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Artykuły

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The non-application of general anti-avoidance rules and state aid rules: Remarks on the CJEU judgment in Engie

Summary. In its judgment of 5 December 2023 in joined cases C-451/21 P and C-454/21 concerning transactions made within the group of Engie companies, the CJEU restricted the Commission's powers to interpret national legal provisions of Member States as regards the review on state aid, stating that such an interpretation cannot refrain from the interpretation made by tax authorities and jurisprudence of the Member States. The case in question concerned (1) the attempt to defer from the literal wording of the national tax law provisions and the use of purposive interpretation, which could not be conferred from the wording of the provisions in question as well as from other administrative acts in setting the "reference framework" for the purpose of the application of provision on state aid; and (2) the attempt to interpret the national provisions on the abuse of law in isolation from their interpretation made by tax authorities and jurisprudence. Although certain limits within the state aid review procedure had been conferred on the Commission, the CJEU's judgment did not disregard the possibility to review the non-application of the provisions on the abuse of tax law (GAAR) concerning the conformity of their application with the EU provisions on state aid.

Keywords: state aid, GAAR, general anti-avoidance rules, fiscal autonomy, tax rulings, CJEU, Engie, Commission

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Niezastosowanie krajowych przepisów klauzuli ogólnej przeciwko unikaniu opodatkowania w świetle unijnych przepisów o pomocy publicznej – rozważania na kanwie wyroku TSUE w sprawie Engie

Streszczenie. W wyroku z dnia 5.12.2023 r. w sprawach połączonych C-451/21 i C-454/21 dotyczących transakcji dokonanych pomiędzy spółkami z grupy Engie TSUE ograniczył prawa Komisji do wykładni przepisów prawa krajowego państw członkowskich UE w ramach kontroli dokonywanej na podstawie przepisów o pomocy publicznej, wskazując, że wykładnia taka nie może nie brać pod uwagę uprzednio dokonanej wykładni przepisów prawa krajowego, dokonywanej przez organy administracji publicznej państwa członkowskiego oraz sądy krajowe tego państwa. Sprawa dotyczyła: (1) próby odstąpienia od wyników wykładni literalnej przepisów prawa krajowego oraz zastosowania wyników wykładni celowościowej przy ustalaniu „ram odniesienia" (*reference framework*), których nie można było wyprowadzić z literalnej treści przepisów prawa krajowego, a także z innych aktów administracyjnych, niemających mocy wiążącej, do celów zastosowania unijnych przepisów dotyczących pomocy publicznej; (2) próby wykładni przepisów prawa krajowego stanowiących klauzulę ogólną przeciwko unikaniu opodatkowania w oderwaniu od ich wykładni, dokonywanej przez organy podatkowe oraz sądy krajowe państwa członkowskiego. Pomimo ustalenia pewnego rodzaju granic działania Komisji w obszarze kontroli dokonywanej na podstawie przepisów o pomocy publicznej wyrokiem w sprawie Engie TSUE nie wykluczył możliwości badania przez Komisję, czy niezastosowanie w danym przypadku przepisów stanowiących klauzulę ogólną przeciwko unikaniu opodatkowania w istocie nie stanowi niedozwolonej pomocy publicznej.

Słowa kluczowe: pomoc publiczna, GAAR, klauzula ogólna przeciwko unikaniu opodatkowania, autonomia fiskalna, interpretacje indywidualne, TSUE, Engie, Komisja

1. Introduction

In recent years, simultaneously with the major developments in the EU law as well as the Directive on Administrative Cooperation 6 (DAC 6),[1] the attempts have been made to combat tax avoidance or – in other words – aggressive tax planning by means of applying EU law on state aid. Issuing the decisions, the European Commission stated that the favourable tax treatment granted by a given state to several taxpayers in the form of individual tax rulings was contrary to the state aid rules based on article 107(1) TFEU. The main subject of this publication is the so-called Engie case, which concerns the matter of tax planning and the non-application of national general anti-avoidance rules. The European Commission's decision

[1] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (OJ L 139).

in the Engie case[2] has been appealed to the EU General Court, which has delivered its judgement, upholding the European Commission's decision.[3] The judgement of the EU General Court has been subsequently appealed to the CJEU. Following the Opinion of Advocate General in the case C-454/21 – being the appealing case to the above-mentioned judgement of the EU General Court provided on 4 May 2023,[4] the CJEU in its judgement of 5 December 2023 set aside the judgement of the EU General Court as well as annulled the Commission's decision.[5]

The significance of the matter as well as the position taken by the Advocate General – distinct from the position expressed in the judgement of the EU General Court – makes it relevant to the discussion of the position taken by the CJEU in its judgment, but also to the thorough analysis of the Opinion of Advocate General. The analysis of the position taken by the Advocate General Juliane Kokott and by the CJEU in its judgment will be preceded by the brief analysis of the legal background underlying the Commission's decision and subsequent judgment of the EU General Court as well as the thorough analysis of the reasoning of the General Court underpinning the judgement.

2. The procedural background of the Engie case

The case concerned tax rulings that were issued by Luxembourg tax authorities in favour of the companies that were part of the Engie Group. The tax rulings concerned the number of business restructurings between the companies forming the Engie group, which were financed by a specific kind of convertible loans (so-called ZORA). The use of such a special legal instrument allowed for significant decrease in the amount of income tax payable, almost to the point of non-taxation. In the European Commission's

[2] Commission decision of 20 June 2018 on State aid SA.44888 (2016/C) implemented by Luxembourg in favour of ENGIE, C(2018) 2839 final.

