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<sup>(1)</sup> Text with EEA relevance.

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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## II

*(Non-legislative acts)*

## DECISIONS

**COMMISSION DECISION (EU) 2019/421****of 20 June 2018****on State aid SA.44888 (2016/C) (ex 2016/NN) implemented by Luxembourg in favour of ENGIE***(notified under document C(2018) 3839)***(Only the French version is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

**1. PROCEDURE**

- (1) By letter of 23 March 2015, the Commission sent a request for information to the Grand Duchy of Luxembourg ('Luxembourg') <sup>(2)</sup> regarding its tax ruling practice in relation to the Engie group (then GDF Suez) <sup>(3)</sup>. In that letter, the Commission requested Luxembourg to provide all tax rulings granted to any entity of that group from 2004 until the date of the letter, addressed to that group or to any entity of that group which were in place at that time or which had been in place in the previous 10 years, as well as annual accounts of that group and the legal entities of that group for 2011, 2012 and 2013, and copies of tax declarations.
- (2) On 25 June 2015, Luxembourg replied to that request by submitting information about the tax rulings issued by the Luxembourg tax administration in favour of several companies of the Engie group resident in Luxembourg, including GDF Suez LNG Supply S.A. ('LNG Supply') <sup>(4)</sup> and GDF Suez Treasury Management S.à.r.l. ('GSTM') <sup>(5)</sup>. In particular, Luxembourg provided two tax ruling requests and their respective approvals that concerned two almost identical intra-group transactions related to transfers of assets from other Engie group companies to,

<sup>(1)</sup> OJ C 36, 3.2.2017, p. 13.

<sup>(2)</sup> That letter was sent under reference SA.37267 (2013/CP) - Pratiques en matière de ruling fiscal — Luxembourg.

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

<sup>(4)</sup> Renamed in 2015 as Engie LNG Supply, S.A. 'LNG' stands for liquefied natural gas.

<sup>(5)</sup> Renamed in 2015 as Engie Treasury Management S.à.r.l.

respectively, LNG Supply and GSTM. In both cases, the transfers were financed by interest-free mandatorily convertible loans denominated as 'ZORA' <sup>(6)</sup> (respectively, the 'LNG ZORA' and the 'GSTM ZORA'; collectively, the 'ZORAs') and by Prepaid Forward Sale Contracts (respectively the 'LNG Forward Contract' and the 'GSTM Forward Contract'; collectively, the 'Forward Contracts').

- (3) By letter of 1 April 2016, the Commission indicated that, based on the information submitted by Luxembourg, it could not exclude that the tax rulings issued in favour of those Engie group companies may have included incompatible State aid. Consequently, it requested Luxembourg to provide reasons why those measures would not be selective or why they could otherwise be justified under Union State aid law and to submit further information and clarifications.
- (4) By letter of 3 May 2016, the Commission reminded Luxembourg to provide the information referred to in recital 3.
- (5) On 23 May 2016, Luxembourg replied to the Commission's request for information of 1 April 2016.
- (6) On 19 September 2016, the Commission adopted the decision to open a formal investigation procedure under Article 108(2) of the Treaty on the tax treatment granted to Engie on the basis of the tax rulings issued by Luxembourg on the grounds that it could constitute State aid within the meaning of Article 107(1) of the Treaty (the 'Opening decision') <sup>(7)</sup>.
- (7) On 21 November 2016, Luxembourg submitted by letter its comments on the Opening decision and the requested information.
- (8) On 3 February 2017, the Opening decision was published in the *Official Journal of the European Union* <sup>(8)</sup>. The Commission invited interested parties to submit their comments on the measure.
- (9) On 27 February 2017, the Commission received observations from Engie on the Opening decision. By letter of 10 March 2017, the Commission forwarded them to Luxembourg, which was given the opportunity to react.
- (10) By letter of 22 March 2017, following observations by Luxembourg and Engie, the Commission requested Luxembourg to provide additional information.
- (11) On 10 April 2017, Luxembourg submitted a letter indicating that the observations made by Engie are in line with its own observations.
- (12) On 12 May 2017, Luxembourg submitted the information requested on 22 March 2017.
- (13) On 1 June 2017, a meeting was held between the Commission services, Engie and Luxembourg. The content of the meeting was recorded in minutes agreed between the Commission and Luxembourg. Following the meeting, Luxembourg sent additional information on 16 June 2017.
- (14) By letter of 11 December 2017, following observations made by Luxembourg and Engie during the meeting of 1 June 2017, the Commission clarified certain aspects of the investigation ('Letter of 11 December 2017') and requested additional information. The Commission invited Luxembourg to forward a copy of that letter to Engie.

<sup>(6)</sup> Although the precise meaning of the acronym ZORA is not specified in the file, and was not clarified by Luxembourg, the Commission presumes it to stand for 'Zero-intérêts Obligation Remboursable en Actions'.

<sup>(7)</sup> Commission decision of 19 September 2016 in State aid SA.44888 (2016/NN) (ex 2016/EO), 'Possible State aid in favour of GDF SUEZ' (OJ C 36, 3.2.2017, p. 13).

<sup>(8)</sup> Cf. footnote 1.

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

## 2. BACKGROUND

### 2.1. THE ENGIE GROUP

- (16) The Engie group (formerly GDF Suez group) consists of Engie S.A., a company established in France, and all companies directly or indirectly controlled by Engie S.A. (collectively referred to as 'Engie'). Engie is the result of a merger in 2008 between the French groups GDF and Suez (formerly, Lyonnaise des Eaux) <sup>(9)</sup>. Engie is headquartered in France. Engie S.A. is listed on the Paris, Brussels and Luxembourg stock exchanges <sup>(10)</sup>.
- (17) Engie is present in three main sectors: power production, natural gas and liquefied natural gas, and energy efficiency services. Engie is mainly active in the production and supply of energy <sup>(11)</sup> and energy trading, exploration, production, supply, transportation and distribution of natural gas, energy efficiency services, and energy infrastructure.
- (18) Engie employs 153 090 people worldwide in 70 countries <sup>(12)</sup>. In 2016, the revenues of Engie amounted to EUR 66,6 billion <sup>(13)</sup>. Of the total revenues recorded by the group, EUR 52,2 billion were realised in Europe <sup>(14)</sup>. In 2016, 67,3 % of the group's earnings before interest, tax, depreciation and amortisation (EBITDA) were generated in Europe <sup>(15)</sup>.
- (19) In Luxembourg, Engie is present through various legal entities, some of which are involved in the transactions which are the object of the contested tax rulings. *Compagnie Européenne de Financement C.E.F. S.A.* ('CEF') <sup>(16)</sup> is an Engie subsidiary incorporated in Luxembourg in 1933. The purpose of the company is the acquisition of participating interests in Luxembourg and foreign entities and the management, exploitation and control of such interests <sup>(17)</sup>. It is primarily responsible for providing inter-company guarantees and loans for subsidiaries of the group. CEF's income is derived from the interest and fees charged for the provision of these loans and guarantees <sup>(18)</sup>.
- (20) GSTM is a Luxembourg company wholly-owned by CEF. It conducts treasury management and financing activities for Engie from Luxembourg. According to the tax ruling request of 15 June 2012, 'in general, GSTM grants loans in various denominations (notably EUR and USD) to related companies and carries out a cash pooling activity [...]. The cash pooling activity of GSTM generally varies between EUR [2-7] and [7-12] EUR 10 billion' <sup>(19)</sup>.
- (21) GDF Suez LNG Holding S.à.r.l. ('LNG Holding') <sup>(20)</sup> is an Engie subsidiary incorporated in Luxembourg in 2009. The object of the company is the acquisition of participating interests in Luxembourg and foreign entities and the management of such participations <sup>(21)</sup>. LNG Holding is wholly-owned by CEF.

<sup>(9)</sup> See Engie's website (<http://www.engie.com/en/group/history-engie-group/>).

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

<sup>(11)</sup> In 2014, it operated close to 650 power plants globally (Engie, Key Figures, [http://library.engie.com/uid\\_3b0d9abd-abf7-404d-913f-0c30f10eb8d0/beevirtua/beevirtua.html#app=3d20&9557-source=xmlConfs/init.xml&adf3-lang=en&ccb3-pageId=0](http://library.engie.com/uid_3b0d9abd-abf7-404d-913f-0c30f10eb8d0/beevirtua/beevirtua.html#app=3d20&9557-source=xmlConfs/init.xml&adf3-lang=en&ccb3-pageId=0)).

<sup>(12)</sup> At 31 December 2016 ([http://www.engie.com/wp-content/uploads/2017/03/chifres-cles-2016-v1\\_va.jpg](http://www.engie.com/wp-content/uploads/2017/03/chifres-cles-2016-v1_va.jpg)).

<sup>(13)</sup> ENGIE, Key Figures ([http://www.engie.com/wp-content/uploads/2017/03/chifres-cles-2016-v1\\_va.jpg](http://www.engie.com/wp-content/uploads/2017/03/chifres-cles-2016-v1_va.jpg)).

<sup>(14)</sup> ENGIE, Results 2016, Appendices FY 2016 (<http://www.engie.com/en/investors/results/2016-results/>). EUR 3,8 billion were generated in Latin America, EUR 4,7 billion in North America, EUR 5,5 billion in Asia, Middle East and Oceania and EUR 0,3 billion in Africa.

<sup>(15)</sup> *Ibid.* 15,1 % in Latin America, 5,9 % in North America and 11,6 % in the rest of the world.

<sup>(16)</sup> Renamed Engie Invest International S.A. in 2015.

<sup>(17)</sup> See CEF unaudited statutory accounts as of 31 December 2014.

<sup>(18)</sup> See <https://www.engie.com/wp-content/uploads/2015/06/gsii-co.pdf>.

<sup>(19)</sup> See tax ruling request of 15 June 2012, page 2.

<sup>(20)</sup> Renamed Engie LNG Holding S.à.r.l. in 2015.

<sup>(21)</sup> See LNG Holding statutory accounts as of 31 December 2013.

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

## 2.2. THE CONTESTED TAX RULINGS

### 2.2.1. INTRODUCTION

- (23) The present Decision concerns two sets of tax rulings issued by the Luxembourg tax administration in favour of Engie group companies (the 'contested tax rulings'). The contested tax rulings concern two similar intragroup transactions implemented by Engie between different companies of the group. In both cases, Engie transfers a set of assets constituting a fully functional business activity to a subsidiary in Luxembourg which will subsequently run this business activity.
- (24) The payment of the price by the subsidiary is financed by means of a 15-year interest-free mandatorily convertible loan (the ZORA) granted by an intermediary group company resident in Luxembourg. The ZORA does not bear any periodic interest but, at conversion, the subsidiary will pay to the lender shares representing the nominal of the ZORA plus a 'bonus' consisting in all the profits realised by the subsidiary during the life of the ZORA minus a limited margin <sup>(24)</sup> agreed with the Luxembourg tax authorities (the amount of this 'bonus' is referred to in the contested rulings and tax returns of the companies as the 'ZORA Accretions') <sup>(25)</sup>.
- (25) In turn, the intermediary entity simultaneously finances this loan by means of a Prepaid Forward Sale Contract (the Forward Contract) entered into with a holding also resident in Luxembourg which is the sole shareholder of both the subsidiary and the intermediary entity. Under the Forward Contract, the holding pays to the intermediary company an amount equal to the nominal of the ZORA against the acquisition of the rights to the shares that the subsidiary will issue at conversion of the ZORA. Therefore, if the subsidiary realises profits during the life of the ZORA, the holding will receive at conversion of the ZORA the shares incorporating the value of the ZORA Accretions. Consequently, the holding provides to the subsidiary the financing for the acquisition of the assets by means of the Forward Contract and the ZORA.
- (26) The contested tax rulings agree to the following tax treatment of the companies involved: the subsidiary will deduct every year provisions for the ZORA Accretions to be paid at conversion. Therefore, the subsidiary will not be taxed except for the limited margin agreed with the tax authorities. When the holding realises the ZORA Accretions <sup>(26)</sup>, this profit will be tax exempt pursuant to the application of the Luxembourg participation exemption regime, which allows for the non-taxation, under certain conditions, of profit stemming from participations held in other companies. The intermediary entity is not taxed either since the profit realised from the conversion of the ZORA (the ZORA Accretions) is compensated by a loss of the same amount resulting from the Forward Contract <sup>(27)</sup>. The final result is that the ZORA Accretions are deducted at the level of the subsidiary and

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

<sup>(23)</sup> On 11 April 2018, the Commission adopted a Decision, pursuant to Article 6(1)(b) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1), not to oppose to the acquisition by Total S.A. of sole control over parts of the LNG business of Engie, including LNG Supply.

<sup>(24)</sup> Less than 1 % of the profit actually realised by the subsidiary from its commercial activities.

<sup>(25)</sup> In case the subsidiary realises losses during the life of the ZORA, the ZORA Accretions will be negative and will reduce the nominal of the ZORA.

<sup>(26)</sup> For instance, because it cancels the shares it receives under the Forward Contract.

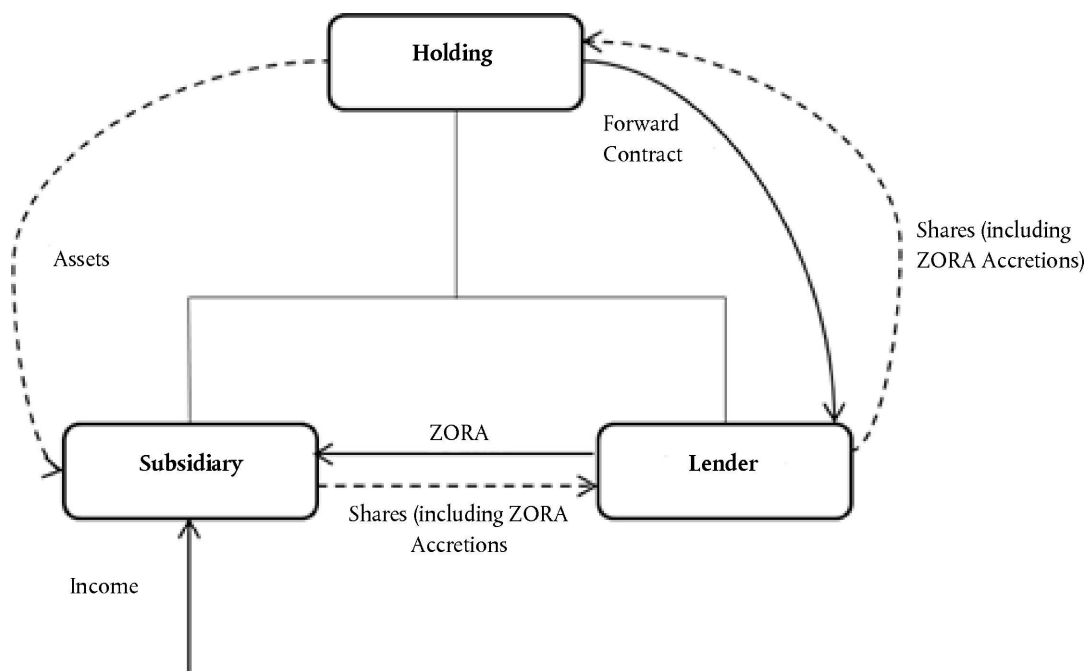
<sup>(27)</sup> Although the contested tax rulings stipulated that the intermediary entity would not be taxed in application of a special provision under Luxembourg tax law (Article 22bis) that allows the deferment of taxation of capital gains resulting from the conversion of loans into participations,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

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

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

Figure 1

**Illustration of the structures set up in the contested tax rulings**



**2.2.2. OVERVIEW OF THE CONTESTED TAX RULING**

- (28) This tax treatment has been endorsed in two sets of tax rulings concerning two different structures set up by Engie.
- (29) The first set of tax rulings concerns the transfer of the activity concerning the purchase, sale and trading of LNG gas and gas derivative products ('LNG Business') <sup>(29)</sup> from the Luxembourg company Suez LNG Trading S.A. ('LNG Trading') to LNG Supply. It includes five tax rulings issued by the Luxembourg tax administration following tax ruling requests submitted by the tax advisor of Engie ('tax advisor') on behalf of different companies of Engie (collectively, the 'LNG tax rulings').

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

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

<sup>(28)</sup> In fact, the subsidiary is only taxed on less than 1 % of the profit actually realised from its commercial activities.

<sup>(29)</sup> See recital 22.

