



2025/2404

28.11.2025

COMMISSION DECISION (EU) 2025/2404

of 28 November 2024

on tax ruling SA.38375 (2014/C) (ex 2014/NN) – Luxembourg, alleged aid to FFT

(notified under document C(2024) 8564)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) By letter of 19 June 2013, the Commission sent an information request to the Grand Duchy of Luxembourg ('Luxembourg') requesting detailed information on the country's tax ruling practice ⁽²⁾.
- (2) By letter of 17 July 2013, Luxembourg responded in general terms to that letter and provided part of the requested information. Luxembourg did not respond to the Commission's request to provide a list of tax rulings issued in 2010, 2011 and 2012 by its tax administration, nor did it submit certain other requested information.
- (3) On 11 October 2013, a meeting was held between Luxembourg and the Commission, followed by a letter from Luxembourg dated 14 October 2013 expressing doubts as to whether the legal basis invoked by the Commission could cover what it considered to be a wide information request of a general nature. The Commission replied to that letter by letter of 15 October 2013.
- (4) Further exchanges of letters took place between Luxembourg (letters dated 11 November and 2 December 2013) and the Commission (letters dated 14 November and 12 December 2013), in which Luxembourg explained that, due to the formation of a new government, it could not respond to the Commission's request for information. Accordingly, the Commission granted an extension of the deadline to reply until 15 January 2014.
- (5) By letter of 15 January 2014, Luxembourg submitted 22 tax rulings relating to the period 2010 to 2013, with the taxpayers' names masked in those rulings. According to Luxembourg, those rulings were representative of Luxembourg's tax ruling practice.

⁽¹⁾ OJ C 369, 17.10.2014, p. 37.

⁽²⁾ That letter was sent under reference number HT.4020 – *Pratiques en matière de ruling fiscal*.

- (6) One of those tax rulings related to an advance pricing arrangement (hereinafter 'APA') with a company referred to as 'FFT'. By letter dated 3 September 2012, the Luxembourg tax administration agreed to the APA proposed by the tax advisor (hereinafter the 'contested tax ruling' or 'FFT APA' ⁽³⁾). The FFT APA related to the following documents ⁽⁴⁾:
- (a) a letter by KPMG (hereinafter referred to as the 'tax adviser') on behalf of its client FFT dated 14 March 2012, requesting the agreement of the Luxembourg tax administration to an advance pricing arrangement;
 - (b) a transfer pricing report containing a transfer pricing analysis, prepared by the tax advisor in support of that request.
- (7) By letter of 7 March 2014, the Commission requested that Luxembourg confirm that the taxpayer referred to as 'FFT' in the FFT APA was Fiat Finance and Trade Ltd. The Commission also indicated that, based on the information submitted, it could not exclude that the FFT APA represented incompatible State aid in favour of FFT. The Commission requested that Luxembourg provide additional information that was relevant for the assessment of the FFT APA.
- (8) On 24 March 2014, the Commission issued an information injunction decision on the basis of Article 10 of Council Regulation (EC) No 659/1999 ⁽⁵⁾, ordering Luxembourg to provide the list of tax rulings referred to in recital 2.
- (9) On 24 April 2014, Luxembourg replied to the letter of 7 March 2014 and confirmed that it had no additional relevant information necessary for the assessment of the FFT APA. As regards the question whether FFT referred to Fiat Finance and Trade Ltd, Luxembourg invoked secrecy provisions under Luxembourg law and argued that those provisions prohibited it from confirming the identity of the taxpayer in question.
- (10) On 11 June 2014, the Commission adopted a decision to initiate the formal investigation procedure under Article 108(2) of the Treaty on the FFT APA (hereinafter 'the Opening Decision') ⁽⁶⁾. The Opening Decision was combined with an information injunction decision requesting that Luxembourg provide additional information on the FFT APA. In particular, the Commission required Luxembourg to confirm the identity of the beneficiary of that measure.
- (11) By letter of 14 July 2014, Luxembourg submitted its comments on the Opening Decision. It also argued that the Commission could not identify any State aid measure and, thus, Luxembourg did not have to answer the questions of the Opening Decision or the information injunction.
- (12) On 14 August 2014, the Commission requested that Luxembourg provide the missing information referred to in the Opening Decision and requested in the information injunction. The Commission also asked Luxembourg to authorise the Commission to address its outstanding questions directly to FFT in accordance with Article 6(a)(6) of Regulation (EC) No 659/1999.
- (13) On 3 September 2014, Luxembourg provided a partial reply to the outstanding questions and indicated that part of the requested information constituted business secrets of FFT which was not in the possession of Luxembourg. Luxembourg further confirmed that FFT indeed refers to the company Fiat Finance and Trade Ltd. and authorised the Commission to address its questions to FFT directly.
- (14) On 17 October 2014, the Opening Decision was published in the *Official Journal of the European Union* ⁽⁷⁾. The Commission invited interested parties to submit their comments on the decision. By letter of 30 October 2014, it received comments from FFT.

⁽³⁾ Advance pricing arrangement, hereinafter referred to separately as 'APA'.

⁽⁴⁾ Luxembourg had redacted selected information, in particular the names of companies and subsidiaries.

⁽⁵⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 Treaty establishing the European Community (OJ L 83, 27.3.1999, p. 1). Regulation (EC) No 659/1999 was repealed and replaced by Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

⁽⁶⁾ *Alleged aid to FFT* (SA.38375) [2014] OJ C 369, 17.10.2014, p. 37.

⁽⁷⁾ OJ C 369, 17.10.2014, p. 37.

