EUROPEAN
COMMISSION

Brussels, 20.6.2018
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COMMISSION DECISION

of 20.6.2018

ON STATE AID SA.44888 (2016/C) (ex 2016/NN) implemented by Luxembourg in favour of ENGIE

(Text with EEA relevance)

(Only the French version is authentic)

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In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […]		PUBLIC VERSION This document is made available for information purposes only.

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (“the Treaty”), and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above[1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter of 23 March 2015, the Commission sent a request for information to the Grand Duchy of Luxembourg (“Luxembourg”)[2] regarding its tax ruling practice in relation to the Engie group (then GDF Suez).[3] In that letter, the Commission requested Luxembourg to provide all tax rulings granted to any entity of that group from 2004 until the date of the letter, addressed to that group or to any entity of that group which were in place at that time or which had been in place in the previous 10

[1] OJ C 36, 3.02.2017, p. 13.

[2] That letter was sent under reference SA.37267 (2013/CP) - Pratiques en matière de ruling fiscal - Luxembourg.

[3] In 2015, the GDF Suez group was renamed Engie; see Engie's website (http://www.engie.com/en/group/history-engie-group/).

years, as well as annual accounts of that group and the legal entities of that group for 2011, 2012 and 2013, and copies of tax declarations.

(2) On 25 June 2015, Luxembourg replied to that request by submitting information about the tax rulings issued by the Luxembourg tax administration in favour of several companies of the Engie group resident in Luxembourg, including GDF Suez LNG Supply S.A. ("LNG Supply")[4] and GDF Suez Treasury Management S.à.r.l. ("GSTM").[5] In particular, Luxembourg provided two tax ruling requests and their respective approvals that concerned two almost identical intra-group transactions related to transfers of assets from other Engie group companies to, respectively, LNG Supply and GSTM. In both cases, the transfers were financed by interest-free mandatorily convertible loans denominated as "ZORA"[6] (respectively, the "LNG ZORA" and the "GSTM ZORA"; collectively, the "ZORAs") and by Prepaid Forward Sale Contracts (respectively the "LNG Forward Contract" and the "GSTM Forward Contract"; collectively, the "Forward Contracts").

(3) By letter of 1 April 2016, the Commission indicated that, based on the information submitted by Luxembourg, it could not exclude that the tax rulings issued in favour of those Engie group companies may have included incompatible State aid. Consequently, it requested Luxembourg to provide reasons why those measures would not be selective or why they could otherwise be justified under Union State aid law and to submit further information and clarifications.

(4) By letter of 3 May 2016, the Commission reminded Luxembourg to provide the information referred to in recital (3).

(5) On 23 May 2016, Luxembourg replied to the Commission's request for information of 1 April 2016.

(6) On 19 September 2016, the Commission adopted the decision to open a formal investigation procedure under Article 108(2) of the Treaty on the tax treatment granted to Engie on the basis of the tax rulings issued by Luxembourg on the grounds that it could constitute State aid within the meaning of Article 107(1) of the Treaty (the "Opening decision").[7]

(7) On 21 November 2016, Luxembourg submitted by letter its comments on the Opening decision and the requested information.

(8) On 3 February 2017, the Opening decision was published in the *Official Journal of the European Union*.[8] The Commission invited interested parties to submit their comments on the measure.

(9) On 27 February 2017, the Commission received observations from Engie on the Opening decision. By letter of 10 March 2017, the Commission forwarded them to Luxembourg, which was given the opportunity to react.

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4 Renamed in 2015 as Engie LNG Supply, S.A. "LNG" stands for liquefied natural gas.

5 Renamed in 2015 as Engie Treasury Management S.à.r.l.

6 Although the precise meaning of the acronym ZORA is not specified in the file, and was not clarified by Luxembourg, the Commission presumes it to stand for "*Zero-intérêts Obligation Remboursable en Actions*".

7 Commission decision of 19 September 2016 in State aid SA.44888 (2016/NN) (ex 2016/EO), "Possible State aid in favour of GDF SUEZ", OJ C 36, 3.02.2017, p. 13.

8 Cf. footnote 1.

(10) By letter of 22 March 2017, following observations by Luxembourg and Engie, the Commission requested Luxembourg to provide additional information.

(11) On 10 April 2017, Luxembourg submitted a letter indicating that the observations made by Engie are in line with its own observations.

(12) On 12 May 2017, Luxembourg submitted the information requested on 22 March 2017.

(13) On 1 June 2017, a meeting was held between the Commission services, Engie and Luxembourg. The content of the meeting was recorded in minutes agreed between the Commission and Luxembourg. Following the meeting, Luxembourg sent additional information on 16 June 2017.

(14) By letter of 11 December 2017, following observations made by Luxembourg and Engie during the meeting of 1 June 2017, the Commission clarified certain aspects of the investigation ("Letter of 11 December 2017") and requested additional information. The Commission invited Luxembourg to forward a copy of that letter to Engie.

(15) On 31 January 2018, Luxembourg and Engie submitted their observations to the Letter of 11 December 2017. On the same date, Luxembourg also submitted the information requested in the Letter of 11 December 2017.

2. BACKGROUND

2.1. The Engie Group

(16) The Engie group (formerly GDF Suez group) consists of Engie S.A., a company established in France, and all companies directly or indirectly controlled by Engie S.A. (collectively referred to as "Engie"). Engie is the result of a merger in 2008 between the French groups GDF and Suez (formerly, Lyonnaise des Eaux).[9] Engie is headquartered in France. Engie S.A. is listed on the Paris, Brussels and Luxembourg stock exchanges.[10]

(17) Engie is present in three main sectors: power production, natural gas and liquefied natural gas, and energy efficiency services. Engie is mainly active in the production and supply of energy[11] and energy trading, exploration, production, supply, transportation and distribution of natural gas, energy efficiency services, and energy infrastructure.

(18) Engie employs 153 090 people worldwide in 70 countries.[12] In 2016, the revenues of Engie amounted to EUR 66.6 billion.[13] Of the total revenues recorded by the group,

[9] See Engie's website (http://www.engie.com/en/group/history-engie-group/).

[10] See Engie's website (http://www.engie.com/en/journalists/press-releases/gdf-suez-becomes-engie/).

[11] In 2014, it operated close to 650 power plants globally (Engie, Key Figures, http://library.engie.com//uid_3b0d9abd-abf7-404d-913f-0c30f10eb8d0/beevirtua/beevirtua.html#app=3d20&9557-source=xmlConfs/init.xml&adf3-lang=en&ccb3-pageId=0).

[12] At December 31 2016 (http://www.engie.com/wp-content/uploads/2017/03/chifres-cles-2016-v1_va.jpg).

[13] ENGIE, Key Figures (http://www.engie.com/wp-content/uploads/2017/03/chifres-cles-2016-v1_va.jpg).

EUR 52.2 billion were realised in Europe.[14] In 2016, 67.3% of the group's earnings before interest, tax, depreciation and amortisation (EBITDA) were generated in Europe.[15]

(19) In Luxembourg, Engie is present through various legal entities, some of which are involved in the transactions which are the object of the contested tax rulings. *Compagnie Européenne de Financement C.E.F. S.A.* ("CEF")[16] is an Engie subsidiary incorporated in Luxembourg in 1933. The purpose of the company is the acquisition of participating interests in Luxembourg and foreign entities and the management, exploitation and control of such interests.[17] It is primarily responsible for providing inter-company guarantees and loans for subsidiaries of the group. CEF's income is derived from the interest and fees charged for the provision of these loans and guarantees.[18]

(20) GSTM is a Luxembourg company wholly-owned by CEF. It conducts treasury management and financing activities for Engie from Luxembourg. According to the tax ruling request of 15 June 2012, "*in general, GSTM grants loans in various denominations (notably EUR and USD) to related companies and carries out a cash pooling activity […]. The cash pooling activity of GSTM generally varies between EUR [2-7] and EUR [7-12] billion*".[19]

(21) GDF Suez LNG Holding S.à.r.l. ("LNG Holding")[20] is an Engie subsidiary incorporated in Luxembourg in 2009. The object of the company is the acquisition of participating interests in Luxembourg and foreign entities and the management of such participations.[21] LNG Holding is wholly-owned by CEF.

(22) LNG Supply is wholly owned by LNG Holding. It is active in the purchase, sale and trading of LNG, gas and gas derivative products, and also in the shipping of LNG. It has a significant number of contracts in place with international energy companies.[22] In 2018, Engie announced its intention to sell parts of its LNG business, including LNG Supply, to Total S.A.[23]

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14 ENGIE, Results 2016, Appendices FY 2016 (http://www.engie.com/en/investors/results/2016-results/). EUR 3.8 billion were generated in Latin America, EUR 4.7 billion in North America, EUR 5.5 billion in Asia, Middle East and Oceania and EUR 0.3 billion in Africa.

15 *Ibid*. 15.1 % in Latin America, 5.9 % in North America and 11.6 % in the rest of the world.

16 Renamed Engie Invest International S.A. in 2015.

17 See CEF unaudited statutory accounts as of 31 December 2014.

18 See https://www.engie.com/wp-content/uploads/2015/06/gsii-co.pdf.

19 See tax ruling request of 15 June 2012, page 2.

20 Renamed Engie LNG Holding S.à.r.l. in 2015.

21 See LNG Holding statutory accounts as of 31 December 2013.

22 According to the tax ruling request of 9 September 2008, the main assets at the time were: an LNG terminal capacity agreement, a swap agreement with respect to this terminal, an LNG sales and purchase agreement with Yemen LNG LLC, long term charter agreements and storage agreements. The complete list of transferred assets is described in Annex 1 of the Business Transfer Agreement of 30 October 2009 between GDF Suez LNG Trading S.A and LNG Supply.

23 On 11 April 2018, the Commission adopted a Decision, pursuant to Article 6(1)(b) of Council Regulation No 139/2004, OJ L 24, 29.1.2004, p. 1, not to oppose to the acquisition by Total S.A. of sole control over parts of the LNG business of Engie, including LNG Supply.

2.2. The contested tax rulings

2.2.1. Introduction

(23) The present Decision concerns two sets of tax rulings issued by the Luxembourg tax administration in favour of Engie group companies (the "contested tax rulings"). The contested tax rulings concern two similar intragroup transactions implemented by Engie between different companies of the group. In both cases, Engie transfers a set of assets constituting a fully functional business activity to a subsidiary in Luxembourg which will subsequently run this business activity.

(24) The payment of the price by the subsidiary is financed by means of a 15-year interest-free mandatorily convertible loan (the ZORA) granted by an intermediary group company resident in Luxembourg. The ZORA does not bear any periodic interest but, at conversion, the subsidiary will pay to the lender shares representing the nominal of the ZORA plus a "bonus" consisting in all the profits realised by the subsidiary during the life of the ZORA minus a limited margin[24] agreed with the Luxembourg tax authorities (the amount of this "bonus" is referred to in the contested rulings and tax returns of the companies as the "ZORA Accretions").[25]

(25) In turn, the intermediary entity simultaneously finances this loan by means of a Prepaid Forward Sale Contract (the Forward Contract) entered into with a holding also resident in Luxembourg which is the sole shareholder of both the subsidiary and the intermediary entity. Under the Forward Contract, the holding pays to the intermediary company an amount equal to the nominal of the ZORA against the acquisition of the rights to the shares that the subsidiary will issue at conversion of the ZORA. Therefore, if the subsidiary realises profits during the life of the ZORA, the holding will receive at conversion of the ZORA the shares incorporating the value of the ZORA Accretions. Consequently, the holding provides to the subsidiary the financing for the acquisition of the assets by means of the Forward Contract and the ZORA.

(26) The contested tax rulings agree to the following tax treatment of the companies involved: the subsidiary will deduct every year provisions for the ZORA Accretions to be paid at conversion. Therefore, the subsidiary will not be taxed except for the limited margin agreed with the tax authorities. When the holding realises the ZORA Accretions,[26] this profit will be tax exempt pursuant to the application of the Luxembourg participation exemption regime, which allows for the non-taxation, under certain conditions, of profit stemming from participations held in other companies. The intermediary entity is not taxed either since the profit realised from the conversion of the ZORA (the ZORA Accretions) is compensated by a loss of the same amount resulting from the Forward Contract.[27] The final result is that the ZORA Accretions are deducted at the level of the subsidiary and that the same

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[24] Less than 1% of the profit actually realised by the subsidiary from its commercial activities.

[25] In case the subsidiary realises losses during the life of the ZORA, the ZORA Accretions will be negative and will reduce the nominal of the ZORA.

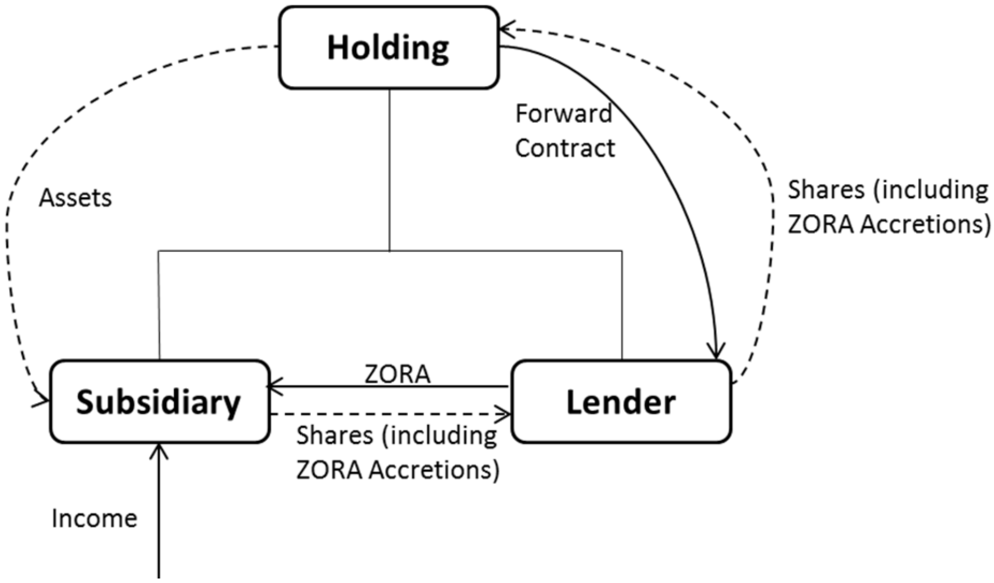
[26] For instance, because it cancels the shares it receives under the Forward Contract.

[27] Although the contested tax rulings stipulated that the intermediary entity would not be taxed in application of a special provision under Luxembourg tax law (Article 22bis) that allows the deferment of taxation of capital gains resulting from the conversion of loans into participations, Luxembourg informed thereafter that in the only conversion which has taken place until the date of this Decision, the companies did not make use of this provision. In any case, irrespective of the application of this special provision, the intermediary entity will not realise any profit at conversion.

amount is not subject to taxation either at the level of the holding, as it is considered a tax exempt income. Therefore the ZORA Accretions, which represent virtually all the profit realised by the subsidiary during the life of the ZORA, will remain untaxed in Luxembourg.[28]

(27) The structure described in the recitals (23) to (26) is illustrated in Figure 1.

Figure 1. – Illustration of the structures set up in the contested tax rulings



2.2.2. Overview of the contested tax ruling

(28) This tax treatment has been endorsed in two sets of tax rulings concerning two different structures set up by Engie.

(29) The first set of tax rulings concerns the transfer of the activity concerning the purchase, sale and trading of LNG gas and gas derivative products ("LNG Business")[29] from the Luxembourg company Suez LNG Trading S.A. ("LNG Trading") to LNG Supply. It includes five tax rulings issued by the Luxembourg tax administration following tax ruling requests submitted by the tax advisor of Engie ("tax advisor") on behalf of different companies of Engie (collectively, the "LNG tax rulings").

(1) The first tax ruling was issued on 9 September 2008 ("2008 LNG tax ruling"). It follows a tax ruling request of the same date ("2008 LNG tax ruling request") concerning the tax treatment of the contracts used to finance the transfer of the LNG Business from LNG Trading to LNG Supply (the LNG ZORA and the LNG Forward Contract). The 2008 tax ruling is partially amended and/or complemented by other rulings issued by the Luxembourg tax administration.

(2) A tax ruling request dated 30 September 2008 concerning the transfer of the effective management of LNG Trading to the Netherlands. This tax ruling request was approved on the same day by the Luxembourg tax administration.

[28] In fact, the subsidiary is only taxed on less than 1% of the profit actually realised from its commercial activities.

[29] See recital (22).

(3) A tax ruling request dated 3 March 2009 ("2009 LNG tax ruling request"), partially modifying the structure set up in the 2008 LNG tax ruling request. This tax ruling request was approved on the same day by the Luxembourg tax administration.

(4) A tax ruling request dated 9 March 2012 ("2012 LNG tax ruling request"), which clarifies certain accounting terms used to determine the margin on which LNG Supply is taxed. This tax ruling request was approved on the same day by the Luxembourg tax administration.

(5) Finally, a tax ruling request dated 20 September 2013 with the object of clarifying the tax treatment of a partial conversion of the LNG ZORA ("LNG conversion tax ruling request"). This tax ruling request was accepted by the Luxembourg tax administration by letter of 13 March 2014 ("LNG conversion tax ruling").

(30) The second set of tax rulings concerns the transfer of the treasury management and financing activities ("Financing and Treasury Business")[30] from CEF to GSTM. It includes two tax rulings issued by the Luxembourg tax administration following tax ruling requests submitted by the tax advisor on behalf of different companies of Engie (collectively, the "GSTM tax rulings").

(1) The first tax ruling was issued by the Luxembourg tax administration on 9 February 2010 ("2010 GSTM tax ruling"). It follows a tax ruling request of the same date ("2010 GSTM tax ruling request") concerning the tax treatment of the contracts used to finance the transfer of the Financing and Treasury Business from CEF to GSTM (the GSTM ZORA and the GSTM Forward Contract).

(2) The 2010 GSTM tax ruling was complemented by a tax ruling request dated 15 June 2012 concerning, *inter alia*, a potential increase in the amount of the GSTM ZORA ("2012 GSTM tax ruling request"). This tax ruling request was approved on the same day by the Luxembourg tax administration ("2012 GSTM tax ruling").

(31) The holdings in each of the structures set up in the LNG tax rulings and in the GSTM tax rulings are, respectively, LNG Holding and CEF (collectively, the "Holdings"). The intermediary entities granting the ZORAs are, respectively, GDF Suez LNG (Luxembourg) S.à.r.l. ("LNG Luxembourg") and Electrabel Invest Luxembourg SA ("EIL", collectively with LNG Luxembourg, "Lenders"). Finally, the subsidiaries acquiring and operating the LNG Business and the Financing and Treasury Business are, respectively, LNG Supply and GSTM (collectively the "Subsidiaries").

2.2.3. Detailed description of the LNG tax rulings

2.2.3.1. The transactions described in the LNG tax rulings

(32) According to the 2008 LNG tax ruling request, LNG Trading will incorporate two new taxable Luxembourg companies: LNG Luxembourg and LNG Supply. The 2008 LNG tax ruling request stipulated that the LNG Business would be sold to LNG Luxembourg which would in turn sell it to LNG Supply.[31] However, this structure was later modified: according to the 2009 LNG tax ruling request, CEF acquired first

[30] See recital (20).
[31] See 2008 LNG tax ruling request, Section 1.

LNG Trading's shares, and incorporated LNG Luxembourg, LNG Supply and LNG Holding. LNG Holding took then the role of LNG Trading[32] in the structure.[33]

(33) The structure is implemented as follows:

(1) LNG Supply acquires LNG Trading's business activity (the LNG Business) for an estimated price of approximately USD 750 million.

(2) LNG Supply finances the purchase price by means of an USD denominated 15-year interest-free mandatorily convertible loan (the LNG ZORA) granted by LNG Luxembourg. At conversion,[34] LNG Supply issues shares ("LNG Supply Shares") incorporating the nominal amount of the ZORA plus/minus the ZORA Accretions.

(3) In turn, LNG Luxembourg finances the investment in the LNG ZORA by means of the LNG Forward Contract entered into with LNG Holding. Under that contract, LNG Luxembourg agrees to transfer to LNG Holding the LNG Supply Shares. The price for the LNG Supply Shares corresponds to the nominal amount of the LNG ZORA.[35]

2.2.3.2. The agreements signed by the parties

(34) Luxembourg has submitted copies of the agreements which reflect the implementation by Engie of the transactions described in the LNG tax rulings:

(1) A Business Transfer Agreement entered into by LNG Trading and LNG Supply on 30 October 2009 ("LNG Transfer Agreement")[36] whereby the former agrees to transfer to the latter the LNG Business for a price of USD 657 million[37] against two promissory notes issued by LNG Supply (as borrower) in favour of LNG Trading (as lender) of, respectively, USD 11 000 000 and USD 646 000 000.[38]

(2) A Mandatorily Exchangeable Loan Agreement entered into by LNG Luxembourg and LNG Supply on 30 October 2009 ("LNG ZORA Agreement").[39] Under this agreement, LNG Luxembourg grants a loan to LNG Supply[40] repayable by the issuance of the LNG Supply Shares.[41] The loan has a

32 The effective management of LNG Trading was transferred to the Netherlands (see tax ruling request of 30 September 2008). The company was subsequently liquidated on 1 October 2012 (see letter sent by Luxembourg on 25 June 2015 under reference SA 37.267 (2013/CP) - Pratiques en matière de ruling fiscal – Luxembourg).

33 This change of structure in the transfer of assets has however no impact on the tax treatment of the different companies.

34 Which takes place, at the latest, at the expiry of the ZORA, see recital (34)(2).

35 The detailed implementation of the structure was as follows: the LNG Business was acquired by LNG Supply against two receivables, one of USD *[7-12]* million, and one representing the fair market value of the LNG Business minus USD *[7-12]* million. The second receivable was transferred by LNG Trading to LNG Holding, which in turn transferred it to LNG Luxemburg against the LNG Forward Contract. LNG Luxemburg transferred the receivable to LNG Supply against the LNG ZORA (see 2009 tax ruling request, Section 1).

36 Submitted by Luxembourg on 16 June 2017.

37 See LNG Transfer Agreement, clause 2.1.

38 See LNG Transfer Agreement, clauses 2.1, 3, and 4.3.

39 Submitted by Luxembourg on 21 November 2016.

40 See LNG ZORA Agreement, clause 2.

41 See LNG ZORA Agreement, clause 5.

maximum term of 15 years, i.e. it expires on 30 October 2024.[42] At the end of that period, it shall be converted into shares, unless converted into shares earlier by any party with the written consent of the other party.[43] The "issue price" of the loan is USD 646 million.[44] The conversion price will be equal to the "issue price" plus the ZORA Accretions accumulated until conversion.[45] As explained in 2.2.3.6, the LNG ZORA was partially converted in 2014.

(3) A Prepaid Forward Share Purchase Agreement entered into by LNG Holding and LNG Luxembourg on the same date (the LNG Forward Contract).[46] According to this agreement, LNG Holding purchases all the rights of LNG Luxembourg in the LNG Supply Shares for a price of USD 646 million,[47] i.e. the same amount as the "issue price" of the LNG ZORA. LNG Supply Shares are to be transferred to LNG Holding on the date of their issuance.[48]

2.2.3.3. Tax treatment of LNG Supply

(35) According to the 2008 LNG tax ruling request, as accepted by the Luxembourg tax administration, the yearly profit that LNG Supply generates will be equal to a margin agreed with the Luxembourg tax administration ("LNG Margin"). Therefore, LNG Supply will only be taxed on that margin. The difference between the profit actually generated each year by LNG Supply and the LNG Margin (the ZORA Accretions) is considered a deductible expense related to the LNG ZORA.[49]

(36) The LNG Margin is set in the 2008 LNG tax ruling request at an amount corresponding to "*an overall net spread of [1/(50-100)%] of the value of the gross amount of assets as shown in [LNG Supply's] balance sheet, such net spread however not being lower than [0,0-0,50] % of the annual gross turn-over derived from the Enterprise*".[50] According to the 2008 LNG tax ruling request, "*the LNG Margin will qualify as arm's length*" because LNG Supply will not "*incur foreign exchange and/or bad debt risk on its trade*".[51] The 2008 LNG tax ruling request further explains that "*the [LNG Supply] gross income […], minus all operational*

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42 See LNG ZORA Agreement, clause 4.

43 See LNG ZORA Agreement, clauses 4 and 5.

44 See LNG ZORA Agreement, clause 2.

45 See LNG ZORA Agreement, clause 5.2, cf. with definitions in clause 1.

46 Submitted by Luxembourg on 21 November 2016.

47 See LNG Forward Contract, clause 2. The difference between the price of the transfer of the LNG Assets under the Business Transfer Agreement (USD 657 million) and the "issue price" of the LNG ZORA and the price under the LNG Forward Contract (USD 646 million) corresponds to the USD 11 million promissory note issued by LNG Supply which is not included in the financing structure (see footnote 35).

48 See LNG Forward Contract, clause 3.

49 The 2008 LNG tax ruling request states that "*the ZORA will accrue to the extent of the pre-tax profits of [LNG Supply] minus a net margin […]. The increase in value of the obligation under the ZORA will lead to a corresponding deduction for [LNG Supply]*" (2008 LNG tax ruling request, page 2). This increase in the obligation is referred in the 2008 LNG tax ruling request as "accrual of the ZORA" or "expense on the ZORA".

50 The 2012 LNG tax ruling request clarifies that the "*net spread of [1/(50-100)%] of the value of the gross assets*" should be considered as referring to the average value of the assets financed by the ZORA, whereas "*gross turnover*" should be considered the total income of LNG Supply as per its accounts, including income and expenses resulting from interest expenses incurred and foreign exchange differences relating to the different activities of LNG Supply.

51 See 2008 LNG tax ruling request, page 5, paragraph 6 and, for the explanation, page 3.

expenses incurred and minus the expense on the ZORA is approximately the [LNG] Margin”.[52]

(37) In other words, before the conversion of the ZORA, the tax base of LNG Supply is limited to the LNG Margin. The conversion has no impact on the tax base of LNG Supply as the amounts of the ZORA Accretions have been deducted by LNG Supply each year before the conversion.

2.2.3.4. Tax treatment of LNG Luxembourg

(38) The 2008 LNG tax ruling request, as accepted by the Luxembourg tax administration, allows LNG Luxembourg, during the life of the LNG ZORA, either to maintain the value of the ZORA in its accounts at book value[53] or, alternatively, to increase (or decrease) its value from its acquisition price to the expected redemption price.[54] Therefore, during the lifetime of the LNG ZORA, LNG Luxembourg can choose not to book any taxable income or tax deductible expense related to the ZORA. As it will be explained in recital (52) below, LNG Luxembourg chose to maintain the value of the ZORA at book value.

(39) At conversion, LNG Luxembourg will receive the LNG Supply Shares, the value of which will incorporate the issue price of the ZORA plus the ZORA Accretions accumulated until the date of the conversion. According to the 2008 tax ruling request, the conversion is governed by the special regime laid down in Article 22bis of the Luxembourg Income Tax Code (*loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu*, “LIR”), unless LNG Supply chooses not to apply it.[55] According to this provision, the conversion of the loan into shares will not give rise to any capital gain for tax purposes.[56] Therefore, the ZORA Accretions received at conversion by LNG Luxembourg will not be subject to tax at conversion.[57]

2.2.3.5. Tax treatment of LNG Holding

(40) According to the 2008 LNG tax ruling request, as accepted by the Luxembourg tax administration, LNG Holding will record the payment under the Forward Contract in its accounts as “Financial Fixed Assets”.[58] The 2008 LNG tax ruling request explains

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52 See 2008 LNG tax ruling request, page 2. This means the ZORA Accretions could also be negative in case LNG Supply had made losses.

53 See 2008 LNG tax ruling request, page 3.

54 The 2008 LNG tax ruling request acknowledges (footnote 4) that, “*in absence of any specific requirements under Luxembourg law and to reflect the substance of the remuneration of the ZORA, it may be recommended for [LNG Luxembourg] to accrue for the income over the life of ZORA. This would result in an increase on the value of ZORA in [LNG Luxembourg]'s accounts, unless the actual value of ZORA is lower*”.

55 Article 22bis(2) LIR reads as follows: “*Par dérogation à l'article 22, alinéa 5, les opérations d'échange visées aux numéros 1 à 4 ci-dessous ne conduisent pas à la réalisation des plus-values inhérentes aux biens échangés, à moins que, dans les cas visés aux numéros 1, 3 et 4, soit le créancier, soit l'associé ne renoncent à l'application de la présente disposition : 1. lors de la conversion d'un emprunt : l'attribution au créancier de titres représentatifs du capital social du débiteur. En cas de conversion d'un emprunt capitalisant convertible, l'intérêt capitalisé se rapportant à la période de l'exercice d'exploitation en cours précédant la conversion est imposable au moment de l'échange*”. In practice, this means that for Luxembourg tax purposes, the historical acquisition price as well as the historical acquisition date of the ZORA will be used for the shares that are issued at that time.