- (3) A tax ruling request dated 3 March 2009 ('2009 LNG tax ruling request'), partially modifying the structure set up in the 2008 LNG tax ruling request. This tax ruling request was approved on the same day by the Luxembourg tax administration.
- (4) A tax ruling request dated 9 March 2012 ('2012 LNG tax ruling request'), which clarifies certain accounting terms used to determine the margin on which LNG Supply is taxed. This tax ruling request was approved on the same day by the Luxembourg tax administration.
- (5) Finally, a tax ruling request dated 20 September 2013 with the object of clarifying the tax treatment of a partial conversion of the LNG ZORA ('LNG conversion tax ruling request'). This tax ruling request was accepted by the Luxembourg tax administration by letter of 13 March 2014 ('LNG conversion tax ruling').
- (30) The second set of tax rulings concerns the transfer of the treasury management and financing activities ('Financing and Treasury Business') <sup>(30)</sup> from CEF to GSTM. It includes two tax rulings issued by the Luxembourg tax administration following tax ruling requests submitted by the tax advisor on behalf of different companies of Engie (collectively, the 'GSTM tax rulings').
- (1) The first tax ruling was issued by the Luxembourg tax administration on 9 February 2010 ('2010 GSTM tax ruling'). It follows a tax ruling request of the same date ('2010 GSTM tax ruling request') concerning the tax treatment of the contracts used to finance the transfer of the Financing and Treasury Business from CEF to GSTM (the GSTM ZORA and the GSTM Forward Contract).
- (2) The 2010 GSTM tax ruling was complemented by a tax ruling request dated 15 June 2012 concerning, inter alia, a potential increase in the amount of the GSTM ZORA ('2012 GSTM tax ruling request'). This tax ruling request was approved on the same day by the Luxembourg tax administration ('2012 GSTM tax ruling').
- (31) The holdings in each of the structures set up in the LNG tax rulings and in the GSTM tax rulings are, respectively, LNG Holding and CEF (collectively, the 'Holdings'). The intermediary entities granting the ZORAs are, respectively, GDF Suez LNG (Luxembourg) S.à.r.l. ('LNG Luxembourg') and Electrabel Invest Luxembourg SA ('EIL', collectively with LNG Luxembourg, 'Lenders'). Finally, the subsidiaries acquiring and operating the LNG Business and the Financing and Treasury Business are, respectively, LNG Supply and GSTM (collectively the 'Subsidiaries').

## 2.2.3. DETAILED DESCRIPTION OF THE LNG TAX RULINGS

### 2.2.3.1. *The transactions described in the LNG tax rulings*

- (32) According to the 2008 LNG tax ruling request, LNG Trading will incorporate two new taxable Luxembourg companies: LNG Luxembourg and LNG Supply. The 2008 LNG tax ruling request stipulated that the LNG Business would be sold to LNG Luxembourg which would in turn sell it to LNG Supply <sup>(31)</sup>. However, this structure was later modified: according to the 2009 LNG tax ruling request, CEF acquired first LNG Trading's shares, and incorporated LNG Luxembourg, LNG Supply and LNG Holding. LNG Holding took then the role of LNG Trading <sup>(32)</sup> in the structure <sup>(33)</sup>.

<sup>(30)</sup> See recital 20.

<sup>(31)</sup> See 2008 LNG tax ruling request, Section 1.

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

<sup>(33)</sup> This change of structure in the transfer of assets has however no impact on the tax treatment of the different companies.

(33) The structure is implemented as follows:

- (1) LNG Supply acquires LNG Trading's business activity (the LNG Business) for an estimated price of approximately USD 750 million.
- (2) LNG Supply finances the purchase price by means of an USD denominated 15-year interest-free mandatorily convertible loan (the LNG ZORA) granted by LNG Luxembourg. At conversion <sup>(34)</sup>, LNG Supply issues shares ('LNG Supply Shares') incorporating the nominal amount of the ZORA plus/minus the ZORA Accretions.
- (3) In turn, LNG Luxembourg finances the investment in the LNG ZORA by means of the LNG Forward Contract entered into with LNG Holding. Under that contract, LNG Luxembourg agrees to transfer to LNG Holding the LNG Supply Shares. The price for the LNG Supply Shares corresponds to the nominal amount of the LNG ZORA <sup>(35)</sup>.

#### 2.2.3.2. *The agreements signed by the parties*

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

- (1) A Business Transfer Agreement entered into by LNG Trading and LNG Supply on 30 October 2009 ('LNG Transfer Agreement') <sup>(36)</sup> whereby the former agrees to transfer to the latter the LNG Business for a price of USD 657 million <sup>(37)</sup> against two promissory notes issued by LNG Supply (as borrower) in favour of LNG Trading (as lender) of, respectively, USD 11 000 000 and USD 646 000 000 <sup>(38)</sup>.
- (2) A Mandatorily Exchangeable Loan Agreement entered into by LNG Luxembourg and LNG Supply on 30 October 2009 ('LNG ZORA Agreement') <sup>(39)</sup>. Under this agreement, LNG Luxembourg grants a loan to LNG Supply <sup>(40)</sup> repayable by the issuance of the LNG Supply Shares <sup>(41)</sup>. The loan has a maximum term of 15 years, i.e. it expires on 30 October 2024 <sup>(42)</sup>. At the end of that period, it shall be converted into shares, unless converted into shares earlier by any party with the written consent of the other party <sup>(43)</sup>. The 'issue price' of the loan is USD 646 million <sup>(44)</sup>. The conversion price will be equal to the 'issue price' plus the ZORA Accretions accumulated until conversion <sup>(45)</sup>. As explained in 2.2.3.6, the LNG ZORA was partially converted in 2014.
- (3) A Prepaid Forward Share Purchase Agreement entered into by LNG Holding and LNG Luxembourg on the same date (the LNG Forward Contract) <sup>(46)</sup>. According to this agreement, LNG Holding purchases all the rights of LNG Luxembourg in the LNG Supply Shares for a price of USD 646 million <sup>(47)</sup>, i.e. the same amount as the 'issue price' of the LNG ZORA. LNG Supply Shares are to be transferred to LNG Holding on the date of their issuance <sup>(48)</sup>.

#### 2.2.3.3. *Tax treatment of LNG Supply*

(35) According to the 2008 LNG tax ruling request, as accepted by the Luxembourg tax administration, the yearly profit that LNG Supply generates will be equal to a margin agreed with the Luxembourg tax administration

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

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

<sup>(36)</sup> Submitted by Luxembourg on 16 June 2017.

<sup>(37)</sup> See LNG Transfer Agreement, clause 2.1.

<sup>(38)</sup> See LNG Transfer Agreement, clauses 2.1, 3, and 4.3.

<sup>(39)</sup> Submitted by Luxembourg on 21 November 2016.

<sup>(40)</sup> See LNG ZORA Agreement, clause 2.

<sup>(41)</sup> See LNG ZORA Agreement, clause 5.

<sup>(42)</sup> See LNG ZORA Agreement, clause 4.

<sup>(43)</sup> See LNG ZORA Agreement, clauses 4 and 5.

<sup>(44)</sup> See LNG ZORA Agreement, clause 2.

<sup>(45)</sup> See LNG ZORA Agreement, clause 5.2, cf. with definitions in clause 1.

<sup>(46)</sup> Submitted by Luxembourg on 21 November 2016.

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

<sup>(48)</sup> See LNG Forward Contract, clause 3.

(‘LNG Margin’). Therefore, LNG Supply will only be taxed on that margin. The difference between the profit actually generated each year by LNG Supply and the LNG Margin (the ZORA Accretions) is considered a deductible expense related to the LNG ZORA <sup>(49)</sup>.

- (36) The LNG Margin is set in the 2008 LNG tax ruling request at an amount corresponding to ‘an overall net spread of 1/[(50-100) %] of the value of the gross amount of assets as shown in [LNG Supply’s] balance sheet, such net spread however not being lower than [0,00-0,50] % of the annual gross turn-over derived from the Enterprise’ <sup>(50)</sup>. According to the 2008 LNG tax ruling request, ‘the [LNG M]argin will qualify as arm’s length’ because LNG Supply will not ‘incur foreign exchange and/or bad debt risk on its trade’ <sup>(51)</sup>. The 2008 LNG tax ruling request further explains that ‘the [LNG Supply] gross income [...], minus all operational expenses incurred and minus the expense on the ZORA is approximately the [LNG] Margin’ <sup>(52)</sup>.
- (37) In other words, before the conversion of the ZORA, the tax base of LNG Supply is limited to the LNG Margin. The conversion has no impact on the tax base of LNG Supply as the amounts of the ZORA Accretions have been deducted by LNG Supply each year before the conversion.

#### 2.2.3.4. Tax treatment of LNG Luxembourg

- (38) The 2008 LNG tax ruling request, as accepted by the Luxembourg tax administration, allows LNG Luxembourg, during the life of the LNG ZORA, either to maintain the value of the ZORA in its accounts at book value <sup>(53)</sup> or, alternatively, to increase (or decrease) its value from its acquisition price to the expected redemption price <sup>(54)</sup>. Therefore, during the lifetime of the LNG ZORA, LNG Luxembourg can choose not to book any taxable income or tax deductible expense related to the ZORA. As it will be explained in recital 52 below, LNG Luxembourg chose to maintain the value of the ZORA at book value.
- (39) At conversion, LNG Luxembourg will receive the LNG Supply Shares, the value of which will incorporate the issue price of the ZORA plus the ZORA Accretions accumulated until the date of the conversion. According to the 2008 tax ruling request, the conversion is governed by the special regime laid down in Article 22bis of the Luxembourg Income Tax Code (*loi modifiée du 4 décembre 1967 concernant l’impôt sur le revenu*, ‘LIR’), unless LNG Supply chooses not to apply it <sup>(55)</sup>. According to this provision, the conversion of the loan into shares will not give rise to any capital gain for tax purposes <sup>(56)</sup>. Therefore, the ZORA Accretions received at conversion by LNG Luxembourg will not be subject to tax at conversion <sup>(57)</sup>.

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

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

<sup>(51)</sup> See 2008 LNG tax ruling request, page 5, paragraph 6 and, for the explanation, page 3.

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

<sup>(53)</sup> See 2008 LNG tax ruling request, page 3.

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

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

<sup>(56)</sup> See 2008 LNG tax ruling request, paragraph 7, page 5.

<sup>(57)</sup> See 2008 LNG tax ruling request, paragraph 7, page 5.

### 2.2.3.5. Tax treatment of LNG Holding

- (40) According to the 2008 LNG tax ruling request, as accepted by the Luxembourg tax administration, LNG Holding will record the payment under the Forward Contract in its accounts as 'Financial Fixed Assets' <sup>(58)</sup>. The 2008 LNG tax ruling request explains that those assets 'will be and will continue to be valued at cost price' <sup>(59)</sup>. Therefore, LNG Holding will not book any taxable income or any tax deductible expense before the conversion of the ZORA and the transfer by LNG Luxembourg of the newly issued LNG Supply Shares.
- (41) The 2008 LNG tax ruling request also asks for confirmation that 'for purposes of Article 166 LIR [...] the participation purchased by [LNG Holding] under the [LNG] Forward Contract will qualify as such as *per the moment the [LNG] Forward Contract is concluded*' <sup>(60)</sup> and that 'any income (dividends and capital gains) derived by and from Luxembourg companies will be exempt on the basis of Article 166 LIR' <sup>(61)</sup>. As explained in Section 2.3.2, Article 166 LIR is the provision of the corporate income tax law that governs the participation exemption in Luxembourg. Under the participation exemption regime, income stemming from the participations held in other entities, such as shares, is tax exempt provided that certain conditions are met.
- (42) Consequently, any taxable income related to the ownership of the LNG Supply Shares issued in the framework of the LNG ZORA conversion will be tax exempt at the level of LNG Holding provided that the requirements of Article 166 LIR are met.

### 2.2.3.6. The LNG conversion tax ruling

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

### 2.2.3.7. Implementation of the LNG tax rulings

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

#### 2.2.3.7.1. LNG Supply

- (45) LNG Supply's 2010 statutory accounts indicate that a 'loan agreement mandatorily exchangeable into shares between LNG Luxembourg and LNG Supply' was entered into in 2009 for an amount of USD 646 million with a 15-year maturity from 30 October 2009 <sup>(64)</sup>.
- (46) The LNG ZORA is reported as a liability in the balance sheet and included in LNG Supply's tax return for an amount equal to the nominal of the ZORA (USD 646 million) from 2009 to 2013 <sup>(65)</sup>. In 2014, the amount was reduced by USD 193,8 million to USD [300-600] million following the partial conversion carried out that year <sup>(66)</sup>.

<sup>(58)</sup> See 2008 LNG tax ruling request, page 3.

<sup>(59)</sup> See 2008 LNG tax ruling request, page 3.

<sup>(60)</sup> See 2008 LNG tax ruling request, page 4 (emphasis added by the Commission).

<sup>(61)</sup> See 2008 LNG tax ruling request, page 9.

<sup>(62)</sup> See 2008 LNG conversion tax ruling request, section 3.1.

<sup>(63)</sup> See 2008 LNG conversion tax ruling request, section 3.2.

<sup>(64)</sup> See LNG Supply 2010 statutory accounts, note 9.

<sup>(65)</sup> See, for each year, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial*, Annex 1.

<sup>(66)</sup> See *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial* for 2014, Annex 1.

- (47) For each year, an amount equal to the yearly ZORA Accretions is recorded as a liability of LNG Supply <sup>(67)</sup> against the corresponding expense in the profit and loss account <sup>(68)</sup> and has consequently been deducted from LNG Supply's tax base. The accumulated ZORA Accretions reported in LNG Supply's tax returns are presented in Table 1. The reduction of the accumulated ZORA Accretions by EUR 193,8 million in 2014 is due to the impact of the partial conversion of the LNG ZORA, which is also partially offset by additional ZORA Accretions for the year <sup>(69)</sup>.

Table 1

**Accumulated ZORA Accretions recorded in LNG Supply's tax returns**

|                                           | 2009 | 2010 | 2011  | 2012      | 2013      | 2014      | 2015 | 2016 |
|-------------------------------------------|------|------|-------|-----------|-----------|-----------|------|------|
| Accumulated ZORA Accretions (USD million) | 10,9 | 46,8 | 165,6 | [350-400] | [650-700] | [450-550] | 0    | 0    |

- (48) LNG Supply is taxed on the LNG Margin. As illustrated in for the year 2011 <sup>(70)</sup>, the LNG Margin is calculated as  $[1/(50-100) \%$  of the total average assets of the company with a minimum of  $[0,0-0,50] \%$  of the annual gross turnover, in line with the 2008 LNG tax ruling. The average value of assets financing the ZORA amounted in 2011 to USD 752 703 699. Therefore, the  $[1/(50-100) \%$  margin amounted to USD [100 000-150 000]. The turnover recorded was USD 1 573 579 569, therefore the margin of  $[0,0-0,50] \%$  of this amount was USD [3 500 000-4 000 000]. As such, this latter amount was deemed to be LNG Supply's tax base for the 2011 period <sup>(71)</sup>. LNG Supply accordingly paid EUR [500 000-1 500 000] <sup>(72)</sup> of corporate income tax for tax year 2011.

Figure 2

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

**ZORA accretion**

The amount of the ZORA accretion as indicated in the annual accounts is not in line with the advance agreements signed by the tax authorities on 9 September 2008 and March 2012.

Consequently, a tax balance sheet was drawn up in order to record the correct amount. In accordance with the advance agreement, the company is not taxable on its margin (see below).

**Calculation of the margin**

Net margin  $[1/(50-100) \%$  of the value of the gross assets (i.e. the average value of the assets financing ZORA) with a minimum of  $[0,0-0,5 \%$  of the gross turnover derived from the assets that have been transferred to the Company (i.e. the Company's total earnings)

<sup>(67)</sup> See, for each year, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial*, Annex 1.

<sup>(68)</sup> See, for each year, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial*, Annex 2.

<sup>(69)</sup> According to the *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial* for 2014, Annex 2, the ZORA Accretion corresponding to 2014 amounted to USD [250-350] million. This means that the amount by which the accumulated ZORA Accretions were actually reduced in 2017 was USD [450-550] million (corresponding to the sum of USD [250-350] million and USD 193,8 million).

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

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

<sup>(72)</sup> Including EUR [100 000-300 000], for *impôt commercial communal* and EUR [550 000-750 000] for *impôt sur le revenu des collectivités*.

