

# ECJ Advocate General Calls for Annulment of State Aid Decisions Made Concerning Engie Group

4 May 2023

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On 4 May 2023, Advocate General (AG) Kokott of the Court of Justice of the European Union (ECJ) gave her opinion in the case of *Engie Global LNG Holding and Others v. Commission* ([Case C-451/21 P](#)) and *Grand Duchy of Luxembourg and Others v. Commission* ([Case C-454/21 P](#)).

(a) Facts. On 20 June 2018, the Commission ruled that Luxembourg had granted the Engie group unlawful state aid in connection with restructuring operations in Luxembourg (For details, see [European Commission: Luxembourg provided illegal State aid to Engie \(20 June 2018\)](#)). According to the Commission, the group had obtained tax rulings, resulting in a tax treatment that left almost all profits of two subsidiaries in Luxembourg untaxed.

Although the operating subsidiaries were taxed at a low rate under a tax base agreement, the parent companies benefited from this tax exemption under the group relief regime.

Consequently, the Commission held that Luxembourg granted a selective advantage to the Engie group in the derogation of the national tax law.

The Commission noted that under Luxembourg national law a tax exemption at the level of a parent company is only granted after taxation at the level of the subsidiary company.

In addition, the Commission held that Luxembourg should have applied an anti-abuse rule.

On 21 May 2021, the General Court of the European Union in Luxembourg e.o./Commission, [T-516/18](#) and [T-525/18](#) upheld the Commission's view. For details, see [General Court Decides on State Aid Cases on Non-Application of Anti-Abuse Provisions to Engie's Intra-group Financing Structures: Luxembourg v Commission \(Cases T-516/18 and T-525/18\) \(12 May 2021\)](#).

The Engie group and Luxembourg thereupon lodged appeals before the Court of Justice.

(b) Issue. The AG opinion focuses on the selectivity of the alleged aid.

(c) Opinion. The AG opined that the judgment of the General Court and the Commission decision should be annulled.

The AG first emphasised that tax rulings do not constitute illegal state aid but are an important instrument for creating legal certainty. They do not constitute state aid if they are open to all taxpayers and are consistent with the relevant national tax law. In this context, the AG noted that the Commission and the General Court started from an incorrect frame of reference. They wrongly assumed that the

Luxembourg tax law contained a correspondence principle according to which a participation exemption at the level of the parent company is only granted if the underlying profits were taxed at the level of the subsidiary.

However, such a correspondence is not apparent and cannot be interpreted into Luxembourg law, merely because this might be more advantageous.

The AG also favours a restricted standard of review of tax law decisions taken by the tax authorities for both tax rulings and anti-abuse rules. This review is limited to a plausibility check.

Concerning selectivity, the AG held that only clearly incorrect tax assessments in favour of the taxpayer constitutes a selective advantage and can be considered a violation of state aid law.

A broader review by the Commission and EU Courts would imply that the Commission would become a supreme tax inspector and the EU Courts supreme tax courts. This would impinge on the Member States' fiscal autonomy in the field of non-harmonised taxes.

For the Engie case, the AG views that the tax rulings are not manifestly erroneous and that a manifest misapplication of abuse-rules only be assumed if one cannot plausibly explain why the case in question should not be considered an abuse.

The AG notes that in the present case, the existence of abuse of legal structuring possibilities under Luxembourg law is not obvious and has not been established by the Commission.