56 See 2008 LNG tax ruling request, paragraph 7, page 5.

57 See 2008 LNG tax ruling request, paragraph 7, page 5.

58 See 2008 LNG tax ruling request, page 3.

that those assets "*will be and will continue to be valued at cost price*".[59] Therefore, LNG Holding will not book any taxable income or any tax deductible expense before the conversion of the ZORA and the transfer by LNG Luxembourg of the newly issued LNG Supply Shares.

(41) The 2008 LNG tax ruling request also asks for confirmation that "*for purposes of Article 166 LIR […] the participation purchased by [LNG Holding] under the [LNG] Forward Contract will qualify as such <u>as per the moment the [LNG] Forward Contract is concluded</u>*"[60] and that "*any income (dividends and capital gains) derived by and from Luxembourg companies will be exempt on the basis of Article 166 LIR*".[61] As explained in Section 2.3.2, Article 166 LIR is the provision of the corporate income tax law that governs the participation exemption in Luxembourg. Under the participation exemption regime, income stemming from the participations held in other entities, such as shares, is tax exempt provided that certain conditions are met.

(42) Consequently, any taxable income related to the ownership of the LNG Supply Shares issued in the framework of the LNG ZORA conversion will be tax exempt at the level of LNG Holding provided that the requirements of Article 166 LIR are met.

2.2.3.6. The LNG conversion tax ruling

(43) According to the LNG conversion tax ruling request, as accepted by the Luxembourg tax administration, Engie would execute a first partial conversion of the LNG ZORA into shares for an amount estimated at that date of USD *[300-400]* million. On the day of the conversion, a decision would be adopted to reduce the nominal capital of LNG Supply by an amount equal to the conversion amount. According to the tax ruling request, "*[f]or [LNG Luxembourg] the Partial Conversion of the ZORA has no tax consequences*".[62] "*Due to the capital reduction by [LNG Supply], [LNG Holding] will recognise a profit equal to the difference between the nominal amount of shares converted and the conversion amount. This profit will be visible in the books of [LNG Holding] and is covered by the participation exemption*".[63] Therefore, the profit realised by LNG Holding at the moment of the cancellation of the shares due to the capital reduction will be exempted from taxation. This profit corresponds to the ZORA Accretions incorporated into the LNG Supply Shares received by LNG Holding at conversion.

2.2.3.7. Implementation of the LNG tax rulings

(44) The tax returns submitted by Luxembourg reflect the tax treatment granted to the companies involved in the transactions as described in the LNG tax rulings.

2.2.3.7.1. LNG Supply

(45) LNG Supply's 2010 statutory accounts indicate that a "*loan agreement mandatorily exchangeable into shares between LNG Luxemburg and LNG Supply*" was entered into in 2009 for an amount of USD 646 million with a 15-year maturity from 30 October 2009.[64]

[59] See 2008 LNG tax ruling request, page 3.
[60] See 2008 LNG tax ruling request, page 4 (emphasis added by the Commission).
[61] See 2008 LNG tax ruling request, page 9.
[62] See 2008 LNG conversion tax ruling request, section 3.1.
[63] See 2008 LNG conversion tax ruling request, section 3.2.
[64] See LNG Supply 2010 statutory accounts, note 9.

(46) The LNG ZORA is reported as a liability in the balance sheet and included in LNG Supply's tax return for an amount equal to the nominal of the ZORA (USD 646 million) from 2009 to 2013.[65] In 2014, the amount was reduced by USD 193.8 million to USD [300 – 600] million following the partial conversion carried out that year.[66]

(47) For each year, an amount equal to the yearly ZORA Accretions is recorded as a liability of LNG Supply[67] against the corresponding expense in the profit and loss account[68] and has consequently been deducted from LNG Supply's tax base. The accumulated ZORA Accretions reported in LNG Supply's tax returns are presented in Table 1. The reduction of the accumulated ZORA Accretions by EUR 193.8 million in 2014 is due to the impact of the partial conversion of the LNG ZORA, which is also partially offset by additional ZORA Accretions for the year.[69]

Table 1 - Accumulated ZORA Accretions recorded in LNG Supply's tax returns

	2009	2010	2011	2012	2013	2014	2015	2016
Accumulated ZORA Accretions (USD million)	10.9	46.8	165.6	[350 – 400]	[650 – 700]	[450 – 550]	0	0

(48) LNG Supply is taxed on the LNG Margin. As illustrated in Figure 2 for the year 2011,[70] the LNG Margin is calculated as [1/(50-100)%] of the total average assets of the company with a minimum of *[0,0-0,50]%* of the annual gross turnover, in line with the 2008 LNG tax ruling. The average value of assets financing the ZORA amounted in 2011 to USD 752 703 699. Therefore, the [1/(50-100)%] margin amounted to USD [100.000-150.000]. The turnover recorded was USD 1 573 579 569, therefore the margin of *[0,0-0,50]%* of this amount was USD [3.500.000-4.000.000].As such, this latter amount was deemed to be LNG Supply’s tax base for the 2011 period.[71] LNG Supply accordingly paid EUR [500.000-1.500.000] [72] of corporate income tax for tax year 2011.

65 See, for each year, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial*, Annex 1.

66 See *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial* for 2014, Annex 1.

67 See, for each year, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial*, Annex 1.

68 See, for each year, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial*, Annex 2.

69 According to the *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial* for 2014, Annex 2, the ZORA Accretion corresponding to 2014 amounted to USD [250-350] million. This means that the amount by which the accumulated ZORA Accretions were actually reduced in 2017 was USD [450-550] million (corresponding to the sum of USD [250-350] million and USD 193.8 million).

70 The figure corresponds to the calculation of the LNG Margin as reflected in Annex 3 to the *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial* for 2011. A similar calculation can be found in the tax returns of other years.

71 According to the *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial* for 2011, Annex 3, this amount was converted into EUR [2 500 000-3 500 000].

72 Including EUR [100.000-300.000], for impôts commercial communal and EUR [550.000-750.000] for impôt sur le revenu des collectivités.

Figure 2 – Calculation of the tax base of LNG Supply, as presented in annex 3 to the tax return of 2011

Figure 2

Accrétion du Zora

Le montant de l´accrétion sur le Zora tel que indiqué dans les comptes annuels n´est pas conforme à aux accords préalables signé par les autorités fiscales le 9 septembre 2008 et mars 2012.

Par conséquent, un bilan fiscal a été dressé afin de tenir compte du montant correct. En effet, suivant cet accord préalable, la société n´est imposable sur la marge (voir ci-dessous).

Calcul de la marge

Marge nette [1/(50-100)%] sur la valeur des actifs bruts (càd le valeur moyenne des actifs finançant le Zora) avec un minimum de [0.0-0.5%] du chiffre d´affaires brut dérivant des actifs qui ont été transférés à la Société (càd le revenu total de la Société)

Marge minimum

Produit total	Taux	Date début	Date fin	Marge minimum (USD)
1.573.579.569	[0.0-0.5%]	01/01/11	31/12/11	[3.500.000-4.000.000]

Marge nette de [1/(50-100)%] sur la valeur moyenne des actifs finançant le Zora.

Date	Zora	
01/01/11	692.817.329	(Voir déclaration fiscale 2010)
31/12/20111	812.590.069	
Total	1.505.407.398	
Moyenne	752.703.699	

Zora	Taux	Date début	Date fin	Marge (USD)
752.703.699	[1/(50-100)%]	01/01/11	31/12/11	[100.000-150.000]

(49) According to LNG Supply's 2014 statutory accounts, the partial conversion of the LNG ZORA was split "*between a part of the nominal amount and a part of accretion*".[73] Accordingly, both the nominal of the ZORA and the accumulated ZORA Accretions were reduced in 2014 by USD 193.8 million.[74] In September 2014, LNG Supply increased its capital by USD 699.9 million[75] to partially reimburse the LNG ZORA. The LNG Supply Shares were issued at nominal value

[73] See 2014 LNG Supply statutory accounts, note 8.

[74] See recitals (46) and (47). However, as indicated in footnote 69, the amount by which the accumulated ZORA Accretions were actually reduced was USD*"[450-550]* million.

[75] The amount of USD 699.9 million includes also the ZORA Accretion corresponding to 2014 (see footnotes 69 and 74).

and were subsequently cancelled through a capital decrease at their nominal amount.[76] This conversion did not have any tax consequences for LNG Supply.

(50) In 2015, as LNG Supply was in a loss-making position, the ZORA Accretions became negative by USD *[650-850]* million which therefore reduced, first the remaining accumulated ZORA Accretions (USD [450-550])) to USD *0*, and second the outstanding nominal value of the LNG ZORA to USD *[200-250]* million.[77]

(51) In 2016, the ZORA Accretions were again negative by USD "[100-200] million, reducing further the outstanding amount of the LNG ZORA to USD "[100-200] million.[78]

2.2.3.7.2. LNG Luxembourg

(52) According to LNG Luxembourg's tax returns, the value of the LNG ZORA was maintained at its nominal amount (USD 646 million) until its partial conversion in 2014,[79] in line with the 2008 LNG tax ruling.[80] The LNG Forward Contract also appears in LNG Luxembourg's tax return as a liability for the same amount.[81]

(53) In 2014, as a result of the partial conversion, both the value of the LNG ZORA (asset) and of the LNG Forward Contract (liability) decreased by USD 193.8 million to USD [300-600] million, with no impact on the profit and loss account.[82] LNG Luxembourg did not opt for the application of Article 22bis LIR.

(54) In 2015, as explained in recital (50), the value of the LNG ZORA was reduced to USD *[200-250]* million due to negative ZORA Accretions. LNG Luxembourg therefore decreased the value of the LNG ZORA to this amount and at the same time decreased the value of the LNG Forward Contract to the same amount.[83]

(55) In 2016, the same adjustments were realised on the LNG ZORA and the LNG Forward Contract to decrease their value to USD [100-200] million.[84]

2.2.3.7.3. LNG Holding

(56) The ZORA is booked in LNG Holding's statutory accounts as a financial asset.[85] From 2012, a participation in LNG Supply for an amount equal to the nominal of the LNG ZORA also appears in LNG Holding's tax return under the category of participations eligible under Article 166 LIR.[86]

(57) According to the 2014 LNG Holding's tax return and statutory accounts, the cancellation of the LNG Supply Shares, received as a result of the partial conversion

[76] See 2014 LNG Supply statutory accounts, note 7.
[77] See LNG Supply statutory accounts for 2015, note 8.
[78] See LNG Supply statutory accounts for 2016, note 8.
[79] See *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial de l'année 2013*, Annex 1.
[80] See recital (38).
[81] See *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial de l'année 2013*, Annex 1.
[82] See *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial de l'année 2014*, Annexes 1 and 2.
[83] See LNG Luxembourg statutory accounts for 2015, notes 4 and 5.
[84] See LNG Luxembourg statutory accounts for 2016, notes 3 and 6.
[85] See, for instance, LNG Holding statutory accounts for 2013, note 3.
[86] See, for each year from 2012, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial, Détails concernant les participations visées à l'Article 166 L.I.R.*

of the LNG ZORA in 2014, generated a capital gain of USD 506.2 million,[87] which remained entirely untaxed in application of the participation exemption regime (Article 166 LIR).

(58) In 2015 and 2016, LNG Holding booked an impairment adjustment on the LNG Forward Contract reflecting the decrease in value of the LNG ZORA following the negative ZORA Accretions, as explained in recitals (50) and (51).[88] This impairment was reflected as a charge in LNG Holding's profit and loss account.

2.2.4. Detailed description of the GSTM tax rulings

2.2.4.1. The transactions described in the GSTM tax rulings

(59) According to the 2010 GSTM tax ruling request, Engie will implement a similar structure to the one described in the LNG tax rulings: GSTM acquires the Financing and Treasury Business and finances the acquisition by means of the GSTM ZORA granted by EIL. At conversion,[89] GSTM issues shares ("GSTM Shares") incorporating the nominal amount of the ZORA plus/minus the ZORA Accretions. In turn, EIL finances the investment in the GSTM ZORA by means of the GSTM Forward Contract entered into with CEF. Under that contract, EIL will agree to transfer to CEF the GSTM Shares. The price for the GSTM Shares corresponds to the nominal amount of the GSTM ZORA.[90]

(60) The 2012 GSTM tax ruling request contains a tax position on the same ZORA which is almost identical to that of the 2008 LNG tax ruling request, except that this ruling contemplates, *inter alia*, a potential future increase in the amount of the GSTM ZORA.[91]

2.2.4.2. The agreements signed by the parties

(61) Luxembourg has submitted copies of the documents and agreements which reflect the implementation by Engie of the transactions described in the GSTM tax rulings:

(1) A document with the title "Proposal of transfer of a branch of activity" filed at the Registry of commerce and corporations of Luxembourg on 13 May 2011 ("GSTM Transfer Proposal").[92] According to this document, CEF proposes to transfer to GSTM the Financing and Treasury Business for an amount of EUR

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87 See 2014 LNG Holding statutory accounts, note 3. The amount of the capital gain corresponds approximately to the amount of the converted accumulated ZORA Accretions (see footnote 74).

88 See LNG Holding statutory accounts for 2015 and 2016, note 3.

89 Which takes place, at the latest, at the expiry of the ZORA, see recital (61)(2).

90 The detailed implementation of the structure was as follows: CEF transfers the Financing and Treasury Business to GSTM against a promissory note from GSTM. CEF will sell the promissory note to EIL against a second promissory note issued by EIL to CEF for the same amount. GSTM will then issue the GSTM ZORA to EIL in exchange for the first promissory note. EIL will finance the investment in the GSTM ZORA by means of the GSTM Forward Contract entered into with CEF. As a consideration for the GSTM Forward Contract, CEF will pay an amount equal to the second promissory note, which will be offset (see 2010 GSTM tax ruling request, Section I).

91 According to paragraph 5 of the 2012 GSTM tax ruling request "*the ZORA issued by GSTM may be increased. The expectation is that the total amount issued under the ZORA will amount between EUR* entre [7-12] et [37-42] *billion*". According to GSTM's accounts and tax returns, as of 31 December 2016 the amount of the GSTM ZORA had not been increased.

92 "*Proposition de cession d'une branche d'activités déposé ou registre de commerce e des sociétés de Luxembourg*", submitted by Luxembourg on 16 June 2017.

1 036 912 506.84. According to the GSTM Transfer Proposal, CEF transfers the branch of activity in exchange of a promissory note from GSTM.[93]

(2) Two Mandatorily Exchangeable Loan Agreements entered into by EIL and GSTM, one dated 17 June 2011 and the other 30 June 2014 ("GSTM ZORA Agreements", together with the LNG ZORA Agreement, the "ZORA Agreements")[94] with essentially the same content.[95] Under the GSTM ZORA Agreements, EIL grants a loan[96] to GSTM repayable by the issuance of the GSTM Shares.[97] The loan expires on 17 June 2026.[98] At the end of that period, it shall be converted into shares, unless it is converted into shares earlier by any party with the written consent of the other party.[99] The "issue price" of the loan is EUR 1 036 912 507.[100] The conversion price will be equal to the "issue price" plus the ZORA Accretions accumulated until conversion.[101]

(3) A Prepaid Forward Share Purchase Agreement entered into by CEF and EIL on 17 June 2011 (the GSTM Forward Contract).[102] According to this agreement, CEF purchases all the rights of EIL in the GSTM Shares for a price equal to the "issue price" of the GSTM ZORA.[103] The GSTM Shares are to be transferred to CEF on the date of their issuance.[104]

2.2.4.3. Tax treatment of GSTM

(62) According to the 2010 GSTM tax ruling request, as approved by the Luxembourg tax administration, GSTM's yearly taxable profit shall be equal to a margin agreed with the Luxembourg tax administration ("GSTM Margin"). Therefore, GSTM will be taxed only on that margin. The difference between the profit actually generated by GSTM and the GSTM Margin (the ZORA Accretions) will be considered a deductible expense related to the GSTM ZORA.[105]

(63) The GSTM Margin is set out in the 2010 GSTM tax ruling request as an amount corresponding to "*an overall net spread of [1/(50-100)%] on the principal value of all its assets, including those assets financed with normal borrowings*".[106] The 2010 GSTM tax ruling request considers the GSTM Margin to be at arm's length.[107]

(64) The 2012 GSTM tax ruling request contemplates a modification in the GSTM Margin. It states that its amount "*will be determined in a future APA letter*

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93 See Proposition de cession d'une branche d'activités – Mémorial C – 13 mai 2011 – section 1: "*En considération de cette cession de Branche d'Activités, la Société Bénéficiaire émettra un billet à ordre dont le montant s'élève à : EUR 1.036.912.506,84*".

94 Submitted by Luxembourg on 21 November 2016.

95 The 2014 agreement was signed upon a further request of financing and it encompasses any amounts previously drawn.

96 See GSTM ZORA Agreements, clause 2.

97 See GSTM ZORA Agreements, clause 5.

98 See GSTM ZORA Agreements, clause 4.

99 See GSTM ZORA Agreements, clauses 4 and 5.

100 See GSTM ZORA Agreements, clause 2.

101 See GSTM ZORA Agreements, clause 5.2, cf. with definitions in clause 1.

102 Submitted by Luxembourg on 21 November 2016.

103 See GSTM Forward Contract, clause 2.

104 See GSTM Forward Contract, clause 3.

105 See 2010 GSTM tax ruling request, page 2.

106 See 2010 GSTM tax ruling request, page 2.

107 See 2010 GSTM tax ruling request, page 5, paragraph 5.

accompanied by a TP [transfer pricing] report".[108] According to GSTM's 2011 statutory financial accounts,[109] the change in the GSTM Margin from 1 January 2012 was due to entry into force of the Administrative Circular of 28 January 2011 concerning intra-group financing activities ("Circular 164/2").[110] This Circular required the submission of transfer pricing ("TP") studies in relation to any tax ruling request requesting the agreement on transfer prices for intragroup financing transactions (such as the GSTM Margin).[111] Accordingly, the tax advisor submitted, by letters of 11 July 2012 and 11 November 2013, two tax ruling requests with TP studies concerning the establishment of the GSTM Margin.[112] According to Luxembourg, these tax ruling requests were not approved by its tax administration. In other words, the Luxembourg tax administration has not issued any tax ruling confirming the value of the GSTM Margin proposed by Engie's tax advisor in its letters of 11 July 2012 and 11 November 2013.[113]

(65) The 2010 GSTM tax ruling request also indicates that "*in the unlikely event that the accounting treatment would not be totally in line with the obligations under the ZORA agreement, the resulting profit or loss reflected in the annual accounts will not affect the tax position set out above*".[114]

(66) In conclusion, before the conversion of the GSTM ZORA, the tax base of GSTM is limited to the GSTM Margin. The conversion of the GSTM ZORA has no impact on the tax base of GSTM.

2.2.4.4. Tax treatment of EIL

(67) The tax treatment granted to EIL is similar to the one described for LNG Luxembourg[115], and following identical arguments.[116] Therefore, during the lifetime of the GSTM ZORA, EIL can choose not to book any taxable income or tax deductible expense. At conversion, if EIL chooses to apply the special regime stipulated in Article 22bis LIR, it will not recognise any income[117] and thus, no corporate income tax will be due.[118] As it will be explained in recital (76), EIL chose to maintain the value of the GSTM ZORA at book value.

108 See 2012 GSTM tax ruling request, page 2. "APA" stands for advanced pricing agreement.
109 See *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial de l'année 2011*, Annex 3.
110 *Circulaire du directeur des contributions n° 164/2 du 28 janvier 2011*.
111 See Circular 164/2, paragraph 4.2.
112 See *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial de l'année 2012*, Annex 3.
113 See letter of Luxemburg of 23 May 2016.
114 See 2010 GSTM tax ruling request, page 2. In the same line, the 2012 GSTM tax ruling request states: "*to the extent the accounting treatment would differ from the annual accretion under the ZORA agreement, GSTM will for tax purposes still only report the Margin*".
115 See Section 0.
116 See 2010 GSTM tax ruling request, page 3, and footnotes 3 and 4, including arguments identical to those used in the 2008 LNG tax ruling request (see recital (38)).
117 See 2010 GSTM tax ruling request, page 3.
118 See 2010 GSTM 2010 tax ruling request, paragraph 6, page 6.

2.2.4.5. Tax treatment of CEF

(68) The tax treatment granted to CEF is similar to the one described for LNG Holding.[119] Accordingly, CEF will not book any taxable income or any tax deductible expense before the conversion of the ZORA.[120]

(69) The 2010 GSTM tax ruling request also asks for confirmation that "*the participation purchased by CEF under the Forward Contract will qualify as direct participation in the capital of GSTM as per the moment that the Forward Contract is concluded for the purposes of the Article 166 LIR*".[121] Consequently, any taxable income related to the ownership of the GSTM Shares will be tax exempt at the level of CEF, provided that the requirements of Article 166 LIR are met.

2.2.4.6. Implementation of the GSTM tax rulings

(70) The tax returns submitted by Luxembourg reflect the tax treatment granted to the companies involved in the transactions as described in the GSTM tax rulings.

2.2.4.6.1. GSTM

(71) GSTM's 2012 statutory accounts indicate that EIL "*granted a mandatory convertible loan amount of EUR 1 036 912 506.84 to [GSTM] with a maturity of 15 years from June, 17 2011*".[122]

(72) The GSTM ZORA is reported as a liability in the balance sheet included in GSTM's tax returns for an amount equal to the nominal of the ZORA (EUR 1 036 912 506.84). That amount does not vary over the years.[123]

(73) For each year, an amount equal to the yearly ZORA Accretion has been recorded as a liability of GSTM[124] against the corresponding expense in the profit and loss account[125] and has consequently been deducted from GSTM's tax base. The accumulated ZORA Accretions reported in GSTM's tax returns over the period 2011 to 2015 are presented in Table 2 below.

Table 2 - Accumulated ZORA Accretions recorded in GSTM's tax returns

	2011	2012	2013	2014	2015	2016
Accumulated ZORA Accretions (EUR million)	44.9	[100-150]	[300 – 350]	[450 – 500]	[600 – 650]	[600-900]

(74) In line with the 2010 GSTM tax ruling, GSTM is taxed on the GSTM Margin. Figure 3 below illustrates the determination of the GSTM Margin for the year 2011.[126] The "*net earnings before tax and ZORA Accretion*" amounted to EUR 45 522 581.

119 See Section 0.
120 See 2010 GSTM tax ruling request, page 3.
121 See 2010 GSTM tax ruling request, paragraph 2, page 5 (emphasis added by the Commission).
122 See also explanatory notes to GSTM's balance sheet at 31 December 2011, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial de l'année 2011* of GSTM, Annex 3.
123 See, for each year, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial*, Annex 1.
124 See, for each year, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial*, Annex 1.
125 See, for each year, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial*, Annex 2.
126 The figure corresponds to the *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial* for 2011, Annex 3.

GSTM's tax base is calculated as [1/(50-100)%] of the total average assets of the company for the 2011 period, which amounted to EUR 3.7 billion. The taxable profit retained for GSTM on this basis amounts to EUR [500.000-600.000] (to which an amount designated as "remuneration of capital" is added for an amount of [6 000-11 000] EUR). The difference between this amount and the "*net earnings before tax and ZORA Accretion*" is the amount of EUR 44.9 million, which was recorded in the tax return as the tax deductible ZORA Accretion.

Figure 3 – The calculation of the tax base of GSTM for the year 2011 as detailed in Annex 3 to the 2011 tax return of GSTM

Figure 3

Total actif	De	à	Nombre de jours	Moyenne*
8.691.871.776	02/05/2011	31/12/2011	244	3.729.884.433

*calculé sur une base mensuelle

Total des dettes finançant les actifs	3.729.202.241
Revenu net avant impôt et avant accrétion du Zora	[45.000.000-50.000.000]
Revenu net avant impôt et avant accrétion du Zora relatif au capital	8.326
Revenu net avant impôt et avant accrétion du Zora relatif à la dette finançant les actifs	[45.000.000-50.000.000]
Total	[45.000.000-50.000.000]
Marge de [1/(50-100)%]	[550.000-600.000]
Rémunération sur le capital	
Rémunération sur la dette finançant les actifs (marge de [1/(50-100)%])	[550.000-600.000]
Marge nette totale	[550.000-600.000]

La marge à déjà été comptabilise dans les comptes annuels, aucun ajustement n´est à opérer

Calcul du montant imposable

	Euro
Résultat de l'exercice	420.802
Ajouter: impôts	[150.000-200.000]
Montant imposable	[550.000-600.000]
Impôt sur le revenu des collectivités	[100.000-150.000]

(75) GSTM's tax returns show that, as indicated earlier,[127] the GSTM Margin changed after 2011. As illustrated in Figure 4 for years 2012 and 2013, the GSTM Margin is

[127] See recital (64).

not set at [1/(50-100)%] on the value of the assets, as was initially contemplated in the 2010 GSTM tax ruling request, but at [0-1%] on the value of the debts financing the assets.[128] In 2014, the GSTM Margin was set at [0-1%] of the total amount of loans and receivables. The tax returns indicate that the GSTM Margin for these years has been calculated by reference to the tax ruling requests of 11 July 2012 and 11 November 2013[129] which, as indicated in recital (64) were never accepted by the Luxembourg tax administration.

Figure 4 – The calculation of the tax base of GSTM in reference to the ruling requests of 2010 and 2012 in Annex 3 to the 2012 GSTM tax return

Figure 4

Annexes a la déclaration pour impôt sur le revenu des collectivités et pour l´impôt commercial communal de l'Anne 2012 et la déclaration de la fortune au 1er janvier 2013 au nom de:

GDF SUEZ Treasury Management S.à r.l numéro fiscal 2011 2416 545

Annexe 3 STAW/NGOK

Notes explicatives

Généralités

Reference est faite aux lettres du conseiller fiscal du 9 février 2010 et 15 juin 2012.

Marge sur activité de financement

Reference et faite aux accords préalables en matière de prix de transfert du conseiller fiscal du 11 juillet 2012 et du 11 novembre 2013 (les APAs)

La marge sus activité de financement est calculée comme suit:

Montant moyen des dettes finançant les actifs*	du	au	jours	%**	marge
[9.000.000.000-10.000.000.000]	1/01/2012	31/12/2012	366	4,2 bps	[3.000.000-4.000.000]
Total			366		

*Calcule sur une base mensuelle

**Nous nous referons a l´étude de prix de transfert comme prévu dans les APAs

Rémunération du capital à risque

Capital moyen	du	au	jours	rémunération du capital a risque
[2.000.000-3.000.000]	1/01/2012	31/12/2012	366	[20.000-30.000]
Total			366	

*Calcule sur une base mensuelle

Calcul de l´accrétion sur Zora

Revenu net avant impôt et avant accrétion du Zora	[100.000.000-150.000.000]
Moins: rémunération en capital	[20.000-30.000]
Moins: marge minimum	[3.000.000-4.000.000]
Accrétion sur Zora	[100.000.000-150.000.000]

128 See *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial* for 2012, Annex 3.

129 See *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial* for 2012, Annex 3.

2.2.4.6.2. EIL

(76) The value of the GSTM ZORA in EIL's books was maintained at the nominal amount, EUR 1 036 912 507,[130] in line with the option granted by the GSTM tax rulings.[131]

2.2.4.6.3. CEF

(77) Finally, a participation in GSTM for an amount equal to the nominal of the GSTM ZORA also appears in CEF's tax returns under the category of participations eligible under Article 166 LIR.[132]

2.3. Description of the relevant national legal framework

2.3.1. Description of the general principles of the Luxembourg corporate income tax system

(78) The ordinary rules of corporate taxation in Luxembourg can be found in the LIR. According to Article 159 LIR, resident tax companies are subject to tax on the totality of their profits.[133] Article 163 LIR provides that the Luxembourg corporate income tax is applicable to the taxable profit of a taxpayer in a given year.[134] Before 2013, all companies subject to tax in Luxembourg were taxed on their taxable profit at the standard tax rate of 28.80 %.[135] Since 2013, the standard tax rate is 29.22%.

(79) Article 18(1) LIR provides the method to establish a corporate taxpayer's annual profit: "*The profit is determined as the difference between net assets as of the end and net assets as of the beginning of the reporting period, increased by the withdrawals for personal use and decreased by additional contributions performed during the reporting period*".

(80) Article 23 LIR explains that the value of the net assets should be determined following accounting rules and principles.[136]

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[130] See, for each year, the balance sheet of EIL in the *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial* , Annex 1.

[131] See recital (67).

[132] See, for each year, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial, Détails concernant les participations visées à l'Article 166 L.I.R.*

[133] Article 159(1) LIR: "*Sont considérés comme contribuables résidents passibles de l'impôt sur le revenu des collectivités, les organismes à caractère collectif énumérés ci-après, pour autant que leur siège statutaire ou leur administration centrale se trouve sur le territoire du Grand-Duché*". Article 159(2) LIR: "*L'impôt sur le revenu des collectivités porte sur l'ensemble des revenus du contribuable*".