Minimum margin

| Total profit  | Tax         | Start date | End date | Minimum margin (USD)  |
|---------------|-------------|------------|----------|-----------------------|
| 1 573 579 569 | [0,0-0,5 %] | 1/1/11     | 31/12/11 | [3 500 000-4 000 000] |

Net margin of [1/(50-100) %] of the average value of the assets financing ZORA

| Date       | Zora          |                       |
|------------|---------------|-----------------------|
| 1/1/11     | 692 817 329   | (See 2010 tax return) |
| 31/12/2011 | 812 590 069   |                       |
| Total      | 1 505 407 398 |                       |
| Average    | 752 703 699   |                       |

| Zora        | Tax            | Start date | End date | Margin (USD)      |
|-------------|----------------|------------|----------|-------------------|
| 752 703 699 | [1/(50-100) %] | 1/1/11     | 31/12/11 | [100 000-150 000] |

- (49) According to LNG Supply's 2014 statutory accounts, the partial conversion of the LNG ZORA was split 'between a part of the nominal amount and a part of accretion' <sup>(73)</sup>. Accordingly, both the nominal of the ZORA and the accumulated ZORA Accretions were reduced in 2014 by USD 193,8 million <sup>(74)</sup>. In September 2014, LNG Supply increased its capital by USD 699,9 million <sup>(75)</sup> to partially reimburse the LNG ZORA. The LNG Supply Shares were issued at nominal value and were subsequently cancelled through a capital decrease at their nominal amount <sup>(76)</sup>. This conversion did not have any tax consequences for LNG Supply.
- (50) In 2015, as LNG Supply was in a loss-making position, the ZORA Accretions became negative by USD [650-850] million which therefore reduced, first the remaining accumulated ZORA Accretions (USD [450-550]) to USD 0, and second the outstanding nominal value of the LNG ZORA to USD [200-250] million <sup>(77)</sup>.
- (51) In 2016, the ZORA Accretions were again negative by USD [100-200] million, reducing further the outstanding amount of the LNG ZORA to USD [100-200] million <sup>(78)</sup>.

#### 2.2.3.7.2. LNG Luxembourg

- (52) According to LNG Luxembourg's tax returns, the value of the LNG ZORA was maintained at its nominal amount (USD 646 million) until its partial conversion in 2014 <sup>(79)</sup>, in line with the 2008 LNG tax ruling <sup>(80)</sup>. The LNG Forward Contract also appears in LNG Luxembourg's tax return as a liability for the same amount <sup>(81)</sup>.
- (53) In 2014, as a result of the partial conversion, both the value of the LNG ZORA (asset) and of the LNG Forward Contract (liability) decreased by USD 193,8 million to USD [300-600] million, with no impact on the profit and loss account <sup>(82)</sup>. LNG Luxembourg did not opt for the application of Article 22bis LIR.

<sup>(73)</sup> See 2014 LNG Supply statutory accounts, note 8.

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

<sup>(75)</sup> The amount of USD 699,9 million includes also the ZORA Accretion corresponding to 2014 (see footnotes 69 and 74).

<sup>(76)</sup> See 2014 LNG Supply statutory accounts, note 7.

<sup>(77)</sup> See LNG Supply statutory accounts for 2015, note 8.

<sup>(78)</sup> See LNG Supply statutory accounts for 2016, note 8.

<sup>(79)</sup> See *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial de l'année 2013*, Annex 1.

<sup>(80)</sup> See recital 38.

<sup>(81)</sup> See *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial de l'année 2013*, Annex 1.

<sup>(82)</sup> See *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial de l'année 2014*, Annexes 1 and 2.

- (54) In 2015, as explained in recital 50, the value of the LNG ZORA was reduced to USD [300-600] million due to negative ZORA Accretions. LNG Luxembourg therefore decreased the value of the LNG ZORA to this amount and at the same time decreased the value of the LNG Forward Contract to the same amount <sup>(83)</sup>.
- (55) In 2016, the same adjustments were realised on the LNG ZORA and the LNG Forward Contract to decrease their value to USD [100-200] million <sup>(84)</sup>.

#### 2.2.3.7.3. LNG Holding

- (56) The ZORA is booked in LNG Holding's statutory accounts as a financial asset <sup>(85)</sup>. From 2012, a participation in LNG Supply for an amount equal to the nominal of the LNG ZORA also appears in LNG Holding's tax return under the category of participations eligible under Article 166 LIR <sup>(86)</sup>.
- (57) According to the 2014 LNG Holding's tax return and statutory accounts, the cancellation of the LNG Supply Shares, received as a result of the partial conversion of the LNG ZORA in 2014, generated a capital gain of USD 506,2 million <sup>(87)</sup>, which remained entirely untaxed in application of the participation exemption regime (Article 166 LIR).
- (58) In 2015 and 2016, LNG Holding booked an impairment adjustment on the LNG Forward Contract reflecting the decrease in value of the LNG ZORA following the negative ZORA Accretions, as explained in recitals 50 and 51 <sup>(88)</sup>. This impairment was reflected as a charge in LNG Holding's profit and loss account.

### 2.2.4. DETAILED DESCRIPTION OF THE GSTM TAX RULINGS

#### 2.2.4.1. *The transactions described in the GSTM tax rulings*

- (59) According to the 2010 GSTM tax ruling request, Engie will implement a similar structure to the one described in the LNG tax rulings: GSTM acquires the Financing and Treasury Business and finances the acquisition by means of the GSTM ZORA granted by EIL. At conversion <sup>(89)</sup>, GSTM issues shares ('GSTM Shares') incorporating the nominal amount of the ZORA plus/minus the ZORA Accretions. In turn, EIL finances the investment in the GSTM ZORA by means of the GSTM Forward Contract entered into with CEF. Under that contract, EIL will agree to transfer to CEF the GSTM Shares. The price for the GSTM Shares corresponds to the nominal amount of the GSTM ZORA <sup>(90)</sup>.
- (60) The 2012 GSTM tax ruling request contains a tax position on the same ZORA which is almost identical to that of the 2008 LNG tax ruling request, except that this ruling contemplates, inter alia, a potential future increase in the amount of the GSTM ZORA <sup>(91)</sup>.

<sup>(83)</sup> See LNG Luxembourg statutory accounts for 2015, notes 4 and 5.

<sup>(84)</sup> See LNG Luxembourg statutory accounts for 2016, notes 3 and 6.

<sup>(85)</sup> See, for instance, LNG Holding statutory accounts for 2013, note 3.

<sup>(86)</sup> See, for each year from 2012, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial, Détails concernant les participations visées à l'Article 166 L.I.R.*

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

<sup>(88)</sup> See LNG Holding statutory accounts for 2015 and 2016, note 3.

<sup>(89)</sup> Which takes place, at the latest, at the expiry of the ZORA, see recital 60(2).

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

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

#### 2.2.4.2. *The agreements signed by the parties*

- (61) Luxembourg has submitted copies of the documents and agreements which reflect the implementation by Engie of the transactions described in the GSTM tax rulings:
- (1) A document with the title 'Proposal of transfer of a branch of activity' filed at the Registry of commerce and corporations of Luxembourg on 13 May 2011 ('GSTM Transfer Proposal')<sup>(92)</sup>. According to this document, CEF proposes to transfer to GSTM the Financing and Treasury Business for an amount of EUR 1 036 912 506,84. According to the GSTM Transfer Proposal, CEF transfers the branch of activity in exchange of a promissory note from GSTM<sup>(93)</sup>.
  - (2) Two Mandatorily Exchangeable Loan Agreements entered into by EIL and GSTM, one dated 17 June 2011 and the other 30 June 2014 ('GSTM ZORA Agreements', together with the LNG ZORA Agreement, the 'ZORA Agreements')<sup>(94)</sup> with essentially the same content<sup>(95)</sup>. Under the GSTM ZORA Agreements, EIL grants a loan<sup>(96)</sup> to GSTM repayable by the issuance of the GSTM Shares<sup>(97)</sup>. The loan expires on 17 June 2026<sup>(98)</sup>. At the end of that period, it shall be converted into shares, unless it is converted into shares earlier by any party with the written consent of the other party<sup>(99)</sup>. The 'issue price' of the loan is EUR 1 036 912 507<sup>(100)</sup>. The conversion price will be equal to the 'issue price' plus the ZORA Accretions accumulated until conversion<sup>(101)</sup>.
  - (3) A Prepaid Forward Share Purchase Agreement entered into by CEF and EIL on 17 June 2011 (the GSTM Forward Contract)<sup>(102)</sup>. According to this agreement, CEF purchases all the rights of EIL in the GSTM Shares for a price equal to the 'issue price' of the GSTM ZORA<sup>(103)</sup>. The GSTM Shares are to be transferred to CEF on the date of their issuance<sup>(104)</sup>.

#### 2.2.4.3. *Tax treatment of GSTM*

- (62) According to the 2010 GSTM tax ruling request, as approved by the Luxembourg tax administration, GSTM's yearly taxable profit shall be equal to a margin agreed with the Luxembourg tax administration ('GSTM Margin'). Therefore, GSTM will be taxed only on that margin. The difference between the profit actually generated by GSTM and the GSTM Margin (the ZORA Accretions) will be considered a deductible expense related to the GSTM ZORA<sup>(105)</sup>.
- (63) The GSTM Margin is set out in the 2010 GSTM tax ruling request as an amount corresponding to 'an overall net spread of [1/(50-100) %] on the principal value of all its assets, including those assets financed with normal borrowings'<sup>(106)</sup>. The 2010 GSTM tax ruling request considers the GSTM Margin to be at arm's length<sup>(107)</sup>.
- (64) The 2012 GSTM tax ruling request contemplates a modification in the GSTM Margin. It states that its amount 'will be determined in a future APA letter accompanied by a TP [transfer pricing] report'<sup>(108)</sup>. According to GSTM's 2011 statutory financial accounts<sup>(109)</sup>, the change in the GSTM Margin from 1 January 2012 was due to entry into force of the Administrative Circular of 28 January 2011 concerning intra-group financing activities ('Circular 164/2')<sup>(110)</sup>. This Circular required the submission of transfer pricing ('TP') studies in relation to any tax

<sup>(92)</sup> 'Proposition de cession d'une branche d'activités déposé au registre de commerce et des sociétés de Luxembourg', submitted by Luxembourg on 16 June 2017.

<sup>(93)</sup> See Proposition de cession d'une branche d'activités – Mémorial C – 13 mai 2011 – section 1: 'En considération de cette cession de Branche d'Activités, la Société Bénéficiaire émettra un billet à ordre dont le montant s'élève à: EUR 1 036 912 506,84'.

<sup>(94)</sup> Submitted by Luxembourg on 21 November 2016.

<sup>(95)</sup> The 2014 agreement was signed upon a further request of financing and it encompasses any amounts previously drawn.

<sup>(96)</sup> See GSTM ZORA Agreements, clause 2.

<sup>(97)</sup> See GSTM ZORA Agreements, clause 5.

<sup>(98)</sup> See GSTM ZORA Agreements, clause 4.

<sup>(99)</sup> See GSTM ZORA Agreements, clauses 4 and 5.

<sup>(100)</sup> See GSTM ZORA Agreements, clause 2.

<sup>(101)</sup> See GSTM ZORA Agreements, clause 5.2, cf. with definitions in clause 1.

<sup>(102)</sup> Submitted by Luxembourg on 21 November 2016.

<sup>(103)</sup> See GSTM Forward Contract, clause 2.

<sup>(104)</sup> See GSTM Forward Contract, clause 3.

<sup>(105)</sup> See 2010 GSTM tax ruling request, page 2.

<sup>(106)</sup> See 2010 GSTM tax ruling request, page 2.

<sup>(107)</sup> See 2010 GSTM tax ruling request, page 5, paragraph 5.

<sup>(108)</sup> See 2012 GSTM tax ruling request, page 2. 'APA' stands for advanced pricing agreement.

<sup>(109)</sup> See Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial de l'année 2011, Annex 3.

<sup>(110)</sup> Circulaire du directeur des contributions n° 164/2 du 28 janvier 2011.

ruling request requesting the agreement on transfer prices for intragroup financing transactions (such as the GSTM Margin) <sup>(111)</sup>. Accordingly, the tax advisor submitted, by letters of 11 July 2012 and 11 November 2013, two tax ruling requests with TP studies concerning the establishment of the GSTM Margin <sup>(112)</sup>. According to Luxembourg, these tax ruling requests were not approved by its tax administration. In other words, the Luxembourg tax administration has not issued any tax ruling confirming the value of the GSTM Margin proposed by Engie's tax advisor in its letters of 11 July 2012 and 11 November 2013 <sup>(113)</sup>.

- (65) The 2010 GSTM tax ruling request also indicates that *'in the unlikely event that the accounting treatment would not be totally in line with the obligations under the ZORA agreement, the resulting profit or loss reflected in the annual accounts will not affect the tax position set out above'* <sup>(114)</sup>.
- (66) In conclusion, before the conversion of the GSTM ZORA, the tax base of GSTM is limited to the GSTM Margin. The conversion of the GSTM ZORA has no impact on the tax base of GSTM.

#### 2.2.4.4. Tax treatment of EIL

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

#### 2.2.4.5. Tax treatment of CEF

- (68) The tax treatment granted to CEF is similar to the one described for LNG Holding <sup>(119)</sup>. Accordingly, CEF will not book any taxable income or any tax deductible expense before the conversion of the ZORA <sup>(120)</sup>.
- (69) The 2010 GSTM tax ruling request also asks for confirmation that *'the participation purchased by CEF under the Forward Contract will qualify as direct participation in the capital of GSTM as per the moment that the Forward Contract is concluded for the purposes of the Article 166 LIR'* <sup>(121)</sup>. Consequently, any taxable income related to the ownership of the GSTM Shares will be tax exempt at the level of CEF, provided that the requirements of Article 166 LIR are met.

#### 2.2.4.6. Implementation of the GSTM tax rulings

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

##### 2.2.4.6.1. GSTM

- (71) GSTM's 2012 statutory accounts indicate that EIL *'granted a mandatory convertible loan amount of EUR 1 036 912 506,84 to [GSTM] with a maturity of 15 years from June, 17 2011'* <sup>(122)</sup>.

<sup>(111)</sup> See Circular 164/2, paragraph 4.2.

<sup>(112)</sup> See *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial de l'année 2012*, Annex 3.

<sup>(113)</sup> See letter of Luxembourg of 23 May 2016.

<sup>(114)</sup> See 2010 GSTM tax ruling request, page 2. In the same line, the 2012 GSTM tax ruling request states: *'to the extent the accounting treatment would differ from the annual accretion under the ZORA agreement, GSTM will for tax purposes still only report the Margin'*.

<sup>(115)</sup> See Section 2.2.3.4.

<sup>(116)</sup> See 2010 GSTM tax ruling request, page 3, and footnotes 3 and 4, including arguments identical to those used in the 2008 LNG tax ruling request (see recital 38).

<sup>(117)</sup> See 2010 GSTM tax ruling request, page 3.

<sup>(118)</sup> See 2010 GSTM 2010 tax ruling request, paragraph 6, page 6.

<sup>(119)</sup> See Section 2.2.3.5.

<sup>(120)</sup> See 2010 GSTM tax ruling request, page 3.

<sup>(121)</sup> See 2010 GSTM tax ruling request, paragraph 2, page 5 (emphasis added by the Commission).

<sup>(122)</sup> See also explanatory notes to GSTM's balance sheet at 31 December 2011, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial de l'année 2011* of GSTM, Annex 3.

- (72) The GSTM ZORA is reported as a liability in the balance sheet included in GSTM's tax returns for an amount equal to the nominal of the ZORA (EUR 1 036 912 506,84). That amount does not vary over the years <sup>(123)</sup>.
- (73) For each year, an amount equal to the yearly ZORA Accretion has been recorded as a liability of GSTM <sup>(124)</sup> against the corresponding expense in the profit and loss account <sup>(125)</sup> and has consequently been deducted from GSTM's tax base. The accumulated ZORA Accretions reported in GSTM's tax returns over the period 2011 to 2015 are presented in Table 2 below.

Table 2

**Accumulated ZORA Accretions recorded in GSTM's tax returns**

|                                           | 2011 | 2012      | 2013      | 2014      | 2015      | 2016      |
|-------------------------------------------|------|-----------|-----------|-----------|-----------|-----------|
| Accumulated ZORA Accretions (EUR million) | 44,9 | [100-150] | [300-350] | [450-500] | [600-650] | [600-900] |

- (74) In line with the 2010 GSTM tax ruling, GSTM is taxed on the GSTM Margin. Figure 3 below illustrates the determination of the GSTM Margin for the year 2011 <sup>(126)</sup>. The 'net earnings before tax and ZORA Accretion' amounted to EUR 45 522 581. GSTM's tax base is calculated as  $[1/(50-100) \%$  of the total average assets of the company for the 2011 period, which amounted to EUR 3,7 billion. The taxable profit retained for GSTM on this basis amounts to EUR [500 000-600 000] (to which an amount designated as 'remuneration of capital' is added for an amount of EUR [6 000-11 000]). The difference between this amount and the 'net earnings before tax and ZORA Accretion' is the amount of EUR 44,9 million, which was recorded in the tax return as the tax deductible ZORA Accretion.

Figure 3

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

| Total assets  | From     | To         | No. Of days | Average (*)   |
|---------------|----------|------------|-------------|---------------|
| 8 691 871 776 | 2.5.2011 | 31.12.2011 | 244         | 3 729 884 433 |

|                                                                               |                         |
|-------------------------------------------------------------------------------|-------------------------|
| Total debts financing assets                                                  | 3 729 202 241           |
| Net earnings before tax and ZORA accretion                                    | [45 000 000-50 000 000] |
| Net earnings before tax and ZORA accretion relating to capital                | 8 326                   |
| Net earnings before tax and ZORA accretion relating to debts financing assets | [45 000 000-50 000 000] |
| Total                                                                         | [45 000 000-50 000 000] |
| Margin of $[1/(50-100) \%$                                                    | [550 000-600 000]       |

<sup>(123)</sup> See, for each year, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial*, Annex 1.

