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Subject: State Aid SA.50400 (2019/NN-2) – Luxembourg – Possible State aid in favour of Huhtamäki

Sir,

The Commission wishes to inform Luxembourg that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ("Treaty").

1. PROCEDURE

(1) By letter of 19 June 2013, the Commission sent to Luxembourg an information request concerning its tax ruling practice.

(2) On 17 July 2013, Luxembourg replied in general terms to that letter and submitted part of the requested information.

(3) On 9 December 2014, the International Consortium of Investigative Journalists ("ICIJ") released a database of Luxembourg tax rulings on a dedicated website. Among these documents appears a tax ruling issued by the Luxembourg tax administration (*Administration des contributions directes*) on 11 November 2009[1] to two Luxembourg tax resident entities of the Huhtamäki group namely Huhtalux Supra S.à r.l. ("Supra")[2] and Huhtalux S.à r.l. ("Huhtalux")[3] (the "2009 tax ruling").

[1] See https://projects.icij.org/luxembourg-leaks/viz/documents/560.html.
[2] Later renamed Huhtamäki Holding S.à r.l.

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(4) On 22 December 2014, Luxembourg submitted a list of beneficiaries of tax rulings in response to the Commission's letter of 19 June 2013. That document lists the rulings issued by the Luxembourg tax administration during the years 2010 to 2012. That list includes a tax ruling issued on 16 February 2012 to Huhtalux and Supra (the "2012 tax ruling").

(5) By letter of 29 November 2017, the Commission indicated that, based on a preliminary analysis, it was concerned that the 2009 tax ruling might have conferred a selective advantage upon Huhtalux. The Commission thus requested Luxembourg to provide reasons why this measure would not be considered unlawful aid. In the same letter, the Commission requested Luxembourg to provide further information including, *inter alia*, all supporting documents of the 2009 tax ruling, any modifications and prolongations as well as all tax rulings granted to companies of the Huhtamäki group which are tax resident or subject to tax in Luxembourg.

(6) On 4 December 2017, Luxembourg requested an extension of the deadline to submit the requested information, which the Commission granted by letter of 6 December 2017.

(7) On 19 January 2018, Luxembourg replied to the Commission's request for information of 29 November 2017. In particular, Luxembourg provided the 2012 tax ruling and a tax ruling issued on 9 October 2013 by the Luxembourg tax administration to Huhtalux (the "2013 tax ruling"), which included a transfer pricing analysis dated 21 March 2012 (the "2012 transfer pricing report").

(8) On 16 November 2018, Luxembourg submitted two additional transfer pricing analyses, both dated 18 January 2018, concerning the tax treatment of Huhtalux for the fiscal years 2015 and 2016 (the "2015 transfer pricing report" and the "2016 transfer pricing report", respectively).

(9) On 20 November 2018, at the request of Luxembourg, a meeting was held between the Commission's services and Luxembourg during which Luxembourg presented and explained the information submitted on 16 November 2018.

2. BENEFICIARY OF THE CONTESTED MEASURES

(10) The Huhtamäki group consists of Huhtamäki Holding Oy, a company established in Finland, and all companies directly or indirectly controlled by Huhtamäki Oy (collectively referred to as the "Huhtamäki Group")[4]. The Huhtamäki Group was founded in 1920 and is based in Espoo, Finland. It specialises in the manufacturing of packaging for food and drinks such as paper and plastic cups, fruit trays and takeout packaging[5].

(11) The Huhtamäki Group has business operations in Europe, Asia, America and Oceania. The group currently has 76 manufacturing units and 24 sales offices in 34 countries. In 2017, the group's net sales were approximately EUR 3 billion and

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3 Later renamed Huhtamäki S.à r.l.

4 See Luxembourg's letter of 19 January 2018, Annex 44.

5 See http://www.huhtamaki.com/about-us.

it had 17,400 employees. The Huhtamäki Group is listed as "Huhtamäki Oyj" on the Nasdaq Helsinki Ltd[6].

(12) Supra is a company of the Huhtamäki Group based in Luxembourg. It is wholly owned by Huhtamäki Holding Oy[7]. Supra's activity consists in the holding of participations both in Luxembourg and abroad as well as in the creation and development of such participations. Huhtalux is a company of the Huhtamäki Group based in Luxembourg and wholly owned by Supra[8]. Huhtalux's activity consists in the holding of participations both in Luxembourg and abroad. In addition, Huhtalux performs group refinancing activities by means of medium-term loans[9]. The number of full-time equivalent employees of Huhtalux amounted to one (1) part-time employee in the period 2010-2013, four (4) full-time employees and one (1) part-time employee in 2014 and eight (8) full-time employees in the period 2015-2016[10].

3. THE CONTESTED TAX RULINGS

(13) The present Decision concerns the tax treatment granted by the Luxembourg tax administration to Huhtalux between 2009 and the date of the present decision, based on the 2009 tax ruling, the 2012 tax ruling and the 2013 tax ruling (collectively, the "contested tax rulings"), which determine the tax liability of Huhtalux with respect to income arising from the transactions that fall under the scope of the contested tax rulings.

3.1. The 2009 tax ruling

(14) The 2009 tax ruling was issued on 11 November 2009 by the Luxembourg tax administration following a tax ruling request submitted by Huhtamäki Group's tax advisor on the same date (the "2009 tax ruling request"). The 2009 tax ruling consists of a letter in which the Luxembourg tax administration confirms that the content of the 2009 tax ruling request is in compliance with the law and the administrative practice.

(15) Huhtalux carries out on-lending financing activities between group companies. It receives financing through an interest-free loan (the "2009 IFL") granted by Huhtamäki Ireland Limited ("Huhtamäki Ireland")[11], an Irish group company fully-owned by Supra. The funds loaned are used by Huhtalux to finance Huhtamäki Group companies based in the United States (the "US group companies") through interest-bearing facilities (the "US receivables")[12].

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6 See http://www.huhtamaki.com/about-us.

7 See Luxembourg's letter of 19 January 2018, Annex 44.

8 See Luxembourg's letter of 19 January 2018, Annex 44.

9 See Luxembourg's letter of 19 January 2018.

10 See Luxembourg's letter of 19 January 2018.

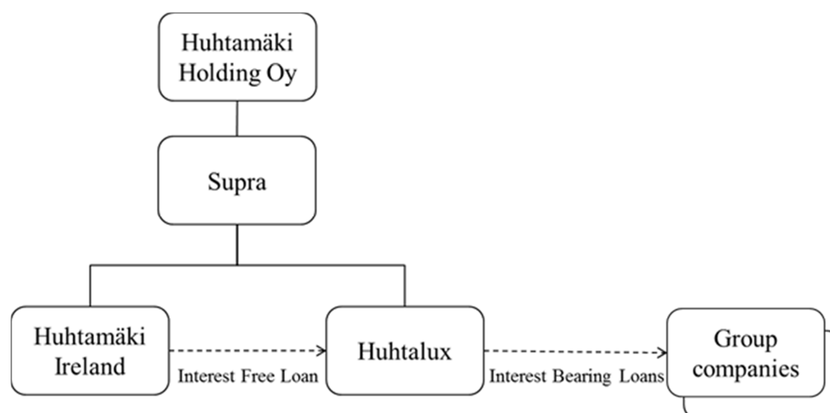
11 The name of the Irish company was submitted by Luxembourg with its letter of 19 January 2018.

12 See 2009 tax ruling request, paragraphs 4 – 7. This financing structure replaces a previous structure whereby the US group companies were financed by the Swiss branch of Huhtahung KFT ("KFT"), a Hungarian resident group company fully owned by Huhtalux at the time of the 2009 tax ruling. The total amount of the funds loaned to the US group companies was approximately USD 300 million, plus accrued interest calculated at 4% or 5% plus Libor. The replacement from the previous tax structure to the current one took place in the following way: the receivables towards the US group companies were transferred by KFT to Huhtalux by way of capital reduction of the same amount. On the date it received the receivables, Huhtalux reduced its share

According to the 2009 tax ruling request, the total amount of the US receivables is approximately USD 300 million plus accrued interest[13], which is financed by the 2009 IFL[14] and by equity for an amount of USD equivalent to EUR 1 million[15].

(16) Figure 1 below summarises these transactions.

Figure 1 - Illustration of the structure set up in the 2009 tax ruling



(17) The 2009 tax ruling determines the computation of Huhtalux's corporate income tax liability. Huhtalux's taxable profit is set in the form of a minimum profit margin (the “Profit Margin”) which is considered the arm's length remuneration for its financing activity. The difference between the profit effectively realised by the company from that financing activity and the Profit Margin is the alleged arm’s length compensation for the 2009 IFL which the company is allowed to deduct from its tax base. This deduction is referred to in the 2009 tax ruling and in the company's tax returns as the “deemed interest”, “notional interest” or “deemed interest deduction”.

(18) The Commission understands from the contested tax rulings that “deemed interest” is an interest which is recorded as a deductible cost in the tax profit and loss account of the company but which does not correspond to an actual cost (or payment) incurred by the company and recorded in its commercial profit and loss accounts[16]. Hence the effect of the deemed interest deduction is that only a part of the profit effectively recorded by the company in its accounts, i.e. the Profit Margin, is included in its tax base and is subject to taxation. In transfer pricing terms, the deemed interest deduction would be considered as a “downward transfer pricing adjustment” or simply as a “downward adjustment”. Furthermore,

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premium by an amount equal to the amount of the receivables minus EUR 1 million against an interest-free loan granted by Supra to Huhtalux for an amount equal to the share premium reduction. On the same date, Supra contributed the interest-free loan to Huhtamäki Ireland in exchange for shares. A summary of the implementing steps of the financing structure is included in Appendix 2 of the 2009 tax ruling request.

