Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

8 November 2022*

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

In Joined Cases C-885/19 P and C-898/19 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought on 4 December 2019,

Fiat Chrysler Finance Europe, established in Luxembourg (Luxembourg), represented by N. de Boynes, lawyer, M. Doeding, Solicitor, M. Engel, Rechtsanwalt, F. Hoseinian, advokat, G. Maisto, A. Massimiano, avvocati, J. Rodríguez, abogado, M. Severi, avvocato, and A. Thomson, Solicitor,

appellant (C-885/19 P)

applicant at first instance (Case C-898/19 P),

Ireland, represented by M. Browne, A. Joyce and J. Quaney, acting as Agents, and by B. Doherty, Barrister-at-Law, P. Gallagher, Senior Counsel, and S. Kingston, Senior Counsel,

appellant (C-898/19 P)

intervener at first instance (C-885/19 P),

the other parties to the proceedings being:

Grand Duchy of Luxembourg, represented by A. Germeaux and T. Uri, acting as Agents, and by J. Bracker, A. Steichen and D. Waelbroeck, lawyers,

applicant at first instance (Case C-898/19 P),

European Commission, represented by P.-J. Loewenthal and B. Stromsky, acting as Agents,

defendant at first instance (C-885/19 P and C-898/19 P),

THE COURT (Grand Chamber),

* Language of the case: English.

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, K. Jürimäe, C. Lycourgos, E. Regan and P.G. Xuereb, Presidents of Chambers, S. Rodin, E. Biltgen, N. Piçarra, A. Kumin, N. Jääskinen, N. Wahl (Rapporteur), I. Ziemele and J. Passer, Judges,

Advocate General: P. Pikamäe,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 10 May 2021,

after hearing the Opinion of the Advocate General at the sitting on 16 December 2021,

gives the following

Judgment

1 By their respective appeals, Fiat Chrysler Finance Europe, formerly known as Fiat Finance and Trade Ltd ('FFT') (C-885/19 P), and Ireland (C-898/19 P) seek to have 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; 'the judgment under appeal'), by which the General Court dismissed their actions for annulment of 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').

I. Background to the dispute

2 For the purposes of the present proceedings, the background to the dispute, as is set out in paragraphs 1 to 46 of the judgment under appeal, may be summarised as follows.

A. The tax ruling issued to FFT by the Luxembourg tax authorities

3 On 14 March 2012, FFT's tax adviser sent a letter to the Luxembourg tax authorities requesting approval of an advance transfer pricing agreement.

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

B. The administrative procedure before the Commission

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

6 On 11 June 2014, the Commission initiated the formal investigation procedure under Article 108(2) TFEU in respect of the tax ruling at issue.

C. The decision at issue

7 On 21 October 2015, the Commission adopted the decision at issue.

1. Commission's description of the tax ruling at issue

8 In Section 2 of the decision at issue, entitled 'Description of the aid measure', the Commission, in the first place, described FFT, the beneficiary of the tax ruling at issue, which was part of the Fiat/Chrysler automobile group ('the Fiat/Chrysler group'). It stated that FFT provided treasury services and financing to the Fiat/Chrysler group companies established in Europe, excluding those established in Italy, and that it operated from Luxembourg, where its head office was located. The Commission stated that FFT was involved, in particular, in market funding and liquidity investments, relations with financial market actors, financial coordination and consultancy services to the group companies, cash management services to the group companies, short-term or medium-term inter-company funding, and coordination with the other treasury companies (recitals 34 to 51 of the decision at issue).

9 In the second place, the Commission indicated that the tax ruling at issue followed (i) the letter of 14 March 2012 from FFT's tax adviser to the Luxembourg tax administration, containing a request for approval of an advance transfer pricing arrangement, and (ii) a transfer pricing report containing a transfer pricing analysis, prepared by the tax adviser in support of FFT's request for a tax ruling (recitals 9, 53 and 54 of the decision 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 group, which enabled FFT to determine its corporate income tax liability to the Grand Duchy of Luxembourg on a yearly basis. It pointed out that that tax ruling had been binding for a period of five years, from the 2012 tax year until the 2016 tax year (recitals 52 and 54 of the decision at issue).

2. Description of the Luxembourg rules and of the OECD Transfer Pricing Guidelines

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 ('the Tax Code') and Circular L.I.R. No 164/2 of 28 January 2011, issued by the director of Luxembourg taxes ('Circular No 164/2'). In that regard, the Commission first noted that that provision established the arm's length principle under Luxembourg tax law, according to which transactions between intra-group companies ('integrated companies') were to be remunerated as if they had been agreed to by independent companies negotiating under comparable circumstances at arm's length ('stand-alone companies'). Second, it noted that Circular No 164/2 explained in particular how to determine an arm's length remuneration specifically in the case of intra-group financing companies (recitals 74 to 83 of the decision at issue).

12 Moreover, the Commission outlined the Organisation for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, adopted by the OECD's Committee on Fiscal Affairs ('the OECD Guidelines'),

and indicated that transfer prices referred to prices charged for commercial transactions between various entities belonging to the same corporate group. It stated that, in order to avoid a situation where multinational companies had a financial incentive to allocate as little profit as possible to jurisdictions where their profits were subject to higher taxation, tax administrations should accept transfer prices between integrated companies only when, in accordance with the arm's length principle, transactions were remunerated as if they had been agreed to by stand-alone companies negotiating under comparable circumstances at arm's length (recitals 84 to 87 of the decision at issue).

13 The Commission also noted that the OECD Guidelines listed five methods for approximating an arm's length pricing of transactions and profit allocation between integrated companies. However, only two of those methods were, in the Commission's view, relevant in the case at hand, namely the comparable uncontrolled price method and the transactional net margin method (recitals 88 and 89 of the decision at issue).

3. Assessment of the tax ruling at issue

14 In Section 7 (recitals 185 to 347) of the decision at issue, the Commission set out the reasons why, in its view, the tax ruling at issue fulfilled all the conditions set out in Article 107(1) TFEU for being classified as State aid within the meaning of that provision.

15 Regarding, more specifically, the condition relating to the existence of a selective advantage, the Commission considered the tax ruling at issue to confer such an advantage on FFT, in so far as it had resulted in a lowering of FFT's tax liability in Luxembourg by deviating from the tax which FFT would have been liable to pay under the ordinary corporate income tax system (recital 190 of the decision at issue). It reached that conclusion after a concurrent examination of advantage and selectivity, structured according to the three steps defined by the Court to determine whether a tax measure is selective (recital 192 of the decision at issue and paragraph 119 of the judgment under appeal).

