in the light of the more limited reference framework consisting of all the integrated companies applying transfer pricing and falling within the scope of the abovementioned national provisions. That line of reasoning was, in essence, endorsed by the General Court in paragraphs 287 to 299 of the judgment under appeal.

42. It is clear that the issue relating to the basis and scope of the arm's length principle was primarily examined by the General Court in paragraphs 140 to 148 of the judgment under appeal, which might suggest that any acknowledgment of the merits of one of the grounds of appeal raised by Ireland would have no effect on the examination carried out in the alternative by the General Court in paragraphs 287 to 299 of that judgment. However, a closer reading of the judgment under appeal shows that that examination cannot be regarded as *severable and autonomous* from the reasoning developed by the General Court, primarily, in paragraphs 140 to 148 of that judgment.

43. In assessing the Commission's subsidiary line of reasoning, the General Court acknowledged that the Commission had correctly applied certain elements from the analysis in its main line of reasoning. In particular, the General Court found, 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 in particular on Section 7.2.2 of the decision at issue, which, it seems to me, contains the Commission's discussion of the legal basis and scope of the arm's length principle, as well as the application of that principle to the case at hand.[25] Since the legal basis for the Commission's subsidiary line of reasoning, as endorsed by the General Court, stems from its principal examination, that legal basis cannot endure legally should the principal examination be found to be unlawful. In other words, if one of the grounds of appeal put forward by Ireland were upheld, thereby invalidating the use of the arm's length principle, that subsidiary line of reasoning would also be vitiated by an error of law, with the result that the conclusion drawn by the decision at issue, as confirmed by the judgment under appeal, would no longer be valid.

44. I therefore consider that the first, third, fourth and fifth grounds of the present appeal cannot be declared ineffective from the outset.

45. Furthermore, I agree with the analysis set out by Ireland in the reply, which highlights the delicate implications of the Commission's choice to include two alternative lines of reasoning in the decision at issue and the undesirable consequences of a declaration of ineffectiveness of the grounds of appeal at issue. In that regard, it is common ground that a plea is considered ineffective where it is directed against a ground included in a judgment of the General Court only for the sake of completeness and cannot therefore lead to the setting aside of that judgment in so far as the prior examination of the principal reasoning had not revealed any error of law. In those circumstances, it is difficult to see how the alleged ineffectiveness of the grounds of appeal in question can be reconciled with the logic and overall reasoning of the judgment under appeal. In paragraph 287 of that judgment, the General Court stated that its examination of the Commission's subsidiary line of reasoning was being done 'for the sake of completeness', whereas categorising those grounds of appeal as ineffective would be tantamount to regarding the General Court's *main* line of reasoning as having been put forward for the sake of completeness.

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

2. Admissibility

46. The Commission contends, in essence, that the substance of the line of argument put forward by Ireland under the first, third, fourth and fifth grounds of appeal is confined to calling into question the decision at issue, the Commission's general practice in relation to tax rulings and certain documents of that institution describing its approach to such rulings. Since that line of argument does not specifically address the paragraphs of the judgment under appeal, it must be rejected, according to the Commission, as inadmissible.

47. It is true that certain parts of Ireland's line of argument depart considerably from the General Court's reasoning in the judgment under appeal and are aimed more at the method used by the Commission to determine the existence of a selective advantage in the decision at issue and in its entire decision-making practice in relation to tax rulings, rather than making specific complaints against the judgment under appeal. I do not consider, however, that this should lead the Court to dismiss from the outset the present appeal as inadmissible. Those parts of Ireland's line of argument are merely elements in an overall line of argument which is clearly aimed at challenging the conclusions reached by the General Court in the judgment under appeal as to the legality of the use of the arm's length principle in the decision at issue. Moreover, the Commission itself acknowledges, in its response, that certain of the arguments put forward in the appeal address specific paragraphs of the judgment under appeal. In particular, the first ground of appeal criticises on a number of occasions paragraphs 141, 142, 147 and 149 of that judgment. The third ground of appeal criticises paragraphs 150 and 161 of the said judgment. The fourth ground of appeal criticises paragraphs 180 to 184 of the judgment. The fifth ground of appeal criticises paragraph 113 of that judgment.

48. In those circumstances, I invite the Court to reject the objection of inadmissibility raised by the Commission.

3. Merits

(a) Preliminary observations on advantage and selectivity in tax matters

(1) The 'particular importance' of determining the reference framework in the case of tax measures

49. It is appropriate to recall that an advantage for the purposes of Article 107(1) TFEU typically exists where the financial situation of an undertaking is improved as a result of State intervention. In order to establish this, it is necessary to carry out a counterfactual assessment, consisting in comparing the situation of the recipient undertaking resulting from the application of the State measure in question with the situation of that undertaking were it not for that measure.

50. As regards tax measures, the Court has specified that, since State interventions are defined, in the context of Article 107(1) TFEU, according to their effects, the concept of 'State aid' encompasses not only the granting of positive benefits, but also 'negative' interventions which, in various forms, have the effect of reducing the tax burden on an undertaking. [26] A State measure of

[26] Judgment of 15 March 1994, *Banco Exterior de España* (C-387/92, EU:C:1994:100, paragraphs 13 and 14). See also judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 71 and 72).

that nature which, although not involving the transfer of State resources, places the recipient undertakings in a more favourable position than other taxpayers is capable of procuring an advantage for those undertakings for the purposes of Article 107(1) TFEU.[27]

51. That assessment involves ascertaining whether the measure in question has the effect of reducing the tax burden ordinarily placed on the budget of the recipient undertaking.[28] According to the case-law of the Court, the determination of that tax burden requires an examination of the national tax system applicable to that undertaking in order to define the 'normal' taxation which the undertaking benefiting from the tax measure would have had to pay if such a measure had not been taken.[29] 'Normal' taxation is thus the comparator used in the counterfactual assessment to determine whether any advantage has been granted through a tax measure. It is only after that 'normal' taxation has been defined that it can be determined whether the tax measure under examination confers an advantage on the recipient undertaking.

52. Selectivity, which involves determining whether a State measure is such as to favour 'certain undertakings or the production of certain goods', must be presumed where there is an economic advantage if that measure constitutes an individual measure and was therefore clearly adopted in order to grant such an advantage.[30] By contrast, where that measure constitutes an aid scheme of a general nature, its selectivity depends, according to the Court, on whether, *within the context of a particular legal system*, a national measure is such as to favour certain undertakings or the production of certain goods by comparison with others which are in a legal and factual situation that is comparable in the light of the objective of that system.[31]

53. In order to determine whether this is the case, the Court has, over the years, developed a three-step method of analysis, which has been crystallised by the most recent case-law.[32] That method requires, first, identifying the *reference framework* and, secondly, determining whether the tax measure at issue differentiates between economic operators in a comparable factual and legal situation in the light of the objective pursued by the reference framework. Should the answer be in the affirmative, that measure is considered a priori selective and the Member State concerned then has only the possibility of proving, thirdly and lastly, that the unequal treatment thus established results from the nature or general scheme of the reference framework. In other words, the question whether the tax measure under examination gives rise to unjustified unequal treatment depends, in the case of a general aid scheme, on the *prior definition of the reference framework*.

54. It is important to underline, at this stage of the Opinion, that, according to the case-law of the Court, the determination of the reference framework for the purpose of assessing selectivity 'has a particular importance in the case of tax measures, since the very existence of an advantage may be

27 Judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 56 and the case-law cited).

28 See judgments of 26 September 1996, *France* v *Commission* (C-241/94, EU:C:1996:353, paragraph 40), and of 12 December 2002, *Belgium* v *Commission* (C-5/01, EU:C:2002:754, paragraphs 38 and 39).

29 See judgment of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 27).

30 See, inter alia, judgment of 4 June 2015, *Commission* v *MOL* (C-15/14 P, EU:C:2015:362, paragraph 60).

31 See, inter alia, judgments of 6 September 2006, *Portugal* v *Commission* (C-88/03, EU:C:2006:511, paragraph 56), and of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 41).

32 Judgments of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981); of 28 June 2018, *Andres (Insolvency of Heitkamp BauHolding)* v *Commission* (C-203/16 P, EU:C:2018:505); and of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024).

established only when compared with "normal" taxation'.[33] The Court thus clearly establishes a link between the concept of advantage and the concept of selectivity. I infer from this that the criteria laid down by the Court for identifying the reference framework for the purpose of examining selectivity must also be used when determining the reference framework constituting 'normal' taxation for the purposes of verifying the existence of an economic advantage.[34] I shall attempt to define these criteria in the following section.

(2) The determination of the reference framework (and 'normal' taxation) in tax matters

55. In its Notice on the notion of State aid, the Commission stated that the reference framework 'is composed of a consistent set of rules that generally apply – on the basis of objective criteria – to all undertakings falling within its scope as defined by its objective'.[35] The Court, for its part, has not adopted that definition but has described the reference framework as 'the ordinary or "normal" tax system applicable in the Member State concerned'.[36]

56. In the judgment in *World Duty Free Group and Spain* v *Commission*, the Court made it clear that the determination of the reference framework 'must be carried out following an exchange of arguments with the Member State concerned' and that it 'must follow from an objective examination of the content, the structure and the specific effects of the applicable rules under the national law of that State'.[37] The criteria on the basis of which such a determination must be carried out, which could already be deduced from existing case-law, have been systematised by that judgment.

57. First, the rules and principles which make up the reference framework must be identified *according to objective criteria*, in particular to enable judicial review of the assessments on which that identification is based.[38]

58. Secondly, the reference framework must be *complete*, in that it must include *all* the rules and principles which affect the tax burden on undertakings and therefore, according to the Court, cannot consist of 'some provisions … that have been artificially taken from a broader legislative framework'.[39]

33 See judgments of 6 September 2006, *Portugal* v *Commission* (C-88/03, EU:C:2006:511, paragraph 56); of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 55); of 28 June 2018, *Andres (Insolvency of Heitkamp BauHolding)* v *Commission* (C-203/16 P, EU:C:2018:505, paragraph 88); and of 7 November 2019, *UNESA and Others* (C-105/18 to C-113/18, EU:C:2019:935, paragraph 62).