[13] See 2009 tax ruling request, paragraph 5.

[14] It is the Commission's understanding, based on the 2009 tax ruling request that the 2009 IFL amounts to USD 300 million minus the equity of EUR 1 million, at the exchange rate applicable at the time.

[15] See 2009 tax ruling request, paragraph 29.

[16] Being an interest-free loan, no interest related to this loan is recorded as a cost in the commercial profit and loss account of the company.

in cross-border transactions, a downward adjustment is considered "unilateral" when it is applied by a tax administration regardless of whether a corresponding upward adjustment has been applied by the State where the other party to the transaction is subject to tax.

(19) The 2009 tax ruling endorses the treatment of the 2009 IFL as debt for corporate income tax, municipal business tax and net wealth tax purposes[17]. It allows Huhtalux to deduct from its tax base a deemed interest on the 2009 IFL so as to realise a minimum profit of 3/32% (i.e. 9.375 basis points (bps)) on the annual average outstanding amount of the US receivables (the Profit Margin)[18]. The deemed interest deduction and consequently the Profit Margin are considered to be in line with the arm's length principle, without any further substantiation of how this Profit Margin was determined or any indication of the existence of a transfer pricing study. The 2009 tax ruling request merely states that the profit margin on Huhtalux's on-lending activity is in conformity with transfer pricing policy and with Articles 56 and 164(3) of the Luxembourg Corporate Income Tax Code (*loi modifiée du 4.12.1967 concernant l'impôt sur le revenu*, "LIR")[19].

(20) As a consequence, the tax base of Huhtalux on its intragroup financing activities consists of a minimum profit of 3/32% on the annual average outstanding amount of the part of the US receivables financed by the 2009 IFL plus the income related to the portion of the US receivables financed by equity[20].

(21) The 2009 IFL has a 15-year maturity. It bears no interest and has no voting rights attached. It cannot be converted into shares or assigned outside the Huhtamäki Group. The 2009 IFL is repayable on Huhtamäki Ireland's demand[21].

(22) According to the 2009 tax ruling request, the Huhtamäki Group intends to repatriate the residual cash deriving from the interest income at the level of Huhtalux before year-end. This could be done by way of dividend distribution or share premium reduction and repayment from Huhtalux to Supra and subsequently from Supra to Huhtamäki Holding Oy[22].

(23) Dividend distributions and repayment of share premium at the level of Supra are tax exempt pursuant to the Luxembourg participation exemption regime[23]. Dividend distributions and repayment of share premium by Huhtalux are not subject to withholding tax[24].

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17 See 2009 tax ruling request, paragraph 28.

18 See 2009 tax ruling request, paragraphs 30 and 31. According to the 2009 tax ruling request (paragraph 32), in case the principal amount of the USD loan was lower than EUR 187.5 million or exceeded EUR 500 million, the minimum margin should be revised.

19 See 2009 tax ruling request, paragraphs 30 and 31.

20 See 2009 tax ruling request, paragraph 33.

21 See 2009 tax ruling request, Appendix 3. The 2009 IFL can be repayable in kind with the principal of the US receivables.

22 See 2009 tax ruling request, paragraph 35. According to the 2009 tax ruling request, if the group wishes to re-inject the cash into the structure, Supra may - instead of distributing the cash to Huhtamäki Holding Oy- capitalise Huhtamäki Ireland, which may in turn on-lend this cash to Huhtalux on an interest free basis, as it does with the 2009 IFL (paragraph 36).

23 See 2009 tax ruling request, paragraph 16. The participation exemption regime in Luxembourg is laid down in Article 166 LIR and the Grand Ducal Decree of December 21, 2001.

24 See 2009 tax ruling request, paragraphs 17-22.

3.2. The 2012 tax ruling

(24) The 2012 tax ruling was issued on 16 February 2012 following a tax ruling request submitted by Huhtamäki Group's tax advisor on 21 December 2011 (the "2012 tax ruling request"). It consists of a letter in which the Luxembourg tax administration confirms that the content of the 2012 tax ruling request is in compliance with the law and the administrative practice.

(25) The 2012 tax ruling concerns a reorganisation of the financing structure due to increasing financing needs of the US group companies[25]. To this end, the amount of the US receivables is increased and the 2009 IFL is replaced by a new interest-free loan agreement of a higher nominal value (the "2012 IFL", collectively referred to with the 2009 IFL as the "IFLs"). Following this reorganisation, the on-lending activity of Huhtalux towards the US group companies increases to USD 435 million, which is financed by means of the 2012 IFL of approximately USD 432 million and equity of EUR 2 million[26]. The terms and conditions of the 2012 IFL are the same as those of the 2009 IFL with the exception of the principal amount and the fact that the 2012 IFL does not have any specific maturity date[27].

(26) The tax treatment agreed in the 2009 tax ruling in relation to the 2009 IFL remained valid and applicable in relation to the 2012 IFL[28].

3.3. The 2013 tax ruling

(27) The 2013 tax ruling was issued on 9 October 2013 following a tax ruling request submitted by Huhtamäki Group's tax advisor on 21 March 2012 (the "2013 tax ruling request"). It consists of a letter in which the Luxembourg tax administration confirms that the transfer pricing analysis contained in the 2013 tax ruling (the 2012 transfer pricing report) request has been made in accordance with Circular 164/2 of 28 January 2011 concerning intra-group financing activities ("Circular 164/2")[29]. The 2013 tax ruling is binding on the tax administration for a period of five years, from tax year 2012 to tax year 2016.[30]

(28) The 2013 tax ruling sets out the remuneration for Huhtalux's financial intermediation activity on the basis of the aforementioned transfer pricing analysis. This is due to the entry into force of the Circular 164/2, which required

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25 See 2012 tax ruling request, paragraph 3.

26 See 2012 tax ruling request, paragraph 14. In practice, the 2009 IFL is replaced by two new IFLs. In particular, Huhtalux repays Huhtamäki Ireland the 2009 IFL by issuing a new interest free loan of the same amount ("IFL 1"). Additionally, Huhtamäki Ireland grants a second interest-free loan to Huhtalux in the amount of USD 125 million less EUR 1 million ("IFL 2"). IFL 1 and IFL 2 are then merged into a single interest-free loan (the 2012 IFL) which is used by Huhtalux to finance the US group companies. A summary of the reorganisation is included in Appendix 1 of the 2012 tax ruling request.

27 See 2012 tax ruling request, paragraph 16. In other words, the 2012 IFL will only be repayable on demand of the holder or at the discretion of the borrower.

28 See 2012 tax ruling request, paragraph 18.

29 *Circulaire du directeur des contributions* n° 164/2 of 28 January 2011.

30 See 2013 tax ruling request, paragraph 20, page 3.

the submission of a transfer pricing study as supporting document to any tax ruling request concerning transfer prices for intra- group financing transactions[31].

(29) On the basis of the 2012 transfer pricing report, the 2013 tax ruling endorses a Profit Margin (i.e. a remuneration for Huhtalux's financial intermediation activity) of at least 3.75 bps on the 2012 IFL principal of approximately EUR 335 million intermediated[32], to the extent that this minimum remuneration is sufficient to cover the annual operating expenses of Huhtalux. In addition, Huhtalux should retain a return on its equity of EUR 2 million in relation to the investment made[33].

(30) The 2013 tax ruling further confirms that the remuneration agreed in the 2009 tax ruling is applicable until 31 December 2011[34]. According to Luxembourg, the 2013 tax ruling is still in effect[35].

3.4. Implementation of the contested tax rulings

(31) The tax returns submitted by Luxembourg reflect the tax treatment agreed for Huhtalux in the contested tax rulings.

(32) The 2009 IFL between Huhtalux and Huhtamäki Ireland was signed on 15 September 2010[36]. For the fiscal years 2010 to 2014, the appendices to the tax returns of Huhtalux contain a table explaining the calculation of the deemed interest. The table corresponding to the fiscal year 2010, included in Appendix 6 to Huhtalux's tax return, is reproduced as an example in Figure 2 below.

31 See Circular 164/2, paragraph 4.2.

32 At the time of the 2013 tax ruling request, Huhtalux had made drawdowns under the 2012 IFL for a total amount of USD 432º394º618, i.e. approximately EUR 335 million at the exchange rate in force at the date (see 2013 tax ruling request, Appendix 2, Section 1.1).

33 The remuneration for Huhtalux's financial intermediation activity is estimated in the 2012 transfer pricing report using a transfer pricing method known as Comparable Uncontrolled Price (CUP). The said remuneration is composed, first, of an annual fee with respect to the granting of credits for the financial intermediation activity, and second, a compensation for the risks borne by Huhtalux for the equity it invests (see 2013 tax ruling request, Appendix 2).