16 As regards the first step, identification of the reference system, the Commission considered that, in the case at hand, that system was the general Luxembourg corporate income tax system, the objective of which was to tax the profits of all companies resident in Luxembourg. It stated, in that regard, that that general system applied to domestic companies and foreign companies resident in Luxembourg, including Luxembourg branches of foreign companies. The Commission considered that the fact that there was a difference in determining the taxable profits of stand-alone companies and integrated companies had no bearing on the objective of the general Luxembourg corporate income tax system, which was to tax the profits of all companies resident in Luxembourg, whether they be integrated or not, and that both types of company were in a comparable factual and legal situation in the light of the intrinsic objective of that system. The Commission rejected all the arguments raised by the Grand Duchy of Luxembourg and by FFT according to which Article 164 of the Tax Code or Circular No 164/2 constituted the relevant reference system, and also their argument that the reference system for determining whether the tax ruling at issue was selective had to be limited to undertakings subject to transfer pricing rules (recitals 193 to 215 of the decision at issue).

17 So far as concerns the second step, the Commission stated that whether a tax measure constitutes a derogation from the reference system would generally coincide with the identification of the advantage granted to the beneficiary under that measure. In its view, where a tax measure results in an unjustified reduction of the tax liability of a beneficiary who would otherwise be subject to a

higher level of tax under the reference system, that reduction constitutes both the advantage granted by the tax measure and the derogation from the reference system. The Commission also noted that, according to the case-law, in the case of an individual measure, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective (recitals 216 to 218 of the decision at issue).

18 With regard to the determination of the advantage, the Commission found, in essence, that a tax measure resulting in a group company charging transfer prices that do not reflect those which would be charged in conditions of free competition, that is prices negotiated by independent undertakings negotiating under comparable circumstances at arm's length, confers an advantage on that group company, in so far as it results in a reduction of its taxable base and thus its tax liability under the general corporate income tax system. In the Commission's view, the Court thus accepted, in the case giving rise to the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416), 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', as a benchmark for establishing whether a group company receives an advantage for the purposes of Article 107(1) TFEU as a result of a measure that determines its transfer pricing and thus its taxable base. Consequently, the Commission considered that it was required, in this case, to verify whether the methodology accepted by the Luxembourg tax administration in the tax ruling at issue for the determination of FFT's taxable profits in Luxembourg departed from a methodology that leads to a reliable approximation of a market-based outcome, and thus from the arm's length principle. If so, the tax ruling at issue should, according to the Commission, be deemed to grant a selective advantage to FFT for the purposes of Article 107(1) TFEU (recitals 222 to 227 of the decision at issue).

19 The Commission thus considered that the arm's length principle necessarily forms part of its assessment, under Article 107(1) TFEU, of tax measures granted to integrated companies, irrespective of whether a Member State has incorporated that principle into its national legal system. It explained, in response to the arguments raised by the Grand Duchy of Luxembourg during the administrative procedure, that it had not examined whether the tax ruling at issue complied with the arm's length principle, as laid down in Article 164(3) of the Tax Code or in Circular No 164/2, but that it had sought to determine whether the Luxembourg tax administration had conferred a selective advantage on FFT for the purposes of Article 107(1) TFEU (recitals 228 to 231 of the decision at issue).

20 In the light of those considerations and for the reasons set out in recitals 241 to 301 of the decision at issue, the Commission considered that certain methodological choices approved by the Grand Duchy of Luxembourg and underlying the transfer pricing analysis in the tax ruling at issue resulted in a lowering of FFT's tax liability as compared to the amount which would have been payable by a stand-alone company (recitals 234 to 240 of the decision at issue).

21 In the alternative, the Commission considered that, in any event, the tax ruling at issue also granted a selective advantage under the more limited reference system, invoked by the Grand Duchy of Luxembourg and by FFT, consisting of Article 164(3) of the Tax Code and Circular No 164/2, which laid down the arm's length principle in Luxembourg tax law (recitals 315 to 317 of the decision at issue). In addition, the Commission rejected FFT's argument that, in order to prove selective treatment benefiting FFT as a result of the tax ruling at issue, the Commission should have compared that ruling to the practice of the Luxembourg tax administration 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 had submitted to the Commission as part of a representative sample of its tax ruling practice (recitals 318 to 336 of the decision at issue).

22 In the third step of its analysis, the Commission found that neither the Grand Duchy of Luxembourg nor FFT had advanced any possible justification for the preferential treatment of FFT resulting from the tax ruling at issue and that, in any event, it had not been possible to identify any justification that could be said to derive directly from the basic principles of the reference framework or resulting from inherent mechanisms necessary for the functioning and effectiveness of the system (recitals 337 and 338 of the decision at issue).

23 The Commission thus concluded, in the light of the foregoing considerations, that the tax ruling at issue had conferred a selective advantage on FFT, in that it had resulted in a lowering of FFT's tax liability, principally, under the general Luxembourg corporate income tax system as compared to stand-alone companies, and, as a subsidiary point, under the tax regime applicable to integrated companies (recitals 339 and 340 of the decision at issue). It considered that the beneficiary of the advantage at issue was the Fiat/Chrysler group as a whole, in so far as FFT formed an economic unit with the other entities of that group, and that the reduction of FFT's tax liability had necessarily reduced the pricing conditions of its intra-group loans granted by FFT (recitals 341 to 345 of the decision at issue).

24 Article 1 of the decision at issue was worded as follows:

'The tax ruling [at issue], which enables [FFT] to determine its tax liability in Luxembourg on a yearly basis for a period of 5 years, constitutes aid within the meaning of Article 107(1) [TFEU] that is incompatible with the internal market and that was unlawfully put into effect by [the Grand Duchy of] Luxembourg in breach of Article 108(3) [TFEU].'

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

25 By applications lodged at the Registry of the General Court on 29 and 30 December 2015 respectively, FFT (Case T-759/15) and the Grand Duchy of Luxembourg (Case T-755/15) brought actions for annulment of the decision at issue.

26 By order of the President of the Seventh Chamber, Extended Composition, of the General Court of 18 July 2016, Ireland was admitted to intervene in support of the form of order sought by FFT and the Grand Duchy of Luxembourg.