34 These criteria seem to me to be relevant irrespective of whether the State measure concerned has the nature of an aid scheme or of individual aid. The use of those criteria when determining 'normal' taxation in the case of an individual measure is necessary, in my view, to ensure the preservation of the exclusive competence of the Member States in the area of direct taxation.

35 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262, p. 1), paragraph 133.

36 Judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 57).

37 Judgment of 6 October 2021, *World Duty Free Group and Spain* v *Commission* (C-51/19 P and C-64/19 P, EU:C:2021:793, paragraph 62).

38 Judgment of 6 October 2021, *World Duty Free Group and Spain* v *Commission* (C-51/19 P and C-64/19 P, EU:C:2021:793, paragraph 66).

39 Judgment of 6 October 2021, *World Duty Free Group and Spain* v *Commission* (C-51/19 P and C-64/19 P, EU:C:2021:793, paragraph 62 and the case-law cited).

59. Thirdly, the reference framework must be determined by an analysis aimed at identifying the provisions by which *the national legislature intended* to determine the tax burden of undertakings. This is the *concrete* nature of the reference framework. As has rightly been pointed out,[40] that criterion follows from the fact that the reference framework is defined by the Member State concerned in the exercise of its exclusive competence in matters of direct taxation and therefore implies that the set of rules and principles comprising the reference framework forms part of that Member State's tax system.

60. This means, in my view, that the reference framework must be determined on the basis of rules of *national law*, including, quite clearly, EU law and international law transposed into the domestic legal system.

61. The judgments delivered by the Court, sitting as the Grand Chamber, in *Commission* v *Poland* [41] and *Commission* v *Hungary*,[42] demonstrate that this is so.

62. The first case concerned a Polish measure introducing a retail sales tax based on the monthly turnover of all retailers. The second case concerned a tax on advertising based on the annual net turnover, generated by the broadcasting or publication of advertisements, of economic operators broadcasting or publishing advertisements (with a few exceptions). In both cases, the Commission had considered that the tax measure in question conferred a selective advantage because the difference in the average tax rate resulting from the progressivity of the rates provided for by that measure favoured small undertakings over large ones. According to the Commission, the reference framework consisted of a *single-rate* turnover tax, the progressive rate being by definition reserved solely for taxes on profits. The question therefore arose as to whether the progressivity of the rates ought to be excluded from the reference framework against which the existence of a selective advantage must be established or whether that progressivity was an integral part of it.

63. In that regard, the Court considered, in essence, that the reference framework, or the 'normal' tax system, is defined, in principle, by the characteristics constituting the tax under examination, in particular the rate, the tax base and the taxable event. Outside the spheres in which EU tax law has been harmonised, the determination of those characteristics falls, according to the Court, within the discretion of each Member State, in the exercise of its exclusive competence in matters of direct taxation.[43]

64. The Court having thus established the major premiss of the syllogism (the reference framework is defined by the characteristics constituting the tax) as well as its minor premiss (the determination of those characteristics is a matter for the Member States), I shall allow myself to draw the conclusion from it. The reference framework comprises *only* rules and principles intrinsic to the national legal system and does not permit their replacement by rules that are extraneous to that system, given that such a replacement would render the reference framework, in the Court's words, 'incomplete or fictitious'.[44]

40 Opinion of Advocate General Pitruzzella in *World Duty Free Group and Spain* v *Commission* (C-51/19 P and C-64/19 P, EU:C:2021:51, point 42) (emphasis added).

41 Judgment of 16 March 2021, *Commission* v *Poland* (C-562/19 P, EU:C:2021:201).

42 Judgment of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202).

43 Judgments of 16 March 2021, *Commission* v *Poland* (C-562/19 P, EU:C:2021:201, paragraphs 37 to 39), and of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202, paragraphs 43 to 45).

44 See judgments of 16 March 2021, *Commission* v *Poland* (C-562/19 P, EU:C:2021:201, paragraph 45), and of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202, paragraph 51).

65. I would add that, if a reference framework comprising rules extraneous to national law, or even simply 'contaminated' by their inclusion, were to be regarded as 'fictitious' on the basis that it did not possess the concrete nature of the rules of national law, the same would apply, in my view, to a reference framework based on a *reference to the objective pursued by the national legislature* in adopting the tax system concerned. As I have already explained above, it is not the presumed intention of the national legislature but the *legislative expression* of that intention which determines the content of the reference framework.

66. These are therefore the criteria relating to the objective, complete and concrete nature of the reference framework which must also guide the analysis aimed at determining 'normal' taxation in the context of the examination of the existence of an economic advantage of a fiscal nature. They should be borne in mind when analysing the present appeal.

(b) The first ground of appeal

(1) Arguments of the parties

67. The first ground of appeal alleges that the General Court erred in law in its application of Article 107 TFEU by endorsing the approach relating to the arm's length principle adopted by the Commission in its determination of the existence of an economic advantage. For the sake of clarity of analysis, it is appropriate to group the complaints raised by Ireland and disputed by the Commission into two categories, that is to say, arguments concerning, first, the legal basis of that principle and, secondly, the scope of that principle. Before that, however, it seems to me necessary to trace the origin of the arm's length principle applied in the decision at issue, to summarise the progressive development of its content by the Commission and to recall the content of the relevant part of the judgment under appeal.

(2) Assessment

(i) Preliminary observations on the origin of the arm's length principle

68. The legal instrument referred to as the 'arm's length principle' is a principle of international tax law.

69. It is now codified by Article 9(1) of the OECD Model Tax Convention on Income and on Capital as follows:

'Where … conditions are made or imposed between the two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.'

70. It is thus a principle according to which transactions between affiliated undertakings must be priced for tax purposes as if they had been concluded at arm's length between independent undertakings.

71. The arm's length principle is applied by making adjustments to 'transfer prices', namely the prices of transactions between companies in the same group and resident in different Member States. It will be recalled that transfer prices determine the apportionment of income and expenditure within one group and, consequently, the allocation of taxable profits between associated undertakings that fall under different tax authorities. They thus combine to form the respective share of worldwide profits that will be subject to taxation in each of the States in which that group is present.

72. Those adjustments are explained by the fact that, unlike in the case of independent undertakings, the calculation of the taxable profits of those associated undertakings is not based on market forces. It is for the company controlling the group to estimate the prices of intra-group transactions between non-competing entities established in different Member States. Consequently, companies belonging to one group could, in the absence of those adjustments, set the prices of transactions concluded with other companies in the group on non-market terms and thus transfer profits from one country to another.

73. The arm's length principle is therefore a consequence of the internationally recognised principle of territoriality of powers of taxation, according to which every State is entitled to tax resident companies on their worldwide profits and non-resident companies on the profits arising from activities carried out by those companies in that State. The territorial nature of powers of taxation means that companies are not free to transfer their profits and losses at will from one tax jurisdiction to another. The purpose of the arm's length principle is specifically to secure the appropriate tax base in each jurisdiction (and to avoid double taxation). [45]

74. In the field of State aid, the arm's length principle has been raised by the Commission in the context of investigations initiated since 2014 and aimed at examining the tax ruling practices followed by the competent authorities of several Member States as regards multinational undertakings, and in its Notice on the notion of State aid. [46]

75. In that notice, the Commission first stated that, 'where a tax ruling endorses a result that does not reflect in a reliable manner what would result from a normal application of the ordinary tax system, that ruling may confer a selective advantage upon the addressee, in so far as that selective treatment results in a lowering of that addressee's tax liability in the Member State as compared to companies in a similar factual and legal situation'. [47] It then set out the role of the arm's length principle in the context of such an assessment, indicating, with reference to the *Forum 187* judgment, [48] that 'a tax ruling which endorses a transfer pricing methodology for determining a corporate group entity's taxable profit that *does not result in a reliable approximation of a market-based outcome in line with the arm's length principle* confers a selective advantage upon its recipient'. [49]

45 *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, OECD, 2010, p. 39, paragraph 1.15.

46 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262, p. 1).

47 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, paragraph 170.

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

49 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, paragraph 171 (emphasis added).

76. As regards the legal characterisation of that principle, the evolution of its wording by the Commission is evidenced by comparing the decision to initiate the formal investigation procedure,[50] adopted in 2014, and the decision at issue, adopted one year later.

77. In paragraph 60 of the decision to initiate the formal investigation procedure, the Commission indicated, in addressing the issue of the existence of an economic advantage, that, 'where an [advance pricing arrangement] concerns transfer pricing arrangements between related companies within a corporate group, [it] should not depart from the arrangement or remuneration *that a prudent independent operator acting under normal market conditions would have accepted*',[51] before adding, in paragraph 61, that, 'in this context, *market conditions can be arrived at* through transfer pricing established at arm's length'[52] and, in paragraph 62, concerning compliance with the arm's length principle, that, 'when accepting a calculation method of the taxable basis proposed by the taxpayer, the tax authorities should compare that method *to the prudent behaviour of a hypothetical market operator*, which would require a market conform remuneration of a subsidiary or a branch, which reflect[s] normal conditions of competition'.[53] It is not difficult to recognise therein the logical approach, as well as terminology, of the *market economy operator principle*, in so far as the behaviour of the national tax authority is compared to that of a prudent operator acting under market conditions, it being specified that those conditions are determined by reference to the transfer prices that would be accepted by a hypothetical market operator.