[134] Article 163(1) LIR: "*L'impôt sur le revenu des collectivités frappe le revenu imposable réalisé par le contribuable pendant l'année du calendrier".*

[135] The Luxembourg corporate income tax consists of a corporate income tax on profits ("*impôt sur le revenu des collectivités*" or "*IRC*"), taxed at a rate of 21 %, and, for companies established in Luxembourg City, a municipal business tax on profits ("*impôt commercial*"), taxed at a rate of 6.75 %. In addition, there is a 5 % surcharge on the 21 % tax rate for an employment fund calculated on the IRC. In 2012, the solidarity surcharge was increased from 5 % to 7 % with effect from tax year 2013. With the changes introduced for tax year 2013, the aggregate income tax rate increases from 28.80% to 29.22% for companies established in Luxembourg City. In addition, Luxembourg companies are subject to an annual net wealth tax, which is levied at a rate of 0.5% on the company's worldwide net worth on 1 January of each year.

[136] Article 23(1) LIR: "(…) *l'évaluation des biens de l'actif net investi doit répondre aux règles prévues aux alinéas suivants et, en ce qui concerne les exploitants obligés à la tenue d'une comptabilité régulière, aux principes d'une comptabilité pareille*".

(81) Article 40 LIR establishes the principle of linking the tax balance sheet to the commercial balance sheet ("*accrochement du bilan fiscal au bilan commercial*"). According to this principle, the tax balance sheet – which sets out the annual tax base - should correspond to the commercial balance sheet unless a specific tax rule applies requiring the use of a different value.[137]

2.3.2. The participation exemption regime and the taxation of profit distributions

(82) According to Article 97(1) LIR, revenues from investment income shall include dividends, profits participations and any other profit allocated based on shares or other participations in companies.[138]

(83) As regards the taxation of the dividends and other income stemming from participations, Article 166 LIR introduces the so-called "participation exemption regime" in Luxembourg. This regime provides for an exemption from corporate income tax, withholding tax and net wealth tax for income stemming from participations held by entities that meet certain criteria. In its opinion on the draft law incorporating this provision into the LIR, the Luxembourg State Council states that this regime is justified in order to avoid triple taxation for reasons of fiscal equity and economic order.[139]

(84) Article 166(2) LIR lists the entities that can benefit from the participation exemption, which include joint-stock companies subject to tax in Luxembourg (such as "société anonyme" and "société à responsabilité limitée"), and the companies listed under Article 2 of Council Directive 90/435/EEC ("Directive 90/435").[140]

(85) In order to benefit from the exemption, two cumulative conditions need to be met: first, the entities must hold or commit to hold the participation for an uninterrupted period of at least 12 months; second, the participation must not fall below either 10% of the capital of the participated entity or a EUR 1.2 million acquisition price.[141]

(86) Provided that these two conditions are met, the income derived from the participation (dividends, capital gains or any other revenues derived from the participation) is fully exempt from Luxembourg corporate income tax. Pursuant to Article 166(9) LIR and the *Règlement grand-ducal* du 21 décembre 2001 ("Decree of 21 December

137 Article 40(1) LIR: "*Lorsque les prescriptions régissant l'évaluation au point de vue fiscal n'exigent pas une évaluation à un montant déterminé, les valeurs à retenir au bilan fiscal doivent être celles du bilan commercial ou s'en rapprocher le plus possible dans le cadre des prescriptions prévisées, selon que les valeurs du bilan commercial répondent ou ne répondent pas aux même prescriptions*".

138 Article 97(1) LIR: "*Sont considérés comme revenus provenant de capitaux mobiliers: 1. les dividendes, parts de bénéfice et autres produits alloués, sous quelque forme que ce soit, en raison des actions, parts de capital, parts bénéficiaires ou autres participations de toute nature dans les collectivités visées aux articles 159 et 160*".

139 *Avis du Conseil d'Etat du 2 avril 1965 concernant l'article 242 du projet de loi sur l'impôt sur le revenu: « La considération que les bénéfices sociaux produits par une société filiale et traversant une société mère avant d'être distribués aux actionnaires de celle-ci, sont exposés à une triple imposition qu'il faut éviter pour des raisons d'équité fiscale et d'ordre économique»* (emphasis added by the Commission).

140 Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 225, 20.08.1990, p. 6).

141 Article 166(1) LIR: "*les revenus d'une participation (…) sont exonérés lorsque à la date de la mise à disposition des revenus, le bénéficiaire détient ou s'engage à détenir ladite participation pendant une période ininterrompue d'au moins douze mois et que pendant toute cette période le taux de participation ne descend pas au-dessous du seuil de 10 pour cent ou le prix d'acquisition au-dessous de 1.200.000 euros*".

2001"),[142] the participation exemption applies also to capital gains (*revenus dégagés par la cession de la participation)*.[143]

(87) The taxation of profits distributed at the level of the distributing entity is governed by Article 164 LIR. Article 164(1) LIR provides that, in order to determine the tax base, it is irrelevant whether the profit has been distributed or not.[144] Article 164(2) LIR explains what should be understood as "distribution" for the purposes of Article 164(1) LIR and includes in this category the distributions of any kind to shareholders, to holders of participation certificates, founder's shares, shares in enjoyment, or any other securities, including variable-yield bonds.[145]

2.3.3. Temporary deferral of taxation of capital gains arising from conversions

(88) The general principle concerning conversion of assets is laid down in Article 22(5) LIR, according to which an exchange of assets should be considered as the sale of the given asset, followed by the acquisition of the asset acquired in return at a price corresponding to its estimated disposal value,[146] thus potentially giving rise to a taxable capital gain.

(89) As an exception to this general rule, Article 22bis(2) number 1 LIR stipulates that the conversion of a loan into the share capital of the debtor will not lead to the realisation of a capital gains for corporate income tax purposes. That same provision provides that such an exception does not cover the interest accrued on the loan corresponding to the year of the conversion up until the date of the exchange.[147]

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142 *Règlement grand-ducal du 21 décembre 2001 portant exécution de l'article 166, alinéa 9, numéro 1 de la loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu.*

143 Article 166(9) LIR: "*Un règlement grand-ducal pourra: 1. étendre l'exonération, sous les conditions et modalités à déterminer, aux revenus dégagés par la cession de la participation, 2. prévoir, dans les conditions à spécifier, que les pertes de cession ne sont pas déductibles*". Article 1(1) of Règlement of 21 December 2001: "*Lorsqu'un contribuable visé à l'article 166, alinéa 1 er, numéros 1 à 4, cède des titres d'une participation directe détenue dans le capital social d'une société visée à l'alinéa 2, numéros 1 à 3 du même article, le revenu dégagé par la cession est exonéré, lorsqu'à la date de l'aliénation des titres le cédant détient ou s'engage à détenir ladite participation pendant une période ininterrompue d'au moins 12 mois et que pendant toute cette période le taux de participation ne descend pas au-dessous du seuil de 10% ou le prix d'acquisition au-dessous de 6.000.000 d'euros*".

144 Article 164(1) LIR: "*Pour déterminer le revenu imposable, il est indifférent que le revenu soit distribué ou non aux ayants droits".*

145 Article 164(2) LIR: "*Sont à considérer comme distribution dans le sens de l'alinéa qui précède, les distributions de quelque nature qu'elles soient, faites à des porteurs d'actions, de part bénéficiaires ou de fondateurs, de parts de jouissance ou de tous autres titres, y compris les obligations à revenu variable donnant droit à une participation au bénéfice annuel ou au bénéfice de liquidation".*

146 Article 22(5) LIR: "*L'échange de biens est à considérer comme cession à titre onéreux du bien donné en échange, suivie de l'acquisition à titre onéreux du bien reçu en échange. Le prix de cession du bien donné en échange correspond à sa valeur estimée de réalisation*".

147 Article 22bis(2) -1 reads as follows: "*Par dérogation à l'Article 22, alinéa 5, les opérations d'échange visées aux numéros 1 à 4 ci-dessous ne conduisent pas à la réalisation des plus-values inhérentes aux biens échangés, à moins que, dans les cas visés aux numéros 1, 3 et 4, soit le créancier, soit l'associé ne renoncent à l'application de la présente disposition : 1. lors de la conversion d'un emprunt : l'attribution au créancier de titres représentatifs du capital social du débiteur. En cas de conversion d'un emprunt capitalisant convertible, l'intérêt capitalisé se rapportant à la période de l'exercice d'exploitation en cours précédant la conversion est imposable au moment de l'échange*". Additionally, Article 22bis(4) provides the following: "*Dans le chef de l'associé, le prix et la date d'acquisition des titres reçus en échange correspondent au prix et à la date d'acquisition des titres donnés en échange. En cas de paiement d'une soulte à l'associé, le prix d'acquisition des titres reçus en échange est à diminuer du montant de ladite soulte*".

2.3.4. Anti-abuse provision

(90) Article 6 of the Luxembourg Tax Adaptation Law or *Steueranpassungsgesetz* ("StAnpG") prohibits that taxes are evaded or mitigated by abuse of forms or constructions which are legal under civil law. According to Article 6 StAnpG, if the legal form or the construction surrounding a transaction is not appropriate in terms of its substance, tax should be assessed in accordance with the substance of the transaction, as if it had been concluded in the appropriate legal form.[148]

3. GROUNDS FOR INITIATING THE PROCEDURE

(91) In its Opening decision, the Commission took the preliminary view that the tax treatment granted on the basis of the contested tax rulings appeared to constitute State aid within the meaning of Article 107(1) of the Treaty and raised doubts as to the compatibility of those measures with the internal market.

(92) More specifically, in the Opening decision, the Commission raised the following doubts:

(1) whether the Luxembourg tax authorities correctly allowed the deduction of the ZORA Accretions and whether the ZORAs were at arm's length;

(2) in case the Luxembourg tax authorities were right to allow for the deduction of the ZORA Accretions first, whether the Luxembourg tax authorities were right to accept the application of Article 22bis LIR; and second, whether the method used to determine the taxable profit of GSTM and LNG Supply was in line with the arm's length principle;

(3) whether the combined effect of the deductibility of expenses (ZORA Accretions) at the level of LNG Supply and GSTM together with the non-taxation of the corresponding income at the level of EIL and LNG Luxembourg departs from the general objective of the Luxembourg tax system, thus providing a selective advantage to the holding companies LNG Holding and CEF.

(93) Under the first doubt, the Commission questioned the deduction of the ZORA Accretions.[149] The Commission questioned the qualification of the ZORA Accretions as interest within the meaning of Article 109 LIR and therefore their deductibility. More precisely, the Commission considered that the ZORA Accretions should be considered as profit distributions in line with Article 164(1) and (2) LIR and therefore the deduction should not have been allowed. The Commission also raised doubts that by allowing the deduction of the ZORA Accretions, Luxembourg misapplied Article 164(3) LIR. This provision requires the inclusion in the tax base of a company, as hidden profit distribution, of any amounts paid to its shareholder which are not at arm's length. More precisely, the Commission questioned whether an independent company negotiating at arm's length would have granted a loan to LNG Supply and GSTM under the same terms as the ZORAs.

[148] Article 6 StAnpG provides: "*Durch Missbrauch von Formen und Gestaltungsmöglichkeiten des bürgerlichen Rechts kann die Steuerpflicht nicht umgangen oder gemindert werden. Liegt ein Missbrauch vor, so sind die Steuern so zu erheben, wie sie bei einer den wirtschaftlichen Vorgängen, Tatsachen und Verhältnissen angemessenen rechtlichen Gestaltung zu erheben wären*".

[149] See Opening decision, Section 4.2.1.

(94) In case the Luxembourg tax authorities were right to allow for the deductions of the ZORA Accretions, the Commission raised a second doubt that can be split into two legs:

(1) Under the first leg, the Commission questioned the application of Article 22bis LIR according to which no corporate income tax is due upon conversion of the ZORA into shares.[150] If the ZORA Accretions were to be considered as deductible debt interests, which the Commission contested under the first doubt, then they should have been taxed as income at the level of EIL and LNG Luxembourg or at the level of the holding companies and should not have qualified for an exemption under Article 22bis LIR.

(2) Under the second leg, the Commission raised doubts regarding the method used in the contested tax rulings for determining the taxable profit of LNG Supply and GSTM – a taxable margin not based on any economic analysis – and its compliance with the arm's length principle.[151]

(95) Finally, the third doubt was based on the combined effect of the deductibility of the ZORA Accretions at the level of the Subsidiaries and the non-taxation of the corresponding income at the level of EIL and LNG Luxembourg due to the application of Article 22bis LIR.[152] By combining both, Luxembourg endorsed the effective non-taxation of a sizeable portion of the profits generated by the businesses of GSTM and LNG Supply in Luxembourg. The Commission questioned whether this result departed from the objective of the Luxembourg corporate income tax system, which according to Article 163 LIR is to tax the profits of all companies subject to tax in Luxembourg.[153]

(96) As part of this third doubt, the Commission also questioned whether the tax treatment endorsed by the tax rulings could constitute a misapplication of Article 166 LIR, the objective of which is to eliminate economic double taxation of the same profit. In particular, the Commission noted that the application of Article 166 LIR appeared to have been relied upon by CEF and LNG Holding to exempt profits which had not been taxed at the level of GSTM and LNG Supply.[154]

(97) The Commission indicated that the contested tax rulings appeared to provide a selective advantage not only to the holding companies CEF and LNG Holding but also to the Engie group as a whole.[155]

(98) The Commission also took the preliminary view that the effect of the contested tax rulings could derogate from the Luxembourg provisions concerning abuse of law in the tax field (Articles 5 and 6 StAnpG).[156]

(99) In a meeting of 1 June 2017 and in the Letter of 11 December 2017, following the submission of additional information by Luxembourg and Engie, the Commission developed further some aspects of its assessment of the case. The Commission noted that Article 109(1) LIR is not applicable to companies incorporated under Luxembourg law and/or to companies tax resident in Luxembourg. The Commission

150 See Opening decision, Section 4.2.2.1.
151 See Opening decision, Section 4.2.2.2.
152 See Opening decision, Section 4.2.3.
153 See Opening decision, recitals 151-155.
154 See Opening decision, recital 156.
155 See Opening decision, recital 152
156 See Opening decision, recital 158.

also noted that Article 22bis LIR is an optional regime and that the companies involved in the present case have not opted for its application as of today. Finally, the Commission indicated that, according to Luxembourg, the contested tax rulings are based on the general corporate tax regime ("*se fondent sur le régime général d'imposition sur les sociétés*")[157] and in particular on the principle of linking the tax balance sheet to the commercial balance sheet ("*le principe de l'accrochement du bilan fiscal au bilan commercial*").[158] In this regard, and as indicated in the Opening decision,[159] the applicable reference system could be the Luxembourg corporate income tax system, the objective of which is to tax the profit of companies subject to corporate tax in Luxembourg.

(100) Furthermore, the Commission explained in the Letter of 11 December 2017, as regards the advantage to Engie group,[160] that since the objective of the Luxembourg corporate income tax system is to include in principle in the tax base all profits recorded in the accounts of the company, intra-group financing transactions between Luxembourg tax resident companies should not have any impact on the sum of the tax bases of these entities or, in other words, on their combined tax base. However, in the present case, the Commission noted that the contested tax rulings lead to a decrease in the combined tax base of Engie in Luxembourg (reasoning at group level).

4. COMMENTS FROM LUXEMBOURG

(101) Luxembourg first recalls that, in line with Article 114 of the Treaty, tax provisions fall within the remit of the Member States. Only if a tax provision infringes Article 107 of the Treaty the Commission can assess it.

(102) Second, Luxembourg contests the presence of a selective advantage, based on the following grounds.

4.1. The system of reference used by the Commission in the Opening decision is erroneous

(103) First, according to Luxembourg, Article 109 LIR applies only to individuals and is not applicable to companies.

(104) Second, Luxembourg argues that ZORAs are, from a Luxembourg tax perspective, a debt instrument; therefore, they cannot be assimilated to equity participations.[161] This classification is mainly justified by the absence of any associated voting rights, management rights, dividends or liquidation dividends, the obligation to be reimbursed at a fixed date, the absence of a notarised act recognising a capital increase and the legal form of the contract. Moreover, Luxembourg argues that ZORAs are not a note instrument giving right to any annual profit sharing or liquidation dividends. Therefore, Articles 164(1) and 164 (2) LIR are, in Luxembourg's view, not applicable.

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157 See observations of Luxembourg on the Opening decision, paragraph 168.

158 See observations of Luxembourg on the Opening decision, paragraph 170.

159 See Opening decision, recital 152

160 See recital (97)

161 See observations by Luxembourg on the Opening Decision, page 8: "*Un ZORA constitue un contrat qui documente une dette ainsi que son remboursement, de sorte qu'on ne voit pas la pertinence de l'article 164 LIR en l'espèce*". "*Les ZORAs ont, d'un point de vue fiscal luxembourgeois, les caractéristiques essentielles d'une dette et non d'une participation au capital*".

(105) Third, regarding the arm's length character of ZORAs, Luxembourg considers that the Commission ignored the different categories of investors. ZORAs are not standard loan agreements but atypical instruments that cover the borrower against any operational risk and allow the investor to benefit from a better return on investment. Given the volatility of the market and the dependence on financing, the use of a ZORA is logical for the lender and similar instruments can be observed on the financial market like securities replicating the performance of a given underlying. Therefore the terms of the ZORA are at arm's length and Article 164(3) LIR is, according to Luxembourg, not applicable.

(106) According to Luxembourg, the system of reference consists, first, of Articles 18, 40 and 23 LIR, which stipulate the determination of the tax base, the linking of the commercial balance sheet with the tax balance sheet and the prudence principle; and second, of Article 22bis LIR.

(107) Luxembourg argues that the determination of the taxable profit, as defined in Article 18 LIR, follows two main concepts: first, the linking of the commercial balance sheet with the tax balance sheet (Article 40 LIR), and second, the prudence concept, according to which a profit cannot be taxed as long as it has not been realised.

(108) Regarding Article 22bis LIR, Luxembourg states that it is an optional regime applicable to companies in line with Article 162 LIR.[162]

(109) Luxembourg contests that Article 163 LIR enshrines any objective, or principle, of the Luxembourg corporate income tax system according to which all profits recorded by companies resident in Luxembourg should be taxed. Luxembourg considers that this objective is neither consecrated nor reflected in any provision of the law. According to Luxembourg, the definition of a system of reference should be based on laws and not on a hypothetical principle or objective, the interpretation of which would risk deviating from the precise terms of the law.

4.2. The contested tax rulings do not depart from the system of reference

(110) Luxembourg argues that, by accepting the deductibility of expenses related to the ZORAs, the tax treatment endorsed by the contested tax rulings was fully in line with Articles 14 to 60 LIR and thus with Articles 18, 40 and 23 LIR. Luxembourg considers that the Commission ignored that the deductible expenses at the level of GSTM and LNG Supply are neither interests nor dividends. The reimbursement of the ZORA can be at a higher price than the nominal of the instrument. In line with the prudence concept, the borrower has to recognise an expense reflecting this risk. According to Articles 18, 40 and 23 LIR, this expense is tax deductible.

(111) Luxembourg considers that the tax treatment endorsed by the contested tax rulings was fully in line with Articles 97 and 22bis LIR. Luxembourg argues that the Commission was wrong to consider that any capitalised interest should be taxable. More generally, Luxembourg supports that the Commission did not take into account that, as explained in recital (110), the deductible expenses are neither interest nor

[162] Article 162 LIR: "(1) *Les dispositions du titre 1er de la présente loi sont applicables pour la détermination du revenu imposable et des revenus nets qui le composent, pour la détermination du bénéfice de cession ou de liquidation et pour la déclaration, l'établissement et la perception de l'impôt, à moins qu'il n'en soit autrement disposé ci-après ou que l'application de ces disposition ne se justifie pas eu égard à la nature spéciale des organismes à caractère collectif. (2) En exécution de l'alinéa qui précède, un règlement grand-ducal spécifiera les dispositions applicables aux organismes à caractère collectif*".

dividends. The concept of prudence supposes that an expense, which is tax deductible for one party, does not necessarily lead to a taxable profit for the other party. ZORAs should be valued at the level of the lender at the acquisition price and not at market price. Therefore, Luxembourg considers that ZORAs do not lead to any taxable income at the level of the lender until the conversion date.

(112) From a tax perspective, at the date of the conversion, a profit, equal to the difference between the acquisition price and the market value of shares, is recognised. However, Luxembourg argues that EIL and LNG Luxembourg can opt for the mechanism of Article 22bis LIR. The shares received by the lender can be considered as substituting the ZORAs. In such a case, the shares can be valued in the accounts at the nominal amount of the ZORAs.

(113) However, Luxembourg clarifies that following the partial reimbursement of the ZORA by LNG Supply that took place in 2014, LNG Luxembourg did not opt for the optional regime of Article 22bis LIR and recognised a taxable profit.

(114) Luxembourg considers that the contested tax rulings do not depart from the arm's length principle by accepting a method of determination of profits of GSTM and LNG Supply based on the risks, functions and assets involved by each entity.

(115) Luxembourg contests any misapplication of Article 166 LIR, as the contested tax rulings only confirm a strict and correct reading of the different tax provisions applicable to any undertaking subject to corporate income tax.

(116) Luxembourg contests that the objective of Article 166 LIR is to prevent economic double taxation. Luxembourg considers that according to Article 166 LIR, profits do not need to have been previously taxed to benefit from the participation exemption. The only conditions to benefit from the participation exemption are the nature of the instrument, the percentage held in the capital of the participated entity or the acquisition price, and the holding period of the participations. In the present case, Article 166 LIR has been applied in line with all these conditions. On this basis, Luxembourg considers not only that the Luxembourg corporate income tax system does not require that all profits should be taxed but also that according to Article 166 LIR, profits eligible to participation exemption should not necessarily result from taxed profits.

(117) Luxembourg also claims that if the Commission considers that Article 166 LIR does not derogate from the reference system, then it should demonstrate that the contested tax rulings allow a derogatory application of Article 166 LIR to CEF and LNG Holding. Luxembourg contests in particular the combined application of Articles 164 LIR and 166 LIR, since Article 164 LIR is not a pre-requisite for applying Article 166 LIR. Article 164 LIR applies only to profits distributed by a domestic company, while Article 166 LIR has a larger scope, the participation exemption regime being applicable to profits coming from domestic or foreign participations. That being said, Luxembourg expressly acknowledges that, except for the case of foreign participations, all participations the profit of which can benefit from Article 166 are also subject to Article 164 LIR.[163]

[163] See observations by Luxembourg to the Letter of 11 December 2017, response to question 1.b: "*Hormis l'exception faite aux sociétés étrangères […], toutes les participations dont les revenus peuvent bénéficier du régime d'éxonération au titre de l'article 166 LIR sont aussi couvertes par les dispositions de l'article 164 de la LIR*".

(118) As regards the reasoning at group level (see recital (100)), Luxembourg reiterates its position that the Commission's reasoning cannot be based on an inadequate and non-existent reference system. Luxembourg highlights that the Luxembourg law does not specify that intra-group financing transactions between entities tax resident in Luxembourg cannot increase or decrease the sum of the tax bases of those entities in Luxembourg, or in other words the combined tax base of the group in Luxembourg. Moreover, Luxembourg explains that in order to determine if a measure is selective, the Commission needs to demonstrate that it derogates from the reference system itself and not from the objective of the reference system.

(119) Luxembourg argues that to establish the selectivity of a measure, the Commission needs to demonstrate that companies from a specific sector are treated in a preferential way compared to others and refers to the annulment of the Commission's decision in case *Comunidad Autonoma de Galicia*.[164]

(120) Luxembourg also contests the statement made by the Commission that any tax deductible expense recorded by the issuer of a ZORA in relation with the ZORA Accretions would have been included in the tax base of the holder, therefore with no impact on the tax base of the group in Luxembourg. Luxembourg reminds that Article 22bis LIR allows the lender of a convertible loan not to book any capital gain at the moment of the conversion. Therefore, according to Luxembourg, the intervention of EIL and LNG Luxembourg did not decrease the tax base of the Engie group compared to a situation in which it would have used a direct ZORA.

(121) Luxembourg also contests any abuse of rights. In particular, Luxembourg denounces the insinuation by the Commission that it approved a simulated transaction within the meaning of Article 5 of the StAnpG and reminds that all parties have a real legal existence and performed their contractual obligations. Luxembourg also rejects the argument that the legal structure of the transaction is not in line with the substance, the transactions being set up to finance the transfer of assets within the group in the meaning of Article 6 of the StAnpG.

4.3. Absence of recovery

(122) Finally, in case the Commission were to adopt a negative decision, Luxembourg considers that it should apply only for the future and that the Commission should not request a recovery of the alleged State aid, in line with the principles of legal certainty and legitimate expectations.

5. COMMENTS FROM ENGIE

(123) Engie considers the ZORAs to be debt instruments. The total amount to be reimbursed depends on the performance of the borrower. Therefore, Engie argues that the lender should not receive any income before the conversion. Moreover, until its conversion, the ZORA is a debt instrument in the accounts and is treated as such both for accounting and fiscal purposes.

(124) Engie argues that the deductibility of the expenses related to a ZORA at the level of the borrower is in line with the applicable tax law. The expenses related to the reimbursement of the ZORA which are booked in the accounts in line with the applicable accounting rules, is tax deductible according to the basic tax principle of

[164] Case C-70/16 P *Comunidad Autónoma de Galicia and Retegal v Commission* EU:C:2017:1002.

linking the accounting balance sheet and the tax balance sheet. In line with the accounting prudence principle, the lender is not allowed to book a profit in its accounts before the conversion of the ZORA into shares. Therefore, it is only at the date of the conversion that the lender books a profit, which is taxable. However, according to Engie, Article 22bis LIR allows a company to get a temporary tax deferral in case of conversion of a convertible loan. Finally, EIL and LNG Luxembourg have covered their risks by entering into the Forward Contracts with, respectively, CEF and LNG Holding. The income of CEF and LNG Holding coming from their investments are taxable according to the relevant tax law, including Article 166 LIR.

(125) Engie explained in further details the activities transferred to LNG Supply and GSTM which consist, respectively, of a long term (around 20 years) liquefied natural gas supply contract ("LNG contract") in Yemen and its ancillary assets (terminal capacity and shipping capacity) on the one hand, and the group's cash pooling activities on the other.[165]

(126) Engie also explained that only the ZORA between LNG Supply and LNG Luxembourg was partially converted in 2014 due to large profits made by LNG Supply. Following the partial conversion, LNG Luxembourg booked a taxable income. LNG Luxembourg did not opt for the regime set by Article 22bis LIR. In the same fiscal year, the entity booked a deductible expense of the same amount due to the transfer of the shares to LNG Holding in the framework of the LNG Forward Contract.

(127) Engie also confirmed that the application of Article 22bis LIR would in fact have had no impact on the taxable income of the ZORA lenders (LNG Luxembourg or EIL) as the sale price and the sale date are fixed in advance by the Forward Contracts. In this regard, during the meeting of 1 June 2017 it was discussed under which scenario LNG Luxembourg or EIL would realise a taxable profit or loss, since the ZORAs have been hedged against the Forward Contracts. Engie clarified that any taxable income stemming from the conversion of the ZORAs is mirrored by a corresponding tax deductible loss on the Forward Contracts.

(128) Finally, as regards the applicable legal framework at the level of the holding companies (i.e. CEF and LNG Holding), Engie specified that at the date of the transfer of shares, and in case the value of the shares is higher than the acquisition price fixed in the Forward Contracts, the holding company does not book any profit. Such profit can only be booked later on if and when the issuers' shares are sold or cancelled. According to Engie, this potential profit can be tax exempt under the participation exemption regime applicable to all Luxembourg companies as per Article 166 LIR.

(129) Engie argues that the implementation of the GSTM and LNG ZORAs respects the tax rulings adopted in line with the tax law and does not lead to double non-taxation. Engie further explained in the meeting of June 2017that, in case one follows an economic reasoning and not a legal one, account should be taken of the long duration of the ZORA and not focus on the profitable years during which limited taxes were

[165] Engie also stated that LNG Supply has around [1-40] full-time employees and GSTM around [1-10] full-time employees. Engie also confirmed that LNG Luxembourg has no other activity than holding the LNG ZORA and the LNG Forward Contract.

paid. Engie explained that, in case one follows an entity-by-entity reasoning and not an economic or global approach, the regime is symmetrical.

(130) Engie further explained that the GSTM ZORA has not led to any conversion yet. No profit was booked at the level of EIL at this date. The LNG ZORA was partially converted into shares in 2014 giving rise to a profit equal to the accumulated ZORA Accretions at the level of LNG Luxembourg. LNG Luxembourg did not opt for the optional regime of deferral of taxation provided by Article 22bis LIR and the profit realised from the conversion was taken into account in the determination of its tax base for 2014.

(131) Engie further explained the precise roles of EIL and LNG Luxembourg. The roles are being described in TP reports prepared by Engie to justify the ZORAs and submitted to the Commission together with its observations to the Opening decision (the "TP Reports"). EIL and LNG Luxembourg are described in the TP Reports as the "Investor" bearing all risks linked to the businesses and performing the key functions pertaining to the latter while at the same time these entities are fully covered from a risk point of view by the Forward Contracts.[166] Engie explained that, from a transfer pricing perspective, in order to determine the remuneration of the ZORA issuer, it is possible to amalgamate the ZORA lender with the purchaser of the converted shares under the Forward Contracts.