- (15) On 22 December 2014, Luxembourg submitted a list of beneficiaries of tax rulings, to comply with the Commission's request for information of 19 June 2013. That document listed the rulings issued by the Luxembourg tax administration during the years 2010 to 2012.
- (16) By letter of 5 January 2015, Luxembourg submitted its observations on third-party comments to the Opening Decision.
- (17) On 12 February 2015, the Commission adopted a decision informing Luxembourg that, in accordance with Article 6(a) of Regulation (EC) No 659/1999, it had identified that the formal investigation procedure on the contested tax ruling was ineffective to date. On that basis, and with the authorisation of Luxembourg, ⁽⁸⁾ the Commission could address its questions to FFT directly.
- (18) By letters of 20 February 2015, the Commission sent an information request to Luxembourg and FFT.
- (19) By emails of 26 February and 3 March 2015, FFT asked for some clarifications on the request for information and an extension of the deadline to respond, which was granted by the Commission by email of 5 March 2015.
- (20) On 23 March 2015, the Commission requested Luxembourg, in response to the list of tax rulings provided on 22 December 2014, to provide additional information regarding the rulings for the years 2010 to 2012 ⁽⁹⁾.
- (21) By letter of 24 March 2015, Luxembourg replied to the Commission's request for information of 20 February 2015 ⁽¹⁰⁾.
- (22) By letter of 31 March 2015, FFT replied to the Commission's request for information of 20 February 2015.
- (23) On 23 April 2015, Luxembourg submitted additional information on 1 900 rulings of those listed in its response of 22 December 2014.
- (24) On 27 April 2015, a meeting took place between FFT, Luxembourg and the Commission, following which Luxembourg provided further information, in its submissions of 4 June 2015, 18 June 2015 and 10 July 2015.
- (25) On 15 July 2015, a meeting took place between the Chief Financial Officer of Fiat Chrysler Automobiles N.V., the successor of Fiat S.p.A., Luxembourg and the Commission.
- (26) On 21 October 2015, the Commission closed the formal investigation concerning the FFT APA by adopting a final decision (the 'Closing Decision' ⁽¹¹⁾). In that decision, the Commission found that the contested tax ruling constituted aid within the meaning of Article 107(1) of the Treaty. This aid was determined to be incompatible with the internal market and had been unlawfully put into effect by Luxembourg in breach of Article 108(3) of the Treaty. Luxembourg was ordered to recover the amount of incompatible and unlawful aid obtained by FFT.
- (27) On 29 and 30 December 2015 respectively, FFT and Luxembourg brought actions for annulment of the Closing Decision.
- (28) On 24 September 2019, the General Court dismissed those actions and upheld the Commission's Closing Decision ⁽¹²⁾.
- (29) On 8 November 2022, the Court of Justice set aside the General Court's judgment of 24 September 2019 and annulled the Commission's Closing Decision ('FIAT judgment' ⁽¹³⁾) leaving the Opening Decision unaffected. Therefore, the formal investigation of the contested tax ruling, as described further in Section 2.2, is still open and needs to be closed.

⁽⁸⁾ See recital 13.

⁽⁹⁾ Under case number SA.37267 – *Pratiques en matières de ruling fiscal* – Luxembourg.

⁽¹⁰⁾ The letter of 24 March 2015 was provided to the Commission on 24 March 2014 and again on 26 March 2015.

⁽¹¹⁾ *State aid which Luxembourg granted to Fiat* (SA.38375) Commission Decision (EU) 2016/2326 [2015] OJ L 351, 22.12.2016, p. 1.

⁽¹²⁾ Joined cases T-755/15 and T-759/15 *Luxembourg and Fiat Chrysler Finance Europe v Commission*, ECLI:EU:T:2019:670.

⁽¹³⁾ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v Commission*, ECLI:EU:C:2022:859.

2. DESCRIPTION OF THE MEASURE

2.1. The beneficiary

- (30) FFT is part of the Fiat group. At the time of the contested tax ruling, the Fiat group was composed of Fiat S.p.A., incorporated in Italy with its head office in Turin, and all companies controlled by Fiat S.p.A. (hereinafter collectively referred to as 'Fiat' or 'Fiat group'). Following a merger of Fiat S.p.A. with and into Fiat Investments N.V. on 12 October 2014, Fiat Chrysler Automobiles N.V. became the successor of Fiat S.p.A.
- (31) Fiat carried out industrial and financial services activities in the automobile sector. It designed, engineered, manufactured, distributed and sold mass-market vehicles. Its brands included Fiat, ALFA Romeo, Lancia, Abarth, Ferrari, Maserati and a number of Chrysler brands. In addition, Fiat was also active in the components sector, the production systems sector and in after-sales services/products. Finally, to support its car activities, the group also provided retail and dealer finance, leasing and rental services (via subsidiaries, joint ventures and commercial agreements with specialised financing services providers). In 2013, Fiat reported revenues of EUR 86 816 million and a net profit of EUR 1 951 million. In 2012, the corresponding figures were respectively EUR 83 957 million (revenues) and EUR 896 million (net profit).
- (32) FFT provided treasury services and financing to the Fiat companies based (mainly) in Europe (excluding Italy) and managed several cash pool structures for the group companies. FFT was owned approximately 40 % by Fiat S.p.A. and 60 % by Fiat Finance S.p.A., which in turn was a wholly-owned subsidiary of Fiat S.p.A. ⁽¹⁴⁾ FFT recorded pre-tax income of EUR 1 572 300 and of EUR 2 334 301 for the years 2012 and 2013 respectively ⁽¹⁵⁾.
- (33) The transfer pricing report provided by Luxembourg on 15 January 2014 contained the following information about FFT and the Fiat group. Fiat had centralised financial and treasury functions, whereby all funding, corporate finance, bank relationship, foreign exchange and interest rate risk management, cash pooling, money market operations, cash balances management, collection and payment initiation were performed by treasury companies within the group (hereinafter collectively referred to as 'the treasury companies').
- (34) The treasury companies were organised as follows:
- (a) Fiat Finance S.p.A. was the Italian-based treasury company in charge of the coordination of the financing operations for group companies based in Italy;
 - (b) FFT performed treasury functions for the group companies based in Europe (excluding Italy);
 - (c) Fiat Finance North America, Inc. (hereinafter referred to as 'FFNA') performed treasury functions for the US-based group companies;
 - (d) Fiat Finance Canada Ltd. (hereinafter referred to as 'FFC') performed treasury functions for the Canada-based group companies;
 - (e) Fiat Finanças Brasil Ltda performed treasury functions for the Brazilian-based Fiat companies.
- (35) The cross-border intra-group transactions entered by FFT could be grouped into two main categories: (i) transactions with other treasury companies (Intra-sector) and (ii) transactions with group companies (Intra-group).
- (36) As regards functions performed, FFT was involved in market funding and liquidity investments; relations with financial market actors; financial coordination and consultancy services to the group companies; cash management services to the group companies; short term ('S/T') and medium term ('M/T') intercompany funding; and coordination with the other treasury companies.

⁽¹⁴⁾ Base Prospectus, Fiat S.p.A., 14 March 2014.

⁽¹⁵⁾ Id.