78. In recital 228 of the decision at issue, the Commission asserts that 'the arm's length principle that the Commission applies in its State aid assessment is not that derived from Article 9 of the OECD Model Tax Convention, which is a non-binding instrument, but is a *general principle of equal treatment in taxation falling within the application of Article 107(1) of the TFEU*, which binds the Member States and from whose scope the national tax rules are not excluded'.[54] The arm's length principle is thus characterised as relating to equal treatment in tax matters.

(ii) The arm's length principle in the judgment under appeal

79. It is necessary briefly to recall the grounds of the judgment under appeal dedicated to the question of whether the arm's length principle could be used, in the decision at issue, for the purpose of determining the existence of an economic advantage.

80. In paragraphs 141 to 154 of the judgment under appeal, the General Court explained that, where national tax law does not make distinctions between integrated undertakings and stand-alone undertakings for the purposes of their liability to corporate income tax, that law is intended to tax the profit made by integrated undertakings as though it had arisen from transactions carried out at market prices. This is also confirmed, according to the General Court, by the *Forum 187* judgment, which specifically concerned a tax system providing for integrated companies and stand-alone companies to be treated on equal terms. The General Court recalled that the Court of Justice had recognised, in paragraph 95 of that judgment, the need to compare an aid scheme 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'. In those

50 Decision to initiate the formal investigation procedure relating to State aid SA.38375 (2014/C) (ex 2014/NN) (ex 2014/CP) – Luxembourg, Alleged aid to FFT, C(2014) 3627 final.

51 Emphasis added.

52 Emphasis added.

53 Emphasis added.

54 Emphasis added.

circumstances, the General Court considered that the Commission could indeed use the arm's length principle as a *tool* enabling it, in the context of its powers under Article 107(1) TFEU, to verify whether a tax measure by which the national authorities have accepted a certain level of pricing for intra-group transactions produces any mitigation of the burdens normally included in the budget of the integrated beneficiary undertaking and thus confers an advantage on that undertaking. As the Income Tax Code was in that case intended to tax integrated companies and stand-alone companies in the same way, the Commission was fully entitled to use that tool to carry out such a verification.

81. As regards the argument that the Commission failed to indicate in the decision at issue the legal basis of the arm's length principle, the General Court acknowledged that the Commission had stated that the arm's length principle existed irrespective of whether that principle had been incorporated into national law and that it is distinct from the principle set out in Article 9 of the OECD Model Tax Convention. It added, however, that the Commission had also made clear 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 that the Commission had described that principle as a 'general principle of equal treatment in taxation' falling within the application of that Treaty provision.

82. In paragraphs 155 to 161 of the judgment under appeal, the General Court responded, in the first place, to the argument that the Commission had examined the tax ruling at issue in the light of the arm's length principle applied as a criterion that is extraneous to Luxembourg tax law, and that this would result in harmonisation in disguise of direct taxation, in breach of the fiscal autonomy of the Member States. In that regard, the General Court considered in essence that the Commission had not exceeded its powers, since it had actually applied the arm's length principle in order to ascertain whether the tax ruling at issue had resulted in a lowering of FFT's tax burden under national legislation. It was after all apparent from that tax ruling that integrated companies were taxed on the same terms as stand-alone companies. In the second place, as regards the argument that the Commission wrongly asserted, in recital 228 of the decision at issue, that the arm's length principle is a 'general principle of equal treatment in taxation[, which falls] within the scope of Article 107(1) TFEU', the General Court held that that wording must not be 'taken out of context' and did not mean that the Commission had asserted that there was 'a general principle of equal treatment in relation to tax *inherent in* Article 107(1) TFEU'.[55] Such an interpretation would, according to the General Court, give that article too broad a scope.

(iii) The basis of the arm's length principle

83. The first complaint put forward by Ireland in this ground of appeal relates specifically to paragraph 161 of the judgment under appeal. In that regard, Ireland maintains, in essence, that the General Court was wrong to endorse the last assertion in recital 228 of the decision at issue, according to which the arm's length principle is a 'general principle of equal treatment in taxation[, which falls] within the scope of Article 107(1) TFEU', in considering that that wording could not be taken out of context and could not therefore be interpreted as meaning that the arm's length principle derives from that provision of primary law. According to settled case-law, the General Court cannot reword the decision at issue or supplement it as regards the reasoning therein. Ireland's second complaint concerns the same assertion of the decision at issue, as was approved by the General Court in paragraph 141 of the judgment under appeal. According to

[55] Emphasis added.

Ireland, there is no general principle of EU law requiring equal treatment of taxpayers. In that regard, it notes that, in the area of business taxation, EU and national law frequently distinguish between integrated companies and stand-alone companies.

84. As regards Ireland's first complaint, it should be noted, first of all, that interpreting Section 7.2.2.1 of the decision at issue, and in particular recital 228 thereof, is extremely difficult because of the infelicitous wording of certain passages of the Commission's reasoning. In those circumstances, it is all the more regrettable that the General Court decided to approve the last sentence of that recital by referring in general terms to the 'context' in which such wording was used, without providing any further clarification.

85. That being said, it is necessary to take a position on whether the General Court thereby exceeded the limits of its judicial review.

86. It is well-established case-law, as Ireland points out in its appeal, that the General Court is not entitled to *substitute its own reasoning* for that of the author of the contested act and cannot *fill, by means of its own reasoning, a gap in the reasoning for* that act in such a way that its examination is not connected with any assessment featuring in the act.[56] It is likewise established – I would add – that the *interpretation* of that act falls within the scope of the review carried out by the General Court.[57]

87. Did the General Court rewrite or supplement the reasoning for the decision at issue or did it merely use legitimate latitude in interpreting it?

88. I do not think that that question can be answered without carrying out an in-depth analysis aimed at identifying the correct reading of recital 228 of the decision at issue. This analysis alone will enable an understanding of the scope of the assessment carried out by the General Court in paragraph 161 of the judgment under appeal and thus make it possible to express a view on the complaints raised by Ireland.

89. As regards its wording, that recital states that 'the arm's length principle therefore necessarily forms part of the Commission's assessment under Article 107(1) of the TFEU of tax measures granted to group companies'. I accept that that sentence might lead one to believe that, according to the decision at issue, the arm's length principle derives from the Treaty provision referred to. It seems to me however that that sentence might also be understood less broadly, in the light of the subsequent statement according to which that principle is applicable irrespective of whether it has been incorporated beforehand into the law of the Member State concerned ('independently of whether a Member State has incorporated this principle into its national legal system'). In other words, although the Commission states that the arm's length principle is an integral part of that assessment even in the absence of such incorporation into national law, it does not mean that the use of the arm's length principle in that context is not subject to other conditions, such as the fact that the tax system constituting 'normal' taxation aims to treat integrated companies and stand-alone companies in the same way.

56 See judgment of 24 January 2013, *Frucona Košice* v *Commission* (C-73/11 P, EU:C:2013:32, paragraphs 87 to 90).

57 See judgment of 26 March 2020, *Larko* v *Commission* (C-244/18 P, EU:C:2020:238, paragraphs 104 and 105).

90. Moreover, the sentence of that recital 228 under examination which is subject to review by the General Court, in paragraph 161 of the judgment under appeal, indicates that the arm's length principle is 'a general principle of equal treatment in taxation *falling within the application* of Article 107(1) [TFEU]',[58] and not that it 'derives from' or is 'inherent in' that Treaty provision.

91. As regards the context of the decision at issue, I would first note that recitals 224, 226, 227 and 228 thereof, which set out the basis and scope of the arm's length principle, all make reference to the fact that that principle makes it possible to identify the existence of more favourable tax treatment for integrated companies *under the general corporate income tax regime*, a clarification which would have no relevance had the Commission considered that the roots of that principle were grounded in Article 107(1) TFEU.

92. Furthermore, I agree with the position taken by the Commission in its response, according to which Section 7.2.2.1 of that decision ('Selective advantage resulting from a deviation from the arm's length principle'), which contains recital 228, must be interpreted in the light of Section 7.2.1 thereof ('Determination of the reference system').

93. After all, Section 7.2.2.1 is the introductory part of Section 7.2.2 ('Selective advantage due to a derogation from the general Luxembourg corporate income tax system'), in which the Commission sought to prove that, by endorsing a transfer pricing agreement which results in earnings lower than those resulting from application of the arm's length principle, the Luxembourg tax authorities had conferred an advantage on FFT and had thereby derogated from the national rules on corporate taxation. Yet it is in Section 7.2.1 that the Commission considered that the general Luxembourg corporate income tax regime constituted the reference framework in the light of which the existence of a selective advantage must be examined and also indicated that integrated companies and stand-alone companies were in a comparable factual and legal situation with regard to the objective of that regime. In the light of that finding, Section 7.2.2.1 explains that the benchmark used by the Commission in the decision at issue to determine whether a tax ruling on transfer pricing confers a selective advantage is the tax treatment of stand-alone companies under the general Luxembourg corporate income tax regime.

94. Accordingly, the 'context' referred to in paragraph 161 of the judgment under appeal is indeed that in which that national tax system, which constitutes the reference framework for the examination of the existence of a selective advantage, seeks to tax integrated companies and stand-alone companies in the same way. It is therefore apparent that the arm's length principle, as referred to in the decision at issue, derives from national law, and not from Article 107(1) TFEU itself.

95. It follows that the General Court neither reformulated nor supplemented the reasoning for the decision at issue, but merely interpreted it without exceeding the limits of its judicial review. Ireland's first complaint should therefore, to my mind, be rejected.[59]

[58] Emphasis added.

[59] At this stage, it is important to make clear that the suggested answer relates to a formal complaint concerning the reasoning for the decision at issue and not to any error of law committed by the General Court in its examination of the Commission's assessment of the substance. The latter issue is covered solely by the fifth complaint, which will be examined below.