(132) Considering that the intervention of EIL and LNG Luxembourg is neutral from an economic and commercial perspective, the Commission asked in the meeting of 1 June 2017 to explain the necessity to have these entities for the financing of the transfer of assets. Engie confirmed that it could have structured the financing of the transfer of activities differently. While there exist other ways to structure this operation, the present structure was chosen because it provided more flexibility for the management of the companies and more options for future operations, which are important criteria for the organisation of a group of companies.

5.1. Engie rejects the presence of any advantage

(133) Engie argues that the concerned companies do not benefit from any advantage as they do not benefit from any unjustified tax reduction. Engie states that the deduction of ZORA Accretions does not constitute a competitive advantage. Furthermore, Engie considers that there cannot be any competitive advantage from the combination of the regime applied to the borrowers of the ZORAs and the regime applied to the lenders, as this advantage did not materialise due to the absence of conversion for the GSTM ZORA and the decision not to opt for Article 22bis LIR for the LNG ZORA.

5.2. Engie rejects the selectivity of the contested measures.

(134) Firstly, Engie considers that the contested tax rulings do not entail any individual aid measure.

(135) Engie contests the system of reference used by the Commission in the Opening decision. Engie considers that Articles 109(1) and 164 LIR are not applicable, the first one because it concerns only individuals and the second one because it does not concern loans. The correct system of reference is constituted of Articles 18 to 45 LIR, which enshrine the fundamental principles of Luxembourg tax law for

166 See TP Report, sections 6.1.2 and 6.1.3.

determining the taxable basis of a company, e.g. the principle of prudence (Article 23 LIR), the linking of the tax balance sheet to the commercial balance sheet (Article 40 LIR) and the deductibility of business expenses (Article 45 LIR).

(136) According to Engie, the contested tax rulings do not depart from the applicable system of reference. The increase of the debt is a financial expense for the borrowers. This financial expense is booked in the annual accounts and is deductible in line with the principle of linking the tax balance sheet with the commercial balance sheet and the deduction of operating expenses. Conversely, in case of negative ZORA Accretions, the decrease of the debt leads to the booking of a taxable income. The subsequent conversion of the loan into shares does not call into question the initial qualification of the instrument as debt. Regarding EIL and LNG Luxembourg, Article 22bis LIR gives them the possibility to opt, at the time of the conversion, for a tax deferral. LNG Luxembourg did not opt for this regime following the partial conversion of the LNG ZORA in 2014 and booked a taxable profit. The GSTM ZORA and the remainder of the LNG ZORA have not given rise to any conversion to date. No income has been realised and no use of the optional regime of Article 22bis LIR could be made. Therefore, Engie considers that both in their substance and in their implementation, the contested tax rulings do not derogate from the system of reference.

(137) Based on the TP reports, Engie argues that the method used to estimate the taxable margin at the level of the borrowers (i.e. the remuneration of the borrowers) represents a reliable approximation of a market-based outcome in line with the arm's length principle. The functions, risks and assets of the different legal entities were remunerated in line with market comparables. The two TP Reports submitted assess the functions and risks performed by the borrowers (LNG Supply or GSTM) and the "Investor" (which is not precisely identified) and conclude that almost all risks are borne by the "Investor" while the borrower is involved in the day-to-day management of the transferred businesses. The TP Reports identify the Comparable Uncontrolled Price[167] method as the relevant method to assess the arm's length character of the ZORA and the remuneration of exchange traded-funds as a comparable remuneration. Finally, the TP Reports conclude that the remuneration of the borrowers is in line with the remuneration of exchange traded funds and thus must be considered at arm's length.

(138) According to Engie, the confirmation by the contested tax rulings of the combined application of the concerned provisions of Luxembourg law is consistent with the objective of the Luxembourg corporate income tax system to tax the profits of any company subject to tax in Luxembourg after taking into account the remuneration of the debt instruments. Any borrower would be subject to the same tax treatment, i.e. the deductibility of financial expenses. In the same way, any lender, which would conclude a similar loan, would be subject to the same tax treatment, i.e. taxation of an accounting profit at the time of the repayment, except if it opts for tax deferral.

(139) Engie also contests any abuse of law. The entities involved in the transactions are all legal entities. Moreover, the contested transactions have an economic rationale, which is to finance the transfer of activities. Therefore, Engie considers that

[167] The Comparable Uncontrolled Price Method is one of the five transfer pricing methods recognised by the OECD in the 2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations

Luxembourg did not exempt the ZORA Accretions from taxes neither endorsed any tax evasion or abuse of the national law.

(140) Secondly, Engie considers that, since the contested tax rulings merely confirm the applicable national law, they should be assessed as a scheme. In this regard, Engie considers that such schemes, as clarified by the contested tax rulings, are not selective. They are of a general nature since they are applicable, individually or cumulatively, without distinction to all economic operators without any condition. Their applicability is not subject to the issuance of tax rulings which were sought in this case for reasons of legal certainty. Any undertaking in a legal and factual comparable situation in the light of the objective of the tax system, namely the taxation of profits, can benefit from these schemes. Therefore, according to Engie, they do not create by their effects any discrimination or differentiation between undertakings.

(141) Thirdly, Engie supports that the measures at issue result from the guiding principles of the Luxembourg tax system, in particular from the principle of prudence.

(142) Engie contests that the Luxembourg corporate income tax system has for objective to tax profits recorded in the accounts. The reference system is the Luxembourg corporate income tax system, including Article 166 LIR, the application of which was approved in the contested tax rulings.

(143) Engie also indicates that the contested tax rulings do not derogate from Article 166 LIR. In line with the Luxembourg corporate income tax system, any dividend or capital-gain recorded by a taxpayer cannot be taxed if the conditions of Article 166 LIR are met. Engie notes that the conditions of Article 166 LIR were met when LNG Supply reduced its capital by the cancellation of the newly issued shares. Therefore, Engie considers that the contested tax rulings did not deviate from the applicable fiscal rules and did not result in a decrease of the taxes, which would have been due in their absence.

(144) Engie also considers, in line with Articles 99 and 101 of the Luxembourg Constitution that the Luxembourg tax authorities cannot derogate from the strict conditions set up in Article 166 LIR.

(145) Engie notes that the Opening decision refers to a potential individual aid measure and not to Article 166 LIR, which would be a scheme. In case the Commission were not to consider Article 166 LIR as derogation in itself, but only question its application in the contested tax rulings, the Commission failed to demonstrate that the contested tax rulings derogate from Article 166 LIR.

(146) Engie argues that the extension of the participation exemption regime - initially introduced in Luxembourg in 1940 - was in accordance with the objective of building the internal market. According to Engie, this is precisely the objective of Directive 90/435. Engie considers that this Directive does not require a taxation of the profits to be distributed.

(147) As regards the reasoning at group level, Engie indicates that the selectivity assessment is only pertinent at the level of an individual legal entity and not at group

level. Engie understands that in past decisions,[168] the Commission considered that an analysis at group level was not justified.

(148) According to Engie, the Luxembourg corporate income tax system does not entail any principle of symmetric treatment between tax resident companies part of the same transaction nor any “linking rules” as recommended by the OECD.[169] Engie reiterates that each entity of the group has been taxed in line with the applicable rules as confirmed by the contested tax rulings.

(149) Engie explains that the transactions whose tax treatment was endorsed by the contested tax rulings pursue an economic objective, i.e. financing the transfer of assets. Therefore, according to Engie, the criteria of the Article 6 StAnpG are not met in the present case.

(150) According to Engie, the beneficiaries of the contested tax rulings have not been treated differently from other companies which would not benefit from such tax rulings, given that the contested tax rulings only confirm the correct application of the applicable tax rules in Luxembourg. Therefore, the contested tax rulings discriminate neither *de jure* nor *de facto* other undertakings in a factual and legal situation comparable to Engie in the light of the objectives of the Luxembourg tax system.

5.3. Absence of recovery

(151) Finally, Engie argues that in case the Commission were to qualify the contested tax rulings as aid incompatible with the internal market, it could not order their recovery without infringing a number of general principles of law, namely the principles of legal certainty, legitimate expectations, good administration and equal treatment.

(152) In particular, according to Engie, the Commission could only demonstrate the existence of a selective advantage by imposing retroactively its own interpretation of the Luxembourg tax law to conclude that it was wrongly applied in the case at hand. The legal uncertainty that would result should be limited by the non-retroactivity of the effects of the decision.

6. ASSESSMENT OF THE AID MEASURES

(153) As described in recital (92), the Opening decision raised three main doubts. In the present Decision, the Commission will focus its assessment on the third doubt, i.e. the combined effect of the deductibility of the ZORA Accretions and the exemption of the corresponding income, and will explain why the doubts expressed in the Opening decision have not been allayed.

6.1. Existence of aid

(154) According to Article 107(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods is incompatible with the internal market, in so far as it affects trade between Member States.

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[168] Commission decision of 8 July 2009 on the *Groepsrentenbox*, OJ L 288, 4.11.2009, p. 26. Commission decision of 21 October 2015 regarding State aid granted by Luxembourg to FIAT, OJ L 351, 22.12.2016, p. 1.

[169] Action 2 of the Base Erosion and Profit Shifting's project.

(155) For a measure to be categorised as aid within the meaning of Article 107(1) of the Treaty, all the conditions set out in that provision must be fulfilled.[170] Therefore, there must, first, be an intervention by the State or through State resources; second, this intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on an undertaking and, fourth, it must distort or threaten to distort competition.[171]

(156) As regards the first condition for a finding of aid, the contested tax rulings were issued by the Luxembourg tax administration, which is an organ of the Luxembourg State. Those tax rulings entailed an acceptance by that administration of a certain tax treatment. On the basis of those rulings, the Engie group companies LNG Supply, LNG Luxembourg, LNG Holding, GSTM, EIL and CEF have determined their corporate income tax liability in Luxembourg on an annual basis. Those tax rulings are subsequently used by those Engie group companies for their annual corporate income tax declarations, which were accepted by the Luxembourg tax administration as corresponding to their corporate income tax liability in Luxembourg. The tax advantage granted on the basis of the contested tax rulings is therefore imputable to Luxembourg.

(157) As regards the financing of the measures through State resources, the Court of Justice has consistently held that a measure by which the public authorities grant certain undertakings a tax exemption which, although not involving a positive transfer of State resources, places the persons to whom it applies in a more favourable financial situation than other taxpayers constitutes State aid.[172] In this case, the contested tax rulings confirm that the ZORA Accretions are tax deductible expenses at the level of LNG Supply and GSTM, whereas the corresponding income, once realised at the level of, respectively, LNG Holding and CEF, would be exempt from taxation. As a consequence, the amounts of the ZORA Accretions, which represent a sizeable portion of the profits generated by LNG Supply and GSTM, remain untaxed in Luxembourg. Therefore, the tax treatment granted on the basis of the contested tax rulings can be said to reduce the corporate income tax liability in Luxembourg of the Engie group and therefore gives rise to a loss of State resources. That is because any expenses of Engie group companies declared tax deductible in Luxembourg, as well as any revenues of Engie group companies declared tax-exempt in Luxembourg result in a loss of tax revenue that would have otherwise been available to Luxembourg.[173] Therefore, the measures are financed through State resources.

(158) As regards the second condition for a finding of aid, the companies benefitting from the contested tax rulings are part of the Engie group, a multinational group operating on various energy markets in several Member States, so that any aid in their favour is liable to affect intra-Union trade. In the same vein, by providing a favourable tax treatment to Engie, Luxembourg has potentially drawn investment away from Member States that cannot or will not offer a similarly favourable tax treatment.

[170] See Case C-399/08 P *Commission v Deutsche Post* EU:C:2010:481, paragraph 38 and the case-law cited therein.

[171] Joined Cases C-20/15 P *Commission* v *World Duty Free* EU:C:2016:981, paragraph 53 and the case-law cited.

[172] See Joined Cases C-106/09 P and C-107/09 P *Commission v. Government of Gibraltar and United Kingdom* EU:C:2011:732, paragraph 72 and the case-law cited therein.

[173] See Joined Cases C-106/09 P and C-107/09 P *Commission v. Government of Gibraltar and United Kingdom*, EU:C:2011:732, paragraph 72 and the case-law cited.

Since the contested tax ruling strengthens the competitive position of its beneficiary as compared with other undertakings competing in intra-EU trade, it must be considered as being liable to affect such trade.[174]

(159) Similarly, as regards the fourth condition for a finding of aid, 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 its recipient as compared to other undertakings with which it competes.[175]

(160) In particular, Engie is active in electricity, natural gas and LNG, energy efficiency services and other related markets in several EU Member States. These are all markets in which Engie faces competition from other undertakings. As it will be demonstrated, the tax treatment granted on the basis of the contested tax rulings relieve Engie of a tax liability they would have otherwise been obliged to bear in their day-to-day management of normal activities. Therefore the aid granted on the basis of those tax rulings should be considered to distort or threaten to distort competition by strengthening the financial position of Engie on the markets on which it operates. By relieving Engie of a tax liability it would otherwise have had to bear and which competing undertakings have to carry, the tax treatment granted on the basis of the contested tax rulings frees up resources which Engie could use, for instance, to invest in its business operations, to undertake further investments or to improve the remuneration of shareholders, thereby distorting competition on the markets where it operates. Therefore, the fourth condition for a finding of aid is also fulfilled in this case.

(161) As regards the third condition for a finding of aid, the function of a tax ruling is to confirm in advance the way the ordinary tax system applies to a particular case in view of its specific facts and circumstances. However, like any other tax measure, the tax treatment granted on the basis of a tax ruling must respect State aid rules. Where a tax ruling endorses a tax treatment that does not reflect what would result from a normal application of the ordinary tax system, without justification, the measure will confer a selective advantage on its addressee in so far as that tax treatment results in improving the financial position of that undertaking in the Member State as compared to undertakings in a comparable factual and legal situation in the light of the objective of the tax system.

(162) In line with the doubts expressed in the Opening decision,[176] the Commission considers that the tax treatment endorsed by the contested tax rulings constitutes a selective advantage. The existence of that selective advantage can be established analysing the effects of the tax treatment conferred to Engie from different angles. In Section 6.2, the Commission will establish the existence of a selective advantage analysing the effects of the contested tax rulings *at the individual level* of the holding entities LNG Holding and CEF. In Section 6.3 the Commission will establish the existence of a selective advantage analysing the effects of the contested tax rulings *at group level*. Finally, in Section 6.4 the Commission will demonstrate that, by not applying its domestic tax anti-abuse rules, Luxembourg has granted a selective advantage to Engie.

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174 Case C-126/01 *GEMO SA* EU:C:2003:622, paragraph 41 and the case-law cited.

175 See Case 730/79 *Phillip Morris* EU:C:1980:209, paragraph 11 and Joined Cases T-298/97, T-312/97 etc. *Alzetta* EU:T:2000:151, paragraph 80.

176 See Opening decision, recital 152.

6.2. Selective advantage established analysing the effects of the tax treatment at the level of LNG Holding and CEF

(163) Whenever a measure adopted by the State improves the net financial position of an undertaking, an advantage is present for the purposes of Article 107(1) of the Treaty.[177] In establishing the existence of an advantage, reference is to be made to the effect of the measure itself.[178] As regards fiscal measures, an advantage may be granted through different types of reduction of an undertaking's tax burden and, in particular, through a reduction in the taxable base or in the amount of tax due.[179]

(164) The contested tax rulings endorse a tax treatment on the basis of which GSTM, EIL, CEF, LNG Supply, LNG Luxembourg and LNG Holding have determined their taxable profit for corporate income tax purposes on an annual basis. That tax treatment, in turn, determines their corporate income tax liability in Luxembourg during the period covered by the contested tax rulings and is thus apt to provide a selective advantage.

(165) Consequently, as regards Engie's argument in recital (133) that there cannot be any advantage as the tax treatment did not materialise due to the absence of conversion of the GSTM ZORA, the Commission observes that the existence of the advantage does not depend on the conversion of the ZORAs, even though, as explained in Section 8, for the purposes of determining the amount of recovery, the advantage materialises only at the moment in which the income received by CEF and LNG Holding is exempted.[180]

(166) Furthermore, and also to address some observations raised by Luxembourg[181] and Engie,[182] the Commission recalls that the present Decision does not concern the participation exemption regime laid down in Article 166 LIR as such, but rather the application of such regime to the specific circumstances of the case, as endorsed by the Luxembourg tax authorities when issuing the contested tax rulings. In fact, the tax treatment under assessment consists in allowing the application of the participation exemption to income received by LNG Holding and CEF stemming from their participation in, respectively, LNG Supply and GSTM, which corresponds economically to amounts deducted as expenses (the ZORA Accretions) at the level of the latter entities. The combined effect of the deductibility of the amount of the ZORA Accretions and the exemption of the corresponding income is that virtually all the profit realised by LNG Supply and GSTM has effectively been left untaxed.[183] As explained in Section 6.2.1, this tax treatment derogates from the reference framework, which is the Luxembourg corporate income tax system. Moreover, it constitutes an unjustified discrimination *vis-à-vis* other undertakings subject to the

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177 See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union ("Notion of aid Notice"), OJ C 262, 19.7.2016, p. 1, paragraph 67 and the case law cited.

178 Case 173/73 *Italy v. Commission* EU:C:1974:71, paragraph 13.

179 See Case C-66/02 *Italy v Commission* EU:C:2005:768, paragraph 78; Case C-222/04 *Cassa di Risparmio di Firenze and Others* EU:C:2006:8, paragraph 132; Case C-522/13 *Ministerio de Defensa and Navantia* EU:C:2014:2262, paragraphs 21 to 31.

180 Moreover, the LNG ZORA has been partly converted.

181 Observations by Luxembourg to the Letter of 11 December 2017, page 5.

182 Observations by Engie to the Letter of 11 December 2017, paragraph 33.

183 More specifically, all the profit realised by these two entities minus the LNG Margin and the GSTM Margin (both set initially at [1/(50-100)%] of the value of their assets).

same reference framework in Luxembourg, which would be taxed on the totality of their profit.

(167) Article 107 of the Treaty prohibits only aid "*favouring certain undertakings or the production of certain goods*", that is to say, it prohibits measures conferring a selective advantage.[184] In order to classify a national tax measure as selective under that analysis, the Court of Justice has devised the so-called three steps test. Under this test, the Commission must begin by identifying the reference system. Thereafter, it must demonstrate that the tax measure at issue is a derogation from that reference system, in so far as it differentiates between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation (*prima facie* selectivity).[185] Finally, a tax measure which constitutes a derogation to the application of the reference system may nevertheless be justified if the Member State concerned can show that that this measure results directly from the basic or guiding principles of that tax system.[186] If that is the case, the tax measure is not selective. The burden of proof in that last step lies with the Member State.

(168) Therefore, the analysis of the existence of a selective advantage must begin with the identification of the reference system applicable in the Member State concerned. It is against that reference system that it must be determined whether the measure constitutes a derogation giving rise to a favourable treatment compared to other undertakings in a comparable factual and legal situation in the light of the objectives of the system.

(169) A reference system is composed of a consistent set of rules that apply on the basis of objective criteria to all undertakings falling within its scope as defined by its objective. Those rules define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of undertakings subject to it and the technicalities of the functioning of the system.[187] In the case of taxes, the reference system is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates.[188]

(170) In this case, the Commission will establish in Section 6.2.1. that the tax treatment granted on the basis of the contested tax rulings constitutes a derogation from the general Luxembourg corporate income tax system. In Section 6.2.2., it will demonstrate that this tax treatment also derogates from a narrower reference system consisting exclusively of the rules of the general Luxembourg corporate income tax system which govern the participation exemption and the taxation of profit distributions.

6.2.1. Derogation from the Luxembourg corporate income tax system giving rise to discrimination

6.2.1.1. Reference framework: Luxembourg corporate income tax system

(171) The contested tax rulings were issued in favour of several Engie companies resident in Luxembourg in order to determine their corporate income tax liability under the

184 See Case C-6/12 *P Oy* EU:C:2013:525, paragraph 17; Case C-522/13 *Ministerio de Defensa and Navantia* EU:C:2014:2262, paragraph 32.

185 See Joined Cases C-20/15 P and C-21/15 P *Commission* v. *World Duty Free Group* EU:C:2016:981, paragraph 57 and the case-law cited.

186 See Joined Cases C-78/08 to C-80/08 *Paint Graphos* EU:C:2011:550, paragraph 65.

187 See Notion of aid Notice, paragraph 133.

188 Notion of aid Notice, paragraph 134.

ordinary rules of taxation of corporate income in Luxembourg. In view of this, the Commission considers that the reference system in the present case is composed of those rules, i.e. the general Luxembourg corporate income tax system.

(172) In this case, the main provisions of the law[189] indicate that the corporate income tax system *applies to all companies resident in Luxembourg* in order to determine their corporate income tax liability.

(173) According to Article 159(1) LIR, all companies with head office or central management in the territory of Luxembourg are considered resident for tax purposes in Luxembourg and are subject to corporate income tax. Pursuant to Article 159(2) LIR, resident companies are subject to tax *on the totality of their profit* (*sur l'ensemble des revenus du contribuable*). Consistently with this provision, Article 163 LIR provides that corporate income tax is applicable *on the taxable profit* realised by the taxpayer in a given calendar year.

(174) The taxable profit (*revenu imposable*) of corporate taxpayers is determined on the basis of its accounting profit. Article 18 LIR[190] explains how the taxpayer's annual profit is determined. According to this provision, the profit is the difference between net invested assets at the end of the tax year period and net invested assets at the beginning of the tax year period, plus withdrawals for personal use, minus additional contributions performed during the year.

(175) Therefore, in order to determine the profit which will be subject to tax it is first necessary to determine the values of the net invested assets of the company to be used for tax purposes. To this end, Article 23 LIR[191] explains that the value of the net assets should be determined following accounting rules and principles and Article 40[192] establishes the *principle of linking the tax balance sheet and the commercial balance sheet*, according to which the values of the tax balance sheet should correspond to the values of the commercial balance sheet unless a specific tax rule requires the use of a different value.[193] This means that, according to the Luxembourg general corporate income tax system, the accounting profit of a company is included in its tax base, unless a specific provision of the law indicates otherwise.

(176) In conclusion, the Luxembourg corporate income tax system applies to all companies with head office or central management located in the territory of Luxembourg, and the basis for the calculation of the taxable profit is the accounting profit. Therefore, the objective of the Luxembourg corporate income tax system is the taxation of the profit of all companies subject to tax in Luxembourg, as determined in their accounts.

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[189] See Section 0.

[190] Although in principle applicable to physical persons, pursuant to Article 162 LIR this provision is also applicable to corporate taxpayers.

[191] Although in principle applicable to physical persons, pursuant to Article 162 LIR this provision is also applicable to corporate taxpayers.

[192] Although in principle applicable to physical persons, pursuant to Article 162 LIR this provision is also applicable to corporate taxpayers.

[193] As such, all the accounting principles, including the principle of prudence, should be considered part of the reference system. In the present case, the principle of prudence explains the existence of a temporary difference between the moment in which the Subsidiaries book the ZORA Accretions as expenses and the moment in which the Lenders book the corresponding income.

(177) This is in principle neither disputed by Luxembourg nor by Engie.[194] According to Luxembourg,[195] the system of reference consists, first, of Articles 18, 40 and 23 LIR, which concerns the determination of the tax base, the linking of the commercial balance sheet with the tax balance sheet and the prudence principle,[196] and second, of Article 22bis LIR. According to Engie,[197] the reference system is constituted of Articles 18 to 45 LIR, which enshrine the fundamental principles of Luxembourg tax law for determining the tax base of a company, e.g. the principle of prudence, the linking of the tax balance sheet to the commercial balance sheet and the deductibility of business expenses.[198] Engie expressly agrees that the objective of the Luxembourg corporate income tax system is the taxation of the profits of all companies subject to tax in Luxembourg.[199]

(178) The definition of the general Luxembourg corporate income tax system as the reference framework is in line with the Court's case law, which has consistently held that in the case of measures concerning the determination of the corporate income tax liability, the reference system to be considered is the corporate income tax system of the Member State in question which applies to all undertakings, and not the specific provisions of that system applicable only to certain taxpayers or to certain transactions. For instance, in *World Duty Free*, a case concerning the rules governing investments in shareholdings, the Court endorsed the Commission's position that the reference system was the Spanish corporate income tax system and not the specific rules governing the tax treatment of those investments.[200]

(179) The Commission considers that limiting the reference framework to specific provisions of the general income tax law that target certain transactions or certain undertakings would mean that the identification of the reference system in a given case would be wholly dependent on whether the Member State in question has adopted specific tax rules, rather than looking at the objective of the tax system. By adopting specific rules applicable only to certain undertakings or transactions, the Member State could argue that the tax treatment of these companies or transactions

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194 See however recital (180).

195 See recitals (106) to (108).

196 See footnote 193.

197 See recital (135).

198 The deductibility of business expenses is only a reflection of the fact that the basis for the calculation of the taxable profit of companies is the profit as determined in their accounts, since that profit corresponds to the income realised minus business expenses and other expenses incurred.

199 "*La confirmation de l'application cumulative des articles visés par les décisions fiscales anticipatives est conforme à <u>l'objectif du système luxembourgeois, d'imposer sur le bénéfice toute société assujettie à l'impôt au Luxembourg</u> après prise en compte de la rémunération des instruments de dette émis par le contribuable*" (observations by Engie to the Opening decision, Executive Summary, Section (III)(B)(a)(iv). Emphasis added by the Commission).

200 Joined Cases C-20/15 P and C-21/15 P *Commission* v. *World Duty Free Group* EU:C:2016:981, paragraph 92: "*[i]n the contested decisions, the Commission, in order to classify the measure at issue as a selective measure, relied on the fact that the tax advantage conferred by that measure did not indiscriminately benefit all economic operators who were objectively in a comparable situation, in the light of the objective pursued <u>by the ordinary Spanish tax system</u>, since resident undertakings acquiring shareholdings of the same kind in companies resident for tax purposes in Spain could not obtain that advantage*" (emphasis added by the Commission); in the same line, see paragraphs 22 and 68. In the same line, see Case C-217/03 *Belgium and Forum 187 v. Commission* EU:C:2005:266, paragraph 95; Case C-88/03 *Portugal v Commission* EU:C:2006:511, paragraph 56; Case C-519/07 P *Commission v Koninklijke FrieslandCampina* EU:C:2009:556, paragraphs 2 to 7; and Joined Cases C-78/08 to C-80/08 *Paint Graphos* EU:C:2011:550, paragraph 50. See also Notion of aid Notice, paragraph 134.

never constitutes a derogation from the reference framework. This would shield those measures against the application of Article 107 of the Treaty and thus would render State aid control ineffective. In other words, accepting this approach would mean that the qualification of a measure as a derogation from the reference system would be entirely dependent on the regulatory technique used by the Member State. As the Court has already held, this is incompatible with the well-established principle according to which Article 107 of the Treaty defines a measure as State aid in relation to its effects, and thus independently of the techniques used.[201]

(180) Luxembourg does not expressly contest that the reference framework is the general corporate income tax system. However, it considers that the objective of taxing the profits realised by companies subject to tax in Luxembourg is neither consecrated nor reflected in the provisions of the income tax law and that the provisions of the law cannot be interpreted as requiring that all profit made by a company subject to tax in Luxembourg must be taxed, in all circumstances, even against the text of the law.[202] Luxembourg and Engie invoke in this respect the principle of legality, according to which the way taxes are determined is established by the law, which must be interpreted strictly, and if a certain situation is not expressly stipulated by the law (silence of the legislator), it cannot be subject to taxation.[203]

(181) The Commission does not agree with this allegation.

(182) First of all, the Commission fails to understand how the taxation of the profit of all companies subject to tax cannot be an objective of a corporate income tax system. In fact, the Commission notes that Luxembourg does not propose in its observations any alternative objective. Second, the Commission also notes that Engie agrees with the fact that the objective of the Luxembourg corporate income tax system is the taxation of the profit of all companies subject to tax in Luxembourg.[204] Third, as described in recitals (172) to (176), a mere reading of the relevant provisions of the law suffices to conclude that the Luxembourg corporate income tax system aims at taxing the profit of all companies subject to tax in Luxembourg, as determined on the basis of their accounts.

(183) By invoking the principle of legality Luxembourg and Engie seem to be referring to the existence of an exception or *lacuna* in the Luxembourg tax law which would have led to the effective non-taxation of virtually all the profits realised by LNG Supply and GSTM in Luxembourg. The essence of this argument is that in those cases such exceptions or *lacunae* would be part of the reference system and, thus, there could be no derogation.

(184) The Commission rejects this argument. Since the structures devised by Engie in the contested tax rulings are – as Luxembourg and Engie admit[205] – open to every operator in the market, this means that any undertaking could transfer its business to

[201] Joined Cases C-106/09 P and C-107/09 P *Commission v. Government of Gibraltar and United Kingdom* EU:C:2011:732, paragraphs 92 to 95. On the assessment of measures in relation to their effects, see also See *British Aggregates* v *Commission*, paragraphs 85 and 89 and the case-law cited, and Case C-279/08 P *Commission* v *Netherlands* EU:C:2011:551, paragraph 51.

[202] See observations by Luxembourg to the Letter of 11 December 2017, page 2.