- (37) The main risks generally faced by the treasury companies included market risk, credit risk related to bank deposits or other similar short-term investments, counterparty related risks and operational risk.
- (38) FFT managed a significant amount of financial assets, which were mainly related to intercompany loans, account receivables from group companies and, in a smaller portion, to bank deposits. FFT used IT systems necessary to perform the day-to-day operations and to monitor the financial market performance.

2.2. The contested tax ruling

- (39) This Decision concerns the FFT APA, a tax ruling on transfer pricing granted by Luxembourg to FFT by letter of 3 September 2012. The contested tax ruling endorses a method for arriving at a profit allocation to FFT within the Fiat group, as proposed by the latter's tax advisor, and enables FFT to determine its corporate income tax liability to Luxembourg on a yearly basis.
- (40) The documents provided by Luxembourg to the Commission as constituting all the essential elements to support the contested tax ruling consist of the two letters and the transfer pricing report referred to in recital 6.
- (41) By letter of 3 September 2012, the Luxembourg tax administration confirmed that 'the transfer pricing analysis hereafter has been realized in accordance with the Circular 164/2 of the 28 January 2011 and respects the arm's length principle' (sic). In other words, the Luxembourg tax administration accepted that the tax advisor's transfer pricing analysis in the transfer pricing report resulted in an arm's length remuneration for the functions performed and the risk borne by FFT. The 'arm's length remuneration' of FFT, as established in the transfer pricing report and accepted by the contested tax ruling, was as follows: 'the transfer pricing study determines an appropriate remuneration on the capital at risk and the capital aimed at remunerating the functions performed by the company of EUR 2,542 millions on which a range of +/- 10 % is envisaged.' On the net profits earned by FFT on the basis of this remuneration, the standard corporate tax rate in Luxembourg of 28,8 % was applied. The letter further stated that the decision of the tax administration was binding for five years (i.e. from tax year 2012 to tax year 2016).
- (42) According to the transfer pricing report, the method considered as most appropriate to determine the taxable profit of FFT within the Fiat group was the transactional net margin method (hereinafter referred to as 'TNMM'). According to the tax advisor, the TNMM was particularly adequate when, within the transaction, there was one party not making valuable and unique contributions. Since, according to the tax advisor, that was the case of FFT, which performed only financial services, this method was the most appropriate to determine an arm's length pricing in line with the Organisation for Economic Cooperation and Development ('OECD') Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ('OECD Guidelines') ⁽¹⁶⁾.
- (43) In the transfer pricing report, the tax advisor determined the remuneration due to FFT, which constituted the taxable profit, by reference to the capital needed by FFT to perform its functions and to bear its risks, in relation to the assets in use.
- (44) That remuneration was determined as follows: (i) estimate of FFT's 'capital at risk'; (ii) identification of FFT's capital used to perform the functions and to support the financial investments; (iii) estimate of the expected remuneration of FFT's 'capital at risk' by using the Capital Asset Pricing Model (hereinafter referred to as 'CAPM') and identification of the return to reward the capital used to perform the functions; and (iv) calculation of the overall profitability to be left to FFT to remunerate the risks borne and the functions performed by combining the results of steps (i) to (iii).
- (45) The present Decision assesses whether the transfer pricing arrangement approved in the contested tax ruling contains a selective advantage amounting to State aid.

⁽¹⁶⁾ OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD Publishing, Paris, 2010.

3. DESCRIPTION OF THE RELEVANT LEGAL FRAMEWORK

3.1. Guidance on transfer pricing

- (46) This Decision concerns a tax ruling which validates a transfer pricing arrangement, also referred to as APA. APAs are arrangements that determine, in advance of intra-group transactions, an appropriate set of criteria for the determination of the transfer pricing for those transactions over a fixed period of time, for tax purposes.
- (47) In this context, transfer pricing refers to the prices charged for commercial transactions between various parts of the same corporate group, in particular prices set for goods sold or services provided by one company of a corporate group to another company of that same group. Transfer pricing thus concerns profit allocation between different parts of the same corporate group.
- (48) Multinational corporations pay taxes in jurisdictions which have different tax rates. The after-tax profit recorded at the corporate group level is the sum of the after-tax profits in each country in which it is subject to taxation. Therefore, rather than maximise the profit declared in each country, multinational corporations may have a financial incentive, when allocating profit to the different companies of the corporate group, to allocate as much profit as possible to low tax jurisdictions and as little profit as possible to high tax jurisdictions.
- (49) To achieve a fair taxation, an internationally agreed standard for setting transfer prices has been established. Thus, Article 9 of the OECD Model Tax Convention⁽¹⁷⁾, concerning the taxation of associated enterprises, establishes so called arm's length principle according to which the prices in intercompany transactions shall be set in line with the market prices. The arm's length principle is further detailed in the OECD Guidelines.

4. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (50) In the Opening Decision, the Commission expressed doubts as to the compatibility of the contested tax ruling with the internal market. In particular, as to whether the transfer pricing arrangement endorsed by the contested tax ruling resulted in an arm's length remuneration for FFT.
- (51) In its Opening Decision, the Commission noted that the contested tax ruling should not have the effect of granting the undertakings concerned lower taxation than other undertakings in a similar legal and factual situation. Tax authorities, by accepting, through a discretionary practice of tax rulings, that multinational companies depart from market conditions in setting the commercial conditions of intra-group transactions, may renounce taxable revenues in their jurisdiction and thereby forego State resources. That is the case, in particular, when the tax authorities accept commercial conditions which depart from conditions prevailing between independent economic operators.
- (52) Further, in its Opening Decision, the Commission noted that, in order to determine whether a method of assessment of the taxable income of an undertaking gave rise to an advantage, it was necessary to compare that method to the ordinary tax system, based on the difference between profits and losses of an undertaking carrying on its activities under normal market conditions. Thus, the Commission asserted that where an APA concerned transfer pricing arrangements between related companies within a corporate group, that arrangement should not depart from the arrangement or remuneration that a prudent independent operator acting under normal market conditions would have accepted (i.e. at arm's length)⁽¹⁸⁾.

⁽¹⁷⁾ Model Tax Convention on Income and on Capital 2010 (Full Version), OECD Publishing, Paris, 2012.

⁽¹⁸⁾ Commission Decision 2003/757/EC [2003], Belgian Coordination centres (OJ L 282, 30.10.2003, p. 25), recital 95.