<sup>(124)</sup> See, for each year, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial*, Annex 1.

<sup>(125)</sup> See, for each year, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial*, Annex 2.

<sup>(126)</sup> The figure corresponds to the *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial* for 2011, Annex 3.

|                                                                                                |                   |
|------------------------------------------------------------------------------------------------|-------------------|
| Return on capital                                                                              |                   |
| Remuneration of debts financing assets (margin of $[1/(50-100) \text{ \%}]$ )                  | [550 000-600 000] |
| Total net margin                                                                               | [550 000-600 000] |
| The margin has already been recorded in the annual accounts so no adjustment needs to be made. |                   |
| Calculation of taxable amount                                                                  | EUR               |
| Profit/loss for the year                                                                       | 420 802           |
| Add: taxes                                                                                     | [150 000-200 000] |
| Taxable amount                                                                                 | [550 000-600 000] |
| Corporate income tax                                                                           | [100 000-150 000] |
| (*) calculated on a monthly basis                                                              |                   |

- (75) GSTM's tax returns show that, as indicated earlier <sup>(127)</sup>, the GSTM Margin changed after 2011. As illustrated in for years 2012 and 2013, the GSTM Margin is not set at  $[1/(50-100) \text{ \%}]$  on the value of the assets, as was initially contemplated in the 2010 GSTM tax ruling request, but at  $[0-1 \text{ \%}]$  on the value of the debts financing the assets <sup>(128)</sup>. In 2014, the GSTM Margin was set at  $[0-1 \text{ \%}]$  of the total amount of loans and receivables. The tax returns indicate that the GSTM Margin for these years has been calculated by reference to the tax ruling requests of 11 July 2012 and 11 November 2013 <sup>(129)</sup> which, as indicated in recital 64 were never accepted by the Luxembourg tax administration.

Figure 4

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

Annexes to the *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial* [corporate income tax and municipal business tax return] for 2012 and declaration of personal assets as of 1 January 2013 in the name of:

GDF SUEZ Treasury Management S.à r.l tax No 2011 2416 545

|         |           |
|---------|-----------|
| Annex 3 | STAW/NGOK |
|---------|-----------|

Explanatory notes

General comments

Reference is made to the letters from the tax adviser of 9 February 2010 and 15 June 2012.

<sup>(127)</sup> See recital 63.

<sup>(128)</sup> See *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial* for 2012, Annex 3.

<sup>(129)</sup> See *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial* for 2012, Annex 3.

### Margin on financing business

Reference is made to the tax advisor's advance transfer pricing agreements of 11 July 2012 and 11 November 2013 (the APAs).

The margin on the financing business is calculated as follows:

| Average amount of debts financing the assets (*) | from     | to         | days | % (**)  | margin                |
|--------------------------------------------------|----------|------------|------|---------|-----------------------|
| [9 000 000 000-10 000 000 000]                   | 1/1/2012 | 31/12/2012 | 366  | 4,2 bps | [3 000 000-4 000 000] |
| Total                                            |          |            | 366  |         |                       |

### Return on risk capital

| Average capital (*)   | from     | to         | days | Return on risk capital |
|-----------------------|----------|------------|------|------------------------|
| [2 000 000-3 000 000] | 1/1/2012 | 31/12/2012 | 366  | [20 000-30 000]        |
| Total                 |          |            | 366  |                        |

### Calculation of ZORA accretion

|                                            |                           |
|--------------------------------------------|---------------------------|
| Net earnings before tax and ZORA accretion | [100 000 000-150 000 000] |
| Less: capital return                       | [20 000-30 000]           |
| Less: minimum margin                       | [3 000 000-4 000 000]     |
| ZORA accretion                             | [100 000 000-150 000 000] |

The amount of the ZORA accretion as indicated in the accounts is not in line with the APAs (not sufficient). Consequently, an adjustment in EUR [40 000-50 000] has been made in the tax balance sheet and the tax profit and loss account, and this adjustment will be recorded in the commercial accounts for 2013.

(\*) Calculated on a monthly basis

(\*\*) We refer to the transfer pricing study as provided for in the APAs

#### 2.2.4.6.2. EIL

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

<sup>(130)</sup> See, for each year, the balance sheet of EIL in the *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial*, Annex 1.

<sup>(131)</sup> See recital 66.

### 2.2.4.6.3. CEF

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

## 2.3. DESCRIPTION OF THE RELEVANT NATIONAL LEGAL FRAMEWORK

### 2.3.1. DESCRIPTION OF THE GENERAL PRINCIPLES OF THE LUXEMBOURG CORPORATE INCOME TAX SYSTEM

- (78) The ordinary rules of corporate taxation in Luxembourg can be found in the LIR. According to Article 159 LIR, resident tax companies are subject to tax on the totality of their profits <sup>(133)</sup>. Article 163 LIR provides that the Luxembourg corporate income tax is applicable to the taxable profit of a taxpayer in a given year <sup>(134)</sup>. Before 2013, all companies subject to tax in Luxembourg were taxed on their taxable profit at the standard tax rate of 28,80 % <sup>(135)</sup>. Since 2013, the standard tax rate is 29,22 %.
- (79) Article 18(1) LIR provides the method to establish a corporate taxpayer's annual profit: 'The profit is determined as the difference between net assets as of the end and net assets as of the beginning of the reporting period, increased by the withdrawals for personal use and decreased by additional contributions performed during the reporting period'.
- (80) Article 23 LIR explains that the value of the net assets should be determined following accounting rules and principles <sup>(136)</sup>.
- (81) Article 40 LIR establishes the principle of linking the tax balance sheet to the commercial balance sheet (*accrochement du bilan fiscal au bilan commercial*). According to this principle, the tax balance sheet – which sets out the annual tax base — should correspond to the commercial balance sheet unless a specific tax rule applies requiring the use of a different value <sup>(137)</sup>.

### 2.3.2. THE PARTICIPATION EXEMPTION REGIME AND THE TAXATION OF PROFIT DISTRIBUTIONS

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

<sup>(132)</sup> See, for each year, *Déclaration pour l'impôt sur le revenu des collectivités et pour l'impôt commercial, Détails concernant les participations visées à l'Article 166 L.I.R.*

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

<sup>(134)</sup> Article 163(1) LIR: 'L'impôt sur le revenu des collectivités frappe le revenu imposable réalisé par le contribuable pendant l'année du calendrier'.

<sup>(135)</sup> The Luxembourg corporate income tax consists of a corporate income tax on profits ('impôt sur le revenu des collectivités' or 'IRC'), taxed at a rate of 21 %, and, for companies established in Luxembourg City, a municipal business tax on profits ('impôt commercial'), taxed at a rate of 6,75 %. In addition, there is a 5 % surcharge on the 21 % tax rate for an employment fund calculated on the IRC. In 2012, the solidarity surcharge was increased from 5 % to 7 % with effect from tax year 2013. With the changes introduced for tax year 2013, the aggregate income tax rate increases from 28,80 % to 29,22 % for companies established in Luxembourg City. In addition, Luxembourg companies are subject to an annual net wealth tax, which is levied at a rate of 0,5 % on the company's worldwide net worth on 1 January of each year.

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

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

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

- (83) As regards the taxation of the dividends and other income stemming from participations, Article 166 LIR introduces the so-called 'participation exemption regime' in Luxembourg. This regime provides for an exemption from corporate income tax, withholding tax and net wealth tax for income stemming from participations held by entities that meet certain criteria. In its opinion on the draft law incorporating this provision into the LIR, the Luxembourg State Council states that this regime is justified in order to avoid triple taxation for reasons of fiscal equity and economic order <sup>(139)</sup>.
- (84) Article 166(2) LIR lists the entities that can benefit from the participation exemption, which include joint-stock companies subject to tax in Luxembourg (such as 'société anonyme' and 'société à responsabilité limitée'), and the companies listed under Article 2 of Council Directive 90/435/EEC <sup>(140)</sup>.
- (85) In order to benefit from the exemption, two cumulative conditions need to be met: first, the entities must hold or commit to hold the participation for an uninterrupted period of at least 12 months; second, the participation must not fall below either 10 % of the capital of the participated entity or a EUR 1,2 million acquisition price <sup>(141)</sup>.
- (86) Provided that these two conditions are met, the income derived from the participation (dividends, capital gains or any other revenues derived from the participation) is fully exempt from Luxembourg corporate income tax. Pursuant to Article 166(9) LIR and the *Règlement grand-ducal* du 21 décembre 2001 ('Decree of 21 December 2001') <sup>(142)</sup>, the participation exemption applies also to capital gains (*revenus dégagés par la cession de la participation*) <sup>(143)</sup>.
- (87) The taxation of profits distributed at the level of the distributing entity is governed by Article 164 LIR. Article 164(1) LIR provides that, in order to determine the tax base, it is irrelevant whether the profit has been distributed or not <sup>(144)</sup>. Article 164(2) LIR explains what should be understood as 'distribution' for the purposes of Article 164(1) LIR and includes in this category the distributions of any kind to shareholders, to holders of participation certificates, founder's shares, shares in enjoyment, or any other securities, including variable-yield bonds <sup>(145)</sup>.

### 2.3.3. TEMPORARY DEFERRAL OF TAXATION OF CAPITAL GAINS ARISING FROM CONVERSIONS

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

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

<sup>(140)</sup> Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 225, 20.8.1990, p. 6).

<sup>(141)</sup> Article 166(1) LIR: 'les revenus d'une participation (...) sont exonérés lorsque à la date de la mise à disposition des revenus, le bénéficiaire détient ou s'engage à détener ladite participation pendant une période ininterrompue d'au moins douze mois et que pendant toute cette période le taux de participation ne descend pas au-dessous du seuil de 10 pour cent ou le prix d'acquisition au-dessous de 1 200 000 euros'.

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

<sup>(143)</sup> Article 166(9) LIR: 'Un règlement grand-ducal pourra: 1. étendre l'exonération, sous les conditions et modalités à déterminer, aux revenus dégagés par la cession de la participation, 2. prévoir, dans les conditions à spécifier, que les pertes de cession ne sont pas déductibles'. Article 1(1) of *Règlement* of 21 December 2001: 'Lorsqu'un contribuable visé à l'article 166, alinéa 1 er, numéros 1 à 4, cède des titres d'une participation directe détenue dans le capital social d'une société visée à l'alinéa 2, numéros 1 à 3 du même article, le revenu dégagé par la cession est exonéré, lorsqu'à la date de l'aliénation des titres le cédant détient ou s'engage à détener ladite participation pendant une période ininterrompue d'au moins 12 mois et que pendant toute cette période le taux de participation ne descend pas au-dessous du seuil de 10 % ou le prix d'acquisition au-dessous de 6 000 000 d'euros'.

<sup>(144)</sup> Article 164(1) LIR: 'Pour déterminer le revenu imposable, il est indifférent que le revenu soit distribué ou non aux ayants droits'.

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

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

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

#### 2.3.4. ANTI-ABUSE PROVISION

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

### 3. GROUNDS FOR INITIATING THE PROCEDURE

- (91) In its Opening decision, the Commission took the preliminary view that the tax treatment granted on the basis of the contested tax rulings appeared to constitute State aid within the meaning of Article 107(1) of the Treaty and raised doubts as to the compatibility of those measures with the internal market.
- (92) More specifically, in the Opening decision, the Commission raised the following doubts:
- (1) whether the Luxembourg tax authorities correctly allowed the deduction of the ZORA Accretions and whether the ZORAs were at arm's length;
  - (2) in case the Luxembourg tax authorities were right to allow for the deduction of the ZORA Accretions first, whether the Luxembourg tax authorities were right to accept the application of Article 22bis LIR; and second, whether the method used to determine the taxable profit of GSTM and LNG Supply was in line with the arm's length principle;
  - (3) whether the combined effect of the deductibility of expenses (ZORA Accretions) at the level of LNG Supply and GSTM together with the non-taxation of the corresponding income at the level of EIL and LNG Luxembourg departs from the general objective of the Luxembourg tax system, thus providing a selective advantage to the holding companies LNG Holding and CEF.
- (93) Under the first doubt, the Commission questioned the deduction of the ZORA Accretions <sup>(149)</sup>. The Commission questioned the qualification of the ZORA Accretions as interest within the meaning of Article 109 LIR and therefore their deductibility. More precisely, the Commission considered that the ZORA Accretions should be considered as profit distributions in line with Article 164(1) and (2) LIR and therefore the deduction should not have been allowed. The Commission also raised doubts that by allowing the deduction of the ZORA Accretions, Luxembourg misapplied Article 164(3) LIR. This provision requires the inclusion in the tax base of a company, as hidden profit distribution, of any amounts paid to its shareholder which are not at arm's length. More precisely, the Commission questioned whether an independent company negotiating at arm's length would have granted a loan to LNG Supply and GSTM under the same terms as the ZORAs.
- (94) In case the Luxembourg tax authorities were right to allow for the deductions of the ZORA Accretions, the Commission raised a second doubt that can be split into two legs:
- (1) Under the first leg, the Commission questioned the application of Article 22bis LIR according to which no corporate income tax is due upon conversion of the ZORA into shares <sup>(150)</sup>. If the ZORA Accretions were to be considered as deductible debt interests, which the Commission contested under the first doubt, then they should have been taxed as income at the level of EIL and LNG Luxembourg or at the level of the holding companies and should not have qualified for an exemption under Article 22bis LIR.

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

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

<sup>(149)</sup> See Opening decision, Section 4.2.1.

<sup>(150)</sup> See Opening decision, Section 4.2.2.1.

- (2) Under the second leg, the Commission raised doubts regarding the method used in the contested tax rulings for determining the taxable profit of LNG Supply and GSTM – a taxable margin not based on any economic analysis – and its compliance with the arm's length principle <sup>(151)</sup>.
- (95) Finally, the third doubt was based on the combined effect of the deductibility of the ZORA Accretions at the level of the Subsidiaries and the non-taxation of the corresponding income at the level of EIL and LNG Luxembourg due to the application of Article 22bis LIR <sup>(152)</sup>. By combining both, Luxembourg endorsed the effective non-taxation of a sizeable portion of the profits generated by the businesses of GSTM and LNG Supply in Luxembourg. The Commission questioned whether this result departed from the objective of the Luxembourg corporate income tax system, which according to Article 163 LIR is to tax the profits of all companies subject to tax in Luxembourg <sup>(153)</sup>.
- (96) As part of this third doubt, the Commission also questioned whether the tax treatment endorsed by the tax rulings could constitute a misapplication of Article 166 LIR, the objective of which is to eliminate economic double taxation of the same profit. In particular, the Commission noted that the application of Article 166 LIR appeared to have been relied upon by CEF and LNG Holding to exempt profits which had not been taxed at the level of GSTM and LNG Supply <sup>(154)</sup>.
- (97) The Commission indicated that the contested tax rulings appeared to provide a selective advantage not only to the holding companies CEF and LNG Holding but also to the Engie group as a whole <sup>(155)</sup>.
- (98) The Commission also took the preliminary view that the effect of the contested tax rulings could derogate from the Luxembourg provisions concerning abuse of law in the tax field (Articles 5 and 6 StAnpG) <sup>(156)</sup>.
- (99) In a meeting of 1 June 2017 and in the Letter of 11 December 2017, following the submission of additional information by Luxembourg and Engie, the Commission developed further some aspects of its assessment of the case. The Commission noted that Article 109(1) LIR is not applicable to companies incorporated under Luxembourg law and/or to companies tax resident in Luxembourg. The Commission also noted that Article 22bis LIR is an optional regime and that the companies involved in the present case have not opted for its application as of today. Finally, the Commission indicated that, according to Luxembourg, the contested tax rulings are based on the general corporate tax regime (*'se fondent sur le régime général d'imposition sur les sociétés'*) <sup>(157)</sup> and in particular on the principle of linking the tax balance sheet to the commercial balance sheet (*'le principe de l'accrochement du bilan fiscal au bilan commercial'*) <sup>(158)</sup>. In this regard, and as indicated in the Opening decision <sup>(159)</sup>, the applicable reference system could be the Luxembourg corporate income tax system, the objective of which is to tax the profit of companies subject to corporate tax in Luxembourg.
- (100) Furthermore, the Commission explained in the Letter of 11 December 2017, as regards the advantage to Engie group <sup>(160)</sup>, that since the objective of the Luxembourg corporate income tax system is to include in principle in the tax base all profits recorded in the accounts of the company, intra-group financing transactions between Luxembourg tax resident companies should not have any impact on the sum of the tax bases of these entities or, in other words, on their combined tax base. However, in the present case, the Commission noted that the contested tax rulings lead to a decrease in the combined tax base of Engie in Luxembourg (reasoning at group level).