27 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.

28 In support of their respective actions, the Grand Duchy of Luxembourg and FFT raised five sets of pleas alleging, in essence:

– in the first series, infringement of Articles 4 and 5 TEU and Article 114 TFEU, in so far as the Commission's analysis led 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 and of the obligation to state reasons, provided for in Article 296 TFEU, and breach of the principles of legal certainty and protection of legitimate expectations, in so far as the Commission considered that the tax ruling at issue conferred an advantage, notably on the ground that that tax ruling did not comply with the arm's length principle (second part of the first plea and first part of the second plea in Case T-755/15; second and third complaints in the first part of the first plea; first part of the second plea, and third and fourth pleas 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, provided for in Article 296 TFEU, in so far as the Commission found that the measure at issue restricted competition and distorted trade between the Member States (second part of the second plea in Case T-755/15; second part of the first plea and second part of the second plea in Case T-759/15), and

– in the fifth series, breach of the principle of legal certainty and infringement of the rights of the defence, in so far as the Commission ordered that the aid at issue be recovered (third plea in Case T-759/15).

29 After having joined Cases T-755/15 and T-759/15 for the purposes of the judgment under appeal, the General Court, by that judgment, dismissed all those pleas and, accordingly, dismissed the actions in those cases in their entirety.

30 As regards the second series of pleas, in particular those alleging an error in the application of the arm's length principle in the monitoring of State aid, the General Court noted, first of all, that, in the context of determining the fiscal position of an integrated company, the pricing of intra-group transactions is not determined under market conditions. It considered that, in order to determine whether there is an advantage within the meaning of Article 107(1) TFEU, when examining a fiscal measure granted to such an integrated company, the Commission may compare the fiscal burden for that company resulting from the application of that fiscal measure with the fiscal burden resulting from the application of the normal tax rules of national law to a company 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 the former as though it had arisen from transactions carried out at market prices (paragraphs 140 and 141 of the judgment under appeal).

31 Against that background, the General Court emphasised that the arm's length principle is a 'tool' or, as the Commission stated in recital 225 of the decision at issue, a 'benchmark' enabling it to be verified 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 receives, pursuant to a tax measure determining its transfer pricing, an advantage within the meaning of Article 107(1) TFEU (paragraph 143 of the judgment under appeal).

32 Next, the General Court observed that, in the case at hand, the tax ruling at issue concerned the determination of FFT's taxable profits under the Tax Code, that code being 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 had been entitled to compare FFT's taxable profit as a result of the application of the tax ruling at issue with the taxable profit, as it would be if the normal tax rules under Luxembourg law were applied, of an undertaking in a factually comparable situation, carrying on its activities in conditions of free competition (paragraphs 145 and 148 of the judgment under appeal). In that context, it stated that the Commission could not be criticised for having used a methodology for determining pricing that it considered appropriate, although it was required to justify its choice of methodology (paragraph 146 of the judgment under appeal).

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

34 In the first place, as regards the arguments that the Commission had provided no legal basis for the arm's length principle applied in the decision at issue and had not defined its content, the General Court held 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, second, that that principle was a general principle of equal treatment in taxation falling within the application of that article (paragraphs 150 and 151 of the judgment under appeal). As for the content of the arm's length principle, the General Court considered that it was apparent from the decision at issue that it was a tool for checking that intra-group transactions were remunerated as though they had been negotiated between independent undertakings (paragraph 155 of the judgment under appeal).

35 In the second place, so far as concerns the argument that the arm's length principle applied in the decision at issue was a criterion that was extraneous to Luxembourg tax law and that it thus enabled the Commission to achieve, ultimately, harmonisation in disguise in breach of the fiscal autonomy of the Member States, the General Court considered that argument to be unfounded, since the use of that principle was permitted by the fact that the Luxembourg tax rules provide that integrated companies are to be taxed on the same terms as stand-alone companies. It followed that, in applying that criterion in the case at hand, the Commission did not exceed its powers (paragraphs 156 to 158 of the judgment under appeal).

36 In the third place, as regards 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 (paragraphs 160 and 161 of the judgment under appeal).

III. Forms of order sought by the parties

A. Case C-885/19 P

37 By its appeal, FFT claims that the Court of Justice should:

– set aside the judgment under appeal;

– annul the decision at issue or, in the alternative, if the Court of Justice is unable to take a final decision, refer the case back to the General Court, and

– order the Commission to pay the costs of the appeal proceedings and of the proceedings before the General Court.

38 The Commission contends that the Court should:

– dismiss the appeal and

– order FFT to pay the costs.

39 Ireland contends that the Court should:

– set aside the judgment under appeal;

– annul the decision at issue, and

– order the Commission to pay the costs.

B. Case C-898/19 P

40 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.

41 The Commission contends that the Court should:

– dismiss the appeal and

– order Ireland to pay the costs.

42 FFT contends that the Court should:

– allow the appeal and

– order the Commission to bear the costs relating to the response and to its subsequent participation in the appeal proceedings.

43 The Grand Duchy of Luxembourg contends that the Court should:

– allow Ireland's claims;

– set aside the judgment under appeal;

– annul the decision at issue, and

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

IV. Procedure before the Court

44 On 9 March 2020, the President of the Court invited the parties to express their views on the possible joinder of Cases C-885/19 P and C-898/19 P for the purposes of the further course of the proceedings.

45 By letters of 16 March 2020, FFT, Ireland, the Commission and the Grand Duchy of Luxembourg informed the Court that they had no objection to the joinder of those cases. By letter of 14 April 2020, however, the Commission stated that it was of the opinion, after having examined the content of the pleadings lodged by the applicants, that it was not appropriate to join those cases for the purposes of the further course of the proceedings.

46 By decision of the President of the Court of 20 April 2020, the parties were informed that there was no need to join the cases at that stage of the procedure.

V. The appeals

47 In view of the connection between them, it is appropriate to join the present cases for the purposes of the judgment, in accordance with Article 54(1) of the Rules of Procedure of the Court.

A. The appeal in Case C-898/19 P

48 In support of its appeal in Case C-898/19 P, which it is appropriate to examine first, Ireland, joined by the Grand Duchy of Luxembourg and FFT, puts forward five grounds of appeal.