- (53) In this context, the Commission, in its Opening Decision, referred to case-law according to which market conditions could be arrived at through transfer pricing established at arm's length. Specifically, if, conversely, the method of taxation for intra-group transactions did not comply with the arm's length principle ⁽¹⁹⁾, and led to a taxable base inferior to that which would result from a correct implementation of that principle, it would provide a selective advantage to the company concerned ⁽²⁰⁾.
- (54) In that context, the Commission observed that the OECD Guidelines are a reference document recommending methods for approximating an arm's length pricing outcome and had been retained as appropriate guidance for this purpose in previous Commission decisions ⁽²¹⁾.
- (55) Hence, in its Opening Decision – and as explained in more detail below – the Commission relied on an autonomous arm's length principle. The Commission did not rely on the national law, in particular Article 164(3) L.I.R. ⁽²²⁾, and the Circular ⁽²³⁾, when defining the arm's length principle in the context of its State aid assessment in this case.
- (56) Based on that autonomous arm's length principle as defined above, the Commission raised the following doubts in its Opening Decision, which thus exclusively related to the compliance of the contested tax ruling with the arm's length principle as set out in the case-law cited in recitals 52 and 53 above and as provided by the OECD Guidelines.
- (57) First, the Commission preliminarily concluded that the contested tax ruling seemed to have authorised a fixed tax base of EUR 2,542 millions (+/- 10 %) with respect to FFT's activities in Luxembourg, that could only vary marginally and would remain stable even if FFT, for example, significantly increased its activities underlying the determination of the tax base.
- (58) Second, the Commission expressed doubts as to the appropriateness of the method chosen by FFT's tax advisor to estimate FFT's remuneration. The tax advisor relied on the TNMM, an indirect method, in its transfer pricing analysis to calculate that remuneration. According to the Commission's preliminary conclusions, the use of direct methods and, in particular, the Comparable Uncontrolled Price (hereinafter referred to as 'CUP') method was preferred in cases where comparable transactions could be observed on the market. In that respect, the Commission noted that Chrysler, the US company of the Fiat group, relied directly on capital market funding for its operations and that some of those transactions could be comparable to those carried out by FFT.
- (59) Third, as regards the use of the CAPM to estimate the required equity returns, the Commission expressed doubts that the CAPM had been correctly applied by FFT's tax advisor. It pointed out that the two components which determine FFT's remuneration on the basis of the CAPM, i.e. the amount of capital remunerated, and the level of remuneration applied to that capital amount, were set at a too low level.

⁽¹⁹⁾ In particular, rulings allowing taxpayers to use improper transfer pricing methods for calculating taxable profits, e.g. the use of fixed margins for a cost-plus or resale-minus method for determining an appropriate transfer pricing may involve State aid – See Commission Decision 2003/438/EC [2002] on State aid C 50/2001, Luxembourg Finance Companies, OJ L 153, 20.6.2003, p. 40, recitals 43 and 44; Commission Decision 2003/501/EC [2002] on State aid C 49/2001, Luxembourg Coordination centres, OJ L 170, 9.7.2003, p. 20, recitals 46-47 and 50; Commission Decision 2003/755/EC [2003], Belgian Coordination centres, OJ L 282, 30.10.2003, p. 25, recitals 89 to 95 and the related Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416, paragraphs 96 and 97; Commission Decision 2004/76/EC [2003], French Headquarters and Logistic Centres, OJ L 23, 28.1.2004, p. 1, recitals 50 and 53.

⁽²⁰⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416, paragraph 95.

⁽²¹⁾ Commission Decision 2003/757/EC [2003], Belgian Coordination centres, OJ L 282, 30.10.2003, p. 25.

⁽²²⁾ Article 164(3) of the Luxembourg Income Tax Code (*Loi modifiée du 4.12.1967 concernant l'impôt sur le revenu*, hereinafter referred to as 'L.I.R.').

⁽²³⁾ Circular L.I.R. n° 164/2 of 28 January 2010 (hereinafter 'the Circular').

- (60) As regards the amount of capital remunerated, the contested tax ruling accepted that the CAPM was only applied to a fraction of the capital, labelled as 'equity at risk', whereas the equity injected into FFNA and FFC was deducted from the equity to be remunerated without any plausible explanation. In addition, the calculation of the 'equity at risk' seemed to lead to a taxable basis that was too low, as it did not include intra-group assets. In its Opening Decision, the Commission questioned the assumption that there was no credit risk on transactions with group companies. The Commission also expressed doubts as to the calculation of the minimum capital requirements for counterparty and credit risk. In particular, there was no justification of either the choice of a relatively low risk weight factor of 20 % for the counterparty risk, nor what would happen if the regulatory framework were to change in a meaningful manner. The tax advisor's transfer pricing report did not explain why the 'difference between creditor interests accrued on bank deposits and debtor interests accrued on bank loans' was a good indication of operational risk. It did not explain either the risk weighting of 15 %. Similarly, that report did not set out why the counterparty risk was multiplied by 6 % instead of 8 %, given that the minimum capital requirement for counterparty risk under the Basel II framework ⁽²⁴⁾, to which the transfer pricing report made explicit reference, was 8 %.
- (61) As regards the level of remuneration applied to that capital, the Commission expressed doubts on the determination of the beta as it seemed too low compared to other comparable companies performing financial services. The Commission also expressed doubts on the tax advisor's choice of the 25th percentile and not the median for the calculation of the beta.
- (62) Fourth, as regards the expected return on equity on the capital considered as excess capital, the Commission expressed doubts on the fact that the contested tax ruling agreed to the use of a very low rate of 0,87 % without any justification.
- (63) In light of these doubts, in its Opening Decision, the Commission came to the provisional conclusion that the contested tax ruling conferred a selective advantage to FFT as the remuneration deviated from an arm's length outcome. Since all the other conditions of Article 107(1) of the Treaty appeared to have been fulfilled and there was no apparent compatibility basis pursuant to Article 107(2) or (3) of the Treaty, the Commission came to the provisional conclusion that the contested tax ruling constituted State aid incompatible with the internal market.