34 See 2013 tax ruling request, paragraph 20.

35 See Luxembourg's letter of 19 January 2018.

36 See Huhtalux's 2010 tax return, Appendix 6.

Figure 2 - Calculation of the deemed interest for fiscal year 2010

Huhtalux S.à r.l.
Luxembourg
File number: 2003 2423 850

Appendix 6

Verification of the remuneration realized on the financing activity

A) Computation of the estimated market remuneration on the financing activity

Annual average remuneration on the activity financed by interest free loan ("IFL")

Period		EUR	Number of days	Market remuneration (%)	Market remuneration to realize for the period (EUR)
From	To				
15/09/2010	31/12/2010	241,151,877.28 *	108	0.09375%	66,894.87

(A) 66,894.87

Remuneration on the activity financed by equity

	Amounts	Percentage	Interest income
Amount lent to Huhtamaki Americas, Inc	242,151,877.27	100.00%	2,793,973.99
Amount financed by IFL	241,151,877.28	99.59%	2,782,435.88
Amount finced by equity	999,999.99	0.41%	11,538.11

(B) 11,538.11

B) Verification of the remuneration realized on the financing activity

		EUR
Interest income on the financing activity	(C)	2,793,973.99
Foreign exchange gain	(D)	24,602.31
Interest charges (**)	(E)	(283,595.17)
Notional interest (C) + (D) - (E) - (A) - (B)		(2,456,548.15)
Remuneration realized on the financing activity	(F)	78,432.98

C) Verification of the market remuneration to realize

		EUR
Remuneration realized on the financing activity	(F)	78,432.98
Estimated market remuneration	(A+B)	(78,432.98)
EXCESS (INSUFFICIENCY) OF REMUNERATION :		0.00

(*) Based the note 6 and 8 of the financial statements, the IFL agreement was entered into on September 15, 2010. The amount of EUR 241,151,877.28 has been considered as the average amount for the period since there was no increase or decrease in value during the period.
(**) this interest charge relates to the funding of the Huhtamaki Americas loans before the subscribtion of the IFL agreement.

(33) The table presents the calculation of the alleged "market remuneration" of Huhtalux on its intra-group financing activity. First, the remuneration corresponding to the part of the activity financed by the 2009 IFL is calculated, in conformity with the 2009 tax ruling, applying a rate of 3/32% (or 9.375 bps) on the annual average outstanding amount of the 2009 IFL during the relevant period (EUR 242,151,877.28). The result (EUR 66,894.87) is then added to the remuneration of the part of the activity financed by equity (EUR 11,358.11). The resulting figure (i.e. EUR 78,432.98) is considered the market remuneration that Huhtalux should receive for its financing activity during 2010.

(34) In order to calculate the notional interest, i.e. the deemed interest deduction, the profit effectively realised by Huhtalux from its financing activity as recorded in the commercial accounts[37] is reduced by the amount of that market remuneration. The difference between the actual profit and the market remuneration is the deemed interest, which in 2010 amounts to EUR 2º456º548.15.

(35) A similar calculation is performed for every fiscal year between 2011 and 2014. From 2012 onwards, the rate applicable on the principal amount of the 2012 IFL is 3.75 bps[38], in conformity with the 2012 transfer pricing report[39].

(36) For the fiscal years 2015 and 2016, the method to calculate the notional deemed interest is based on the 2015 transfer pricing report and on the 2016 transfer pricing report[40]. Based on these transfer pricing studies, the computation of the deemed interest is based on two components: first, a gross remuneration for functions performed expressed in basis points of the nominal outstanding amount of the interest bearing loans[41]; second, a risk premium also expressed in basis points and calculated on the outstanding amount of the interest bearing loans[42]. The total amount, as calculated with these two components, is considered to be the "market remuneration" for Huhtalux's financing activity.

(37) The difference between the actual profit realised by Huhtalux and the alleged "market remuneration" is considered the "notional interest", i.e. the deemed interest deduction. The same calculation is performed for 2015 and 2016.

(38) The annual amounts of the deemed interest deductions reported in Huhtalux's tax returns over the period 2010 to 2016 are presented in the Table 1 below.

Table 1 - Annual deemed interest reported in Huhtalux's tax returns

	2010	2011	2012	2013	2014	2015	2016
Annual deemed interest (EUR million)	2.46	9.12	19.25	18.86	23.51	31.05	39.60

(39) As contemplated in the 2009 tax ruling request[43], the cash corresponding to the deemed interest deducted from Huhtalux's tax base appears to have been repatriated to Supra in the form of either share premium reductions or dividends

37 Corresponding to "Interest income on the financing activity" (EUR 2,793,973.99), plus "Foreign exchange gain" (EUR 24,602.31), minus "Interest charges" (EUR 283,595.17).

38 See Huhtalux's tax returns for 2012, 2013 and 2014, Appendix 8.

39 See recital (29).

40 The Commission notes that, according to Huhtalux's 2015 and 2016 tax returns, those reports were supposed to be dated 21 April 2017. However, the date actually reflected on the versions submitted to the Commission is 18 January 2018. Therefore, those reports are dated after the submission of Huhtalux's 2015 and 2016 tax returns (21 May 2017) and seem to determine Huhtalux's tax liability *a posteriori*.

41 7 bps for the period covering 1 January 2015 to 30 November 2015, then 5 bps from December 2015 and the entire year 2016.

42 6.4 bps for the period covering 1 January 2015 to 30 November 2015, then 4.6 bps from December 2015 and the entire year 2016.

43 See recital (22).

that seem to have been exempted[44] at the level of this company under the participation exemption regime.

(40) Huhtalux's 2014 tax return[45] shows that the total notional interest deductions accumulated from 2010 up to 2014 amounted to EUR 73.20 million, of which EUR 71.14 million were paid out to Supra by means of a requalification for tax purposes as share premium reimbursements in 2013 (EUR 47.16 million) and 2014 (EUR 23.98 million). Those share premium reductions seem to have been recorded as a capital gain by Supra in 2013 and 2014[46], which would have been tax exempt pursuant to Luxembourg's participation exemption regime.

(41) By contrast, Supra's tax returns[47] for tax years 2015[48] and 2016[49] show that the cash corresponding to the deemed interest deducted from Huhtalux's tax base in those two years (EUR 31.05 million in 2015 and EUR 39.60 million in 2016) was paid out to Supra in the form of dividends. The tax returns also show that the dividends received by Supra remained tax exempt in application of the participation exemption regime.

4. THE RELEVANT LEGAL AND REGULATORY FRAMEWORK

4.1. Description of the relevant national legal framework

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

(42) The ordinary rules of corporate taxation in Luxembourg can be found in the Luxembourg income tax law. According to Article 159 LIR, resident tax companies are subject to tax on the totality of their profits[50]. Article 163 LIR provides that the Luxembourg corporate income tax is applicable to the taxable profit of a taxpayer in a given year[51]. Before 2013, all companies subject to tax in Luxembourg were taxed on their taxable profit at the standard tax rate of 28.80 %[52]. Since 2013, the standard tax rate is 29.22%.

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44 See Supra's 2015 tax return

45 See Huhtalux's 2014 tax return, Appendix 4.

46 See Supra's tax return for 2013 and 2014.

47 As from 2015, Huhtalux and Supra form a fiscal unity. Therefore the total taxable basis for the two companies is consolidated and calculated in Supra's tax returns as the latter is the head of the fiscal unity group.

48 See 2015 Supra tax returns, Appendix 5.

49 See 2016 Supra tax returns, Appendix 5.

50 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*".

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

52 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

(43) 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"*.

(44) Article 23 LIR explains that the value of the net assets should be determined following accounting rules and principles[53].

(45) 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.[54]

4.1.2. The arm's length principle in the Luxembourg corporate income tax system: the former Article 56 LIR and Article 164(3) LIR

(46) The legal basis for the deemed deductions are, according to the contested tax rulings, Article 56 LIR in the version before its amendment in 2015 and Article 164(3) LIR which, according to the 2009 tax ruling request, set out the arm's length principle and the transfer pricing policy of Luxembourg at that time[55].

(47) The former Article 56 LIR allowed the Luxembourg tax administration to reassess the operating result (*fixer forfaitairement le résultat d'exploitation)* of a company if "*a transfer of profit is made possible*" due to special economic links between a company subject to tax in Luxembourg and another entity not subject to tax in Luxembourg. It reads as follows:

« *Sans égard au résultat accusé, un fonctionnaire supérieur de l'administration des contributions à désigner par le directeur de cette administration et ne pouvant avoir un rang inférieur à celui d'inspecteur de direction peut fixer forfaitairement le résultat d'exploitation, lorsqu'un transfert du résultat est rendu possible par le fait que l'entreprise entretient des relations économiques particulières, soit directes, soit indirectes, avec une personne physique ou morale qui n'est pas contribuable résident ».*

(48) Article 164(3) LIR governs the tax treatment of hidden profit distributions and is considered to reflect the application of the arm's length principle in Luxembourg

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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.

53 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*".

54 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*".

55 See 2009 tax ruling request, paragraph 31.

tax law[56]. According to this provision "*(a) hidden profit distribution arises in particular when a shareholder, a stockholder or an interested party receives either directly or indirectly benefits from a company or an association which he normally would not have received if he had not been a shareholder, a stockholder or an interested party*". The said provision, read together with Article 164(1) LIR[57], provides that such (hidden) profit distribution is to be included in the tax base of the company.

(49) This means that, according to the interpretation given by the Luxembourg tax administration, prices charged for intra-group transactions should correspond to the prices which would have been charged and agreed by independent companies in comparable circumstances[58]. Article 164(3) LIR does not differentiate between cross-border and internal transactions[59].

