Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber, Extended Composition)

24 September 2019*

(State aid — Aid granted by Luxembourg — Decision declaring the aid incompatible with the internal market and unlawful and ordering its recovery — Tax ruling — Advantage — Arm's length principle — Selectivity — Presumption — Restriction of competition — Recovery)

In Cases T-755/15 and T-759/15,

Grand Duchy of Luxembourg, represented initially by D. Holderer and T. Uri, subsequently by T. Uri, acting as Agents, and initially by D. Waelbroeck, S. Naudin and A. Steichen, subsequently by D. Waelbroeck and A. Steichen, lawyers,

applicant in Case T-755/15,

supported by

Ireland, represented initially by E. Creedon, G. Hodge and A. Joyce, subsequently by G. Hodge, M. Browne and A. Joyce, and finally by A. Joyce and J. Quaney, acting as Agents, and by P. Gallagher and M. Collins, Senior Counsel, B. Doherty and S. Kingston, Barristers,

intervener,

Fiat Chrysler Finance Europe, established in Luxembourg (Luxembourg), represented by J. Rodríguez, Solicitor, G. Maisto and M. Engel, lawyers,

applicant in Case T-759/15,

supported by

Ireland, represented initially by E. Creedon, G. Hodge, K. Duggan and A. Joyce, subsequently by G. Hodge, K. Duggan, M. Browne and A. Joyce, and finally by A. Joyce and J. Quaney, acting as Agents, and by M. Collins and P. Gallagher, Senior Counsel, S. Kingston and B. Doherty, Barristers,

intervener,

v

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

defendant,

* Languages of the case: French and English.

APPLICATIONS pursuant to Article 263 TFEU 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 GENERAL COURT (Seventh Chamber, Extended Composition),

composed of M. van der Woude, President, V. Tomljenović (Rapporteur), E. Bieliūnas, A. Marcoulli and A. Kornezov, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written part of the procedure and further to the hearing on 21 June 2018,

gives the following

Judgment

I. Background to the dispute

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

1 On 14 March 2012, the tax adviser of Fiat Chrysler Finance Europe, formerly Fiat Finance and Trade Ltd ('FFT'), sent a letter to the Luxembourg tax authorities requesting a tax ruling. [*confidential*] [1]

2 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'.

3 The letter of 3 September 2012 also made clear that the decision contained therein was to be binding on the tax authorities for a period of five years (that is from tax year 2012 to tax year 2016).

B. The administrative procedure before the Commission

4 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, on 24 March 2014, the Commission adopted a decision requiring information to be provided to it by the Grand Duchy of Luxembourg.

5 On 11 June 2014, the Commission decided to initiate the formal investigation procedure under Article 108(2) TFEU ('the opening decision') in respect of the tax ruling at issue. Between the date of the opening decision and 15 July 2015, there was a further lengthy exchange of correspondence between the Commission and the Grand Duchy of Luxembourg, as well as FFT, with particular regard to the tax ruling at issue.

1 Confidential information omitted.

C. The contested decision

6 On 21 October 2015, the Commission adopted Decision (EU) 2016/2326 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat (OJ 2016 L 351, p. 1, 'the contested decision').

1. Description of the contested measure

7 In Section 2 of the contested decision, entitled 'Description of the aid measure', the Commission first described FFT, the beneficiary of the tax ruling at issue, which was part of the Fiat/Chrysler automobile group ('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 contested decision).

8 The Commission then described the tax ruling at issue, stating that it had been issued by the Luxembourg tax administration on 3 September 2012. It indicated that that ruling 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 ('the transfer pricing report') (recitals 9, 53 and 54 of the contested decision).

9 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 the tax ruling at issue 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 contested decision).

10 The Commission noted that, according to the transfer pricing report, the most appropriate method for determining the taxable profit of FFT was the transactional net margin method ('the TNMM'). This method entails, according to the Commission, taking into consideration the net margins earned in comparable transactions by independent enterprises. This choice was justified, according to that report, by the fact that FFT was providing financial services only to Fiat/Chrysler group companies. The Commission added that, according to the transfer pricing report, the remuneration due to FFT, which constituted the taxable profit, had to be determined by reference to the capital needed by FFT to perform its functions and to bear its risks, in relation to the assets in use (recitals 55 and 56 of the contested decision).

11 Specifically, the Commission found that the transfer pricing report, as endorsed by the tax ruling at issue, proposed calculating the overall remuneration due to FFT for its financing and treasury activities and the risks that it bore, such remuneration consisting of the following two components (recital 70 of the contested decision):

– a 'risk remuneration', calculated by multiplying FFT's hypothetical regulatory capital of EUR 28 500 000, estimated by applying the Basel II framework by analogy, by the pre-tax expected return of 6.05%, estimated using the Capital Asset Pricing Model ('CAPM');

– a 'functions remuneration', calculated by multiplying what is designated as FFT's capital used to perform the functions, estimated as EUR 93 710 000, by the market interest rate applied to short-term deposits, estimated to be 0.87%.

12 In addition, the Commission noted that the tax ruling at issue had endorsed the proposal in the transfer pricing report not to remunerate the portion of FFT's equity designated as supporting FFT's financial investments in Fiat Finance North America Inc. ('FFNA') and Fiat Finance Canada Ltd ('FFC') (recital 69 of the contested decision).

2. Description of the Luxembourg rules on transfer pricing

13 The Commission indicated that the tax ruling at issue had been issued on the basis of Article 164(3) of the Luxembourg Income Tax Code (loi du 4 décembre 1967 concernant l'impôt sur le revenu (Law of 4 December 1967 on income tax), as amended, 'the Tax Code') and Circular L.I.R. No 164/2 of 28 January 2011, issued by the director of Luxembourg taxes ('the Circular'). In that regard, first, the Commission noted that that article 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 added that the Circular 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 contested decision).

3. Description of the OECD Guidelines

14 The Commission outlined the transfer pricing guidelines of the Organisation for Economic Cooperation and Development (OECD) and indicated that transfer prices referred to prices charged for commercial transactions between various entities belonging to the same corporate group. It stated that, in order to avoid a situation where multinational companies had a financial incentive to allocate as little profit as possible to jurisdictions where their profits were subject to higher taxation, tax administrations should only accept transfer prices between integrated companies when, in accordance with the arm's length principle, transactions are remunerated as if they were agreed to by stand-alone companies negotiating under comparable circumstances at arm's length. The Commission pointed out that that principle was to be found in Article 9 of the OECD Model Tax Convention on Income and on Capital ('the OECD Model Tax Convention') (recitals 84 to 87 of the contested decision).

15 The Commission recalled that the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, adopted by the OECD's Committee on Fiscal Affairs on 27 June 1995 and updated on 22 July 2010 ('the OECD Guidelines'), set out five methods for approximating an arm's length pricing of transactions and profit allocation between integrated companies. Only two of those methods were relevant for the contested decision (recitals 88 and 89 of the contested decision).

16 The first of these is the comparable uncontrolled price ('CUP') method, which is a traditional transaction method. The Commission noted that the CUP method compares the price charged for the transfer of property or services in a transaction between two associated enterprises to the price charged for the transfer of property or services in a comparable transaction between independent enterprises conducted under comparable circumstances (recital 90 of the contested decision).

17 The second method is the TNMM, which is an indirect method used to approximate an arm's length pricing of transactions and profit allocation between companies of the same group. The Commission described that method as one that involves estimating what would be an arm's length profit for an entire activity, rather than for specific transactions. It explained that, in that context, a profit level indicator would be selected, such as costs, turnover or fixed investment, to which would be applied a profit ratio reflecting that observed in comparable uncontrolled transactions (recital 91 of the contested decision).

4. Assessment of the contested measure

18 In Section 7 of the contested decision, entitled 'Assessment of the contested measure', the Commission concluded that State aid had been granted.

19 After recalling the conditions for a finding of State aid, according to which, in order for a measure to be categorised as State aid within the meaning of Article 107(1) TFEU, first, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on the recipient; and, fourth, it must distort or threaten to distort competition, the Commission found that the first condition had been fulfilled in this case. In that regard, it stated that the tax ruling at issue was imputable to the Grand Duchy of Luxembourg. Moreover, the Commission found that that ruling had given rise to a loss of State resources, since any reduction of FFT's tax liability had resulted in a loss of tax revenue that would otherwise have been available to the Grand Duchy of Luxembourg (recitals 185 to 188 of the contested decision).

20 As regards the second and fourth conditions, the Commission found that since FFT was part of a group operating in all Member States, any aid in its favour was liable to affect intra-Union trade. Moreover, it found that, in so far as the tax ruling at issue relieved FFT of a tax liability, that ruling improved its financial position and, as a result, distorted or threatened to distort competition (recital 189 of the contested decision).

21 As regards the third condition 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 system (recital 190 of the contested decision).

22 As a preliminary point, the Commission observed that the case-law had established a three-step analysis to be used in determining whether a tax measure is selective. The first step is to identify the common or normal regime applicable in the Member State ('the reference system'). In the second step, it is necessary to determine whether the tax measure in question constitutes a derogation from that system, in so far as it differentiates between economic operators who, in the light of the objectives intrinsic to the system, are in a comparable factual and legal situation. The Commission then recalled that, in the third step, if the measure constitutes a derogation from the reference system, the State must establish whether that measure is justified by the nature or the general scheme of the reference system (recital 192 of the contested decision).

23 As regards the first step, identification of the reference system, the Commission considered that, in the present case, this was the general Luxembourg corporate income tax system, the objective of which was to tax the profits of all companies subject to tax in Luxembourg. It stated in that regard that the general Luxembourg corporate income tax 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 aimed to tax the profits of all companies resident in Luxembourg, whether or not integrated, and that both types of company are in a similar factual and legal situation in the light of the intrinsic objective of that system. The Commission rejected all the arguments put forward by the Grand Duchy of Luxembourg and by FFT to the effect that Article 164 of the Tax Code or the Circular 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 contested decision).

24 As regards the second step, the Commission stated that whether a tax measure constituted a derogation from the reference system would generally coincide with 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 contested decision).

25 The Commission went on to state that a tax measure which results in a group company charging transfer prices that do not resemble prices which would be charged between independent undertakings under the arm's length principle confers an advantage on that company, in so far as it results in a reduction of its taxable base and thus its tax liability under the ordinary corporate income tax system, which, according to the Commission, the Court of Justice had accepted. Therefore, the Commission explained that it was required to verify whether the methodology accepted by the Luxembourg tax administration by way of the tax ruling at issue for the determination of FFT's taxable profits in Luxembourg departed from a methodology that led to a reliable approximation of a market-based outcome, and thus from the arm's length principle. In that case the tax ruling at issue would be deemed to confer a selective advantage on FFT for the purposes of Article 107(1) TFEU (recitals 222 to 227 of the contested decision).

26 Consequently, 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 integrated companies, irrespective of whether a Member State had incorporated that principle into its national legal system. The Commission then 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 the Circular, 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 contested decision).

27 In the first place, the Commission considered that several of the methodological choices 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 (recitals 234 to 240 of the contested decision).

28 First, in relation to the capital to be remunerated, the Commission did not consider the tax adviser's chosen profit level indicator, namely FFT's hypothetical regulatory capital, to be appropriate in the application of the TNMM for estimating an arm's length remuneration for the functions performed by FFT. The Commission went on to find that, by taking into account the hypothetical regulatory capital of EUR 28.5 million, instead of the accounting equity, which was EUR 287.5 million in 2011, on the basis of which the CAPM was applied, the tax adviser had divided FFT's taxable remuneration by 10. The Commission made clear that it had rejected all the arguments of the Grand Duchy of Luxembourg and FFT in that respect (recitals 248 to 266 of the contested decision).

29 Second, as regards the application of the Basel II framework in order to determine the hypothetical regulatory capital, the Commission considered that the Grand Duchy of Luxembourg had made errors that led to FFT's hypothetical regulatory capital being underestimated and resulted in a lowering of FFT's tax liability (recitals 267 to 276 of the contested decision).

30 Third, the Commission found that the tax adviser had made several deductions from FFT's remaining capital that departed from a market-based outcome. First of all, it observed that if the hypothetical regulatory capital had been correctly estimated, it was likely that no capital in excess of regulatory

capital would have been found. Next, the Commission took the view that the tax adviser's decision to isolate the equity component designated as 'equity supporting the financial investments in FFNA and FFC' and to accord it a zero remuneration for the purpose of estimating FFT's tax base was inappropriate. The Commission indicated that it did not regard the Grand Duchy of Luxembourg's arguments on this point as convincing (recitals 277 to 291 of the contested decision).

31 Fourth, the Commission considered that the tax adviser's choice of a beta of 0.29 when using the CAPM to determine the return on capital to be applied to FFT's hypothetical regulatory capital resulted in a profit allocation to FFT that was not in line with the arm's length principle (recitals 292 to 301 of the contested decision).

32 Among the conclusions reached by the Commission in the light of those findings are: (i) the appropriate level of remuneration for the financing and treasury functions of FFT should be established on the basis of FFT's accounting equity; (ii) 2012 was an appropriate reference year for assessing FFT's tax base in Luxembourg; (iii) the pre-tax return on equity of 6.05% (and the post-tax return of 4.3%) accepted by the tax ruling at issue and calculated using the CAPM was well below the required returns on capital in the financial sector, which had remained consistently at or above 10%; and (iv) the required post-tax return on equity was 10%, applied to the full amount of the accounting equity (recitals 302 to 311 of the contested decision).

33 In the second place, the Commission rejected FFT's argument that there was no advantage for the Fiat/Chrysler group because any increase in the tax base in Luxembourg would have been offset in full by an increased tax deduction in other Member States (recitals 312 to 314 of the contested decision).

34 In the third place, as a subsidiary point, the Commission found 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 the Circular, which laid down the arm's length principle in Luxembourg tax law (recitals 315 to 317 of the contested decision).

35 In the fourth place, 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 the Circular 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 contested decision).

36 In the fifth place, neither the Grand Duchy of Luxembourg nor FFT had, according to the Commission, advanced any possible justification for the selective treatment of FFT as a result of the tax ruling at issue. Nor had the Commission identified any ground justifying the preferential treatment from which FFT had benefited (recitals 337 and 338 of the contested decision).

37 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 contested decision).

38 Finally, the Commission 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 within the group, and that those entities had benefited from the tax reduction granted to FFT, given that that tax reduction necessarily had the effect of reducing the pricing conditions of its intra-group loans (recitals 341 to 345 of the contested decision).

39 In the light of all of the foregoing considerations, the Commission concluded that the tax ruling at issue constituted State aid and that the aid in question was operating aid (recitals 346 and 347 of the contested decision).

40 In Section 8 of the contested decision, entitled 'Compatibility of the aid', the Commission concluded that the aid granted to FFT was incompatible with the internal market. In this respect, it noted that the Grand Duchy of Luxembourg had not invoked any of the derogations provided for in Article 107(2) and (3) TFEU and, moreover, that the aid in question, which had to be considered to be operating aid, could not normally be considered compatible with the internal market (recitals 348 to 351 of the contested decision).

41 In Section 9 of the contested decision, entitled 'Unlawfulness of the aid', the Commission observed that the Grand Duchy of Luxembourg had not notified it, in accordance with Article 108(3) TFEU, of any plan to grant the tax ruling at issue, nor had it complied with the standstill obligation laid down in that provision. Consequently, the tax ruling at issue constituted unlawful State aid, put into effect in contravention of that provision (recitals 352 and 353 of the contested decision).

42 In Section 10 of the contested decision, entitled 'Recovery', the Commission stated, first, that the arguments advanced by the Grand Duchy of Luxembourg as to observance of the principles of protection of legitimate expectations and legal certainty were without merit (recitals 354 to 364 of the contested decision).

43 Second, the Commission pointed out that it was not required to state the exact amount of the aid to be recovered, and that it was sufficient for the contested decision to include information enabling the addressee to work out the amount itself without overmuch difficulty. In the present case, the Commission proposed one possible methodology in the contested decision for eliminating the selective advantage granted to FFT by the tax ruling at issue, and made clear that it would also be prepared to accept another method of calculation should the Grand Duchy of Luxembourg propose one before the deadline for implementation of the contested decision, provided that that method resulted in a reliable approximation of a market-based outcome (recitals 365 to 369 of the contested decision).

44 Third, the Commission found that, in the first instance, the Grand Duchy of Luxembourg was required to recover from FFT the unlawful and incompatible aid granted by means of the tax ruling at issue. Should FFT not have been in a position to repay the aid in full, the Grand Duchy of Luxembourg was to recover the balance from Fiat Chrysler Automobiles NV, the successor of Fiat SpA, since it was that entity which controlled the group to which FFT belonged (recital 370 of the contested decision).

45 In conclusion, the Commission found that the Grand Duchy of Luxembourg had, by way of the tax ruling at issue, unlawfully granted State aid to FFT and to the group to which it belonged, in breach of Article 108(3) TFEU, that that aid was incompatible with the internal market and that, consequently, the Grand Duchy of Luxembourg was required to recover it from FFT or, in the event of FFT failing to repay the full amount of the aid, from Fiat Chrysler Automobiles (recital 371 of the contested decision).

46 The operative part of the contested decision is worded as follows:

'Article 1

The tax ruling [at issue], which enables [FFT] to determine its tax liability in Luxembourg on a yearly basis for a period of five 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].

Article 2

1. [The Grand Duchy of] Luxembourg shall recover the incompatible and unlawful aid referred to in Article 1 from [FFT].

2. Any sums that remain unrecoverable from [FFT], following the recovery described in the paragraph 1, shall be recovered from Fiat Chrysler Automobiles NV.

3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

4. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

Article 3

1. Recovery of the aid granted referred to in Article 1 shall be immediate and effective.

2. [The Grand Duchy of] Luxembourg shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 4

1. Within two months following notification of this Decision, [the Grand Duchy of] Luxembourg shall submit to the Commission information regarding the methodology used to calculate the exact amount of aid.

2. [The Grand Duchy of] Luxembourg shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision.

Article 5

This Decision is addressed to the Grand Duchy of Luxembourg.'

II. Procedure and forms of order sought

A. The written part of the procedure and the forms of order sought in Case T-755/15

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

1. Composition of the formation of the Court and priority treatment

48 By document lodged at the Court Registry on 6 June 2016, the Grand Duchy of Luxembourg requested that the case be heard and determined by a Chamber sitting in extended composition. The Court took formal note, pursuant to Article 28(5) of its Rules of Procedure, of the fact that Case T-755/15 had been referred to the Fifth Chamber, Extended Composition.

49 Following a change in the composition of the Chambers of the Court on 26 September 2016, the Judge-Rapporteur was assigned, pursuant to Article 27(5) of the Rules of Procedure, to the Seventh Chamber, Extended Composition, to which Case T-755/15 was accordingly allocated.

50 Since a member of the Seventh Chamber, Extended Composition, of the General Court was unable to sit in the present case, the President of the General Court, by decision of 6 February 2017, designated the Vice-President of the General Court to complete the Chamber.

51 By decision of 12 December 2017, the President of the Seventh Chamber, Extended Composition, of the General Court approved the proposal of the Judge-Rapporteur that Case T-755/15 be given priority under Article 67(2) of the Rules of Procedure.

2. Request that the case be dealt with under the expedited procedure

52 By separate document lodged at the Court Registry on 30 December 2015, the Grand Duchy of Luxembourg requested that Case T-755/15 be dealt with under the expedited procedure provided for in Article 151 of the Rules of Procedure. On 2 February 2016, the Court decided not to grant that request.

3. Interventions

53 By document lodged at the Court Registry on 6 April 2016, the United Kingdom of Great Britain and Northern Ireland applied for leave to intervene in support of the form of order sought by the Commission.

54 By document lodged at the Court Registry on 7 April 2016, Ireland applied for leave to intervene in support of the form of order sought by the Grand Duchy of Luxembourg.

55 By order of 25 May 2016, the President of the Fifth Chamber of the General Court granted the applications to intervene of the United Kingdom and Ireland.

56 By document lodged at the Court Registry on 9 November 2016, the United Kingdom withdrew its intervention.

57 By order of 15 December 2016, the President of the Seventh Chamber, Extended Composition, of the General Court removed the United Kingdom as intervener from Case T-755/15.