96. In the event that the Court does not follow my proposal, a final remark is necessary. If the Court of Justice considers, contrary to what the General Court held in the judgment under appeal, that the reasoning for the decision at issue must be understood as meaning that the arm's length principle derives from Article 107(1) TFEU, it remains to be ascertained whether a principle of equal treatment of taxpayers can actually be derived from that Treaty provision.

97. As Ireland argues in its appeal, the Court has already recognised that the Treaty contains no general principle of non-discrimination beyond the grounds which are *expressly* stated therein (nationality, sex, age, and so forth).[60] It is clear that Article 107(1) TFEU, which lays down a general prohibition on the granting of State aid, in no way establishes a general principle requiring equal treatment of taxpayers. Such a principle can therefore be relied on as against national legislative provisions only if that principle has first been developed by the EU legislature in an act showing its well-defined content,[61] which does not seem to me to be the case with respect to the equal treatment of integrated and stand-alone undertakings.

98. As regards the second complaint put forward by Ireland, it is based on the premiss that paragraph 141 of the judgment under appeal indicates that the arm's length principle *is derived from Article 107(1) TFEU*. In so far as that paragraph states, by contrast, that the arm's length principle applies where *national law* is intended to accord the same treatment to integrated companies and stand-alone companies for the purposes of corporate taxation, I consider that that complaint must also be rejected.

99. It is now appropriate to examine the fifth complaint raised by Ireland. That Member State submits that the arm's length principle may be applied to verify the existence of an advantage in a situation such as that in the present case only if that principle is incorporated into the national tax system constituting 'normal' taxation, and that this means that rules actually applied in the Member State concerned must be taken into account and not rules external to that system. The General Court did not fulfil that requirement when it endorsed, in paragraphs 141 and 145 of the judgment under appeal, the Commission's use of that principle on the basis of the presumed objective of Luxembourg tax law.

100. It is appropriate at the outset to frame the terms of the discussion. The parties agree on two essential findings arising from the reasoning of the General Court in the judgment under appeal. First, there is nothing, on the face of it, preventing the arm's length principle from being applied as a 'tool' for examining the existence of an advantage in favour of an integrated undertaking. Secondly, whether that principle is intended to apply depends on the question whether it forms part of the body of normal taxation rules applicable to such an undertaking in the absence of the tax ruling at issue. The point of divergence between the parties relates solely to the way in which the General Court answered the latter question.

101. It is therefore necessary to take a position in that regard, which requires account to be taken of the criteria governing the determination of that 'normal' taxation.

102. As is apparent from my earlier remarks, the fact that the concept of 'normal' taxation, used in the assessment of the existence of an economic advantage, is essentially equated with the concept of 'reference framework', used in the analysis of selectivity, leads me to consider that the criteria

60 Judgment of 18 December 2014, *FOA* (C-354/13, EU:C:2014:2463, paragraph 33).

61 See, inter alia, judgments of 15 October 2009, *Audiolux and Others* (C-101/08, EU:C:2009:626, paragraph 34), and of 29 October 2009, *NCC Construction Danmark* (C-174/08, EU:C:2009:669, paragraph 42).

used by the case-law to determine the content of the latter concept may indeed be applied to the former. Those criteria are concerned with the objectivity, comprehensiveness and concrete nature of the body of rules constituting 'normal' taxation.

103. In view of the subject of the present complaint, it seems to me that the criterion relating to the *concrete* nature of 'normal' taxation is of particular importance.

104. In that regard, it must be stated, first of all, that a reading of paragraph 139 of the judgment under appeal in conjunction with the initial wording used in paragraph 141 thereof shows that the General Court implicitly accepted the premiss that 'normal' taxation must include only rules of national law.

105. Next, it is apparent from paragraphs 141 and 145 of that judgment that, according to the General Court, the *objective* of the Income Tax Code consisting in taxing integrated undertakings and stand-alone undertakings in the same way in respect of corporate income tax is sufficient to justify the conclusion that the arm's length principle falls under 'normal' taxation. In paragraph 141 of the judgment under appeal, the General Court referred, after all, to the fact that, 'where national tax law does not make a distinction between integrated undertakings and stand-alone undertakings …, 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'. [62] In paragraph 145 of the judgment under appeal, the General Court stated that '*the objective of* [the Income Tax Code] is to tax integrated and stand-alone undertakings in Luxembourg in the same way' and that that code '*is intended to* tax the profit resulting from the economic activity of … an integrated undertaking as if it had resulted from transactions carried out at market prices'. [63] However, no specific provision of Luxembourg law is relied on in support of its conclusion.

106. As I have shown above and as follows from the most recent case-law of the Court, the concrete nature of 'normal' taxation means that it derives from rules of *positive* law. In order to avoid any encroachment on the exclusive competence of the Member States in the area of direct taxation, the existence of an advantage within the meaning of Article 107 TFEU can be verified only by reference to the normative framework outlined by the national legislature in the *actual* exercise of that competence. The latter alone can ensure that the arm's length principle forms part of the set of rules and principles applicable to the tax affairs of an integrated undertaking such as FFT, in the absence of the tax ruling at issue.

107. In those circumstances, I share Ireland's view that the approach adopted by the Commission in the decision at issue and endorsed by the General Court in the judgment under appeal ultimately amounts to introducing into the national tax system constituting 'normal' taxation a rule, namely the arm's length principle, which is extraneous to that system. For the reasons set out inter alia in the preceding point, the reference to the purported objective pursued by the national legislature is not capable of justifying the arm's length principle's belonging to the said system.

108. In that connection, it should be noted that Ireland also argues that the General Court thus simply disregarded Article 164(3) of the Income Tax Code, by which the national legislature had incorporated the arm's length principle into Luxembourg tax law. 'Normal' taxation should have been determined, in its view, by reference to that provision alone.

62 Emphasis added.

63 Emphasis added.

109. I do not believe that the General Court disregarded that article. It is clear from paragraph 13 of the judgment under appeal that the General Court did take into account the recitals of the decision at issue in which the Commission indicated that the tax ruling at issue had been adopted on the basis of Article 164(3) of the Income Tax Code (and Circular No 164/2) and that that provision established the arm's length principle under Luxembourg tax law. However, it considered that the Commission had rightly concluded that the reference framework constituting 'normal' taxation had to be determined more broadly than by reference to that article alone. It is that assessment, I would emphasise, which is vitiated by an error of law.

110. It has not escaped my attention that, if the arm's length principle were incorporated into the national legal order, the number of national tax authorities whose tax rulings might be subject to Commission scrutiny from a State aid perspective would be reduced and the OECD guidelines would become de facto binding by restricting the Commission's discretion in examining those rulings. Nevertheless, this is, in my view, the only reasoning that the General Court can regard as legally correct, since it respects the exclusive competence of the Member States in matters of direct taxation.

111. By contrast, the legal reasoning followed by the Commission, principally, and endorsed by the General Court in the judgment under appeal defines the reference framework constituting 'normal' taxation by relying on a version of the arm's length principle based on an uncodified element such as the (purported) objective of Luxembourg tax law. Is this not precisely the undue interference in the Member States' tax autonomy which the Court has always carefully condemned until now? I think that it is. [64]

112. In the light of all the foregoing considerations, I am persuaded that the fifth complaint raised by Ireland must be upheld.

113. By its sixth complaint, Ireland criticises paragraph 142 of the judgment under appeal, stating that the *Forum 187* judgment does not support the conclusion that Article 107(1) TFEU requires Member States to comply with an autonomous obligation to apply the arm's length principle irrespective of whether that principle has been incorporated into national law. It submits in particular that, in the case which gave rise to the *Forum 187* judgment, the existence of a derogation from the arm's length principle had been deemed relevant in so far as that principle had been incorporated into the national law at issue, namely Belgian law.

114. It is therefore necessary to examine whether the reading of the *Forum 187* judgment, as resulting from paragraph 142 of the judgment under appeal, is correct.

115. In that case, the Court was called upon to examine a decision by which the Commission had concluded that the tax regime in force in Belgium for approved coordination centres was a State aid scheme incompatible with the common market. [65] Among the many economic advantages enjoyed by those coordination centres under that tax scheme was the method for assessing their taxable income. Taxable profits were set at a flat-rate amount according to the 'cost-plus' method and represented a percentage of the amount of operating costs and expenses, from which staff costs and financial charges, in particular, were excluded. In the absence of any information on 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.

64 See, in that regard, Mason, R., 'Identifying Illegal Subsidies', *American University Law Review*, Vol. 69: Issue 2, Article 3, pp. 530-531.

65 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).

116. In order to ascertain whether that tax scheme conferred an advantage on the coordination centres, the Court of Justice considered it necessary, in the passage cited by the General Court in paragraph 142 of the judgment under appeal, to compare that regime with the ordinary tax system, under which the taxable income of any undertaking carrying on its activities in conditions of free competition represented the difference between its income and its outgoings.[66] Accordingly, the Court had concluded that the effect of the exclusion of staff costs and financial charges, which made a major contribution to enabling the coordination centres to earn revenue, from the expenditure which serves to determine the taxable income of those centres '[was] that the transfer prices d[id] not resemble those which would [have been] charged in conditions of free competition'.[67]

117. There is no doubt, according to the Commission, that the Court thus applied the arm's length principle. Even though that principle is not referred to in paragraphs 95 and 96 of the *Forum 187* judgment, the Commission takes the view that the use of the terms 'carrying on its activities in conditions of free competition', in paragraph 95, and 'transfer prices', in paragraph 96, leaves no room for any other interpretation.

118. As regards the legal basis for the application of that principle, the Commission joins Ireland in indicating that the Court compared, in the *Forum 187* judgment, the tax treatment of the coordination centres to the ordinary rules of Belgian law. It adds, however, that the reason why the Court of Justice used the tax treatment of stand-alone companies as the benchmark to determine the existence of an advantage in favour of those centres was the same as that used by the General Court in paragraphs 141 and 145 of the judgment under appeal, according to which the ultimate objective of the national tax system at issue was to ensure that the tax base of integrated companies was assessed in the same way as that of stand-alone companies.