#### 4. COMMENTS FROM LUXEMBOURG

- (101) Luxembourg first recalls that, in line with Article 114 of the Treaty, tax provisions fall within the remit of the Member States. Only if a tax provision infringes Article 107 of the Treaty the Commission can assess it.
- (102) Second, Luxembourg contests the presence of a selective advantage, based on the following grounds.

<sup>(151)</sup> See Opening decision, Section 4.2.2.2.

<sup>(152)</sup> See Opening decision, Section 4.2.3.

<sup>(153)</sup> See Opening decision, recitals 151-155.

<sup>(154)</sup> See Opening decision, recital 156.

<sup>(155)</sup> See Opening decision, recital 152.

<sup>(156)</sup> See Opening decision, recital 158.

<sup>(157)</sup> See observations of Luxembourg on the Opening decision, paragraph 168.

<sup>(158)</sup> See observations of Luxembourg on the Opening decision, paragraph 170.

<sup>(159)</sup> See Opening decision, recital 152.

<sup>(160)</sup> See recital 97.

4.1. THE SYSTEM OF REFERENCE USED BY THE COMMISSION IN THE OPENING DECISION IS  
ERRONEOUS

- (103) First, according to Luxembourg, Article 109 LIR applies only to individuals and is not applicable to companies.
- (104) Second, Luxembourg argues that ZORAs are, from a Luxembourg tax perspective, a debt instrument; therefore, they cannot be assimilated to equity participations <sup>(161)</sup>. This classification is mainly justified by the absence of any associated voting rights, management rights, dividends or liquidation dividends, the obligation to be reimbursed at a fixed date, the absence of a notarised act recognising a capital increase and the legal form of the contract. Moreover, Luxembourg argues that ZORAs are not a note instrument giving right to any annual profit sharing or liquidation dividends. Therefore, Articles 164(1) and 164(2) LIR are, in Luxembourg's view, not applicable.
- (105) Third, regarding the arm's length character of ZORAs, Luxembourg considers that the Commission ignored the different categories of investors. ZORAs are not standard loan agreements but atypical instruments that cover the borrower against any operational risk and allow the investor to benefit from a better return on investment. Given the volatility of the market and the dependence on financing, the use of a ZORA is logical for the lender and similar instruments can be observed on the financial market like securities replicating the performance of a given underlying. Therefore the terms of the ZORA are at arm's length and Article 164(3) LIR is, according to Luxembourg, not applicable.
- (106) According to Luxembourg, the system of reference consists, first, of Articles 18, 40 and 23 LIR, which stipulate the determination of the tax base, the linking of the commercial balance sheet with the tax balance sheet and the prudence principle; and second, of Article 22bis LIR.
- (107) Luxembourg argues that the determination of the taxable profit, as defined in Article 18 LIR, follows two main concepts: first, the linking of the commercial balance sheet with the tax balance sheet (Article 40 LIR), and second, the prudence concept, according to which a profit cannot be taxed as long as it has not been realised.
- (108) Regarding Article 22bis LIR, Luxembourg states that it is an optional regime applicable to companies in line with Article 162 LIR <sup>(162)</sup>.
- (109) Luxembourg contests that Article 163 LIR enshrines any objective, or principle, of the Luxembourg corporate income tax system according to which all profits recorded by companies resident in Luxembourg should be taxed. Luxembourg considers that this objective is neither consecrated nor reflected in any provision of the law. According to Luxembourg, the definition of a system of reference should be based on laws and not on a hypothetical principle or objective, the interpretation of which would risk deviating from the precise terms of the law.

4.2. THE CONTESTED TAX RULINGS DO NOT DEPART FROM THE SYSTEM OF REFERENCE

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

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

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

- (111) Luxembourg considers that the tax treatment endorsed by the contested tax rulings was fully in line with Articles 97 and 22bis LIR. Luxembourg argues that the Commission was wrong to consider that any capitalised interest should be taxable. More generally, Luxembourg supports that the Commission did not take into account that, as explained in recital 110, the deductible expenses are neither interest nor dividends. The concept of prudence supposes that an expense, which is tax deductible for one party, does not necessarily lead to a taxable profit for the other party. ZORAs should be valued at the level of the lender at the acquisition price and not at market price. Therefore, Luxembourg considers that ZORAs do not lead to any taxable income at the level of the lender until the conversion date.
- (112) From a tax perspective, at the date of the conversion, a profit, equal to the difference between the acquisition price and the market value of shares, is recognised. However, Luxembourg argues that EIL and LNG Luxembourg can opt for the mechanism of Article 22bis LIR. The shares received by the lender can be considered as substituting the ZORAs. In such a case, the shares can be valued in the accounts at the nominal amount of the ZORAs.
- (113) However, Luxembourg clarifies that following the partial reimbursement of the ZORA by LNG Supply that took place in 2014, LNG Luxembourg did not opt for the optional regime of Article 22bis LIR and recognised a taxable profit.
- (114) Luxembourg considers that the contested tax rulings do not depart from the arm's length principle by accepting a method of determination of profits of GSTM and LNG Supply based on the risks, functions and assets involved by each entity.
- (115) Luxembourg contests any misapplication of Article 166 LIR, as the contested tax rulings only confirm a strict and correct reading of the different tax provisions applicable to any undertaking subject to corporate income tax.
- (116) Luxembourg contests that the objective of Article 166 LIR is to prevent economic double taxation. Luxembourg considers that according to Article 166 LIR, profits do not need to have been previously taxed to benefit from the participation exemption. The only conditions to benefit from the participation exemption are the nature of the instrument, the percentage held in the capital of the participated entity or the acquisition price, and the holding period of the participations. In the present case, Article 166 LIR has been applied in line with all these conditions. On this basis, Luxembourg considers not only that the Luxembourg corporate income tax system does not require that all profits should be taxed but also that according to Article 166 LIR, profits eligible to participation exemption should not necessarily result from taxed profits.
- (117) Luxembourg also claims that if the Commission considers that Article 166 LIR does not derogate from the reference system, then it should demonstrate that the contested tax rulings allow a derogatory application of Article 166 LIR to CEF and LNG Holding. Luxembourg contests in particular the combined application of Articles 164 LIR and 166 LIR, since Article 164 LIR is not a pre-requisite for applying Article 166 LIR. Article 164 LIR applies only to profits distributed by a domestic company, while Article 166 LIR has a larger scope, the participation exemption regime being applicable to profits coming from domestic or foreign participations. That being said, Luxembourg expressly acknowledges that, except for the case of foreign participations, all participations the profit of which can benefit from Article 166 are also subject to Article 164 LIR <sup>(163)</sup>.
- (118) As regards the reasoning at group level (see recital 100), Luxembourg reiterates its position that the Commission's reasoning cannot be based on an inadequate and non-existent reference system. Luxembourg highlights that the Luxembourg law does not specify that intra-group financing transactions between entities tax resident in Luxembourg cannot increase or decrease the sum of the tax bases of those entities in Luxembourg, or in other words the combined tax base of the group in Luxembourg. Moreover, Luxembourg explains that in order to determine if a measure is selective, the Commission needs to demonstrate that it derogates from the reference system itself and not from the objective of the reference system.

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

- (119) Luxembourg argues that to establish the selectivity of a measure, the Commission needs to demonstrate that companies from a specific sector are treated in a preferential way compared to others and refers to the annulment of the Commission's decision in case *Comunidad Autónoma de Galicia* <sup>(164)</sup>.
- (120) Luxembourg also contests the statement made by the Commission that any tax deductible expense recorded by the issuer of a ZORA in relation with the ZORA Accretions would have been included in the tax base of the holder, therefore with no impact on the tax base of the group in Luxembourg. Luxembourg reminds that Article 22bis LIR allows the lender of a convertible loan not to book any capital gain at the moment of the conversion. Therefore, according to Luxembourg, the intervention of EIL and LNG Luxembourg did not decrease the tax base of the Engie group compared to a situation in which it would have used a direct ZORA.
- (121) Luxembourg also contests any abuse of rights. In particular, Luxembourg denounces the insinuation by the Commission that it approved a simulated transaction within the meaning of Article 5 of the StAnpG and reminds that all parties have a real legal existence and performed their contractual obligations. Luxembourg also rejects the argument that the legal structure of the transaction is not in line with the substance, the transactions being set up to finance the transfer of assets within the group in the meaning of Article 6 of the StAnpG.

#### 4.3. ABSENCE OF RECOVERY

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

#### 5. COMMENTS FROM ENGIE

- (123) Engie considers the ZORAs to be debt instruments. The total amount to be reimbursed depends on the performance of the borrower. Therefore, Engie argues that the lender should not receive any income before the conversion. Moreover, until its conversion, the ZORA is a debt instrument in the accounts and is treated as such both for accounting and fiscal purposes.
- (124) Engie argues that the deductibility of the expenses related to a ZORA at the level of the borrower is in line with the applicable tax law. The expenses related to the reimbursement of the ZORA which are booked in the accounts in line with the applicable accounting rules, is tax deductible according to the basic tax principle of linking the accounting balance sheet and the tax balance sheet. In line with the accounting prudence principle, the lender is not allowed to book a profit in its accounts before the conversion of the ZORA into shares. Therefore, it is only at the date of the conversion that the lender books a profit, which is taxable. However, according to Engie, Article 22bis LIR allows a company to get a temporary tax deferral in case of conversion of a convertible loan. Finally, EIL and LNG Luxembourg have covered their risks by entering into the Forward Contracts with, respectively, CEF and LNG Holding. The income of CEF and LNG Holding coming from their investments are taxable according to the relevant tax law, including Article 166 LIR.
- (125) Engie explained in further details the activities transferred to LNG Supply and GSTM which consist, respectively, of a long term (around 20 years) liquefied natural gas supply contract ('LNG contract') in Yemen and its ancillary assets (terminal capacity and shipping capacity) on the one hand, and the group's cash pooling activities on the other <sup>(165)</sup>.
- (126) Engie also explained that only the ZORA between LNG Supply and LNG Luxembourg was partially converted in 2014 due to large profits made by LNG Supply. Following the partial conversion, LNG Luxembourg booked a taxable income. LNG Luxembourg did not opt for the regime set by Article 22bis LIR. In the same fiscal year, the entity booked a deductible expense of the same amount due to the transfer of the shares to LNG Holding in the framework of the LNG Forward Contract.

<sup>(164)</sup> Case C-70/16 P *Comunidad Autónoma de Galicia and Retegal v Commission* ECLI:EU:C:2017:1002.

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

- (127) Engie also confirmed that the application of Article 22bis LIR would in fact have had no impact on the taxable income of the ZORA lenders (LNG Luxembourg or EIL) as the sale price and the sale date are fixed in advance by the Forward Contracts. In this regard, during the meeting of 1 June 2017 it was discussed under which scenario LNG Luxembourg or EIL would realise a taxable profit or loss, since the ZORAs have been hedged against the Forward Contracts. Engie clarified that any taxable income stemming from the conversion of the ZORAs is mirrored by a corresponding tax deductible loss on the Forward Contracts.
- (128) Finally, as regards the applicable legal framework at the level of the holding companies (i.e. CEF and LNG Holding), Engie specified that at the date of the transfer of shares, and in case the value of the shares is higher than the acquisition price fixed in the Forward Contracts, the holding company does not book any profit. Such profit can only be booked later on if and when the issuers' shares are sold or cancelled. According to Engie, this potential profit can be tax exempt under the participation exemption regime applicable to all Luxembourg companies as per Article 166 LIR.
- (129) Engie argues that the implementation of the GSTM and LNG ZORAs respects the tax rulings adopted in line with the tax law and does not lead to double non-taxation. Engie further explained in the meeting of June 2017 that, in case one follows an economic reasoning and not a legal one, account should be taken of the long duration of the ZORA and not focus on the profitable years during which limited taxes were paid. Engie explained that, in case one follows an entity-by-entity reasoning and not an economic or global approach, the regime is symmetrical.
- (130) Engie further explained that the GSTM ZORA has not led to any conversion yet. No profit was booked at the level of EIL at this date. The LNG ZORA was partially converted into shares in 2014 giving rise to a profit equal to the accumulated ZORA Accretions at the level of LNG Luxembourg. LNG Luxembourg did not opt for the optional regime of deferral of taxation provided by Article 22bis LIR and the profit realised from the conversion was taken into account in the determination of its tax base for 2014.
- (131) Engie further explained the precise roles of EIL and LNG Luxembourg. The roles are being described in TP reports prepared by Engie to justify the ZORAs and submitted to the Commission together with its observations to the Opening decision (the 'TP Reports'). EIL and LNG Luxembourg are described in the TP Reports as the 'Investor' bearing all risks linked to the businesses and performing the key functions pertaining to the latter while at the same time these entities are fully covered from a risk point of view by the Forward Contracts<sup>(166)</sup>. Engie explained that, from a transfer pricing perspective, in order to determine the remuneration of the ZORA issuer, it is possible to amalgamate the ZORA lender with the purchaser of the converted shares under the Forward Contracts.
- (132) Considering that the intervention of EIL and LNG Luxembourg is neutral from an economic and commercial perspective, the Commission asked in the meeting of 1 June 2017 to explain the necessity to have these entities for the financing of the transfer of assets. Engie confirmed that it could have structured the financing of the transfer of activities differently. While there exist other ways to structure this operation, the present structure was chosen because it provided more flexibility for the management of the companies and more options for future operations, which are important criteria for the organisation of a group of companies.

#### 5.1. ENGIE REJECTS THE PRESENCE OF ANY ADVANTAGE

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

#### 5.2. ENGIE REJECTS THE SELECTIVITY OF THE CONTESTED MEASURES.

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

<sup>(166)</sup> See TP Report, sections 6.1.2 and 6.1.3.

- (135) Engie contests the system of reference used by the Commission in the Opening decision. Engie considers that Articles 109(1) and 164 LIR are not applicable, the first one because it concerns only individuals and the second one because it does not concern loans. The correct system of reference is constituted of Articles 18 to 45 LIR, which enshrine the fundamental principles of Luxembourg tax law for determining the taxable basis of a company, e.g. the principle of prudence (Article 23 LIR), the linking of the tax balance sheet to the commercial balance sheet (Article 40 LIR) and the deductibility of business expenses (Article 45 LIR).
- (136) According to Engie, the contested tax rulings do not depart from the applicable system of reference. The increase of the debt is a financial expense for the borrowers. This financial expense is booked in the annual accounts and is deductible in line with the principle of linking the tax balance sheet with the commercial balance sheet and the deduction of operating expenses. Conversely, in case of negative ZORA Accretions, the decrease of the debt leads to the booking of a taxable income. The subsequent conversion of the loan into shares does not call into question the initial qualification of the instrument as debt. Regarding EIL and LNG Luxembourg, Article 22bis LIR gives them the possibility to opt, at the time of the conversion, for a tax deferral. LNG Luxembourg did not opt for this regime following the partial conversion of the LNG ZORA in 2014 and booked a taxable profit. The GSTM ZORA and the remainder of the LNG ZORA have not given rise to any conversion to date. No income has been realised and no use of the optional regime of Article 22bis LIR could be made. Therefore, Engie considers that both in their substance and in their implementation, the contested tax rulings do not derogate from the system of reference.
- (137) Based on the TP reports, Engie argues that the method used to estimate the taxable margin at the level of the borrowers (i.e. the remuneration of the borrowers) represents a reliable approximation of a market-based outcome in line with the arm's length principle. The functions, risks and assets of the different legal entities were remunerated in line with market comparables. The two TP Reports submitted assess the functions and risks performed by the borrowers (LNG Supply or GSTM) and the 'Investor' (which is not precisely identified) and conclude that almost all risks are borne by the 'Investor' while the borrower is involved in the day-to-day management of the transferred businesses. The TP Reports identify the Comparable Uncontrolled Price <sup>(167)</sup> method as the relevant method to assess the arm's length character of the ZORA and the remuneration of exchange traded-funds as a comparable remuneration. Finally, the TP Reports conclude that the remuneration of the borrowers is in line with the remuneration of exchange traded funds and thus must be considered at arm's length.
- (138) According to Engie, the confirmation by the contested tax rulings of the combined application of the concerned provisions of Luxembourg law is consistent with the objective of the Luxembourg corporate income tax system to tax the profits of any company subject to tax in Luxembourg after taking into account the remuneration of the debt instruments. Any borrower would be subject to the same tax treatment, i.e. the deductibility of financial expenses. In the same way, any lender, which would conclude a similar loan, would be subject to the same tax treatment, i.e. taxation of an accounting profit at the time of the repayment, except if it opts for tax deferral.
- (139) Engie also contests any abuse of law. The entities involved in the transactions are all legal entities. Moreover, the contested transactions have an economic rationale, which is to finance the transfer of activities. Therefore, Engie considers that Luxembourg did not exempt the ZORA Accretions from taxes neither endorsed any tax evasion or abuse of the national law.
- (140) Secondly, Engie considers that, since the contested tax rulings merely confirm the applicable national law, they should be assessed as a scheme. In this regard, Engie considers that such schemes, as clarified by the contested tax rulings, are not selective. They are of a general nature since they are applicable, individually or cumulatively, without distinction to all economic operators without any condition. Their applicability is not subject to the issuance of tax rulings which were sought in this case for reasons of legal certainty. Any undertaking in a legal and factual comparable situation in the light of the objective of the tax system, namely the taxation of profits, can benefit from these schemes. Therefore, according to Engie, they do not create by their effects any discrimination or differentiation between undertakings.