49 By the first ground of appeal, which is divided into eight parts, Ireland submits that the General Court erred in law and misapplied Article 107(1) TFEU in its approach to the Commission's use of the arm's length principle in the decision at issue. By its second ground, Ireland submits that the General Court erred in its analysis of the selectivity of the tax ruling at issue. The third ground alleges breach of the obligation to state reasons. The fourth ground alleges breach of the principle of legal certainty. Finally, the fifth and final ground alleges infringement of Articles 4 and 5 TEU and Article 114 TFEU in that the State aid rules were, in this case, used to harmonise the Member States' direct taxation rules.

50 The Commission contends that the appeal is partially inadmissible and adds that, in any event, the grounds relied on in support of the appeal must be rejected as unfounded.

1. Admissibility

51 The Commission contends that the appeal is partially inadmissible. It maintains, in essence, that the substance of the line of argument put forward by Ireland under the first and third to fifth grounds of appeal are aimed primarily at 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, rather than specific paragraphs of the judgment under appeal.

52 In that regard, it follows from the second subparagraph of Article 256(1) TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) and Article 169(2) of the Rules of Procedure that an appeal must indicate precisely the contested paragraphs of the judgment under appeal and the legal arguments specifically advanced in support of the appeal, failing which the appeal or the ground of appeal concerned may be inadmissible (judgment of 23 November 2021, *Council* v *Hamas*, C-833/19 P, EU:C:2021:950, paragraph 50 and the case-law cited).

53 In the case at hand, the appeal identifies with sufficient precision, in each of its grounds, the paragraphs criticised in the judgment under appeal and sets out the reasons for which those paragraphs are, in Ireland's view, vitiated by a failure to state reasons and by errors of law, enabling the Court, consequently, to carry out its review of legality. In particular, and as the Commission acknowledges, it is apparent from Ireland's written pleadings that the grounds it puts forward in support of its appeal refer expressly to the General Court's findings set out, inter alia, in paragraphs 113, 140 to 142, 145, 147, 149, 150 to 152, 161 and 180 to 184 of the judgment under appeal.

54 It follows that the plea of inadmissibility raised by the Commission in respect of a part of the appeal must be rejected.

2. Substance

55 It is appropriate to begin by examining the fifth and sixth parts of the first ground of appeal and the fifth ground.

(a) Arguments of the parties

56 In the fifth part of the first ground of appeal, Ireland submits that the reference framework against which the existence of a selective advantage within the meaning of Article 107(1) TFEU is to be assessed must be based on the national tax system at issue and not on a hypothetical tax system. It 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. When the question arises as to whether a measure derogates from the 'normal' tax regime, it is necessary to take into consideration the rules which are actually applied in the Member State concerned and not rules external to that system or hypothetical. In the present case, 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 the arm's length principle on the basis of the presumed objective of Luxembourg tax law. The General Court thus disregarded the specific rules of national law which apply to integrated companies in the context of the preparation of tax rulings by which the tax authorities of a Member State take a position, at the request of an integrated company, on the transfer pricing applicable to that company.

57 By the sixth part of the first ground of appeal, Ireland complains that the General Court held, in paragraph 142 of the judgment under appeal, that the Commission was correct to cite in the decision at issue the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416). According to Ireland, that judgment does not support the Commission's conclusion that the arm's length principle derives from Article 107(1) TFEU irrespective of whether or not it has been incorporated into national law. On the contrary, in the

case which gave rise to that judgment, the existence of a derogation from the arm's length principle had been deemed relevant by the Court of Justice only because it had been incorporated into the national law at issue, namely Belgian law.

58 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 to 5 TEU and Article 114 TFEU, to harmonisation in disguise contrary to the rules of the conferral of powers. 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 version of the arm's length principle will be binding on all Member States, irrespective of what is provided for in their own tax legislation.

59 The Commission is of the opinion that Ireland's line of argument is ineffective. That line of argument, which is based largely on an incorrect and biased reading of the judgment under appeal, is, in any event, unfounded.

60 As regards, in the first place, the fifth part of the first ground of appeal, the Commission submits that, in so far as Ireland's line of argument seeks to challenge the General Court's findings in paragraph 145 of the judgment under appeal, according to which, under the Tax Code, first, integrated and stand-alone companies in Luxembourg are taxed in the same way with regard to corporate income tax and, second, Luxembourg law is intended to tax the profit resulting from the economic activity of such an integrated company as if it had resulted from transactions carried out at market prices, the said line of argument ultimately tends to call into question findings of fact which are not subject to review in an appeal.

61 The Commission considers that, in any event, what matters in the present case is not whether tax and company law frequently distinguish between stand-alone companies and group companies, but whether they distinguish between such companies when it comes to determining their taxable profit under the general corporate income tax system. As the General Court rightly found in paragraph 145 of the judgment under appeal, the Luxembourg Tax Code does not make such a distinction. The General Court was therefore right to find that Luxembourg tax legislation is intended to tax the profit resulting from the economic activity of such an integrated company as if it had resulted from transactions carried out at market prices.

62 In the second place, the Commission contends, in response to the sixth complaint of Ireland's first ground of appeal, that the General Court properly relied on the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416), in concluding that, where a Member State's tax system treats group and stand-alone companies in the same way with regard to corporate taxation, a transfer pricing measure that allows a group company to price its intra-group transactions below an arm's length level gives rise to an advantage for the purposes of Article 107(1) TFEU.

63 The benchmark that the Court of Justice applied to find the existence of an advantage in paragraphs 95 and 96 of that judgment was the very same as that which the Commission set out in Section 7.2.2.1 of the decision at issue and which the General Court endorsed in paragraphs 141 and 145 of the judgment under appeal, namely the treatment of stand-alone companies under the ordinary tax rules. There is no doubt, according to the Commission, that the Court of Justice thus applied, in the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03

and C-217/03, EU:C:2006:416), the arm's length principle. Even though that principle is not expressly mentioned in that judgment, the Commission takes the view that the use of the terms 'carrying on its activities in conditions of free competition', in paragraph 95 of the same judgment, and 'transfer prices', in paragraph 96 thereof, leaves no room for any other interpretation.

64 In the third place, the Commission states, in response to the fifth ground of appeal, that it assessed the tax ruling at issue in the light of the general Luxembourg corporate income tax regime and that, if the judgment under appeal were confirmed as regards the finding of a selective advantage, it would simply mean that Member States which 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 explicitly codify objective criteria for the attribution of profits to those branches or subsidiaries.