[3] The judgement of the General Court of 12 May 2021, Grand Duchy of Luxembourg and Engie Global LNG Holding Sàrl, Engie Invest International SA, Engie v European Commission, in joined cases T-516/18 and T-525/18, ECLI:EU:T:2021:251.

[4] The Opinion of Advocate General Juliane Kokott delivered on 4 May 2023 in joined cases C-454/21 P and C-451/21 P, Engie Global LNG Holding Sàrl, Engie Invest International SA and Grand Duchy of Luxembourg v. European Commission, EU:C:2023:383.

[5] Judgment of the CJEU, 5 December 2023, joined cases, C-451/21 P and C-454/21 P, Grand Duchy of Luxembourg, Engie Global LNG Holding Sàrl, Engie Invest International SA, Engie SA v. European Commission.

view, the issuance of tax rulings resulted in the selective advantage within the meaning of Article 107(1) TFEU because of the tax exemption granted to the parent company as regards their income on participation in the share capital of a subsidiary upon the conversion of a convertible loan ZORA, irrespective of the fact that no effective taxation was confirmed to have arisen at the level of the subsidiaries or other companies engaged in the process.[6]

The argumentation of the European Commission was based on four lines of reasoning. Firstly, in the European Commission's view, the special treatment at the level of parent companies derogated from a reference framework which encompasses the Luxembourg corporate income tax system, under which entities liable for corporate income tax established in Luxembourg are taxed on the profits recorded in their annual accounts. Secondly, the special treatment at the level of the parent companies is selective, because it derogates from a reference framework limited to the legal provisions on tax exemptions for participation income, which state that a tax exemption is only to be granted if the distributed profits have been previously taxed at the level of subsidiaries (the so-called principle of correspondence). Thirdly, the fact that tax deductibility at the level of the subsidiaries combined with non-taxation at the level of intermediate and parent companies has resulted in the reduction of the group's total basis of assessment for taxation in Luxembourg, which derogated from a reference framework, encompassing that Luxembourg corporate income tax system does not allow for a reduction in the basis of assessment (group approach). Fourthly, as the European Commission sees it, the tax rulings derogated from Luxembourg's general anti-avoidance rules.[7] As a result of issuing the said tax rulings, Luxembourg tax authorities failed to apply the national general anti-avoidance rules, because – in the European Commission's view – the conditions to apply the national general anti-avoidance rules in the said case have been met. The failure to apply national general anti-avoidance rules, irrespective of the fact that the conditions to apply these legal provisions have been met, qualified as a fiscal state aid. It has been stated that the national general anti-avoidance rules form part of the domestic tax system and a deviation from the application of these rules in individual cases, provided that the conditions to apply the national general

[6] Opinion (C-454/21 P and C-451/21 P), point 45.

[7] See, in a nutshell: Opinion (C-454/21 P and C-451/21 P), points 47–50.

anti-avoidance rules have been met, should be classified as granting a so-called "selective advantage".

The European Commission's view has been approved by the EU General Court. In the Opinion of the EU General Court, if the "operative part of Commission decision is based on several pillars of reasoning, each of which would in itself be sufficient to justify that operative part, that decision should, in principle be annulled only if each of those pillars is vitiated by an illegality".[8] Therefore, the EU General Court limited itself to examining only the European Commission's two lines of reasoning, concerning the principle of correspondence and the non-application of national general anti-avoidance rules, concluding that tax advantages granted to taxpayers in the case in question were of selective nature according to each of these lines of reasoning.

The EU General Court agreed with the European Commission that legal provisions in the area of income tax should be read as introducing a principle that participation exemption – tax advantage – is applicable solely to income which has not been deducted from the taxable income of the subsidiary.[9]

As regards the European Commission's second line of reasoning – i.e. the one concerning the non-application of national general anti-avoidance rules – the EU General Court has agreed that the four criteria for the application of the Luxembourg general anti-avoidance rule have been met, namely (1) the use of private law forms or institutions; (2) the reduction of tax liability; (3) the use of inappropriate legal means; and (4) the absence of non-tax-related reasons.[10] The EU General Court has highlighted that although a taxpayer may choose the least onerous legal means, a taxpayer cannot choose a legal means that have exclusive tax-related aims and result in no tax being levied on profits generated by the group while other legal means were available to achieve the same results leading to taxation.[11] Subsequently, the EU General Court has stressed that the holding companies being part of the Engie Group are "in factual and legal situation comparable to that of all Luxembourg taxpayers, who

[8] Engie (T-516/18 and T-525/18), point 231.

[9] *Ibidem*, point 297.