[203] See observations by Luxembourg to the Letter of 11 December 2017, page 2. Observations by Engie to the Letter of 11 December 2017, paragraph 30.

[204] See footnote 199.

[205] See observations by Luxemburg to the Letter of 11 December 2017, page 8; observations by Engie to the Opening decision, paragraphs 125-126.

a subsidiary, set up a similar financing structure and end up being taxed only on a marginal portion of its profits, such as Engie has been. In other words, according to this argument, any taxpayer in Luxembourg can choose to be taxed on the totality of its profit or remain virtually untaxed. The Commission cannot accept this conclusion. Not only would it contravene the general feature of any tax system according to which the amount of taxes to be paid cannot unilaterally be determined by the taxpayer, but also the basic principle – common to every Member State – that income taxes should be levied according a taxpayer's ability to pay. Moreover, it would put at risk the capacity by the State to mobilise the necessary resources to finance its budget, thus rendering ineffective its tax system.

(185) In practice, the approach defended by Luxembourg and Engie would render State aid control ineffective, since Member States would be allowed to introduce in their tax systems – intentionally or not – unjustified exceptions from the general principle of taxation of profit from which entire categories of undertakings or transactions could benefit. Since such exceptions would be part of the reference framework, they could never constitute State aid.

(186) As a related argument, Luxembourg also claims that the reference framework should be defined by reference to a body of rules expressly stipulated by the national legislator and not to an alleged "principle" or "objective", the interpretation of which would risk going beyond the clear and precise terms of the law.[206]

(187) The Commission does not agree that a reference system cannot be defined by reference to its objectives, such as the taxation of the profit of all companies subject to tax. On the contrary, that is the standard way in which the case-law of the Court has been defining the reference framework in State aid cases in the corporate income tax field.[207] Indeed, the Commission *is required* to define the objective of the system in order to establish selectivity, since only in light of that objective it can demonstrate whether undertakings which are excluded from the advantage are in a legal and factual situation that is comparable to that of the beneficiaries of the

[206] See observations by Luxemburg to the Letter of 11 December 2017, page 2.

[207] See, for instance, in Case C-217/03 *Belgium and Forum 187 v. Commission* EU:C:2005:266 where, just as in the present Decision, the Court defined the reference framework by reference to the principle that companies are taxed on their commercial profit: "*In order to decide whether a method of assessment of taxable income such as that laid down under the regime for coordination centres confers an advantage on them, it is necessary, as the Commission suggests at point 95 of the contested decision, to compare that regime 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*" (paragraph 95); In the same sense see Joined Cases C-78/08 to C-80/08 *Paint Graphos* EU:C:2011:550, paragraph 50: "*It is apparent from the information available to the Court, first, that, for the purpose of calculating corporation tax, the basis of assessment of the producers' and workers' cooperative societies concerned is determined in the same way as that of other types of undertaking, namely <u>on the basis of the amount of net profit earned as a result of the undertaking's activities at the end of the tax year</u>. Corporation tax must therefore be regarded as the legal regime of reference for the purpose of determining whether the measure at issue may be selective*" (emphasis added by the Commission). See also Cases C-106/09 P and C-107/09 P *Commission v Government of Gibraltar and United Kingdom* EU:C:2011:732, paragraph 95: "*It should be noted in that respect that, contrary to what the General Court held with regard to recitals 143, 144 and 150 of the contested decision, it is apparent from those recitals that the Commission examined the existence of selective advantages for offshore companies in the light of the tax regime at issue, which formally applies to all undertakings. It is thus apparent that the contested decision identifies that regime as a reference framework in relation to which offshore companies are, in fact, favoured*". More recently, Cases C-236/16 and C-237/16 *ANGED v Generalitat de Catalunya* ECLI:EU:C:2018:280, paragraphs 42 to 45.

measure in question.[208] In any case, the objective of the Luxembourg corporate income tax system, which applies to all corporate taxpayers subject to tax in Luxembourg, is defined in the law, as it has been explained in recitals (172) to (176) and, once again, Luxembourg has not identified any alternative objective. Therefore, this argument must be rejected.

(188) In light of the foregoing, the Commission concludes that the applicable reference system is the Luxembourg corporate income tax system, the objective of which is the taxation of the profit of all companies subject to tax in Luxembourg.[209] The fact that there may be some exceptions or adjustments in the way in which the tax base is determined, as Luxembourg[210] or Engie[211] allege, does not undermine this conclusion. It is thus against that system that it must be determined whether the tax treatment granted on the basis of the contested tax rulings constitutes a derogation giving rise to a favourable treatment compared to other undertakings in a comparable factual and legal situation in light of the objective of the system.[212]

(189) LNG Holding and CEF can be considered in a legal and factual situation comparable to all corporate taxpayers subject to tax in Luxembourg in the light of the objective of Luxembourg's general corporate income tax system, i.e. the taxation of the profit of all companies subject to tax in Luxembourg. In the light of that objective, all corporate taxpayers that are capable of generating profit are, as a matter of principle, in a comparable factual and legal situation when it comes to assessing their corporate income tax liability in Luxembourg.

(190) The fact that – unlike other taxpayers – LNG Holding and CEF receive profit distributions from participated entities which can be subject to the participation exemption under Article 166 LIR does not make these two entities non-comparable to taxpayers not benefitting from this exemption in the light of the objective of the system. The exemption stipulated under this provision is granted only to certain type of income provided that some conditions are met. However, the nature of the income realised by the company (profit distribution eligible under Article 166 LIR or other commercial profit realised by the company), and the rest of conditions set out under Article 166 LIR[213] do not have any bearing on the objective of the system, which is the taxation of the profit of all companies subject to tax in Luxembourg.[214] Indeed, if the benefit from a certain corporate income tax exemption would be sufficient to render an undertaking not comparable to other undertakings not benefitting from that

208 See Joined Cases C-20/15 P and C-21/15 P *Commission* v. *World Duty Free Group* EU:C:2016:981, paragraph 54 and the case law cited, and also paragraph 86.

209 See Joined Cases C-78/08 to C-80/08 *Paint Graphos* EU:C:2011:550, paragraph 54, where the Court confirms that the objective pursued by the corporation tax regime is the taxation of company profits.

210 See observations by Luxembourg to the Letter of 11 December 2017, page 2.

211 See observations by Engie to the Letter of 11 December 2017, paragraphs 22 and 23.

212 In any event, in Section 0 the Commission will demonstrate that, should a narrower reference framework be considered, limited to the rules concerning the participation exemption and the taxation of profit distributions, the tax treatment granted on the basis of the contested tax rulings would also constitute a derogation giving rise to a favourable treatment compared to other undertakings in a comparable factual and legal situation.

213 12 month-period holding the participation and holding of minimum 10% of the capital of the participated entity or EUR 1.2 million acquisition price.

214 As a matter of fact, undertakings receiving income of the same nature but that do not comply with the conditions of Article 166 LIR (for instance, because the participation is lower than 5% or because it has been held for less than 12 months) do not benefit from the same exemption.

exemption, then corporate income tax exemptions would, by definition, never be considered selective.

6.2.1.2. Derogation from the reference framework giving rise to discrimination

(191) In view of the reference framework described in 6.2.1.1, the basis of assessment of their corporate income tax liability is the same for all corporate taxpayers in Luxembourg, i.e. the amount of net profit as determined in their accounts.[215]

(192) The tax treatment endorsed by the contested tax rulings allows exempting an income received by LNG Holding and CEF: the income resulting from their participation in, respectively, LNG Supply and GSTM. As the contested tax rulings and the agreements signed by the parties show, and Luxembourg expressly admits,[216] there is a direct and clear link between that income and the ZORA Accretions deducted from the tax base of, respectively, LNG Supply and GSTM. In fact, any profit realised by LNG Supply and GSTM exceeding the LNG Margin and GSTM Margin is deducted from their tax bases in the form of the ZORA Accretions (thus remaining untaxed). The taxable profit of the subsidiaries is therefore limited to the LNG Margin and GSTM Margin. The untaxed profit deducted in the form of ZORA Accretions is then incorporated into the LNG Shares and the GSTM Shares, which are, by virtue of the ZORAs and of the Forward Contracts, received at conversion by, respectively, LNG Holding and CEF. However, when the profit incorporated into the LNG Shares and the GSTM Shares is realised as income at the level of LNG Holding and CEF, it can benefit from the participation exemption,[217] thus remaining also untaxed at the level of those companies.

(193) The consequence is that virtually all the profit realised by LNG Supply and GSTM is left untaxed in the hands of, respectively, LNG Holding and CEF. However, such profit is realised by companies subject to tax in Luxembourg and is recorded in the accounts, first of LNG Supply and GSTM, and later of LNG Holding and CEF. Consequently, under the ordinary taxation system, it should be subject to taxation in Luxembourg. Therefore, the tax treatment granted on the basis of the contested tax ruling constitutes a derogation from the reference framework.

(194) Luxembourg raises again the principle of legality. It considers that the terms of the provisions of the law which have been applied in the contested tax rulings are clear and do not admit an interpretation *ratio legis* or according to their objectives. Since the text of the provisions of the law has been respected, there can be no derogation and therefore there is no advantage.[218]

(195) With this argument, Luxembourg essentially considers that a measure cannot constitute a selective advantage if it complies with national law, since in this case it would not constitute a derogation. In the Commission's view, this argument is ineffective. As it has already been explained, State aid measures are assessed in

[215] This was confirmed by Luxembourg during the meeting of 1 June 2017. In particular, when the Commission asked during the meeting whether the tax adjustment contemplated under Article 164(3) LIR could be considered one of the derogations of the principle of "*accrochement*" under Article 40 LIR, Luxembourg clarified that "*any tax provision, which provides for an adjustment of the commercial balance sheet would be considered an exception*".

[216] See letter by Luxembourg of 12 May 2017, response to question 2.ii: "*La plus-value comptable de 506,2 MUSD réalisée par LNG Holding correspond économiquement à l'accroissement de valeur de LNG Supply entre 2009 et 2014*".

[217] See Sections 0, 0, 0, 0, 0 and 0.

[218] See observations by Luxembourg to the Letter of 11 December 2017, page 4.

relation to their effects. Therefore, the definition of a measure as aid cannot depend on their legality under the national legal order. If that was the case, virtually no State measures could be qualified as State aid.[219] On the contrary, whenever the application of one or more provisions of the law to a specific case gives rise to an exception to the general rule set out in the reference system (in this case, the taxation of the profit of all companies subject to tax in Luxembourg), then that tax treatment must be considered as constituting a derogation. Moreover, if such derogation gives rise to a discrimination *vis-à-vis* undertakings in a comparable legal and factual situation in the light of the objective of the system, the tax treatment in question must be considered *a priori* selective, and this irrespective of whether the terms of the provisions applied have been respected or not.

(196) As a consequence, the tax treatment granted on the basis of the contested tax rulings derogates from the general Luxembourg corporate income tax system and hence constitutes an economic advantage to LNG Holding and CEF. The fact that there exists in the corporate income tax law of a number of other derogations does not undermine the derogatory nature of the tax treatment granted on the basis of the contested tax rulings.[220]

(197) Moreover, as established in Section 6.2.1.1, LNG Holding and CEF are in a comparable legal and factual situation to all corporate taxpayers subject to corporate income tax in Luxembourg. Therefore, the tax treatment granted to LNG Holding and CEF on the basis of the contested tax rulings confers an advantage on those two companies as compared to all other corporate taxpayers in a comparable legal and factual situation in the light of the objective pursued by the Luxembourg corporate income tax.

(198) In light of the foregoing, the Commission concludes that the advantage granted on the basis of the contested tax rulings is *prima facie* selective.

(199) In any case, even if only corporate taxpayers that are subject to the rules concerning the participation exemption and the taxation of profit distributions were considered to be in a legal and factual situation comparable to LNG Holding and CEF, in Section 6.2.2 the Commission will also demonstrate that those corporate taxpayers are also excluded from the tax advantage granted to LNG Holding and CEF.

6.2.2. Derogation from the rules of the Luxembourg corporate income tax system concerning the participation exemption and the taxation of profit distributions

6.2.2.1. Reference framework: the rules of the Luxembourg corporate income tax system concerning the participation exemption and the taxation of profit distributions

(200) Engie claims that the adjustments imposed by the tax law to the profit determined in the taxpayer's commercial balance sheet, and in particular the participation exemption regime, are part of the reference framework.[221] In practice, with this allegation Engie attempts to narrow down the reference framework to the specific provisions of the income tax law that govern the participation exemption and the taxation of profit distributions. Against this narrower reference framework, the assessment of the undertakings which are in a legal and factual situation comparable to LNG Holding and CEF will necessarily be limited to those taxpayers to which

[219] Except in cases of misapplication of national law.
[220] Case C-217/03 *Belgium and Forum 187 v. Commission* EU:C:2005:266, paragraph 120.
[221] See observations by Engie to the Letter of 11 December 2017, paragraphs 22 to 24.

these provisions apply. However, as it will be demonstrated in this Section, under this narrower reference framework the tax treatment granted on the basis of the contested tax rulings is also *prima facie* selective.

(201) Article 164(1) LIR provides that, in order to determine the tax base of a company, it is irrelevant whether the profit has been distributed or not. This means that the profit distributed by a company does not reduce its tax base, i.e. it cannot be deducted. As a consequence, profit can only be distributed after tax. As explained in recital (87), Article 164(2) LIR applies to distributions of any kind to shareholders.

(202) Conversely, the beneficiaries will record the distributed profit in their accounts as an income. Following the principle of linking of the commercial and tax balance sheet, this income, which is part of the profit realised by those companies and thus recorded in their accounts, will in principle be included in their tax base. That inclusion will therefore lead to economic double taxation, unless the participation exemption is applied in accordance with the provisions of Article 166 LIR.[222] The exemption under this provision applies to income stemming from "participations", a term not defined in the law. However, as Luxembourg has clarified, all the participations the income of which can benefit from the exemption under Article 166 LIR (including shares) are also covered by the obligation under Article 164 LIR (with the exception of participations in foreign entities).[223] Therefore, under the ordinary Luxembourg corporate income tax system, the participation exemption applies on post-tax profit (i.e. it cannot be applied to amounts deducted from the tax base of the distributing entity).[224]

(203) Following the Decree of 21 December 2001, the participation exemption is applicable not only to profit distributed by the participated entity, but also to capital gains stemming from participations eligible to the regime.[225] A capital gain is the income resulting from the difference between the value of realisation of a participation (in the case of sale or cancellation) and its acquisition value. Capital gains arising from participations reflect either profit already realised by the participated entity but which have not yet been distributed or profit expected to be realised in the future, and therefore, not distributed either. Pursuant to Articles 18 LIR and 40 LIR all profit must necessarily be included in the tax base of the participated entity. Moreover, since it has not been distributed by the participated entity that profit cannot, by definition, be the object of any deduction. Accordingly,

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222 See recital (85).

223 See observations by Luxembourg to the Letter of 11 December 2017, response to question 1.b: "*Hormis l'exception faite aux sociétés étrangères précédemment développé, toutes les participations dont les revenus peuvent bénéficier du régime d'exonération au titre de l'article 166 LIT sont aussi couvertes par les dispositions de l'article 164 de la LIR*" (emphasis added by the Commission).

224 See, to this regard, Steichen, Alain, *Manuel de Droit fiscal. Droit fiscal général*, Les cours de l'Université du Luxemburg, 2015, page 644: "*L'article 166 LIR visant à éliminer la double imposition économique, la philosophie sous-jacente à cet article est qu'il s'applique aux revenus après impôts distribués par les sociétés. L'article 166 LIT doit donc être lu ensemble avec l'article 164 al. 2 LIR qui définit les distributions qui ne sont pas déductibles de la base imposable de la société opérant le paiement […]. Outre la cohérence logique entre l'article 166 LIR et 164 al. 2 LIR (peut n'être exonéré chez le bénéficiaire ce qui n'est pas déductible chez le débiteur di revenu ; tout ce qui n'est pas déductible chez le débiteur du revenu doit pouvoir être exonéré chez le créancier du revenu) […]*".

225 See recital (86). The tax exemption of capital gains stemming from participations follows the same logic than the tax exemption of profit distributions. In the absence of the participation exemption, the same profit would be included in the tax base of both the entity issuing and the entity holding the participation, thus giving rise to economic double taxation.

also in the case of capital gains, the participation exemption is applicable to income which cannot correspond to amounts deducted from the tax base of the participated entity (such as the ZORA Accretions).

(204) In other words, under a narrower reference framework composed exclusively of the rules concerning participation exemption and the taxation of profit distributions, the participation exemption is applicable to income which does not correspond to amounts deducted from the tax base of the participated entity, and this regardless of whether such income is qualified as a profit distribution or a capital gain.

(205) LNG Holding and CEF are in a legal and factual situation comparable to all corporate taxpayers that receive income from participations and which are therefore subject to the rules concerning the participation exemption and the taxation of profit distributions in Luxembourg. Those undertakings hold the same type of instruments as LNG Holding and CEF (participations) and the income received from those instruments is of the same nature than the income received by LNG Holding and CEF, which qualifies in principle for the application of the participation exemption.

6.2.2.2. Derogation from the reference framework giving rise to discrimination

(206) The contested tax rulings allow LNG Holding and CEF (entities resident for tax purposes in Luxembourg) to apply the participation exemption to an income which corresponds economically to amounts deducted as expenses (ZORA Accretions) at the level of, respectively, LNG Supply and GSTM (also resident in Luxembourg).

(207) In fact, the contested tax rulings confirm that any profit made by LNG Supply and GSTM exceeding the LNG Margin and GSTM Margin (and therefore deducted from their tax bases in the form of ZORA Accretions) is incorporated into the LNG Shares and the GSTM Shares. Those shares are, by virtue of the ZORAs and of the Forward Contracts, received at conversion by, respectively, LNG Holding and CEF. Thereafter, when the profit incorporated into the LNG Shares and the GSTM Shares is realised as income at the level of LNG Holding and CEF, it can benefit from the participation exemption.[226]

(208) The existence of a direct and clear link between the income benefitting from the participation exemption at the level of the Holdings and the amounts deducted as expenses at the level of the Subsidiaries is apparent in the case of the partial conversion of the LNG ZORA. In this case, as the tax returns submitted show, the income realised by LNG Holding as a result of the partial conversion and cancellation of LNG Supply Shares in 2014 corresponds economically to the ZORA Accretions deducted by LNG Supply between 2009 and 2014, which LNG Holding has received by means of the LNG ZORA and the LNG Forward Contract.[227] This has been expressly confirmed by Luxembourg: "*La plus-value comptable de 506,2 MUSD réalisée par LNG Holding correspond économiquement à l'accroissement de valeur de LNG Supply entre 2009 et 2014*".[228]

(209) The application of the participation exemption to an income at the level of the Holdings which corresponds economically to amounts deducted as expenses at the level of the Subsidiaries constitutes an exception to the reference framework described in Section 6.2.2.1 above according to which, the participation exemption is

[226] See Sections 0, 0, 0, 0, 0 and 0.
[227] See recitals (49), (53) and (57).
[228] See letter by Luxembourg of 12 May 2017, response to question 2.ii.

applicable to income which does not correspond to amounts deducted from the tax base of the participated entity. The effect of this derogation is that *virtually all the profit* generated by LNG Supply and GSTM is *never subject to taxation in Luxembourg*. As a consequence, the tax treatment endorsed by the contested tax rulings improves the financial position of LNG Holding and CEF. In fact, under the ordinary system described in Section 6.2.2.1 above, the income received by these entities would have not been deducted (in the form of ZORA Accretions) at the level of the Subsidiaries. That income would have been lower because the corresponding profit would have previously been subject to taxation in the hands of the Subsidiaries.

(210) Luxembourg and Engie contest the applicability of Article 164(2) LIR to the ZORA Accretions. In other words, Luxembourg and Engie contest that ZORA Accretions can be assimilated to profit distributions.

(211) In this regard, the Commission recalls that LNG Holding expressly qualifies the profit resulting from the cancellation of the LNG Supply Shares as "exempted dividends", i.e. as a profit distribution, in its tax returns for the year 2014.[229]

(212) Moreover, as explained in recitals (207) and (208), there exists a direct and clear link between the income that can be exempted at the level of LNG Holding and CEF and the amounts deducted by LNG Supply and GSTM as expenses (the ZORA Accretions). Therefore, from an economic perspective, the income received by LNG holding and CEF is equivalent to a profit distribution.[230]

(213) In any case, the Commission recalls that the formal qualification of the profit exempted at the level of LNG Holding and CEF as a profit distribution or as a capital gain is irrelevant. In fact, as it has been explained in Section 6.2.2.1, under the narrower reference framework composed exclusively of the rules concerning participation exemption and the taxation of profit distributions, the participation exemption is applicable to income which does not correspond to amounts deducted from the tax base of the participated entity, and this regardless of whether such income is qualified as a profit distribution or a capital gain.[231]

(214) In conclusion, the tax treatment granted to LNG Holding and CEF on the basis of the contested tax rulings derogates from the general rules of the Luxembourg corporate income tax system governing the participation exemption and the taxation of profit distributions.

(215) Moreover, this derogation gives rise to discrimination compared to other undertakings which are in a legal and factual situation compared to LNG Holding and CEF in the light of the objective of the system. In fact, other corporate taxpayers that receive income from participations and are therefore subject to the rules concerning the participation exemption and the taxation of profit distributions in

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[229] *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial* of LNG Holding for the year 2014, *formulaire modèle 506A*, "*Détails concernant les participations visées à l'Article 166 LIR*" concerning LNG Supply, section 3), ligne 19: "*dividendes exonérés*".

[230] The fact that, formally, LNG Supply has not held a shareholder's meeting approving a dividend distribution is irrelevant. LNG Holding is the sole shareholder of both LNG Supply and the entity granting the LNG ZORA (LNG Luxembourg). Therefore, it can at any moment unilaterally decide when to convert the ZORA just as it can decide when to approve the distribution of LNG Supply's profits in a shareholder's meeting.

[231] See recital (204).

Luxembourg are excluded from the benefit of the tax advantage granted to LNG Holding and CEF, even though they are in a comparable factual and legal situation in the light of the objective of the system. It is true that all those taxpayers could benefit of the exemption under Article 166 LIR. However, the participation exemption would have been applied to a relatively lower income, (i.e. post-tax profit of the participated entity), as explained in recital (209).

(216) Luxembourg claims that Article 166 LIR does not require for its application that the profit stemming from participations must have previously been taxed and that the provisions of Article 164 LIR are not a condition *sine qua non* for the application of Article 166 LIR.[232] In the same line, Engie considers that the conditions for the application of Article 166 LIR have all been respected, so there can be no derogation.[233] Both Luxembourg and Engie also contest that the objective of Article 166 LIR is the avoidance of double taxation with various arguments related, *inter alia*, to Council Directive (EU) 2015/121 ("parent-subsidiary Directive").[234]

(217) The Commission must reject this line of argument.

(218) First of all, the fact that there is no express link between Article 166 LIR and Article 164(1) and (2) LIR is irrelevant. Luxembourg has expressly confirmed[235] that all participations eligible for the exemption under Article 166 LIR are also caught by Article 164(1) and (2) LIR at the level of the participated entity.[236] The consequence of this is that under the reference framework described in Section 6.2.2.1, the participation exemption is applicable to income which cannot correspond to amounts deducted from the tax base of the participated entity. As an exception to this rule, the contested tax rulings allow the application of the participation exemption at the level of the Holdings (entities resident for tax purposes in Luxembourg) to an income which corresponds economically with the amounts deducted as expenses (the ZORA Accretions) at the level of the Subsidiaries (also resident in Luxembourg). As a consequence, the tax treatment granted on the basis of the contested tax rulings derogates from the reference system.

(219) Second, even in the absence of an express link between both provisions, the complementarity of Article 166 LIR and Article 164(1) and (2) LIR is necessary in order to ensure the logical consistency of the tax system. If the same amount could be deducted as an expense at the level of the participated entity and exempted as

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232 See observations by Luxembourg to the Letter of 11 December 2017, pages 4, 6 and responses to questions 1.b and 1.c.

233 See observations by Engie to the Letter of 11 December 2017, paragraphs 26-31.

234 Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.
In its observations to the Letter of 11 December 2017, Luxembourg explains that the recent amendment introduced in the parent-subsidiary Directive in 2015 - where the application of the participation exemption on profits distributed is made conditional on the non-deductibility of these profits by the subsidiary - would have been unnecessary if the objective of the participation exemption was to avoid double taxation (page 4). Engie also refers to other objectives pursued by this Directive (see observations to the Letter of 11 December 2017, paragraphs 35-43).

235 See Luxembourg observations to the Letter of 11 December 2017, response to question 1.b: "*Hormis l'exception faite aux sociétés étrangères précédemment développé, toutes les participations dont les revenus peuvent bénéficier du régime d'exonération au titre de l'article 166 LIT sont aussi couvertes par les dispositions de l'article 164 de la LIR*" (emphasis added by the Commission).

236 Except if the participated entity is not resident for tax purposes in Luxembourg, in which case Article 164 LIR would not be applicable.

income at the level of the beneficiary, that profit would escape taxation in Luxembourg. Such an interpretation would allow any corporate group to easily circumvent the objective of the Luxembourg corporate income tax system, which is to tax the profit of all companies subject to tax in Luxembourg, by distributing to its shareholder all the previously untaxed profit of the subsidiaries.[237] Moreover, such an interpretation would also be inconsistent with the objective of avoiding double or triple taxation.[238]

(220) Article 107 of the Treaty defines aid measures in relation to their *economic effects* in the market, not in relation to their legality under the national legal order, to the legislative techniques used or to the intention of the legislator. Consequently, to the extent that the combined *effect* of the deductibility of the ZORA Accretions and the exemption of the corresponding income is that virtually all the profit realised by the Subsidiaries has been left untaxed at the level of the Holdings, thus giving rise to discrimination with undertakings in a comparable legal and factual situation, the State measure endorsing such tax treatment must be considered as granting a *prima facie* selective advantage. This conclusion is this irrespective of whether the conditions of Articles 166 and 164 LIR have been respected, of whether there is an express link between such provisions or of the objective of the parent-subsidiary Directive.

(221) Engie refers to the judgment of the Court in the case *Service public federal Finances*[239] which interprets the provisions of the parent-subsidiary Directive which were in force at the time in which the contested tax rulings were issued.[240] According to Engie, the Court confirmed in that judgment that the parent-subsidiary Directive – applicable to cross-border situations – does not require that profit subject to the participation exemption has been taxed before. Engie considers that by applying the same exemption regime to internal situations, Luxembourg has opted to ensure equal treatment between corporate groups with subsidiaries in Luxembourg and corporate groups with subsidiaries in other Member States. As both situations are factually identical and the same provisions are applicable in both cases, Engie considers that the participation exemption cannot be said to apply only in the cross-border situation and not in the internal one.

(222) At the outset, the Commission clarifies that the present Decision concerns a purely internal situation, in which all companies involved in the different transactions contemplated in the contested tax rulings are resident for tax purposes in Luxembourg. The selective advantage derives from a derogation consisting in the fact that the profit realised by two subsidiaries of the Engie group resident in Luxembourg have remained virtually untaxed at the level of their shareholders, also resident in Luxembourg. Therefore, the Commission has not investigated if a similar measure, applied to a situation in which the participated entities were not tax resident in Luxembourg, would also constitute a selective advantage.

(223) The Commission rejects the argument that Luxembourg must necessarily apply to a purely internal situation the more favourable treatment that would apply to the same

[237] See, to this regard, Steichen, Alain in footnote **Error! Bookmark not defined.**.

[238] See the advice of the State Council on Article 166 LIR (recital (83)); see also Decision 2006/940/EC of 19 July 2006 on aid scheme C 3/2006 implemented by Luxembourg for 1929 holding companies and billionaire holding companies, recital (63).

[239] See Case C-48/07 *État belge – Service public fédéral Finances* EU:C:2008:758, paragraphs 37 and 45.

[240] The judgment refers to Directive 90/435.

transaction at cross-border level. A mismatch arises due to the differences in the legal qualification - and therefore in the tax treatment - of a cross-border instrument or transaction under the laws of two different tax jurisdictions, giving rise to non-taxation. Such mismatches, however, should in principle not take place in a purely internal situation, where the internal logic and coherence of the system are aimed precisely at preventing this type of *lacunae*. As it is well known, in order to limit tax avoidance, the Union, the OECD and the international tax community are undertaking efforts to reduce the differences in the tax legislations and close the existing mismatches and gaps. Therefore arguing, as Engie seems to do, that Luxembourg should apply the existing cross-border mismatches *also at internal level*, even against the internal logic of the tax system, is not only legally inconsistent, but also contrary to these efforts.