4. Applications for confidential treatment

58 By documents lodged at the Court Registry on 29 April, 27 June and 24 October 2016, the Grand Duchy of Luxembourg requested that certain information contained in the application, in the reply, in the rejoinder and in certain annexes to those pleadings be treated as confidential vis-à-vis the United Kingdom and Ireland. By document lodged at the Court Registry on 3 January 2017, the Grand Duchy of Luxembourg informed the Court that it wished to maintain its applications for confidential treatment vis-à-vis Ireland, in the event of any joinder of Cases T-755/15 and T-759/15.

5. Forms of order sought

59 The Grand Duchy of Luxembourg claims that the Court should:

– declare the present action admissible and well founded;

– principally, annul the contested decision;

– alternatively, annul the contested decision in so far as it orders the recovery of the aid;

– order the Commission to pay the costs.

60 Ireland, intervening in support of the form of order sought by the Grand Duchy of Luxembourg, claims that the Court should annul the contested decision in whole or in part.

61 The Commission contends that the Court should:

– declare the action unfounded;

– order the Grand Duchy of Luxembourg to pay the costs.

B. The written part of the procedure and the forms of order sought in Case T-759/15

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

1. Composition of the formation of the Court and priority treatment

63 Following a change in the composition of the Chambers of the Court on 26 September 2016, the Judge-Rapporteur was assigned, pursuant to Article 27(5) of the Rules of Procedure, to the Seventh Chamber, Extended Composition, to which Case T-759/15 was accordingly allocated.

64 On a proposal from the Seventh Chamber, the Court decided, on 15 February 2017, to refer the case to a Chamber sitting in extended composition.

65 Since a member of the Seventh Chamber, Extended Composition, of the General Court was unable to sit in the present case, the President of the General Court, by decision of 23 February 2017, designated the Vice-President of the General Court to complete the Chamber.

66 By decision of 12 December 2017, the President of the Seventh Chamber, Extended Composition, of the General Court approved the proposal of the Judge-Rapporteur that Case T-759/15 be given priority under Article 67(2) of the Rules of Procedure.

2. Request that the case be dealt with under the expedited procedure

67 By separate document lodged at the Court Registry on 29 December 2015, FFT requested that Case T-759/15 be dealt with under the expedited procedure provided for in Article 151 of the Rules of Procedure. On 2 February 2016, the Court decided not to grant that request.

3. Interventions

68 By document lodged at the Court Registry on 6 April 2016, the United Kingdom applied for leave to intervene in support of the form of order sought by the Commission.

69 By document lodged at the Court Registry on 7 April 2016, Ireland applied for leave to intervene in support of the form of order sought by FFT.

70 By order of 18 July 2016, the President of the Fifth Chamber of the General Court granted the applications to intervene of the United Kingdom and Ireland.

71 By document lodged at the Court Registry on 9 November 2016, the United Kingdom withdrew its intervention.

72 By order of 15 December 2016, the President of the Seventh Chamber, Extended Composition, removed the United Kingdom as intervener from Case T-759/15.

4. Applications for confidential treatment

73 By documents lodged at the Court Registry on 20 May, 11 June, 27 July and 28 July 2016, FFT requested that certain information contained in the application, in the defence, in the reply and in certain annexes to those pleadings be treated as confidential vis-à-vis the United Kingdom and Ireland.

74 By document lodged at the Court Registry on 17 January 2017, FFT stated that it maintained its claims of confidentiality with regard to Ireland, in the event of the case being joined with Case T-755/15.

5. Forms of order sought

75 FFT claims that the Court should:

– declare the action admissible;

– annul Articles 1 to 4 of the contested decision;

– order the Commission to pay the costs.

76 Ireland, intervening in support of the form of order sought by FFT, claims that the Court should annul the contested decision in whole or in part.

77 The Commission contends that the Court should:

– declare the action unfounded;

– order FFT to pay the costs.

C. Joinder for the purposes of the oral part of the procedure, and the oral part of the procedure in Cases T-755/15 and T-759/15

1. Joinder

78 By document lodged at the Court Registry on 1 December 2016, the Grand Duchy of Luxembourg applied for Cases T-755/15 and T-759/15 to be joined for the purposes of the oral part of the procedure and of the decision which closes the proceedings.

79 By document lodged at the Court Registry on 1 December 2016, FFT also applied for Cases T-755/15 and T-759/15 to be joined for the purposes of the oral part of the procedure and of the decision which closes the proceedings.

80 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. By the same order, it was decided to exclude the confidential information from the case file to be made available to Ireland.

2. Oral part of the procedure in Cases T-755/15 and T-759/15

81 By letter lodged at the Court Registry on 7 February 2017, the Grand Duchy of Luxembourg requested that a hearing be held, in accordance with Article 106(2) of the Rules of Procedure.

82 By letter lodged at the Court Registry on 10 February 2017, FFT requested that a hearing be held, in accordance with Article 106(2) of the Rules of Procedure.

83 Acting on a report from the Judge-Rapporteur, the Court decided to open the oral part of the procedure in Cases T-755/15 and T-759/15. By way of measures of organisation of procedure under Article 89 of the Rules of Procedure, the Court asked the parties to answer questions in writing. The parties complied with those requests within the prescribed periods.

84 On 24 May 2017, FFT lodged a submission containing further evidence, on which the parties submitted their observations.

85 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 21 June 2018.

III. Law

A. Joinder of the cases for the purposes of the present judgment

86 In accordance with Article 19(2) of the Rules of Procedure, the President of the Seventh Chamber, Extended Composition, of the General Court referred the decision as to whether Cases T-755/15 and T-759/15 should be joined for the purposes of the decision closing the proceedings, which fell within his remit, to the Seventh Chamber, Extended Composition, of the General Court.

87 The parties having been heard at the hearing with respect to a possible joinder of the cases, it is appropriate for Cases T-755/15 and T-759/15 to be joined for the purposes of the decision which closes the proceedings, on account of the connection between them, in accordance with Article 68(1) of the Rules of Procedure.

B. Pleas in law relied on and the structure of the examination of the present actions

88 By the actions brought in Cases T-755/15 and T-759/15, annulment is sought of the contested decision in so far as it classifies the tax ruling at issue as State aid within the meaning of Article 107(1) TFEU and in so far as it orders the recovery of sums which have allegedly not been collected from FFT and the Fiat/Chrysler group by the Grand Duchy of Luxembourg as corporate income tax.

89 In support of its action, the Grand Duchy of Luxembourg puts forward three pleas in law.

90 The first plea in law, which covers, in essence, the condition for a finding of selective aid and the Commission's competence in fiscal matters, is divided into three parts. First, the Grand Duchy of Luxembourg submits that, in the context of its examination of the selectivity of the contested

measure, the Commission incorrectly considered the relevant reference framework to be the general corporate income tax regime (first part). Second, the Grand Duchy of Luxembourg claims that the Commission failed to demonstrate that the tax ruling at issue constituted a derogation from the reference framework used, or that it derogated from the arm's length principle (second part). Third, the Grand Duchy of Luxembourg submits that the Commission infringed Articles 4 and 5 TEU and Article 114 TFEU by engaging in tax harmonisation in disguise, consisting in the imposition of a *sui generis* arm's length principle (third part).

91 The second plea in law, which is divided into two parts, alleges infringement of Article 107(1) TFEU and of the Commission's obligation to state reasons as provided for in Article 296 TFEU, in that the Commission failed to demonstrate that there was any advantage (first part) or any restriction of competition (second part).

92 The third plea in law, advanced in the alternative, alleges infringement of Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1). However, since that regulation has been repealed by Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9), which was applicable at the date of the contested decision, this plea must be understood as alleging infringement of Article 16(1) of the latter regulation. The plea is divided into two parts. The Grand Duchy of Luxembourg claims that the Commission ordered recovery of the aid contrary to the principle of legal certainty (first part) and to its rights of defence (second part).

93 In support of its action, FFT puts forward four pleas in law.

94 The first plea in law, which is divided into two parts, alleges infringement of Article 107 TFEU. In support of the first part of its first plea, FFT submits that the Commission misapplied the concept of selective advantage. In that respect, it raises four complaints. The first alleges an error in the determination of the relevant reference framework. The second alleges an error in that an unprecedented and undefined concept of the arm's length principle was applied. The third alleges that there was no proof that an advantage had been given to the Fiat/Chrysler group. The fourth complaint is that, even if the tax ruling at issue derogates from the general corporate income tax system, that derogation is justified. In support of the second part of its first plea, FFT claims that the Commission failed to show that the tax ruling at issue was liable to distort competition.

95 The second plea in law, which is also divided into two parts, alleges infringement of the second paragraph of Article 296 TFEU. FFT claims that the Commission failed to fulfil its obligation to state reasons through its failure to explain in the contested decision how it derived the arm's length principle from EU law and what that principle is (first part). Next, it claims that the Commission failed to set out the reasons for its view that the tax ruling at issue distorted competition (second part).

96 The third plea in law alleges breach of the principle of legal certainty. FFT submits that the Commission's formulation of the arm's length principle introduces legal uncertainty and confusion as to when a tax ruling might breach the rules on State aid.

97 The fourth plea in law alleges breach of the principle of protection of legitimate expectations, in so far as the Commission did not assess the tax ruling at issue in the light of the relevant OECD rules.

98 It is apparent from all of the above that the Grand Duchy of Luxembourg and FFT are advancing, albeit in a different order, five series of pleas, alleging, in essence:

– in the first series, infringement of Articles 4 and 5 TEU, in so far as the Commission's analysis would lead to tax harmonisation in disguise (third part of the first plea in Case T-755/15);

– in the second series, infringement of Article 107 TFEU, of the obligation to state reasons 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, 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 provided for 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, 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).

99 The Court will examine the pleas in the order of the series of pleas set out in paragraph 98 above.

C. First series of pleas, alleging infringement of Articles 4 and 5 TEU, in so far as the Commission has allegedly engaged in tax harmonisation in disguise

100 The Grand Duchy of Luxembourg claims, in essence, that the Commission exceeded its powers and infringed Articles 4 and 5 TEU by engaging in tax harmonisation in disguise, despite direct taxation falling within the exclusive competence of the Member States pursuant to Article 114 TFEU. It adds that the Commission established itself as a national 'tax administrations appeal chamber', by reviewing whether the tax ruling at issue was abnormal having regard to Luxembourg law and the OECD.

101 Ireland submits that the contested decision disturbs the division of powers between the European Union and the Member States established, in particular, by Article 3(6) TEU and Article 5(1) and (2) TEU, direct taxation being a matter that falls within the exclusive competence of the Member States. In its view, therefore, the Commission is engaging in harmonisation in disguise.

102 The Commission contests those arguments.

103 In essence, the parties disagree as to whether the Commission infringed the rules on the allocation of powers in so far as it allegedly engaged in tax harmonisation in disguise in the contested decision.

104 In that regard, it should be recalled that, according to settled case-law, while direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law (see judgment of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 47 and the case-law cited). Thus, intervention by the Member States in areas which have not been harmonised in the European Union, such as direct taxation, is not excluded from the scope of the rules on the monitoring of State aid. Accordingly, the Commission can classify a tax measure as State aid provided that the conditions for that classification are met (see, to that effect, judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 28; of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 81; and of 25 March 2015, *Belgium* v *Commission*, T-538/11, EU:T:2015:188, paragraphs 65 and 66).

105 It is true that, in the absence of EU rules governing the matter, it falls within the competence of the Member States to designate bases of assessment and to spread the tax burden across the different factors of production and economic sectors (see, to that effect, 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, paragraph 97).

106 However, that does not mean that every tax measure, which affects, inter alia, the basis of assessment taken into account by the tax authorities, will escape the application of Article 107 TFEU. If such a measure in fact discriminates between companies that are in a comparable situation with regard to the objective of that tax measure and as a result confers selective advantages on the beneficiaries of the measure which favour 'certain' undertakings or the production of 'certain' goods, it can be considered State aid within the meaning of Article 107(1) TFEU (see, to that effect, 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, paragraph 104).

107 It follows from the foregoing that, since the Commission has the power to monitor compliance with Article 107 TFEU, it cannot be accused of having exceeded its powers when it examined the tax ruling at issue in order to determine whether it constituted State aid and, if it did, whether it was compatible with the internal market, within the meaning of Article 107(1) TFEU.

108 The Grand Duchy of Luxembourg is therefore wrong to claim that the Commission established itself as a tax appeal chamber for the Grand Duchy of Luxembourg, since the Commission merely exercised its powers under Article 107 TFEU in examining whether the tax ruling at issue complied with the law on State aid.

109 In those circumstances, it must be concluded that the Commission did not infringe Articles 4 and 5 TEU or Article 114 TFEU by adopting the contested decision.

110 That conclusion is not undermined by the arguments of the Grand Duchy of Luxembourg and Ireland.

111 First, in so far as the Grand Duchy of Luxembourg and Ireland claim that the Commission has engaged in tax harmonisation in disguise by disregarding the Luxembourg rules in order to conclude that the tax calculation did not comply with the arm's length principle and by relying on rules that are not part of the Luxembourg tax system, that argument must be rejected as unfounded.

112 It does indeed follow from the case-law set out in paragraph 105 above that the Commission does not, at this stage of the development of EU law, have the power autonomously to define the 'normal' taxation of an integrated undertaking, disregarding national tax rules.

113 However, although 'normal' taxation is defined by the national tax rules and the actual existence of an advantage must be demonstrated by reference thereto, the fact remains that, as is recalled in paragraph 106 above, a tax measure which affects the tax base that is taken into account by the tax authorities may come within the scope of Article 107(1) TFEU. Thus, when considering whether the tax ruling at issue complied with the rules on State aid, the Commission did not engage in any 'tax harmonisation' but exercised the power conferred on it by Article 107(1) TFEU notably by verifying, in a specific case, whether that tax ruling conferred on its beneficiary an advantage as compared to 'normal' taxation, as defined by national tax law.

114 Second, the Grand Duchy of Luxembourg and Ireland claim that the contested decision creates 'total legal uncertainty', not only in the Member States but also in third countries, that that measure has been strongly criticised notably by leaders of the United States of America, that it is a 'first' which is illegal and that it will cause the Member States to notify all their tax rulings and to question existing tax rulings. Such arguments must be rejected as unfounded.

115 First, it does not follow from the contested decision that the Commission has concluded that every tax ruling necessarily constitutes State aid within the meaning of Article 107 TFEU. Provided that it does not grant any selective advantage, notably in that it does not result in a reduction of the tax burden of its beneficiary by derogating from the 'normal' taxation rules, such a tax ruling does not constitute State aid within the meaning of Article 107 TFEU and is not subject to a notification obligation under Article 2 of Regulation 2015/1589.

116 Second, contrary to what is maintained by the Grand Duchy of Luxembourg and Ireland, the contested decision does not create 'total legal uncertainty' in the Member States or third countries. It merely represents the application to the tax ruling at issue of Articles 107 and 108 TFEU, according to which a State measure which constitutes aid that is incompatible with the internal market is prohibited and the aid must be recovered.

117 It follows from all of the foregoing that the plea intended to establish that the Commission has engaged in tax harmonisation in disguise must be rejected as unfounded.

D. Second series of pleas, alleging the absence of an advantage

1. Preliminary observations

118 As a preliminary point, it must be borne in mind that, according to the case-law, classification as State aid requires all the conditions referred to in Article 107 TFEU to be fulfilled. It is thus established that, for a measure to be categorised as State aid within the meaning of that provision, there must, first, be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on the recipient; and, fourth, it must distort or threaten to distort competition (see judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 40 and the case-law cited).

119 In the present case, it must be noted that, as is apparent from paragraphs 21 to 37 above, in the contested decision, the Commission examined the two criteria of the existence of an advantage and the selectivity of the measure at issue concurrently.

120 Specifically, principally, the Commission considered that the tax ruling at issue conferred a selective advantage on FFT with regard to the general Luxembourg corporate income tax system, because the methodology accepted in that tax ruling did not comply with the arm's length principle, which necessarily formed part of the Commission's assessment under Article 107(1) TFEU of tax measures granted to group companies, independently of whether a Member State had incorporated that principle into its national legal system, and according to which intra-group transactions should have been remunerated as if they had been negotiated between independent undertakings ('the arm's length principle as described by the Commission in the contested decision') (see recitals 219 to 231 of the contested decision and, in particular, recital 228 of that decision). The Commission then set out, in recitals 234 to 311 of the contested decision, its reasoning according to which the methodology for determining FFT's taxable profit, accepted by the tax ruling at issue, could not result in a reliable approximation of an outcome obtained under market conditions (arm's length outcome).

121 Moreover, as a subsidiary point, the Commission considered that the tax ruling at issue conferred an advantage on FFT because it derogated from Article 164(3) of the Tax Code and the Circular, which established the arm's length principle under Luxembourg law (see recitals 316 and 317 of the contested decision). The Commission then referred to its analysis, according to which the method validated by the tax ruling at issue could not result in a reliable approximation of a market-based outcome, as set out in the context of its main line of reasoning (see recitals 234 to 311 of the contested decision).

122 The Commission's approach of examining the criteria of advantage and selectivity concurrently is not in itself incorrect, in so far as, as the Commission observes, both the advantage and the selective nature of that advantage are examined. Nevertheless, the Court considers it appropriate to consider, first of all, whether the Commission was entitled to conclude that there was an advantage, before going on, if necessary, to examine whether that advantage had to be considered to be selective.

123 In that regard, it must be noted that, although some of the arguments raised by the Grand Duchy of Luxembourg and FFT, including those put forward in the second part of the first plea of the Grand Duchy of Luxembourg, are presented as relating to the selectivity of the measure at issue, the Court considers that they are also intended to elicit a finding that the Commission wrongly concluded that the measure at issue conferred an advantage on FFT. The Court will therefore examine the arguments raised in the second part of the first plea of the Grand Duchy of Luxembourg in conjunction with the pleas challenging the Commission's conclusion that the tax ruling at issue conferred an advantage on FFT.

124 In the light of these observations, the Court will examine the pleas put forward in support of the argument that FFT did not enjoy an advantage, distinguishing, first, the complaints made in respect of the Commission's principal line of reasoning and, second, those relating to what was set out as a subsidiary line of reasoning. Third, the Court will examine the complaint by which the Grand Duchy of Luxembourg argues that the Commission has failed to prove the existence of an advantage at the level of the Fiat/Chrysler group.

2. The Commission's principal line of reasoning, that the tax ruling at issue derogated from the general Luxembourg corporate income tax system

125 The pleas put forward by the Grand Duchy of Luxembourg and FFT to challenge the examination of the advantage, the principal facet of the Commission's approach, may be summarised as follows. First, the Grand Duchy of Luxembourg and FFT, supported by Ireland, dispute the existence of the arm's length principle as described by the Commission in the contested decision and the Commission's application of that principle as a criterion for assessing the existence of a selective advantage. Second, the Grand Duchy of Luxembourg disputes the Commission's conclusion that the method validated by the tax ruling at issue for determining the amount of tax payable by FFT does not comply with the arm's length principle.

(a) Pleas alleging an error in the application of the arm's length principle in the monitoring of State aid

126 In essence, the Grand Duchy of Luxembourg and FFT claim that the Commission identified an arm's length principle that is specific to EU law, in breach of the fiscal autonomy of the Member States, and that it examined the tax ruling at issue in the light of that principle, without taking account of Luxembourg law. They also submit that, by applying the arm's length principle as described in the contested decision, the Commission breached the principles of legal certainty and protection of legitimate expectations, and failed to fulfil its obligation to state reasons.

127 The Commission contests those arguments.

128 It will be recalled that, in recitals 219 to 231 of the contested decision, the Commission explained that it was entitled, in order to identify a selective advantage, to examine whether a tax ruling, such as that at issue, deviated from the arm's length principle as described in the contested decision. It then outlined the scope of that arm's length principle.

129 First and foremost, it must be noted that, as is apparent in particular from recitals 216, 231 and 311 of the contested decision, the examination in the light of the arm's length principle as described by the Commission in the contested decision forms part of its principal analysis of the selective advantage. As is apparent from recitals 216, 219 and 301 of the contested decision, that analysis entails examining whether the tax ruling at issue derogates from the general Luxembourg corporate income tax system. It must be noted in that regard that the Commission had previously indicated, in recitals 194 to 199 of the contested decision, that the objective of the general Luxembourg corporate income tax system was to tax the profits of all companies resident in Luxembourg, whether or not integrated, and that both types of company are in a similar factual and legal situation in the light of that objective.