<sup>(167)</sup> The Comparable Uncontrolled Price Method is one of the five transfer pricing methods recognised by the OECD in the 2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

- (141) Thirdly, Engie supports that the measures at issue result from the guiding principles of the Luxembourg tax system, in particular from the principle of prudence.
- (142) Engie contests that the Luxembourg corporate income tax system has for objective to tax profits recorded in the accounts. The reference system is the Luxembourg corporate income tax system, including Article 166 LIR, the application of which was approved in the contested tax rulings.
- (143) Engie also indicates that the contested tax rulings do not derogate from Article 166 LIR. In line with the Luxembourg corporate income tax system, any dividend or capital-gain recorded by a taxpayer cannot be taxed if the conditions of Article 166 LIR are met. Engie notes that the conditions of Article 166 LIR were met when LNG Supply reduced its capital by the cancellation of the newly issued shares. Therefore, Engie considers that the contested tax rulings did not deviate from the applicable fiscal rules and did not result in a decrease of the taxes, which would have been due in their absence.
- (144) Engie also considers, in line with Articles 99 and 101 of the Luxembourg Constitution that the Luxembourg tax authorities cannot derogate from the strict conditions set up in Article 166 LIR.
- (145) Engie notes that the Opening decision refers to a potential individual aid measure and not to Article 166 LIR, which would be a scheme. In case the Commission were not to consider Article 166 LIR as derogation in itself, but only question its application in the contested tax rulings, the Commission failed to demonstrate that the contested tax rulings derogate from Article 166 LIR.
- (146) Engie argues that the extension of the participation exemption regime — initially introduced in Luxembourg in 1940 — was in accordance with the objective of building the internal market. According to Engie, this is precisely the objective of Directive 90/435/EEC. Engie considers that this Directive does not require a taxation of the profits to be distributed.
- (147) As regards the reasoning at group level, Engie indicates that the selectivity assessment is only pertinent at the level of an individual legal entity and not at group level. Engie understands that in past decisions <sup>(168)</sup>, the Commission considered that an analysis at group level was not justified.
- (148) According to Engie, the Luxembourg corporate income tax system does not entail any principle of symmetric treatment between tax resident companies part of the same transaction nor any 'linking rules' as recommended by the OECD <sup>(169)</sup>. Engie reiterates that each entity of the group has been taxed in line with the applicable rules as confirmed by the contested tax rulings.
- (149) Engie explains that the transactions whose tax treatment was endorsed by the contested tax rulings pursue an economic objective, i.e. financing the transfer of assets. Therefore, according to Engie, the criteria of the Article 6 StAnpG are not met in the present case.
- (150) According to Engie, the beneficiaries of the contested tax rulings have not been treated differently from other companies which would not benefit from such tax rulings, given that the contested tax rulings only confirm the correct application of the applicable tax rules in Luxembourg. Therefore, the contested tax rulings discriminate neither *de jure* nor *de facto* other undertakings in a factual and legal situation comparable to Engie in the light of the objectives of the Luxembourg tax system.

### 5.3. ABSENCE OF RECOVERY

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

<sup>(168)</sup> 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). Commission Decision (EU) 2016/2326 of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat (OJ L 351, 22.12.2016, p. 1).

<sup>(169)</sup> Action 2 of the Base Erosion and Profit Shifting's project.

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

## 6. ASSESSMENT OF THE AID MEASURES

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

### 6.1. EXISTENCE OF AID

- (154) According to Article 107(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods is incompatible with the internal market, in so far as it affects trade between Member States.
- (155) For a measure to be categorised as aid within the meaning of Article 107(1) of the Treaty, all the conditions set out in that provision must be fulfilled <sup>(170)</sup>. Therefore, there must, first, be an intervention by the State or through State resources; second, this intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on an undertaking and, fourth, it must distort or threaten to distort competition <sup>(171)</sup>.
- (156) As regards the first condition for a finding of aid, the contested tax rulings were issued by the Luxembourg tax administration, which is an organ of the Luxembourg State. Those tax rulings entailed an acceptance by that administration of a certain tax treatment. On the basis of those rulings, the Engie group companies LNG Supply, LNG Luxembourg, LNG Holding, GSTM, EIL and CEF have determined their corporate income tax liability in Luxembourg on an annual basis. Those tax rulings are subsequently used by those Engie group companies for their annual corporate income tax declarations, which were accepted by the Luxembourg tax administration as corresponding to their corporate income tax liability in Luxembourg. The tax advantage granted on the basis of the contested tax rulings is therefore imputable to Luxembourg.
- (157) As regards the financing of the measures through State resources, the Court of Justice has consistently held that a measure by which the public authorities grant certain undertakings a tax exemption which, although not involving a positive transfer of State resources, places the persons to whom it applies in a more favourable financial situation than other taxpayers constitutes State aid <sup>(172)</sup>. In this case, the contested tax rulings confirm that the ZORA Accretions are tax deductible expenses at the level of LNG Supply and GSTM, whereas the corresponding income, once realised at the level of, respectively, LNG Holding and CEF, would be exempt from taxation. As a consequence, the amounts of the ZORA Accretions, which represent a sizeable portion of the profits generated by LNG Supply and GSTM, remain untaxed in Luxembourg. Therefore, the tax treatment granted on the basis of the contested tax rulings can be said to reduce the corporate income tax liability in Luxembourg of the Engie group and therefore gives rise to a loss of State resources. That is because any expenses of Engie group companies declared tax deductible in Luxembourg, as well as any revenues of Engie group companies declared tax-exempt in Luxembourg result in a loss of tax revenue that would have otherwise been available to Luxembourg <sup>(173)</sup>. Therefore, the measures are financed through State resources.
- (158) As regards the second condition for a finding of aid, the companies benefitting from the contested tax rulings are part of the Engie group, a multinational group operating on various energy markets in several Member States,

<sup>(170)</sup> See Case C-399/08 P *Commission v Deutsche Post*, ECLI:EU:C:2010:481, paragraph 38 and the case-law cited therein.

<sup>(171)</sup> Joined Cases C-20/15 P *Commission v World Duty Free*, ECLI:EU:C:2016:981, paragraph 53 and the case-law cited.

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

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

so that any aid in their favour is liable to affect intra-Union trade. In the same vein, by providing a favourable tax treatment to Engie, Luxembourg has potentially drawn investment away from Member States that cannot or will not offer a similarly favourable tax treatment. Since the contested tax ruling strengthens the competitive position of its beneficiary as compared with other undertakings competing in intra-EU trade, it must be considered as being liable to affect such trade <sup>(174)</sup>.

- (159) Similarly, as regards the fourth condition for a finding of aid, a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of its recipient as compared to other undertakings with which it competes <sup>(175)</sup>.
- (160) In particular, Engie is active in electricity, natural gas and LNG, energy efficiency services and other related markets in several EU Member States. These are all markets in which Engie faces competition from other undertakings. As it will be demonstrated, the tax treatment granted on the basis of the contested tax rulings relieve Engie of a tax liability they would have otherwise been obliged to bear in their day-to-day management of normal activities. Therefore the aid granted on the basis of those tax rulings should be considered to distort or threaten to distort competition by strengthening the financial position of Engie on the markets on which it operates. By relieving Engie of a tax liability it would otherwise have had to bear and which competing undertakings have to carry, the tax treatment granted on the basis of the contested tax rulings frees up resources which Engie could use, for instance, to invest in its business operations, to undertake further investments or to improve the remuneration of shareholders, thereby distorting competition on the markets where it operates. Therefore, the fourth condition for a finding of aid is also fulfilled in this case.
- (161) As regards the third condition for a finding of aid, the function of a tax ruling is to confirm in advance the way the ordinary tax system applies to a particular case in view of its specific facts and circumstances. However, like any other tax measure, the tax treatment granted on the basis of a tax ruling must respect State aid rules. Where a tax ruling endorses a tax treatment that does not reflect what would result from a normal application of the ordinary tax system, without justification, the measure will confer a selective advantage on its addressee in so far as that tax treatment results in improving the financial position of that undertaking in the Member State as compared to undertakings in a comparable factual and legal situation in the light of the objective of the tax system.
- (162) In line with the doubts expressed in the Opening decision <sup>(176)</sup>, the Commission considers that the tax treatment endorsed by the contested tax rulings constitutes a selective advantage. The existence of that selective advantage can be established analysing the effects of the tax treatment conferred to Engie from different angles. In Section 6.2, the Commission will establish the existence of a selective advantage analysing the effects of the contested tax rulings *at the individual level* of the holding entities LNG Holding and CEF. In Section 6.3 the Commission will establish the existence of a selective advantage analysing the effects of the contested tax rulings *at group level*. Finally, in Section 6.4 the Commission will demonstrate that, by not applying its domestic tax anti-abuse rules, Luxembourg has granted a selective advantage to Engie.

## 6.2. SELECTIVE ADVANTAGE ESTABLISHED ANALYSING THE EFFECTS OF THE TAX TREATMENT AT THE LEVEL OF LNG HOLDING AND CEF

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

<sup>(174)</sup> Case C-126/01 *GEMO SA* ECLI:EU:C:2003:622, paragraph 41 and the case-law cited.

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

<sup>(176)</sup> See Opening decision, recital 152.

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

<sup>(178)</sup> Case 173/73 *Italy v Commission* ECLI:EU:C:1974:71, paragraph 13.

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

- (164) The contested tax rulings endorse a tax treatment on the basis of which GSTM, EIL, CEF, LNG Supply, LNG Luxembourg and LNG Holding have determined their taxable profit for corporate income tax purposes on an annual basis. That tax treatment, in turn, determines their corporate income tax liability in Luxembourg during the period covered by the contested tax rulings and is thus apt to provide a selective advantage.
- (165) Consequently, as regards Engie's argument in recital 133 that there cannot be any advantage as the tax treatment did not materialise due to the absence of conversion of the GSTM ZORA, the Commission observes that the existence of the advantage does not depend on the conversion of the ZORAs, even though, as explained in Section 8, for the purposes of determining the amount of recovery, the advantage materialises only at the moment in which the income received by CEF and LNG Holding is exempted <sup>(180)</sup>.
- (166) Furthermore, and also to address some observations raised by Luxembourg <sup>(181)</sup> and Engie <sup>(182)</sup>, the Commission recalls that the present Decision does not concern the participation exemption regime laid down in Article 166 LIR as such, but rather the application of such regime to the specific circumstances of the case, as endorsed by the Luxembourg tax authorities when issuing the contested tax rulings. In fact, the tax treatment under assessment consists in allowing the application of the participation exemption to income received by LNG Holding and CEF stemming from their participation in, respectively, LNG Supply and GSTM, which corresponds economically to amounts deducted as expenses (the ZORA Accretions) at the level of the latter entities. The combined effect of the deductibility of the amount of the ZORA Accretions and the exemption of the corresponding income is that virtually all the profit realised by LNG Supply and GSTM has effectively been left untaxed <sup>(183)</sup>. As explained in Section 6.2.1, this tax treatment derogates from the reference framework, which is the Luxembourg corporate income tax system. Moreover, it constitutes an unjustified discrimination *vis-à-vis* other undertakings subject to the same reference framework in Luxembourg, which would be taxed on the totality of their profit.
- (167) Article 107 of the Treaty prohibits only aid 'favouring certain undertakings or the production of certain goods', that is to say, it prohibits measures conferring a selective advantage <sup>(184)</sup>. In order to classify a national tax measure as selective under that analysis, the Court of Justice has devised the so-called three steps test. Under this test, the Commission must begin by identifying the reference system. Thereafter, it must demonstrate that the tax measure at issue is a derogation from that reference system, in so far as it differentiates between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation (*prima facie* selectivity) <sup>(185)</sup>. Finally, a tax measure which constitutes a derogation to the application of the reference system may nevertheless be justified if the Member State concerned can show that that this measure results directly from the basic or guiding principles of that tax system <sup>(186)</sup>. If that is the case, the tax measure is not selective. The burden of proof in that last step lies with the Member State.
- (168) Therefore, the analysis of the existence of a selective advantage must begin with the identification of the reference system applicable in the Member State concerned. It is against that reference system that it must be determined whether the measure constitutes a derogation giving rise to a favourable treatment compared to other undertakings in a comparable factual and legal situation in the light of the objectives of the system.
- (169) A reference system is composed of a consistent set of rules that apply on the basis of objective criteria to all undertakings falling within its scope as defined by its objective. Those rules define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of undertakings subject to it and the technicalities of the functioning of the system <sup>(187)</sup>. In the case of taxes, the reference system is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates <sup>(188)</sup>.
- (170) In this case, the Commission will establish in Section 6.2.1 that the tax treatment granted on the basis of the contested tax rulings constitutes a derogation from the general Luxembourg corporate income tax system.

<sup>(180)</sup> Moreover, the LNG ZORA has been partly converted.

<sup>(181)</sup> Observations by Luxembourg to the Letter of 11 December 2017, page 5.

<sup>(182)</sup> Observations by Engie to the Letter of 11 December 2017, paragraph 33.

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

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

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

<sup>(186)</sup> See Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 65.

<sup>(187)</sup> See Notion of aid Notice, paragraph 133.

<sup>(188)</sup> Notion of aid Notice, paragraph 134.

In Section 6.2.2, it will demonstrate that this tax treatment also derogates from a narrower reference system consisting exclusively of the rules of the general Luxembourg corporate income tax system which govern the participation exemption and the taxation of profit distributions.

#### 6.2.1. DEROGATION FROM THE LUXEMBOURG CORPORATE INCOME TAX SYSTEM GIVING RISE TO DISCRIMINATION

##### 6.2.1.1. *Reference framework: Luxembourg corporate income tax system*

- (171) The contested tax rulings were issued in favour of several Engie companies resident in Luxembourg in order to determine their corporate income tax liability under the ordinary rules of taxation of corporate income in Luxembourg. In view of this, the Commission considers that the reference system in the present case is composed of those rules, i.e. the general Luxembourg corporate income tax system.
- (172) In this case, the main provisions of the law <sup>(189)</sup> indicate that the corporate income tax system applies to all companies resident in Luxembourg in order to determine their corporate income tax liability.
- (173) According to Article 159(1) LIR, all companies with head office or central management in the territory of Luxembourg are considered resident for tax purposes in Luxembourg and are subject to corporate income tax. Pursuant to Article 159(2) LIR, resident companies are subject to tax on the totality of their profit (*sur l'ensemble des revenus du contribuable*). Consistently with this provision, Article 163 LIR provides that corporate income tax is applicable on the taxable profit realised by the taxpayer in a given calendar year.
- (174) The taxable profit (*revenu imposable*) of corporate taxpayers is determined on the basis of its accounting profit. Article 18 LIR <sup>(190)</sup> explains how the taxpayer's annual profit is determined. According to this provision, the profit is the difference between net invested assets at the end of the tax year period and net invested assets at the beginning of the tax year period, plus withdrawals for personal use, minus additional contributions performed during the year.
- (175) Therefore, in order to determine the profit which will be subject to tax it is first necessary to determine the values of the net invested assets of the company to be used for tax purposes. To this end, Article 23 LIR <sup>(191)</sup> explains that the value of the net assets should be determined following accounting rules and principles and Article 40 <sup>(192)</sup> establishes the principle of linking the tax balance sheet and the commercial balance sheet, according to which the values of the tax balance sheet should correspond to the values of the commercial balance sheet unless a specific tax rule requires the use of a different value <sup>(193)</sup>. This means that, according to the Luxembourg general corporate income tax system, the accounting profit of a company is included in its tax base, unless a specific provision of the law indicates otherwise.
- (176) In conclusion, the Luxembourg corporate income tax system applies to all companies with head office or central management located in the territory of Luxembourg, and the basis for the calculation of the taxable profit is the accounting profit. Therefore, the objective of the Luxembourg corporate income tax system is the taxation of the profit of all companies subject to tax in Luxembourg, as determined in their accounts.
- (177) This is in principle neither disputed by Luxembourg nor by Engie <sup>(194)</sup>. According to Luxembourg <sup>(195)</sup>, the system of reference consists, first, of Articles 18, 40 and 23 LIR, which concerns the determination of the tax base,

<sup>(189)</sup> See Section 2.3.1.

<sup>(190)</sup> Although in principle applicable to physical persons, pursuant to Article 162 LIR this provision is also applicable to corporate taxpayers.