5. COMMENTS FROM LUXEMBOURG ON THE OPENING DECISION

5.1. On the Commission's procedure

- (64) As regards the procedure, Luxembourg alleged that the proper procedure for issuing the information injunction had not been followed in this case, in that Regulation (EC) No 659/1999 did not allow the Commission to issue injunctions in a decision to initiate the formal investigation procedure. Before such an injunction could be issued, the procedure provided for in Article 10 of Regulation (EC) No 659/1999 should have been followed.
- (65) Luxembourg further claimed that, as regards the information requested under the injunction decision, the Commission did not explain why the disclosure of the name of the beneficiary was necessary to assess the measure under State aid rules. Luxembourg explained that it could not disclose the name at that stage. Luxembourg further claimed that there was lack of clarification on the requested information, whereas the Commission's own Manual of Procedure required such clarification.
- (66) Luxembourg alleged that, as the Opening Decision did not explain how the contested tax ruling constituted aid, it was impossible for it to implement the standstill obligation, hence it approved the submitted tax return of FFT based on the methodology in the contested tax ruling.

⁽²⁴⁾ Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards A Revised Framework*, June 2004 (hereinafter: 'Basel II framework').

- (67) Luxembourg further argued that the Commission infringed the principles of sincere cooperation, impartiality, and good administration by, for instance, not responding to its offers to meet so as to allow it to explain the methodology used in the contested tax ruling.
- (68) Luxembourg contested the decision by the Commission to split the procedure relating to FFT (with a new case number SA.38375) from the general investigation into the tax ruling practices of Luxembourg under case number SA.37267. Given that Luxembourg had appealed the information injunction adopted by the Commission in the latter case before the General Court, the Commission could thereby artificially circumvent an annulment of the information injunction under SA.37267 by opening a new case.
- (69) Finally, Luxembourg claimed that the Commission misused its powers by confusing the exercise of discretion with the mere interpretation of a rule of ordinary law. In particular, the contested tax ruling did not constitute an exercise of discretion by the Luxembourg tax administration but was in line with Article 164(3) L.I.R. and the Circular. According to Luxembourg, when applying those provisions, it was inevitable to interpret them in light of the facts of each case to arrive at solutions that were determined by and based on their specific circumstances. The Commission ignored that distinction between discretion, on the one hand, and the interpretation of rules that included abstract legal terms and that subsequently needed to be applied to the case at issue, on the other. Moreover, by substituting the interpretation of Luxembourg law put forward by the national authorities, the Commission infringed the competence of the Member States in the field of direct taxation.
- (70) According to Luxembourg, given that its tax administration did not exercise discretion in the case of FFT, the Commission failed to prove that the contested tax ruling derogated from normal administrative practice. Luxembourg explained that its administrative action was based on the principles of legality and equality, thereby ensuring the same treatment for all taxpayers whose situations were essentially the same. Luxembourg contended that the Opening Decision was based on the OECD Guidelines and not on Luxembourg's administrative practice.

5.2. On substantive errors in the Opening Decision

- (71) As a general matter, Luxembourg claimed that the Commission committed a substantive error by taking as the reference system, against which to find a selective advantage, an arm's length principle not enshrined in its national law and practice.
- (72) Furthermore, Luxembourg criticised the Commission for not applying the relevant national law provision, namely Article 164(3) L.I.R. and the resulting administrative practice, to the case at hand, but instead taking as a reference only the OECD Guidelines. In doing so, the Commission decided on the calculation method it considered most appropriate, whereas Luxembourg law precisely did not provide for the use of specific transfer pricing methods. The Commission therefore entirely disregarded Luxembourg's legal framework and administrative practice in this area.
- (73) In addition, Luxembourg claimed that the Commission misinterpreted the OECD Guidelines by establishing a hierarchy of transfer pricing methods. Luxembourg claimed that the choice of the TNMM was justified and compatible with Article 164 L.I.R.
- (74) As regards the doubts expressed in the Opening Decision, Luxembourg criticised the Commission for focusing too much and one-sidedly on the alleged tax strategy of Fiat at group level, without considering that Fiat, being a group, may have had other reasons for setting up its structure in the manner it did.
- (75) First, the Luxembourg tax administration did not agree to a 'fixed tax base' as alleged by the Commission. FFT's taxable revenue depended on the amount of loans granted and the transfer pricing report only established a bracket in terms of basis points for the margin to be achieved.

- (76) Second, with respect to the amount of equity required and the Commission's doubts in that respect, Luxembourg considered the choice of the Basel II framework to constitute a reasonable choice, as did the choice to exclude holdings. As holdings were paid through dividends from subsidiaries, the amount of which could vary according to the results of the subsidiaries and their reinvestment requirements, the notion of a margin to be applied to that flow of revenue made no commercial sense.
- (77) Third, Luxembourg claimed that the exclusion of intra-group debts from the calculation was also justified given that FFT's debts were backed by an explicit guarantee for FFT lenders.
- (78) Fourth, Luxembourg criticised the Commission for calling into question the way in which the beta was calculated for the determination of the risk premium.
- (79) Finally, Luxembourg claimed that given that the tax ruling practice in Luxembourg had been explicitly confirmed by the Code of Conduct Group (Business Taxation) to be consistent with the OECD Code of Conduct and Guidelines, the principle of legitimate expectations meant that FFT should have been able to rely on the contested tax ruling for its full period of validity, namely five years.

6. COMMENTS FROM INTERESTED PARTIES ON THE OPENING DECISION

- (80) FFT submitted its comments to the Opening Decision on 30 October 2014, in two separate documents.

6.1. FFT's first set of comments

- (81) FFT's first set of comments related to (i) the purported misapplication of the OECD transfer pricing principles by the Commission and (ii) the alleged failure to meet the required legal standard to establish selectivity under Article 107(1) of the Treaty.

6.1.1. *Misapplication of the OECD principles*

- (82) First, FFT submitted that there was no agreement with the Luxembourg tax administration on a fixed taxable income, but rather an agreement related only to a method to remunerate the treasury functions performed by FFT.
- (83) Second, FFT put forward arguments in support of the selection of TNMM as the most appropriate method. FFT explained that the absence of internal comparable transactions precluded the possibility to apply the CUP method. FFT further claimed that if it had used the pricing of its bonds, in the application of the CUP method, to set the transfer prices applied to the loans to group companies, it would have incurred losses.
- (84) FFT also noted that although transfer pricing is not an exact science, it had used its best efforts to estimate an arm's length remuneration for the activities.
- (85) Third, as regards the adequacy of FFT's equity, in absence of specific guidance in the Circular, to determine the appropriate level of equity at risk, FFT decided to analyse its equity to ascertain what proportion of capital was necessary to perform its activities and to bear its risks. For this purpose, FFT referred to the Basel II framework. FFT further explained that, as holding activities were not considered for the purpose of the contested tax ruling, it was justified to exclude FFT's shareholdings from its equity at risk. Besides, the amount of equity equivalent to the investment in FFT's subsidiaries had been excluded since it reflected non-portfolio investments in affiliates that were remunerated through dividends. However, dividends were not subject to transfer pricing analyses, which was consistent with the Basel II framework and Article 57 of Directive 2006/48/EC of the European Parliament and of the Council relating to the taking up and pursuit of the business of credit institutions (the Capital Requirement Directive, hereinafter referred to as 'CRD III') ⁽²⁵⁾.