130 As regards the definition of the arm's length principle, the Commission asserted, in recitals 222 and 225 of the contested decision, that, according to that principle, intra-group transactions should be remunerated as if they had been agreed to by independent companies. It added, in recital 226 of the contested decision, that the purpose of that principle was to ensure that intra-group transactions were treated for tax purposes by reference to the amount of profit that would have arisen if the same transactions had been executed by independent companies. The Commission moreover argued during the hearing that the arm's length principle was, in its view, a tool for assessing the price level of intra-group transactions.

131 With regard to the legal nature of the arm's length principle, the Commission considered, in recital 228 of the contested decision, that the arm's length principle necessarily formed part of the assessment, under Article 107 TFEU, of tax measures granted to group companies, irrespective of whether the Member State had incorporated that principle into its national legal system. It stated that the arm's length principle which it was applying was a general principle of equal treatment in taxation, which fell within the application of Article 107 TFEU. The Commission based that statement on the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416) concerning the tax regime for coordination centres in Belgium, in which the Court of Justice had held that the method for determining taxable income under that regime conferred a selective advantage on those centres. Specifically, the Commission referred to paragraph 96 of that judgment, in which the Court of Justice held that the effect of the method of assessment of the taxable income of the centres '[was] that the transfer prices [did] not resemble those which [were] charged in conditions of free competition'.

132 As regards the application of the arm's length principle, in recital 227 of the contested decision, the Commission indicated that, 'the Commission's assessment of whether [the Grand Duchy of] Luxembourg [had] granted a selective advantage to FFT [had] therefore [to] consist in verifying whether the methodology accepted by the Luxembourg tax administration by way of the [tax ruling at issue] for the determination of FFT's taxable profits in Luxembourg depart[ed] from a methodology that [led] to a reliable approximation of a market-based outcome and thus from the arm's length principle'. It added, in recital 228 of the contested decision, that the arm's length principle was used to establish whether the taxable profit of a group company for corporate income tax purposes had been determined on the basis of a methodology that approximated market conditions, so that that company was not treated favourably under the general corporate income tax system as compared to non-integrated companies whose taxable profit was determined by the market.

133 The Court must thus consider whether the Commission was entitled to analyse the measure at issue in the light of the arm's length principle as described in the contested decision and set out in paragraphs 130 to 132 above, which consists in verifying whether intra-group transactions are remunerated as if they had been negotiated under market conditions.

134 As has been stated in paragraph 104 above, according to settled case-law, while direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law (see judgment of 12 July 2012, *Commission* v *Spain*,

C-269/09, EU:C:2012:439, paragraph 47 and the case-law cited). Thus, intervention by the Member States in matters of direct taxation, even if it relates to issues that have not been harmonised in the European Union, is not excluded from the scope of the rules on the monitoring of State aid.

135 It follows that the Commission can classify a tax measure as State aid provided that the conditions for that classification are met (see, to that effect, judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 28, and of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 81). Member States must exercise their competence in respect of taxation in accordance with EU law (judgment of 3 June 2010, *Commission* v *Spain*, C-487/08, EU:C:2010:310, paragraph 37). Consequently, Member States must refrain from taking, in that context, any measure likely to constitute State aid that is incompatible with the internal market.

136 As regards the condition that the measure at issue must grant an economic advantage, it should be borne in mind that, according to settled case-law, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (see judgment of 2 September 2010, *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 40 and the case-law cited; judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 21).

137 Specifically, a measure by which the public authorities grant certain undertakings favourable tax treatment which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than that of other taxpayers amounts to State aid within the meaning of Article 107(1) TFEU (judgment of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 14; see also judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 46 and the case-law cited).

138 In the case of tax measures, the very existence of an advantage may be established only when compared with 'normal' taxation (judgment of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 56). Accordingly, such a measure confers an economic advantage on its recipient if it mitigates the burdens normally included in the budget of an undertaking and which, accordingly, without being subsidies in the strict meaning of the word, are similar in character and have the same effect (judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 22).

139 Consequently, in order to determine whether there is a tax advantage, the position of the recipient as a result of the application of the measure at issue must be compared with his position in the absence of the measure at issue (see, to that effect, judgment of 26 April 2018, *Cellnex Telecom and Telecom Castilla-La Mancha* v *Commission*, C-91/17 P and C-92/17 P, not published, EU:C:2018:284, paragraph 114), and under the normal rules of taxation.

140 In the context of determining the fiscal position of an integrated company which is part of a group of undertakings, it must be noted at the outset that the pricing of intra-group transactions carried out by that company is not determined under market conditions. That pricing is agreed to by companies belonging to the same group, and is therefore not subject to market forces.

141 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 prices. In those circumstances, it must be held that, when examining, pursuant to the power conferred on it by Article 107(1) TFEU, a fiscal measure granted to such an integrated undertaking, the Commission may compare the fiscal burden of such an integrated

undertaking resulting from the application of that fiscal measure with the fiscal burden resulting from the application of the normal rules of taxation under the national law of an undertaking placed in a comparable factual situation, carrying on its activities under market conditions.

142 Furthermore, and as the Commission correctly stated in the contested decision, those findings are supported by the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416) concerning Belgian tax law, which provided for integrated companies and stand-alone companies to be treated on equal terms. The Court of Justice recognised in paragraph 95 of that judgment the need to compare a regime of derogating aid with the 'ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition'.

143 In that context, although, through that fiscal measure granted to an integrated company, the national authorities have accepted a certain level of pricing for an intra-group transaction, Article 107(1) TFEU allows the Commission to check whether that pricing corresponds to pricing under market conditions, in order to determine whether, as a result, charges normally included in the budget of the undertaking concerned are mitigated, thus conferring on that undertaking an advantage within the meaning of that article. The arm's length principle, as described by the Commission in the contested decision, is thus a tool for making that determination in the exercise of the Commission's powers under Article 107(1) TFEU. The Commission also stated, correctly, in recital 225 of the contested decision, that the arm's length principle was a 'benchmark' for establishing whether an integrated company was receiving, pursuant to a tax measure determining its transfer pricing, an advantage within the meaning of Article 107(1) TFEU.

144 It should also be stated that when the Commission uses that tool to check whether the taxable profit of an integrated undertaking pursuant to a tax measure corresponds to a reliable approximation of a taxable profit generated under market conditions, the Commission can identify an advantage within the meaning of Article 107(1) TFEU only if the variation between the two comparables goes beyond the inaccuracies inherent in the methodology used to obtain that approximation.

145 In the present case, the tax ruling at issue concerns the determination of FFT's remuneration for its intra-group financing and treasury activities for the purpose of establishing its taxable profit under the Luxembourg Tax Code the objective of which, irrespective of whether the normal rules of taxation are to be broadly or narrowly defined, is to tax integrated and stand-alone undertakings in Luxembourg in the same way with regard to corporate income tax. The Commission was therefore in a position to verify whether FFT's taxable profit pursuant to the tax ruling at issue was lower than its tax burden in the absence of that tax ruling and under the normal rules of taxation in Luxembourg law. Given that FFT is an integrated undertaking and that the Luxembourg Tax Code is intended to tax the profit resulting from the economic activity of such an integrated undertaking as if it had resulted from transactions carried out at market prices, it is necessary, in examining the tax ruling at issue, to compare FFT's taxable profit as a result of the application of that tax ruling with the position, 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. Against that background, although the tax ruling at issue accepted a certain level of pricing for intra-group transactions, it is necessary to check whether that pricing corresponds to prices that would have been charged under market conditions.

146 In that context, it must be stated that, with regard to the examination as to whether an integrated undertaking has obtained an advantage within the meaning of Article 107(1) TFEU, the Commission cannot be criticised for having used a methodology for determining transfer pricing that it considers appropriate in this 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. The Commission is nevertheless required to justify its choice of methodology.

147 Even though the Commission correctly observed that it cannot be formally bound by the OECD Guidelines, the fact remains that those guidelines are based on important work carried out by groups of renowned experts, that they reflect the international consensus achieved with regard to transfer pricing and that they thus have a real practical significance in the interpretation of issues relating to transfer pricing, as the Commission acknowledged in recital 87 of the contested decision.

148 Consequently, the Commission correctly concluded that it was entitled to examine, in the context of its analysis under Article 107(1) TFEU, whether intra-group transactions were remunerated as though they had been negotiated under market conditions. That finding is not called into question by the other arguments of the Grand Duchy of Luxembourg and FFT.

149 First, as regards FFT's argument that the Commission failed to provide any legal basis for its arm's length principle, it must admittedly be pointed out that, in recitals 228 and 229 of the contested decision, the Commission stated that the arm's length principle as described in the contested decision existed independently of the incorporation of that principle into the national legal system. It also made clear that it had not examined whether the tax ruling at issue complied with the arm's length principle laid down in Article 164(3) of the Tax Code or in the Circular, which incorporate the arm's length principle into Luxembourg law. The Commission also confirmed that the arm's length principle which it applied was distinct from that enshrined in Article 9 of the OECD Model Tax Convention.

150 However, the Commission also made clear, in recital 228 of the contested decision, 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 arm's length principle was a general principle of equal treatment in taxation, which fell within the application of Article 107 TFEU.

151 It is therefore apparent from the contested decision that the arm's length principle, as described by the Commission, is a tool which it used, correctly, in the context of the examination carried out under Article 107(1) TFEU.

152 It is true that, at the hearing, the Commission stated that the arm's length principle as described in the contested decision did not fall within EU law, or international law, but that it was inherent in the ordinary system of taxation as provided for by national law. Thus, according to the Commission, if a Member State chooses, in the context of its national tax system, the approach of the separate legal entity, according to which tax law is concerned with legal entities, and not with economic entities, the arm's length principle is necessarily a corollary of that approach, which is binding in the Member State concerned, independently of whether the arm's length principle has, expressly or impliedly, been incorporated into national law.

153 In that regard, the Grand Duchy of Luxembourg and FFT indicated at the hearing that, by those assertions, the Commission seemed to be changing its stance on the arm's length principle as described in the contested decision. However, on the assumption that the interpretation put forward by the Grand Duchy of Luxembourg and FFT is found to be correct, it must be stated, in any event, that the Commission cannot change the legal basis of the arm's length principle, as set out in the contested decision, at the hearing stage (see, to that effect, judgment of 25 June 1998, *British Airways and Others* v *Commission*, T-371/94 and T-394/94, EU:T:1998:140, paragraph 116). In all events, it must be noted that the clarification provided at the hearing does not call into question the finding in paragraph 151 above that it is apparent from the contested decision that the arm's length principle is being applied in the context of the examination under Article 107(1) TFEU. It is, moreover, apparent from all of the written submissions of the Grand Duchy of Luxembourg and FFT that they understood the contested decision to mean that the arm's length principle as described by the Commission in the contested decision was being applied in the context of the examination of a national tax measure under Article 107(1) TFEU.

154 The Court must therefore reject FFT's argument that the Commission did not provide any legal basis for the arm's length principle as described in the contested decision.

155 Second, in so far as FFT maintains that the Commission failed to define the content of the arm's length principle as described in the contested decision, suffice it to note that it is apparent from the contested decision that that principle is a tool for checking that intra-group transactions are remunerated as though they had been negotiated between independent undertakings (see paragraph 151 above). That argument must therefore be rejected.

156 Third, the Grand Duchy of Luxembourg criticises the Commission, in essence, for having examined the tax ruling at issue in the light of the arm's length principle as described in the contested decision even though that is a criterion that is extraneous to Luxembourg tax law. It maintains that the arm's length principle as described by the Commission in the contested decision would enable the Commission to prescribe methodological standards for determining taxable profit which do not appear in national legislation, and that that would result in the harmonisation in disguise of direct taxation, contrary to the fiscal autonomy of the Member States. That argument must, however, be rejected.

157 Suffice it to note in that regard that, as has been stated in paragraphs 138 and 141 above, although 'normal' taxation is defined by the national tax rules and the actual existence of an advantage must be demonstrated by reference thereto, the fact remains that if those national rules provide that integrated companies are to be taxed on the same terms as stand-alone companies, Article 107(1) TFEU allows the Commission to check whether the pricing of intra-group transactions, accepted by the national authorities for determining the taxable base of an integrated undertaking, corresponds to prices that would have been charged at arm's length.

158 Consequently, when the Commission examines whether the method validated by a national tax measure leads to an outcome that has been achieved in a manner consistent with the arm's length principle as defined in paragraph 151 above, it is not exceeding its powers.

159 In addition, to the extent that the Grand Duchy of Luxembourg and FFT maintain that the Commission made an assessment in the light of the arm's length principle without considering the existence of an advantage having regard to national tax law, suffice it to note that it is clear from recitals 231, 266, 276, 291, 301 and 339 of the contested decision that the Commission examined whether the tax ruling at issue resulted in a reduction of FFT's tax burden as compared with the tax that it would otherwise have had to pay under Luxembourg rules of taxation. It did therefore examine whether the tax ruling at issue had resulted in a lowering of the tax burden under national legislation. While the Commission did, in that context, carry out its examination in the light of the arm's length principle, it used that principle, as has been noted in paragraph 151 above, as a tool enabling it to verify whether FFT's transfer pricing had been artificially lowered in comparison with a situation in which prices would have been established under market conditions. Consequently, the argument that the Commission substituted an extraneous rule for Luxembourg rules of tax law must be rejected.

160 Fourth, FFT and Ireland submit, in essence, that the Commission wrongly asserted, in the contested decision, that there was a general principle of equal treatment in taxation.

161 It is true that the Commission indicated, in recital 228 of the contested decision, that the arm's length principle was a general principle of equal treatment in taxation, which fell within the scope of Article 107(1) TFEU. However, that wording must not be taken out of context and cannot be interpreted as meaning that the Commission asserted that there was a general principle of equal treatment in relation to tax inherent in Article 107(1) TFEU, which would give that article too broad a scope.

162 In any event, it is implicitly but necessarily evident from recitals 222 to 231 of the contested decision, and in particular from recitals 226 and 229 of that decision, that the arm's length principle as described by the Commission in the contested decision was perceived by the Commission only as a tool enabling it to check that intra-group transactions are remunerated as though they had been negotiated between independent companies. The argument of FFT and Ireland does not alter the finding in paragraph 146 above that the Commission was entitled to examine, in the context of its analysis under Article 107(1) TFEU, whether intra-group transactions were remunerated as though they had been negotiated under market conditions.

163 Accordingly, the Court must reject the argument of FFT and Ireland in that respect.

164 Fifth, FFT claims that the Commission deviated in the contested decision from the conception of the arm's length principle that it had used in the opening decision. It submits, in that regard, that the Commission had referred, in recitals 14 and 62 of the opening decision, to Article 9 of the OECD Model Tax Convention.

165 It must be pointed out in that regard that FFT does not draw any legal inference from its claim that the arm's length principle as described by the Commission in the contested decision differs from the arm's length principle to which the Commission referred in the opening decision. Consequently, that argument must be rejected as ineffective.

166 In any event, that argument must also be rejected as unfounded.

167 First, although the Commission referred, in recital 14 of the opening decision, to the '"arm's length principle" as set [out] in Article 9 of the OECD Model Tax Convention', that reference appeared in the section entitled 'Introduction to transfer pricing rulings'. It is not evident from recital 14 of the opening decision, invoked by FFT, that the Commission based its provisional assessment on Article 9 of the OECD Model Tax Convention. Likewise, although the Commission referred, in recital 62 of the opening decision, invoked by FFT, to the OECD Guidelines, the Commission presents them only as a 'reference document' or as 'appropriate guidance'. This presentation is no different from the Commission's presentation of those guidelines in the contested decision.

168 Second, it must be noted that it is apparent from recitals 58 and 59 of the opening decision that, even at that stage of the procedure, the Commission explained its stance that it can apply the arm's length principle, in the context of its review under Article 107 TFEU, for the purpose of examining whether a tax measure confers a selective advantage on an integrated undertaking.

169 In that regard, it must be noted that, in recital 61 of the opening decision, the Commission explained that a method of taxation applied to transfer pricing that does not comply with the arm's length principle and leads to a lowering of the taxable base of its beneficiary would confer an advantage. It based that statement on the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416), as it subsequently did in the contested decision.

170 Sixth, the Court must reject FFT's argument that the Commission's position on the arm's length principle departed from its previous practice in taking decisions, in so far as that practice in other cases cannot affect the validity of a contested decision, which can be assessed only in the light of the objective rules of the FEU Treaty (see, to that effect, judgment of 20 May 2010, *Todaro Nunziatina & C.*, C-138/09, EU:C:2010:291, paragraph 21).

171 Seventh, inasmuch as FFT indicates that the Commission was very opaque with regard to the concept of the arm's length principle adopted by the Commission, refusing to provide FFT with the slides the Commission had used at a conference on State aid in Brussels, that argument must be rejected as

ineffective. The Commission's position concerning the arm's length principle can be seen from recitals 219 to 231 of the contested decision, and therefore the fact that it failed to provide slides after a conference has no bearing on the lawfulness of the contested decision.

172 Eighth, FFT submits that the arm's length principle as described by the Commission in the contested decision is distinct from that used by the OECD. It submits that the OECD allows for 'appropriate adjustments', such as shareholdings in its subsidiaries not being taken into account in calculating the remuneration of FFT's functions. According to FFT, that is, moreover, explained in the report by an economic consultancy company that is annexed to the application. That argument must be rejected as, in part, inadmissible and, in part, unfounded.

173 As regards the assertion that the arm's length principle is distinct from that used by the OECD, FFT does not advance any specific argument, with the exception of that relating to the taking into account of its shareholdings. In so far as FFT claims that the Commission disregarded paragraph 2.74 of the OECD Guidelines, according to which appropriate adjustments must be made in applying the TNMM, it must be noted not only that the Commission, as has been stated in paragraph 147 above, is not formally bound by those guidelines but that, contrary to FFT's contention, the Commission did not rule out the possibility of making 'appropriate adjustments'. The Commission merely found that, in the present case, the exclusion of FFT's shareholdings in FFNA and FFC was not justified, an issue which will, moreover, be examined in paragraphs 273 to 278 below.

174 Furthermore, in so far as FFT refers to the report of an economic consultancy company in which an expert put forward arguments to show that the Commission should not have taken into account FFT's shareholdings in the subsidiaries, the reference to that line of argument is, in accordance with settled case-law, inadmissible, as it does not appear in the actual body of the application. It should be borne in mind that, according to the case-law, although the text of the application may be supported and supplemented in regard to specific points by references to particular passages in documents appended thereto, a general reference to other documents cannot compensate for the lack of essential information in the application itself, even if those documents are attached to the application, since the annexes have a purely evidential and instrumental function (see judgment of 30 January 2007, *France Télécom* v *Commission*, T-340/03, EU:T:2007:22, paragraph 167 and the case-law cited).

175 Moreover, and in any event, even on the assumption that the Commission failed, wrongly, to make the 'appropriate adjustments' to which FFT refers, it should be noted that that would not alter the finding that FFT has not put forward any argument that would serve to explain why the arm's length principle used by the Commission is allegedly incorrect. The fact that 'appropriate adjustments' are provided for by the OECD Guidelines to take account of each factual situation, and that the circumstances giving rise to such adjustments may exist in the present case, does not call into question the finding that, in essence, the arm's length principle requires integrated undertakings to charge transfer prices that reflect those which would be charged under conditions of competition, which corresponds to the examination undertaken by the Commission in the contested decision.

176 Ninth, the Court must reject the argument of the Grand Duchy of Luxembourg that the arm's length principle as described by the Commission in the contested decision is subjective and arbitrary. First, it is sufficient to note that the examination in the light of the arm's length principle consists, as is evident from recital 231 of the contested decision, in examining whether the methodology for the determination of transfer pricing accepted in the tax ruling at issue can result in a reliable approximation of a market-based outcome. Second, the Commission refers broadly, for the purposes of its analysis, to the OECD Guidelines, about which there is a broad consensus. The Grand Duchy of Luxembourg and FFT do not, moreover, dispute that last point.

177 Tenth, FFT submits that the Commission failed to explain how it had derived the arm's length principle as described in the contested decision, or the content of that principle, contrary to its obligation to state reasons, as laid down in Article 296 TFEU.