(50) Finally, the arm's length principle has been explicitly included by the Luxembourg legislature through the adoption of a new Article 56 LIR and of Article 56bis LIR, which came into force, respectively, as of 1 January 2015 and 1 January 2017[60]. According to the new version of Article 56 LIR, when the conditions of intra-group transactions differ from those that would have been agreed by independent companies, the profit shall be fixed and taxed at the conditions that would have existed between independent companies. It reads as follows:

« *Lorsque (a) une entreprise participe directement ou indirectement à la direction, au contrôle ou au capital d'une autre entreprise, ou que (b) les mêmes personnes participent directement ou indirectement à la direction, au contrôle ou au capital de deux entreprises, et que, dans l'un ou l'autre cas, les deux entreprises sont, dans leurs relations commerciales ou financières, liées par des conditions convenues ou imposées, qui diffèrent de celles qui seraient convenues entre des entreprises indépendantes, les bénéfices de ces entreprises seront*

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56 See OECD's 2012 Transfer Pricing Country Profile for Luxembourg (https://www.oecd.org/tax/transfer-pricing/Luxembourg_TPCountryProfile_Oct2012.pdf): "*The arm's length principle is embedded in Section II Article 164 paragraph 3 of the income tax law (loi modifiée du 4.12.1967 concernant l'impôt sur le revenu)*".

57 According to Article 164(1) LIR, in order to determine the tax base, it is irrelevant whether the profit has been distributed or not.

58 The interpretation of Article 164(3) has been codified by the Luxembourg Tax Administration in several Circulars, in particular Circular no. 164/2 of 28 January 2011 and Circular no. 164/2bis of 8 April 2011, which concern the application of the arm's length principle to intra-group financing transactions. In addition to the specific guidance on the application of the arm's length principle for such transactions, the Circulars contained a general description of the arm's length principle. According to Circular no. 164/2 of 28 January 2011 (page 1): "*An intra-group service [...] has been rendered if, in comparable circumstances, an independent enterprise had been willing to pay another independent enterprise to carry out that activity, or if it had carried out that activity itself. Where an intra-group service has been rendered, as with other types of intra-group transfers, one should ascertain whether an arm's length price is charged for such service, i.e. a price corresponding to the price which would have been charged and agreed to by independent enterprises in comparable circumstances*".

59 As regards intra-group financing activities, the determination of the arm's length remuneration and the conditions to obtain a tax ruling from the tax administration were laid down in Circular 164/2. This Circular required to the taxpayer the submission of a transfer pricing study with any tax ruling request concerning this subject.

60 Additionally, Circulars no. 164/2 of 28 January 2011 and no. 164/2bis of 8 April 2011 were replaced by the Circular no. 56/1 – 56bis/1 of 27 December 2016.

déterminés aux conditions qui prévalent entre entreprises indépendantes et imposés en conséquence ».

(51) Article 56bis LIR introduces the recommendations of Organisation for Economic Cooperation and Development's ("OECD") Base Erosion and Profit Shifting (BEPS) Action Plan with regard to the methods to be used for the determination of the appropriate arm's length remuneration[61].

(52) Luxembourg also adopted on 27 December 2016 the Circular no. 56/1 – 56bis/1 regarding the tax treatment of companies performing intragroup financing

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[61] Article 56bis LIR: *"Au sens du présent article, on entend par: - entreprise liée: toute entreprise visée à l'article 56; - transaction: le transfert d'un bien corporel ou incorporel, la prestation de service et l'engagement, formalisé ou non par un écrit, qui serait rémunéré sur le marché libre; - transaction contrôlée: la transaction entre entreprises liées; - transaction sur le marché libre : la transaction entre entreprises indépendantes; - transaction comparable sur le marché libre: la transaction entre deux parties indépendantes qui est comparable à la transaction contrôlée examinée. Il peut s'agir d'une transaction comparable entre une partie à la transaction contrôlée et une partie indépendante («comparable interne») ou entre deux entreprises indépendantes dont aucune n'est partie à la transaction contrôlée («comparable externe»); - prix de pleine concurrence: le prix ou tarif qui serait appliqué sur une transaction comparable sur le marché libre. Dans le contexte de l'analyse qu'une entreprise effectue dans le but de contrôler la conformité au principe de pleine concurrence, l'entreprise doit procéder sur toutes les transactions contrôlées à une fixation des prix et tarifs respectant le prix de pleine concurrence. Le fait qu'une transaction donnée ne soit pas observée entre parties indépendantes ne signifie pas forcément que cette transaction n'est pas conforme au principe de pleine concurrence. La technique à mettre en œuvre dans le cadre de la détermination du prix de pleine concurrence afin d'assurer le principe de pleine concurrence repose sur l'analyse de comparabilité. Il s'agit d'opérer une comparaison entre les conditions imposées à une transaction contrôlée et celles imposées à une transaction comparable sur le marché libre. Pour qu'une telle comparaison soit significative, il faut que les caractéristiques économiques des transactions prises en compte soient suffisamment comparables. Des transactions sont suffisamment comparables lorsqu'il n'existe pas de différences matérielles entre les transactions comparées qui pourraient avoir une influence significative d'un point de vue méthodologique sur la détermination du prix ou bien lorsque des ajustements raisonnablement fiables peuvent être opérés pour éliminer l'incidence sur la détermination du prix. L'analyse de comparabilité de la transaction repose sur deux piliers: a) identifier les relations commerciales ou financières entre les entreprises liées et déterminer les conditions et circonstances économiquement significatives qui se rattachent à ces relations de manière à délimiter de façon précise la transaction contrôlée; b) comparer les conditions et les circonstances économiquement significatives de la transaction contrôlée, délimitée de façon précise, avec celles de transactions comparables sur le marché libre. Les conditions et circonstances économiquement significatives ou facteurs de comparabilité qui doivent être identifiés sont globalement les suivants: a) les dispositions contractuelles de la transaction; b) les fonctions exercées par chacune des parties à la transaction, compte tenu des actifs utilisés et des risques gérés et assumés; c) les caractéristiques du bien transféré, du service rendu ou de l'engagement conclu; d) les circonstances économiques des parties et du marché sur lequel les parties exercent leurs activités; e) les stratégies économiques poursuivies par les parties. Les méthodes à retenir pour la détermination du prix comparable approprié doivent tenir compte des facteurs de comparabilité identifiés et doivent être cohérents avec la nature de la transaction délimitée de façon précise. Le prix ainsi identifié, par la comparaison de la transaction délimitée de façon précise avec des transactions comparables sur le marché libre, sera le prix de pleine concurrence applicable à la transaction analysée en vue du respect du principe de pleine concurrence. Le choix de la méthode de comparaison à retenir doit correspondre à la méthode qui permet la meilleure approximation possible du prix de pleine concurrence. Lorsqu'une transaction a été effectuée et que tout ou partie de cette transaction délimitée de façon précise contient un ou des éléments qui en substance ne contiennent pas de rationalité commerciale valable et qui ont un impact significatif sur la détermination du prix de pleine concurrence, cette transaction ou cette partie de la transaction sont à ignorer dans la détermination du prix de pleine concurrence dans le but de respecter le principe de pleine concurrence".*

activities ("Circular 56"). The Circular 56, which replaces the Circular 164/2, is applicable as of 1 January 2017. According to Circular 56, the arm's length principle is embedded in Article 56 LIR, which allows to perform adjustments of the profits of a company if the remuneration for the intragroup transactions departs from the price that would have been agreed by independent companies in the market[62]. The Circular also explains that companies having a purely intermediary intragroup financing activity should obtain a minimum arm's length remuneration corresponding to a return on assets of 2% after tax[63]. Finally the Circular states that any tax ruling based on the arm's length principle before Article 56bis came into force on January 1st 2017 will not be binding for the Luxembourg tax administration after tax year 2016[64].

4.2. The OECD framework on transfer pricing and the arm's length principle

4.2.1. The OECD Model Tax Convention and Transfer Pricing Guidelines

(53) The OECD provides guidance on taxation for its member countries. The OECD's guidance on transfer pricing can be found in the OECD Model Tax Convention and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("OECD TP Guidelines")[65], which are both non-binding legal instruments.

(54) Given their non-binding nature, the tax administrations of the OECD member countries are simply encouraged to follow the Model Tax Convention and the TP Guidelines. However, in general, both instruments serve as a focal point and exert a clear influence on the tax practices of OECD member (and even non-member) countries. Moreover, in numerous OECD member countries those instruments have been given the force of law or serve as a reference for the purpose of interpreting Double Tax Treaties and domestic tax law.

4.2.2. The arm's length principle

(55) Transfer prices refer to prices charged for commercial transactions between the separate entities of the same corporate group. The relationship among members of a multinational group may permit the group members to establish special conditions in their intra-group relations, which affect transfer prices (and consequently taxable income), that differ from those that would have been established had the group members been acting as independent enterprises[66]. This can allow profit shifting from one tax jurisdiction to another and provides for an incentive to allocate as little profit as possible to jurisdictions where it is subject to higher taxation. To avoid these problems, tax administrations of jurisdictions suffering from such profit shifiting out of their jurisdiction should only accept

[62] Circular 56, paragraph 4.