(224) The Court's case-law, and in particular the *Service public federal Finances* judgment, says nothing different. This case concerns a Belgian law that extended the application of the parent-subsidiary Directive also to purely internal situations. The Belgian Court referred to the Court of Justice a question for a preliminary ruling regarding the interpretation of the Directive.[241] The judgment confirms that the objective of the Directive is to *eliminate cases of double taxation* of profits distributed by subsidiaries to their parent companies and to eliminate disadvantages for cross-border cooperation due to the *less advantageous* tax treatment of cross-border relations between parent companies and subsidiaries as compared to purely internal relations.[242] In light of that spirit, and in line with the case law on the fundamental freedoms, the Court states that the "*freedoms of movement guaranteed by the Treaty preclude a Member State from treating foreign-sourced dividends <u>less favourably</u> than nationally-sourced dividends, unless such a difference in treatment concerns situations which are not objectively comparable or is justified by overriding reasons in the general interest*".[243] In other words, this judgment merely applies the well-established case-law according to which the fundamental freedoms prevent Member States from treating domestic situations more favourably than comparable cross-border situations. The opposite, however, is not true: Member States are not required, as Engie seems to suggest, to extend to purely internal situations the more favourable tax treatment applicable to cross-border situations, in particular if that more favourable treatment results from mismatches or gaps leading to non-taxation.[244]

[241] The Court explicitly states in the judgment that, although the referring court is bound by its interpretation of the Directive, the extent to which such interpretation applies to an internal situation "*is a matter for domestic law and consequently falls within the exclusive jurisdiction of the courts of the Member State*" (paragraph 27).

[242] *Ibid*., paragraph 37.

[243] *Ibid*., paragraphs 46 and 47 (emphasis added by the Commission).

[244] In fact, fundamental freedoms deal with cross-border situations. Purely internal situations are not covered and in principle reverse discrimination is permitted from EU law perspective (see Cases C-60/91 *Batista Morais* EU:C:1992:140, paragraph 7; C-29/94 to C-35/94 *Jean-Louis Aubertin* EU:C:1995:39, paragraphs 9-11; C-332/90 *Steen v. Deutsche Bundespost* EU:C:1992:40; C-139/12 *Caixa d'Estalvis i Pensions de Barcelona v. Generalidad de Cataluña* EU:C:2014:174, paragraphs 42 and 45, C-591/15 *The Gibraltar Betting and Gaming Association Limited v. Commissioners for Her Majesty's Revenue and Customs* EU:C:2017:449, paragraph 33.

Even more, since domestic situations cannot be treated more favourably than comparable cross-border situations, LNG Holding and CEF should not receive advantages which would not be granted for cross-border situations. In this respect, it should be recalled that under Article 166 para 2bis – introduced in

(225) The argument according to which the tax advantage granted to LNG Holding and CEF on the basis of the contested tax rulings is of general application, since any other undertakings could potentially have access to a similar benefit replicating the structure implemented by Engie, is also ineffective. According to the Court's settled case-law, the fact that the number of undertakings able to claim entitlement under a national measure is very large or that those undertakings belong to various economic sectors is not sufficient to call into question the selective nature of the measure.[245] The same principle can be applied in cases in which the advantage results from a tax ruling applying a combination of provisions of the law to a specific set of facts when those facts can be replicated by other undertakings. The Court has also established that the Commission is not required, in order to establish the selectivity of a measure, to identify certain specific features that are characteristic of and common to the undertakings that could be the recipients of the tax advantage, by which they can be distinguished from those undertakings that are excluded from the advantage.[246]

(226) In light of the foregoing the Commission concludes that under a narrower reference framework consisting exclusively of the rules of the general Luxembourg corporate income tax system which govern the participation exemption and the taxation of profit distributions, the advantage granted on the basis of the contested tax rulings is *prima facie* selective as it favours LNG Holding and CEF as compared to undertakings which are in a comparable legal and factual situation.

6.2.3. Lack of justification

(227) According to settled case-law, 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 and the logic of the system, which it is for the Member State concerned to demonstrate.[247]

(228) A measure which creates an exception to the application of the general tax system may be justified by the nature and overall structure of the tax system if the Member State concerned can show that that measure results directly from the basic or guiding

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the LIR in 2016 as a result of the transposition of Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States -, the participation exemption would not be applicable in cross-border situations in cases where the income received by the beneficiary can be deducted in the Member State of the participated entity: "*[…] l'exonération ne s'applique pas aux revenus visés par la directive 2011/96/UE du Conseil du 30 novembre 2011 concernant le régime fiscal commun applicable aux sociétés mères et filiales d'Etats membres différents, qui proviennent d'une participation détenue directement dans le capital social d'un organisme à caractère collectif qui est un résident d'un autre Etat membre de l'Union européenne et visé par l'article 2 de la directive 2011/96/UE, dans la mesure où ils sont déductibles dans cet Etat membre ou lorsqu'ils sont alloués dans le cadre d'un montage ou d'une série de montages qui, ayant été mis en place pour obtenir, à titre d'objectif principal ou au titre d'un des objectifs principaux, un avantage fiscal allant à l'encontre de l'objet ou de la finalité de cette directive, n'est pas authentique compte tenu de l'ensemble des faits et circonstances pertinents. Au sens de la présente disposition, un montage, qui peut comprendre plusieurs étapes ou parties, ou une série de montages est considéré comme non authentique dans la mesure où ce montage ou cette série de montages n'est pas mis en place pour des motifs commerciaux valables qui reflètent la réalité économique*".

245 Joined cases C-20/15 P and C-21/15 P *World Duty Free* EU:C:2016:981, paragraph 80, case C-409/00 *Spain v Commission*, paragraph 48; case C-279/08 P *Commission v Netherlands* EU:C:2011:551, paragraph 50.

246 Joined cases C-20/15 P and C-21/15 P *World Duty Free* EU:C:2016:981, paragraph 78.

247 Case C-88/03 *Portugal v Commission* EU:C:2006:511, paragraphs 52 and 80 and the case-law cited.

principles of its tax system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system.[248] In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax regime, which are extrinsic to it, and, on the other hand, the mechanisms inherent in the tax system itself, which are necessary for the achievement of such objectives.[249]

(229) Neither Luxembourg nor Engie have advanced any possible justification for the favourable treatment endorsed by the contested tax rulings in favour of LNG Holding and CEF. The Commission recalls, in this respect, that the burden of establishing such a justification lies with the Member State. Therefore, in the absence of any justification advanced by Luxembourg, the Commission must conclude that the tax advantage granted to LNG Holding and CEF cannot be justified by the nature or general scheme of the Luxembourg corporate income tax system.

(230) In any event, the Commission has not been able to identify any possible ground for justifying the preferential treatment for LNG Holding and CEF that could be said to derive directly from the intrinsic, basic or guiding principles of the reference system or that is the result of inherent mechanisms necessary for the functioning and effectiveness of the system.[250]

(231) The Commission notes that, according to the Luxembourg State Council,[251] one of the objectives of the participation exemption regime contemplated in Article 166 LIR is to avoid double or triple taxation for reasons of fiscal equity.[252] Double taxation refers to situations in which the same profit is taxed twice in respect of the same taxpayer (also referred to as legal double taxation) or in respect of two different taxpayers (economic double taxation). The Commission accepts that an exemption from taxation aiming at avoiding economic double taxation may be justified by the nature and overall structure of the tax system.[253] Thus, the application of the exemption under Article 166 LIR so as to avoid economic double or triple taxation may result directly from basic or guiding principles of its tax system.

(232) However, the advantage granted on the basis of the contested tax rulings does not consist exclusively in the application of the participation exemption, but in its application at the level of the Holdings to an income which corresponds economically to amounts deducted as expenses (the ZORA Accretions) by the Subsidiaries, thus leading to the non-taxation in the hands of LNG Holding and CEF of virtually all the profit realised by LNG Supply and GSTM. In these circumstances,

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248 Joined Cases C-78/08 to C-80/08 *Paint Graphos* EU:C:2011:550, paragraph 69.

249 Case C-88/03 *Portugal v Commission* EU:C:2006:511, paragraph 81.

250 Joined Cases C-78/08 to C-80/08 *Paint Graphos* EU:C:2011:550, paragraph 69.

251 See recital (83).

252 See the advice of the State Council on Article 166 LIR (recital (83)). See also Decision 2006/940/EC of 19 July 2006 on aid scheme C 3/2006 implemented by Luxembourg for 1929 holding companies and billionaire holding companies, recital 63. This objective is confirmed by the fact that non-resident companies can benefit from the exemption granted by Article 166 LIR only if they are subject to a tax corresponding to Luxembourg corporate income tax. In other words, the exemption will not apply in the absence of a prior taxation of the profit, i.e. if there is no double taxation.

253 See, by way of analogy, Joined Cases C-78/08 to C-80/08 *Paint Graphos* EU:C:2011:550, paragraph 71, in which the Court referred to the possibility of relying on the nature or general scheme of the national tax system as a justification for the fact that cooperative societies which distribute all their profits to their members are not taxed themselves as cooperatives, provided that tax is levied on the individual members.

the tax treatment granted to LNG Holding and CEF on the basis of the contested tax rulings cannot serve the purpose of avoiding economic double taxation. The combined application of the exemption and the deduction is determined in the contested tax rulings and thus the Luxembourg tax administration was aware that there could never be any economic double taxation. As a consequence, the tax treatment granted on the basis of the contested tax rulings is unrelated to the objective of avoidance of (potential or actual) economic double or triple taxation or any other fiscal equity-related reasons. Therefore, these objectives cannot be validly invoked as justification for the difference in treatment that results from the contested measures.

(233) In this regard, the Commission notes that, as the Court has underlined in the past, in order for tax exemptions to be justified by the nature or general scheme of the tax system of the Member State concerned, Member States must ensure that those exemptions are consistent with the principle of proportionality and do not go beyond what is necessary, in that the legitimate objective being pursued could not be attained by less far-reaching measures.[254] In this case, the application of the participation exemption to an income received by LNG Holding and CEF which corresponds economically to amounts deducted as expenses (the ZORA Accretions) by LNG Supply and GSTM can in no way be considered proportionate to avoid economic double taxation nor does it contribute to the principle of fiscal equity. The situation is rather the opposite: the contested measures allow LNG Holding and CEF, and Engie as a group, to benefit from double non-taxation. Therefore, the application of the tax exemption in the present case goes beyond what is necessary and proportionate to achieve such objective.

(234) In this regard, according to the Court, a benefit must be consistent not only with the inherent characteristics of the tax system in question but also as regards the manner in which that system is implemented.[255] In this case, the tax advantage granted on the basis of the contested tax rulings is inconsistent not only with one of the objectives of the participation exemption but also with the logic of the system in which this regime is inserted, which is the taxation of the profit of all companies subject to tax in Luxembourg.[256]

(235) In conclusion, the tax advantage granted to LNG Holding and CEF cannot be justified by the nature and logic of the system.

6.2.4. *Conclusion on selective advantage at the level of LNG Holding and CEF*

(236) In the light of all of the foregoing, the Commission concludes that the tax advantage granted to LNG Holding and CEF on the basis of the contested tax rulings is selective in nature.

254 Joined Cases C-78/08 to C-80/08 *Paint Graphos* EU:C:2011:550, paragraph 75. See also Case T-287/11 *Heitkamp BauHolding v Commission* EU:T:2016:60, paragraph 160 and T-620/11 *GFKL Financial Services AG* EU:T:2016:59, paragraph 154.

255 Joined Cases C-78/08 to C-80/08 *Paint Graphos* EU:C:2011:550, paragraph 73. See also T-287/11 *Heitkamp BauHolding v Commission* EU:T:2016:60, paragraph 160; and T-620/11 *GFKL Financial Services AG* EU:T:2016:59, paragraph 154.

256 Indeed, under the logic of the system, the profit generated by a company can be subject to taxation *more than once* (for instance, in the case of the profit distribution which do not meet the conditions to benefit from the exemption under Article 166 LIR) but in no way can they be subject to *no taxation*.

6.3. Selective advantage established analysing the effects of the tax treatment at group level

(237) Without prejudice to the conclusion in recital (236), an analysis of the effects of the contested tax rulings at the level of the group and not just of the individual legal entities leads to the same conclusion: the tax treatment granted on the basis of the contested tax rulings confers a selective advantage to Engie.

(238) In this context, Engie argues that the selectivity in fiscal measures can only be assessed at the level of the individual taxpayer and not at group level and refers to the Commission decisions in *FIAT*[257] and *Groepsrentebox*.[258]

(239) In this respect the Commission notes that, according to the tax returns provided by Luxembourg, from 2015 the entities GSTM, EIL, LNG Supply, LNG Luxembourg and LNG Holding formed a fiscal unity with CEF for Luxembourg tax purposes in which CEF operated as the parent of the unity.[259] Under Luxembourg tax law, therefore, those companies were not treated from 2015 as separate entities, but paid their taxes on a consolidated basis, i.e. as if they were one single taxpayer.[260] The Commission considers that only this circumstance would already justify a combined assessment, at least from 2015.

(240) In any case, even if these entities did not form a fiscal unity, Engie's argument cannot be accepted. As explained also in Section 6.6, it is apparent from the very wording of Article 107 of the Treaty that State aid rules analyse the economic effects of state measures in relation to "undertakings" and not of separate legal entities. An undertaking must be understood as an economic unit even if it consists of several legal persons.[261] To determine whether several entities form an economic unit, the Court of Justice looks at the existence of a controlling share or functional, economic or organic links.[262] In the present case, GSTM, EIL, LNG Supply, LNG Luxembourg and LNG Holding are fully controlled by CEF, which in is turn controlled by Engie S.A. Therefore, all those entities must be considered as being part of a single undertaking.

(241) In addition, the advantage granted on the basis of the contested tax rulings consists in the application of the participation exemption, at the level of the Holdings, to an income which corresponds economically to amounts deducted as expenses (the ZORA Accretions) by the Subsidiaries. Therefore, in order to determine the existence of an advantage it is logical to assess also the combined effects of the tax measures at both levels. The fact that Luxembourg income tax law concerns individual entities does not undermine this conclusion. In fact, the Commission notes that the tax rulings requests submitted by the tax advisor concern the tax treatment *of*

257 Commission decision of 21 October 2015 regarding State aid granted by Luxembourg to FIAT, OJ L 351, 22.12.2016, p. 1.

258 Commission decision of 8 July 2009 on the Groepsrentenbox, OJ L 288, 4.11.2009, p. 26.

259 See LNG Luxembourg tax return for 2015, Annex 3.

260 In a fiscal unity (*régime d'intégration fiscal*), a parent company may be taxed as a group together with one or more of its subsidiaries. For corporate income tax purposes, this means that the subsidiaries are deemed to have been absorbed by the parent company.

261 Case C-170/83 *Hydrotherm* EU:C:1984:271, paragraph 11. See also Case T-137/02 *Pollmeier Malchow v Commission* EU:T:2004:304, paragraph 50.

262 Case C-480/09 P *Acea Electrabel Produzione SpA v Commission* EU:C:2010:787 paragraphs 47 to 55; Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others* EU:C:2006:8, paragraph 112.

all the legal entities of the Engie group involved in the transactions and that these entities are all subject to tax in Luxembourg.

(242) This circumstance makes this case different from the *Groepsrentebox* and *FIAT cases*. In *Groepsrentebox*, the Commission decided to assess the scheme at individual level since the measure at stake applied to individual entities.[263] Likewise, in *FIAT*, the measure (the tax ruling) concerned *only the taxable profit of one individual legal entity*, whereas the counterparts in the transaction were resident in another Member State. Consequently, any reduced tax revenue, which was the basis of the advantage in that case, was necessarily based on the results of the entity resident in Luxembourg and did not need to take into account a possible neutral impact of the measure at the level of other FIAT group companies as a result of their treatment by other Member States.[264]

(243) On the contrary, in this case the effect of the measure (non-taxation of part of the profit realised by some entities in Luxembourg) derives from the combined application of an exemption and a deduction at the level of different group entities, all of which are resident for tax purposes in Luxembourg. An assessment of the combined effect of the tax rulings at the level of Engie group in Luxembourg is thus adequate to fully appreciate the result of the tax treatment.

(244) In any case, the Commission recalls that it is not bound by its decisional practice. Each potential aid measure must be assessed on the basis of its own merits under the objective criteria of Article 107(1) of the TFEU, so that even if a contrary decisional practice were shown to exist, that could not affect the findings of this Decision.[265]

6.3.1. Reference system

(245) As established in Section 6.2.1.1, in the present case the reference system is the Luxembourg corporate income tax system, which aims at taxing the profit of all companies subject to tax in Luxembourg. The basis for the calculation of the taxable profit is the accounting profit realised by the taxpayer (principle of linking the commercial and tax balance sheets). This objective applies to all corporate taxpayers in Luxembourg.

(246) The transactions concerned by the contested tax rulings are intragroup transactions which consist in, first, the transfer of certain assets to the Engie Subsidiaries subject to tax in Luxembourg and, second, the financing of those transfers by the Holdings, which are also subject to tax in Luxembourg.[266]

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263 See *Groeprentebox*, recital 80.

264 See *FIAT*, recital 198: "*Moreover, even if financing decisions could be expected to be taken in the best interest of a group as a whole, Luxembourg corporate income tax is levied on individual entities, not on groups, <u>and the contested tax ruling relates only to the taxable profit of FFT, so that any reduced tax revenue is based individually on that company's results</u>*" (emphasis added by the Commission). See also in the same decision, recital 314.

265 See C-138/09 *Todaro Nunziatina & C.* ECLI:EU:C:2010:291, paragraph 21.

266 The financing by the Holdings takes place via Forward Contracts entered into by the Holdings and the Lenders and ZORA Agreements signed between the Lenders and the Subsidiaries. This is contested neither by Luxembourg nor by Engie (see the description of the transactions provided by Luxembourg in its observations to the Opening decision, sections 2.1 and 2.2). The contested tax rulings also endorsed that the Holdings "*should be considered the owner of the shares […] as from the moment that [they] enter […] into the Forward Contract*" (see 2008 LNG tax ruling request, page 4 and 2010 GSTM tax ruling request, page 4), showing that the Holdings are considered as providing the financing).

(247) Considering that the tax treatment of those intragroup transactions must be assessed against the background of the Luxembourg corporate income tax system and in order to determine whether the tax treatment granted to Engie on the basis of the contested tax rulings derogates from that reference system, the Commission will narrow its analysis to a comparison with other intragroup financing transaction of the same type and, consequently, will assess the rules of the Luxembourg corporate income tax system governing intragroup financing transactions between group entities resident in Luxembourg.

(248) The Commission will establish that, under the Luxembourg corporate income tax system, the payment of a remuneration in the framework of a financing transaction[267] between two group entities subject to tax in Luxembourg cannot result in a reduction of the combined tax base of the group in Luxembourg, and this irrespective of the nature of the financing means used or of the level of the remuneration. “Combined tax base” must in this context be understood as the sum of the tax bases of all the group entities involved in an intragroup financing transaction subject to tax in Luxembourg.

(249) Under the Luxembourg corporate income tax system, financing means can be divided into two categories: first, participation instruments, such as shares, the profit of which can qualify for the participation exemption under Article 166 LIR (“participations”); and second, other instruments and contracts the profit of which cannot benefit from the participation exemption (“non-participation instruments”).

(250) In the case of *non-participation instruments*, in line both with Luxembourg and international accounting principles,[268] the payment of the remuneration (such as the payment of the interest of a loan) is booked in the accounts of the borrower as an expense. The same amount will be recorded at some stage as an income by the lender.

(251) As regards the tax treatment, following the principle of linking the commercial and tax balance sheet,[269] the income booked by the lender will in principle be taxable, while the expense booked by the borrower will in principle be tax deductible. Therefore, the payment of the remuneration derived from a non-participation instrument does not lead to a reduction of the combined tax base of the group in Luxembourg as compared to the combined tax base before the payment.[270]

(252) In the case of *participations*, such as shares, the payment of the remuneration takes the form of a distribution of profits. From an accounting perspective, the amounts distributed are booked by the beneficiary (the entity holding the participation) as an

[267] The payment of a remuneration in the framework of a financing transaction should be understood as any payment made by the borrower to the lender, in cash or in any other financial asset, including the borrower's own equity, which does not aim at redeeming / reimbursing the financing or, in case of redemption / reimbursement, which exceeds the amount initially financed.

[268] See IAS 32 and *loi du 19 décembre 2002 concernant le registre des sociétés ainsi que la comptabilité et les comptes annuels des entreprises*.

[269] Article 40 LIR. See recital (81).

[270] The fact that there can be, in some cases, a temporary difference between the moment in which the borrower books the expense and the moment in which the lender books the corresponding income does not alter this conclusion. From an accounting perspective, this temporary difference is justified by the principle of prudence, according to which an income will be recorded when it is realised, i.e. when it is certain, whereas an expense must be booked as soon as its realisation is probable or even potential.

income. However, the sums distributed will by definition have been part of the profit of the distributing entity, i.e. they have not been booked as an expense.[271]

(253) As regards the tax treatment, as explained in recitals (201) and (202), under Article 164(1) and (2) LIR the distributing entity cannot deduct from its tax base the profit distributed. Moreover, following the principle of linking the commercial and tax balance sheet, the beneficiary will also include the profit distributed in its tax base. This means that the distribution of profits will lead to economic double taxation unless it qualifies for the participation exemption under Article 166 LIR.[272] Therefore, the distribution of profits stemming from a participation does not lead to a reduction of the combined tax base of the group in Luxembourg as compared to the situation before the distribution.

(254) In conclusion, according to the Luxembourg corporate income tax system, the payment of a remuneration in the framework of an intragroup financing transaction between entities tax resident in Luxembourg, whether by means of a participation or a non-participation instrument, cannot result in a reduction of the combined tax base of the group in Luxembourg.

(255) Luxembourg argues that in the definition of the reference system the Commission must necessarily make reference to the text of the law. In this regard, it claims that the principle according to which the payment of the remuneration (or the distribution of profits) related to an intragroup financing transaction between entities resident in Luxembourg cannot lead to a reduction of the combined tax base of the group in Luxembourg is not stipulated in the law.

(256) The Commission recalls, first, that contrary to what Luxembourg claims, the objective of the Luxembourg tax system, i.e. the taxation of the profits of all companies subject to tax in Luxembourg can be found in the law as explained in recitals (171) to (176). The principle that the payment of a remuneration related to an intragroup financing transaction between entities subject to tax in Luxembourg cannot result in a reduction of the combined tax base of the group can directly be deducted from this objective. Indeed, if the payment of a remuneration could give rise to a reduction of the combined tax base of the group in Luxembourg as compared to the tax base prior to the payment, then part of the profit of the lender and/or the borrower would escape taxation, as it would not be included in any tax base. This result would be in open contradiction with the objective of the system. Moreover, such possibility would make the Luxembourg tax system inherently discriminatory, as it would allow group companies to exclude part of their profit from their tax base, a possibility not afforded to standalone companies.

(257) Second, if the LIR does not refer explicitly to financing transactions or to the remuneration of financing transactions, it sets out in a clear and unambiguous way how the payment of the remuneration should be taxed for each of the categories of financing instruments. The Commission has demonstrated in recitals (249) to (254), based on Luxembourg tax law, that the payment of a remuneration related to an

[271] See IAS 32, paragraph 35 "*Distributions to holders of an equity instrument shall be debited by the entity directly to equity, net of any related income tax benefit*" and paragraph 36 "*redemptions or refinancings of equity instruments are recognised as changes in equity*".

[272] This means that, from a group perspective, all the participation exemption does is *eliminating a disadvantage* caused by the economic double taxation.

intragroup financing transaction between entities subject to tax in Luxembourg cannot lead to a reduction of the combined tax base.

6.3.2. Comparability with corporate groups engaging in intragroup financing transactions between group entities resident in Luxembourg

(258) The Commission considers that all corporate groups engaging in intragroup financing transactions between group entities resident in Luxembourg are in a comparable legal and factual situation to Engie, and this irrespective of the nature of the financing instrument used.

(259) It has been explained in Section 6.3.1 that the objective of the tax system is the taxation of the profit of all companies subject to tax in Luxembourg. Against that principle, all corporate groups engaging in intragroup financing transactions between group entities resident in Luxembourg are necessarily comparable, since the financing instrument chosen and the amount of the remuneration for the financing are unrelated to this principle.[273]

(260) The type of instrument chosen for the financing might have an impact on the type of the remuneration, the dates and modalities of payment of such remuneration, as well as the rights assigned to the "lender" or the "holder" of the instrument. For example, in the case of ordinary shares, which are participation instruments, the remuneration takes the form of a profit distribution, the amount and terms of which are typically decided by the corporate bodies of the entity issuing the shares. Furthermore, there is no obligation to reimburse the amount of the financing. Ordinary shares can also give the right to vote in the shareholders' meeting and to be represented in the board of directors, supervisory board or other corporate bodies. By contrast, in case of non-participating instruments, such as loans, the terms and amount of the remuneration (interest) are set by both parties in the agreement and the lender has in principle no right to participate in or control in any way the management of the borrower. Additionally, there is a contractual obligation to reimburse the nominal value of the loan.

(261) The Commission considers that none of these differences affect in any way the basic principle that, according to the Luxembourg corporate income tax system, the entire profit realised by companies must be subject to taxation and that, therefore, the payment of the remuneration for intragroup financing transactions between companies resident in Luxembourg cannot lead to a reduction of the combined tax base of the group in Luxembourg. Against that principle, the choice of one financing instrument over another does not make an undertaking less comparable.

(262) In fact, in the case of participation instruments, such as shares, it has already been explained in Section 6.3.1. that, according to Article 164(1) and (2) LIR, the profits distributed would need to be included, and therefore subject to tax, at least in the tax base of the participated entity. In the case of non-participations instruments, for example loans, the interests paid by the borrower are deducted from its tax base but are included as a taxable income in the tax base of the lender. Therefore, despite the differences in the terms and modalities of the remuneration and of the reimbursement

[273] In fact, the combined tax base of the group in Luxembourg must remain the same after the payment of the remuneration. As explained in Section 0, as an exception to this rule, the combined tax base can in some exceptional situations *increase* giving rise to economic double taxation, namely in the case of distribution of profits when the participation does not qualify for the application of the participation exemption under Article 166 LIR.

of the financing, as well as in the rights and obligations of the parties, in both cases the payment of the remuneration would not lead to a reduction in the combined tax base of the companies involved in the transaction.

(263) The Commission considers that the arguments made by Luxembourg that the structure implemented by Engie provides more flexibility than a direct transaction between the Holdings and the Subsidiaries and that it allows Engie to finance the businesses acquired and at the same time to limit the risk profile of the Subsidiaries[274] are ineffective, since none of these reasons have any bearing in relation to the principle that, according to the Luxembourg corporate income tax system, the payment of the remuneration for intragroup financing transactions between companies resident in Luxembourg cannot lead to a reduction of the combined tax base of the group in Luxembourg.

(264) Therefore, it can be concluded that all corporate groups engaging in intragroup financing transactions between companies resident in Luxembourg are in a legal and factual situation comparable to Engie. The intervention of the Lenders in the structures set up by Engie does not affect this conclusion given that the Lenders are also resident in Luxembourg and the purpose of those structures is still to finance the transfer of assets, as admitted by Luxembourg and Engie.

6.3.3. Derogation from the reference framework giving rise to discrimination

(265) The Commission considers that the tax treatment granted on the basis of the contested tax rulings derogates from the tax treatment of intragroup financing transactions between group entities resident in Luxembourg under the Luxembourg corporate income tax system.

(266) On the one side, the ZORA Accretions, when positive, are recorded each year as a tax deductible expense by the Subsidiaries. On the other side, at conversion of the LNG ZORA, the LNG Supply Shares – which include the ZORA Accretions – are immediately transferred to LNG Holding pursuant to the LNG Forward Contract. Therefore, LNG Holding receives the remuneration for the financing provided to LNG Supply (which LNG Supply has deducted from its tax base). However, LNG Holding books the LNG Supply Shares in its accounts at the nominal value of the ZORA, i.e. not including the converted ZORA Accretions.

(267) Therefore, the contested tax rulings allow a situation whereby the remuneration paid by LNG Supply for the financing it received, i.e. the issuance of shares for an amount equal to the ZORA Accretions, leads to a decrease in the tax base of LNG Supply (the value of the ZORA Accretions) which was not compensated (and will not be compensated in the future) by an increase in the tax base of LNG Holding (or an effective increase in the tax base of LNG Luxembourg).

(268) The above reasoning has to be transposed *mutatis mutandis* to GSTM, EIL and CEF[275],

(269) In short, the tax rulings endorse a tax treatment of the remuneration paid by LNG Supply and GSTM for the financing provided, respectively, by LNG Holding and CEF, which allows a reduction in the combined tax base of the Engie group in Luxembourg.

[274] See observations by Luxemburg to the Letter of 11 December 2017.

[275] Once there will be a conversion and cancellation of GSTM shares, as it is equally permitted by the contested tax rulings.

(270) In view of the foregoing, the Commission considers that the tax treatment granted to Engie on the basis of the contested tax rulings derogates from the reference system and hence constitutes an economic advantage to the Engie group.

(271) According to the Court, the assessment of selectivity involves "*ascertaining whether the exclusion of certain operators from the benefit of a tax advantage that arises from a measure derogating from an ordinary tax system constitutes discrimination with respect to those operators*".[276]

(272) As established in Section 6.3.2, all groups engaging in intragroup financing transactions between companies resident in Luxembourg are in a legal and factual situation comparable to Engie in the light of the objectives of the system. However, such groups would not have access to the advantage granted to Engie since, as it has been established in Section 6.3.1, under the Luxembourg corporate income tax system, the payment of a remuneration in the framework of a financing transaction between two group entities resident in Luxembourg cannot result in a reduction of the combined tax base of the group in Luxembourg, and this irrespective of the type of financing instrument or contract used or of the level of the remuneration. Therefore, the measures at stake constitute a discrimination with respect to these operators.