178 In that regard, it should be borne in mind that, according to settled case-law, the statement of reasons required by Article 296(2) TFEU must be appropriate to the measure at issue and disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296(2) TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 15 July 2004, *Spain* v *Commission*, C-501/00, EU:C:2004:438, paragraph 73 and the case-law cited).

179 In the present case, it has already been found, in paragraphs 149 to 151 and 154 above, that, contrary to FFT's submission, the Commission specified the legal basis and the content of the arm's length principle in recitals 219 to 231 of the contested decision. It must therefore be held that, so far as those issues are concerned, the reasons given for the contested decision are sufficient. As has been stated in paragraph 153 above, it is, moreover, apparent from all of the written submissions of the Grand Duchy of Luxembourg and FFT that they understood the contested decision to mean that the arm's length principle as described by the Commission in that decision was being applied in the context of the examination of a national tax measure under Article 107(1) TFEU.

180 Eleventh, in so far as FFT claims that the arm's length principle as described by the Commission in the contested decision in recitals 219 to 231 and, specifically, in recital 228 of the contested decision introduces legal uncertainty and confusion so that it is difficult to understand whether a tax ruling based on transfer pricing will infringe the law on State aid or not, that argument must be rejected.

181 According to the case-law, the principle of legal certainty, which is a general principle of EU law, requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by EU law remain foreseeable (judgment of 15 February 1996, *Duff and Others* v *Commission*, C-63/93, EU:C:1996:51, paragraph 20).

182 It must be borne in mind that the concept of State aid is defined on the basis of the effects of the measure on the competitive position of its beneficiary (see, to that effect, judgment of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 87). It follows from this that Article 107 TFEU prohibits any aid measure, irrespective of its form or the legislative means used to grant such aid (see, to that effect, 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 79).

183 Moreover, it should be noted that Luxembourg tax law provides that integrated undertakings and stand-alone undertakings are subject, under the same conditions, to corporate income tax. In those circumstances, it was foreseeable that the Commission would be able to verify, in the examination provided for by Article 107 TFEU, whether the methodology for determining transfer pricing accepted in the tax ruling deviated from pricing that would have been set under market conditions, in order to examine whether that tax ruling conferred an advantage on its beneficiary.

184 In any event, in so far as FFT merely asserts that, in its view, the wording of recital 228 of the contested decision lacks clarity and generates legal uncertainty, it is sufficient to observe that the contested decision must be read as a whole. As is apparent from paragraphs 130 to 132 above, the Commission specified, in the contested decision, the definition, scope and legal nature of the arm's length principle. In addition, as has been stated in paragraph 115 above, it does not follow from the contested decision that the Commission found that every tax ruling necessarily constitutes State aid within the meaning of Article 107 TFEU. Provided that it does not grant any selective advantage,

notably in that it does not result in a reduction of the tax burden of its beneficiary, such a tax ruling does not constitute State aid within the meaning of Article 107 TFEU and is not subject to a notification obligation under Article 2 of Regulation 2015/1589.

185 Twelfth, in so far as FFT maintains that the Commission breached the principle of protection of legitimate expectations since no one foresaw, or could have foreseen, that the Commission would apply an arm's length principle other than that of the OECD, this complaint must be rejected.

186 Suffice it to recall that, according to settled case-law, any economic operator whom an institution has, by giving him precise assurances, caused to entertain justified expectations may rely on the principle of protection of legitimate expectations (see judgment of 24 October 2013, *Kone and Others* v *Commission*, C-510/11 P, not published, EU:C:2013:696, paragraph 76 and the case-law cited). In the present case, however, FFT has neither established nor even claimed in what respect it might have received precise assurances from the Commission that the tax ruling at issue would not fulfil the requirements for aid within the meaning of Article 107 TFEU. Furthermore, the mere fact that, in FFT's view, the Commission expressly based certain earlier State aid decisions on the arm's length principle laid down in Article 9 of the OECD Model Tax Convention does not amount to precise assurances within the meaning of the case-law set out above.

187 In those circumstances, all the complaints put forward by the Grand Duchy of Luxembourg and FFT concerning the arm's length principle as described by the Commission in the contested decision must be rejected as, in part, unfounded and, in part, ineffective.

(b) Plea regarding an incorrect method of calculation in the determination of FFT's remuneration

188 The Grand Duchy of Luxembourg claims, in essence, that the tax ruling at issue did not confer an advantage on FFT, as it did not involve a reduction of the amount of tax paid by FFT. In that context, the Grand Duchy of Luxembourg disputes the existence of alleged errors in the methodology for calculating FFT's remuneration that were allegedly validated by the Luxembourg tax authorities, and to which the Commission referred in the contested decision.

189 The Commission contests the arguments of the Grand Duchy of Luxembourg.

(1) Preliminary observations

190 By the second part of its first plea, the Grand Duchy of Luxembourg states that the Commission failed to demonstrate that the methodology validated in the tax ruling at issue did not comply with the arm's length principle, whether that is the arm's length principle incorporated into Luxembourg national law, the OECD Guidelines or the arm's length principle as described by the Commission in the contested decision.

191 In essence, the Grand Duchy of Luxembourg disputes the five errors in the methodology for calculating FFT's remuneration that were identified by the Commission.

192 First of all, the Grand Duchy of Luxembourg challenges, in essence, the Commission's assessment that FFT's capital should not have been segmented, as a single rate should have been applied to FFT's accounting equity in its entirety ('the first error').

193 Next, the Grand Duchy of Luxembourg submits that, contrary to the Commission's assertion in the contested decision, it did not make an error by endorsing the use of hypothetical regulatory capital ('the second error') or in calculating the amount of that hypothetical regulatory capital ('the third

error'). Further, it denies that it made an error in accepting the deduction of FFT's shareholdings in FFC and FFNA ('the fourth error'). The second, third and fourth errors are connected to the first error, relating to the segmentation of the capital.

194 Last, the Grand Duchy of Luxembourg takes issue with a fifth error identified by the Commission, concerning the calculation of the rate of return of 6.05%, applied to the hypothetical regulatory capital ('the fifth error').

195 Although the five errors contested by the Grand Duchy of Luxembourg were not clearly identified as such in the contested decision, in particular the first error, relating to the segmentation of the capital, it must be noted that those five errors are apparent, in essence, from the text of that decision.

196 It will be recalled that the Commission found, in recitals 248 to 301 of the contested decision (Sections 7.2.2.5 to 7.2.2.9 of that decision), that the methodology for determining the remuneration for FFT's financing activity, endorsed by the tax ruling at issue, contained several errors in the methodological choices and in the choices of parameters and adjustments. In that regard, it must be noted that the errors identified concern, on the one hand, the amount of capital to be remunerated, namely the profit level indicator, and, on the other, the rate of return to be applied.

197 As regards, first, the amount of capital to be remunerated, the Commission considered, in essence, that the decision to segment the capital into three categories to be subject to different rates of return is incorrect, which corresponds to the first error. As can be seen, in particular, from recitals 265, 278 and 287 of the contested decision, the Commission found that a single rate of return should have been applied to the accounting equity in its entirety. The Commission thus stated, in recital 265 of the contested decision, that using accounting equity would have obviated the need to calculate a separate 'functions remuneration'.

198 The first error underlies the second, third and fourth errors, each of which is addressed in a clearly identified section of the contested decision. First of all, in recitals 249 to 266 of the contested decision (Section 7.2.2.6 of that decision), the Commission found that the use of hypothetical regulatory capital as a profit level indicator was incorrect, which corresponds to the second error. Next, in recitals 267 to 276 of the contested decision (Section 7.2.2.7), the Commission stated that, even if the hypothetical regulatory capital could be used, the application by analogy of the Basel II framework, for the purpose of determining the level of FFT's hypothetical regulatory capital, was incorrect, which corresponds to the third error. Last, in recitals 277 to 291 of the contested decision (Section 7.2.2.8), the Commission found that the deduction of the FFNA and FFC shareholdings was incorrect, which corresponds to the fourth error.

199 As regards, second, the rate of return, the Commission considered, in recitals 292 to 301 of the contested decision (Section 7.2.2.9), that the level of the rate of return on capital to be remunerated, calculated as 6.05%, using the CAPM, was incorrect, which corresponds to the fifth error.

200 The Court will therefore examine in turn each of the five errors identified by the Commission and disputed by the Grand Duchy of Luxembourg, as set out in paragraphs 196 to 199 above.

201 In that regard, the Court notes that, in connection with the second part of the first plea in Case T-755/15, the Grand Duchy of Luxembourg and the Commission disagree as to the scope of the review which the Commission was entitled to carry out in respect of the methodology used by the Grand Duchy of Luxembourg to calculate FFT's remuneration in the tax ruling at issue, given the inherent uncertainties in the evaluation of transfer pricing and the fact that this represented an intrusion into the national authorities' freedom to act.

202 It must be borne in mind that, in its review of State aid, the Commission must, in principle, provide proof in the contested decision of the existence of the aid (see, to that effect, judgments of 12 September 2007, *Olympiaki Aeroporia Ypiresies* v *Commission*, T-68/03, EU:T:2007:253, paragraph 34, and of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 95). In that context, the Commission is required to conduct a diligent and impartial examination of the measures at issue, so that it has at its disposal, when adopting a final decision establishing the existence and, as the case may be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible (see, to that effect, judgments of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 90, and of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 63).

203 By contrast, it is for the Member State which has made a distinction between undertakings to show that it is actually justified by the nature and the general scheme of the system in question. The concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective where that differentiation arises from the nature or the general scheme of the system of which they form part (see, to that effect, judgment of 21 June 2012, *BNP Paribas and BNL* v *Commission*, C-452/10 P, EU:C:2012:366, paragraphs 120 and 121 and the case-law cited).

204 In the light of the above, it was for the Commission to show, in the contested decision, that the requirements for a finding of State aid, within the meaning of Article 107(1) TFEU, were met. In that regard, it must be held that, while it is common ground that the Member State has a margin of appreciation in the approval of transfer pricing, that margin of appreciation cannot lead to the Commission being deprived of its power to check that the transfer pricing in question does not lead to the grant of a selective advantage within the meaning of Article 107(1) TFEU. In that context, the Commission must take into account the fact that the arm's length principle allows it to verify whether the transfer pricing accepted by a Member State corresponds to a reliable approximation of a market-based outcome and whether any variation that may be identified in the course of that examination does not go beyond the inaccuracies inherent in the methodology used to obtain that approximation.

205 The Grand Duchy of Luxembourg and the Commission also disagree as to the extent to which the Court can review the Commission's assessments in relation to the calculation of FFT's taxable profit. According to the Commission, the Court should undertake a limited review of those economic findings, which are complex. In that regard, it should be noted that, as is clear from Article 263 TFEU, the object of an action for annulment is to review the legality of the acts adopted by the EU institutions named therein. Consequently, the analysis of the pleas in law raised in such an action has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure (see, to that effect, judgment of 2 September 2010, *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 84).

206 In the field of State aid, it must be recalled that State aid, as defined in the FEU Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Courts of the European Union must, in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (judgments of 4 September 2014, *SNCM and France* v *Corsica Ferries France*, C-533/12 P and C-536/12 P, EU:C:2014:2142, paragraph 15, and of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 87).

207 As to whether a method for determining transfer pricing of an integrated company complies with the arm's length principle, it should be borne in mind that, as has already been indicated above, when using that tool in carrying out its assessment under Article 107(1) TFEU, the Commission must take into account its approximate nature. The purpose of the Court's review is therefore to verify whether

the errors identified in the contested decision, and on the basis of which the Commission found there to be an advantage, go beyond the inaccuracies inherent in the application of a method designed to obtain a reliable approximation of a market-based outcome.

208 The various errors identified by the Commission must be examined in the light of these matters.

(2) The first error, relating to the failure to take into consideration the whole of FFT's equity

209 The Grand Duchy of Luxembourg submits that the Commission wrongly considered it appropriate to take into consideration the whole of the accounting equity in order to apply a uniform return of 10% to FFT, irrespective of its various activities. It maintains that the methodology accepted by the tax ruling at issue applies the principle of 'functional analysis' in a manner that is consistent with Luxembourg rules and OECD rules, to take account of the mixed nature of FFT's activities, taking into consideration the assets used and risks assumed. According to the Grand Duchy of Luxembourg, it is therefore appropriate to isolate, for the purpose of determining FFT's remuneration, the assets or the capital connected with the operation of relevant transactions or functions, so that only operating assets and capital employed are to be taken into account, in accordance with the OECD Guidelines. It submits that those requirements are transposed by the Circular, in so far as, first, the Circular excludes holding functions from its scope; second, it reproduces the terminology of the OECD Guidelines; and, last, it identifies the capital covering the risks related to financing activities.

210 The Commission contests those arguments.

(i) Observations on the tax ruling at issue

211 First, as is apparent from the tax ruling at issue and as was stated in the contested decision (see in particular recital 70 of that decision), the tax ruling at issue relates to the determination of FFT's remuneration for its intra-group financing and treasury activities. FFT's tax liability in Luxembourg is then calculated by applying the standard corporate tax rate applicable in Luxembourg to the net profits earned by FFT on the basis of the remuneration accepted by the tax ruling at issue.

212 In that regard, first of all, it must be recalled that the tax ruling at issue determines FFT's remuneration for transactions falling within its intra-group financing and treasury activities. It is common ground that that type of transaction is subject to tax under the Tax Code.

213 Next, the parties do not dispute that, since the transactions that constitute FFT's intra-group financing and treasury activities are intra-group transactions, the tax ruling at issue concerns the determination of transfer pricing for those transactions at a level corresponding to the level that would have been charged if that type of transaction had been concluded between stand-alone companies, subject to market conditions. Nor do they dispute that that tax ruling allows FFT to determine its taxable base in Luxembourg.

214 Last, in the contested decision, the Commission did not take issue with the choice, endorsed by the tax ruling at issue, of the TNMM as the method for determining the appropriate level of transfer pricing for transactions that constitute FFT's financing and treasury activities. In that regard, it is common ground that the correct application of the TNMM, in this instance, consists of an analysis of the return on capital.

215 The parties disagree therefore, in essence, only as to the level of FFT's remuneration for transactions falling within its intra-group financing and treasury activities.

216 Second, as is apparent from the transfer pricing report, and as the Commission found in Table 2 of the contested decision and in recitals 61, 62, 65 and 70 of that decision, for the purposes of calculating the return on capital, the report segmented FFT's equity, the total amount of which is EUR 287 477 000, into three categories of funds:

– first, the hypothetical regulatory capital, within the meaning of the Basel II framework, to remunerate the 'risks', that is EUR 28 523 000, to which a rate of return of 6.05% is applied;

– second, the equity used to offset the shareholdings in FFNA and FFC, and linked to FFT's 'holding' activities, that is EUR 165 244 000, on which no return was applied;

– last, the equity used to perform the 'functions', that is EUR 93 710 000, to which a rate of return of 0.87% is applied. This corresponds to the total accounting equity, minus the hypothetical regulatory capital and the amount of FFT's shareholdings in FFNA and FFC.

217 In that respect, the parties do not dispute that the segmentation of the capital limits the capital base taken into account for the purpose of calculating that return. They disagree, in essence, on the principle itself, in the context of the TNMM, of assigning capital to specific functions that are subject to different rates of return. The Grand Duchy of Luxembourg and FFT take the view that that segmentation of the capital is not only consistent with the OECD Guidelines and the Circular but is also appropriate in view of the different activities of FFT. According to the Commission, however, such segmentation is wrong.

218 The Court must therefore consider whether the Commission was right to find that the segmentation of the capital, to which different rates of return are applied, did not enable a reliable approximation of an arm's length outcome to be obtained, and thus contributed to a lowering of FFT's tax burden.

(ii) The possibility in the OECD Guidelines and in the Circular of segmenting capital

219 As the parties recognised, in essence, at the hearing, the Circular and the OECD Guidelines, to which the Circular refers, neither authorise nor prohibit the possibility of segmenting the capital of an integrated company by reference to its various activities.

220 In any event, none of the arguments advanced by the Grand Duchy of Luxembourg in its written submissions would support a finding that the OECD Guidelines or the Circular permitted segmentation of the capital for the purposes of obtaining an arm's length outcome.

221 First, the Grand Duchy of Luxembourg maintains that the application of a uniform rate of return to the whole of FFT's equity is contrary to the recommendations in the OECD Guidelines and in particular the requirement to carry out a 'functional' analysis of the activity of the undertaking concerned, consisting in distinguishing the various activities of an undertaking and identifying the assets and risks associated with those activities. In that regard, it should be noted that, contrary to what is claimed by the Grand Duchy of Luxembourg, it cannot be concluded from point D.1.2.2 of the OECD Guidelines, on 'Functional analysis', that it was correct in this case to segment FFT's capital by reference to its various activities.

222 Indeed, it is evident from paragraph 1.42 of the OECD Guidelines that it is the assets associated with each activity, and not the capital, that may be isolated and related to specific risks or activities. While, as the Grand Duchy of Luxembourg submits, both the profitability of the capital and that of the assets can be used as an indicator for the application of the TNMM, that does not mean that capital is to be treated in the same way as operating assets. Unlike operating assets, capital is fungible and is exposed to risk irrespective of the activity thereby served.

223 Second, in so far as the Grand Duchy of Luxembourg refers to paragraphs 2.77 and 2.78 of the OECD Guidelines, suffice it to note in that regard, as does the Commission, that, while it is apparent that, in essence, only those items that are related to a transaction must be taken into account, neither paragraph provides that only capital that is related to taxable activities should be taken into consideration. As the Commission correctly contends, capital is, by nature, fungible.

224 Third, in so far as the Grand Duchy of Luxembourg submits that it is possible, under Luxembourg law, to relate certain capital to certain functions, it must be noted that, as has been stated in paragraphs 212 to 215 above, the tax ruling at issue concerns only the determination of FFT's remuneration for transactions falling within its intra-group financing and treasury activities, at arm's length level. As is evident from paragraphs 137 to 139 above, the Commission was in a position to review, under Article 107(1) TFEU, whether the level of that remuneration was lower than it would have been on an arm's length basis and, therefore, whether the tax ruling at issue had conferred an advantage on FFT. The functional analysis of the controlled transaction makes it possible in particular to choose the part tested, the most appropriate method of transfer pricing and the financial indicator to be tested, as the case may be, or to identify the key comparability factors to be taken into account.

225 By contrast, the tax ruling at issue does not concern the question whether, as a result of a functional analysis of FFT, certain parts of FFT's capital are not subject to tax under the Luxembourg Tax Code.

226 Moreover, the Grand Duchy of Luxembourg bases its claim on a legal article on Luxembourg taxation and on a Grand-Ducal regulation. Nevertheless, it must be noted that, assuming that those items, relating to Luxembourg law, are relevant for the purpose of examining in the context of the application of Article 107(1) TFEU whether FFT's remuneration was lower than it would have been on an arm's length basis, they do not demonstrate that FFT's capital could be segmented by reference to its various activities for the purposes of calculating the return on capital.

227 First, in so far as the Grand Duchy of Luxembourg refers to the règlement grand-ducal du 16 juillet 1987, modifiant le règlement grand-ducal du 23 juillet 1983 portant exécution de l'article 1er de la loi du 23 juillet 1983 modifiant certaines dispositions de la loi du 4 décembre 1967 concernant l'impôt sur le revenu (Grand-Ducal Regulation of 16 July 1987 amending the Grand-Ducal Regulation of 23 July 1983 implementing Article 1 of the Law of 23 July 1983 amending certain provisions of the Law of 4 December 1967 on income tax) (published in *Mémorial* A No 65 of 6 August 1987, p. 1540), it should be pointed out that this provides that 'it shall be accepted that the assets are financed by the equity in the following order: tangible and intangible fixed assets, financial fixed assets, available and realisable securities'. It must therefore be noted that that Grand-Ducal regulation does not, contrary to what is claimed by the Grand Duchy of Luxembourg, provide that a company's capital may be assigned to particular assets of a company.