⁽²⁵⁾ Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.6.2006, p. 1, as amended).

- (86) Fourth, with respect to the Commission's analysis of the treatment of intra-group receivables and the fact that the FFT APA disregarded all assets other than third-party assets, FFT submitted that the group credit rating was already incorporated in the group cost of funding sourced by FFT. As FFT and all associated group companies had a credit rating equivalent to Fiat S.p.A., there was no additional credit risk to FFT from lending to its associated group companies. In light of the above, FFT further clarified how the interest rate charged by FFT was set.
- (87) Fifth, according to FFT, it was justified to use the 6 % coefficient applied to its risk weighted assets as it corresponded to FFT's understanding of the Basel II framework transposed to non-bank financial institutions in certain EU jurisdictions (for instance, Italy) by local regulatory authorities in accordance with the CRD. FFT further claimed that risk weighting for asset exposure and operational risk were in line with the Basel II framework. As regards any possible change of the regulatory framework, FFT submitted that also under the Basel III framework⁽²⁶⁾ and Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms⁽²⁷⁾ ('CRD IV'), the relevant criteria were still valid.
- (88) Sixth, as regards the Commission's doubt on the beta used, FFT submitted that even when excluding certain comparable undertakings (such as national banks), the arm's length range stayed almost exactly the same. Since FFT acted as a treasury company, betas of financing companies were considered by FFT to be the most appropriate comparable. Moreover, the Circular made a clear reference to financial service providers. With respect to the adoption of the 25th percentile of the arm's length range, this was in line with the OECD Guidelines.
- (89) Seventh, FFT contested the Commission's doubt that the 0,87 % return on equity was too low. The excess capital, i.e. the capital that was not necessary to cover the risks assumed by FFT on its financing activity, was either on-lent in case another group company needed additional funding or used to fund operating expenses incurred by FFT while rendering financial services. As such, it should have been remunerated in line with short-term liquidity investments.

6.1.2. *The Commission's selectivity analysis*

- (90) FFT submitted that even if the Commission's analysis of the compliance with the arm's length principle was correct, the Opening Decision provided no evidence of FFT being treated more advantageously than any other Luxembourg taxpayer in a comparable legal and factual situation. The Opening Decision did not contain any comparison of the position of FFT with other Luxembourg taxpayers, such as the 21 other taxpayers whose APAs had been reviewed by the Commission. FFT had been entitled to an APA from the Luxembourg tax administration, like any other Luxembourg taxpayer having a real presence in Luxembourg.
- (91) Moreover, given that the aggregate Luxembourg corporate income tax rate for FFT was 28,8 % (for the financial year 2011), while in Italy the headline corporate tax rate was approximately 33 %, a higher profit earned by FFT would have resulted in higher deductible costs in Italy, since the majority of the FFT loans were to Fiat Finance S.p.A. Hence, it was not clear what kind of 'aid' the group as a whole obtained if FFT reported a lower profit in Luxembourg and was thus entitled to lower interest deductions in Italy.

⁽²⁶⁾ Basel Committee on Banking Supervision, International regulatory framework for banks (Basel III).

⁽²⁷⁾ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

6.2. FFT's second set of comments

6.2.1. *The APA did not confer an 'advantage'*

- (92) FFT's second set comments started off by explaining the importance of APAs in general and their acceptance both as a part of the general tax system, as well as their endorsement by the Luxembourg tax system. The FFT APA followed the guidance contained in the Circular and did not depart from the Luxembourg general tax system.
- (93) Luxembourg transfer pricing rules, which were the basis on which the Circular had been issued, were part of the general tax system. Luxembourg transfer pricing rules did not derogate from that general tax system, as they respected in practice the OECD Guidelines and were aimed at identifying an arm's length profit.
- (94) As regards the doubt of the Commission expressed in the Opening Decision on the choice of the transfer pricing methodology, FFT submitted that the TNMM was a generally accepted OECD-approved methodology that was consistent with the general tax system in Luxembourg.
- (95) According to FFT, tax authorities should be allowed a certain margin of appreciation when applying the TNMM, which, as far as the determination of the taxable profit was concerned, never leads to one single outcome, but to the identification of a range of valid results. Accordingly, the difference between the taxable income obtained by FFT (and accepted by the Luxembourg tax administration) and the alleged taxable income calculated by the Commission should not have been considered an advantage for State aid purposes. Such an advantage would only arise where the measure amounted to a flagrant departure from standard transfer pricing rules and went beyond the margin of appreciation of the tax administration. Otherwise, the Commission would interfere with the taxing powers of a Member State.
- (96) Finally, when assessing whether an advantage existed, FFT alleged that the Commission should have considered the overall 'group' effect. In that regard, no advantage existed for the Fiat group because any increase of the taxable base in Luxembourg was offset in full by an increased tax deduction in other European countries (in the latest years mainly in Italy).

6.2.2. *Lack of selectivity*

- (97) According to FFT, the reference system to assess selectivity could only include companies being subject to transfer pricing rules, i.e. dealing exclusively with related parties. This was recognised in the Commission decision on *Groepsrentebox* ⁽²⁸⁾, which stated, with respect to debt financing activities, that related companies were not in a legal and factual situation comparable to that of unrelated companies. Thus, to demonstrate selectivity, the Commission would have had to prove that FFT obtained an APA under conditions which were different from those of other Luxembourg group entities engaged in financing activities. However, the Circular explained that APAs were available to all finance group companies. Therefore, there was no selectivity.
- (98) According to FFT, tax rulings issued by the Luxembourg tax administration were not discretionary, since they followed the principles of the Circular, which specifically referred to the arm's length principle as defined in Article 9 of the OECD Model Tax Convention. Thus, the margin of appreciation of the Luxembourg tax administration, if any, was limited by the guidance offered in the Circular. In addition, this limited margin of appreciation left to the tax administration was inherent to the application of the OECD Guidelines. This, in itself, could not trigger the presence of State aid. Furthermore, the FFT APA was subject to periodical review.