[10] Engie (T-516/18 and T-525/18), points 410–463. See also: L. de Broe, M. Massant, *The General Court's Judgment in Engie: The Non-application of a National GAAR Confers State Aid*, "EC Tax Review" 2022, no. 1, pp. 9–10, https://doi.org/10.54648/ECTA2022002

[11] Engie (T-516/18 and T-525/18), point 459.

cannot reasonably expect to benefit as well from the non-application of the provision on abuse of law in circumstances where the conditions for its application have been met".[12] Moreover, the EU General Court has also confirmed that the disputed tax rulings may have been regarded as individual aid notwithstanding the fact that the similar tax treatment has been given to other taxpayers benefitting from the same legal provisions.[13]

The EU General Court has also rejected as unfounded pleas that the obligation imposed on Luxembourg to recover state aid unduly granted have been contrary to the principle of legal certainty and the principle of the protection of legitimate expectations.[14] The EU General Court pointed out that the reasoning of the European Commission cannot be regarded as unprecedented, as the decision in the said case was "based on its [European Commission's] standard reasoning and on settled case-law in the field of State aid".[15] Therefore, the obligation imposed on Luxembourg to recover state aid in the said case cannot be regarded as contrary to the principle of legal certainty, requiring that legal provisions be clear, precise, and predictable in their effect.[16] In addition, in the EU General Court's view, the European Commission did not infringe the principle of legitimate expectations, because the principle of legitimate expectations in the area of state aid law may only be invoked and apply – i.e. the granted state aid should be deemed as lawful – when the said state aid has been granted in accordance with the procedure provided for in Article 108 TFEU. The tax rulings contested in the said case have not been issued in accordance with the above-mentioned legal procedure, hence there were no grounds upon which any expectations as to the lawfulness of these rulings may have been created by the European Commission.[17]

3. The Opinion of the Advocate General Juliane Kokott of 4 May 2023

The judgment of the EU General Court has been appealed to the CJEU. The Opinion of Advocate General Juliane Kokott in the appealing case was issued on 4 May 2023. In the Opinion, the Advocate General proposed

[12] *Ibidem*, point 469.
[13] *Ibidem*, points 479–488.
[14] *Ibidem*, point 497.
[15] *Ibidem*, point 501.
[16] *Ibidem*, points 498–503.
[17] *Ibidem*, points 505–509.

that the decision of the European Commission as well as the EU General Court's judgement be set aside and the European Commission's decision be annulled.[18] The considerations concentrated on the following matters: (1) whether tax advantages gained by taxpayers in the said case indeed have the characteristics of selective tax advantage within the meaning of Article 107(1) TFEU; (2) whether state aid law requests that there is a correspondent taxation in the area of domestic tax law, i.e. in the said case there should be no tax exemption for participation income if the distributed profits have not been fully taxed at the level of a subsidiary; (3) whether the European Commission and the EU General Court indeed enjoy powers to review the national tax authorities and their assessment by means of state aid law, which – in other words – comes down to determining to what extent the European Commission may substitute the interpretation of domestic tax provisions of national tax authorities for its own interpretation in order to demonstrate that there has been a selective advantage.[19]

In the Advocate General's view, the argumentation purported by the European Commission and accepted by the EU General Court for recognising the tax rulings issued by Luxembourg tax authorities as granting selective advantage within the meaning of Article 107(1) TFEU is not enough and, therefore, the European Commission did not prove in a sufficient manner that Luxembourg indeed granted the impermissible state aid by way of issuing the said tax rulings. In the Opinion of the Advocate General, the European Commission had incorrectly identified the reference framework, i.e. the basis for determination in comparison with tax advantages given to the taxpayers by way of issuance of the tax rulings in question was, in fact, of selective nature. There were no grounds to stipulate that the applicable tax law provisions undoubtedly introduce the principle of correspondence, i.e. the condition upon which the application of tax exemption of profit distribution within a group of companies is dependent upon the prior taxation at the level of a subsidiary. Unless such a conclusion – upon the existence of such a principle in the domestic legal system – can be drawn unambiguously from the domestic legal system considered as a whole or specific legal provisions, the said tax rulings cannot be deemed as having the characteristics of selective advantage.[20] As stated in

[18] Opinion (C-454/21 P and C-451/21 P), points 194–195.

[19] *Ibidem*, points 4–5.

[20] *Ibidem*, points 113–114.

the Opinion of the Advocate General, the principle of correspondence does not clearly emerge from the wording of the national legal provisions, their spirit, and purpose, or from the settled case-law of the Luxembourg courts; the Commission had relied on ultimately fictitious tax system instead of applicable domestic legal system.[21] It has been highlighted that although the existence of the principle of correspondence may indeed be preferable from the point of view of the creation of a fair legal system, the decision to indeed introduce such a principle to the domestic legal system is at the discretion of neither the European Commission nor the Courts of the European Union, but at the discretion of the national legislature instead.[22]

In addition to the above, the Opinion of the Advocate General read that it is immaterial for the case in question whether the lack of the principle of correspondence in the Luxembourg tax system resulted in inconsistency in this system and, therefore, constituted state aid in itself, because the European Commission's decision and the judgement of the EU General Court concerned the issuance of the tax rulings as individual aid, not the Luxembourg tax law in itself. Therefore, the lack of the principle of correspondence in the Luxembourg tax system cannot be part of the subject matter of the dispute.[23]

As regards the argument of the European Commission that the tax rulings did have the characteristics of a selective advantage because of the non-application of the Luxembourg general anti-avoidance rules, it has also been stated in the Opinion of Advocate General that the European Commission had insufficiently proved that there have indeed been no grounds which would justify the non-application of such legal provisions. First of all, it has been highlighted that the statement in the EU General Court's judgement that 'the provision on abuse of law raised no difficulties of interpretation in the present case' gives rise to a number of concerns. Therefore, the assessment of the application of general anti-avoidance rules for compliance with state aid law should be limited only to cases involving the manifest non-application of such legal provisions. In the Advocate General's view, such a manifest non-application of general anti-avoidance rules may arise if there is no plausible explanation as to why the case in question was not, in fact, considered as tax avoidance

[21] *Ibidem*, points 134–135.
[22] *Ibidem*, points 130–133.
[23] *Ibidem*, points 125–126.