228 Second, in so far as the Grand Duchy of Luxembourg relies on an extract from a legal journal on Luxembourg taxation, according to which, 'on the basis of purely economic considerations, it is accepted in the German legal literature that long-term resources are assigned primarily to the financing of long-term assets' and that 'accordingly, it may be concluded that the equity finances fixed assets first', it must be noted that that element of the legal literature is not sufficient to support the position of the Grand Duchy of Luxembourg that a company's capital can be segmented, in the context of the application of the TNMM, so as to be assigned to specific assets or activities. Although that extract may be understood to mean that the shareholdings of a company would be the first to be financed by the equity, the answer to the question as to whether that is relevant to the application of the TNMM and, specifically, for the purposes of determining a return on capital is not clear from the text of that extract. Furthermore, the extract is presented without a precise indication of the context in which it appears and is not corroborated by other elements of the legal literature, so that its evidential value is extremely limited.

229 Consequently, it must be concluded that the segmentation of the capital of an integrated company by reference to its various activities is neither expressly authorised nor prohibited. In those circumstances, the Court must ascertain whether the segmentation in the tax ruling at issue is appropriate, given the particular circumstances of the present case.

(iii) Whether the segmentation of the capital is appropriate

230 The parties disagree as to whether the Commission erred in finding that the segmentation of the capital was inappropriate in this case.

231 In the first place, it must be noted that, in the present case, the segmentation of FFT's capital is not justified by the need to differentiate the remuneration for the various functions of FFT.

232 Contrary to what is maintained in essence by the Grand Duchy of Luxembourg, the segmentation of capital, accepted in the tax ruling at issue, does not reflect the various functions or activities identified in the transfer pricing report, in the context of the 'functional' analysis and in respect of which the level of remuneration is validated by the tax ruling at issue.

233 As has been found in paragraph 211 above, the methodology endorsed in the tax ruling at issue does not relate to the determination of the remuneration for FFT's holding activities, but only the remuneration for its intra-group financing and treasury functions.

234 In that regard, it must be noted that the transfer pricing report [*confidential*].

235 The three categories of capital validated by the tax ruling at issue relate, respectively, to risk remuneration, remuneration for holding activities and functions remuneration. Furthermore, as regards the last category, it must be pointed out that the transfer pricing report makes clear that [*confidential*]. This segment therefore corresponds to all the activities of FFT that are covered by the tax ruling at issue.

236 It therefore follows from these findings that, contrary to what is claimed by the Grand Duchy of Luxembourg, the segmentation of capital is not likely to satisfy the requirement of differentiation of FFT's functions.

237 In the second place, it must be held that the Commission did not err in finding that the segmentation of capital as accepted in the tax ruling at issue was inappropriate, since it is based on an entirely artificial analysis of the use of FFT's equity.

238 First, it must be noted that, as the Commission stated, in essence, in recital 282 of the contested decision, the segmentation of FFT's equity was not appropriate, since such funds are, by nature, fungible. In so far as all of FFT's equity is exposed to risk and is available to support FFT's solvency, it should be remunerated in full and it is not necessary to segment it.

239 In that regard, even if it is true that part of FFT's capital is assigned to the shareholdings in FFNA and FFC, which would already have been taxed and would therefore no longer be taxable, that fact has no bearing at all on the finding that that part of the capital is also exposed to risk and should therefore be covered by risk remuneration.

240 As is apparent from recitals 247 and 286 of the contested decision, by opting for the segmentation of the capital, instead of using the whole of the capital as a base from which the return on capital is calculated, the Grand Duchy of Luxembourg overlooks the fact that the full capital is necessary for

the provision of the financing functions and to absorb any losses linked to the financing activities. As the Commission observed at the hearing, if the leverage ratio between capital and lending went from [*confidential*]% to 1.3 or 1.5%, it would be lower than would be acceptable for a credit institution.

241 In addition, it must be pointed out that, as the Commission found in recital 247 of the contested decision and is not disputed by the Grand Duchy of Luxembourg, FFT plays a maturity transformation and financial intermediation role, since it borrows on the markets to fund the group's financing needs. As is apparent from recital 43 of the contested decision, FFT funding comes from instruments such as bond issuance, bank term loans, committed and uncommitted credit lines. It must therefore be noted that, as the Grand Duchy of Luxembourg moreover acknowledged in its answers to questions put at the hearing, when it borrows on the market in order to fund its activities, it is FFT's total capital that is taken into consideration by the market operators from which it borrows. The segmentation of capital by reference to the activities of FFT takes no account of the fact that its taxable profits will vary according to its borrowing costs, which depend, in particular, on the size of its capital.

242 Second, and in any event, the three segments, as endorsed in the tax ruling at issue, are artificial.

243 First of all, as regards the first segment, namely equity used to bear risk, it is sufficient to recall that, as has been stated in paragraph 238 above, all of FFT's capital is exposed to risk.

244 Next, as regards the second segment, namely equity used for the shareholdings in FFNA and FFC, it is sufficient to recall that, in so far as capital is fungible, the share of that equity that corresponds to the amount of the shareholdings in FFNA and FFC cannot be separated from the rest of FFT's equity. Contrary to what is claimed both by the Grand Duchy of Luxembourg and by FFT in its observations at the hearing, even though the shareholdings in FFNA and FFC would not give rise to any taxable dividend, FFNA's and FFC's dividends having been taxed before being distributed to FFT as holding company, the fact remains that, in the event of FFT's insolvency, the equity linked to the holding of those shares, like the rest of the equity, would be used to cover FFT's debts. In those circumstances, FFT's capital, whether or not it can be linked to the shares it holds, is in any event exposed to risk and must be taken into consideration in the calculation of FFT's remuneration.

245 In addition, in an intra-group context, the shares which a parent company holds in its subsidiaries might in fact be designed as a form of capital injection as an alternative to the grant of an intra-group loan. Thus, the distinction between the second segment and the first — which corresponds, according to the transfer pricing report, to equity exposed to risks, notably credit and counterparty risks (recital 58 of the contested decision) — is, for that reason also, artificial in so far as both could ultimately represent an intra-group financing operation, as the Grand Duchy of Luxembourg essentially confirmed during the hearing.

246 Last, as regards the third segment, namely equity used to perform the functions, it must be noted, as the Commission pointed out in recital 277 of the contested decision, that this corresponds to the remaining capital, obtained after deducting the first two segments from the total capital. It follows from this that, given its residual nature, this segment does not in fact correspond to any particular function or activity. In addition, as the Commission correctly stated in recital 265 of the contested decision, that segment does not correspond to any customary capital component used in the calculation of return requirements. Furthermore, [*confidential*]. Those functions correspond to the functions in respect of which FFT's remuneration, as accepted by the tax ruling at issue, is calculated. Consequently, it must be held that this segmentation is necessarily inappropriate.

247 It therefore follows from these findings that the Commission did not err in concluding, in essence, that the segmentation of capital was erroneous and that the whole of FFT's capital had to be taken into account for the purposes of the risk remuneration.

248 The other arguments of the Grand Duchy of Luxembourg are not convincing.

249 In so far as the Grand Duchy of Luxembourg claims that FFT would have had to pay the same amount of tax if its activities had been divided between three separate entities, that argument cannot succeed.

250 First, as has been noted in paragraph 235 above, the segmentation of the capital does not correspond to the different functions performed by FFT. Second, as has been noted in paragraph 241 above, all of FFT's capital is taken into consideration by the market operators from which it borrows and its borrowing capacity necessarily affects its financing activities and its profits. It cannot therefore be concluded that FFT would have to pay a single rate of tax if its capital were held by three separate companies in order to carry out activities with a different return. In addition, as has been established in paragraph 240 above, the capital linked to FFT's financing activities would be insufficient in view of the risks run if they were to be taken into consideration. In any event, that argument must be rejected since it relates to a hypothetical situation that is outwith the subject matter of the present case.

251 In the light of all of the foregoing, it must be held that the Commission correctly found that FFT's capital should have been taken into account in its entirety for the purposes of calculating the remuneration for its intra-group financing and treasury activities.

(3) The second error, relating to the taking into consideration of the hypothetical regulatory capital

252 The Grand Duchy of Luxembourg disputes, in essence, the Commission's assessment that it was wrong to take account of the hypothetical regulatory capital for remuneration of the risks linked to FFT's intra-group financing and treasury activities. The Grand Duchy of Luxembourg disputes the Commission's assessment that there is no economic rationale in applying a return on capital to a base made up of FFT's regulatory capital when the TNMM requires the capital assigned to the various functions of FFT to be evaluated, and adds that the Basel II framework and the CAPM are international standards.

253 The Commission objects to those arguments on the ground that FFT's calculation of the taxable base on the basis of the hypothetical regulatory capital is incorrect and inconsistent.

254 In the first place, it must be recalled that, as the Commission observed in recitals 254 and 262 of the contested decision, and which is not disputed by the Grand Duchy of Luxembourg, the Basel II framework defines required regulatory capital as a proportion of assets held by a bank or financial institution, weighted by the underlying risk of each such asset. The regulatory capital thus constitutes the estimate, by the regulator, of a minimum level of capitalisation that a bank or other financial institution must maintain and does not constitute a right to the profits of the entity concerned, or to the remuneration of the risks borne by that entity.

255 In the second place, as regards the Commission's assessment, principally, that choosing to take FFT's hypothetical regulatory capital into consideration — a choice endorsed by the tax ruling at issue — is wrong, it should be noted, as the Commission submits, that, unlike the accounting equity used for FFT's financing activities, regulatory capital has no connection with the profits that an investor would claim from the company in which he invests. Regulatory capital is not an appropriate indicator of the profits obtained by a bank or financial institution, but only the implementation of a prudential obligation to which those institutions are subject. Hypothetical regulatory capital, determined by the application by analogy of the Basel II framework, cannot, a fortiori, constitute an appropriate indicator for determining the remuneration in respect of the risk to which FFT's capital is exposed.

256 None of the arguments raised by the Grand Duchy of Luxembourg is such as to call that finding into question.

257 First, the fact, relied on by the Grand Duchy of Luxembourg, in response to questions put by the Court at the hearing, that the tax administration queried whether FFT was correctly capitalised, does not justify the hypothetical regulatory capital having been used as a profit level indicator.

258 Second, the argument of the Grand Duchy of Luxembourg that FFT was obliged, as a financing company, to have minimum capital in accordance with the Circular must be rejected as ineffective. It is sufficient to note, as the Commission points out, that such an obligation does not justify the minimum capital, held in accordance with that obligation, constituting an appropriate profit level indicator, since a regulatory obligation does not reflect the shares of profits obtained.

259 In the third place, with regard to the Commission's assessment, as a subsidiary point, that there is an inconsistency in taking into consideration the hypothetical regulatory capital for the purpose of determining the return on accounting equity, unlike the return on regulatory capital, first, it must be noted that, even if it was correct to use only the hypothetical regulatory capital as a profit level indicator, the Grand Duchy of Luxembourg offers no convincing explanation to justify the inconsistency in the methodology applied.

260 As the Commission stated in recitals 253 and 254 of the contested decision, a return on equity is a profitability ratio. Taking into consideration the accounting equity enables the net profit to be established, which constitutes the shareholders' remuneration, whereas the regulatory capital does not reflect any claim to the company's profits, but represents only the capital which a regulated company is obliged to hold.

261 The arguments of the Grand Duchy of Luxembourg that the method used to determine the return on equity is not 'inconsistent' because (i) it enables the separate activities of FFT to be taken into account, and (ii) the Basel II framework is an international benchmark just like the CAPM must be rejected as ineffective in that respect. None of them can explain why the regulatory capital can be used to determine the return on accounting equity.

262 Second, it should also be noted that, as the Commission found in recital 263 of the contested decision, since the comparison of FFT, in the transfer pricing report for the purpose of calculating the CAPM, with 66 companies identified by the tax adviser is not based on the hypothetical regulatory capital of those 66 companies, the choice of FFT's hypothetical regulatory capital as a profit level indicator is inconsistent.

263 In the light of the foregoing, it must be held that the Commission was fully entitled to consider that the Grand Duchy of Luxembourg should not have used the hypothetical regulatory capital of FFT as a base for calculating the risk remuneration.

264 Since it has been held that the Commission correctly found that the hypothetical regulatory capital could not be used to calculate FFT's remuneration, there is no need to examine the arguments by which the Grand Duchy of Luxembourg seeks to challenge the Commission's assessment that the calculation of FFT's hypothetical regulatory capital was incorrect (the third error). That reasoning was put forward by the Commission as a subsidiary point, as is evident from recital 276 of the contested decision, and is based on the erroneous premiss that the hypothetical regulatory capital could be used as a profit level indicator to calculate the remuneration in respect of the risks borne by FFT.

(4) The fourth error, relating to the failure to take FFT's shareholdings into consideration

265 The Grand Duchy of Luxembourg disputes the Commission's assessment that the capital linked to FFT's shareholdings in FFC and FFNA should have been taken into consideration in calculating the remuneration for FFT's intra-group financing and treasury activities.

266 First of all, the Grand Duchy of Luxembourg maintains that the Commission should have found that the remuneration for the shareholdings in FFNA and FFC was by definition excluded from the scope of transfer pricing. In its submission, dividends from shareholdings are exempt from tax and no financial burden is associated with that financing, or deducted.

267 The Grand Duchy of Luxembourg goes on to claim that, contrary to the Commission's assertion in recital 282 of the contested decision, under Luxembourg law, any source of funding must be allocated so far as possible to every company asset. It submits that FFT's shareholdings are funded by equity, in the amount of EUR 165 244 000, which is outside the scope of transfer pricing and should be excluded from the calculations in respect of the remuneration for the risks borne by FFT for its intra-group financing activity.

268 In addition, the Grand Duchy of Luxembourg submits that, under the rules of the Basel II framework, shareholdings in other credit institutions may be excluded. In so far as the Commission rejected that argument, in recital 281 of the contested decision, on the ground that FFT was not a credit institution, the Grand Duchy of Luxembourg considers that approach to be inconsistent with the rest of the contested decision, in which the Commission applied the Basel II framework.

269 Furthermore, the Grand Duchy of Luxembourg takes issue with the Commission's finding in recital 286 of the contested decision that, in essence, the shareholdings in FFNA and FFC could not be deducted from the accounting equity, because that would bring down FFT's leverage effect, which corresponds to the ratio of indebtedness to equity, which is [*confidential*]% taking into account those shareholdings, [*confidential*] the ratio of indebtedness of the European banks' average, which is 2.9% or 3.3% according to sampling. It argues that the panel of banks used by the Commission and the average resulting therefrom are certainly not a decisive benchmark, since other banks have higher debt ratios. Moreover, it was not individual accounting equity but consolidated accounting equity that would have had to have been taken into account. Furthermore, the sample used by the Commission is not representative.

270 Last, according to the Grand Duchy of Luxembourg, the comparison drawn by the Commission, in recital 288 of the contested decision, with Fiat Finance SpA ('FF'), a treasury company established in Italy, is neither relevant nor conclusive. In that respect, it disputes that it was necessary to apply to FF the same methodology as that applied to FFT, namely that of deducting shareholdings from the equity, because that would result in FF having negative capital. First, FF is an Italian taxable entity, not a Luxembourg entity. Second, the Commission had merely shown that, in the case of FF, the shareholdings were funded by debt.

271 As a preliminary point, it must be noted that, in recitals 277 to 290 of the contested decision, the Commission found, in essence, that the Grand Duchy of Luxembourg had made an error of assessment by isolating the 'financial investments in FFNA and FFC', which FFT had assessed as EUR 165 244 000 (Table 2 of the contested decision) and by according it a zero remuneration. That will have led, according to the Commission, to a reduction in FFT's tax liability.

272 It must also be pointed out that it is common ground that the method endorsed by the Grand Duchy of Luxembourg in the tax ruling at issue is intended, for the purposes of establishing the tax payable by FFT, to determine the remuneration which FFT would have obtained for its intra-group financing and treasury activities if it had operated under market conditions. The method in question consists in calculating the return on capital. In that context, admittedly, the fact that FFT is not subject to tax, as a holding company, on the dividends it receives from FFNA and FFC — which, as is undisputed, are taxed on the dividends — might suggest that the capital assigned to those shareholdings does not have to be taken into consideration in determining the tax that would be payable by FFT if it operated at arm's length. However, such an assertion cannot be accepted for the following reasons.

273 First, it must be noted that, as the Commission correctly argues in recital 282 of the contested decision, equity is fungible. In the event of FFT's insolvency, the creditors will be repaid on the basis of the whole of the equity. Therefore, contrary to what is claimed by the Grand Duchy of Luxembourg, and by FFT in its observations at the hearing, even though the shareholdings in FFNA and FFC would not give rise to any taxable dividend, the latter's dividends having been taxed before being distributed to FFT as holding company, the fact remains that, in the event of FFT's insolvency, the equity linked to the holding of those shares, like the rest of the equity, would be used to cover FFT's debts. In those circumstances, FFT's capital, whether or not it can be linked to the shares it holds, is in any event exposed to risk and must be taken into consideration in the calculation of FFT's remuneration even though the shareholdings in FFNA and FFC would not give rise to any taxable income.

274 Second, it must be pointed out that, as the Commission correctly notes, the Grand Duchy of Luxembourg has not established that the other companies with which the Commission compared FFT deducted their shareholdings in subsidiaries from their capital or that it is not common for financial institutions operating on the market to have such shareholdings. In those circumstances, the Commission was entitled to find that excluding FFT's shareholdings in its two subsidiaries did not enable an appropriate comparison to be made of FFT with other undertakings operating on the market.

275 Third, it must be stated that, even if the Basel II framework principles were applied in the present case, FFT would not satisfy the prerequisite for deducting part of the amount of its capital equal to the shareholdings in FFNA and FFC, namely that FFT, FFNA and FFC do not have consolidated accounts in Luxembourg. As the Commission noted in recitals 112 and 281 of the contested decision, and as the Grand Duchy of Luxembourg confirmed in response to measures of organisation of procedure, FFT's accounts were consolidated in Luxembourg.

276 Fourth, it must be noted that, while the Grand Duchy of Luxembourg disputes that FFT's leverage ratio must be compared to the Commission's sample of banks, the fact remains that it has not put forward any argument or any evidence to explain why — if it must be concluded that the equity covering the financial investments in FFNA and FFC is not to be taken into consideration even though it constitutes almost 60% of FFT's total equity (Table 2 in the contested decision) — that ratio would not be significantly lower than that identified by the Commission and even that used by the Grand Duchy of Luxembourg itself.

277 In so far as the leverage ratio is calculated by reference to the amount of equity, it must be noted that, while the leverage ratio of [*confidential*]%, identified by the Commission, [*confidential*] when all of FFT's equity was taken into account, [*confidential*] if the proportion of equity equal to the shareholdings in FFNA and FFC was not taken into account. That finding applies irrespective of whether the market standard is 2.9% or 3.3%, as identified by the Commission, or even 4 to 4.5%, as is evident from the sample of ratios used by the Grand Duchy of Luxembourg.

278 In the light of the considerations set out in paragraphs 271 to 277 above, it must be held that the Commission correctly found that the Grand Duchy of Luxembourg had wrongly excluded part of FFT's capital, equal to its shareholdings in its subsidiaries, from the capital to be taken into consideration for the purpose of determining FFT's remuneration for its intra-group financing and treasury activities.

279 It follows from all of the findings set out in paragraphs 209 to 278 above that the Commission was fully entitled to find that FFT's capital should have been taken into account in its entirety for the purposes of calculating FFT's remuneration and that a single rate should have been applied. In any event, it also correctly considered that the method consisting, on the one hand, in using FFT's hypothetical regulatory capital and, on the other, in excluding FFT's shareholdings in FFNA and FFC from the amount of the capital to be remunerated could not result in an arm's length outcome.

280 In those circumstances, it must be held that the methodology approved by the Grand Duchy of Luxembourg minimised FFT's remuneration, on the basis of which FFT's tax liability is determined, and it is not necessary to examine the complaints put forward by the Grand Duchy of Luxembourg in relation to the fifth error identified by the Commission, concerning the rate of return. The finding that the amount of capital to be remunerated was underestimated alone is sufficient, in the present case, to establish the existence of an advantage.

281 First, the ratio between the capital actually taken into account in the methodology used by the tax ruling at issue and the total capital is so great that the error in the determination of the capital to be remunerated necessarily leads to a reduction of FFT's tax burden, irrespective of the single rate of return to be applied. The amount of the hypothetical regulatory capital, which is EUR 28 million, represents only approximately 10% of the total amount of the equity, which is EUR 287 million.