(b) Findings of the Court

(1) Preliminary reminders

65 It should be borne in mind that, according to the settled case-law of the Court, action by Member States in areas that are not subject to harmonisation by EU law is not excluded from the scope of the provisions of the FEU Treaty on monitoring State aid. The Member States must thus refrain from adopting any tax measure liable to constitute State aid that is incompatible with the internal market (judgment of 16 March 2021, *Commission* v *Poland*, C-562/19 P, EU:C:2021:201, paragraph 26 and the case-law cited).

66 In that regard, it follows from the well-established case-law of the Court that the classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the beneficiary. Fourth, it must distort or threaten to distort competition (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 30 and the case-law cited).

67 So far as concerns the condition relating to selective advantage, it requires a determination as to whether, under a particular legal regime, the national measure at issue is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory (judgment of 16 March 2021, *Commission* v *Poland*, C-562/19 P, EU:C:2021:201, paragraph 28 and the case-law cited).

68 In order to classify a national tax measure as 'selective', the Commission must begin by identifying the reference system, that is the 'normal' tax system applicable in the Member State concerned, and demonstrate, as a second step, that the tax measure at issue is a derogation from that reference system, in so far as it differentiates between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation. The concept of 'State aid' does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal

situation, and are, therefore, a priori selective, where the Member State concerned is able to demonstrate, as a third step, that that differentiation is justified, in the sense that it flows from the nature or general structure of the system of which those measures form part (see, to that effect, 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, paragraphs 35 and 36 and the case-law cited).

69 In that regard, it must be recalled that the determination of the reference framework is of particular importance in the case of tax measures, since the existence of an economic advantage for the purposes of Article 107(1) TFEU may be established only when compared with 'normal' taxation. Thus, determination of the set of undertakings which are in a comparable factual and legal situation depends on the prior definition of the legal regime in the light of whose objective it is necessary, where applicable, to examine whether the factual and legal situation of the undertakings favoured by the measure in question is comparable with that of those which are not (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 60 and the case-law cited).

70 It must nevertheless be stated that regulatory technique cannot be decisive in order to determine whether a tax measure is selective, so that it is not always necessary for that technique to derogate from a common or normal tax system. As is apparent inter alia from paragraph 101 of the 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), even a measure which is not formally a derogation and founded on criteria that are in themselves of a general nature may be selective, if it in practice discriminates between companies which are in a comparable situation in the light of the objective of the tax system concerned (see, to that effect, judgment of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraphs 32 and 33 and the case-law cited).

71 For the purposes of assessing the selective nature of a tax measure, it is, therefore, necessary that the common tax regime or the reference system applicable in the Member State concerned be correctly identified in the Commission decision and examined by the court hearing a dispute concerning that identification. Since the determination of the reference system constitutes the starting point for the comparative examination to be carried out in the context of the assessment of selectivity, an error made in that determination necessarily vitiates the whole of the analysis of the condition relating to selectivity (see, to that effect, 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 61 and the case-law cited).

72 In that context, it must be stated, in the first place, that the determination of the reference framework, which must be carried out following an exchange of arguments with the Member State concerned, 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 (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).

73 In the second place, outside the spheres in which EU tax law has been harmonised, it is the Member State concerned which determines, by exercising its own competence in the matter of direct taxation and with due regard for its fiscal autonomy, the characteristics constituting the tax, which define, in principle, the reference system or the 'normal' tax regime, from which it is necessary to analyse the condition relating to selectivity. This includes, in particular, the

determination of the basis of assessment and the taxable event (see, to that effect, judgments of 16 March 2021, *Commission* v *Poland*, C-562/19 P, EU:C:2021:201, paragraphs 38 and 39, and of 16 March 2021, *Commission* v *Hungary*, C-596/19 P, EU:C:2021:202, paragraphs 44 and 45).

74 It follows that only the national law applicable in the Member State concerned must be taken into account in order to identify the reference system for direct taxation, that identification being itself an essential prerequisite for assessing not only the existence of an advantage, but also whether it is selective in nature.

75 In the present case, Ireland's line of argument summarised in paragraphs 56 to 58 of the present judgment raises the question whether the General Court erred in law in upholding, for the reasons set out in paragraphs 30 to 36 of the said judgment, the reference system adopted by the Commission in the decision at issue.

76 In that regard, it should be noted that, according to recital 228 of the decision at issue, the Commission found that the arm's length principle necessarily formed part of its assessment, under Article 107(1) TFEU, of tax measures granted to group companies, irrespective of whether a Member State had incorporated that principle into its national legal system.

77 The Commission stated, in the same recital 228, that that arm's length principle is used to establish whether the taxable profits of a group company for corporate income tax purposes has been determined on the basis of a methodology that approximates market conditions, so that that company is not treated favourably under the general corporate income tax system as compared to non-integrated companies whose taxable profit is determined by the market.

78 It is apparent, moreover, from the general scheme of the decision at issue, in particular from the analysis of the reference system conducted in recitals 193 to 209 thereof, that the Commission took account of the fact that the general corporate income tax system in Luxembourg does not distinguish between integrated companies and non-integrated companies, since the objective of that system is to tax all resident companies.

79 It is in the light of those considerations that the General Court, for its part, specified, in paragraph 161 of the judgment under appeal, that the statement 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 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.

80 As is apparent from paragraph 141 of the judgment under appeal, the General Court found that the arm's length principle applies where the relevant 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, since, in such a case, that law would be 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. That legal basis having been identified, the General Court considered, in essence, in paragraph 145 of the judgment under appeal, that that principle was applicable in the present case in so far as the objective of the Tax Code was to tax integrated and stand-alone companies in the same way with regard to corporate income tax.

(2) The existence of an error of law in the determination of the 'normal' tax regime applicable in the Member State concerned

81 At the outset, it is necessary to reject the Commission's line of argument according to which the appellant, by the complaints it puts forward, is in fact challenging the General Court's findings relating to the applicable national law, set out in particular in paragraph 145 of the judgment under appeal, findings of fact which are not subject to review in an appeal in accordance with the case-law of the Court of Justice.

82 It is true that, with respect to the assessment in the context of an appeal of the General Court's findings on national law, which, in the field of State aid, constitute findings of fact, the Court of Justice has jurisdiction only to determine whether that law was distorted (judgment of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 78 and the case-law cited).