[63] Circular 56, section 4. According to the Circular, the purely intermediary character of a financing activity is not affected by the number, the amounts, the nature, the maturity or other characteristics of the loans. Finally, the Circular states that a deviation from this minimum remuneration will only be accepted in exceptional cases duly supported by a transfer pricing analysis.

[64] Circular 56, paragraph 33.

[65] The latest version of the OECD TP Guidelines was published in 2017 (OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD, July 2017). Earlier versions of the guidelines were approved by the OECD on July 2010 and on July 1995.

[66] See paragraph 6 of the preface to the OECD TP Guidelines.

transfer prices between intra-group companies that reflect what would be agreed by independent companies negotiating under comparable circumstances at arm's length[67]. This is known as the "arm's length principle".

(56) OECD member countries have agreed that, for tax purposes, the profits of associated companies may be adjusted as necessary to ensure that the arm's length principle is complied with. In other words, the OECD member countries consider that an adjustment of transfer prices is appropriate when the conditions of the commercial and financial relations in an intra-group transaction differ from those they would expect to find in comparable uncontrolled transactions, leading to a reduced tax base.

(57) By seeking to adjust profits by reference to the commercial or financial conditions which would have been obtained in comparable uncontrolled transactions, the arm's length principle ensures the preferred approach of the OECD of treating the members of a corporate group for tax purposes as operating as separate entities (the "separate entity approach"), rather than as inseparable parts of a single unified business[68]. The separate entity approach has been chosen as an international taxation principle by the OECD member countries with a view to securing the appropriate tax base in each jurisdiction while avoiding double taxation, thereby minimising conflicts between tax administrations and promoting international trade and investment.

(58) The authoritative statement of the arm's length principle is found in Article 9 of the OECD Model Tax Convention, which forms the basis of Double Tax Treaties involving OECD member countries and an increasing number of non-member countries. This provision sets out how and when transfer pricing adjustments of the tax base should take place in practice.

- Article 9, first paragraph, determines that a Contracting State may increase the tax base of a taxpayer resident in its territory and allow that State to tax it accordingly when it believes that the transfer prices applied by it have led to a too low taxable base. This is referred to as the "primary adjustment" and results in the tax administration increasing the taxable profit reported by a taxpayer[69].

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67 Tax administrations and legislators are aware of this problem and tax legislation generally allows the tax administration to correct tax declarations of associated companies that incorrectly apply transfer prices to reduce their taxable income, by substituting prices which correspond to a reliable approximation of those agreed to by independent companies negotiating under comparable circumstances at arm's length.

68 The separate entity approach is explained in the preface to the OECD TP Guidelines, paragraph 6: *"In order to apply the separate entity approach to intra-group transactions, individual group members must be taxed on the basis that they act at arm's length in their dealings with each other. However, the relationship among members of an MNE [multinational enterprise] group may permit the group members to establish special conditions in their intra-group relations that differ from those that would have been established had the group members been acting as independent enterprises operating in open markets. To ensure the correct application of the separate entity approach, OECD Member countries have adopted the arm's length principle, under which the effect of special conditions on the levels of profits should be eliminated.*"

69 Article 9(1) provides: "*Where […] conditions are made or imposed between the two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions,*

– Article 9, second paragraph, aims to prevent that the profit so taxed by the Contracting State making the primary adjustment in accordance with the first paragraph is not also taxed at the level of an associated company resident in the other Contracting State to which the profits were shifted[70]. It does this by committing the other Contacting State to either decrease the tax base of that associated company with the amount of adjusted profit taxed by the first Contracting State following the primary adjustment or to provide a refund of taxes already collected. Such an adjustment by the other Contacting State is, however, not automatically made. If it considers that the primary adjustment is not justified, either in principle or as regards the amount, it may – and usually will – refrain from making such an adjustment[71].

(59) The downward adjustment by the other Contracting State on the basis of Article 9, second paragraph, is referred to as the "corresponding adjustment" and, when granted, effectively prevents that the same profit is taxed twice.

5. POSITION OF LUXEMBOURG

(60) In its letter of 19 January 2018, Luxembourg claims that the contested tax rulings did not grant any selective advantage to Huhtalux *vis-à-vis* other companies in a comparable legal and factual situation with regard to the objective pursued by the applicable tax provisions. In Luxembourg authorities' view, Huhtalux has not benefitted from a favourable tax treatment and thus, the measure does not fall under the scope of State aid in the sense of Article 107(1) of the Treaty[72].

(61) Luxembourg argues that the contested tax rulings were issued on the basis and in line with Article 56 LIR, as applicable at the time of the 2009 ruling[73]. According to Luxembourg[74], former Article 56 does not target exclusively "transfers of the result" to the detriment of Luxembourg. The expression "transfer of results" should be read in a neutral way, hence it can be applied both to the detriment of a company but also to its advantage. In other words, Luxembourg considers that this provision allows the tax administration to apply not only upward adjustments

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have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly."

70 Article 9(2) provides: "*Where a Contracting State includes in the profits of an enterprise of that State — and taxes accordingly — profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other.*"

71 If there is a dispute between the parties concerned over the amount and character of the appropriate adjustment the mutual agreement procedure provided for in Article 25 of the OECD Model Tax Convention should be implemented, even in the absence of a provision such as Article 9(2). The competent authorities involved are under a duty merely to use their best endeavours, but not to achieve a result, so double taxation could not be solved if an arbitration clause has not be agreed in the Double Tax Treaty in place between Contracting States.

72 Luxembourg's letter of 19 January 2018, Section 4.

73 Luxembourg's letter of 19 January 2018, Section 3. For Article 56 LIR, see recital (47) .

74 Luxembourg's letter of 19 January 2018, Section 3.

if results were transferred out of Luxembourg but also downward adjustments if results were transferred into Luxembourg.

(62) Luxembourg clarifies that former Article 56 LIR is primarily applied in cases of undue reductions of taxable profits in Luxembourg, i.e. in order to make upward adjustments[75]. However, this article also allows Luxembourg tax authorities to adjust the accounting result downwards if there has been an undue increase in taxable profits in Luxembourg[76]. The purpose of this provision is hence to tally a company's taxable income with its income truly generated in Luxembourg[77].

(63) Luxembourg explains[78] that former Article 56 LIR constitutes a specific application of the concept of hidden capital contribution (*apport caché*). This concept describes situations where a taxable person has benefitted from an increase in its assets or alternatively, has avoided a decrease in its assets because of a transaction it engaged with a related or interested party. Hidden capital contributions and hidden dividend distributions are two fiscal mechanisms that allow Luxembourg tax authorities to adjust the accounting income upwards or downwards in order to tally the declared income with the taxable income[79].

(64) Luxembourg states that the treatment of hidden capital contributions follows the treatment of any standard capital contribution (*apport ouvert*), hence implying in principle an evaluation of the contribution at its market value. Therefore, according to Luxembourg, the case at hand should not focus on whether the interest rate taken into account by the Luxembourg tax authorities should have been deducted from the taxable base of Huhtalux, regardless of the fact that the contract did not provide for any interest, but rather on whether the deemed interest rate corresponds to the interest rate that would have been agreed between two independent companies.

(65) Finally, Luxembourg clarifies that no correspondence with the Irish authorities preceded the granting of the 2009 tax ruling to establish if the Irish authorities would perform an upward adjustment of Huhtamäki Ireland’s tax base[80].

6. ASSESSMENT OF THE CONTESTED MEASURES

6.1. Existence of aid

(66) 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

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75 Luxembourg’s letter of 19 January 2018, Section 3.

76 Luxembourg’s letter of 19 January 2018, Section 3, footnote 2 reads: « Documents parlementaires 571-4, Article 61 du projet, p. 208-209*:" Comme les dispositions de l'article 61 ont un caractère facultatif, il va sans dire qu'elles ne seront appliquées qu'au cas où une diminution indue du bénéfice a eu vraisemblablement lieu. Leur application manquerait de sens dans l'hypothèse contraire. (…) Il se peut aussi que des conventions régulières passées avec l'étranger présentent la situation financière de l'exploitation sous un autre jour que celui résulte d'une saine appréciation économique »*.

77 Luxembourg’s letter of 19 January 2018, Section 3.

78 Luxembourg’s letter of 19 January 2018, Section 3.

79 Luxembourg’s letter of 19 January 2018, Section 3.

80 Luxembourg’s letter of 19 January 2018, Section 5.

between Member States. 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[81]. First, there must, be an intervention through State resources and imputable to the State; second, the 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[82].

(67) As regards the first condition for a finding of aid, the State measure must be, on the one hand, imputable to the State, and on the second hand, financed through State resources. As far as the imputability of the measures is concerned, the contested tax rulings were issued by the Luxembourg tax authorities, which are an organ of Luxembourg. On the basis of those rulings, Huhtalux has determined its yearly corporate income tax liability in Luxembourg, as reflected in its annual income tax declarations. These declarations were accepted by the Luxembourg tax authorities[83]. Hence, the tax treatment granted on the basis of the contested tax rulings is imputable to Luxembourg.

(68) 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[84]. The contested tax rulings confirm that Huhtalux may lower its tax liability in Luxembourg through deemed interest deductions. As a consequence, the tax treatment granted on the basis of the contested measures and used for the yearly tax computation of Huhtalux can be said, at this stage, to reduce the corporate income tax liability in Luxembourg of that company and of the Huhtamäki Group as a whole and therefore gives rise to a loss of State resources. That is because any deemed interest expense of entities of the Huhtamäki Group declared tax deductible in Luxembourg as well as any revenues of entities of the Huhtamäki Group declared exempt from tax in Luxembourg, result in a loss of tax revenue that would have been otherwise available to Luxembourg[85].