or tax abuse in the first place. As has been stated in the Opinion of the Advocate General, both the European Commission and the EU General Court had substituted the interpretation of national tax authorities for their own interpretation of the Luxembourg general anti-avoidance rules by not taking into account the administrative practice of the national tax authorities as well as not examining whether the national tax authorities would have applied the general anti-avoidance rules in similar cases, involving comparable factual and legal situations, but decided not to apply these legal provisions in the said case.[24] In the Advocate General's view, 'it is not sufficient to find that the anti-abuse rule has, in a very general sense, been applied in respect of other taxpayers'.[25]

In the Opinion of the Advocate General, there are many concerns with regard to the conformity of the European Commission's decision with the principle of legitimate expectations. It has been emphasised that if every misapplication of domestic legal provisions by national tax authorities – the appropriateness of which has subsequently been confirmed by way of issuing a tax ruling – were to prevent a taxpayer from the protection arising from the principle of legitimate expectations, it would have a severe impact on the realisation of the principle of legal certainty and, therefore, undermine the aim to be achieved by the issuance of a tax ruling and the very existence of such a legal instrument.[26]

All in all, in the Opinion of the Advocate General, the activity performed by national tax authorities should be examined with regard to the reduced standard of review which implies that when 'the error in application of national tax law is not obvious, there has been no State aid'. Moreover, concerning the reduced standard of review, it has also been proposed that when the misapplication of the law is manifest and cannot be plausibly explained to a third party, it can mean that state aid may have occurred and also that the 'breach of law' is recognisable to the taxpayer, too, which means that the taxpayer bears no protection with regard to the principle of legitimate expectations.[27]

As is apparent from the above analysis of the Opinion of the Advocate General, the reasoning put forward by the European Commission and the EU General Court has been critically evaluated. The considerations set out

[24] *Ibidem*, points 151–163.
[25] *Ibidem*, points 160–161.
[26] *Ibidem*, points 168–169.
[27] *Ibidem*, point 170.

in the Opinion of the Advocate General focused on the lack of sufficient argumentation for the selective character of tax advantages granted to the taxpayer by Luxembourg tax authorities. In addition to the above, it has been highlighted that state aid law should only be considered as circumvented if the law has been applied by the national tax authorities in a 'manifestly discriminatory manner'.[28] In such a situation, there is no risk that any incorrect tax ruling by which a certain tax advantage is granted to a taxpayer may be considered impermissible state aid as having the characteristics of a selective tax advantage. As has been pointed out by the Advocate General:

> [i]f every simple error in the setting of tax suffices to be considered an infringement of State aid law, the Commission would consequently become a de facto supreme inspector of taxes and the Court of the European Union, by dint of reviewing the Commission's decisions, would become de facto supreme tax courts. That, in turn, would impinge on the Member States' fiscal autonomy […].[29]

In addition to the above, it has also been emphasised that the limited scope of the examination of the application of domestic legal provisions is critical to the proper realisation of not only the principle of legal certainty, but also the definiteness and irrevocability of administrative acts which would have been set aside in any case if it has been established by the European Commission that the tax assessment made by the national tax authorities – even in the event of normal tax assessment – has been incorrect and, therefore, considered as an infringement of state aid law.[30]

As regards the remaining lines of reasoning brought by the European Commission in its decision, the Advocate General considered it important to make references also to these arguments, as the annulment of the European Commission's decision may be considered only if all arguments cannot establish that tax treatment granted by way of issuing tax rulings was selective. In the Opinion of the Advocate General, the European Commission insufficiently proved the selectivity of tax treatment within the reference framework indicated in the two remaining lines of reasoning, not assessed by the EU General Court.[31]

[28] *Ibidem*, point 92.
[29] *Ibidem*, points 96–97.
[30] *Ibidem*, points 100–101.
[31] *Ibidem*, points 171–189.

4. Remarks on the Opinion of the Advocate General of 4 May 2023

The position taken by Advocate General Juliane Kokott concerning the non-application of national general anti-avoidance rules as conferring state aid reflects the views already expressed by legal scholars as regards the European Commission's decision and the EU General Court's judgment. As has been emphasised by J. Englisch, the interpretation of the national general anti-avoidance rules made by Luxembourg tax authorities has been supplanted by the interpretation of the provisions in question made by the European Commission and the EU General Court. Therefore, both the European Commission and the EU General Court have impinged on the competences of the Member States.[32] This view is not unanimously shared among legal scholars. In particular, L. de Broe and M. Massant indicate that neither the European Commission nor the EU General Court misused their powers reviewing the possible application of the national general anti-avoidance rules.[33] It should, however, be noted that, in J. Englisch's view, a certain level of a review of national provisions, including national general anti-avoidance rules, is necessary in order to properly apply Article 107(1) TFEU. Nevertheless, such reviewing should comprise only of whether failure to apply national general anti-avoidance rules is manifestly erroneous or arbitrary.[34] This view of J. Englisch is shared by L. de Broe and M. Massant, who propose that the non-application of national general anti-avoidance rules should be reviewed from the point of view of state aid only "in most striking cases of selective application of those rules", which should be understood as a "manifestly erroneous, arbitrary or unreasonable" application of those rules. In addition, the review by the Commission should be performed on the case-by-case basis and comprise of the analysis of all appropriate legal provisions, including their legislative history and case-law as well as official circular letters and published rulings of tax authorities.[35] Refraining from reviewing the non-application of national general anti-avoidance rules should be considered in any case when there is a case-law of the highest courts of a Member State which supports the non-application

[32] J. Englisch, *State Aid Prohibition: The New GAAR in Town*, "EC Tax Review" 2021, no. 4, p. 146, https://doi.org/10.54648/ECTA2021016

[33] L. de Broe, M. Massant, *The General Court's Judgment in Engie*…, pp. 12–13.