83 However, in the present case, by the line of argument it sets out, Ireland does not seek to call into question the General Court's interpretation of national law, but invites the Court of Justice to determine whether it was without error of law that the General Court adopted the delimitation of the relevant reference framework as the decisive parameter for the purposes of examining the existence of a selective advantage, without taking into account the specific transfer pricing rules provided for by the Luxembourg law applicable to integrated companies.

84 Ireland merely challenges the application by the General Court of the legal test for determining whether a tax ruling such as that at issue confers a selective advantage.

85 The question whether the General Court adequately defined the relevant reference system and, by extension, correctly applied a legal test, such as the arm's length principle, is a question of law which can be reviewed by the Court of Justice on appeal. The arguments aimed at calling into question the choice of reference system as part of the first step of the analysis of the existence of a selective advantage are admissible, since that analysis derives from a legal classification of national law on the basis of a provision of EU law (see, by analogy, judgment of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraphs 80 and 81).

86 As far as the merits of Ireland's line of argument are concerned, it should be recalled that, as is apparent, in essence, from recital 210 of the decision at issue, FFT and the Grand Duchy of Luxembourg argued before the Commission that the reference system should include only group companies, or group companies engaged in financing activities, falling under Article 164(3) of the Tax Code, with the result that the tax ruling at issue had to be compared with the tax rulings relating to the period from 2010 to 2013 and concerning 21 other taxpayers, which had been communicated to the Commission on 15 January 2014. According to the Grand Duchy of Luxembourg and FFT, given that the treatment of FFT was in line with Article 164(3) of the Tax Code, Circular No 164/2 and the relevant administrative practice, no selective advantage had been granted through that tax ruling.

87 The Commission nevertheless considered, in recitals 211 to 215 of the decision at issue, that it was not necessary to take account of those specific provisions for the purposes of determining the relevant reference system, indicating, to that end, that to do so would be contrary to the objective of the general Luxembourg corporate income tax system, which that institution had already identified, in recitals 193 to 209 of the decision at issue, as the reference system. In the case at

hand, it found that the objective of that system was to tax the profits of all companies falling under its tax jurisdiction, irrespective of whether those companies were integrated companies or non-integrated companies (recitals 198 and 212 of the decision at issue).

88 The Commission stated that it had not examined whether the tax ruling at issue complied with the arm's length principle as laid down in Article 164(3) of the Tax Code or in Circular No 164/2 (recital 229 of the decision at issue). If it could be shown that the methodology accepted by the Luxembourg tax administration by way of that tax ruling for the determination of FFT's taxable profits in Luxembourg departed from a methodology that leads to a reliable approximation of a market-based outcome and thus from the arm's length principle, that ruling would be found to confer a selective advantage on FFT for the purposes of Article 107(1) TFEU (recital 231 of the decision at issue).

89 It is apparent from paragraphs 149 to 151 of the judgment under appeal that the General Court endorsed the Commission's methodology which consisted, in essence, in considering that, in the case of a tax system which pursues the objective of taxing the profits of all resident companies, whether integrated or not, the application of the arm's length principle for the purposes of applying Article 107(1) TFEU is justified independently of whether that principle has been incorporated into national law.

90 It is therefore necessary to determine whether the General Court erred in law by validating the Commission's approach consisting, in essence, in not taking that principle into account, as provided for in Article 164(3) of the Tax Code and specified in the related Circular No 164/2, in the context of the examination carried out pursuant to Article 107(1) TFEU, in particular when defining the reference system in order to determine whether the tax ruling at issue confers a selective advantage on its beneficiary.

91 In that regard, in dismissing the relevance of Article 164(3) of the Tax Code and Circular No 164/2, the Commission applied an arm's length principle different from that defined by Luxembourg law. It thus confined itself to identifying, in the objective pursued by the general corporate income tax system in Luxembourg, the abstract expression of that principle and to examining the tax ruling at issue without taking into account the way in which the said principle has actually been incorporated into that law with regard to integrated companies in particular.

92 By endorsing such an approach, the General Court failed to take account of the requirement arising from the case-law cited in paragraphs 68 to 74 of the present judgment, according to which, in order to determine whether a tax measure has conferred a selective advantage on an undertaking, it is for the Commission to carry out a comparison with the tax system normally applicable in the Member State concerned, following an objective examination of the content, interaction and concrete effects of the rules applicable under the national law of that State. In so doing, it erred in law in the application of Article 107(1) TFEU.

93 It is true, as the parties all agree, that the national law applicable to companies in Luxembourg is intended, as regards the taxation of integrated companies, to bring about a reliable approximation of the market price. While that objective corresponds, in general terms, to that of the arm's length principle, the fact remains that, in the absence of harmonisation in EU law, the specific detailed rules for the application of that principle are defined by national law and must be taken into account in order to identify the reference framework for the purposes of determining the existence of a selective advantage.

94 In addition, by accepting, in paragraph 113 of the judgment under appeal, that the Commission may rely on rules which were not part of Luxembourg law, even though it recalled, in paragraph 112 of that judgment, that that institution did not, at that stage of development of EU law, have the power autonomously to define the 'normal' taxation of an integrated company, disregarding national tax rules, the General Court infringed the provisions of the FEU Treaty relating to the adoption by the European Union of measures for the approximation of Member State legislation relating to direct taxation, in particular Article 114(2) TFEU and Article 115 TFEU. The autonomy of a Member State in the field of direct taxation, as recognised by the settled case-law cited in paragraph 73 of the present judgment, cannot be fully ensured if, in the absence of any such approximation measure, the examination carried out under Article 107(1) TFEU is not based exclusively on the normal tax rules laid down by the legislature of the Member State concerned.

95 In that regard, it should be noted, in the first place, that, without harmonisation in that regard, any fixing of the methods and criteria for determining an 'arm's length' outcome falls within the discretion of the Member States. Although the member States of the OECD recognise the merits of using the arm's length principle in order to establish the correct allocation of company profits between different countries, there are significant differences between those States in the detailed application of transfer pricing methods. As the Commission itself mentioned in recital 88 of the decision at issue, the OECD Guidelines provide for several methods for approximating an arm's length pricing of transactions and profit allocation between companies of the same corporate group.