282 Second, as has been stated in paragraph 211 above, the method for determining the remuneration for FFT's intra-group financing and treasury activities, as endorsed in the tax ruling at issue, consists of two steps: first, determination of the amount of capital to be remunerated and, second, determination of the rate of return to be applied. In the first step, the methodology accepted by the tax ruling at issue distinguishes between three separate amounts to which three separate rates are applied, determined by different methods. Consequently, since the first step of the calculation is incorrect, it is not necessary to examine the second step. The finding of an error in the first step of the methodology endorsed in the tax ruling at issue necessarily makes the examination of any errors in the calculation of the rate of return — the second step — redundant. The return should be entirely recalculated by the Grand Duchy of Luxembourg in the light of the amount of capital that should have been taken into consideration. It is apparent, moreover, from recital 311 of the contested decision that an accurate estimate of the taxable base of FFT should be calculated on the basis that a single rate is applied to the full amount of its accounting equity.

283 It must be noted that, as regards the amount of the rate of return, the parties disagree as to whether this should be 10%, as the Commission contends, or 6.05%, as is maintained by the Grand Duchy of Luxembourg (recital 304 of the contested decision). Consequently, even if it is the lower rate that is to be applied, the amount of FFT's resulting remuneration would still be considerably higher than that accepted by the tax ruling at issue. That rate, which corresponds to that applied to the first segment, would be applied to the full amount of the capital, which represents an amount 10 times greater than that to which the rate was applied pursuant to the tax ruling at issue. In that context, it must be stated that, in any event, none of the arguments of the Grand Duchy of Luxembourg relating to the rate of return can invalidate the Commission's finding of the existence of an advantage.

284 The Court therefore considers that, although the Grand Duchy of Luxembourg has disputed the fifth error identified by the Commission, concerning the rate of return (see paragraph 194 above), it is not necessary to examine the merits of those arguments.

285 In those circumstances, all the complaints raised by the Grand Duchy of Luxembourg concerning the Commission's examination of the methodology for determining FFT's remuneration must be rejected.

286 It follows from all of the findings in paragraphs 211 to 285 above that the Commission correctly considered that the tax ruling at issue had endorsed a methodology for determining FFT's remuneration that did not enable an arm's length outcome to be achieved and that resulted in a reduction of FFT's tax burden. Accordingly, it was fully entitled to find, in the context of its principal line of reasoning, that the tax ruling at issue conferred an advantage on FFT.

3. The Commission's subsidiary line of reasoning according to which the tax ruling at issue derogated from Article 164(3) of the Tax Code and from the Circular

287 The finding, in paragraph 286 above, that the Commission did not make an error in its principal line of reasoning alone is sufficient for it to be concluded that the Commission has established that the tax ruling at issue conferred an advantage on FFT. Nevertheless, the Court considers it appropriate to examine, for the sake of completeness, the Commission's subsidiary line of reasoning, according to which the tax ruling at issue derogated from Article 164(3) of the Tax Code and from the Circular.

288 In that regard, the Court notes that, in the second part of its first plea, the Grand Duchy of Luxembourg submits that the tax ruling at issue is in line with the arm's length principle as provided for in the domestic law of Luxembourg.

289 The Commission contests those arguments.

290 It must be observed in that regard that, as a subsidiary point, in Section 7.2.4 of the contested decision, entitled 'Subsidiary line of reasoning: Selective advantage due to a derogation from Article 164 [of the Tax Code] and/or the Circular' (recitals 315 to 317 of the contested decision), the Commission found that the tax ruling at issue conferred an advantage on FFT on the ground that it derogated from the arm's length principle under Luxembourg law, provided for in Article 164(3) of the Tax Code and in the Circular (see recitals 316 and 317 of the contested decision).

291 In recital 316 of the contested decision, the Commission stated the following:

'As a subsidiary line of reasoning, … the [tax ruling at issue] also grants FFT a selective advantage in the context of the more limited reference system composed of group companies applying transfer pricing to which Article 164(3) [of the Tax Code] and the Circular apply. Article 164(3) [of the Tax Code] and the Circular are considered to establish the "arm's length principle" under Luxembourg tax law, according to which 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. Section 2 of the Circular, in particular, contains a description of the arm's length principle as set out in the OECD … Guidelines and transposed into domestic law.'

292 Next, in recital 317 of the contested decision, the Commission recalled that it had already demonstrated, in the context of Section 7.2.2 of that decision, that the tax ruling at issue did not enable a reliable approximation of an arm's length outcome to be achieved. On the basis of that finding, it concluded that the tax ruling at issue 'also [gave] rise to a selective advantage under the more limited reference system of Article 164(3) [of the Tax Code] or the Circular, since it [resulted] in a lowering of FFT's tax liability as compared to the situation where the arm's length principle laid down in that provision had been properly applied'.

293 It is clear from recitals 316 and 317 of the contested decision that the Commission concluded that the tax ruling at issue conferred a selective advantage on FFT, since it resulted in a lowering of the tax liability as compared to the situation where the arm's length principle laid down by Article 164(3) of the Tax Code and in the Circular had been properly applied.

294 It must be noted that the Commission based that conclusion on the examination of the tax ruling at issue which it undertook in the context of its principal analysis. It thus confirmed that it had already demonstrated, in Section 7.2.2 of the contested decision, that the tax ruling at issue did not enable a reliable approximation of an arm's length outcome to be achieved.

295 In that regard, first, it must be noted that Article 164(3) of the Tax Code provides that 'taxable income comprises hidden profit distributions' and that '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 normally would not have received if he had not been a shareholder, a stockholder or an interested party'. In addition, the Circular states, in Section 2, that 'where an intra-group service has been rendered, as with other types of intra-group transfers, one should ascertain whether an arm's length price is charged for such service, i.e. a price corresponding to the price which would have been charged and agreed to by independent enterprises in comparable circumstances'. It follows that Article 164(3) of the Tax Code and the Circular provide that the remuneration for intra-group transactions must be determined as though the price of those transactions had been agreed between stand-alone undertakings. The Grand Duchy of Luxembourg and FFT do not, moreover, dispute the Commission's assessment, in recital 75 of the contested decision, that those provisions establish the arm's length principle under Luxembourg law.

296 Second, it must be noted that the Circular refers to Article 9 of the OECD Model Tax Convention and to the OECD Guidelines as the international benchmark for transfer pricing purposes. In its principal analysis of the selective advantage, the Commission largely referred to the OECD Guidelines, notably in identifying the five errors in the methodology for determining FFT's remuneration. It follows that the same analytical framework could be used by the Commission both in its principal analysis and in its subsidiary analysis.

297 Accordingly, in the circumstances of the present case, it must be concluded that the Commission did not make an error in considering itself entitled to transpose the analysis undertaken in the light of the arm's length principle as described in the contested decision, entailing the determination of FFT's remuneration, in order to conclude that the tax ruling at issue conferred an advantage on FFT because FFT had paid less tax than it would have had to pay under Article 164(3) of the Tax Code and the Circular.

298 The arguments of the Grand Duchy of Luxembourg that the tax ruling at issue complies with Luxembourg law cannot call into question the finding in paragraph 297 above. Those arguments have already been rejected in paragraphs 226 and 227 above.

299 It follows from all of these findings that the Commission was fully entitled to consider that, in any event, the tax ruling at issue conferred a selective advantage on FFT because it resulted in a lowering of FFT's tax liability as compared to the tax it would have had to pay under Article 164(3) of the Tax Code and the Circular.

4. Plea alleging the lack of any advantage at group level

300 The Grand Duchy of Luxembourg and FFT claim, in essence, that the Commission has not demonstrated that there is an advantage at the level of the Fiat/Chrysler group and has thus infringed its obligation to state reasons as provided for in Article 296 TFEU and also Article 107 TFEU.

301 Specifically, the Grand Duchy of Luxembourg contends that the statement of reasons for the contested decision is manifestly deficient and contradictory in that the Commission refused, in recital 314 of that decision, to take account of its effects at the level of the Fiat/Chrysler group, whilst simultaneously relying on the effects of that advantage in designating that group, in recitals 342 and 344 of the decision, the beneficiary of the alleged aid at issue.

302 The Grand Duchy of Luxembourg maintains that, unlike the facts in the case giving rise to the order of 31 August 2010, *France Télécom* v *Commission* (C-81/10 P, not published, EU:C:2010:475, paragraph 43), any charges borne by the other subsidiaries, such as higher taxation, are not 'unconnected' with the advantage that FFT allegedly obtained. Moreover, it relies on the judgment of 17 December 2015, *Spain and Others* v *Commission* (T-515/13 and T-719/13, EU:T:2015:1004, paragraphs 115 and 116), in criticising the Commission for having failed to investigate or to explain how the Fiat/Chrysler group had actually been given an advantage.

303 For its part, FFT claims that the Commission misapplied Article 107 TFEU by ignoring the effect of the tax ruling at issue on the Fiat/Chrysler group as a whole when determining whether FFT and the Fiat/Chrysler group had benefited from an advantage.

304 First, FFT observes that, in recital 155 of Commission Decision 2011/276/EU of 26 May 2010 concerning State aid in the form of a tax settlement agreement implemented by Belgium in favour of Umicore SA (formerly Union Minière SA) (State aid C 76/03 (ex NN 69/03)) (OJ 2011 L 122, p. 76, 'the Umicore decision'), the Commission recognised that national tax authorities had to have a margin of appreciation in the assessment of transfer pricing. The alleged advantage to FFT is, in its submission, not out of proportion and is only a consequence of that margin of appreciation.

305 Second, FFT observes that, in recital 314 of the contested decision, the Commission wrongly considered it unnecessary to examine whether the impact of the tax ruling at issue was neutral at group level. FFT thus submits that, even if the transactions between FFT and another group company had given it a higher profit margin in Luxembourg, that would have meant that the other company of the Fiat/Chrysler group would have been entitled to a correspondingly higher deductible interest expense.

306 Furthermore, FFT maintains that the contested decision is contradictory in that the Commission, on the one hand, concludes that the tax advantage benefits the whole group and, on the other, refuses to take into consideration the effect of the measure on the whole group. FFT claims that, in the present case, unlike the facts in the case giving rise to the judgment of 30 November 2009, *France and France Télécom* v *Commission* (T-427/04 and T-17/05, EU:T:2009:474), the effects of the measure are neutralised at group level, and that therefore there is no advantage.

307 In addition, FFT submits that the seven judgments to which the Commission refers are no authority for the latter's position that it is not obliged to review the existence of an advantage at the level of the Fiat/Chrysler group.

308 In that regard, FFT notes that the importance of the effect on the Fiat/Chrysler group when determining whether the tax ruling at issue conferred an advantage is illustrated by the difficulties faced by that group, since the Italian tax administration found that FFT's taxable profit was too high to be considered arm's length. Consequently, FFT had overstated its taxable profit and paid too much corporate income tax in Luxembourg.

309 Last, as regards the various methodological points, FFT submits that the Commission should have applied a proportionality test when determining whether the tax ruling at issue conferred an advantage on it. Furthermore, FFT states that it fully supports the arguments of the Grand Duchy of Luxembourg, in Case T-755/15, concerning the methodology for determining its remuneration and challenging the errors identified by the Commission.

310 The Commission contests those arguments.

311 As a preliminary point, it must be stated that the Grand Duchy of Luxembourg does not make any distinction between the arguments it puts forward, whether to establish the existence of an infringement of Article 107 TFEU or of a failure to state reasons in that regard. However, it must be noted that, in essence, its arguments are intended to establish, on the one hand, a failure to state reasons, in so far as there is allegedly an inconsistency in the contested decision, and, on the other hand, an infringement of Article 107 TFEU in so far as, in its view and according to FFT, the Commission was not entitled to conclude that FFT and the Fiat/Chrysler group had been given an advantage.

312 As regards, in the first place, the alleged inconsistency of the contested decision, it should be noted that, in recital 314 of the contested decision, the Commission concluded, in essence, that FFT had received a selective advantage in so far as its tax burden in Luxembourg had been lowered. In that regard, the Commission also noted in that recital that, according to the case-law, the fact that that lowering of the tax in Luxembourg had led to a greater tax burden in another Member State would have no bearing on the categorisation of that measure as aid.

313 Moreover, in recitals 341 to 345 of the contested decision, the Commission found that, while the tax ruling at issue granted a selective advantage to FFT within the meaning of Article 107(1) TFEU, the favourable tax treatment afforded to FFT would benefit that group as a whole, since FFT and the Fiat/Chrysler group formed an economic unit. The Commission made clear in that respect that, since the amount of tax paid by FFT influenced the pricing conditions of the intra-group loans granted by it to the companies of that group, reductions of FFT's tax liability reduced the pricing conditions of its intra-group loans.

314 It must therefore be held — as regards the requirement that there be an advantage, which is the third prerequisite for a finding of State aid according to the case-law cited in paragraph 118 above — that there is no inconsistency in the Commission's assessments in the contested decision with regard to determining the beneficiary of the aid, who is identified, in essence, as being FFT, directly, and the Fiat/Chrysler group, indirectly, inasmuch as FFT forms an economic unit and, therefore, an undertaking, for the purposes of the law on State aid, with the Fiat/Chrysler group.

315 That first complaint of the Grand Duchy of Luxembourg, alleging a failure to state reasons, must therefore be rejected as unfounded.

316 As regards the complaint that the Commission infringed Article 107 TFEU by finding that FFT and the Fiat/Chrysler group had been given an advantage, it must be stated at the outset that, as the Commission indicates, the Grand Duchy of Luxembourg has not put forward any argument to establish that the Fiat/Chrysler group and FFT do not constitute an economic unit for the purposes of State aid law. In any event, as the Commission pointed out in recital 342 of the contested decision, FFT is fully controlled by Fiat SpA, which in turn controls the Fiat/Chrysler group. Therefore, any advantage that would benefit FFT would benefit that group as a whole, in particular if it involves, as the Commission observes, without being contradicted in that respect by the Grand Duchy of Luxembourg, conditions of loans granted by FFT to other group companies that are more advantageous because of the lowering of FFT's tax burden.

317 In addition, and in any event, assuming that that factor may be relevant, it must be noted that neither the Grand Duchy of Luxembourg nor FFT has established that the tax reductions from which FFT benefits in Luxembourg are 'neutralised' by higher taxes in other Member States.

318 Furthermore, even if that were the case, such 'neutralisation' would not permit the inference that FFT or the Fiat/Chrysler group had not benefited from an advantage in Luxembourg. It must be noted that, in the context of a tax measure, the existence of an advantage is determined by reference to normal taxation rules, so that the tax rules of another Member State are not relevant (see, by analogy, judgment of 11 November 2004, *Spain* v *Commission*, C-73/03, not published, EU:C:2004:711, paragraph 28). Consequently, where it has been established that an integrated undertaking benefits, under a tax measure granted by a Member State, from a reduction of the tax burden that it would otherwise have had to bear in accordance with the normal rules of taxation, the tax situation of another undertaking of the same group in another Member State has no bearing on the existence of an advantage. For the same reason, and without it being necessary to rule on the admissibility of the documents lodged by FFT following the reply to show that an arbitration procedure had been initiated to avoid double taxation of FFT in Luxembourg and in Italy, the Court must reject as unfounded FFT's argument that, in essence, in any event, its income is taxed either in Italy or in Luxembourg, so that it does not benefit from an advantage.

319 None of the arguments which the Grand Duchy of Luxembourg and FFT advance in that respect can call that finding into question.

320 First, in so far as the Grand Duchy of Luxembourg claims that the Commission could not refer to the order of 31 August 2010, *France Télécom* v *Commission* (C-81/10 P, not published, EU:C:2010:475, paragraph 43), since it did not investigate whether the Fiat/Chrysler group had actually benefited from an advantage, that argument must be rejected as unfounded. Suffice it to note in that regard that, in recital 343 of the contested decision, the Commission found that any favourable tax treatment afforded to FFT necessarily benefited the other group companies in respect of which it charged transfer prices.

321 Second, in so far as the Grand Duchy of Luxembourg relies on the judgment of 17 December 2015, *Spain and Others* v *Commission* (T-515/13 and T-719/13, EU:T:2015:1004, paragraphs 115 and 116), in order to establish that the Commission should have investigated whether the Fiat/Chrysler group actually benefited from an advantage, it must be pointed out not only that that judgment has been set aside by the Court of Justice (judgment of 25 July 2018, *Commission* v *Spain and Others*, C-128/16 P, EU:C:2018:591), but that the facts in the case that gave rise to that judgment are, in all events, unconnected with the facts of the present case.

322 In the judgment of 17 December 2015, *Spain and Others* v *Commission* (T-515/13 and T-719/13, EU:T:2015:1004), the General Court held that the Commission had made an error in finding that the beneficiaries of aid were Economic Interest Groupings (EIG) and their members, when it could not be established that their members, who were the only entities referred to by the recovery order, benefited from selective advantages.

323 In the present case, the Commission has established to the requisite legal standard that not only FFT but also all the companies forming part of the group and dealing with FFT would benefit from the tax advantage granted by FFT, in view of its impact on the pricing conditions of its intra-group loans. That argument of the Grand Duchy of Luxembourg must therefore be rejected as unfounded.

324 Third, in so far as FFT takes the view that the Commission should have applied a proportionality test to determine whether the tax ruling at issue conferred an advantage, notably in the light of the Umicore decision, that argument must be rejected as unfounded. First, it must be borne in mind that the Commission is not bound by its previous practice in taking decisions. Second, as it points out in the Umicore decision, the Commission recognised that the tax authorities have a discretion in the context of a transaction bringing an end to a dispute, thereby avoiding potentially long or uncertain litigation, but not in the context of a tax ruling to determine the tax which a company should pay in the future.

325 It follows from all of the foregoing that the third plea must be rejected as unfounded.

326 Accordingly, in the light of the considerations set out in paragraphs 118 to 325 above, it must be held that the Commission did not infringe Article 107 TFEU by finding that FFT and the Fiat/Chrysler group had benefited from an advantage as a result of the fact that FFT had paid less tax than that which an undertaking transacting on the market would have had to pay.

327 In those circumstances, the second series of pleas raised by the Grand Duchy of Luxembourg and FFT, relating to the existence of an advantage, must be rejected in its entirety.

E. Third series of pleas, concerning the non-selectivity of the advantage granted to FFT

328 By the first plea in Case T-755/15 and by the first complaint in the first part of the first plea in Case T-759/15, the Grand Duchy of Luxembourg and FFT claim that the Commission wrongly considered that the tax ruling at issue was a selective measure. They maintain, principally, that the Commission took into consideration an erroneous reference framework in its three-step analysis of selectivity. In their view, the tax ruling at issue does not derogate from the tax regime applicable to integrated companies, which they regard as the relevant reference framework. They thus argue that the Commission failed to demonstrate that the tax ruling at issue had been granted to FFT on more advantageous terms than those given to other integrated companies.

329 In addition, the Grand Duchy of Luxembourg and FFT take issue with the Commission's argument that it could in any event presume that the tax ruling at issue was selective, since it was an individual measure and the Commission had established that that measure conferred an advantage on FFT. They contend that the case-law distinguishes between ad hoc individual measures and individual tax measures applying general tax arrangements. In the latter case, selectivity could not be presumed but would have to be examined by reference to Luxembourg law and practice in order for it to be established whether the conditions of application are discriminatory or whether the discretion afforded to the national authorities is excessive. The Grand Duchy of Luxembourg and FFT go on to argue that the tax ruling at issue is not an ad hoc individual measure but an individual measure which is part of a general system prescribing the imposition of additional charges, that is the transfer pricing legislation, as in the case giving rise to the judgment of 4 June 2015, *Commission* v *MOL* (C-15/14 P, EU:C:2015:362).

330 Ireland submits that, according to the case-law and legal literature, the only relevant reference system for determining whether a tax measure is selective is the Member State's tax system of which that measure forms part, and not an abstract or hypothetical tax system, as applied, wrongly, by the Commission in the contested decision. In its submission the reference system to be taken into consideration is that of the specific tax regime applicable to integrated companies.