119. At the same time, the *Forum 187* judgment also confirms, according to the Commission, that the application of the arm's length principle is not dependent on whether it is incorporated into national law. The Commission notes that the Court did not examine the existence of an advantage in favour of coordination centres, in that judgment, by reference to an arm's length principle codified in Belgian tax law.

120. That interpretation of the *Forum 187* judgment is not, in my opinion, convincing.

121. At no point does that judgment indicate that Member States are required to implement the arm's length principle where that principle is not codified in national law. That is not surprising, in my view, since that legal issue was not the subject of the Court's interpretation.

122. This is clearly shown by the structure of the Court's reasoning in that judgment. First of all, the Court recalls, in paragraphs 91 to 93, the essential features of the method of assessment of taxable income, as stems from the tax scheme provided for by arrêté royal n° 187, du 30 décembre 1982, relatif à la création des centres de coordination (Royal Decree No 187 of 30 December 1982 on the establishment of coordination centres).[68] Next, the Court 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

66 The *Forum 187* judgment, paragraph 95.

67 The *Forum 187* judgment, paragraph 96.

68 *Moniteur belge* of 13 January 1983.

finding, 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 scheme and the amount resulting from the application of the general law regime.

123. It follows that the Belgian legislature had incorporated into national law a method similar 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 Advocate General Léger states in point 257 of his Opinion in that case, the applicant had not challenged the fact that whether 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. [69] Moreover, it is apparent from the Commission's decision that the Belgian authorities had to refer, for the purposes of establishing those prices, to OECD reports. [70]

124. This demonstrates, in my view, that, contrary to what the Commission contends in its response, the absence of any reference to the arm's length principle in the *Forum 187* judgment – even if that principle could be regarded as being encompassed by Article 26 of the Belgian Income Tax Code 1992 – does not mean that the question whether that principle is incorporated into national law is irrelevant in that judgment.

125. In the judgment under consideration, the Court seems to me to resolve a different legal question, for which the incorporation of the arm's length principle into national law is merely the logical premiss. Once a Member State has chosen to incorporate into its national law a method of determining the taxable profits of integrated companies which is similar to the OECD's 'cost-plus' method *and is thus intended to tax those companies on a basis comparable to that which would result if the general law regime were applied*, that State confers an economic advantage on those companies if it includes in that method provisions which have the effect of reducing the tax burden that those companies would normally have to bear under that regime.

126. In summary, I consider that, contrary to what the General Court held in paragraph 142 of the judgment under appeal, the *Forum 187* judgment does not support the position that the arm's length principle is applicable where national tax law is intended to tax integrated companies and stand-alone companies in the same way, irrespective of whether that principle has been incorporated into that law.

127. Accordingly, Ireland's sixth complaint must, in my view, be upheld.

128. By its seventh complaint, Ireland considers that the arm's length principle does not stem from OECD documents and that the market economy operator principle, which formed the basis of the Commission's approach in the matter, does not constitute an appropriate legal basis. In that regard, it notes that the Commission referred to the latter principle in the decisions to initiate the procedures relating to the tax rulings issued in favour of Apple, Fiat and Starbucks and that the Commission confirmed, at the oral hearing held before the General Court in the present case, that it no longer based its theory concerning the arm's length principle on the market economy operator principle.

69 Opinion of Advocate General Léger in Joined Cases *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:89).

70 Decision 2003/757, recital 95. In that regard, the Commission refers to No 26/48 of the commentary on the Belgian Income Tax Code 1992.

129. As regards that complaint, I would merely note that it appears to criticise, in generic terms, the Commission's general approach to the basis of the arm's length principle, without addressing the reasons for the approval of that approach in the judgment under appeal. In those circumstances, I invite the Court to declare that complaint inadmissible.

130. The third and fourth complaints raised by Ireland call for a reminder of the relevant passage of the judgment under appeal. In paragraph 152 of the judgment, the General Court noted that, at the hearing, the Commission had stated that the arm's length principle was inherent in the ordinary system of taxation as provided for by national law as a corollary of the 'separate legal entity' approach, according to which national law is concerned with legal entities and not with economic entities. In paragraph 153, the General Court addressed the objections of the Grand Duchy of Luxembourg and FFT according to which the Commission had thereby changed at the hearing the stance on the arm's length principle which it had expressed in the decision at issue. While acknowledging that a change in the legal basis of the arm's length principle given in the decision at issue was not legally legitimate, the General Court considered that, in any event, this did not call into question its earlier finding that the arm's length principle is a tool used in the context of the examination under Article 107(1) TFEU.

131. In that regard, Ireland submits, in the first place, that the Commission could not validly rely, without disregarding the rights of defence, on the new argument that it had thus raised at the hearing. The separate legal entity approach had not been given as a legal basis for that principle in the decision at issue.

132. In the second place, Ireland claims that, even if the Commission had indicated in the decision at issue that the separate legal entity approach was the legal basis of the arm's length principle, it committed an error of law. In its view, it is erroneous to assert that that principle is a necessary corollary of the separate entity approach, since other models of taxation, such as that of apportionment according to a pre-established formula, as provided for by the proposal for a directive on a common corporate tax base, are also based on that approach.

133. In that regard, I would state here that the Court of Justice should not, in my view, allow itself to be drawn into a discussion which has no practical significance, since the General Court did not base its decision on the elements criticised by Ireland in its complaints. Such a discussion would be purely theoretical or, more precisely, would have no bearing on the resolution of the dispute before it.

134. It should be noted that, in paragraph 153 of the judgment under appeal, the General Court did not rule on the question whether, by the explanations given by the Commission at the hearing on the relationship between the implementation of the separate legal entity approach in the national tax system and the arm's length principle, the Commission had changed the stance initially taken in the decision at issue. On the contrary, the General Court merely held, in essence, that, even if the objections raised by the Grand Duchy of Luxembourg and FFT had been regarded as well founded, this would not have affected the conclusion reached by the General Court as to the legal basis for using the arm's length principle.[71] The present complaints therefore are based on a misreading of the judgment under appeal.

[71] While it is true that, in paragraph 153 of the judgment under appeal, the General Court does not appear to refer to that legal basis when it merely summarises its conclusion as 'the arm's length principle is being applied in the context of the examination under Article 107(1) TFEU', it is also true that that reference may be inferred from the General Court's reasoning as a whole, according to which the legitimacy of the use of the arm's length principle as a tool in the context of that examination depends on whether *national law* is aimed at taxing the profit resulting from the economic activity of an integrated undertaking as if it resulted from transactions carried out at market prices.

135. Ireland's third and fourth complaints must therefore be rejected, in my view, as ineffective.

(iv) The scope of the arm's length principle and the principle of legal certainty

136. By its eighth complaint, Ireland considers that the content of the arm's length principle used by the Commission in the decision at issue and endorsed by the General Court in the judgment under appeal is fundamentally unclear. In that regard, Ireland observes that, whilst the only precise definition of the arm's length principle is to be found in the documents drawn up by the OECD, recital 229 of the decision at issue and paragraph 147 of the judgment under appeal state that the OECD's arm's length principle differs from that of the Commission. Moreover, it is apparent from paragraph 149 of the judgment under appeal that the Commission is not required to take into account the way in which the arm's length principle is defined by national law, which led it to disregard, in the present case, the fact that the Grand Duchy of Luxembourg had in fact incorporated that principle into its domestic law. Lastly, according to Ireland, there is no definition in any manual or guidelines of the content of the arm's length principle as described by the Commission in the decision at issue. The failure to describe the content of that principle is problematic in the light of the principle of legal certainty, in so far as it is thus impossible for a taxpayer or for a national tax authority to know which rules actually apply.

137. In its response, the Commission counters, in particular, that the content of that principle is extremely clear. It provides that transactions between related economic operators must be assessed for tax purposes as if they had been concluded at arm's length between unrelated economic operators.

138. It should be recalled that 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 be clear and precise and that they be foreseeable.[72] In particular, that principle requires an assessment of whether an EU legal act enables those concerned to know precisely and to ascertain unambiguously the extent of their rights and obligations and to take steps accordingly.[73] That requirement must be observed all the more strictly in the case of a measure liable to have financial consequences.[74]

139. It is apparent from the case-law of the Court that the principle of legal certainty is intrinsically linked to the legislative measures enacted by the European Union and by the national authorities when they implement EU law and that it allows judicial review of the imperfections that might lead to uncertainty as to the application of the legislative measure in question.[75]

140. The principle of legal certainty has a more limited scope as regards an administrative decision, as is apparent from the case-law on State aid. In that area, an infringement of the principle of legal certainty may be found by the Court only where the conduct of the Commission prior to or during the *procedure* leading to a decision to recover the State aid was at issue.[76]

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

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

74 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).

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

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

141. In the case at hand, the principle of legal certainty is invoked against the use, for the purpose of examining the advantage condition, of the arm's length principle *due to the claimed difficulty in grasping the content of that principle*. What is disputed here, in other words, is the validity of an assessment by the Commission concerning the *classification of a State measure as State aid*. However, the validity of such an assessment cannot, in my view, be called into question from the perspective of compliance with the principle of legal certainty. Taking the opposite view would be tantamount to prohibiting the Commission from considering new approaches to the application of rules of law and would therefore oblige it to freeze its position in time. In particular, such a reading would mean that the Commission would be prevented from using any new benchmark to guide its assessment of the existence of an advantage within the meaning of Article 107(1) TFEU.