96 Moreover, even assuming that there is a certain consensus in the field of international taxation that transactions between economically linked companies, in particular intra-group transactions, must be assessed for tax purposes as if they had been concluded between economically independent companies, and that, therefore, many national tax authorities are guided by the OECD Guidelines in the preparation and control of transfer prices, without prejudice to the considerations set out in paragraphs 120 to 122 of the present judgment, it is only the national provisions that are relevant for the purposes of analysing whether particular transactions must be examined in the light of the arm's length principle and, if so, whether or not transfer prices, which form the basis of a taxpayer's taxable income and its allocation among the States concerned, deviate from an arm's length outcome. Parameters and rules external to the national tax system at issue cannot therefore be taken into account in the examination of the existence of a selective tax advantage within the meaning of Article 107(1) TFEU and for the purposes of establishing the tax burden that should normally be borne by an undertaking, unless that national tax system makes explicit reference to them.

97 This finding is an expression of the principle of legality of taxation, which forms part of the legal order of the European Union as a general principle of law, requiring that any obligation to pay a tax and all the essential elements defining the substantive features thereof must be provided for by law, the taxable person having to be in a position to foresee and calculate the amount of tax due and determine the point at which it becomes payable (see, to that effect, judgment of 8 May 2019, *Związek Gmin Zagłębia Miedziowego*, C-566/17, EU:C:2019:390, paragraph 39).

98 In the second place, the Grand Duchy of Luxembourg stated at the hearing that, in addition to the fact that the OECD Guidelines are not binding on the member States of that organisation, Circular No 164/2 interpreting Article 164(3) of the Tax Code lays down specific rules on the calculation of transfer prices in the case of group financing companies, such as FFT, implying that activities related to the holding of participations should not be taken into account for the

calculation of those prices. Recital 79 of the decision at issue, which is set out in Section 2.3.2 thereof and contains a description of the content of the said circular, confirms that that Member State laid down specific rules for determining an arm's length remuneration for such companies and that those rules had been brought to the Commission's attention in the context of the administrative procedure.

99 However, the Commission's analysis of the reference system and, by extension, of the existence of a selective advantage granted to FFT, as validated by the General Court, does not take account of those legislative choices, aimed at clarifying the scope of the arm's length principle and its implementation in Luxembourg law.

100 In that regard, it should be noted that, in response to a question asked at the hearing, the Commission stated that, in the tax ruling at issue, the Luxembourg tax administration had 'misapplied the rules that normally apply' as regards the arm's length principle and the calculation of transfer pricing. It must be pointed out, however, that, in the decision at issue, the Commission, whose approach was confirmed by the General Court, avoided any examination of the way in which the arm's length principle, as enshrined, in essence, in Article 164(3) of the Tax Code, had been interpreted and applied.

101 The General Court expressly validated that analysis in paragraph 146 of the judgment under appeal, where it stated that the Commission could not be criticised for having used a methodology for determining transfer pricing that it considered appropriate in that instance in order to examine the level of transfer pricing for a transaction or for several closely connected transactions forming part of the contested measure, as well as in paragraph 147 of the same judgment, where it emphasised that the OECD Guidelines relied on by the Commission '[we]re based on important work carried out by groups of renowned experts', that they 'reflect[ed] the international consensus achieved with regard to transfer pricing' and that 'they thus ha[d] a real practical significance in the interpretation of issues relating to transfer pricing'.

102 In the third place, contrary to what the General Court held in paragraph 142 of the judgment under appeal, the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416), 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, and in what way, that principle has been incorporated into that law.

103 In that judgment, the Court of Justice held that, once a Member State has chosen to incorporate into its national law a method for determining the taxable profits of integrated companies that is analogous to the OECD 'cost-plus' method, and therefore has the objective of taxing such companies on a basis comparable to that on which they would be taxed under the ordinary regime, that State confers an economic advantage on such companies if it includes, within that method, provisions which have the effect of reducing the tax burden that those companies would normally have to bear under that regime.

104 Thus, in the said judgment, it was in the light of the rules on taxation laid down in the relevant national law, namely Belgian law, which provided for a mechanism for taxing profits according to an OECD 'cost-plus' method, that the Court concluded that it was appropriate to use the arm's length principle. It cannot therefore be inferred from the same judgment that the Court intended

to establish an autonomous arm's length principle that applied independently of the incorporation of that principle into national law for the purposes of examining tax measures in the context of the application of Article 107(1) TFEU.

105 It follows from all these considerations that the grounds of the judgment under appeal relating to the examination of the Commission's principal line of reasoning, according to which the tax ruling at issue derogated from the general Luxembourg corporate income tax system, recalled in paragraphs 17 to 20 of the present judgment, are vitiated by an error of law in that the General Court validated the Commission's approach consisting, in essence, in not taking into account the arm's length principle as provided for in Article 164(3) of the Tax Code and specified in the related Circular No 164/2, when defining the reference system as part of the examination carried out under Article 107(1) TFEU, for the purposes of determining whether the tax ruling at issue confers a selective advantage on its beneficiary.

106 It is nevertheless necessary to examine whether the error of law made by the General Court gives cause to set aside the judgment under appeal.

107 The Commission has argued that any errors of law vitiating paragraphs 125 to 286 of the judgment under appeal would be incapable of bringing about the setting aside of the judgment under appeal if the General Court's analysis in paragraphs 290 to 299 of that judgment were upheld.

108 The Commission therefore considers the appeal to be ineffective in so far as, even if one of the grounds relied on were held to be well founded, that could not lead to setting aside of the judgment under appeal. In its view, the decision at issue contains a subsidiary line of reasoning based on Article 164(3) of the Tax Code and Circular No 164/2, the endorsement of which by the General Court is in no way disputed by Ireland.

109 In that regard, it should be noted that, by the reasons set out in paragraphs 290 to 299 of the judgment under appeal, the General Court, in essence, validated the 'subsidiary' line of reasoning put forward by the Commission in recitals 315 to 317 of the decision at issue, according to which the tax ruling at issue derogated from the reference system constituted by Article 164(3) of the Tax Code and Circular No 164/2.

110 Although Ireland has not directly challenged the reasons set out in that passage of the judgment under appeal, it cannot, however, be argued, as the Commission submits, that the appeal must be declared ineffective in that the line of argument developed by Ireland cannot have a bearing on the operative part of the judgment under appeal.