(273) Consequently, the advantage granted to Engie on the basis of the contested tax rulings is *prima facie* selective.

(274) Luxembourg[277] and Engie[278] claim that corporate groups using as a financing instrument a direct ZORA between two group entities resident in Luxembourg, i.e. without an intermediary entity and a prepaid forward contract, would have access to the same advantage than Engie, i.e. a reduction of the combined tax base of the group in Luxembourg, and that, consequently, there would be no derogation from the reference framework.

(275) The Commission would like to recall at the outset that, in order to establish selectivity, it is not required to demonstrate that *every single undertaking* in a comparable legal and factual situation is excluded from the advantage granted to the beneficiary of the measure. It is sufficient to demonstrate, as the Commission has already done in recital (271), that "*certain operators*" which are in a comparable legal and factual situation in the light of the objective of the system, are excluded from the benefit of the tax advantage granted to the beneficiary.[279] Therefore, even if a specific category of undertakings – corporate groups using a direct ZORA – could also benefit from the same tax treatment as Engie, this circumstance would in itself be insufficient to conclude that the advantage granted to Engie is not *prima facie* selective.

(276) In any case, the Commission considers that, contrary to what Luxembourg and Engie argue, a group using a direct ZORA between two entities resident in Luxembourg would not benefit from the same tax treatment as Engie.

(277) This is in fact confirmed by the tax returns provided by Luxembourg, which show that the tax treatment of a ZORA follows the tax treatment of any non-participation

276 See Joined cases C-20/15 P and C-21/15 P *World Duty Free* EU:C:2016:981, paragraph 71.

277 See observations by Luxembourg to the Letter of 11 December 2017, page 8.

278 See observations by Engie to the Letter of 11 December 2017, paragraphs 89, 93 and 94.

279 Joined cases C-20/15 P and C-21/15 P *World Duty Free* EU:C:2016:981, paragraph 71.

instrument:[280] the Subsidiaries recorded each year as a tax deductible expense the provisions for the future payments of ZORA Accretions[281] and, at conversion, LNG Luxembourg recorded the ZORA Accretions as a taxable income.[282]

(278) In other words, as in the case of any other non-participation instrument, the payment of the remuneration related to the ZORAs (i.e. the conversion of the ZORA Accretions) does not lead to the reduction of the combined tax base of the group in Luxembourg as compared to the tax base existing before that payment.[283]

(279) Luxembourg argues[284] that in case of a conversion of a direct ZORA, the profit resulting from the payment of the remuneration, i.e. the conversion of the ZORA Accretions, would not be taxed at the level of the Lender if it opts for the application of the special regime under Article 22bis LIR. According to this provision, the conversion of a loan into participations in the capital of the company will not give rise to any capital gain, and therefore, no corporate income tax will be due upon conversion, just as it occurs in the structures set up by Engie.

(280) The Commission rejects this argument. Article 22bis LIR would not lead to the non-taxation of the ZORA Accretions converted into shares. Firstly, because Article 22bis LIR would not be applicable to the ZORA Accretions; and secondly, because even if it was applicable, its effect would not be a permanent exemption from taxation of the ZORA Accretions at the level of the beneficiary.

(281) Indeed, Article 22bis LIR would not be applicable to the ZORA Accretions. This provision clearly distinguishes the capital gains resulting from the conversion of the financing instrument into shares from the remuneration of this instrument before its conversion and expressly stipulates that the second cannot benefit from the exemption under Article 22bis LIR: "*en cas de conversion d'un emprunt capitalisant convertible, l'intérêt capitalisé se rapportant à la période d'exploitation en cours précédant la conversion <u>est imposable au moment de l'échange</u>*".[285] The terms of "*emprunt capitalisant convertible*" and "*intérêt capitalisé*" are not defined in the law. However, according to Luxembourg, the ZORAs are convertible loans. Moreover, the ZORA Accretions are not paid annually but are accreted to the issue price of the ZORA only at conversion in order to determine the amount to be converted into shares. There is no difference between an "*intérêt capitalisé*" which would be converted into shares at the moment of the conversion of a loan and the ZORA Accretions. Consequently, at conversion, the part of the newly issued shares corresponding to the ZORA Accretions *is taxable* and should be included in the tax base of the beneficiary.

(282) Therefore, in the present case, the exemption under Article 22bis LIR could in theory apply only to the shares corresponding *to the nominal of the ZORA* but not to the

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280 This is consistent with Luxembourg's position that ZORAs must be considered non-participation instruments (see observations by Luxembourg to the Letter of 11 December 2017, response to question 1.d).

281 See Sections 2.2.3.7.1. and 2.2.4.6.1.

282 See Section 2.2.3.7.2.

283 In case of a reduction in the value of the ZORA due to negative accumulated ZORA Accretions, the expense booked by the Lenders due to the decrease of value of its claim should correspond to an income booked by the Subsidiaries due to a decrease of its liabilities.

284 See observations by Luxembourg to the Letter of 11 December 2017, page 8.

285 Article 22bis (2) alinéa 1 LIR (emphasis added by the Commission).

shares corresponding to the ZORA Accretions, which should be directly included in the tax base of the beneficiary.

(283) Furthermore, even if Article 22bis LIR was applicable to the ZORA Accretions, it would not lead to the permanent exemption of this profit. Indeed, it is clear from the wording of Article 22bis (4) LIR that this provision merely allows a *temporary deferral of taxation*.[286] The fact that it is not intended to facilitate non-taxation, as Luxembourg and Engie suggest, is expressly confirmed by the Luxembourg tax administration in its Circular of 27 November 2002 concerning the application of this provision ("Circular 22bis").[287] This Circular explains that capital gains arising from the conversion are only transferred to the assets received in exchange (in this case, the shares) but remain in principle taxable when they will be realized.[288]

(284) In conclusion, the Commission has demonstrated that the advantage granted to Engie on the basis of the contested tax rulings would not be available to other undertakings in a legal and factual situation comparable to Engie in the light of the objective of the system. Therefore, this advantage must be considered *prima facie* selective. This conclusion is not undermined by the fact that the structure implemented by Engie is in principle open to any group in Luxembourg. It is settled case law that the determining factor to assess selectivity is that the measure derogates from the general reference framework thus giving rise to discrimination, which is what the Commission has established in the present Section.[289]

6.3.4. Lack of Justification

(285) Neither Luxembourg nor Engie have advanced any possible justification for the favourable treatment endorsed by the contested tax rulings in favour of Engie. The Commission recalls, in this respect, that the burden of establishing such a justification lies with the Member State.

(286) Therefore, in the absence of any justification advanced by Luxembourg, the Commission must conclude that the tax advantage granted to Engie cannot be justified by the nature or general scheme of that system.

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286 22bis(4) LIR: "*Dans le chef de l'associé, le prix et la date d'acquisition des titres reçus en échange correspondent au prix et à la date d'acquisition des titres donnés en échange*".

287 *Circulaire du Directeur des Contributions Directes LIR n°22bis/1 du 27 novembre 2002*.

288 See Circular 22bis: "*la plus-value inhérente aux titres donnés en changes est transférée sur les titres nouvellement acquis <u>et devient en principe imposable lors de la réalisation ultérieure de ces derniers</u>*" (emphasis added by the Commission).
It could be argued that, once realised, the profit would be exempted by application of the participation exemption under Article 166 LIR. This argument would also be flawed. In fact, Circular 22bis clarifies that, precisely to avoid the use of Article 22bis LIR to circumvent the obligation to subject all profit to taxation, this regime cannot be used to permanently exempt from taxation capital gains *which would have been taxable if this provision had not been applied* (See Circular 22bis: "*L'objectif de l'Article 22bis LIR consiste à déterminer les opérations d'échanges de titres qui peuvent être réalisées dans la neutralité fiscale. L'Article 22bis LIR ne vise cependant pas à exempter de manière définitive des plus-values, <u>qui à défaut de cette mesure auraient été imposables</u> dans le chef du cédant, mais à reporter leur imposition dans le temps*" (emphasis added by the Commission).
In any case, the application of Article 166 LIR to an income temporarily deferred thanks to the application of Article 22bis LIR and corresponding to amounts deducted from the tax base of the borrower would constitute a selective advantage in line with the reasoning developed by the Commission in Section 0.

289 Joined cases C-20/15 P and C-21/15 P *World Duty Free* EU:C:2016:981, paragraph 80.

(287) As regards any justifications that Luxembourg might hypothetically raise –which it has not – concerning the avoidance of economic double taxation, the Commission refers to its assessment in Section 6.2.3.

6.3.5. Conclusion on the selective advantage at group level

(288) In the light of all of the foregoing, and without prejudice to the conclusions under recital 6.2.4, the Commission concludes that the tax advantage granted to Engie on the basis of the contested tax rulings is selective in nature.

6.4. Selective advantage resulting from the non-application of Luxembourg tax rules on abuse of law (Article 6 StAnpG)

(289) As an alternative line of reasoning, the Commission considers also that its doubts expressed in recital 158 of the Opening Decision i.e. whether with the non-taxation of the group Luxembourg derogated from its domestic rules on abuse of law in the field of taxation have not been allayed.

(290) As established in Section 6.2.1.1, the reference framework is the Luxembourg corporate income tax system, which aims at the taxation of the profit of all companies subject to tax in Luxembourg. The basis for the calculation of the taxable profit is the profit determined in their accounts. This objective applies to all corporate taxpayers resident in Luxembourg.

(291) Anti-abuse tax rules are the set of rules devised to avoid that taxpayers circumvent the main objective of the reference system, i.e. the taxation of corporate profit. Therefore, these rules must be understood as an inherent part of the reference system, as they ensure the internal consistency of the system and aim at achieving its fundamental objectives.

6.4.1. Conditions for the application of anti-abuse tax rules

(292) Article 6 StAnpG prohibits that taxes are evaded or mitigated by abuse of forms or constructions which are legal under civil law. According to this provision, if the legal form or the construction surrounding a transaction is not appropriate in terms of its substance, tax should be assessed in accordance with the substance of the transaction, as if it had been concluded in the appropriate legal form.[290] According to Luxembourg, this provision allows the tax administration to disregard legal constructions or transactions concluded exclusively for tax reasons and not motivated by any economic consideration, however without limiting the choices available to the taxpayer.[291]

(293) According to the Administrative Circular of 21 August 1989 (the “1989 Circular”),[292] Article 6 StAnpG is applicable to any tax procedure, including tax rulings issued by the Luxembourg tax administration. When issuing a ruling, the Luxembourg tax administration has to ensure that the structure and/or transactions as presented by the taxpayer in the ruling request do not constitute an abuse of law as described in Article 6 StAnpG. This means that the Luxembourg tax authorities should not give binding decisions such as tax rulings in case the main reason for the

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290 See Section 0.

291 See observations by Luxembourg to the letter of 11 December 2017, response to question 2.a.

292 *Note de service du directeur des contributions L.G/N.S no 3 du 21 août 1989*.

taxpayer to seek such decision is to obtain a tax benefit.[293] The 1989 Circular also confirms that it is a mandatory requirement for the Luxembourg tax administration to rule out the existence of a potential abuse of law before granting a tax ruling.[294]

(294) According to Luxembourg, based on the relevant case law, in order for a measure to constitute an abuse of law, four criteria need to be fulfilled: first, the use of private law forms or institutions by the taxpayer; second, an outcome of tax avoidance or decrease in the tax liability of any kind for the taxpayer; third, the use of an inadequate legal means by the taxpayer; and fourth, the absence of non-tax related reasons to justify the legal means selected by the taxpayer.[295]

(295) The first criterion requires that the structure of a given transaction, as designed by the taxpayer, uses private law forms or institutions ("*Formen und Gestaltungsmöglichkeiten des bürgerlichen Rechts*"). As there is no exact definition of the substance of private laws forms and institutions, neither in Article 6 StAnpG nor in the case law, it is nevertheless understood that they should be defined as any legal means that are not related to public law. As such, the incorporation of a company and the implementation of intragroup financing contracts are to be considered as the use by the taxpayer of a private law form or institution.[296]

(296) The second criterion requires that through the abusive structure, the taxpayer is able to reduce his tax liability ("*Minderung der Steuerpflicht*") either via avoidance of tax, a tax exemption, or a reduction of the tax base.[297]

(297) The third criterion requires that the taxpayer uses an inappropriate legal means ("*unangemessene rechtliche Gestaltung*") in the framework of the potentially abusive structure. According to Luxembourg,[298] this means that the means chosen must allow the taxpayer to obtain a tax effect that cannot be in conformity with the intention of the legislator.[299] According to Luxembourg, for this condition to be met, it is necessary that the pursued economic result can be achieved by at least two means, one of which would not be appropriate. The use of the non-appropriate means must allow tax savings which would have not been possible using any of the appropriate means.

(298) The fourth criterion is the absence of non-tax related reasons to justify the legal means selected by the taxpayer in order to achieve the economic objectives of the transaction or structure. According to Luxembourg[300] the case law states that non-tax

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[293] See 1989 Circular : "*5. Des renseignements à l'effet de lier l'administration ne sont pas fournis dans les cas où la préoccupation d'obtenir un avantage fiscal est le souci primordial (p.ex. l'examen des schémas aux fins d'épargner des impôts dits « Steuersparmodelle », la fixation des limites pour échapper aux éléments constitutifs de la simulation ou de l'abus de droit)*".

[294] As only Article 6 StAnpG defines abuse of law in Luxembourg law, this provision is to be applied in the framework of the 1989 Circular.

[295] The Observations by Luxembourg to the Letter of 11 December 2017 include a description of these four criteria and an explanation of how they should be applied.

[296] See Observations by Luxembourg to the Letter of 11 December 2017, answer to question 2.a

[297] See Observations by Luxembourg to the Letter of 11 December 2017, answer to question 2.a

[298] See Observations by Luxembourg to the Letter of 11 December 2017, answer to question 2.a

[299] In its response to the Letter of 11 December 2017, Luxembourg cites the judgment of 1 August 2017 of the *Cour Administrative du Grand-Duché de Luxembourg*, nº 39009C: means allowing the taxpayer "*d'atteindre un objectif économique d'une manière telle que cette voie permet l'obtention d'un effet fiscal que le législateur ne peut pas être considéré comme ayant voulu accorder dans le cadre d'une application de la loi fiscale conforme à son intention*".

[300] See Observations by Luxembourg to the Letter of 11 December 2017, answer to question 2.a.

reasons, such as economic reasons, have to be real and provide enough economic benefit to the taxpayer.[301] The existence of such economic reasons is sufficient to disregard the application of the anti-abuse provision.

6.4.2. Application of the conditions to the present case

(299) On the basis of the information provided by Luxembourg, the Commission concludes that the Luxembourg tax administration should not have issued the contested tax rulings, as the structures set up by Engie are abusive within the meaning of Article 6 StAnpG.

(300) In fact, the transactions presented by Engie in the tax ruling requests meet the conditions described in Section 6.4.1 for the application of Article 6 StAnpG.

6.4.2.1. Use of private law forms or institutions

(301) It is not disputed that Engie used private law forms or institutions in order to implement the structures described in the contested tax ruling: the Forward Contracts and convertible loans such as the ZORAs. Thus, the first criterion for the application of Article 6 StAnpG is met.

6.4.2.2. Reduction of tax liability

(302) It is apparent, as established in Sections 6.2.1, 6.2.2 and 6.3.3, that the contested tax rulings allow Engie to significantly reduce its tax liability at group level in Luxembourg, as the profit realised by activities transferred to the Subsidiaries (the LNG Business and the Financing and Treasury Business) remains virtually untaxed. Thus, the second criterion for the recognition of an abuse of law is also met.

6.4.2.3. Use of inappropriate legal means

(303) The third criterion requires, as a first step, to establish the pursued economic objective of the transaction at stake. Only then will it be possible to determine whether such objective can be achieved by means different than the one chosen by the taxpayer. In the second step, it is necessary to establish whether the means chosen by the taxpayer is inappropriate, in the sense that it allows for a tax reduction that cannot be in conformity with the intention of the legislator and which would have not been possible using any of the other appropriate means.

(304) In this case it is apparent, in the first place, that the economic result pursued by Engie with the structures described in the contested tax rulings is the financing of the acquisition by the Subsidiaries of the LNG Business and the Financing and Treasury Business. It is also not disputed that the same economic result could be achieved by several other financing means: direct equity or debt instruments between the Subsidiaries and the Holdings.[302]

(305) In the second place, as the Commission has established Sections 6.2 and 6.3, the effect of the structures put in place by Engie is the virtual non-taxation of the profit realised by the Subsidiaries in Luxembourg. This result is incompatible with the

[301] Luxembourg cites in its Letter of 16 February 2016 the judgment of the *Cour Administrative du Grand-Duché de Luxembourg*, n°35979C and n°35978C: *"[I]l ne suffit pas que le contribuable fasse simplement état de motifs économiques pour que ceux-ci doivent nécessairement être admis comme valables, mais il faut que ces motifs puissent être considérés comme réels et présentent par eux-mêmes un avantage économique suffisant au-delà du seul bénéfice fiscal obtenu"*.

[302] The Commission recalls that in the case of a direct ZORA, the underlying profit should be subject to taxation as established in recitals (279) to (283).

fundamental objective of the Luxembourg corporate income tax system, which is the taxation of the profit of companies subject to tax in Luxembourg. Therefore, such an effect cannot be in conformity with the intention of the legislator. Moreover, such an effect would have not been possible if the transfer of activities to the Subsidiaries had been financed with a direct equity or debt instruments. Therefore, the structures implemented by Engie do not constitute appropriate legal means to finance the transfer of activities to the Subsidiaries.

6.4.2.4. Absence of non-tax related reasons

(306) Finally, the Commission has not been able to identify any economic reasons that are real and provide enough economic benefit for the complex structures devised by Engie other than the achievement of significant tax savings.

(307) Luxembourg claims[303] that the structures implemented via the Forward Contracts and ZORAs would be necessary to finance the acquisition of the businesses by the Subsidiaries. This argument is flawed. In fact, as the contested tax rulings show, the financing is provided by the Holdings to the Lenders, which on the same day make it available to the Subsidiaries. In other words, it is the Holdings that provide financing to the Subsidiaries to acquire the assets.

(308) The Commission notes that the LNG Transfer Agreement and the GSTM Transfer Proposal already included provisions regarding the financing of the transfer of businesses. The LNG Transfer Agreement specifies that in exchange for the assets received, LNG Supply should issue to LNG Trading promissory notes for an amount equivalent to the nominal amount of the ZORA.[304] In the same line, the GSTM Transfer Proposal states that CEF transfers a branch of activity in exchange of a promissory note from GSTM.[305] These provisions show that the transfer of assets had already been financed by the Holdings with debt instruments. In other words the Forward Contracts and ZORAs were purely redundant structures, replacing previously existing direct debt transactions between the Holdings and the Subsidiaries.[306] The role of the Lenders as mere pass-through entities with no possibility to make any profit confirms that their intervention has no other economic purpose but to enable the tax savings.

(309) Luxembourg also argues that the complex structures implemented by Engie provide more flexibility and allow it to finance the businesses acquired while at the same time limiting the risk profile of the Subsidiaries. This argument is also unsubstantiated. In fact, the same purpose could have been achieved via the direct issuance of shares from the Subsidiaries to the Holdings. A direct equity transaction between the Holdings and the Subsidiaries would provide the same protection for the Subsidiaries than the complex structure set up by Engie. The structures set up by Engie can absorb losses for an amount equal to the nominal of the ZORAs. In case the loss exceeds the nominal of the ZORAs, the capital of the Subsidiaries would be impacted. In case of a capital injection for an amount equal to the nominal of the ZORA, the Subsidiaries would have exactly the same capital buffer, before the initial

[303] See observations by Luxembourg to the Opening decision, page 16.
[304] See recital (34)(1).
[305] See recital (61)(1).
[306] In the same line, the detailed implementation of the structures (see footnotes 35 and 90) shows that in both cases the businesses were transferred against promissory notes issued by the Subsidiaries to the Holdings. Therefore, the Forward Contracts and ZORAs merely replace the financing by the Holdings which were already in place.

capital is impacted by losses. Moreover, the Commission rejects the argument that adding an additional layer (the Lenders) and using complex financial products (ZORA and Forward Contracts) instead of straightforward capital injections can increase the flexibility. On the contrary, it could raise some operational risk issues for the group: the use of pass-through entities, instead of providing flexibility, creates an administrative burden, entails an execution risk for the Holdings and adds transaction costs.

(310) In conclusion, the complex structures set up by Engie could be seen as economically equivalent to direct financing transactions between the Holdings and the Subsidiaries, be it in the form of equity or debt instruments. Whatever form was to be considered economic equivalent to the complex structures set up by Engie, it would have led to the taxation of the underlying profit. This means that, in any case, there would be no economic reasons that are real and provide enough economic benefit for Engie to opt for the complex structures set up in the contested tax rulings other than the achievement of significant tax savings.

(311) Therefore, the criteria of Article 6 StAnpG are met and thus the complex structures set up by Engie should have been considered abusive by the Luxembourg tax administration. According to the 1989 Circular, the tax administration should only grant a tax ruling when the main reason for obtaining such a ruling is not a tax benefit. Consequently, by endorsing the tax ruling requests, the Luxembourg tax administration misapplied the law and granted an advantage to Engie in the form of the exclusion from taxation of virtually all the profit realised by two of its subsidiaries (LNG Supply and GSTM) in Luxembourg.[307]

(312) Since the advantage granted to Engie on the basis of the contested tax rulings is based on a misapplication of the law which, by definition, is not available to any other undertakings, the Commission concludes under this reasoning that this advantage is selective in nature.

6.5. Conclusion on the existence of aid

(313) Since the tax treatment granted on the basis of the contested tax rulings fulfils all the conditions of Article 107(1) of the Treaty, it must be considered to constitute State aid within the meaning of that provision. That aid results in a reduction of charges that should normally be borne by Engie in the course of its business operations and should therefore be considered as granting operating aid to Engie.

6.6. Beneficiary of the aid

(314) In Section 6.2, the Commission has concluded that the tax treatment granted on the basis of the contested tax rulings confers a selective advantage to LNG Holding and CEF within the meaning of Article 107(1) of the Treaty, since they lead to a lowering of those entities' taxable profit and thus their corporate income tax liability in Luxembourg. LNG Holding and CEF form part of the Engie group.

(315) The rules on participation exemption concern profit distributed by one group company to another. In the present case, the ruling endorses the exemption of an income at the level of LNG Holding and CEF which corresponds economically to amounts deducted as expenses at the level of, respectively, LNG Supply and GSTM, thereby giving rise to the effective non-taxation of virtually all the profit realised by

[307] See also Communication Notion of Aid, recital 174 (c).

LNG Supply and GSTM, apart from a limited margin. There is therefore a situation of deduction and exemption which, as indicated in recital (243), has a positive impact on the tax liability of Engie in Luxembourg.

(316) In the same vein, separate legal entities may be considered to form one economic unit for the purpose of the application of State aid rules. That economic unit is then considered to be the relevant undertaking benefitting from the aid measure. As the Court of Justice has previously held, "*[i]n competition law, the term 'undertaking' must be understood as designating an economic unit […] even if in law that economic unit consists of several persons, natural or legal*".[308] To determine whether several entities form an economic unit, the Court of Justice looks at the existence of a controlling share or functional, economic or organic links.[309] In the present case, both LNG Holding and CEF are fully controlled by Engie S.A., the parent company of the Engie group.

(317) Consequently, any favourable tax treatment afforded to LNG Holding and CEF by the Luxembourg tax administration benefits not only these entities, but Engie as a whole, by providing additional financial resources to the entire group. Therefore, notwithstanding the fact that that group is organised in different legal personalities and the contested tax rulings concern the tax treatment of individual entities, that group must be considered as a single economic unit benefitting from the contested aid measure.[310]

(318) Additionally, the conclusion of recital (318) is reinforced by the findings of Sections 6.3 and 6.4, where the Commission has established that the tax treatment granted on the basis of the contested tax rulings confers a selective advantage within the meaning of Article 107(1) of the Treaty to the Engie group in Luxembourg, since they lead to a reduction of the combined tax base of the group in this Member State.

6.7. Compatibility of the aid

(319) State aid shall be deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2) of the Treaty and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the categories listed in Article 107(3) of the Treaty. However, it is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Articles 107(2) or 107(3) of the Treaty.

(320) Luxembourg has not invoked any of the grounds for a finding of compatibility under either of those provisions for the State aid it has granted on the basis of the contested tax rulings. Engie has not invoked any such grounds either.

(321) Moreover, since the tax treatment granted on the basis of the contested tax rulings relieves Engie of a tax liability it would otherwise have been obliged to bear in their day-to-day management of normal activities, the aid granted on the basis of those tax

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308 Case C-170/83 *Hydrotherm* EU:C:1984:271, paragraph 11. See also Case T-137/02 *Pollmeier Malchow v Commission* EU:T:2004:304, paragraph 50.

309 Case C-480/09 P *Acea Electrabel Produzione SpA v Commission* EU:C:2010:787 paragraphs 47 to 55; Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others* EU:C:2006:8, paragraph 112.

310 See, by analogy, Case 323/82 *Intermills* EU:C:1984:345, paragraph 11. See also Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v. Commission* EU:C:2005:266, paragraph 102: "*the Commission was correct to hold that the rules governing the determination of taxable income constitute an advantage for the coordination centres and the groups to which they belong*".

rulings constitutes operating aid. As a general rule, such aid can normally not be considered compatible with the internal market under Article 107(3) of the Treaty in that it does not facilitate the development of certain activities or of certain economic areas. Furthermore, the tax advantages in question are not limited in time, declining or proportionate to what is necessary to remedy to a specific market failure or to fulfil any objective of general interest in the areas concerned. Therefore, they could not be considered compatible.

(322) Consequently, the State aid granted to the Engie group by Luxembourg is incompatible with the internal market.

6.8. Unlawfulness of the aid

(323) According to Article 108(3) of the Treaty, Member States are obliged to inform the Commission of any plan to grant aid (notification obligation) and they may not put into effect any proposed aid measures until the Commission has adopted a final decision on the aid in question (standstill obligation).

(324) The Commission notes that Luxembourg did not notify the Commission of any plan to grant the contested aid measure, nor did it respect the standstill obligation laid down in Article 108(3) of the Treaty. Therefore, in accordance with Article 1(f) of Regulation (EU) 2015/1589, the tax treatment granted on the basis of the contested tax rulings constitutes unlawful aid, put into effect in breach of Article 108(3) of the Treaty.

7. ALLEGED PROCEDURAL IRREGULARITIES

(325) Luxembourg claims[311] that the Commission has infringed its right to be heard, since the focus of the Commission's investigation had allegedly changed since the adoption of the Opening decision, as demonstrated by the Letter of 11 December 2017. According to Luxembourg, the Commission should have either closed the ongoing procedure and re-opened a new case or adopted a decision to extend the Opening decision in order to afford Luxembourg the opportunity to properly make its views known on the Commission's alleged new focus of the investigation.

(326) In addition, Engie claims[312] that its right of defense has been infringed as it was not given the opportunity to present its observations on the Commission's analysis of other Luxembourg tax rulings in the period 2009 to 2016 that refer to the existence of ZORA or "Mandatorily Exchange Loan Agreements" and their respective tax and accounting treatment.

(327) The Commission considers that the procedural rights of Luxembourg and Engie have been fully respected in this case.

(328) The Commission notes, first and foremost, that the scope of the Commission's State aid investigation has remained the same between the Opening decision and the adoption of this Decision. Both decisions concern the same contested tax rulings, the same beneficiaries (LNG Holding, CEF as well as the Engie group) and the same State aid concerns (whether the tax treatment granted to LNG Holding, CEF and the Engie group on the basis of the contested tax rulings, complies with the State aid rules pursuant to Article 107(1) of the Treaty).

[311] See observations by Luxembourg to the Letter of 11 December of 2017, page 3.
[312] See observations by Engie to the Letter of 11 December of 2017, paragraphs 98 to 102.

(329) In the Opening decision, the Commission expressed its initial doubts as to the compatibility with State aid rules of the tax treatment granted on the basis of the contested tax rulings to the different entities of the Engie group in Luxembourg. The purpose of an in-depth investigation phase following an Opening decision is to bring additional elements of fact and law to the Commission's attention. Those elements can further develop or address the Commission's initial doubts as set out in an opening decision. Accordingly, at the end of that procedure, the Commission's analysis may have changed, which implies that the final decision may differ somewhat from the opening decision, without those differences affecting the legality of the final decision[313].

(330) It is as a consequence of the written submissions that were provided by Luxembourg and Engie on the State aid concerns raised by the Commission in the Opening decision that the Commission's analysis further developed in this case. For instance, Luxembourg clarified during the administrative procedure[314] that following the partial reimbursement of the LNG ZORA that took place in 2014, LNG Luxembourg did not opt for the optional regime of Article 22bis (2) LIR but that any taxable profit stemming from the conversion of the ZORA was mirrored by a corresponding tax deductible loss on the LNG Forward Contract. The text of the Forward Contracts was provided by Luxembourg after the Opening decision, on 21 November 2016, and the role of LNG Luxembourg and EIL as intermediary entities and the functioning of Article 22bis (2) was explained in detail by Luxembourg and Engie to the Commission during the meeting of 1 June 2017.