<sup>(191)</sup> Although in principle applicable to physical persons, pursuant to Article 162 LIR this provision is also applicable to corporate taxpayers.

<sup>(192)</sup> Although in principle applicable to physical persons, pursuant to Article 162 LIR this provision is also applicable to corporate taxpayers.

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

<sup>(194)</sup> See however recital 180.

<sup>(195)</sup> See recitals 106 to 108.

the linking of the commercial balance sheet with the tax balance sheet and the prudence principle <sup>(196)</sup>, and second, of Article 22bis LIR. According to Engie <sup>(197)</sup>, the reference system is constituted of Articles 18 to 45 LIR, which enshrine the fundamental principles of Luxembourg tax law for determining the tax base of a company, e.g. the principle of prudence, the linking of the tax balance sheet to the commercial balance sheet and the deductibility of business expenses <sup>(198)</sup>. Engie expressly agrees that the objective of the Luxembourg corporate income tax system is the taxation of the profits of all companies subject to tax in Luxembourg <sup>(199)</sup>.

- (178) The definition of the general Luxembourg corporate income tax system as the reference framework is in line with the Court's case law, which has consistently held that in the case of measures concerning the determination of the corporate income tax liability, the reference system to be considered is the corporate income tax system of the Member State in question which applies to all undertakings, and not the specific provisions of that system applicable only to certain taxpayers or to certain transactions. For instance, in *World Duty Free*, a case concerning the rules governing investments in shareholdings, the Court endorsed the Commission's position that the reference system was the Spanish corporate income tax system and not the specific rules governing the tax treatment of those investments <sup>(200)</sup>.
- (179) The Commission considers that limiting the reference framework to specific provisions of the general income tax law that target certain transactions or certain undertakings would mean that the identification of the reference system in a given case would be wholly dependent on whether the Member State in question has adopted specific tax rules, rather than looking at the objective of the tax system. By adopting specific rules applicable only to certain undertakings or transactions, the Member State could argue that the tax treatment of these companies or transactions never constitutes a derogation from the reference framework. This would shield those measures against the application of Article 107 of the Treaty and thus would render State aid control ineffective. In other words, accepting this approach would mean that the qualification of a measure as a derogation from the reference system would be entirely dependent on the regulatory technique used by the Member State. As the Court has already held, this is incompatible with the well-established principle according to which Article 107 of the Treaty defines a measure as State aid in relation to its effects, and thus independently of the techniques used <sup>(201)</sup>.
- (180) Luxembourg does not expressly contest that the reference framework is the general corporate income tax system. However, it considers that the objective of taxing the profits realised by companies subject to tax in Luxembourg is neither consecrated nor reflected in the provisions of the income tax law and that the provisions of the law cannot be interpreted as requiring that all profit made by a company subject to tax in Luxembourg must be taxed, in all circumstances, even against the text of the law <sup>(202)</sup>. Luxembourg and Engie invoke in this respect the principle of legality, according to which the way taxes are determined is established by the law, which must be interpreted strictly, and if a certain situation is not expressly stipulated by the law (silence of the legislator), it cannot be subject to taxation <sup>(203)</sup>.
- (181) The Commission does not agree with this allegation.

<sup>(196)</sup> See footnote 193.

<sup>(197)</sup> See recital 135.

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

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

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

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

<sup>(202)</sup> See observations by Luxembourg to the Letter of 11 December 2017, page 2.

<sup>(203)</sup> See observations by Luxembourg to the Letter of 11 December 2017, page 2. Observations by Engie to the Letter of 11 December 2017, paragraph 30.

- (182) First of all, the Commission fails to understand how the taxation of the profit of all companies subject to tax cannot be an objective of a corporate income tax system. In fact, the Commission notes that Luxembourg does not propose in its observations any alternative objective. Second, the Commission also notes that Engie agrees with the fact that the objective of the Luxembourg corporate income tax system is the taxation of the profit of all companies subject to tax in Luxembourg <sup>(204)</sup>. Third, as described in recitals 172 to 176, a mere reading of the relevant provisions of the law suffices to conclude that the Luxembourg corporate income tax system aims at taxing the profit of all companies subject to tax in Luxembourg, as determined on the basis of their accounts.
- (183) By invoking the principle of legality Luxembourg and Engie seem to be referring to the existence of an exception or *lacuna* in the Luxembourg tax law which would have led to the effective non-taxation of virtually all the profits realised by LNG Supply and GSTM in Luxembourg. The essence of this argument is that in those cases such exceptions or *lacunae* would be part of the reference system and, thus, there could be no derogation.
- (184) The Commission rejects this argument. Since the structures devised by Engie in the contested tax rulings are – as Luxembourg and Engie admit <sup>(205)</sup> – open to every operator in the market, this means that any undertaking could transfer its business to a subsidiary, set up a similar financing structure and end up being taxed only on a marginal portion of its profits, such as Engie has been. In other words, according to this argument, any taxpayer in Luxembourg can choose to be taxed on the totality of its profit or remain virtually untaxed. The Commission cannot accept this conclusion. Not only would it contravene the general feature of any tax system according to which the amount of taxes to be paid cannot unilaterally be determined by the taxpayer, but also the basic principle – common to every Member State – that income taxes should be levied according to a taxpayer's ability to pay. Moreover, it would put at risk the capacity by the State to mobilise the necessary resources to finance its budget, thus rendering ineffective its tax system.
- (185) In practice, the approach defended by Luxembourg and Engie would render State aid control ineffective, since Member States would be allowed to introduce in their tax systems – intentionally or not – unjustified exceptions from the general principle of taxation of profit from which entire categories of undertakings or transactions could benefit. Since such exceptions would be part of the reference framework, they could never constitute State aid.
- (186) As a related argument, Luxembourg also claims that the reference framework should be defined by reference to a body of rules expressly stipulated by the national legislator and not to an alleged 'principle' or 'objective', the interpretation of which would risk going beyond the clear and precise terms of the law <sup>(206)</sup>.
- (187) The Commission does not agree that a reference system cannot be defined by reference to its objectives, such as the taxation of the profit of all companies subject to tax. On the contrary, that is the standard way in which the case-law of the Court has been defining the reference framework in State aid cases in the corporate income tax field <sup>(207)</sup>. Indeed, the Commission is *required* to define the objective of the system in order to establish selectivity, since only in light of that objective it can demonstrate whether undertakings which are excluded from the

<sup>(204)</sup> See footnote 199.

<sup>(205)</sup> See observations by Luxembourg to the Letter of 11 December 2017, page 8; observations by Engie to the Opening decision, paragraphs 125-126.

<sup>(206)</sup> See observations by Luxembourg to the Letter of 11 December 2017, page 2.

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

advantage are in a legal and factual situation that is comparable to that of the beneficiaries of the measure in question <sup>(208)</sup>. In any case, the objective of the Luxembourg corporate income tax system, which applies to all corporate taxpayers subject to tax in Luxembourg, is defined in the law, as it has been explained in recitals 172 to 176 and, once again, Luxembourg has not identified any alternative objective. Therefore, this argument must be rejected.

- (188) In light of the foregoing, the Commission concludes that the applicable reference system is the Luxembourg corporate income tax system, the objective of which is the taxation of the profit of all companies subject to tax in Luxembourg <sup>(209)</sup>. The fact that there may be some exceptions or adjustments in the way in which the tax base is determined, as Luxembourg <sup>(210)</sup> or Engie <sup>(211)</sup> allege, does not undermine this conclusion. It is thus against that system that it must be determined whether the tax treatment granted on the basis of the contested tax rulings constitutes a derogation giving rise to a favourable treatment compared to other undertakings in a comparable factual and legal situation in light of the objective of the system <sup>(212)</sup>.
- (189) LNG Holding and CEF can be considered in a legal and factual situation comparable to all corporate taxpayers subject to tax in Luxembourg in the light of the objective of Luxembourg's general corporate income tax system, i.e. the taxation of the profit of all companies subject to tax in Luxembourg. In the light of that objective, all corporate taxpayers that are capable of generating profit are, as a matter of principle, in a comparable factual and legal situation when it comes to assessing their corporate income tax liability in Luxembourg.
- (190) The fact that – unlike other taxpayers – LNG Holding and CEF receive profit distributions from participated entities which can be subject to the participation exemption under Article 166 LIR does not make these two entities non-comparable to taxpayers not benefitting from this exemption in the light of the objective of the system. The exemption stipulated under this provision is granted only to certain type of income provided that some conditions are met. However, the nature of the income realised by the company (profit distribution eligible under Article 166 LIR or other commercial profit realised by the company), and the rest of conditions set out under Article 166 LIR <sup>(213)</sup> do not have any bearing on the objective of the system, which is the taxation of the profit of all companies subject to tax in Luxembourg <sup>(214)</sup>. Indeed, if the benefit from a certain corporate income tax exemption would be sufficient to render an undertaking not comparable to other undertakings not benefitting from that exemption, then corporate income tax exemptions would, by definition, never be considered selective.

#### 6.2.1.2. *Derogation from the reference framework giving rise to discrimination*

- (191) In view of the reference framework described in 6.2.1.1, the basis of assessment of their corporate income tax liability is the same for all corporate taxpayers in Luxembourg, i.e. the amount of net profit as determined in their accounts <sup>(215)</sup>.
- (192) The tax treatment endorsed by the contested tax rulings allows exempting an income received by LNG Holding and CEF: the income resulting from their participation in, respectively, LNG Supply and GSTM. As the contested

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

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

<sup>(210)</sup> See observations by Luxembourg to the Letter of 11 December 2017, page 2.

<sup>(211)</sup> See observations by Engie to the Letter of 11 December 2017, paragraphs 22 and 23.

<sup>(212)</sup> In any event, in Section 6.2.2 the Commission will demonstrate that, should a narrower reference framework be considered, limited to the rules concerning the participation exemption and the taxation of profit distributions, the tax treatment granted on the basis of the contested tax rulings would also constitute a derogation giving rise to a favourable treatment compared to other undertakings in a comparable factual and legal situation.

<sup>(213)</sup> 12-month period holding the participation and holding of minimum 10 % of the capital of the participated entity or EUR 1,2 million acquisition price.

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

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

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

- (193) The consequence is that virtually all the profit realised by LNG Supply and GSTM is left untaxed in the hands of, respectively, LNG Holding and CEF. However, such profit is realised by companies subject to tax in Luxembourg and is recorded in the accounts, first of LNG Supply and GSTM, and later of LNG Holding and CEF. Consequently, under the ordinary taxation system, it should be subject to taxation in Luxembourg. Therefore, the tax treatment granted on the basis of the contested tax ruling constitutes a derogation from the reference framework.
- (194) Luxembourg raises again the principle of legality. It considers that the terms of the provisions of the law which have been applied in the contested tax rulings are clear and do not admit an interpretation *ratio legis* or according to their objectives. Since the text of the provisions of the law has been respected, there can be no derogation and therefore there is no advantage <sup>(218)</sup>.
- (195) With this argument, Luxembourg essentially considers that a measure cannot constitute a selective advantage if it complies with national law, since in this case it would not constitute a derogation. In the Commission's view, this argument is ineffective. As it has already been explained, State aid measures are assessed in relation to their effects. Therefore, the definition of a measure as aid cannot depend on their legality under the national legal order. If that was the case, virtually no State measures could be qualified as State aid <sup>(219)</sup>. On the contrary, whenever the application of one or more provisions of the law to a specific case gives rise to an exception to the general rule set out in the reference system (in this case, the taxation of the profit of all companies subject to tax in Luxembourg), then that tax treatment must be considered as constituting a derogation. Moreover, if such derogation gives rise to a discrimination *vis-à-vis* undertakings in a comparable legal and factual situation in the light of the objective of the system, the tax treatment in question must be considered *a priori* selective, and this irrespective of whether the terms of the provisions applied have been respected or not.
- (196) As a consequence, the tax treatment granted on the basis of the contested tax rulings derogates from the general Luxembourg corporate income tax system and hence constitutes an economic advantage to LNG Holding and CEF. The fact that there exists in the corporate income tax law of a number of other derogations does not undermine the derogatory nature of the tax treatment granted on the basis of the contested tax rulings <sup>(220)</sup>.
- (197) Moreover, as established in Section 6.2.1.1, LNG Holding and CEF are in a comparable legal and factual situation to all corporate taxpayers subject to corporate income tax in Luxembourg. Therefore, the tax treatment granted to LNG Holding and CEF on the basis of the contested tax rulings confers an advantage on those two companies as compared to all other corporate taxpayers in a comparable legal and factual situation in the light of the objective pursued by the Luxembourg corporate income tax.
- (198) In light of the foregoing, the Commission concludes that the advantage granted on the basis of the contested tax rulings is *prima facie* selective.
- (199) In any case, even if only corporate taxpayers that are subject to the rules concerning the participation exemption and the taxation of profit distributions were considered to be in a legal and factual situation comparable to LNG Holding and CEF, in Section 6.2.2 the Commission will also demonstrate that those corporate taxpayers are also excluded from the tax advantage granted to LNG Holding and CEF.

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

<sup>(217)</sup> See Sections 2.2.3.3, 2.2.3.4, 2.2.3.5, 2.2.4.3, 2.2.4.4 and 2.2.4.5.

<sup>(218)</sup> See observations by Luxembourg to the Letter of 11 December 2017, page 4.

<sup>(219)</sup> Except in cases of misapplication of national law.

<sup>(220)</sup> Case C-217/03 *Belgium and Forum 187 v Commission* ECLI:EU:C:2005:266, paragraph 120.

6.2.2. DEROGATION FROM THE RULES OF THE LUXEMBOURG CORPORATE INCOME TAX SYSTEM  
CONCERNING THE PARTICIPATION EXEMPTION AND THE TAXATION OF PROFIT DISTRIBUTIONS

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

- (200) Engie claims that the adjustments imposed by the tax law to the profit determined in the taxpayer's commercial balance sheet, and in particular the participation exemption regime, are part of the reference framework <sup>(221)</sup>. In practice, with this allegation Engie attempts to narrow down the reference framework to the specific provisions of the income tax law that govern the participation exemption and the taxation of profit distributions. Against this narrower reference framework, the assessment of the undertakings which are in a legal and factual situation comparable to LNG Holding and CEF will necessarily be limited to those taxpayers to which these provisions apply. However, as it will be demonstrated in this Section, under this narrower reference framework the tax treatment granted on the basis of the contested tax rulings is also *prima facie* selective.
- (201) Article 164(1) LIR provides that, in order to determine the tax base of a company, it is irrelevant whether the profit has been distributed or not. This means that the profit distributed by a company does not reduce its tax base, i.e. it cannot be deducted. As a consequence, profit can only be distributed after tax. As explained in recital 87, Article 164(2) LIR applies to distributions of any kind to shareholders.
- (202) Conversely, the beneficiaries will record the distributed profit in their accounts as an income. Following the principle of linking of the commercial and tax balance sheet, this income, which is part of the profit realised by those companies and thus recorded in their accounts, will in principle be included in their tax base. That inclusion will therefore lead to economic double taxation, unless the participation exemption is applied in accordance with the provisions of Article 166 LIR <sup>(222)</sup>. The exemption under this provision applies to income stemming from 'participations', a term not defined in the law. However, as Luxembourg has clarified, all the participations the income of which can benefit from the exemption under Article 166 LIR (including shares) are also covered by the obligation under Article 164 LIR (with the exception of participations in foreign entities) <sup>(223)</sup>. Therefore, under the ordinary Luxembourg corporate income tax system, the participation exemption applies on post-tax profit (i.e. it cannot be applied to amounts deducted from the tax base of the distributing entity) <sup>(224)</sup>.
- (203) Following the Decree of 21 December 2001, the participation exemption is applicable not only to profit distributed by the participated entity, but also to capital gains stemming from participations eligible to the regime <sup>(225)</sup>. A capital gain is the income resulting from the difference between the value of realisation of a participation (in the case of sale or cancellation) and its acquisition value. Capital gains arising from participations reflect either profit already realised by the participated entity but which have not yet been distributed or profit expected to be realised in the future, and therefore, not distributed either. Pursuant to Articles 18 LIR and 40 LIR all profit must necessarily be included in the tax base of the participated entity. Moreover, since it has not been

<sup>(221)</sup> See observations by Engie to the Letter of 11 December 2017, paragraphs 22 to 24.

<sup>(222)</sup> See recital 85.

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

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

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

distributed by the participated entity that profit cannot, by definition, be the object of any deduction. Accordingly, also in the case of capital gains, the participation exemption is applicable to income which cannot correspond to amounts deducted from the tax base of the participated entity (such as the ZORA Accretions).