142. If that were the case, the market economy investor principle could not have been incorporated into the examination of the advantage condition, since, when that principle made its first appearances in decision-making practice in the early 1980s, its content was far from fully developed. When the Court approved it in 1986, the market economy investor principle required simply assessing 'whether in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question'.[77] It is only over the course of the years that the Commission's decision-making practice and quasi-legislative activities and the case-law of the Court have defined the detailed rules governing its application.[78]

143. Similarly, the content of the arm's length principle has essentially been defined by the Commission as meaning that transactions between integrated undertakings must be priced for tax purposes as if they had been concluded between stand-alone undertakings. It was applied, in the present case, in accordance with the OECD guidelines. It is the combined effect of the legislative rules and the case-law cited at the end of the preceding point that will subsequently determine the manner in which it is implemented.

144. I therefore consider that the principle of legal certainty cannot be relied on to criticise the General Court for having accepted an insufficiently precise description by the Commission of the content of a benchmark, such as the arm's length principle, in a decision adopted by that institution.

145. It follows that the eighth complaint raised by Ireland should, in my view, be rejected as unfounded.

(3) Conclusion on the first ground of appeal

146. In the light of the foregoing considerations, and in particular of my proposals concerning the fifth and sixth complaints raised by Ireland, I suggest that the Court of Justice uphold the first ground of appeal in so far as the General Court erred in law in approving the reference framework as established by the Commission for the purpose of examining the existence in the present case of an advantage within the meaning of Article 107(1) TFEU. Indeed, the case-law of

77 Judgment of 10 July 1986, *Belgium* v *Commission* (234/84, EU:C:1986:302, paragraph 14).

78 See, inter alia, Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, Section 4.2.

the Court according to which an error in the determination of that framework vitiates the whole of the analysis relating to selectivity [79] may, to my mind, be applied by analogy to the examination of advantage.

(c) The third ground of appeal

(1) Arguments of the parties

147. By its third ground of appeal, Ireland submits that the General Court breached its obligation to state reasons. First, the General Court failed to rule on the precise legal basis of the arm's length principle, which is described simply as a 'tool' or a 'benchmark'. Secondly, Ireland submits that the reasoning followed in the judgment under appeal is contradictory in that the General Court indicated that the arm's length principle, as it was characterised in the decision at issue, is 'a general principle of equal treatment in taxation' (paragraph 150 of the judgment under appeal) and not 'a general principle of equal treatment in relation to tax' (paragraph 161 of the judgment under appeal), without explaining such a distinction.

148. The Commission takes the view that this ground of appeal is based on a misreading of the judgment under appeal and must therefore be rejected.

(2) Assessment

149. As a preliminary point, it should be recalled that, according to settled case-law, the statement of the reasons on which a judgment of the General Court is based must disclose in a clear and unequivocal fashion the General Court's reasoning, in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to exercise its power of review. [80]

150. As regards the complaint that no reasons were given as to the legal basis for the arm's length principle, I would observe at the outset that, after having noted in general terms that the arguments of the Grand Duchy of Luxembourg and FFT criticising that legal basis are examined in paragraphs 126 to 187 of the judgment under appeal, Ireland appears not to refer to the relevant points of that judgment. Had it done so, that Member State could not, in my view, have criticised the General Court for having failed to identify the legal basis in question.

151. As I have already shown in this Opinion, the General Court ruled on that matter in paragraph 141 of the judgment under appeal. Before setting out its content by stating that, where a tax measure is granted to an integrated undertaking, the Commission may compare 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 of a stand-alone undertaking in a comparable situation, the General Court took pains to clarify that the arm's length principle *is derived from national law*, and, in particular, that, '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, 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

[79] Judgment of 28 June 2018, *Andres (Insolvency of Heitkamp BauHolding)* v *Commission* (C-203/16 P, EU:C:2018:505, paragraph 107).

[80] 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).

prices'. Having thus identified the legal basis of the arm's length principle, the General Court in essence held, in paragraph 145 of the judgment under appeal, that that principle was applicable in the present case in so far as the Income Tax Code was aimed at taxing integrated companies and stand-alone companies in the same way in respect of corporate income tax.

152. While that legal basis is not compatible with the relevant case-law, as is apparent from the examination of the fifth complaint in the first ground of appeal, it cannot be denied that it was nevertheless identified by the General Court, which indisputably deprives the complaint alleging a failure to state reasons in the judgment under appeal of any foundation in that connection.

153. The foregoing explains why, as Ireland rightly observes, paragraphs 151 to 154 of the judgment under appeal do not indicate what the basis of the arm's length principle is. In paragraphs 149 to 154 of that judgment, the General Court specifically sought to demonstrate that the arguments put forward by the Grand Duchy of Luxembourg and FFT were not capable of invalidating the conclusion which had *already* been reached, namely that the arm's length principle had its origin in national law.

154. As to the complaint that the statement of reasons is contradictory, it seems to me that that complaint arises from a misunderstanding of paragraphs 150 and 161 of the judgment under appeal. Ireland starts from the premiss that the General Court suggested that there was a difference between the description 'general principle of equal treatment in taxation', which applies to the arm's length principle according to paragraph 150, and the description 'general principle of equal treatment in relation to tax', which does not apply to that principle according to paragraph 161. That premiss is, in my view, incorrect.

155. 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*'.[81] In paragraph 161 of the judgment, the General Court responded to a complaint by Ireland and FFT that that wording could not be understood as asserting that there was a 'general principle of equal treatment in relation to tax *inherent in Article 107(1) TFEU*'.[82] The General Court thus confined itself to dismissing one of the possible interpretations of recital 228 of the decision, as set out in paragraph 150 of the judgment under appeal, namely that according to which the legal basis for the arm's length principle lay in Article 107(1) TFEU. I therefore see no contradiction between paragraph 150 and paragraph 161 of the judgment under appeal. In my view, therefore, this complaint must be rejected.

156. In the light of those considerations, I propose that the Court reject the third ground of appeal as unfounded.

81 Emphasis added.

82 Emphasis added.

(d) The fourth ground of appeal

(1) Arguments of the parties

157. By its fourth ground of appeal, Ireland submits that the General Court was wrong to reject the argument, examined in paragraphs 180 to 184 of the judgment under appeal, that the Commission, by imposing its arm's length principle, infringed the principle of legal certainty. In arguing, in paragraph 183 of the judgment under appeal, that it was 'foreseeable' that the Commission would be able to verify whether the methodology for determining transfer pricing deviated from pricing that would have been set under market conditions, in order to examine whether that tax ruling conferred an advantage, the General Court disregarded the fact that the principle set out by the Commission is a new rule having content which the Luxembourg tax authorities could not have known in advance. Even if the Luxembourg tax authorities could have anticipated that the Commission might verify whether an integrated company was treated for tax purposes in the same way as a stand-alone company, it could neither have foreseen that the Commission would apply its own version of the arm's length principle nor have known its content.

158. The Commission challenges Ireland's entire reasoning.

(2) Assessment

159. It is necessary, first of all, to delineate carefully the scope of the present ground of appeal. Ireland seems to me to call into question the refusal of the General Court to acknowledge that the examination of the existence of an advantage within a legal framework that was completely new and therefore unforeseeable for the national tax administration constituted an infringement of the principle of legal certainty. According to Ireland, the basis and content of the arm's length principle had not been developed by the Commission prior to the adoption of the decision at issue, in particular by the publication of soft law instruments such as a manual or guidelines.

160. Admittedly, it cannot be denied that the approach adopted by the Commission in the decision at issue is somewhat novel. It should be recalled that the Commission's previous decision-making practice in the field of fiscal aid contains no trace of the arm's length principle, as conceived by the Commission in the decision at issue and approved by the General Court in the judgment under appeal. In that regard, an interpretation has already been carried out in this Opinion to demonstrate that the judgment under appeal was wrong to confirm the correctness of the reading in the decision at issue according to which the *Forum 187* judgment ratified the use of such an arm's length principle for the purpose of analysing the existence of an advantage.

161. I do not believe, however, that this can lead to the conclusion that the principle of legal certainty has been infringed.

162. In that regard, reference must be made once again to the *Forum 187* judgment, in particular to the passage in which the Court adopted Advocate General Léger's reading that, although the Commission is undoubtedly obliged to respect the principle of legal certainty when carrying out its task of monitoring State aid, that requirement is inseparable from the requirement to respect the *principle of legality* and, consequently, the provisions of Articles 107 and 108 TFEU.[83] The Court had therefore considered, in essence, that the principle of legal certainty was not infringed

[83] See the *Forum 187* judgment, paragraphs 73 to 76, and Opinion of Advocate General Léger in Joined Cases *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:89, point 219).

where the Commission altered its appraisal for the purpose of classifying a national tax measure as State aid. There is no doubt, in my view, that the finding concerning the relationship between the principles of legal certainty and of legality applies also to an assessment by the Commission which is novel in relation to its previous decision-making practice. It follows that the principle of legal certainty does not preclude the Commission from carrying out, as in the present case, a pioneering assessment into the question of whether a State measure constitutes State aid where it considers that this is the conclusion to which a correct application of Articles 107(1) and 108 TFEU must lead. It has moreover been explained in point 142 of this Opinion that the validity of an assessment by the Commission concerning the classification of a State measure as State aid cannot be called into question on the basis of the principle of legal certainty.

163. Similarly, the principle of legal certainty in no way requires that the new interpretation that the Commission wishes to introduce into the analysis carried out under Article 107(1) TFEU be set out in advance in manuals or guidelines. While such instruments contribute to ensuring that the Commission's own actions are transparent, foreseeable and consistent with legal certainty, as the Court has repeatedly pointed out,[84] they are by no means necessary to justify the legality of such an initiative.

164. In those circumstances, I consider that no legal criticism can be levelled against the assertion in paragraph 183 of the judgment under appeal.