331 The Commission contests all of those arguments.

332 As a preliminary point, it should be observed that the requirement as to selectivity under Article 107(1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage, in that, where the Commission has identified an advantage, understood in a broad sense, as arising directly or indirectly from a particular measure, it is also required to establish that that advantage specifically benefits one or more undertakings. It falls to the Commission to show that the measure, in particular, creates differences between undertakings which, with regard to the objective of the measure, are in a comparable situation. It is necessary therefore that the advantage be granted selectively and that it be liable to place certain undertakings in a more favourable situation than that of others (judgment of 4 June 2015, *Commission* v *MOL*, C-15/14 P, EU:C:2015:362, paragraph 59).

333 It must, however, be noted that the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective ('the presumption of selectivity'). By contrast, when examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity (judgments of 4 June 2015, *Commission* v *MOL*, C-15/14 P, EU:C:2015:362, paragraph 60, and of 30 June 2016, *Belgium* v *Commission*, C-270/15 P, EU:C:2016:489, paragraph 49; see also, to that effect, judgment of 26 October 2016, *Orange* v *Commission*, C-211/15 P, EU:C:2016:798, paragraphs 53 and 54). It should be made clear that, where individual aid is at issue,

the presumption of selectivity operates independently of the question whether there are operators on the relevant market or markets which are in a comparable factual and legal situation (judgment of 13 December 2017, *Greece* v *Commission*, T-314/15, not published, EU:T:2017:903, paragraph 79).

334 It is also apparent from settled case-law that, in order to classify a national tax measure which is not an individual measure as 'selective', the Commission must begin by identifying the ordinary or 'normal' tax system applicable in the Member State concerned, and thereafter demonstrate that the tax measure at issue is a derogation from that ordinary system, in so far as it differentiates between operators who, in the light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation (judgments of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 49; 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; and of 13 December 2017, *Greece* v *Commission*, T-314/15, not published, EU:T:2017:903, paragraph 85).

335 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 that that differentiation is justified since it flows from the nature or general structure of the system of which the measures form part (see 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 58 and the case-law cited).

336 Therefore, using a three-step method, as set out in paragraphs 334 and 335 above, it is possible to conclude that a national tax measure that does not constitute an individual measure is selective.

337 In the present case it must be noted that, in the contested decision, the Commission principally examined the selectivity of the measure at issue by following the three steps mentioned in paragraphs 334 to 336 above. However, it also applied the presumption of selectivity, according to which a measure is presumed to be selective if it confers an advantage and if the aid is individual aid. In recital 218 of the contested decision, and in its written submissions, the Commission recalled that, 'according to the Court, in the case of an individual aid measure, as opposed to a scheme, "the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective"', and that FFT benefits in the present case from an 'individual aid measure'. The Commission also emphasised at the hearing, in response to questions put by the Court, that it demonstrated the selectivity of the advantage in question in several ways in the contested decision, including by means of the presumption of selectivity, the lawfulness of which was not, however, confirmed by the case-law until after the contested decision was adopted.

338 The Court considers it appropriate to begin by examining the arguments of the Grand Duchy of Luxembourg and FFT to the effect that the Commission was not entitled to presume that the aid was selective, nor to find that they had failed to rebut the presumption of selectivity.

339 In the first place, as regards the presumption of selectivity, it must be recalled that, as is evident, in essence, from the case-law cited in paragraph 333 above, this applies subject to the twofold condition that the measure at issue constitutes individual aid (and not an aid scheme) and that it grants an advantage to the undertaking that is the beneficiary of the aid. In the case of a simple presumption, it is therefore for the applicant to establish that one or other of those two conditions is not met, if the presumption is to be rebutted.

340 First, as regards the condition relating to the existence of an advantage, it must be held that that is met. As has been noted in paragraph 286 above, the Grand Duchy of Luxembourg and FFT were unable to show that the Commission had wrongly concluded that the amount of tax payable by FFT was lower than that which it would have had to pay under normal market conditions.

341 Second, as regards the condition that the measure at issue must be individual aid, the Grand Duchy of Luxembourg and FFT dispute, in essence, both in their written submissions and at the hearing in response to questions put by the Court, that the tax ruling at issue may constitute ad hoc individual aid. According to them, it is an individual implementing measure which is part of a general scheme, as in the case giving rise to the judgment of 4 June 2015, *Commission* v *MOL* (C-15/14 P, EU:C:2015:362).

342 In that regard, it should be noted that, under Article 1(e) of Regulation 2015/1589, individual aid is aid that is not awarded on the basis of an aid scheme and awards of aid on the basis of an aid scheme that are notifiable under Article 2 of that regulation.

343 According to Article 1(d) of Regulation 2015/1589, an aid scheme comprises 'any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount'.

344 The following considerations can be extrapolated from the definition of 'aid scheme' provided for in Article 1(d) of Regulation 2015/1589, set out in paragraph 343 above, as interpreted by the case-law.

345 First, the existence of an aid scheme implies, in principle, the identification of provisions on the basis of which the aid is granted. It has nevertheless already been held that, when examining an aid scheme, and no legal act establishing such an aid scheme having been identified, the Commission may rely on a set of circumstances which, taken as a whole, indicate the de facto existence of an aid scheme (see, to that effect, judgment of 13 April 1994, *Germany and Pleuger Worthington* v *Commission*, C-324/90 and C-342/90, EU:C:1994:129, paragraphs 14 and 15).

346 Second, where the individual aid is granted without the need for further implementing measures, the essential elements of an aid scheme must necessarily be apparent from the provisions identified as constituting the basis of that scheme.

347 Third, where the national authorities apply an aid scheme, those authorities cannot have a discretion in determining the essential elements of the aid in question and as to whether it is appropriate to grant it. In order for the existence of such implementing measures to be ruled out, the national authorities' powers should be limited to the technical application of the provisions deemed to constitute the scheme in question, possibly after having verified that applicants satisfy the requirements for benefiting from the scheme.

348 Fourth, it follows from Article 1(d) of Regulation 2015/1589 that the acts underpinning the aid scheme must define the beneficiaries in a general and abstract manner, even if the aid that is granted to them is indefinite.

349 In the present case, it must be stated that, as the Commission emphasised in response to questions at the hearing, the tax ruling at issue cannot be considered to be a measure granted on the basis of an aid scheme.

350 First of all, it must be noted that neither the general system of corporate taxation, nor the specific tax regime applicable to integrated companies, or any other provision identified by the parties constitutes a scheme within the meaning of both parts of the sentence in Article 1(d) of Regulation 2015/1589, on the basis of which the measure at issue was granted to FFT. Nor do the parties rely on a set of circumstances which, taken as a whole, indicate the de facto existence of an aid scheme.

351 Next, it must be pointed out that the measure at issue does not relate in general terms to the adoption of tax rulings by the tax authorities but to a tax ruling which specifically concerns FFT (see judgment of 13 December 2017, *Greece* v *Commission*, T-314/15, not published, EU:T:2017:903, paragraphs 80 and 81). It is common ground that the purpose of the tax ruling at issue is to determine the amount of tax which FFT alone is required to pay under the applicable Luxembourg tax provisions, and therefore that the tax ruling at issue relates exclusively to the individual situation of FFT. It must therefore be stated that the essential elements of the aid measure and notably the elements that constitute the advantage, namely the approval of a methodology for determining FFT's remuneration on the basis of the segmentation of the capital and the application of different rates of return by reference to that segmentation, thereby deviating from an arm's length outcome, are apparent solely from the tax ruling at issue and not from provisions of Luxembourg tax law on the basis of which the tax ruling at issue was granted.

352 Last, it must be noted, in all events, that, as the Grand Duchy of Luxembourg indicated in response to the oral questions put by the Court, it is evident from the Luxembourg legislation itself that the tax administration has a margin of appreciation in evaluating, in the light of the circumstances of each case, the best method for calculating the taxable amount of each company submitting a request for a tax ruling. The grant of tax rulings by the Luxembourg tax authorities requires, in every case, a specific analysis resulting in a complex assessment. The margin of appreciation which the Luxembourg administration has in every tax ruling thus precludes the tax ruling at issue being nothing more than a measure implementing an aid scheme.

353 In that regard, it must be pointed out that the fact that the tax ruling at issue is not an isolated measure but one of a large number of tax rulings granted to undertakings in Luxembourg has no bearing on the finding that, in so far as the tax ruling at issue granted an advantage to FFT, such a tax ruling constitutes individual aid to that undertaking.

354 It is apparent from all those considerations, and in particular from paragraphs 345 and 350 above, that the tax ruling at issue is not an aid scheme nor an individual aid measure adopted pursuant to an aid scheme, within the meaning of both parts of the sentence in Article 1(d) of Regulation 2015/1589. First, the tax ruling at issue does not contain any provision on the basis of which it would be possible to award aid within the meaning of both parts of the sentence in Article 1(d) of Regulation 2015/1589. Second, there is nothing from which it might be inferred that that tax ruling was adopted on the basis of such a provision.

355 In those circumstances, it must therefore be held that the tax ruling at issue must be considered to constitute individual aid, within the meaning of Article 1(e) of Regulation 2015/1589.

356 That conclusion is not called into question by the other arguments raised by the Grand Duchy of Luxembourg and by FFT.

357 First, the Court must reject as unfounded the argument of the Grand Duchy of Luxembourg that, in essence, the Commission could not call into question aid adopted under an aid scheme without first calling that scheme into question, since the tax ruling at issue was not adopted under an aid scheme.

358 Second, in so far as FFT claims that the tax ruling at issue represents the application of the transfer pricing rules in Luxembourg and the Commission failed to identify undertakings that were in circumstances legally and factually comparable to FFT, and to take account of the significant differences between group companies and stand-alone companies, that argument must be rejected as ineffective. That argument does not call into question the finding that the measure at issue is ad hoc individual aid.

359 In the light of the above, it must be concluded that the Commission did not in any event err in finding that the advantage conferred on FFT by the tax ruling at issue was selective, since the conditions attached to the presumption of selectivity were fulfilled in the present case.

360 In any event, and even if the presumption of selectivity did not in fact apply, it must be noted that the Commission also found that the advantage conferred on FFT by the tax ruling at issue was selective in the light of the three-step examination mentioned in paragraphs 334 to 336 above. It will be recalled that the first step of this examination consists of identifying the relevant reference framework; the second step, of examining whether the measure at issue derogates from that reference framework; and, finally, the third step, of verifying whether any such derogation can be justified by the nature and the general scheme of the rules of which the reference framework is composed. The Commission carried out that examination using as a reference framework, principally, the general Luxembourg corporate income tax system and, on a subsidiary basis, Article 164 of the Tax Code and the Circular.

361 As regards the first and second steps, it should be noted that, irrespective of the reference framework used by the Commission, whether that is the general corporate income tax system or Article 164 of the Tax Code and the Circular, the Commission correctly found that the tax ruling at issue derogated from the rules constituting each of those reference frameworks. As has been found in paragraphs 286 and 299 above, the Commission correctly considered, both in its principal analysis, in the light of the general corporate income tax system, and in its subsidiary analysis, in the light of Article 164 of the Tax Code and the Circular, that the tax ruling at issue conferred an advantage on FFT. As has been found in paragraph 122 above, the Commission considered, concurrently, whether there was an advantage and, in the context of its examination of selectivity, whether there was a derogation from the reference frameworks previously identified. As the Commission stated in recital 217 of the contested decision, the question whether the tax ruling at issue constitutes a derogation from the reference framework coincides with the identification of the advantage granted to the beneficiary by that measure.

362 In those circumstances, it must be held that the arguments by which the parties seek to challenge the reference framework identified by the Commission are ineffective and the Court must reject, as unfounded, the arguments seeking to challenge the Commission's analysis with regard to the second step of its reasoning, that is the examination of a derogation from the reference framework.

363 As regards the third step, it must be noted that, in the contested decision, the Commission found that neither the Grand Duchy of Luxembourg nor FFT had advanced any possible justification for the selective treatment of FFT as a result of the tax ruling at issue. Moreover, it confirmed that it had not identified any ground justifying the preferential treatment from which FFT had benefited (recitals 337 and 338 of the contested decision).

364 In addition, inasmuch as FFT claims, for the purpose of justifying the derogation, that the tax ruling at issue is in line with the arm's length principle, suffice it to note that that argument is based on a false premiss.

365 As regards FFT's argument that the tax ruling at issue would enable double taxation to be avoided, as the Commission correctly points out, FFT has not maintained nor established that it could avoid double taxation only if the tax ruling at issue was adopted. Furthermore, in all events it must be stated that, as the Commission rightly observes, the question of double taxation is unconnected with, and has no bearing on, the question of determining the selectivity of an advantage.

366 It therefore follows from the considerations set out in paragraphs 360 to 365 above that the Commission did not make any error in concluding on the basis of the three-step analysis of selectivity that the measure at issue was selective.

367 In the light of the above, the Court must reject, in its entirety, the third series of pleas put forward by the Grand Duchy of Luxembourg and FFT, concerning the non-selectivity of the advantage granted to FFT.

F. Fourth series of pleas, concerning a restriction of competition

368 The Grand Duchy of Luxembourg claims that the Commission has not adduced proof, in breach of Articles 107 and 296 TFEU, of any restriction of competition, actual or potential.

369 According to the Grand Duchy of Luxembourg, the Commission did not establish either in recital 189 of the contested decision or in recitals 343 and 345 of that decision how FFT's being relieved of a tax liability that it would otherwise have been obliged to pay would have the effect of strengthening its position or that of the Fiat/Chrysler group on any market. Moreover, in its submission, the generic reference alone, in recital 189 of the contested decision, to the financial position of that group is manifestly insufficient to characterise such an effect, even a potential effect.

370 FFT also submits that the Commission infringed Articles 107 and 296 TFEU in that the analysis in the contested decision of the competitive effect of the tax ruling at issue was almost non-existent.

371 In the first place, FFT claims that in recital 189 of the contested decision the Commission merely asserted that the tax ruling at issue had strengthened the financial position of FFT and of the Fiat/Chrysler group and was therefore liable to distort competition.

372 In addition, FFT submits that, according to the case-law, a measure must be assessed according to its effects and not according to its objectives. The bald assertion that lower tax liability in Luxembourg strengthened the competitive position of the Fiat/Chrysler group is tantamount to a 'by object' condemnation, when it is only effect that counts. The Commission cannot always presume that competition is distorted. FFT adds that the facts of the case are complex and that it was necessary to take into account the overall effect of the tax ruling at issue on the group.

373 Furthermore, FFT maintains that, even if it were assumed that it benefited from an unduly low corporate income tax in Luxembourg, FFT does not provide services or goods to third parties and therefore does not have a competitive position in any market in which competition could be distorted.

374 In the second place, FFT maintains that the statements in recital 345 of the contested decision, although not part of the competitive effects analysis in the contested decision, are erroneous.

375 In the third place, FFT submits that the Commission's conclusion that the tax ruling at issue affected competition is based on the assumption that FFT paid less corporate income tax than a stand-alone company. However, FFT challenges the validity of that comparison.

376 The Commission contests those arguments.

377 As regards the Commission's finding that there was a restriction of competition, which is the fourth condition for a finding of State aid, it should be noted that, in recital 189 of the contested decision, first of all, the Commission recalled that a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes. Next, it stated that, to the extent that the tax ruling at issue had relieved FFT of a tax liability that it would otherwise have been obliged to pay under the general corporate income tax system, that tax ruling distorted or threatened to distort competition by strengthening the financial position of FFT and the Fiat/Chrysler group.

378 In addition, in recitals 343 to 345 of the contested decision, which concern the beneficiary of the contested measure, the Commission made clear that the tax ruling at issue benefited the whole of the Fiat/Chrysler group, since it provided additional resources not only to FFT but to the entire group. The Commission added that the amount of tax paid by FFT to Luxembourg influenced the pricing conditions of the intra-group loans granted by it to the group companies, since those conditions were based on the average cost of capital of the group. The Commission concluded that reductions of FFT's tax liability had necessarily reduced the pricing conditions of its intra-group loans.

379 As has been stated in paragraph 178 above, according to settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the Courts of the European Union to carry out their review.

380 When applied to the classification of a measure as aid, that principle requires a statement of the reasons for which the Commission considers that the measure concerned falls within the scope of Article 107(1) TFEU. In that regard, even in cases where it is apparent from the circumstances under which it was granted that the aid is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision (judgments of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 89, and of 30 April 2009, *Commission* v *Italy and Wam*, C-494/06 P, EU:C:2009:272, paragraph 49).

381 As regards the condition relating to the distortion of competition, it follows from the case-law that, in principle, aid intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities distorts the conditions of competition (judgments of 19 September 2000, *Germany* v *Commission*, C-156/98, EU:C:2000:467, paragraph 30, and of 3 March 2005, *Heiser*, C-172/03, EU:C:2005:130, paragraph 55).

382 It is settled case-law that, for the purpose of categorising a national measure as 'State aid', it is necessary not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (see judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 140 and the case-law cited).

383 Furthermore, as regards in particular operating aid such as the aid at issue, as the Commission submits, it is apparent from the case-law that such aid is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities and in principle distorts the conditions of competition (see judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 136 and the case-law cited).

384 In the present case, it should be noted that it is apparent from recitals 189, 343 and 345 of the contested decision, the content of which is set out in paragraphs 377 and 380 above, that the Commission found that FFT and the group to which it belonged benefited from an advantage resulting from a tax reduction that the other companies with which it competes did not have and which was therefore liable to improve its financial position on the market, so that the tax ruling at issue restricted competition. According to the Commission, the reduction of FFT's tax burden as a result of the tax ruling at issue provided additional resources to the whole group, in so far as it had the effect of reducing the pricing conditions of its intra-group loans. In the light of the case-law set out in paragraphs 379 to 382 above, it must be stated that these points are sufficient for a finding that the Commission did refer to the circumstances that led it to consider the measure at issue to be liable

to affect competition and to distort trade. It should be borne in mind that, as is evident from paragraph 7 above, FFT provides treasury and financing services to the companies of that group which are established in Europe, excluding those established in Italy.

385 It must therefore be held that the Commission did not infringe its obligation to state reasons or make an error of assessment by concluding that the measure at issue was liable to restrict competition on the market, in so far as the corresponding tax reduction improved the financial position of FFT and of the group to which it belonged to the detriment of that of its competitors.

386 That finding is not called into question by the other arguments of the Grand Duchy of Luxembourg and of FFT.

387 In the first place, in so far as the Grand Duchy of Luxembourg relies on the judgment of 17 December 2015, *Spain and Others* v *Commission* (T-515/13 and T-719/13, EU:T:2015:1004), it must be noted, as has been indicated in paragraph 321 above, that that judgment of the General Court was set aside by the Court of Justice in its judgment of 25 July 2018, *Commission* v *Spain and Others* (C-128/16 P, EU:C:2018:591).

388 In any event, it must be noted that, in the judgment of 17 December 2015, *Spain and Others* v *Commission* (T-515/13 and T-719/13, EU:T:2015:1004), the General Court found that the statement of reasons for the Commission's decision was insufficient in that the reasons why the advantage conferred on investors, and not on the shipping companies and shipyards that had received the aid, was liable to entail a distortion of competition were not sufficiently clear. However, the facts of the present case are different, since the advantage is conferred on FFT and on the group to which it belongs. Therefore, the circumstances of the present case require no other explanation than that, by being required to pay a reduced tax, FFT, and the companies of the Fiat/Chrysler group, had benefited from an advantage, so that competition on the markets on which the companies of the Fiat/Chrysler group operated was affected as a result.

389 In the second place, FFT refers to three judgments to support its argument that the Commission should have undertaken a more detailed investigation of the facts.

390 First, as regards the judgments of 17 September 1980, *Philip Morris* v *Commission* (730/79, EU:C:1980:209, paragraph 11), and of 15 June 2000, *Alzetta and Others* v *Commission* (T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, EU:T:2000:151, paragraph 80), it must be noted that, contrary to FFT's contention, while the Commission did, in those cases, specifically identify the relevant market, the pre-existing competitive position and the purpose of the aid, it is not apparent from either of those judgments that the Commission must systematically carry out such an analysis when it sets out the reasons why the measure at issue distorts competition. As has been stated in paragraph 384 above, the Commission identified the reasons why the measure at issue constituted operating aid enabling FFT and the Fiat/Chrysler group companies to benefit from an advantage and to improve their financial position and, in FFT's case, to reduce the pricing conditions of its intra-group loans.