(331) However, the subject matter of the Commission's State aid investigation, i.e. the tax treatment of different entities of the Engie group in Luxembourg as a result of the contested tax rulings, has never changed since the adoption of the Opening decision. The same holds for the the main doubts of the Commission as to the compliance of the contested measures with the State aid rules.[315] It was only in the interest of transparency that the Commission services sent the Letter of 11 December 2017 to Luxembourg, which the latter transmitted to Engie.

(332) As regards Engie, the Commission recalls that, as an interested party, it only has the right to submit observations in response to the Opening decision and not on the information submitted by Luxembourg after the Opening decision. Nevertheless, Engie was given and has effectively made use of the opportunity to submit its observations to the Commission on several occasions, both in writing and orally.

(333) Consequently, the Commission considers that Luxembourg's and Engie's procedural rights have been respected in this case.

8. RECOVERY

(334) Article 16(1) of Regulation 2015/1589[316] establishes an obligation on the Commission to order recovery of unlawful and incompatible aid. That provision also

[313] Case T-424/05 *Italy v. Commission* EU:T:2009:49, paragraph 69; and Cases T-231/06 and T-237/06 *Netherlands and NOS v. Commission* EU:T:2010:525, paragraph 50. See also Case T-242/12 *(SNCF) v. Commission* EU:T:2015:1003, paragraphs 345 to 367.

[314] See recital (113).

[315] See Opening decision, recitals (152), (156), (158) and (160).

[316] Council Regulation (UE) 2015/1589 of July 13 2015 laying down detailed rules for the application of Article 108 of the Treaty (OJ L 248, 24.9.2015, p. 9).

provides that the Member State concerned shall take all necessary measures to recover unlawful aid that is found to be incompatible. Article 16(2) of Regulation 2015/1589 establishes that the aid to be recovered includes interest from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its effective recovery. Commission Regulation (EC) No 794/2004 elaborates on the methods to be used for the calculation of recovery interest.[317] Finally, Article 16(3) of Regulation No. 2015/1589 states that "*recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow for the immediate and effective execution of the Commission decision*".

8.1. New aid

(335) According to Article 1(c) of Regulation (EU) 2015/1589 'new aid' means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid.

(336) In accordance with Article 17 of Regulation (EU) 2015/1589, the power of the Commission to recover aid is subject to a limitation period of 10 years. The limitation period begins on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid interrupts the limitation period. Each interruption starts time running afresh. The limitation period is suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice. Finally, any aid with regard to which the limitation period has expired is deemed to be existing aid.

(337) In the present case, the contested tax rulings were issued by the Luxembourg tax administration and the aid has been awarded less than 10 years before the date on which the Commission submitted its first request for information to Luxembourg concerning the contested tax rulings (23 March 2015).[318] As a consequence, all aid granted to Engie on the basis of the contested tax rulings constitutes new aid.

8.2. No general principle of law prevents recovery

(338) Article 16(1) of Regulation No. 2015/1589 provides that the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law.

8.2.1. Legal certainty and legitimate expectations

8.2.1.1. Arguments submitted by Luxembourg and Engie

(339) Luxembourg and Engie invoke the principles of legal certainty and legitimate expectations to prevent recovery of the unlawful and incompatible aid using similar arguments.

(340) As regards *legal certainty*, Luxembourg argues that this principle stands in the way of recovery in the present case due to the "*complexity of the analysis of the tax schemes under State aid*" and because the Commission would be imposing its own

[317] Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p.1).

[318] See Section 0 for Procedure and Section 0 for the timing of both the rulings and the granting of the aid.

interpretation of Luxembourg law.[319] Luxembourg invokes its good faith when applying the contested tax rulings in a manner corresponding strictly to its consistent application by Luxembourg.[320] It then refers[321] to the Commission decisions of 17 July 2013 regarding the *Spanish tax lease system*[322] and the decisions in the *1929 Holding*[323] and *Belgian Coordination Centres*[324] and argues that, in view of these cases, any negative decision should only take effect for the future after a transitional period.

(341) Engie also claims that the Commission is adopting an innovative approach[325] and imposing retroactively its own interpretation of Luxembourg tax law, departing from some principles of Luxembourg tax law (the principle of linking the balance sheet with the commercial balance sheet) and showing lack of consistency with the reference framework defined in the Commission decision in the *FIAT* case.[326] It also refers to the Commission decision on the tax scheme applicable to economic interest groupings[327] in which the Commission would have limited recovery on the basis that the allegedly poor management of the file had created legal uncertainty.[328]

(342) Finally, Luxembourg[329] and Engie[330] argue that recovery would lead to a risk of serious economic repercussions or serious disruption both for Luxembourg and for Engie.

(343) As regards the *principle of legitimate expectations*, Engie invokes arguments and precedents similar to those raised by Luxembourg in relation to legal certainty (Luxembourg's good faith in implementing the tax rulings and the reference to the *1929 Holding* and *Belgian Coordination Centres* decisions).[331] It also claims that recovery is prevented by the *Unicredito*[332] judgment, which allegedly allows an undertaking to choose the least-taxed option for a transaction.[333]

8.2.1.2. Assessment

(344) While the general principles of Union law inspire the whole Union legal framework, the Court has given a very restrictive interpretation to these principles in the context of recovery**.** The principle of legal certainty is a general principle of Union law that predicates the predictability of rules and their legal effects. According to the case law, the principle of legal certainty prevents the Commission from indefinitely

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319 Luxembourg observations to the Opening decision, page 20.

320 Luxembourg observations to the Opening decision, page 21.

321 Luxembourg observations to the Opening decision, page 20.

322 Commission decision of 17 July 2013 on the aid scheme SA.21233 implemented by Spain - Tax scheme applicable to certain finance lease agreements, also known as the "Spanish Tax Lease System", OJ L 114, 16.04.2014, p. 1.

323 Decision 2006/940/EC of 19 July 2006 on aid scheme C 3/2006 implemented by Luxembourg for 1929 holding companies and billionaire holding companies, OJ L 366, 21.12.2006, p. 47, recitals 102-113.

324 Decision 2003/755/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium, OJ L 282, 30.10.2003, p. 25, recitals 117-120.

325 Engie's observations to the Opening decision, paragraphs 336-339.

326 Engie's observations to the Opening decision, paragraphs 346 and 349.

327 Commission Decision of 20 December 2006 on the aid scheme SA.16608 implemented by France under Article 39 CA of the General Tax Code, OJ L 112, 30.04.2007, p. 41.

328 Engie's observations to the Opening decision, paragraphs 354.

329 Luxembourg observations to the Opening decision, page 21.

330 Engie's observations to the Opening decision, paragraphs 356.

331 Engie's observations to the Opening decision, paragraphs 323-333.

332 See Case C-148/04 *Unicredito Italiano SpA v Agenzia delle Entrate* EU:C:2005:774, paragraph 119.

333 Engie's observations to the Opening decision, paragraphs 334.

delaying the exercise of its powers.[334] The Court of Justice has also stated that the only grounds on which, in exceptional cases, that principle may be invoked, is when the Commission has manifestly failed to act and has clearly breached its duty of diligence in the exercise of its supervisory powers.[335]

(345) In the present case, since the contested tax rulings were never notified to the Commission by Luxembourg, nor otherwise were publicly available, the Commission could have only learnt of their existence on 25 June 2015, when Luxembourg responded to its request for information of 25 March 2015. Therefore, there have not been any injustified delays nor any breach by the Commission of its duty of diligence in the exercise of its powers that can justify the application of this principle to prevent recovery.

(346) The fact that Luxembourg considers that it has applied in good faith its own law in a way which it considers correct and consistent with its previous practice, or that it disagrees with the interpretation of the reference system adopted by the Commission, is irrelevant for the purposes of its recovery obligation. Accepting Luxembourg's argument would lead to the unacceptable result that a Member State which consistently grants unlawful and incompatible aid would not be obliged to recover any of it. It would also mean that the mere fact that an aid measure has been implemented in compliance with the Member State's interpretation of its own national law could be invoked to prevent recovery. This conclusion would jeopardise the enforcement of State aid rules in relation to any aid measure that has been deemed unlawful and incompatible, as the recovery obligation cannot based on the intention of the Member States when the aid was granted, but on the distortions of competition created by that aid. Moreover, the alleged “complexity” of the analysis of the tax measures by the Commission is not an acceptable argument with respect to the obligation of recovery established by Regulation (EU) 2015/1589.

(347) As regards the alleged “new approach” on which the present decision would be based, the Commission rejects this claim. The analysis carried out by the Commission is consistent with its previous decisions and with the case law: the existence of a selective advantage has been assessed against the ordinary rules of taxation of corporate profit in Luxembourg. In this regard, while the Member States enjoy fiscal autonomy in the field of direct taxation, any fiscal measure a Member State adopts must comply with the Union State aid rules, which bind the Member States and enjoy primacy over their domestic legislation.[336] The fact that Luxembourg or Engie may not agree with the interpretation of certain provisions or that the facts on which this Decision is based are different than those on which other previous decisions are based does not make the Commission approach “innovative”. Moreover, as already demonstrated, the reference framework defined by the Commission in this Decision is fully consistent with its previous decisions not only in the *FIAT* case, but also in the *Amazon* case and in the Court's case law.[337]

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334 Case C-74/00 *Falck y A. di Bolzano* v *Commission* EU:C:2002:524, paragraph 140.

335 Case C-408/04 P *Commission* v *Salzgitter*, EU:C:2008:236, paragraphs 100-107.

336 See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* EU:C:2006:416, paragraph 81; Joined Cases C-106/09 P and C-107/09 P *Commission v Government of Gibraltar and United Kingdom* EU:C:2011:732; Case C-417/10 *3M Italia* EU:C:2012:184, paragraph 25, and Order in Case C-529/10 *Safilo* EU:C:2012:188, paragraph 18; See also Case T-538/11 *Belgium v. Commission* EU:T:2015:188, paragraph 66.

337 See recital (174).

(348) As regards the principle of legitimate expectations, this principle can be invoked by any person in a situation where a Union institution "*has caused him to entertain expectations which are justified*".[338] Important limitations apply to invoking that principle. First, the Court has stated that that principle cannot be invoked unless the person invoking it "*has been given precise assurances by the administration*".[339] These assurances should have been given by the institutions of the Union.[340] Second, Member States cannot invoke that principle in cases where they have failed to notify the aid measure to the Commission.[341] Third, the Commission's alleged failure to act is irrelevant when an aid measure has not been notified to it[342] and, consequently, the Commission's silence cannot be interpreted as an implicit authorisation of the measure that may give rise to legitimate expectations.[343] In this case, neither did Luxembourg notify the contested tax ruling to the Commission nor did the Commission give precise assurances to Luxembourg that the contested tax rulings do not constitute aid. Therefore, Luxembourg cannot rely on the principle of legitimate expectations.

(349) As regards Luxembourg's and Engie's reliance on the Commission's previous decision-making practice both in the context of legal certainty and legitimate expectations, the Commission recalls, as a preliminary matter, that it is not bound by its decision-making practice.[344] Moreover, the cases referred to do not sustain Luxembourg and Engie's arguments.

(350) In *Belgian Coordination Centres*, the reason why the Commission did not order the recovery of the aid was because it had raised no objections in a previous decision concerning a Belgian scheme with similar characteristics. The Commission therefore deemed its previous decision on the Belgian measure to confer a legitimate expectation on the beneficiaries of the new scheme it assessed at the time. Similarly, in its Decision on the tax scheme applicable to economic interest groupings, the Commission considered that two exceptional circumstances justified the non-recovery of the aid granted: first, the Commission had delayed exercising its powers

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[338] See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v. Commission* EU:C:2005:266, paragraph 147, Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products Lopik* v *Commission* [1987] ECR 1155, paragraph 44.

[339] *Id*.

[340] See for instance Case T-243/09, FEDECOM v Commission, EU:T:2012:497, paragraph 91 and quoted case law.

[341] See Joined Cases C-471/09 P to C-473/09 P Territorio Histórico de Vizcaya – Diputación Foral de Vizcaya and Others v Commission EU:C:2011:521, paragraph. 64: "*Sur ce point, il convient de rappeler qu'un État membre, dont les autorités ont octroyé une aide en violation des règles de procédure prévues à l'Article 88 CE, ne saurait, en principe, invoquer la confiance légitime des bénéficiaires pour se soustraire à l'obligation de prendre les mesures nécessaires en vue de l'exécution d'une décision de la Commission lui ordonnant de récupérer l'aide. Admettre une telle possibilité reviendrait, en effet, à priver les dispositions des Articles 87 CE et 88 CE de tout effet utile, dans la mesure où les autorités nationales pourraient ainsi se fonder sur leur propre comportement illégal pour mettre en échec l'efficacité des décisions prises par la Commission en vertu de ces dispositions du traité CE*". In the same line, see also Joined Cases C-465/09 to C-470/09 *Diputacion Foral de Vizcaya e.a./Commission*, EU:C:2011:372, paragraph 150; and Case, C-372/97 *Italy v Commission* EU:C:2003:275, paragraph 112.

[342] See Joined Cases C-471/09 P to C-473/09 P Territorio Histórico de Vizcaya – Diputación Foral de Vizcaya and Others v Commission EU:C:2011:521, paragraph 68. See also Case C-183/02 P *Demesa and Territorio Histórico de Álava v Commission* EU:C:2004:701, paragraph 52.

[343] See Joined Cases C-471/09 P to C-473/09 P Territorio Histórico de Vizcaya – Diputación Foral de Vizcaya and Others v Commission EU:C:2011:521, paragraph 76.

[344] See C-138/09 *Todaro Nunziatina & C.* ECLI:EU:C:2010:291, paragraph 21.

when it came to examining the scheme, as it had not followed up on several letters submitted by France, and second, the beneficiaries under the scheme had been misled as to its lawfulness due to a previous Commission decision considering that a similar measure did not constitute aid. Precisely, the uncertainty created by this previous decision justified the Commission's decision in the *Spanish tax lease* not to recover the aid granted before the publication of the Decision on the tax scheme applicable to economic interest groupings. None of these circumstances is present in this case. Neither has the Commission incurred any exceptional delays nor have Luxembourg or Engie been misled by any prior Commission decision concerning a similar tax arrangement.

(351) The reference to *1929 Holding* is equally ineffective. In this case, the Commission considered that no aid would be recovered given the nature of existing aid of the scheme which had been adopted in 1929, i.e. prior to the Treaty's entry into force. It then decided to grant a transitional period to put an end to the scheme given some exceptional circumstances that concurred in the case, namely the exceptionally long period during which the scheme had been in place (76 years) and the fact that an immediate abolishment of the measure could have relatively serious consequences for employment and economic growth in Luxembourg, where 13 000 exempt holding companies were active in a country with an active population of no more than 110 000 workers. Again, none of these exceptional circumstances are present in this case: neither can the aid granted in the present case be considered as existing aid, nor can any serious economic consequences be derived for Luxembourg from the recovery of the aid from Engie. The Commission also rejects the arguments concerning the serious economic consequences of the recovery for Engie. As the Court has already established, recovery cannot be affected by circumstances linked to the economic situation of the beneficiary.[345]

(352) Recovery is not prevented either by the Court's case-law in *Unicredito*. All this judgment states is that, at the stage of the recovery, the national authorities can take into account a more favourable tax treatment than the ordinary treatment which would have been granted to the beneficiary "*in the absence of unlawful aid and in accordance with domestic rules which are compatible with Community law*".[346] Therefore, the fact that an undertaking can choose the "least-taxed option" for a transaction or a "more favourable tax treatment than the ordinary system" in no way prevents recovery when such option or treatment constitutes precisely the unlawful aid measure addressed by the Commission decision.

8.2.2. Principle of good administration

(353) Engie argues that the Opening Decision lacks sufficient reasoning. In particular, according to Engie, the Commission dedicated only one paragraph to the application to the contested tax rulings of the presumption of selectivity of individual measures and to the claim of an alleged derogation from the Luxembourg rules of abuse of

[345] Case C-52/84, *Commission v Belgium* EU:C:1986:3, paragraph 14. The case law referred by Engie in its observations in support of this argument (footnotes 168-170) is irrelevant. Not only these judgments are unrelated to State aid recovery decisions (they refer to the limitation of the effects of Court's judgments in requests for preliminary rulings) but, if anything, they confirm the Commission's position that the possibility of limiting the effects of an EU act is "*quite exceptional*" (see Joined Cases C-367/93 to C-377/93 *Roders BV* EU:C:1995:261, paragraph 43).

[346] See Case C-148/04 *Unicredito Italiano SpA v Agenzia delle Entrate* EU:C:2005:774, paragraph. 119.

law. This lack of reasoning would lead to a violation of the principle of good administration which would also prevent recovery.[347]

(354) The Commission cannot accept that there has been any violation of the principle of good administration. The Commission learnt about the existence of the aid measures only on 25 June 2015, when Luxembourg responded to its request for information of 25 March 2015. Therefore, there have not been any unjustified delays in the procedure.

(355) As to the lack of reasoning, the Commission recalls that the Opening Decision must only "*summarise the relevant issues of fact and law, include a preliminary assessment as to the aid character of the State measure in question and set out its doubts as to the measure's compatibility with the common market*".[348] Given the preliminary nature of the assessment, recovery cannot be prevented by a perceived lack of reasoning in the Opening Decision. In any case, the Commission recalls that the alleged insufficient reasoning of the presumption of selectivity of individual measures is an ineffective argument since the Commission does not base this Decision on that presumption.

8.2.3. Principle of equal treatment

(356) Finally, Engie invokes a breach of the principle of equal treatment, arguing that a recovery decision would only affect Engie and no other taxpayers which have benefitted from the same tax treatment.[349] However, the Court has already considered that the fact that other undertakings are granted State aid, even competitors, is irrelevant for determining whether a particular measure constitutes State aid.[350] Since recovery is the logical consequence of the existence of unlawful aid, this reasoning must *a fortiori* apply to the repayment of the unlawful State aid.

(357) In conclusion, no general principle of law prevents recovery in the present case.

8.3. Methodology for recovery

(358) The obligation on a Member State to abolish unlawful aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing competitive situation on the market. In this context, the Court of Justice has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it has enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored.

(359) No provision of Union law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to quantify the exact amount of the aid to be recovered.[351] Rather, it is sufficient that the Commission's decision include information enabling the addressee of the decision to determine that amount without difficulty.[352] Union law merely requires the recovery of unlawful aid to restore the position to the *status quo ante* and that repayment be made in accordance

[347] Observations by Engie to the Opening decision, paragraphs 358-367.
[348] C-194/09 P *Alcoa Trasformazioni* EU:C:2011:497, paragraph 102.
[349] Observations by Engie to the Opening decision, paragraphs 368 – 372.
[350] Case T-214/95 *Het Vlaamse Gewest (Flemish Region)* v *Commission* EU:T:1998:77, paragraph 54.
[351] Albeit in the context of "impossibility to recover" and not "difficulty to quantify the aid amount".
[352] See Case C-441/06 *Commission v France* EU:C:2007:616, paragraph 29 and the case-law cited.

with the rules of national law.[353] Accordingly, the Commission may confine itself to declaring that there is an obligation to repay the aid at issue and leave it to the national authorities to calculate the exact amount of aid to be repaid.[354]

(360) In relation to unlawful State aid in the form of tax measures, the amount to be recovered should be calculated on the basis of a comparison between the tax actually paid and the amount which should have been paid in the absence of the contested tax rulings. The difference between the two values represents the aid granted to the beneficiary, which must be entirely recovered.

(361) As explained in Section 6, the aid granted on the basis of the contested tax rulings consists, essentially, in the application of the participation exemption at the level of LNG Holding and CEF to an income which corresponds economically to amounts deducted as expenses at the level of, respectively, LNG Supply and GSTM.[355] Such combined application of exemption and deduction to the same amounts has left virtually the entire profit realised by LNG Supply and GSTM untaxed. Therefore, the advantage effectively materialises at the moment in which the participation exemption is applied, at the level of LNG Holding and CEF, on the income corresponding to the ZORA Accretions that were previously deducted at the level of, respectively, LNG Supply and GSTM. In this regard, the Commission notes that, until 31 December 2016,[356] the GSTM ZORA had not yet been converted into GSTM Shares, which means that, in relation to this transaction, the participation exemption had not been applied yet. As a consequence, the aid granted on the basis of the GSTM tax rulings has not yet materialised and therefore, there are no amounts to recover (except if the GSTM ZORA has been converted into GSTM Shares, those shares have been cancelled or sold and the participation exemption has been applied on the corresponding profit between 31 December 2016 and the date of this Decision).

(362) By contrast, the LNG ZORA was partially converted in 2014 and the LNG Supply Shares received by LNG Holding at conversion were cancelled on the same year, giving rise to an income of USD 506.2 million for LNG Holding. This income remained untaxed pursuant to the application of the participation exemption. This amount corresponds to the expense deducted, as ZORA Accretions, at the level of LNG Supply.

(363) In light of the foregoing considerations, the amount to be recovered should be determined: first, by taking any income recorded in the tax returns of LNG Holding that corresponds to converted ZORA Accretions which were previously deducted at the level of LNG Supply;[357] and second, by applying to the resulting amount the ordinary rules of taxation of corporate profit in Luxembourg, including the standard corporate income tax, municipal tax, surcharges and wealth tax. The resulting sum constitutes the amount of aid to be recovered to eliminate the selective advantage granted by Luxembourg on the basis of the contested tax rulings. Until fiscal year

[353] Joined Cases T-427/04 and T-17/05 *France and France Telecom v Commission* EU:T:2009:474, paragraph 297.

[354] Joined Cases T-427/04 and T-17/05 *France and France Telecom v Commission* EU:T:2009:474, paragraph 299.

[355] In particular, see Recitals (157), (192) and (241).

[356] The date of the most recent financial statements of GSTM submitted by Luxembourg.

[357] To this regard, the qualification of this income in the statutory accounts or in the tax returns of LNG Holding as “capital gains”, “dividends” or otherwise is irrelevant.

2016 included, the Commission takes note that the amount of income recorded in the tax returns of LNG Holding that corresponds to converted ZORA Accretions deducted at the level of LNG Supply was USD 506.2 million, awarded in fiscal year 2014.[358]

(364) The methodology described in recital (364) should apply to CEF, in case any amount of aid had materialised via a (total or partial) conversion of the GSTM ZORA into GSTM Shares, their cancellation or sale, and the subsequent application of the participation exemption in the tax returns of CEF at the date of adoption of this Decision. The same applies to any additional aid awarded to LNG Holding at the date of adoption of the present Decision as a result of any further conversions of the LNG ZORA, the cancellation or sale of the corresponding LNG Supply Shares, and the application of the participation exemption in the tax returns of LNG Holding.

8.4. Entity from whom the aid is to be recovered

(365) In light of the observations in Sections 6.6 and 8.3, the Commission considers that Luxembourg should, in the first place, recover the unlawful and incompatible aid already materialised from LNG Holding.[359] Should LNG Holding not be in a position to repay the full amount of the aid received as a result of the contested tax ruling, Luxembourg should recover any remaining amounts from Engie S.A. or/and any of its successors, or group companies, since that entity controls the Engie group, which is the single economic unit benefitting from the aid. In this manner, the undue advantage granted on the basis of the contested tax rulings is eliminated and the previously existing situation on the market is restored through recovery.

9. MONITORING OF THE IMPLEMENTATION OF THE DECISION

(366) As explained in Section 6.2, it is the application of the participation exemption at the level of LNG Holding and CEF to income which corresponds economically to amounts deducted as expenses at the level of LNG Supply and GSTM (the ZORA Accretions) that generates an undue advantage and materially constitutes the aid granted by Luxembourg on the basis of the contested tax rulings. The Commission does not call into question as such the legality under Luxembourg tax law of the entire structure set up by Engie for the transfer of the two businesses. It merely objects to the practical effects of this structure on the total tax liability of the Engie group, i.e. that virtually all the profits realised by LNG Supply and GSTM are effectively left untaxed. In particular, the Commission requires Luxembourg *inter alia* not to apply the participation exemption at the level of the Holdings to any income which corresponds to amounts previously deducted from the tax base of the Subsidiaries.

(367) As the ZORA Agreements are due to expire in 2024 and 2026,[360] a large part of the advantage granted to Engie via the contested rulings would effectively materialise in the future, depending on the choices of Engie regarding the timing of the conversion of the ZORAs into shares of LNG Supply and GSTM, and their subsequent cancellation or sale. For this reason, the Commission considers that, on top of the obligation to recover the aid *already* materialised as described in Section 8,

358 See Recital (57).

359 Also from GSTM if any amount of aid had materialised at the date of publication of the present Decision.

360 See Recitals (34) and (61).

Luxembourg must not accept the application of the participation exemption, at the level of LNG Holding and CEF, to income corresponding to ZORA Accretions already deducted by, respectively, LNG Supply and GSTM, irrespectively of whether this happens on the due dates of the ZORA Agreements in 2024 and 2026, earlier in time, or even beyond 2026.[361].

(368) As a large part of the aid awarded to Engie has not materialised yet, and in order to verify that this will not happen in the future, the Commission will need to receive from Luxembourg, *inter alia*, the tax returns, statutory accounts and final tax assessments of the following entities of the Engie group: Engie LNG Supply, S.A., Engie Treasury Management S.à.r.l., Engie LNG Holding S.à.r.l., Engie Invest International S.A. (including tax returns and tax assessments under the fiscal unity regime),[362] Engie LNG (Luxembourg) S.à.r.l. and Electrabel Invest Luxembourg S.A.. The Commission will also need to receive any new tax rulings, issued by Luxembourg in favour of the entities listed above or any other entities of the Engie group, concerning the tax treatment of the structures set up by Engie in the contested tax rulings. This information is required to ensure the continuous implementation of this Decision over time. Indeed, the Commission will then verify for each financial year that, *inter alia*, no participation exemption is applied at the level of Engie LNG Holding S.à.r.l. and Engie Invest International S.A. on income corresponding to ZORA Accretions deducted at the level of, respectively, Engie LNG Supply, S.A., and Engie Treasury Management S.à.r.l. This monitoring obligation stands irrespective of whether the proposed transaction described in recital (22) is finalised or not, i.e. if the parent company of Engie LNG Supply, S.A., belongs to the Engie group or the Total group. Additionally, should Engie decide to revise the structures set up in the contested tax rulings, Luxembourg shall inform the Commission of the relevant changes and their impact on the total fiscal liability in Luxembourg of the Engie group. The obligations set out in this recital stand until the shares of LNG Supply and GSTM are entirely converted and subsequently cancelled or sold.

10. CONCLUSION

(369) In conclusion, the Commission finds that Luxembourg, in breach of Articles 107(1) and 108(3) of the Treaty, has unlawfully granted State aid to Engie on basis of the contested tax rulings. Luxembourg is required to recover that State aid by virtue of Article 16 of Regulation No 2015/1589 from LNG Holding or if the latter fails to repay the full amount of the aid, from Engie S.A. or any of its successors, or group companies for the outstanding amount of aid. Luxembourg shall also ensure that no additional aid is granted in the future to Engie or to any of its group companies as a result of the tax treatment set out in the contested tax rulings. Accordingly, the Commission,

HAS ADOPTED THIS DECISION:

Article 1

The State aid granted in favour of Engie S.A., and all companies directly or indirectly controlled by Engie S.A. on the basis of the tax ruling issued by the Luxembourg tax

[361] This means, in practical terms, that Luxembourg must not issue any tax assessment for LNG Holding and CEF where it accepts the participation exemption under these conditions.

[362] These are the new names of the relevant companies: see footnotes 4, 5, 16 and 20.

administration on 9 September 2008 as amended and complemented by the tax rulings of 30 September 2008, 3 March 2009, 9 March 2012 and 13 March 2014, and on the basis of the tax ruling issued by the Luxembourg tax administration on 9 February 2010, complemented by the tax ruling of 15 June 2012, unlawfully put into effect by Luxembourg in breach of Article 108(3) of the Treaty on the Functioning of the European Union is incompatible with the internal market.

Article 2

1. Luxembourg shall recover the incompatible and unlawful aid referred to in Article 1 from Engie LNG Holding S.à.r.l.
2. Any sums that remain unrecoverable from Engie LNG Holding S.à.r.l, following the recovery referred to in the preceding paragraph, shall be recovered from Engie S.A. or/and any of its successors, or group companies.
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.
5. Luxembourg shall cease granting the aid measure referred to in Article 1 with effect from the date of adoption of this Decision.

Article 3

1. Recovery of the aid granted under the measures referred to in Article 1 shall be immediate and effective.
2. 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, Luxembourg shall submit information regarding the methodology used to calculate the exact amount of aid.
2. Luxembourg shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the measures 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.

If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Fax: +32 2 296 12 42
Stateaidgreffe@ec.europa.eu

Done at Brussels, 20.6.2018

For the Commission
Margrethe VESTAGER
Member of the Commission