165. I therefore suggest that the Court reject the fourth ground of appeal as unfounded.

(e) The fifth ground of appeal

(1) Arguments of the parties

166. By its fifth ground of appeal, directed against paragraphs 100 to 117 of the judgment under appeal, Ireland criticises the General Court for having rejected its line of argument according to which the decision at issue amounts, in breach of Articles 3, 4 and 5 TEU and Article 114 TFEU, to harmonisation in disguise contrary to the principle of the division of competences. According to Ireland, the Commission relied in the decision at issue on rules which do not form part of the national tax system while disregarding the relevant provisions of that system. Ireland notes that, if the Commission is successful in the present case, the Commission's arm's length principle will be binding on all Member States, irrespective of what is provided for in their own tax legislation.

167. The Commission counters that it did in fact assess the tax ruling at issue in the light of the general Luxembourg corporate income tax regime and that, if the judgment of the General Court were confirmed as regards the finding of a selective advantage, it would simply mean that Member States that tax the branches or subsidiaries of multinational companies under their ordinary rules as if they were separate entities could not escape scrutiny of their tax rulings from the perspective of the State aid rules on the sole ground that their tax legislation did not expressly codify objective criteria for the attribution of profits to those branches or subsidiaries.

[84] See judgment of 14 November 2018, *Commission* v *Greece* (C-93/17, EU:C:2018:903, paragraph 119 and the case-law cited).

(2) Assessment

168. As a preliminary point, it should be noted that Ireland does not contest the entire reasoning of the General Court in paragraphs 100 to 117 of the judgment under appeal. It wishes to clarify that it approves the first part of that reasoning, in which the General Court pointed out that the State aid rules are applicable to national tax measures. Its complaints relate solely to the finding in paragraph 113 of the judgment under appeal.

169. After having recalled, in paragraph 112 of that judgment, that the Commission does not have the power to define autonomously the 'normal' taxation of an integrated undertaking by disregarding national tax rules, the General Court, according to Ireland, wrongly held, in paragraph 113 of that judgment, that, in the decision at issue, the Commission had simply verified whether the tax ruling at issue conferred on its beneficiary an advantage over 'normal' taxation, *as defined by national tax law*. The erroneous nature of that finding is moreover supported, in Ireland's view, by the fact that the General Court accepted, in paragraph 149 of the judgment under appeal, that the Commission had not examined whether the tax ruling at issue complied with Luxembourg tax law.

170. In other words, the present ground of appeal amounts to a challenge to the Commission's use of the arm's length principle to determine 'normal' taxation, made irrespective of any reference to the existence of that principle in national law. Accordingly, the answer that must be given in relation to this ground of appeal is the same as the answer to the question of whether or not it is necessary to confirm the General Court's assessments as regards the reference framework for determining the existence of a tax advantage.

171. I would note, in that regard, that is indeed not surprising that, in a legal area characterised by the coexistence of the Treaty rules on State aid and national tax rules, in which prevention of the risk of those Treaty rules encroaching on the national rules involves assessing the existence of an advantage on the basis of a national reference framework, infringement of the division of competences between the European Union and its Member States depends on whether that reference framework has been correctly defined.

172. In the light of the proposal put forward in this Opinion that the first ground of appeal should be declared well founded in so far as the arm's length principle used in the decision at issue is not a rule which is expressly codified in national law, I, like the appellant, consider that the judgment under appeal disregards, in paragraph 113 thereof, the Treaty provisions governing the division of competences between the European Union and its Member States (Article 3(6), Article 4(1) and Article 5(1) and (2)) and providing for a prohibition of harmonisation in the field of taxation (Article 114(2) TFEU).

173. I therefore invite the Court to uphold also the fifth ground of appeal.

B. The second ground of appeal

174. By the present ground of appeal, Ireland argues, in essence, that the General Court was wrong to conclude that the Commission could rely in the present case on the presumption of selectivity, according to which a measure is presumed to be selective where it confers an advantage and constitutes individual aid, in so far as a tax ruling is individual aid.

175. The Commission submits that this ground of appeal must be rejected as ineffective. The decision at issue also established the selectivity of the tax ruling at issue by means of the three-step analysis applicable to aid schemes and this was approved by the General Court in paragraphs 360 to 366 of the judgment under appeal. According to the Commission, since Ireland has not contested those paragraphs in its appeal, the conclusion as to the selectivity of the tax ruling at issue remains valid even if the present ground of appeal is upheld.

176. On the merits, the Commission argues that an individual tax ruling cannot be regarded as being granted under a general aid scheme. According to the Commission, tax authorities, when endorsing a transfer pricing agreement in a tax ruling, have the possibility of influencing whether or not aid is granted in an individual case, since they can endorse either an agreement which produces an arm's length outcome or a method which departs from such an outcome. Moreover, the elements constituting the advantage are to be found, in the case at hand, solely in the tax ruling at issue and not in the provisions of Luxembourg law on the basis of which that tax ruling was issued.

1. Effectiveness

177. It should be noted that, in the decision at issue, selectivity is assessed not only on the basis of a presumption, but also by using the three-step analysis already described in this Opinion. That analysis was carried out in the alternative and was endorsed by the General Court in paragraphs 360 to 366 of the judgment under appeal.

178. In that regard, it seems to me necessary to note, as the General Court did in paragraph 361 of the judgment under appeal, that the first two steps in that analysis, namely those relating to the determination of the reference framework and to the verification of the existence of a derogation from that framework, respectively, were examined *concurrently* with the economic advantage and that the question whether the tax ruling derogates from the reference framework, whether it be the broader or the more limited one, *coincided* with the identification of the advantage granted to the recipient undertaking.

179. In view of that, I would merely point out that that alternative analysis cannot remain valid should the Court of Justice decide in its forthcoming judgment to criticise the General Court's findings relating to the basis of the arm's length principle, as I invite it to do in this Opinion, which would in turn have the effect of invalidating the General Court's entire examination of the selective advantage, both in its principal and in its alternative reasoning.

180. I therefore suggest that the Court rule that the present ground of appeal is not ineffective.

2. Merits

181. With regard to the presumption of selectivity, it should be recalled that this was first referred to in the judgment in *Commission* v *MOL*, in which the Court 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' before next adding that, 'in the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective'. [85]

[85] Judgment of 4 June 2015, *Commission* v *MOL* (C-15/14 P, EU:C:2015:362, paragraph 60).

It is therefore a rebuttable presumption, which applies subject to the fulfilment of a twofold requirement, namely the existence of an advantage for the purposes of Article 107(1) TFEU and the individual nature of the measure concerned.

182. To date, that individual nature has been recognised on three occasions for the purposes of applying the presumption of selectivity. In the first two judgments, delivered by the Court of Justice in *Orange* v *Commission*[86] and by the General Court in *Greece* v *Commission*,[87] the dispute concerned the classification as State aid of *national legislative measures* adopted for the benefit of France Télécom[88] and of the private company holding the concession to operate part of the port of Piraeus, respectively.[89] In the third judgment, that of the Court of Justice, in *Mytilinaios Anonymos Etairia – Omilos Epicheiriseon*, the dispute centred on the classification as State aid of the measure resulting from an *interim order* which declared invalid the termination by the Greek public electricity company of the agreement which had been previously concluded with a private company and which granted the latter a preferential electricity tariff.[90]

183. There is therefore no precedent, to my knowledge, in which the Courts of the European Union have been called upon to examine an administrative decision in that light. That examination entails a more complex assessment, since such a decision may constitute both an individual measure and a measure granted on the basis of an aid scheme. It is precisely this legal issue which is at the heart of the debate concerning the present ground of appeal. Ireland criticises the conclusion reached by the General Court in the judgment under appeal, arguing that, contrary to what the General Court held, the tax ruling at issue must be regarded as aid implemented in accordance with an aid scheme, referring in all likelihood to the scheme established by Article 164(3) of the Income Tax Code and Circular No 164/2.

184. The General Court concluded that the tax ruling at issue was individual in nature following an analysis based, in paragraphs 342 and 343 of the judgment under appeal, on the definitions of 'individual aid' and 'aid scheme' set out in Article 1(e) and in Article 1(d) of Regulation 2015/1589,[91] respectively.

185. The first of those provisions essentially characterises individual aid as aid which is not granted under an aid scheme, while the second makes classification as an 'aid scheme' subject to the fulfilment of three cumulative conditions. First, aid may be granted individually to undertakings on the basis of an act. Secondly, no further implementing measure is required for that aid to be granted. Thirdly, undertakings to which individual aid may be granted must be

86 Judgment of 26 October 2016, *Orange* v *Commission* (C-211/15 P, EU:C:2016:798).

87 Judgment of 13 December 2017, *Greece* v *Commission* (T-314/15, not published, EU:T:2017:903).

88 Specifically, the French legislation reduced the compensation which France Télécom was required to pay to the Treasury for the payment and servicing of the pensions of its civil servants. In the judgment, the Court confirmed the General Court's finding that a comparison of the beneficiary with other operators in a comparable factual and legal situation in the light of the aim pursued by such a measure is irrelevant since that measure was 'an ad hoc measure which concern[ed] just one undertaking and [wa]s intended to modify certain competitive constraints which [were] specific to the undertaking'. See judgment of 26 October 2016, *Orange* v *Commission* (C-211/15 P, EU:C:2016:798, paragraphs 53 and 54).

89 Specifically, the Greek law ratifying the concession agreement between the public operator of the port of Piraeus and Piraeus Container Terminal SA set out a series of tax provisions in favour of the latter. In that judgment, the General Court reproduced the same wording as that previously used by the Court of Justice. See judgment of 13 December 2017, *Greece* v *Commission* (T-314/15, not published, EU:T:2017:903, paragraph 81).

90 Judgment of 11 December 2019, *Mytilinaios Anonymos Etairia – Omilos Epicheiriseon* (C-332/18 P, EU:C:2019:1065, paragraph 69), in which the Court held, in essence, that the presumption of selectivity applied in so far as the effects of that order '[had been] confined solely to the parties to the dispute in question'.