⁽²⁸⁾ Commission Decision 2009/809/EC of 8 July 2009 on the *groepsrentebox* scheme which the Netherlands is planning to implement (C 4/07 (ex N 465/06)) (OJ L 288, 4.11.2009, p. 26) (hereinafter '*Groepsrentebox* decision').

- (99) FFT further argued that the Commission had not demonstrated that the application of the TNMM method in the FFT APA diverged from other rulings concluded by companies in situations comparable to FFT. According to FFT, there was no doubt that a comparable undertaking in a similar situation to FFT would have been able to request a ruling and to determine its taxable profits on the basis of the TNMM. Since FFT and comparable undertakings were subject to the same tax regime, it also became immaterial to establish whether the transfer pricing methodology applied to FFT was compliant with the OECD Guidelines (which, according to FFT, it was in any event).

6.2.3. *FFT's factual situation differed substantially from the decisions on Coordination Centres*

- (100) According to FFT, the Opening Decision illustrated a number of noteworthy differences vis-à-vis previous decisions in which the Commission challenged the application of a transfer pricing methodology (namely the cost plus method) as being the tax measure that gave rise to the selective advantage⁽²⁹⁾. In those decisions, the regime was available only to those taxpayers that met certain requirements, whereas in the Opening Decision the Commission challenged solely the application of the TNMM, i.e., the specific determination of the taxable profits, in the context of an APA procedure available to all Luxembourg taxpayers engaged in related-party financing.
- (101) Moreover, in those decisions, the income determined under the cost plus method could depart substantially from the statutory profit, which was not the case for FFT. Unlike in the case of FFT, the application of the transfer pricing methodology in the earlier decisions manifestly deviates from the OECD Guidelines. There was also no clear transfer pricing guidance in the OECD Guidelines about some of the activities performed by FFT (such as financial and treasury activities).
- (102) FFT further alleged that the Commission also did not consider that the FFT APA was based on an economic study in line with the OECD Guidelines, which showed that the profit determination was not arbitrary, and that the Luxembourg tax administration did not exercise any discretion.

7. COMMENTS FROM LUXEMBOURG ON THIRD PARTY COMMENTS

- (103) By letter of 5 January 2015, Luxembourg expressed its agreement with FFT's observations.

8. ASSESSMENT

- (104) According to Article 107(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods is incompatible with the internal market, in so far as it affects trade between Member States.
- (105) As held by the Union Court⁽³⁰⁾, the qualification of a measure as aid within the meaning of Article 107(1) of the Treaty therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and have the potential to affect trade between Member States.
- (106) For the purposes of this decision, it is in particular necessary to further examine the presence of a selective advantage.

⁽²⁹⁾ Commission Decision [2003] on the aid scheme implemented by Belgium – Tax ruling system for United States foreign sales corporations, OJ L 23, 28.1.2004, p. 14; Commission Decision [2003] on the aid scheme implemented by Belgium for coordination centres established in Belgium, OJ L 282, 30.10.2003, p. 25; Commission Decision [2002] on the State aid scheme C 49/2001 (ex NN 46/2000) – Coordination Centres – implemented by Luxembourg, OJ L 170, 9.7.2003, p. 20; Commission Decision [2003] on the aid scheme implemented by France for headquarters and logistics centres, OJ L 23, 28.1.2004, p. 1; Commission Decision [2002] on the aid scheme implemented by Germany for control and coordination centres, OJ L 177, 16.7.2003, p. 17.

⁽³⁰⁾ Case C-399/08 P *Commission v Deutsche Post*, ECLI:EU:C:2010:481, paragraph 39.

- (107) According to settled case-law, the condition relating to a selective advantage, 'requires a determination as to whether, under a particular legal regime, the national measure at issue is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory' ⁽³¹⁾.
- (108) More specifically, the Court of Justice has developed a three-step analysis to determine whether a particular tax measure is selective ⁽³²⁾. First, the common or normal tax regime applicable in the Member State is identified. This constitutes the 'reference system'. Second, it is determined whether the tax measure in question constitutes a derogation from that system, in so far as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure constitutes a derogation from the reference system, it is then established, in the third step of the analysis, whether that measure is justified by the nature or the general scheme of the reference system. A tax measure which constitutes a derogation from the application of the reference system may be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of that tax system ⁽³³⁾. If that is the case, the tax measure is not selective. The burden of proof in that third step lies with the Member State.
- (109) In the *FIAT* judgment ⁽³⁴⁾, the Court of Justice further clarified how to identify the relevant reference system. The Court of Justice indicated that the Commission should not consider parameters and rules that are external to the national tax system when determining the reference system. More specifically, in paragraph 96 of the *FIAT* judgment, the Court of Justice considered that '[p]arameters 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 within the meaning of Article 107(1) of the Treaty 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'.
- (110) In light of those principles, the Court of Justice concluded, in paragraph 117 of the *FIAT* judgment ⁽³⁵⁾, that the Closing Decision in that case had to be annulled in so far as the Commission had erred in law in finding that there was a selective advantage in the light of a reference framework comprising an arm's length principle which did not derive from a full examination of the relevant national tax law.
- (111) Pursuant to Article 266 of the Treaty, it is therefore incumbent on the Commission to take the necessary measures to comply with the *FIAT* judgment of the Court of Justice.
- (112) In that regard, the Commission recognises that, in the Opening Decision it had based its assessment of the selective advantage criterion on the assumption that the reference framework included an arm's length principle. It derived this principle both from prior Commission decisions ⁽³⁶⁾ and the case-law of the Court of Justice ⁽³⁷⁾, interpreted in accordance with the OECD Guidelines, as detailed in recitals 53 to 56 of the this Decision.

⁽³¹⁾ Joined Cases C-451/21 P and C-454/21 P *Luxembourg and Others v Commission*, ECLI:EU:C:2023:948, paragraph 106. See also C-172/03 *Heiser*, ECLI:EU:C:2005:130, paragraph 40.