[34] J. Englisch, *State Aid Prohibition*…, p. 146.

[35] L. de Broe, M. Massant, *The General Court's Judgment in Engie*…, p. 14.

of national general anti-avoidance rules in other relevant tax cases. The other important indicator for refraining from reviewing the non-application of national general anti-avoidance rules is when the non-application of the provisions in question was on grounds that there were small chances of success in litigation.[36]

With respect to the findings of the Advocate General concerning inadmissibility to derive the principle of correspondence from the Luxembourg legal system and inadmissibility to decide on the selectivity of tax advantages in question based on the fictitious legal system, it is, in fact, consistent with the findings of the CJEU in its recent judgment in the FIAT case in the area of transfer pricing rules. In the FIAT case, the CJEU stated that:

> […] even assuming that there is a certain consensus in the field of international taxation that transactions between economically linked companies, in particular intra-group transactions, must be assessed for tax purposes as if they had been concluded between economically independent companies, and that, therefore, many national tax authorities are guided by the OECD Guidelines in the preparation and control of transfer prices […] it is only the national provisions that are relevant for the purposes of analysing whether particular transactions must be examined in the light of the arm's length principle and, if so, whether or not transfer prices, which form the basis of a taxpayer's taxable income and its allocation among the States concerned, deviate from an arm's length outcome. Parameters and rules external to the national tax system at issue cannot therefore be taken into account in the examination of the existence of a selective tax advantage […] and for the purposes of establishing the tax burden that should normally be borne by an undertaking, unless that national tax system makes explicit reference to them.[37]

As pointed out by A.P. Dourado, granting the European Commission right to convert international legal standards such as arm's length into EU law without prior process of harmonisation enabling Member States its direct application would, in fact, result in granting the European Commission a wide margin of appreciation. In A.P. Dourado's view, there are, however, several risks arising from the attribution of the right to exercise the transfer pricing rights to the Member States, such as the risk that tax rulings in the area of transfer pricing will be exploited as an instrument to grant aid to individual taxpayers or that despite wide-ranging activities in the area of counteracting tax competition between Member States and aggressive tax planning, the admissibility to adopt different transfer pricing rules among

[36] *Ibidem*.

[37] FIAT (C-885/19 P and C-898/119 P), point 96.

Member States may, in fact, still incentivise some form of tax competition between Member States and influence the existence of aggressive tax planning.[38] The same risks may arise with regard to the non-existence of the principle of correspondence referred to in the Engie case. However, the critical remarks made by A.P. Dourado concern the non-inclusion of the concept of arm's length in the Anti-Tax Avoidance Directive rather than the fact that the CJEU held that the European Commission's margin of appreciation should be limited.[39] It should be agreed upon that from the point of view of the principle of legality, any legal concept which may aim at countering tax competition between Member States as well as aggressive tax planning should be introduced by means of harmonising legal systems of Member States, not by individual decisions of the European Commission.

Irrespective of the above, it should be noted that the position taken by the Advocate General concerning the non-selectivity of tax rulings issued by Luxembourg tax authorities as regards the non-existence of the principle of correspondence is subject to criticism by legal scholars. In the literature, it has been stated that by issuing tax rulings, Luxembourg's tax authorities contravened the principle of the equal taxation of income in all comparable situations, because in the case at hand there was no double taxation to avoid and tax rulings allowed for double non-taxation of income as well as the principle of single taxation.[40] Moreover, in P. Rossi-Maccanico's view, the principle of correspondence is of vital importance to achieving the internal coherence of the domestic tax system so that the views presented in the Opinion of the Advocate General as regards the freedom to introduce such a principle into the domestic tax system should not be followed.[41]

In conclusion, it should be highlighted that the admissibility of reviewing the non-application of national general anti-avoidance rules as regards its conformity with state aid rules is generally not being disputed. However, as seen from the above, the reviewing of the legal provisions in question should specifically consider not only their wording, but also the administrative practice of tax authorities and case-law of national

[38] A.P. Dourado, *The FIAT Case and the Hidden Consequences*, "Intertax" 2023, no. 1, p. 4, https://doi.org/10.54648/TAXI2023015

[39] *Ibidem*, p. 2.

[40] P. Rossi-Maccanico, *AG Kokott Tries to Bring Clarity to the Selectivity Test for Individual Tax Rulings*, "EC Tax Review" 2023, no. 4, pp. 183–188, https://doi.org/10.54648/ECTA2023023

[41] *Ibidem*, pp. 186–188.