391 Furthermore, unlike the facts in the case giving rise to the judgment of 24 October 1996, *Germany and Others* v *Commission* (C-329/93, C-62/95 and C-63/95, EU:C:1996:394), in which the Court annulled the Commission's decision for failure to state reasons, and contrary to the facts that gave rise to the judgment of 13 March 1985, *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* (296/82 and 318/82, EU:C:1985:113), in the present case, the Commission did in fact set out the reasons for its view that there was a restriction of competition.

392 Those arguments must therefore be rejected as unfounded.

393 In the third place, inasmuch as FFT submits that a measure must be assessed according to its effects and not according to its objectives, suffice it to note that it is apparent from the case-law cited in paragraph 118 above that aid must distort or threaten to distort competition. In the present case, as has been stated in paragraph 384 above, the Commission correctly found that the measure at issue had the effect of distorting competition.

394 In the fourth place, in so far as FFT submits that the Commission's conclusion that the tax ruling at issue affected competition is based on the erroneous assumption that FFT paid less corporate income tax than a stand-alone company, that argument must be rejected as unfounded. The Commission correctly found that FFT had benefited from a tax advantage, and was thus entitled to conclude that such an advantage would be liable to distort competition in the markets in which FFT and the group to which it belonged operated.

395 In the fifth place, in so far as FFT maintains that, even if it were assumed that it had benefited from an unduly low corporate income tax in Luxembourg, FFT does not provide services or goods to third parties and does not, therefore, have a competitive position in any market in which competition could be distorted, or that the goods and services which the group companies provide are driven by market conditions, those arguments must be rejected as unfounded. Since FFT benefits from a reduction of its tax burden, it is in a position to finance the activities of other companies of the group at a lower cost, thereby distorting competition in the markets in which the latter operate.

396 In the sixth place, FFT maintains that the statements in recital 345 of the contested decision, although not part of the competitive effects analysis in the contested decision, are erroneous. According to FFT, the Commission was wrong to find that there was a link between the amount of tax paid by FFT in Luxembourg and the amount of interest FFT charges to Fiat/Chrysler group companies on its loans to them. In that regard, it is sufficient to note that, as FFT itself acknowledges, moreover, the fact that the Commission made an error in the amount of interest to be taken into consideration has no bearing on the finding that there is a restriction of competition. That argument must therefore be rejected as ineffective.

397 In the seventh place, inasmuch as FFT claims that there is a similarity between the decision annulled by the Court of Justice in the judgment of 30 April 2009, *Commission* v *Italy and Wam* (C-494/06 P, EU:C:2009:272) and the present case, that argument, which it did not raise in the context of the second part of the first plea, must be rejected as unfounded. As the Commission contends, in the former case, the Court of Justice found that the aid in question was not operating aid. In addition, FFT has not called into question the case-law on which the Commission relied in the present case, according to which, in principle, operating aid distorts the conditions of competition. Nor has FFT established that such a presumption would not apply in the present case.

398 In the light of the foregoing, the Court must reject the pleas advanced by the Grand Duchy of Luxembourg and by FFT to the effect that the Commission failed to establish that there was a restriction of competition.

G. Fifth series of pleas, relating to recovery of the aid

399 This series of pleas, raised in the alternative by the Grand Duchy of Luxembourg, which deals with recovery of the aid, is in two parts.

1. First part, alleging infringement of Regulation 2015/1589 in that recovery of the alleged aid at issue is incompatible with the principle of legal certainty

400 The Grand Duchy of Luxembourg contends that the Commission breached the principle of legal certainty and Article 16(1) of Regulation 2015/1589 in ordering the recovery of the alleged aid at issue.

401 Ireland states that it shares the Grand Duchy of Luxembourg's view that the Commission breached the principle of legal certainty.

402 The Commission contests those arguments.

403 It should be noted that Article 16(1) of Regulation 2015/1589 provides as follows:

'Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary … The Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law.'

404 In the contested decision, first of all, the Commission indicated that, under Article 16(1) of Regulation 2015/1589, it was obliged to order recovery of unlawful and incompatible aid, unless recovery would be contrary to a general principle of law (recitals 354 and 355 of the contested decision). The Commission went on to find that the arguments of the Grand Duchy of Luxembourg to the effect that recovery would breach the principles of protection of legitimate expectations and of legal certainty were without merit (recital 364 of the contested decision). First, with regard to the protection of legitimate expectations, it observes that it did not give any precise assurance to the Grand Duchy of Luxembourg or to FFT (recitals 356 to 358 of the contested decision). Second, with regard to breach of the principle of legal certainty, it states that there is no previous decision-making practice that might have created uncertainty about the fact that tax rulings could lead to the granting of State aid. Moreover, and in particular, the Commission recalls that, according to the case-law, it is not required to state the exact amount of the aid to be recovered (recitals 360 to 363 of the contested decision).

405 According to the case-law, the principle of legal certainty, which is a general principle of EU law, requires that legal rules be clear and precise and aims to ensure that situations and legal relationships governed by EU law remain foreseeable (judgment of 15 February 1996, *Duff and Others* v *Commission*, C-63/93, EU:C:1996:51, paragraph 20).

406 In the present case, first, inasmuch as the Grand Duchy of Luxembourg maintains that, in accordance with Article 16(1) of Regulation 2015/1589, recovery should not be ordered as it would breach the principle of legal certainty, it must be noted that the legal rule that led to the adoption of the contested decision — that is Article 107 TFEU, and the four conditions for a finding of such aid, which are recalled in paragraph 118 above — is clear and precise.

407 In that regard, it must be borne in mind that the concept of State aid is defined on the basis of the effects of the measure on the competitive position of its beneficiary (see, to that effect, judgment of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 87). It follows from this that Article 107 TFEU prohibits any aid measure, irrespective of its form or the legislative means used to grant such aid (see, to that effect, 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 79).

408 Accordingly there is no doubt that any State measure, such as a tax ruling, that fulfils the conditions referred to in Article 107 TFEU is, in principle, prohibited and must be made the subject of a recovery order.

409 Second and in any event, it must be noted that, as the Commission has observed, there was no objective fact on the basis of which the Grand Duchy of Luxembourg or FFT were entitled to conclude that the Commission would not apply Article 107 TFEU to tax rulings. First, it is evident from the Commission's practice in taking decisions, to which it refers in footnote 71 of the contested decision and the validity of which is not disputed by the Grand Duchy of Luxembourg, that the Commission has previously examined the compatibility of tax rulings with Article 107 TFEU. Second, the Grand Duchy of Luxembourg does not dispute that the Commission has already examined individual tax measures and has used the arm's length principle to order the recovery of aid.

410 In those circumstances, the application alone of Article 107 TFEU to the tax ruling at issue does not constitute a breach of the principle of legal certainty. Accordingly, it is not possible properly to rely upon any breach of that principle in order to justify non-recovery of the aid resulting from the tax ruling at issue, pursuant to Article 16(1) of Regulation 2015/1589.

411 The other arguments put forward by the Grand Duchy of Luxembourg and Ireland are not persuasive.

412 First of all, inasmuch as the Grand Duchy of Luxembourg maintains that the framework used by the Commission to analyse FFT's tax base was not sufficiently foreseeable, that it is necessary to display flexibility in not requiring an unrealistic level of precision and that it cannot be concluded that there was bad faith, it should be recalled that the Member States have a margin of appreciation in determining transfer pricing, and that it is only if the Commission finds an error in the determination of that pricing, which is such that that transfer pricing does not represent a reliable approximation of a market-based outcome, that it is entitled to identify an aid measure (see paragraph 204 above). In the present case, the Court has found that the Commission was fully entitled to conclude that the Grand Duchy of Luxembourg had endorsed, by the tax ruling at issue, errors in the methodology for determining FFT's remuneration the effect of which was that the transfer price did not reflect the prices that would have been negotiated under market conditions. In those circumstances, it cannot be concluded that the Commission required an unrealistic level of precision, or that its analytical framework is unforeseeable. The Grand Duchy of Luxembourg cannot therefore properly claim that it was not foreseeable that the Commission would make a finding of aid and order its recovery.

413 Next, in so far as the Grand Duchy of Luxembourg submits that its tax ruling practice was compatible with the Code of Conduct in relation to business taxation and the OECD Guidelines, it is sufficient to note that the Commission found that, by the tax ruling at issue, which was not notified to it, the Grand Duchy of Luxembourg had granted State aid that was incompatible with the internal market within the meaning of Article 107 TFEU. In so doing, the Commission did not call into question the tax ruling practice as such. Moreover, the existence of State aid is examined in the light of the criteria laid down in Article 107 TFEU. In those circumstances, the fact that transfer pricing texts — which are not binding on the Commission — have been approved by the Council of the European Union or by the OECD has no bearing on the finding that the tax ruling at issue grants a selective advantage to FFT.

414 In addition, the Grand Duchy of Luxembourg and Ireland maintain that the application of the principle of legal certainty may require the retroactive effect of an act to be limited if there are serious economic risks and if the interested parties are acting in good faith, conditions that are met in the present case. In so far as the Grand Duchy of Luxembourg raises that argument in order to challenge the recovery of the aid at issue, it is sufficient to recall that an order for recovery does not constitute the retroactive implementation of an act. Removing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful and seeks to re-establish the previous situation (judgment of 19 October 2005, *CDA Datenträger Albrechts* v *Commission*, T-324/00, EU:T:2005:364, paragraph 77 and the case-law cited).

415 In any event, in so far as the Grand Duchy of Luxembourg submits that the contested decision would have serious economic repercussions or cause serious difficulties for it and for other Member States, as has been observed in particular by representatives of the United States of America, it must be noted

that Article 16(1) of Regulation 2015/1589 does not provide for aid that has been declared incompatible to be unrecoverable for that reason. Moreover, none of the arguments raised by the Grand Duchy of Luxembourg establishes that such serious economic repercussions exist. It is clear that the recovery of the aid at issue cannot, as such, have negative economic effects for the Grand Duchy of Luxembourg, since the sums recovered are allocated to its public finances. Further, contrary to what the Grand Duchy of Luxembourg seems to contend, as such, recovery from FFT of the aid received by FFT pursuant to the tax ruling at issue cannot have the direct effect of possibly 'calling into question a very large number of tax rulings in the Grand Duchy of Luxembourg and potentially thousands in all the other Member States'. The mere fact that the Commission has called into question a tax ruling that grants a selective advantage to an undertaking means only that that tax ruling, issued contrary to Article 107 TFEU, will be subject to recovery, but not that all tax rulings, including those that do not constitute State aid, will be subject to recovery.

416 Therefore, the contested decision cannot be considered to have novel or serious consequences for international taxation, as the Commission has always had the power to investigate whether any tax measure constitutes State aid within the meaning of Article 107 TFEU.

417 Last, in so far as Ireland submits, in essence, that the Commission could not suggest, as it did in the contested decision, that if the Commission does not identify the amount of aid, the Member State is to contact it to determine the amount, suffice it to note that, in the present case, the Grand Duchy of Luxembourg has neither claimed nor established that the Commission's findings, in recital 311 of the contested decision, with respect to the methodology for calculating the tax payable by FFT were so imprecise that it would have been impossible to calculate the amount of aid received without contacting the Commission, and thus that the contested decision created a legal uncertainty. On the contrary, the Grand Duchy of Luxembourg acknowledges having estimated the amount of the aid to be recovered as EUR 23.1 million. That argument must therefore be rejected as unfounded.

418 In the light of the above, the first part of the series of pleas concerning recovery must be rejected as unfounded.

2. Second part, alleging infringement of Regulation 2015/1589 in that recovery of the alleged aid at issue is contrary to the rights of the defence

419 The Grand Duchy of Luxembourg submits that, in accordance with the Commission's practice in taking decisions, where the amount of the aid cannot be assessed, it is not appropriate to order recovery. Where it is not possible to quantify the aid precisely, or to identify criteria by which a Member State, in conjunction with the Commission, could quantify it precisely, the Member State's rights of defence are infringed, precluding recovery.

420 In that regard, the Grand Duchy of Luxembourg states that it has admittedly required the beneficiary of the alleged aid to pay an amount into an escrow account. That amount was calculated according to the information given by the Commission in recital 311 of the contested decision, and it was made clear that that calculation was without prejudice to the challenge to the Commission's methodology. However, the Grand Duchy of Luxembourg considers that that calculation is completely artificial in that it would be impossible to quantify the alleged aid precisely, 'without resorting to the Commission's entirely arbitrary assessments in this case'. It maintains that there is not, in essence, one correct transfer price, according to the OECD and the Commission, but a broad range of correct prices. Further, the Grand Duchy of Luxembourg submits that it has no real flexibility to deviate from the methodology proposed by the Commission in the contested decision.

421 The Commission contests those arguments.

422 In the contested decision, the Commission found first of all in recital 367 that, according to the case-law, although EU law does not require the exact amount of the aid to be recovered to be quantified, it is sufficient for the Commission's decision to include information enabling the addressee of the decision to work out that amount itself without overmuch difficulty. The Commission went on to explain that it had identified, in recital 311 of the contested decision, a methodology for eliminating the selective advantage granted to FFT if the Grand Duchy of Luxembourg chose to use the TNMM, while also mentioning that the Grand Duchy of Luxembourg could use an alternative method within the deadline for the implementation of the decision (recitals 367 to 369 of the contested decision).

423 In the present case, first, it must be noted that the Grand Duchy of Luxembourg does not dispute the Commission's assessment that it is apparent from the judgment of 18 October 2007, *Commission* v *France* (C-441/06, EU:C:2007:616, paragraph 29 and the case-law cited), that a Commission decision does not necessarily have to indicate the amount of aid to be recovered if it includes information enabling the Member State to work out that amount itself without overmuch difficulty.

424 Second, the Grand Duchy of Luxembourg does not claim that, in the present case, the contested decision failed to provide information enabling it to work out the amount to be recovered itself. It thus acknowledges having calculated and assessed that amount as EUR 23.1 million, for the purpose of its recovery from FFT. Moreover, far from considering the Commission's method of calculation to be imprecise, it merely submits, in essence, that that method does not give it 'real flexibility to deviate from the Commission's dogmatic approach'. In so doing, the Grand Duchy of Luxembourg recognises, at least implicitly, that that method is sufficiently precise to enable it to calculate the amount of aid to be recovered.

425 In those circumstances, the Commission cannot be accused of having infringed the rights of defence of the Grand Duchy of Luxembourg by failing to indicate the amount of aid to be recovered in the contested decision.

426 None of the arguments advanced by the Grand Duchy of Luxembourg is liable to undermine that conclusion.

427 First, in so far as the Grand Duchy of Luxembourg submits that the fact that it asked FFT to pay an amount of EUR 23.1 million into an escrow account is without prejudice to the fact that it challenges the Commission's method of calculation, that argument must be rejected as ineffective. The Grand Duchy of Luxembourg has not established that the contested decision is insufficiently precise to the extent that it is unable to determine the amount that must be recovered. It merely challenges the methodology used by the Commission for the purposes of calculating the amount of aid to be recovered, which it describes as arbitrary. The question as to whether or not the methodology is correct is unconnected with infringement of the rights of the defence, to which the second part of the fifth series of pleas relates.

428 Next, in so far as the Grand Duchy of Luxembourg maintains that, by identifying a 'broad range' of possible amounts, the contested decision fails to comply with the requirement that the amount of the aid be identified relatively precisely, it is sufficient to note that, by identifying a method which was followed by the Grand Duchy of Luxembourg, the Commission satisfied the condition set out in the case-law mentioned in paragraph 423 above, according to which the method must enable the amount to be recovered to be determined without difficulty. Moreover, the range proposed by the Commission does not relate to the amount of aid to be recovered but to the amount it considers appropriate for FFT's tax base. That information is sufficiently precise to enable the Grand Duchy of Luxembourg to calculate the amount of aid to be recovered. Furthermore, the fact that the Commission confirmed that other methods could have resulted in other amounts and that it provided an opportunity to propose an alternative method for calculating the amount to be recovered does not affect the fact that the contested decision contains sufficiently precise information regarding recovery, nor in itself prevent recovery of the aid.

429 In those circumstances, the second part of the fifth series of pleas relating to recovery, and this series as a whole, must be rejected as unfounded.

430 It follows from all of the above considerations that the actions in Cases T-755/15 and T-759/15 must be dismissed.

IV. Costs

A. In Case T-755/15

431 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Grand Duchy of Luxembourg has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission, in accordance with the form of order sought by the Commission.

432 Under Article 138(1) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs. Ireland shall therefore bear its own costs.

B. In Case T-759/15

433 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since FFT has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission, in accordance with the form of order sought by the Commission.

434 Under Article 138(1) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs. Ireland shall therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Seventh Chamber, Extended Composition),

hereby:

1. **Joins Cases T-755/15 and T-759/15 for the purposes of the judgment;**

2. **Dismisses the actions;**

3. **Orders the Grand Duchy of Luxembourg to bear its own costs and to pay those incurred by the European Commission in Case T-755/15;**

4. **Orders Fiat Chrysler Finance Europe to bear its own costs and to pay those incurred by the Commission in Case T-759/15;**

5. **Orders Ireland to bear its own costs.**

Van der Woude Tomljenović Bieliūnas

Marcoulli Kornezov

Delivered in open court in Luxembourg on 24 September 2019.

E. Coulon
Registrar

M. van der Woude
President

Table of contents

I. Background to the dispute 2

A. The tax ruling issued to FFT by the Luxembourg tax authorities 2

B. The administrative procedure before the Commission 2

C. The contested decision 3

1. Description of the contested measure 3

2. Description of the Luxembourg rules on transfer pricing 4

3. Description of the OECD Guidelines 4

4. Assessment of the contested measure 5

II. Procedure and forms of order sought 9

A. The written part of the procedure and the forms of order sought in Case T-755/15 9

1. Composition of the formation of the Court and priority treatment 9

2. Request that the case be dealt with under the expedited procedure 10

3. Interventions 10

4. Applications for confidential treatment 10

5. Forms of order sought 10

B. The written part of the procedure and the forms of order sought in Case T-759/15 11

1. Composition of the formation of the Court and priority treatment 11

2. Request that the case be dealt with under the expedited procedure 11

3. Interventions 11

4. Applications for confidential treatment 12

5. Forms of order sought 12

C. Joinder for the purposes of the oral part of the procedure, and the oral part of the procedure in Cases T-755/15 and T-759/15 12

1. Joinder 12

2. Oral part of the procedure in Cases T-755/15 and T-759/15 13

III. Law 13

A. Joinder of the cases for the purposes of the present judgment 13

B. Pleas in law relied on and the structure of the examination of the present actions 13

C. First series of pleas, alleging infringement of Articles 4 and 5 TEU, in so far as the Commission has allegedly engaged in tax harmonisation in disguise 15

D. Second series of pleas, alleging the absence of an advantage 17

1. Preliminary observations 17

2. The Commission's principal line of reasoning, that the tax ruling at issue derogated from the general Luxembourg corporate income tax system 18

(a) Pleas alleging an error in the application of the arm's length principle in the monitoring of State aid 18

(b) Plea regarding an incorrect method of calculation in the determination of FFT's remuneration 27

(1) Preliminary observations 27

(2) The first error, relating to the failure to take into consideration the whole of FFT's equity 30

(i) Observations on the tax ruling at issue 30

(ii) The possibility in the OECD Guidelines and in the Circular of segmenting capital 31

(iii) Whether the segmentation of the capital is appropriate 33

(3) The second error, relating to the taking into consideration of the hypothetical regulatory capital 35

(4) The fourth error, relating to the failure to take FFT's shareholdings into consideration 36

3. The Commission's subsidiary line of reasoning according to which the tax ruling at issue derogated from Article 164(3) of the Tax Code and from the Circular 40

4. Plea alleging the lack of any advantage at group level 41

E. Third series of pleas, concerning the non-selectivity of the advantage granted to FFT 45

F. Fourth series of pleas, concerning a restriction of competition 50

G. Fifth series of pleas, relating to recovery of the aid 53

1. First part, alleging infringement of Regulation 2015/1589 in that recovery of the alleged aid at issue is incompatible with the principle of legal certainty 54

2. Second part, alleging infringement of Regulation 2015/1589 in that recovery of the alleged aid at issue is contrary to the rights of the defence 56

IV. Costs 58

A. In Case T-755/15 58

B. In Case T-759/15 58