(69) As regards the second and fourth conditions for a finding of aid, Huhtalux is part of the Huhtamäki Group, a globally active multinational group operating in various Member States. Furthermore, it operates on a liberalized sector of activity. Therefore, any aid in its favour distorts or threatens to distort competition and has the potential to affect intra-Union trade. Similarly, 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

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

[82] See Case C-399/08 P *Commission v Deutsche Post* EU:C:2010:481, paragraph 39 and the case-law cited therein.

[83] The Luxembourg tax authorities have issued tax assessments (“bulletin d’imposition”) for every year until 2015. In addition a tax audit of Huhtalux's and Supra’s tax declarations was conducted by the Luxembourg authorities for 2014 and 2015 and did not come up with any findings against the company concerning the implementation of the deemed interest deductions.

[84] 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.

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

undertakings with which it competes[86]. To the extent that the contested tax measures relieve a Huhtamäki Group company of a tax liability it would have otherwise been obliged to pay, the aid granted on the basis of those tax rulings constitutes operating aid, in that it relieves that undertaking from a charge that it would normally have had to bear in its day-to-day management or normal activities. In particular, by relieving that undertaking 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 for that undertaking and the group to which it belongs to invest in their business operations, thereby distorting competition on the market.

(70) In light of the foregoing, the Commission provisionally concludes at this stage that the first, second and fourth conditions for a finding of aid are fulfilled.

6.2. Selective advantage

6.2.1. Introduction

(71) 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[87]. In this regard, 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.

(72) In order to classify a national tax measure as selective, the Court of Justice has devised the so-called three-step 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)[88]. 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 this measure results directly from the basic or guiding principles of that tax system[89]. If that is the case, the tax measure is not selective. The burden of proof in that last step lies with the Member State.

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86 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.

87 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.

88 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.

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

6.2.2. Reference system

(73) A reference system is composed of a consistent set of rules that apply on the basis of objective criteria to all undertakings falling under 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[90]. In the case of taxes in general, the reference system shall be based on such elements as the tax base, the taxable persons, the taxable event and the tax rates[91].

(74) The contested tax rulings were issued in favour of Huhtalux, a Huhtamäki Group company resident in Luxembourg, in order to determine its corporate income tax liability under the ordinary rules of taxation of corporate income in Luxembourg. In the case of measures concerning the determination of the corporate income tax liability, it seems in general appropriate to take into account a broad legislative framework and to avoid artificially taking some provisions from this framework. The reference system to be considered is the corporate income tax system of the Member State in question which has as its objective the taxation of profits of all taxpayers subject to tax in that Member State[92].

(75) The Luxembourg corporate income tax system stipulates that resident companies are subject to tax on the totality of their profit.[93] According to the principle of *linking the tax balance sheet and the commercial balance sheet* enshrined in Article 40 LIR, the accounting profit of a company is the basis to determine the taxable profit of the company, unless a specific provision of the law indicates otherwise. In other words, under the Luxembourg corporate income tax system, a company's tax liability is, as a starting point, determined on the basis of actual transactions leading to income actually realised and expenses actually incurred and booked in the commercial accounts.

(76) In conclusion, the Commission considers the Luxembourg corporate income tax system to be the reference framework applicable in the present case. This system applies to all companies with head office or central management located in the territory of Luxembourg, and its objective is the taxation of the profit effectively

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[90] See Notion of aid Notice, paragraph 133.

[91] Notion of aid Notice, paragraph 134.

[92] See, in that sense, 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); 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. More recently, in Case C-203/16 P *Dirk Andres v Commission* ("*Sanierungsklausel*") EU: C:2018:505, the Court has ruled that "*the selectivity of a tax measure cannot be precisely assessed on the basis of a reference framework consisting of some provisions that have been artificially taken from a broader legislative framework*" (paragraph 103). See also Notion of aid Notice, paragraph 134.

[93] See Article 159(2) LIR.

realised by all companies subject to tax in Luxembourg, taking as a starting point the profit recorded in their accounts.

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

(77) The treatment granted on the basis of the contested tax rulings appears to derogate from this reference framework.

(78) In fact, the contested tax rulings accept Huhtalux's request to deduct each year from its tax base a deemed interest expense connected to the IFLs granted by Huhtamäki Ireland. That deemed interest is considered to be the arm's length remuneration of those loans, i.e. it corresponds to the interest that would have been agreed by independent companies negotiating under comparable circumstances at arm's length.

(79) The deemed interest is a deductible expense in the tax profit and loss account of Huhtalux which does not correspond to an actual expense effectively incurred by it and recorded in its commercial profit and loss account. Therefore, its effect is that a substantial proportion of the profit realised each year by Huhtalux on its financing activities and recorded as profit in its commercial accounts will remain untaxed[94]. This is despite the fact that such profit has been realised by a company subject to tax in Luxembourg and has been recorded in its accounts. Under the ordinary taxation system such profit should be subject to taxation in Luxembourg. Consequently, the tax treatment granted on the basis of the contested tax rulings appears to derogate from the ordinary corporate income tax system, according to which the accounting profit should form the starting point and thus the basis for taxing corporate profit.

(80) Luxembourg argues that downward adjustments were allowed under former Article 56 LIR. This provision constituted a specific application of hidden capital contributions (*apport caché*) in cases in which a taxpayer has benefitted from a service from a related party not subject to tax in Luxembourg against no remuneration or against a remuneration below market value. In these cases, the absence of an adequate remuneration increases the value of the accounting net assets of the taxpayer, leading *a priori* to an increase of its accounting profit which should be neutralised from a tax point of view[95]. With this reasoning, Luxembourg seems to claim that the deemed deductions are downward adjustments allowed by the Luxembourg tax administration in application of the arm's length principle and that, therefore, its application in the present case would not be a derogation from the reference system.

(81) Former Article 56 LIR allowed the Luxembourg tax administration to reassess the operating result of a company if "*a transfer of profit is made possible*" (*transfert du résultat)* due to special economic links between a company subject to tax in Luxembourg and another company not subject to tax in Luxembourg.

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94 That untaxed profit will then be distributed in the form of a dividend or repaid following a share premium reduction to Supra where it will also remain exempt from taxation (see 2009 tax ruling request, paragraphs 16 and 35).

95 Luxembourg's letter of 19 January 2018, pages 3 and 4, as well Luxembourg's letter of 19 April 2017 submitted in case SA.37267 "Pratiques en matière de ruling fiscal" (referred in its letter of 19 January 2018), pages 3-6.

(82) Nevertheless, according to Luxembourg[96], the wording of former Article 56 LIR did not target exclusively "transfers of the result" to the detriment of Luxembourg but also to its advantage. Thus, former Article 56 LIR allowed applying both upward and downward adjustments, the objective being to make sure that the taxable profit reflected the profit truly attributable to Luxembourg[97].

(83) At the outset, the Commission notes that, as Luxembourg admits, former Article 56 LIR merely *allowed* the tax administration to apply transfer pricing adjustments, without imposing any obligation to do so[98]. It appears, therefore, that under former Article 56 LIR the tax administration enjoyed discretion in order to decide whether to apply a tax adjustment. Moreover, at the date of the 2009 tax ruling, there seemed to be no objective criteria determining when such downward adjustments could be applied, to what companies and how to determine the amount of the adjustments. As a consequence, even if – as Luxembourg maintains – former Article 56 LIR allowed the application of downward adjustments, the application of such provision to the present case would seem to be *a priori* selective due to its discretionary nature[99].

(84) Additionally, the information provided by Luxembourg does not seem to support its interpretation that former Article 56 LIR allowed both upward and downward adjustments. On the contrary, the scope of this provision seems to target only upward adjustments. In fact, the literal wording of Article 56 LIR refers to the reassessment of the taxable profit of a company if a "transfer of results", that is to say a situation in which the Luxembourg tax base is **reduced** due to the fact that part of the taxpayer's profit is shifted to another party in another State.

(85) The fact that the use of this provision is not compulsory and that it is envisaged only for upward adjustments seems to be confirmed by the Luxembourg legislature, according the information on the parliamentary works submitted by Luxembourg:

"*Comme les dispositions de l'article 61*[100] *ont un* ***caractère facultatif****, il va sans dire qu'elles* ***ne seront appliquées qu'au cas où une diminution indue du***

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96 See Luxembourg's letter of 19 January 2018, Section 3.

97 *Ibid.*

98 This is confirmed by the literal wording of Article 56 LIR: "*[…] un fonctionnaire supérieur de l'administration des contributions à désigner par le directeur de cette administration […]* ***peut*** *fixer forfaitairement le résultat d'exploitation…"* (emphasis added by the Commission). By contrast, the new version of Article 56 LIR clearly imposes an obligation on the tax administration to apply the adjustments whenever the conditions of a transaction do not reflect market conditions: "*les bénéfices de ces entreprises* ***seront*** *déterminés aux conditions qui prévalent entre entreprises indépendantes.*"

99 See Case C-6/12 *P Oy* C-6/12 EU:C:2013:525, paragraph 27 and Case C-128/16 P *Lico Leasing*., paragraph 55 EU:C:2018:591.