courts. It seems inadmissible that the well-established position taken by national tax authorities and national courts is being set aside by the European Commission. Finding that tax advantage is selective based on a legal principle which – in the European Commission's view – should be applicable in a given legal system but, in fact, cannot be explicitly derived from this legal system also seems inadmissible. Nevertheless, as P. Rossi-Maccanico claims, the selective nature of tax advantage granted in the case at hand arises from the fact that the issuance of the tax rulings has resulted in unjustified narrowing of the scope of a tax system, which is inadmissible in view of the established case-law of the CJEU.[42] In this author's view, it is, therefore, not the non-application of the principle of correspondence in itself that has been claimed by the European Commission to constitute a part of the Luxembourg tax system, but the non-conformity with the principle of equal taxation and the principle of single taxation. All in all, in the case in question, the selectivity of tax advantages arises from the overall shape of income tax provisions, which were applied to taxpayers, rather than from the issuance of tax rulings itself. Such an approach makes it possible to assess the case at hand from the point of view of the established case-law of the CJEU concerning the compliance of general taxation decisions made by Member States with the rules on state aid.[43] As confirmed by the CJEU in the Gibraltar case, "[…] advantages resulting from a general measure applicable without distinction to all economic operators do not constitute State aid […]".[44] Therefore:

> […] a different tax burden resulting from the application of a 'general' tax regime is not sufficient on its own to establish the selectivity of taxation […]. Thus the criteria forming the basis of assessment which are adopted by a tax system must also, in order to be capable of being recognised as conferring selective advantages, be such as to characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category, thus permitting such a regime to be described as favouring 'certain' undertakings or the production of 'certain' goods […].[45]

[42] *Ibidem*.

[43] *Ibidem*.

[44] The judgment of the CJEU of 15 November 2011, European Commission v. Government of Gibraltar, United Kingdom of Great Britain and Northern Ireland and Kingdom of Spain v. European Commission, in joined cases C-106/09 P and C-107/09 P, point 73.

[45] Gibraltar (C-106/09 P and C-107/09 P), points 103–104.

In the above-mentioned judgement of the CJEU, it was outlined that the selectivity of advantages enjoyed by a certain group of companies was based on the fact that the proposed tax reform "[…] in practice discriminates between companies which are in a comparable situation with regard to the objective of the proposed tax reform, namely to introduce a general system of taxation for all companies established in Gibraltar".[46] What is more, it was highlighted that the selectivity of the advantage granted to a certain group of companies was not:

> […] a random consequence of the regime at issue, but the inevitable consequence of the fact that the bases of assessment are specifically designed so that offshore companies, which by their nature have no employees and do not occupy business premises, have no tax base under the bases of assessment adopted in the proposed tax reform.[47]

In the subsequent jurisprudence of the CJEU, it is emphasised that a legal measure which results in granting a tax advantage in principle falls within the scope of the fiscal autonomy of Member States "[…] unless it is established that it is based on discriminatory parameters […]" as the EU law on State aid is aimed at removing only "[…] the selective advantages from which certain undertakings might benefit to the detriment of others which are placed in a comparable situation […]".[48]

In view of the above-mentioned jurisprudence of the CJEU in the area of state aid law, it becomes apparent that the application of certain legal provisions in the area of tax law by which tax advantages are granted only to a certain group of taxpayers may be considered discriminatory and, therefore, inconsistent with EU law on state aid as granting advantages of selective nature. The question, however, arises whether the shape of a tax system which includes legal provisions – which may be exploited in a way constituting tax avoidance – may in itself be considered as allowing for tax advantages of selective nature and, therefore, be inconsistent with EU law on state aid. As pointed out by P. Rossi-Maccanico, tax advantages arising from the complex tax arrangement using a combination of tax measures

[46] *Ibidem*, point 101.

[47] *Ibidem*, point 106.

[48] The judgement of the CJEU of 15 September 2022, Fossil (Gibraltar) Ltd v. Commissioner of Income Tax, C-705/20, point 61. See also the judgment of the CJEU of 16 March 2021, European Commission v. Hungary, C-596/19 P, point 50, and the judgement of the CJEU of 13 April 2021, European Commission v. the Republic of Poland, C-562/19 P, point 44.

may also be considered selective, which was already confirmed by the CJEU in the Lico Leasing case.[49] It should, however, be expressed that the EU General Court's judgment annulling the European Commission's decision has been repealed by the CJEU on grounds that the EU General Court has not established whether a tax measure in question in the case at hand "[…] by their practical effects introduced differentiated treatment of operators, where the operators which benefited from the tax advantages and those which were excluded from it, were, in view of the objective pursued by that tax system, in a comparable factual and legal situation […]", but only established that a tax measure in question could not be regarded as selective, because with reference to investors the certain operations "[…] were available, on the same terms, to any undertaking, without distinction".[50] After repealing the judgement of the EU General Court, the CJEU referred the case back to the General Court for further examination of the pleas put forward by the parties.[51] The subsequent EU General Court's judgement,[52] which dismissed the actions, was finally set aside and the European Commission's decision was annulled, but the EU General Court annulled the decision of the European Commission only in as much as it designated the economic interest groupings and their investors as the sole recipients of the tax planning scheme in question, thereby upholding the subsequent findings of the European Commission concerning the selective nature of this scheme.[53]

Consequently, from the analysis conducted above, it can be drawn that in the Engie case, the Luxembourg income tax provisions allowing companies being part of the Engie group for receiving tax advantages may be in themselves selective. Such a finding is, however, distinct from the grounds on which the European Commission's decision had been based initially. Therefore, it should not affect the findings set out in the Opinion

[49] P. Rossi-Maccanico, *AG Kokott Tries to Bring Clarity*…, pp. 186–188.

[50] The judgment of the CJEU of 25 July 2018, European Commission v. Kingdom of Spain, Lico Leasing SA, Pequeños y Medianos Astilleros Sociedad de Reconversión SA, C-128/16 P, point 71.

[51] Lico Leasing (C-128/16 P), point 105.