⁽³²⁾ Joined Cases C-78/08 to C-80/08 *Paint Graphos*, ECLI:EU:C:2009:417, paragraphs 49 and 64-65. That three-step method of analysing the selectivity of aid was designed in order to reveal the concealed selectivity of advantageous tax measures that are apparently available to any undertaking: see Joined Cases C-649/20 P, C-658/20 P, C-662/20 P *Spain and Others v Commission*, ECLI:EU:C:2023:60, paragraph 48.

⁽³³⁾ Joined Cases C-78/08 to C-80/08 *Paint Graphos*, ECLI:EU:C:2009:417, paragraph 65.

⁽³⁴⁾ Joined Cases C-885/19 P and C-898/19 P *Commission v Fiat Chrysler Finance Europe*, ECLI:EU:C:2022:859.

⁽³⁵⁾ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v European Commission*, ECLI:EU:C:2022:859. See also the reasoning set out at paragraphs 81 to 112 of the judgment.

⁽³⁶⁾ Commission Decision [2003] on the aid scheme implemented by Belgium – Tax ruling system for United States foreign sales corporations, OJ L 23, 28.1.2004, p. 14; Commission Decision [2003] on the aid scheme implemented by Belgium for coordination centres established in Belgium, OJ L 282, 30.10.2003, p. 25; Commission Decision [2002] on the State aid scheme C 49/2001 (ex NN 46/2000) – Coordination Centres – implemented by Luxembourg, OJ L 170, 9.7.2003, p. 20; Commission Decision [2003] on the aid scheme implemented by France for headquarters and logistics centres, OJ L 23, 28.1.2004, p. 1; Commission Decision [2002] on the aid scheme implemented by Germany for control and coordination centres, OJ L 177, 16.7.2003, p. 17.

⁽³⁷⁾ Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416 (hereinafter '*Forum 187* case-law').

- (113) Accordingly, the four specific doubts outlined in recitals 63 to 80 of the Opening Decision and referenced above in section 4 were based on the existence of an autonomous arm's length principle ⁽³⁸⁾. In other words, the preliminary conclusion on the State aid character of the contested tax ruling, as laid down in the Opening Decision, stemmed from a deviation from or misapplication of an arm's length principle and rules which did not derive from a full examination of Luxembourg law.
- (114) The Commission acknowledges however, that in the *FIAT* judgment, the Court of Justice held that the Commission had not established, in the Closing Decision, the existence of a selective advantage for the benefit of FFT, within the meaning of Article 107(1) of the Treaty because, when establishing the reference system: *'the Commission applied an arm's length principle different from that defined by Luxembourg law. It thus confined itself to identifying, in the objective pursued by the general corporate tax system in Luxembourg, the abstract expression of that principle and to examining the tax ruling at issue without taking into account the way in which the said principle has actually been incorporated into that law with regard to integrated companies in particular'* ⁽³⁹⁾. That conclusion is also relevant for the analysis set out in the Opening Decision.
- (115) As regards the taxation of integrated companies, the Court of Justice further observed that, while Luxembourg's national law applicable to companies aims to achieve a reliable approximation of market prices – and that objective corresponds, in general terms, to that of the arm's length principle – it remains that, in the absence of harmonisation at EU level, the specific detailed rules for applying that principle are determined by national law and it is those national rules that must be considered when identifying the reference framework ⁽⁴⁰⁾. However, in the Opening Decision the Commission did not refer to an arm's length principle, as essentially enshrined in Article 164(3) L.I.R.
- (116) The Court of Justice also noted that it cannot be inferred from the *Forum 187* case-law that the Court intended to establish an autonomous arm's length principle applicable independently of its incorporation into national law when assessing tax measures under Article 107(1) of the Treaty ⁽⁴¹⁾.
- (117) Moreover, the Court of Justice stated that even assuming that there is an international consensus on the arm's length principle, and that 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'* ⁽⁴²⁾.
- (118) In light of those findings and conclusions of the Court of Justice in the *FIAT* judgment, it must be concluded that the reference system as defined in recitals 59 to 63 of the Opening Decision, which is based exclusively on an autonomous arm's length principle, derived from the Commission's decisions and *Forum 187* case-law as interpreted by the OECD Guidelines, cannot constitute an appropriate starting point for the State aid analysis of the existence of a selective advantage in the present case. Moreover, the Opening Decision did not express doubts based on Article 164(3) L.I.R and the Circular.
- (119) As recalled in the *FIAT* judgment, generally an error in determining the rules actually applicable under the relevant national law and, therefore, in identifying the reference system in the light of which the tax ruling at issue had to be assessed necessarily invalidates the entirety of the reasoning relating to the existence of a selective advantage ⁽⁴³⁾.

⁽³⁸⁾ See Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v European Commission*, ECLI:EU:C:2022:859, paragraph 104.

⁽³⁹⁾ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v European Commission*, ECLI:EU:C:2022:859, paragraph 91.

⁽⁴⁰⁾ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v European Commission*, ECLI:EU:C:2022:859, paragraph 93.

⁽⁴¹⁾ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v European Commission*, ECLI:EU:C:2022:859, paragraph 104.

⁽⁴²⁾ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v European Commission*, ECLI:EU:C:2022:859, paragraph 96.

⁽⁴³⁾ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v European Commission*, ECLI:EU:C:2022:859, paragraph 118.

- (120) As a result, neither the specific doubts raised in the Opening Decision, nor the underlying reasoning set out therein on the definition of reference system, allow the Commission to establish that, by the contested tax ruling, Luxembourg granted a selective advantage to FFT. Furthermore, in the Opening Decision, the Commission did not assess the presence of a derogation by the contested tax ruling in light of any other reference system nor did it raise doubts concerning the existence of aid on other grounds related to the presence of a selective advantage.
- (121) In the present Decision, therefore, the Commission must set aside the doubts expressed in the Opening Decision as to the existence of a selective advantage. As the criteria for finding the existence of State aid pursuant to Article 107(1) of the Treaty are cumulative, there is no need to assess the other criteria set out in that provision.

9. CONCLUSION

- (122) In light of the foregoing, the Commission concludes that the contested tax ruling issued by Luxembourg in favour of FFT does not constitute State aid within the meaning of Article 107(1) of the Treaty.

HAS ADOPTED THIS DECISION:

Article 1

The contested tax ruling of 3 September 2012 of the Grand Duchy of Luxembourg in favour of FFT does not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Grand Duchy of Luxembourg.

Done at Brussels, 28 November 2024.

For the Commission
Margrethe VESTAGER
Executive Vice-President