111 As the Advocate General observed in point 42 of his Opinion, the line of reasoning set out in paragraphs 290 to 299 of the judgment under appeal does not contain an analysis which is severable and autonomous from that resulting from the reference system used by the Commission principally and thus does allow the error vitiating that system to be remedied. It is true that the Commission found, in recital 317 of the decision at issue, that the tax ruling had resulted in a lowering of FFT's tax liability 'as compared to the situation where the arm's length principle laid down in [Article 164(3) of the Tax Code] had been properly applied'. However, as the General Court noted in paragraph 294 of the judgment under appeal, it referred in full, as regards that proper application, to its principal analysis of the reference system based on the general system of corporate taxation in Luxembourg.

112 It follows that the line of reasoning on which the Commission relied as a subsidiary point rectifies only in a superficial manner the error it committed in the identification of the reference system that should have formed the basis of its analysis relating to the existence of a selective advantage. In those circumstances, the error of law committed by the General Court in its analysis of the Commission's primary line of reasoning concerning the reference system also vitiates its analysis of the subsidiary line of reasoning contained in the decision at issue on that aspect.

113 It follows from the foregoing that the fifth and sixth parts of the first ground of appeal and the fifth ground of appeal must be upheld and, accordingly, the judgment under appeal must be set aside, without it being necessary to rule on the other parts of the first ground or on the other grounds.

B. The appeal in Case C-885/19 P

114 In the light of the setting aside of the judgment under appeal, it is no longer necessary to rule on FFT's appeal.

VI. The actions before the General Court

115 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.

116 That is so in the present case, as the pleas in law of the actions seeking annulment of the decision at issue were the subject of an exchange of arguments before the General Court and examining them does not require the adoption of any additional measure of organisation of procedure or inquiry of the case.

117 In that regard, it is sufficient to note that, for the reasons set out in paragraphs 81 to 112 of the present judgment, the decision at issue must be annulled in so far as the Commission erred in law in finding that there was a selective advantage in the light of a reference framework comprising an arm's length principle which does not derive from a full examination of the relevant national tax law, following an exchange of arguments on that subject with the Member State concerned, and that, in so doing, it also infringed the provisions of the FEU Treaty relating to the adoption by the European Union of measures for the approximation of Member State legislation relating to direct taxation, in particular Article 114(2) TFEU and Article 115 TFEU.

118 As follows from the case-law cited in paragraph 71 of the present judgment, such an error in determining the rules actually applicable under the relevant national law and, therefore, in identifying the 'normal' taxation in the light of which the tax ruling at issue had to be assessed necessarily invalidates the entirety of the reasoning relating to the existence of a selective advantage.

119 Such a finding does not, however, rule out the possibility that direct tax measures, such as tax rulings granted by the Member States, may be classified as State aid provided that all the conditions for the application of Article 107(1) TFEU recalled in paragraph 66 of the present judgment have been fulfilled.

120 After all, as has been recalled in paragraph 65 of the present judgment, action by Member States in areas that are not subject to harmonisation by EU law is not excluded from the scope of the provisions of the FEU Treaty on monitoring State aid.

121 Thus, the Member States must exercise their competence in the field of direct taxation, such as that which they hold in the area of the adoption of tax rulings, in compliance with EU law and, in particular, the rules established by the FEU Treaty on State aid. They must therefore refrain, in the exercise of that competence, from adopting measures which may constitute State aid incompatible with the internal market within the meaning of Article 107 TFEU (see, to that effect, judgment of 16 September 2021, *Commission* v *Belgium and Magnetrol International*, C-337/19 P, EU:C:2021:741, paragraphs 161 and 162 and the case-law cited).

122 In particular, after having observed that a Member State has chosen to apply the arm's length principle in order to establish the transfer prices of integrated companies, the Commission must, in accordance with the case-law cited in paragraph 70 of the present judgment, be able to establish that the parameters laid down by national law are manifestly inconsistent with the objective of non-discriminatory taxation of all resident companies, whether integrated or not, pursued by the national tax system, by systematically leading to an undervaluation of the transfer prices applicable to integrated companies or to certain of them, such as finance companies, as compared to market prices for comparable transactions carried out by non-integrated companies.

123 In the present case, as has been concluded in paragraph 105 of the present judgment, the Commission did not carry out such an examination in the decision at issue, since its analytical framework did not include all the relevant norms implementing the arm's length principle under Luxembourg law.

124 It follows from all these considerations that the first and third parts of the first plea in law put forward by the Grand Duchy of Luxembourg in Case T-755/15 and the first complaint of the first plea in law raised by FFT in Case T-759/15 must be upheld. Consequently, the decision at issue must be annulled, without it being necessary to examine the other pleas of the actions for annulment.

VII. Costs

125 Under Article 184(2) of the Rules of Procedure, 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 the costs.

126 Article 138(1) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 184(1) thereof, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

127 In the present case, as regards the appeal brought in Case C-898/19 P, Ireland having been successful, it is appropriate, in accordance with the form of order sought by it, to order the Commission to bear its own costs and to pay those incurred by Ireland.

128 As for the appeal in Case C-885/19 P, under Article 149 of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 190 thereof, where a case does not proceed to judgment, the Court is to give a decision as to costs. In accordance with Article 142 of the Rules of

Procedure, applicable to appeal proceedings by virtue of Article 184 thereof, the costs are, in such a case, to be in the discretion of the Court. In the present case, it is appropriate to order each of the parties to bear its own costs relating to the appeal in Case C-885/19 P.

129 Furthermore, since the actions before the General Court have been upheld, the Commission is ordered to pay all the costs relating to the proceedings at first instance.

On those grounds, the Court (Grand Chamber) hereby:

1. **Joins Cases C-885/19 P and C-898/19 P for the purposes of the judgment;**

2. **Sets 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);**

3. **Annuls 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. **Declares that there is no need to adjudicate on the appeal in Case C-885/19 P;**

5. **Orders each of the parties to bear its own costs in Case C-885/19 P;**

6. **Orders the European Commission to pay the costs of the appeal in Case C-898/19 P;**

7. **Orders the European Commission to pay the costs of the proceedings at first instance.**

Lenaerts	Bay Larsen	Arabadjiev
Jürimäe	Lycourgos	Regan
Xuereb	Rodin	Biltgen
Piçarra	Kumin	Jääskinen
Wahl	Ziemele	Passer

Delivered in open court in Luxembourg on 8 November 2022.

A. Calot Escobar	K. Lenaerts
Registrar	President