91 Council Regulation (EU) 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).

defined 'in a general and abstract manner'.[92] It should be added that, as the General Court indicated in paragraphs 346 and 347 of the judgment under appeal and as the Court of Justice has very recently confirmed, fulfilment of those conditions implies, in particular, that the essential elements of the aid scheme must be apparent from the provisions identified as constituting the legal basis of that scheme and that the national tax authority, when adopting the measure, did not have discretion to influence the amount of the aid, its characteristics or the conditions for granting it.[93]

186. Ireland's objections are not concerned, however, with the failure to fulfil those conditions in the present case. Ireland has adduced no evidence aimed at calling into question, in particular, the General Court's findings concerning the legal source of the constituent elements of the State aid allegedly granted by means of the tax ruling at issue and the extent of the discretion available to the Luxembourg tax authorities when adopting the tax rulings.[94]

187. Ireland asserts, in essence, that an arrangement whereby all the tax rulings simply apply a legislative provision which is also the basis of a number of other tax rulings implies the existence of an aid scheme and a series of individual measures granted on the basis of that scheme. Accordingly, Ireland evokes, to my mind, a concept of 'aid scheme' with a scope *broader* than that provided for in Article 1(d) of Regulation 2015/1589. Indeed, in the remainder of its reasoning, Ireland criticises the General Court for having derived that concept from an instrument of secondary legislation, notwithstanding the fact that selectivity, as a constituent of the concept of State aid, stems directly from the Treaty and should not depend on definitions found in legislation.

188. The concept of selectivity as it is characterised by the case-law proves, according to Ireland, that, under an arrangement such as that under review, it is necessary to carry out a comparative examination based on the taking into account of the situations of other undertakings entitled to the same treatment as the undertaking to which the tax ruling is addressed.

189. In support of its argument, Ireland cites the judgment in *Commission* v *Hansestadt Lübeck*.[95] It seems clear to me, however, that that judgment cannot in any way support that argument since, in the case which gave rise to that judgment, there was no doubt that the State measure which the Commission wrongly classified as selective – a regulation adopted by the manager of Lübeck Airport (Germany) and relating to the charges payable by all the airlines using that airport – was an aid scheme, thereby making the comparative examination described in the preceding point mandatory.

190. To that same end, Ireland cites also the judgment of the Court in *Commission* v *MOL*.[96] It will be recalled that that case concerned a Hungarian mining law which provided that any mining company operating under an authorisation regime was entitled to ask the Mining Authority, once only, to extend the deadline for extraction from the fields concerned. If that authority agreed, a contract between the competent minister and the undertaking concerned determined the mining fee rate applied to those fields within an upper and a lower limit provided for by the law.

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

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

94 Paragraphs 351 and 352 of the judgment under appeal.

95 Judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971).

96 Judgment of 4 June 2015, *Commission* v *MOL* (C-15/14 P, EU:C:2015:362).

191. It is true that, as regards the selective nature of an extension agreement between that authority and the undertaking MOL, the Court of Justice, like the General Court, held that the Commission had failed to demonstrate the existence of selectivity because it had not verified whether MOL had received preferential treatment vis-à-vis any undertaking likely to be in a comparable situation. It is also true that, when concluding extension agreements such as the one in question, the national authority was applying a provision of the mining law and that the latter could form the basis for other agreements in similar situations. However, I do not believe that it can be inferred from that judgment, as Ireland seems to do, that those two elements alone are sufficient to conclude in the present case that aid was granted under an aid scheme and that the presumption of selectivity therefore does not apply. It should be recalled that, in that case, the Court was called upon to rule on whether the national authority's margin of assessment in setting the mining fee when concluding extension agreements made it possible to conclude that the agreement at issue was selective. After having demonstrated the unusual nature of the measure at issue ('optional provisions of national law prescribing the imposition of additional charges'), the Court answered in the negative, explaining that 'the margin of assessment at issue in the present case allows the fixing of an additional charge imposed on economic operators in order to take account of the imperatives arising from the principle of equal treatment, and can be distinguished, *by its very nature*, from cases in which the exercise of such a margin is connected with the grant of an advantage in favour of a specific economic operator'. [97]

192. The inapplicability of the presumption of selectivity thus depending on the State measure under consideration, [98] I fail to see how that judgment can be regarded as providing criteria that can be applied beyond the situation examined by the Court. In order to reach the same conclusion in the present case, it would have to be established, in my view, that the case also involves an 'optional provision of national law prescribing the imposition of additional charges'. In that regard, it should be noted, first, that, as was confirmed by the Grand Duchy of Luxembourg at the hearing, Article 164(3) of the Income Tax Code is not optional, since it is applicable to integrated undertakings even if they do not request a tax ruling from the Luxembourg tax authorities. Secondly, it seems clear to me that that article in no way imposes additional charges on those undertakings.

193. In conclusion, the case-law relating to selectivity relied on by Ireland does not permit an interpretation lending the concept of 'aid scheme' a scope broader than that recognised by Regulation 2015/1589, as that Member State claims. Accordingly, that case-law does not allow classification of the tax ruling at issue as individual aid to be ruled out, as follows from paragraphs 350 to 355 of the judgment under appeal. Consequently, I consider that the General Court committed no error of law in holding that the Commission correctly established the selective nature of the tax ruling at issue by applying the presumption of selectivity.

194. In the light of the foregoing considerations, I suggest that the Court reject Ireland's second ground of appeal as unfounded.

195. For the sake of completeness, it is necessary, in my view, to make one further point. When pleading before the General Court that the tax ruling at issue should be regarded as aid granted under an aid scheme, the applicants at first instance did not claim that that scheme was based on Article 164(3) of the Income Tax Code and Circular No 164/2, in conjunction with the

97 Judgment of 4 June 2015, *Commission* v *MOL* (C-15/14 P, EU:C:2015:362, paragraph 65). Emphasis added.

98 On that point, see also the Opinion of Advocate General Wahl in *Commission* v *MOL* (C-15/14 P, EU:C:2015:32, point 67), according to which 'it is necessary, bearing in mind the highly unusual nature of the measure at issue, to refrain from drawing any hasty analogy with previous examinations of the selectivity of schemes which the EU Courts have had occasion to hear and determine'.

Luxembourg tax authorities' consistent practice as regards tax rulings granted to financing and treasury companies other than FFT. Had the existence of such a consistent administrative practice been confirmed, the answer I advocate in the preceding point would probably be the opposite.

196. This would be the consequence of taking into account the interpretation of the concept of 'aid scheme', set out in Article 1(d) of Regulation 2015/1589, that was recently provided by the Court in the judgment in *Commission* v *Belgium and Magnetrol International* in relation to excess profit tax exemptions granted by the Belgian authorities in the form of tax rulings. When examining whether the first condition set by that article had been fulfilled, the Court specified that the 'act' of the scheme forming the basis on which individual aid is granted may also be a consistent administrative practice by 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 the possibility of taking such an administrative practice into account is not limited to situations in which there is no legal provision forming the basis of the scheme in question.[99] As is apparent from that judgment, however, the existence of that administrative practice generally implies that the other conditions are also fulfilled, since the conditions set in Article 1(d) of Regulation 2015/1589 are regarded by the Court as being 'intrinsically linked'.[100]

IV. The action before the General Court

197. Under the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded and the Court of Justice quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits. I consider this to be so in the present case.

198. It follows from the reasoning set out in points 101 to 113 and points 167 to 174 of this Opinion that the General Court committed an error of law, in the judgment under appeal, in approving the examination of the existence of an economic advantage on the basis of a reference framework comprising an arm's length principle which does not derive from national tax law and thereby also infringed the provisions governing the division of competences between the European Union and its Member States.

199. Accordingly, the Court should, in my view, uphold the first and third parts of the first plea put forward by the Grand Duchy of Luxembourg in Case T-755/15, as well as the first complaint in the first plea put forward by FFT in Case T-759/15, and consequently annul the decision at issue.

V. Costs

200. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

[99] Judgment of 16 September 2021, *Commission* v *Belgium and Magnetrol International* (C-337/19 P, EU:C:2021:741, paragraphs 79 to 81).

[100] See, inter alia, judgment of 16 September 2021, *Commission* v *Belgium and Magnetrol International* (C-337/19 P, EU:C:2021:741, paragraphs 106 and 121).

201. Under Article 138(1) of the Rules of Procedure, applicable 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. Since Ireland, FFT and the Grand Duchy of Luxembourg have applied for costs, the Commission should be ordered to pay the costs incurred by the Grand Duchy of Luxembourg before the General Court and those incurred by Ireland in the present appeal. Moreover, the Commission should be ordered to pay the costs incurred by FFT before the General Court and in the present appeal.

202. 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. The Grand Duchy of Luxembourg, intervener in the proceedings, must therefore bear its own costs relating to the present appeal.

VI. Conclusion

203. In the light of the foregoing, I propose that the Court should:

(1) Set aside the judgment of the General Court of the European Union of 24 September 2019, *Luxembourg and Fiat Chrysler Finance Europe* v *Commission* (T-755/15 and T-759/15, EU:T:2019:670);

(2) Uphold the actions brought by the Grand Duchy of Luxembourg and Fiat Chrysler Finance Europe before the General Court of the European Union;

(3) Annul Commission Decision (EU) 2016/2326 of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat;

(4) Order the Commission to bear its own costs and to pay those incurred by the Grand Duchy of Luxembourg before the General Court, as well as the costs incurred by Ireland in the present appeal; and order the Commission to pay the costs incurred by Fiat Chrysler Finance Europe before the General Court and in the present appeal;

(5) Order the Grand Duchy of Luxembourg to bear its own costs incurred in the present appeal.