[52] The judgement of the General Court of 23 September 2020, Kingdom of Spain, Lico Leasing SA, Pequeños y Medianos Astilleros Sociedad de Reconversión, SA v. European Commission, T-515/13 RENV and T-719/13 RENV.

[53] The judgement of the CJEU of 2 February 2023, Kingdom of Spain, Lico Leasing SA, Pequeños y Medianos Astilleros Sociedad de Reconversión, SA v. European Commission, C-649/20 P and C-658/20 P.

of the Advocate General in the Engie case that the grounds on which the European Commission had based its decision were inadequate and rooted in however desirable yet fictitious legal system. As has already been indicated above, such a line of reasoning is consistent with the position taken by the Advocate General, who stated that the European Commission's decision and the judgement of the EU General Court concerned the issuance of the tax rulings as individual aid, not the Luxembourg tax law itself. Therefore, the lack of the principle of correspondence in the Luxembourg tax system cannot be part of the subject matter of the dispute.[54] Thus, as has already been pointed out by the CJEU in the FIAT case, the principle of legality requires that "[…] any obligation to pay tax and all the essential elements defining the substantive features thereof must be provided for by law, the taxable person having to be in a position to foresee and calculate the amount of tax due and determine the point at which it becomes payable […]."[55] With respect to the above, it seems inadequate from the point of view of the principle of legality that the powers are given to the European Commission to set aside previous decisions of the tax authorities of Member States based on a desirable legal standard, even if it assures a higher level of protection against aggressive tax planning as well as against tax competition between Member States, yet cannot be derived from the national legal system of a given Member State.

5. The CJEU judgment of 5 December 2023 in Engie and remarks on its findings

In its judgment of 5 December 2023, the CJEU set aside the General Court's judgment of 12 May 2021 based on the fact that the General Court had erred in considering as correct the Commission's findings as regards the reference framework, the distortion from which the granting of tax advantage by Luxembourg tax authorities allegedly was.

Firstly, the CJEU stated that the General Court had failed to properly determine that the reference framework was appropriate legal provisions of the Luxembourg's income tax system, derogation from which the issuance of tax rulings for entities being part of the Engie group was. The General Court, following the Commission's findings, has departed from the

[54] Opinion (C-454/21 P and C-451/21 P), points 125–126.

[55] FIAT (C-885/19 P and C-898/19 P), point 97.

literal interpretation of the relevant legal provisions of the tax system in question and found that there is a link of conditionality between Article 164 and Article 166 of the Luxembourg's Income Tax Act, which was pivotal for the determination that the tax rulings in question indeed derogated from the reference framework. The CJEU confirmed that the determination of the reference framework for the purpose of applying Article 107(1) TFEU requires that the Commission accepts the interpretation of the relevant provisions of national law given by a given Member State provided that such an interpretation is compatible with the wording of these provisions as well as the Commission may set aside such an interpretation based on the fact that there is a reliable and consistent evidence that another interpretation prevails in the case-law or the administrative practice of the Member State.[56] Nevertheless, while it is admissible to depart from the literal interpretation of the relevant legal provisions of the Luxembourg's tax system, the CJEU noted that the General Court, following the Commission's findings, had misinterpreted the wording of the sentences cited from the correspondence exchanged during the proceedings by taking them out of context, as well as the wording of the relevant administrative opinion by applying the purposive interpretation of the provisions in question, for which there was no ground either in the wording of the legislation itself or in the wording of other documentation.[57] Therefore, the CJEU has stated that while the reference framework had not been properly determined, it is not necessary to further examine whether the derogation from the reference framework was assessed in the proper manner.

Secondly, the CJEU also stated that the determination of reference framework comprising the relevant provisions of Luxembourg's tax system on the abuse of law had also not been done in a proper manner. The CJEU emphasised that a legal provision intended to prevent abuse in tax matters is general in nature and, therefore, may be applied in a very wide range of contexts and situations.[58] Therefore, it is required that the Commission's assessment that the non-application of such a provision by tax authorities led to the selective advantage granted to a taxpayer cannot be done unless such a non-application departs from the national case-law or administrative practice concerning the interpretation of such a provision. The CJEU

[56] Engie (C-454/21 P and C-451/21 P), points 120–121.

[57] *Ibidem*, points 129–132.

[58] *Ibidem*, point 153.

pointed out that the opposite approach would indeed give powers to the Commission, such as being able to define what the correct application of a provision on the abuse of tax law is, which would exceed those conferred on it by the Treaties in the field of state aid review. In the CJEU's view, such an approach would be incompatible with the fiscal autonomy of the Member States in the field of direct taxation in areas that have not been harmonised.[59] Notwithstanding the above-mentioned right to assess the non-application of provisions on the abuse of law while taking into consideration the administrative practice as well as the relevant case-law concerning the provision in question, the CJEU stated that in the case in question the General Court, following the Commission's findings, failed to properly interpret the provision on the abuse of law, concluding that the Commission was not required to take into account the administrative practice of Luxembourg's tax authorities related to the interpretation on the provision on the abuse of law, based on the fact that the provision did not give rise to any difficulties in interpretation. Although the Commission had referred to the circular from Luxembourg's tax authorities as well as to the judicial practice in Luxembourg, there have been no grounds to not take into account the administrative practice of Luxembourg's tax authorities, which in the issued tax rulings had departed from their own practice concerning the comparable transactions to those at issue.[60]

Having set aside the General Court's judgment, the CJEU deemed it possible to give final judgment on the matter and annulled the Commission's decision.[61]

Although the CJEU's judgment in the Engie case is corresponding in its conclusions to the recommendations given by Advocate General Kokott in her Opinion, the grounds upon which the judgment was based are somewhat different. Especially, in the Advocate General's view, the state aid assessment should be performed only in cases where an error in the interpretation of national law is obvious; in any other case the review should not be done, whilst, in the CJEU's view, the Commission may depart from the literal interpretation of the national legal provisions only inasmuch as there is a reliable and consistent evidence that another interpretation prevails in case-law or in the administrative practice of a given Member

[59] *Ibidem*, point 155.
[60] *Ibidem*, points 156–160.
[61] *Ibidem*, points 161–186.