100 Article 61 of Projet de loi I- 1955-0-0050 is similar in substance with former Article 56 LIR. It reads: "*Sans égard au résultat accusé, un fonctionnaire supérieur de l'administration des contributions à désigner sar le directeur de cette administration et ne pouvant avoir un rang inférieur à celui d'inspecteur de direction peut fixer forfaitairement le résultat d'exploitation, lorsqu'un transfert du résultat est rendu possible par le fait que l'exploitation entretient des relations économiques particulières, soit directes, soit indirectes, avec une personne qui, au Grand-Duché, n'est pas imposable à l'impôt sur le revenu des personnes physiques ou à l'impôt sur le revenu des collectivités ou qui n'y est imposable à l'un de ces impôts qu'en raison de ses revenus indigènes au sens de l'article 200."*

bénéfice a eu vraisemblablement lieu. Leur application manquerait de sens dans l'hypothèse contraire *(…). Il se peut aussi que des conventions régulières passées avec l'étranger présentent la situation de l'exploitation sous un autre jour que celui qui résulte d'une saine appréciation économique*"[101].

(86) Moreover, former Article 56 LIR constitutes a specific application of the concept of hidden capital contribution (*apport caché*)[102]. As Luxembourg has explained[103], hidden capital contributions necessarily imply a tax adjustment not only at the level of the beneficiary of the service rendered against a remuneration below market level (downward adjustment) **but also** at the level of the entity providing the service (upward adjustment). Luxembourg expressly admits that this symmetric double adjustment is necessary in order to **avoid leaving an untaxed tax base (double non-taxation)**[104]. It is therefore against this objective that former Article 56 LIR should be interpreted and applied. The same interpretation necessarily applies to the new version of Article 56 LIR[105] which, even if it does not seem to grant any discretionary power to the administration, is also a specific application of hidden capital contributions, thus sharing the same purpose and logic. As a consequence, to the extent that Article 56 LIR (both the former and the new versions) allowed (or imposed) a downward adjustment, such adjustment should be applied with the spirit and objective of avoiding double non-taxation[106].

(87) In any event, at the present stage, the Commission takes the view that the deemed deductions allowed by the contested tax rulings constitute a derogation from the reference framework, and this even if they were allowed (or even prescribed) by Article 56 LIR (both the former and the new versions) or by any other provision of Luxembourg national tax law. In fact, even provisions of national law might be selective when they are not an inherent part of the reference system and depart from its objectives. In that case, the individual applications of this provision in favour of one undertaking are also selective.

(88) Accepting the argument of Luxembourg that a certain tax treatment is not selective because it respects the provisions of national law would allow a Member State to easily circumvent the application of the Union State aid rules to tax measures by merely introducing the exemption into its tax code. As the Court has already held, this is incompatible with the well-established principle according to

(https://www.chd.lu/wps/portal/public/Accueil/TravailALaChambre/Recherche/RechercheArchives?lqs_fmid=&lqs_dpid=571).

101 See *documents parlamentaires 571-4, article 61 du projet, pages 208-209*, quoted in the letter by Luxembourg of 19 January 2018 footnote 2. Emphasis added by the Commission.

102 See recital (63).

103 Luxembourg's letter of 19 April 2017 submitted in case SA.37267 "Pratiques en matière de ruling fiscal" (referred in its letter of 19 January 2018), pages 5 and 6.

104 "*L'ajustement [au niveau de la personne physique ou morale ayant procédé à l'apport caché]* ***permet d'éviter une double non-imposition*** *d'un point de vue fiscal luxembourgeois*" (letter by Luxembourg of 19 April 2017 submitted in case SA.37267 "*Pratiques en matière de ruling fiscal*" (referred in Luxembourg's letter of 19 January 2018), pages 5 and 6).

105 Which would in theory apply to the deemed deductions as from 1 January 2015.

106 As to Article 164(3) LIR, this provision only envisages that hidden profit distribution must be included in the tax base of the company (see recital (48)); therefore, it targets exclusively upward adjustments.

which Article 107 of the Treaty defines a measure as State aid in relation to its effects, and thus independently of the techniques used[107].

(89) As outlined above, the objective of the Luxembourg corporate income tax system is the taxation of the profit effectively realised by all companies subject to tax in Luxembourg. In order to achieve this objective, the taxable profit is determined on the basis of the commercial profit effectively realised by companies and booked in their commercial accounts as a result of the income realised and expenses incurred from their activity in the market. That is the starting point for the determination of the tax base which applies to all legal entities under the Luxembourg corporate income tax system. Therefore, a tax treatment which allows certain companies to exclude from taxation a portion of their commercial profit must in principle be considered derogatory[108]. The Commission considers at this stage that the fact that this effect was obtained through a correct application of the former (or the new) Article 56 LIR is, therefore, irrelevant, since the existence of State aid must be assessed in relation to the effects of the measure in question.

(90) Moreover, such tax treatment seems to put Huhtalux in a better financial position than undertakings in a comparable factual and legal position in view of the objectives of the system. Indeed, the deemed deductions allow Huhtalux to achieve an effective tax rate (i.e. the amount of tax paid as a percentage of the profit actually realised) that is significantly lower than the effective tax rate applicable to standalone companies[109]. Standalone companies are factually and legally comparable to group companies such as Huhtalux in the view of the objective of the system, which is the taxation of the profits actually realised by companies subject to tax in Luxembourg, taking as a starting point the commercial profit recorded in their accounts. In other words, other undertakings in a factual and legal situation comparable to Huhtalux seem to be excluded from the tax treatment granted on the basis of the contested tax rulings. Therefore, the tax treatment granted to Huhtalux appears to be discriminatory.

(91) In conclusion, the preliminary view of the Commission is that the tax treatment granted on the basis of the contested tax rulings seems to derogate from the reference system in so far as that tax treatment results in improving the financial position of Huhtalux as compared to undertakings in a comparable factual and legal situation in the light of the objective of the tax system. Therefore, that tax treatment seems to confer a *prima facie* selective advantage to Huhtalux, and this

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107 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.

108 Conversely, an upward adjustment does not necessarily constitute a derogation from the reference system. It is true that it also constitutes a formal exception to the general rule that the taxable profit is determined as a starting point on the basis of the commercial profit booked in the accounts; however, its effect is not to exempt a portion of the profit from taxation but **to ensure taxation** of part of the profit which should have been recorded in the accounts but was not due to a misuse of transfer pricing rules. As a consequence, an upward adjustment cannot be considered an "advantage" for State aid purposes.

109 Indeed, in the case of standalone companies, the nominal tax rate is applied on the totality of their commercial profits, while for Huhtalux is applied only on a minor portion of it.

irrespective of whether it is allowed or not under the former (or the new) Article 56 LIR[110].

6.2.4. *Justification by the nature and overall structure of the tax system*

(92) According to settled case-law, a measure which creates an exception to the application of the general tax system may be justified by the nature and general structure of the tax system if the Member State concerned can show that such measure results directly from the basic or guiding principles of its tax system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system[111].

(93) Moreover, according to the case law, in order for tax advantages to be justified by the nature or general scheme of the tax system, it is necessary to ensure that those advantages "*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*"[112].

(94) Luxembourg argues that the objective of former Article 56 LIR, which claims to be the legal basis for allowing the deemed interest deductions, was to ensure that, in cases where the taxpayer entertains contractual relationships with companies not subject to tax in Luxembourg, its taxable profit corresponds to the profit truly attributable to the territory of Luxembourg[113]. With this argument, Luxembourg seems to be referring to the arm's length principle as a justification for the deemed deduction.

(95) At this stage, the Commission considers that the need to tax only at arm's length profits and not more, even if actually realised profits are higher, cannot be considered an objective intrinsic to the tax system as such. The application of the arm's length principle is merely a tool applied specifically to achieve other objectives, such as to prevent companies belonging to corporate groups from being treated better than standalone companies or to avoid double taxation[114].

(96) In this regard, the Commission takes the preliminary view that the tax treatment granted by the contested tax rulings is neither adequate, nor necessary to achieve those two objectives (avoidance of double taxation and ensuring equal treatment with standalone companies), and thus cannot be considered proportionate.

(97) As regards the *adequacy*, the Commission considers at this stage that the deemed interest deductions allowed by the contested tax rulings do not appear to be in this case an adequate means to achieve the objective to prevent discrimination *vis-à-*

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110 In addition, at the present stage the Commission notes that the tax treatment applicable to Huhtahlux S.à r.l. may not be in line with the requirements of Luxembourg's Circular no. 56/1 – 56bis/1 of 27 December 2016. According to the said Circular, companies having a purely intermediary intragroup financing activity should, contrary to what is observed in the present case, have a minimum arm's length remuneration corresponding to a return on assets of 2% after tax and a deviation from this minimum remuneration may only be accepted in exceptional cases duly supported by a transfer pricing analysis.

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

112 Joined Cases C-78/08 to C-80/08 *Paint Graphos* EU:C:2011:550, paragraph 75.

113 Luxembourg's letter of 19 January 2018.

114 Case C-217/03 *Belgium and Forum 187 v. Commission* EU:C:2005:266, paragraph 95; OECD TP Guidelines, paragraph 6.

vis standalone companies. The reason for this is that in the present case, far from ensuring any equal treatment, the granting of the deemed interest deductions to Huhtalux facilitates the exact opposite result: the granting of an advantage (an untaxed tax base) which is not available to other companies. In fact, both standalone companies and companies belonging to corporate groups transacting at arm's length do not have the possibility to apply downward adjustments and to leave untaxed a portion of their accounting profit. In other words, the unilateral downward adjustment does in this case not ensure equal treatment between integrated and standalone companies but rather allows integrated companies a better treatment.

