



## PwC's EU Direct Tax Group

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# EU Direct Tax Newsalert

## General Court of EU confirms European Commission's final decision in the GDF Suez (now Engie) State aid case

On 12 May 2021, the General Court of the European Union ("GC") rendered its judgments (T-516/18 and T-525/18) regarding the action brought by Engie group companies and Luxembourg against the final State aid decision of the European Commission (EC) of 20 June 2018 (SA.44888).

### Background and facts

The EC investigation was related to rulings issued by the Luxembourg tax authorities between 2008 and 2014, which were confirming the tax treatment of certain mandatorily convertible instruments (the "instruments") issued by two Luxembourg group subsidiaries ("borrowers") to two other Luxembourg companies of the Group ("lenders").

The rulings were confirming the following tax treatment:

- the borrowers treated the instruments as debt and recorded in their accounts accretions which were deductible at their level;
- the lenders entered into a forward sale agreement with a third entity with the receipt being subject to a participation exemption

In its decision, the EC considered that the rulings granted State aid by incorrectly lowering the tax basis of the Luxembourg companies.

More specifically, the EC decision argued that the rulings endorsed an inconsistent treatment of the same amounts as representing deductible expenses on the instruments at the level of the borrowers and income exempt under the domestic participation exemption at the level of the creditors.

### GC decision

The GC approved the EC's approach of analyzing this intra-group financing structure by looking at its final economic result, disregarding the specific tax treatment applicable under the Luxembourg law at the time for each individual transaction.

For the GC, these transactions were designed to be implemented in three successive but interdependent stages achieving a single economic result.

The GC considered that the EC was entitled to determine that the combined effect of the transactions derogated from the reference framework and represented a selective advantage because the lenders were allowed to benefit from the provisions of the Luxembourg domestic participation exemption on amounts which corresponded from an economic perspective to deductible expenses incurred by the borrowers in relation to the instruments.

In a secondary line of argument the EC ascertained in their interpretation that the criteria laid down by Luxembourg law in order to determine the existence of an abuse of law were met and hence the group of companies received preferential tax treatment owing to the non-application in the rulings of the provision relating to the abuse of law.

In the light of the objective pursued by the provision relating to abuse of law, namely to combat abusive practices in tax matters, the GC considered that the holding companies were in the same factual and legal situation as Luxembourg taxpayers that cannot reasonably expect to benefit from the non-application of the abuse of law provisions in cases where the conditions for its application (in the interpretation of the GC) have been satisfied and hence the holding companies benefitted from a selective advantage.

On this basis, the GC concluded on the existence of State aid under article 107 TFEU.

### Takeaway

This decision is of importance because it confirms for the first time that the EC can determine the existence of a selective advantage for state aid purposes on the grounds of non-application of a local concept of abuse of law by the local authorities. It remains to be seen whether the judgement will be appealed.