State.[62] All in all, the Commission is not granted the right to interpret the legal provisions of the national legal system of Member States in isolation from the formed interpretation reflected not only in the literal wording of the national legal provisions in question, but especially in the case-law and administrative practice of these Member States. Unfortunately, neither the Opinion of Advocate General Kokott nor the CJEU's judgment in the Engie case provide an explicit answer to the question about what the prerequisites of the Commission are as regards the interpretation of the legal provisions of the national legal system of a given Member State when there is no administrative practice or case-law in the matter, which would be the case when the provisions in question were newly enacted. It should, however, be borne in mind that the CJEU may have limited the attempts at the purposive interpretation of the legal provisions of a national legal system, reviewing the accuracy of the interpretation performed by the Commission and the General Court as regards the relevant provision of Luxembourg's income tax system. The CJEU rejected the purposive interpretation of the relevant provision of Luxembourg's income tax system and the attempt to depart from their literal wording inasmuch as the purpose of these provisions that the Commission and the General Court attempted to attribute to the provisions in question could not be derived both from the wording of these provisions as well as from other documents, including documents from Luxembourg's tax administration concerning the interpretation of the provisions.[63]

Moreover, it should be remembered that although the CJEU restricted the Commission's powers in interpreting national legal provisions, the judgment did not disregard the possibility to review the application of national provisions on the abuse of law from the point of view of their conformity with the EU provisions on state aid. Likewise, the non-application of national general anti-avoidance rules can also in certain situations be considered as selective and, therefore, infringe the EU law on state aid. It is surely necessary to agree with such findings, especially with regard to the non-application of national general anti-avoidance rules. There is a risk of granting tax advantages of this kind only to certain taxpayers whilst applying national general anti-avoidance rules to other taxpayers who are in a comparable legal and factual situation.

[62] *Ibidem*, points 120–121.
[63] *Ibidem*, points 129–130.

This is because of the character of general anti-avoidance rules, which grant tax authorities a wide margin of discretion in finding whether a certain business arrangement meets the conditions set out in the provisions in question and, therefore, constitutes impermissible tax advantage.

6. Conclusions

As is apparent from the above considerations, the CJEU's judgment in the Engie case is of importance in ensuring the fiscal autonomy of the Member States, including Poland. Along with the CJEU's judgment in the Fiat case, referred to above, it forms part of a wider line of the CJEU's jurisprudence, which states that the reference framework upon which the findings of the European Commission are based as regards the selectivity of advantages granted to taxpayers should explicitly be derived from the national tax system. It considers both reviewing the non-application of national general anti-avoidance rules and the possible non-application of any legal principle applicable in the area of tax law. These findings are of tantamount importance to the maintenance of the fiscal autonomy of Member States, including Poland, in the areas which have not been harmonised in as much as the CJEU restricted the Commission's autonomy to interpret the national legal provisions in isolation from the national interpretation of these provisions, performed by national tax authorities and jurisprudence. In particular, the attempts to interpret national tax provisions according to certain uncodified international tax law principles have been rejected unless such principles cannot be derived from the national tax system itself.

It should, however, be borne in mind that the above findings do not undermine the fact that according to the well-established jurisprudence of the CJEU tax provisions in themselves, granting certain tax advantages may be considered selective because of their discriminatory nature. In its judgment in the Engie case, the CJEU explicitly recalled their previous judgment in the Gibraltar case, also referred to above, stating that there may be a possibility of finding that "the reference framework itself, as it results from national law, is incompatible with EU law on State aid, since the tax system at issue has been configured according to manifestly discriminatory parameters intended to circumvent that law […]".[64] Therefore, the CJEU's judgment in the Engie case cannot be read as, for example, allowing for

[64] *Ibidem*, points 112–114.

selective advantageous treatment of a certain group of taxpayers, if there are no grounds for their preferential tax treatment by the national tax system. It can be said that the CJEU confirms that the national tax systems indeed may be reviewed in the light of state aid as to whether the provisions of national tax system giving preferential tax treatment are consistent with the provisions on state aid. All in all, although the findings of the CJEU in its judgment in the Engie case give rise to preserve greater legal certainty for taxpayers of the Member States, including Poland as regards the decisions made by national tax authorities and jurisprudence as well as to respect the principle of legitimate expectations, it should be borne in mind that the possibility of reviewing the national tax law provisions as regards their confinement with the provisions on state aid imposes further restrictions on these principles. Nevertheless, from the point of view of the principle of legal certainty and the principle of legitimate expectations, such an approach should be evaluated as less likely to violate such principles in comparison to assessing the already performed taxpayer's activities and granted tax advantages, because it ensures that the national legal provisions are enacted as not prone to exploitation in aggressive tax planning schemes from the very beginning.

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