(98) The Commission also does not consider at this stage that the deemed interest deductions allowed by the contested tax rulings can be considered an adequate means to achieve the objective of avoiding double taxation. In fact, it does not appear that they pursued that objective since they were granted regardless of whether the corresponding profit had been included in the tax base of another company or had actually been taxed in another jurisdiction[115].

(99) In relation to the *necessity*, the Commission considers at this stage that the deemed deductions allowed by the contested tax rulings do not seem to be necessary in order to achieve any of these two objectives and, as a consequence, they cannot be considered to be justified.

(100) In fact, in the present case, Huhtamäki submitted several tax ruling requests explaining, first, that the IFLs between Huhtalux and Huhtamaki Ireland were not at arm's length, as Huhtamaki Ireland receives no remuneration with regard to the IFLs, and second, proposing an allegedly arm's length remuneration for the IFLs in the form of a deemed interest for tax purposes. It is on the basis of those tax ruling requests that the Luxembourg tax administration allowed the application of the deemed deductions reflecting the deemed interest for the IFLs proposed by Huhtamäki. The Commission notes that, in these circumstances, it would have been sufficient for Huhtalux to effectively pay to Huhtamaki Ireland that interest in order for Huhtalux to be taxed at the same level as independent companies negotiating under comparable circumstances at arm's length, or in order to avoid any possible double taxation. In fact, the payment of that interest would have been reflected, like any other cost, as a deductible expense in the commercial accounts leading to a lower taxable profit, and thus avoiding any double taxation or any discrimination *vis-à-vis* standalone companies. Therefore, it appears that these two objectives (i.e. avoidance of double taxation and ensuring equal treatment) could have been reached by the taxpayer itself without any deviation from the general principle according to which companies are taxed, as a starting point, on the basis of the commercial profit reflected in their accounts. As a consequence, the Commission fails to see at this stage why such deviation (the deemed deductions) is at all necessary in a situation like the one at stake where

[115] See Cases T-131/16 and T-263/16 *Belgium v Commission* EU:T:2019:91, paragraphs 72-73 where the General Court considered that a downward adjustment (in that case the non-taxation of the 'excess profit') cannot be considered to pursue the objective of avoiding double taxation when its application "*was not subject to the condition that it be demonstrated that the excess profit in question had been included in the profit of another company. Nor was it necessary to demonstrate that that excess profit had actually been taxed in another country*", i.e. the downward adjustment was carried out "*without it being verified whether the profit deducted from that company's tax base, as excess profit, was actually included in the profit of another company*".

the taxpayer chooses not to transact at arm's length. It rather seems that the State intervention had no other effect than to generate for Huhtalux an untaxed tax base in Luxembourg, an advantage which is not available to other companies subject to tax in Luxembourg and transacting on the market.

(101) Finally, the Commission considers at this stage that, even if a deviation from the general principle of taxation on the basis of the profit reflected in the accounts was considered necessary to achieve the objective of avoiding double taxation, there could be other less-far reaching measures to attain the same objective.

(102) It is true that a downward transfer pricing adjustment aiming at avoiding double taxation may be justified by the nature and overall structure of the tax system[116]. However, less far reaching measures such as allowing a downward adjustment conditioned on the taxpayer providing evidence that a corresponding upward adjustment has been – or was at risk of being – carried out by the tax administration in Ireland or requiring a corresponding adjustment in the commercial accounts of Huhtalux would have also allowed to avoid any double taxation.

(103) This is consistent with Article 9 of the OECD Model Tax Treaty, which only applies if it is established that the same profit has been included in the tax base of two different companies established in different tax jurisdictions, and has been – or is at risk of being – "taxed accordingly" by both jurisdictions.

(104) Consequently, the Commission considers at this stage that the deemed interest deductions do not seem to address situations of double taxation or discrimination *vis-à-vis* standalone companies in a necessary and proportionate manner.

(105) Therefore, the Commission at this stage takes the view that the tax advantage granted to Huhtalux cannot be justified by the nature and logic of the system.

6.2.5. Conclusion on selective advantage

(106) In the light of all of the foregoing, the Commission provisionally concludes that the tax advantage granted to Huhtalux on the basis of the contested tax rulings is selective in nature, since it leads to a lowering of that entity's taxable profit and thus its corporate income tax liability in Luxembourg.

(107) However, the Commission notes that Huhtalux forms part of a multinational corporate group, i.e. the Huhtamäki Group. 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*

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[116] 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.

persons, natural or legal."[117] 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[118]. In the present case, Huhtalux was fully controlled by Huhtamäki Holding Oy during the relevant period.

(108) In conclusion, the contested tax rulings seem to confer aid on the Huhtamäki Group as a whole.

6.3. Conclusion on the existence of aid

(109) For all the foregoing reasons, the Commission considers, at this stage, that the tax treatment granted on the basis of the contested tax rulings constitutes State aid within the meaning of Article 107(1) of the Treaty. Therefore, in the absence of any notification pursuant to Article 108(3) of the Treaty, the measure is considered at this stage unlawful aid.

6.4. Compatibility with the internal market

(110) State aid is deemed compatible with the internal market if it falls within any of the grounds listed in Article 107(2) of the Treaty[119] and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the grounds listed in Article 107(3) of the Treaty[120]. 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 Article 107(2) or (3) of the Treaty[121].

(111) At this stage, the Commission has no indication that aid afforded to Huhtalux and to the Huhtamäki Group as a whole on the basis of the contested tax rulings could be considered compatible with the internal market, nor has Luxembourg put forward any argument in this respect. In particular, the Commission considers that that tax treatment appears to result in a reduction of charges that should normally be borne by the undertaking concerned in the course of their business, and that the exemption of those charges should therefore be considered to constitute operating aid. According to Commission practice, such aid can normally not be considered compatible with the internal market in that it does not facilitate the development of certain activities or of certain economic areas, nor are the incentives in

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117 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.

118 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.

119 The exceptions provided for in Article 107(2) of the Treaty concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.

120 The exceptions provided for in Article 107(3) of the Treaty concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.

121 Case T-68/03 *Olympiaki Aeroporia Ypiresies v Commission* EU:T:2007:253 paragraph 34.

question limited in time, digressive or proportionate to what is necessary to remedy to a specific economic handicap of the areas concerned[122].

7. CONCLUSION

In the light of the foregoing considerations, the Commission's preliminary view is that the tax treatment granted by the Luxembourg tax administration to Huhtalux between 2009 and the date of the present decision, based on the tax rulings issued on 11 November 2009, 16 February 2012 and 9 October 2013 constitutes State aid within the meaning of Article 107(1) of the Treaty granted to Huhtalux and to the Huhtamäki Group as a whole. That aid is granted annually when Huhtalux applies those tax rulings to calculate its annual corporate income tax liability in Luxembourg. The Commission has doubts as to the compatibility of that State aid with the internal market. The Commission has therefore decided to initiate the procedure laid down in Article 108(2) of the Treaty with respect to these agreements.

The Commission requests Luxembourg to submit its comments on this Decision and to provide all such information as may help to assess the tax treatment granted on the basis of the contested tax rulings, within one month of the date of receipt of this letter. In particular, the Commission wishes to receive the information listed in the annex to this decision.

The Commission requests Luxembourg to forward a copy of this letter to the potential beneficiary of the aid identified herein immediately.

The Commission wishes to remind Luxembourg that Article 108(3) of the Treaty has suspensory effect, and would draw its attention to Article 16 of Council Regulation (EU) No 2015/1589[123], which provides that all unlawful aid may be recovered from the recipient of that aid.

The Commission warns Luxembourg that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter to it. All such interested parties will be invited to submit their comments within one month of the date of such publication.

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[122] Decision of 21 October 2015 in case SA.38375, Luxembourg – *alleged aid to FFT*, OJ L 351, of 22.12.2016, p. 1, under appeal, paragraph 347 *et seq*. See also judgment of 16 October 2014, *Eurallumina* v *Commission*, T-308/11, EU:T:2014:894, paragraphs 85 and 86.

[123] OJ L 2015 L 248/9.

If this letter 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 this letter. 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
Stateaidgreffe@ec.europa.eu

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission

ANNEX

1. Please provide the tax returns of Huhtalux Supra S.à r.l. and Huhtalux S.à r.l. for 2017.
2. Please confirm that, as stated in your letter of 19 January 2018, the 2013 tax ruling is still in effect. Please explain how this is compatible with Circular no. 56/1 – 56bis/1 of 27 December 2016 and notably paragraph 33 of the latter according to which all tax rulings granted before 1 January 2017 and pertaining to the arm's length principle on the basis of Article 56bis should not be binding to the Luxembourg tax authorities after this date.
3. If the 2013 tax ruling is not in effect, please explain what is the tax treatment currently applicable to Huhtahlux S.à r.l. as from the tax year 2017 and provide the relevant documentation.
4. Please explain the compatibility of the tax treatment applicable to Huhtahlux S.à r.l. as from the tax year 2017 with the requirements of Circular no. 56/1 – 56bis/1 of 27 December 2016.