- (204) In other words, under a narrower reference framework composed exclusively of the rules concerning participation exemption and the taxation of profit distributions, the participation exemption is applicable to income which does not correspond to amounts deducted from the tax base of the participated entity, and this regardless of whether such income is qualified as a profit distribution or a capital gain.
- (205) LNG Holding and CEF are in a legal and factual situation comparable to all corporate taxpayers that receive income from participations and which are therefore subject to the rules concerning the participation exemption and the taxation of profit distributions in Luxembourg. Those undertakings hold the same type of instruments as LNG Holding and CEF (participations) and the income received from those instruments is of the same nature than the income received by LNG Holding and CEF, which qualifies in principle for the application of the participation exemption.

#### 6.2.2.2. *Derogation from the reference framework giving rise to discrimination*

- (206) The contested tax rulings allow LNG Holding and CEF (entities resident for tax purposes in Luxembourg) to apply the participation exemption to an income which corresponds economically to amounts deducted as expenses (ZORA Accretions) at the level of, respectively, LNG Supply and GSTM (also resident in Luxembourg).
- (207) In fact, the contested tax rulings confirm that any profit made by LNG Supply and GSTM exceeding the LNG Margin and GSTM Margin (and therefore deducted from their tax bases in the form of ZORA Accretions) is incorporated into the LNG Shares and the GSTM Shares. Those shares are, by virtue of the ZORAs and of the Forward Contracts, received at conversion by, respectively, LNG Holding and CEF. Thereafter, when the profit incorporated into the LNG Shares and the GSTM Shares is realised as income at the level of LNG Holding and CEF, it can benefit from the participation exemption <sup>(226)</sup>.
- (208) The existence of a direct and clear link between the income benefitting from the participation exemption at the level of the Holdings and the amounts deducted as expenses at the level of the Subsidiaries is apparent in the case of the partial conversion of the LNG ZORA. In this case, as the tax returns submitted show, the income realised by LNG Holding as a result of the partial conversion and cancellation of LNG Supply Shares in 2014 corresponds economically to the ZORA Accretions deducted by LNG Supply between 2009 and 2014, which LNG Holding has received by means of the LNG ZORA and the LNG Forward Contract. <sup>(227)</sup> This has been expressly confirmed by Luxembourg: '*La plus-value comptable de 506,2 MUSD réalisée par LNG Holding correspond économiquement à l'accroissement de valeur de LNG Supply entre 2009 et 2014*' <sup>(228)</sup>.
- (209) The application of the participation exemption to an income at the level of the Holdings which corresponds economically to amounts deducted as expenses at the level of the Subsidiaries constitutes an exception to the reference framework described in Section 6.2.2.1 above according to which, the participation exemption is applicable to income which does not correspond to amounts deducted from the tax base of the participated entity. The effect of this derogation is that virtually all the profit generated by LNG Supply and GSTM is never subject to taxation in Luxembourg. As a consequence, the tax treatment endorsed by the contested tax rulings improves the financial position of LNG Holding and CEF. In fact, under the ordinary system described in Section 6.2.2.1 above, the income received by these entities would have not been deducted (in the form of ZORA Accretions) at the level of the Subsidiaries. That income would have been lower because the corresponding profit would have previously been subject to taxation in the hands of the Subsidiaries.
- (210) Luxembourg and Engie contest the applicability of Article 164(2) LIR to the ZORA Accretions. In other words, Luxembourg and Engie contest that ZORA Accretions can be assimilated to profit distributions.

<sup>(226)</sup> See Sections 2.2.3.3, 2.2.3.4, 2.2.3.5, 2.2.4.3, 2.2.4.4 and 2.2.4.5.

<sup>(227)</sup> See recitals 49, 53 and 57.

<sup>(228)</sup> See letter by Luxembourg of 12 May 2017, response to question 2.ii.

- (211) In this regard, the Commission recalls that LNG Holding expressly qualifies the profit resulting from the cancellation of the LNG Supply Shares as 'exempted dividends', i.e. as a profit distribution, in its tax returns for the year 2014 <sup>(229)</sup>.
- (212) Moreover, as explained in recitals 207 and 208, there exists a direct and clear link between the income that can be exempted at the level of LNG Holding and CEF and the amounts deducted by LNG Supply and GSTM as expenses (the ZORA Accretions). Therefore, from an economic perspective, the income received by LNG holding and CEF is equivalent to a profit distribution <sup>(230)</sup>.
- (213) In any case, the Commission recalls that the formal qualification of the profit exempted at the level of LNG Holding and CEF as a profit distribution or as a capital gain is irrelevant. In fact, as it has been explained in Section 6.2.2.1, under the narrower reference framework composed exclusively of the rules concerning participation exemption and the taxation of profit distributions, the participation exemption is applicable to income which does not correspond to amounts deducted from the tax base of the participated entity, and this regardless of whether such income is qualified as a profit distribution or a capital gain <sup>(231)</sup>.
- (214) In conclusion, the tax treatment granted to LNG Holding and CEF on the basis of the contested tax rulings derogates from the general rules of the Luxembourg corporate income tax system governing the participation exemption and the taxation of profit distributions.
- (215) Moreover, this derogation gives rise to discrimination compared to other undertakings which are in a legal and factual situation compared to LNG Holding and CEF in the light of the objective of the system. In fact, other corporate taxpayers that receive income from participations and are therefore subject to the rules concerning the participation exemption and the taxation of profit distributions in Luxembourg are excluded from the benefit of the tax advantage granted to LNG Holding and CEF, even though they are in a comparable factual and legal situation in the light of the objective of the system. It is true that all those taxpayers could benefit of the exemption under Article 166 LIR. However, the participation exemption would have been applied to a relatively lower income, (i.e. post-tax profit of the participated entity), as explained in recital 209.
- (216) Luxembourg claims that Article 166 LIR does not require for its application that the profit stemming from participations must have previously been taxed and that the provisions of Article 164 LIR are not a condition *sine qua non* for the application of Article 166 LIR <sup>(232)</sup>. In the same line, Engie considers that the conditions for the application of Article 166 LIR have all been respected, so there can be no derogation <sup>(233)</sup>. Both Luxembourg and Engie also contest that the objective of Article 166 LIR is the avoidance of double taxation with various arguments related, inter alia, to Council Directive (EU) 2015/121 <sup>(234)</sup> ('parent-subsidiary Directive').
- (217) The Commission must reject this line of argument.
- (218) First of all, the fact that there is no express link between Article 166 LIR and Article 164(1) and (2) LIR is irrelevant. Luxembourg has expressly confirmed <sup>(235)</sup> that all participations eligible for the exemption under

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

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

<sup>(231)</sup> See recital 204.

<sup>(232)</sup> See observations by Luxembourg to the Letter of 11 December 2017, pages 4, 6 and responses to questions 1.b and 1.c.

<sup>(233)</sup> See observations by Engie to the Letter of 11 December 2017, paragraphs 26-31.

<sup>(234)</sup> Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 21, 28.1.2015, p. 1).

In its observations to the Letter of 11 December 2017, Luxembourg explains that the recent amendment introduced in the parent-subsidiary Directive in 2015 — where the application of the participation exemption on profits distributed is made conditional on the non-deductibility of these profits by the subsidiary — would have been unnecessary if the objective of the participation exemption was to avoid double taxation (page 4). Engie also refers to other objectives pursued by this Directive (see observations to the Letter of 11 December 2017, paragraphs 35-43).

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

Article 166 LIR are also caught by Article 164(1) and (2) LIR at the level of the participated entity <sup>(236)</sup>. The consequence of this is that under the reference framework described in Section 6.2.2.1, the participation exemption is applicable to income which cannot correspond to amounts deducted from the tax base of the participated entity. As an exception to this rule, the contested tax rulings allow the application of the participation exemption at the level of the Holdings (entities resident for tax purposes in Luxembourg) to an income which corresponds economically with the amounts deducted as expenses (the ZORA Accretions) at the level of the Subsidiaries (also resident in Luxembourg). As a consequence, the tax treatment granted on the basis of the contested tax rulings derogates from the reference system.

- (219) Second, even in the absence of an express link between both provisions, the complementarity of Article 166 LIR and Article 164(1) and (2) LIR is necessary in order to ensure the logical consistency of the tax system. If the same amount could be deducted as an expense at the level of the participated entity and exempted as income at the level of the beneficiary, that profit would escape taxation in Luxembourg. Such an interpretation would allow any corporate group to easily circumvent the objective of the Luxembourg corporate income tax system, which is to tax the profit of all companies subject to tax in Luxembourg, by distributing to its shareholder all the previously untaxed profit of the subsidiaries <sup>(237)</sup>. Moreover, such an interpretation would also be inconsistent with the objective of avoiding double or triple taxation <sup>(238)</sup>.
- (220) Article 107 of the Treaty defines aid measures in relation to their *economic effects* in the market, not in relation to their legality under the national legal order, to the legislative techniques used or to the intention of the legislator. Consequently, to the extent that the combined *effect* of the deductibility of the ZORA Accretions and the exemption of the corresponding income is that virtually all the profit realised by the Subsidiaries has been left untaxed at the level of the Holdings, thus giving rise to discrimination with undertakings in a comparable legal and factual situation, the State measure endorsing such tax treatment must be considered as granting a *prima facie* selective advantage. This conclusion is this irrespective of whether the conditions of Articles 166 and 164 LIR have been respected, of whether there is an express link between such provisions or of the objective of the parent-subsidiary Directive.
- (221) Engie refers to the judgment of the Court in the case *Service public fédéral Finances* <sup>(239)</sup> which interprets the provisions of the parent-subsidiary Directive which were in force at the time in which the contested tax rulings were issued <sup>(240)</sup>. According to Engie, the Court confirmed in that judgment that the parent-subsidiary Directive – applicable to cross-border situations – does not require that profit subject to the participation exemption has been taxed before. Engie considers that by applying the same exemption regime to internal situations, Luxembourg has opted to ensure equal treatment between corporate groups with subsidiaries in Luxembourg and corporate groups with subsidiaries in other Member States. As both situations are factually identical and the same provisions are applicable in both cases, Engie considers that the participation exemption cannot be said to apply only in the cross-border situation and not in the internal one.
- (222) At the outset, the Commission clarifies that the present Decision concerns a purely internal situation, in which all companies involved in the different transactions contemplated in the contested tax rulings are resident for tax purposes in Luxembourg. The selective advantage derives from a derogation consisting in the fact that the profit realised by two subsidiaries of the Engie group resident in Luxembourg have remained virtually untaxed at the level of their shareholders, also resident in Luxembourg. Therefore, the Commission has not investigated if a similar measure, applied to a situation in which the participated entities were not tax resident in Luxembourg, would also constitute a selective advantage.
- (223) The Commission rejects the argument that Luxembourg must necessarily apply to a purely internal situation the more favourable treatment that would apply to the same transaction at cross-border level. A mismatch arises due

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

<sup>(237)</sup> See, to this regard, Steichen, Alain in footnote 224.

<sup>(238)</sup> See the advice of the State Council on Article 166 LIR (recital 83); see also Commission Decision 2006/940/EC of 19 July 2006 on aid scheme C 3/2006 implemented by Luxembourg for 1929 holding companies and billionaire holding companies (OJ L 366, 21.12.2006, p. 47), recital 63.

<sup>(239)</sup> See Case C-48/07 *État belge – Service public fédéral Finances* ECLI:EU:C:2008:758, paragraphs 37 and 45.

<sup>(240)</sup> The judgment refers to Directive 90/435/EEC.

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

- (224) The Court's case-law, and in particular the *Service public federal Finances* judgment, says nothing different. This case concerns a Belgian law that extended the application of the parent-subsidiary Directive also to purely internal situations. The Belgian Court referred to the Court of Justice a question for a preliminary ruling regarding the interpretation of the Directive <sup>(241)</sup>. The judgment confirms that the objective of the Directive is to eliminate cases of double taxation of profits distributed by subsidiaries to their parent companies and to eliminate disadvantages for cross-border cooperation due to the less advantageous tax treatment of cross-border relations between parent companies and subsidiaries as compared to purely internal relations <sup>(242)</sup>. In light of that spirit, and in line with the case law on the fundamental freedoms, the Court states that the 'freedoms of movement guaranteed by the Treaty preclude a Member State from treating foreign-sourced dividends less favourably than nationally-sourced dividends, unless such a difference in treatment concerns situations which are not objectively comparable or is justified by overriding reasons in the general interest' <sup>(243)</sup>. In other words, this judgment merely applies the well-established case-law according to which the fundamental freedoms prevent Member States from treating domestic situations more favourably than comparable cross-border situations. The opposite, however, is not true: Member States are not required, as Engie seems to suggest, to extend to purely internal situations the more favourable tax treatment applicable to cross-border situations, in particular if that more favourable treatment results from mismatches or gaps leading to non-taxation <sup>(244)</sup>.
- (225) The argument according to which the tax advantage granted to LNG Holding and CEF on the basis of the contested tax rulings is of general application, since any other undertakings could potentially have access to a similar benefit replicating the structure implemented by Engie, is also ineffective. According to the Court's settled case-law, the fact that the number of undertakings able to claim entitlement under a national measure is very large or that those undertakings belong to various economic sectors is not sufficient to call into question the selective nature of the measure <sup>(245)</sup>. The same principle can be applied in cases in which the advantage results from a tax ruling applying a combination of provisions of the law to a specific set of facts when those facts can be replicated by other undertakings. The Court has also established that the Commission is not required, in order

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

<sup>(242)</sup> *Ibid.*, paragraph 37.

<sup>(243)</sup> *Ibid.*, paragraphs 46 and 47 (emphasis added by the Commission).

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

Even more, since domestic situations cannot be treated more favourably than comparable cross-border situations, LNG Holding and CEF should not receive advantages which would not be granted for cross-border situations. In this respect, it should be recalled that under Article 166 para 2bis – introduced in the LIR in 2016 as a result of the transposition of Directive 2014/86/EU, the participation exemption would not be applicable in cross-border situations in cases where the income received by the beneficiary can be deducted in the Member State of the participated entity: '[...] l'exonération ne s'applique pas aux revenus visés par la directive 2011/96/UE du Conseil du 30 novembre 2011 concernant le régime fiscal commun applicable aux sociétés mères et filiales d'Etats membres différents, qui proviennent d'une participation détenue directement dans le capital social d'un organisme à caractère collectif qui est un résident d'un autre Etat membre de l'Union européenne et visé par l'article 2 de la directive 2011/96/UE, dans la mesure où ils sont déductibles dans cet Etat membre ou lorsqu'ils sont alloués dans le cadre d'un montage ou d'une série de montages qui, ayant été mis en place pour obtenir, à titre d'objectif principal ou au titre d'un des objectifs principaux, un avantage fiscal allant à l'encontre de l'objet ou de la finalité de cette directive, n'est pas authentique compte tenu de l'ensemble des faits et circonstances pertinents. Au sens de la présente disposition, un montage, qui peut comprendre plusieurs étapes ou parties, ou une série de montages est considéré comme non authentique dans la mesure où ce montage ou cette série de montages n'est pas mis en place pour des motifs commerciaux valables qui reflètent la réalité économique'.

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

to establish the selectivity of a measure, to identify certain specific features that are characteristic of and common to the undertakings that could be the recipients of the tax advantage, by which they can be distinguished from those undertakings that are excluded from the advantage <sup>(246)</sup>.

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

### 6.2.3. LACK OF JUSTIFICATION

- (227) According to settled case-law, the concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, *prima facie* selective, where that differentiation arises from the nature and the logic of the system, which it is for the Member State concerned to demonstrate <sup>(247)</sup>.
- (228) A measure which creates an exception to the application of the general tax system may be justified by the nature and overall structure of the tax system if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system <sup>(248)</sup>. In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax regime, which are extrinsic to it, and, on the other hand, the mechanisms inherent in the tax system itself, which are necessary for the achievement of such objectives <sup>(249)</sup>.
- (229) Neither Luxembourg nor Engie have advanced any possible justification for the favourable treatment endorsed by the contested tax rulings in favour of LNG Holding and CEF. The Commission recalls, in this respect, that the burden of establishing such a justification lies with the Member State. Therefore, in the absence of any justification advanced by Luxembourg, the Commission must conclude that the tax advantage granted to LNG Holding and CEF cannot be justified by the nature or general scheme of the Luxembourg corporate income tax system.
- (230) In any event, the Commission has not been able to identify any possible ground for justifying the preferential treatment for LNG Holding and CEF that could be said to derive directly from the intrinsic, basic or guiding principles of the reference system or that is the result of inherent mechanisms necessary for the functioning and effectiveness of the system <sup>(250)</sup>.
- (231) The Commission notes that, according to the Luxembourg State Council <sup>(251)</sup>, one of the objectives of the participation exemption regime contemplated in Article 166 LIR is to avoid double or triple taxation for reasons of fiscal equity <sup>(252)</sup>. Double taxation refers to situations in which the same profit is taxed twice in respect of the same taxpayer (also referred to as legal double taxation) or in respect of two different taxpayers (economic double taxation). The Commission accepts that an exemption from taxation aiming at avoiding economic double taxation may be justified by the nature and overall structure of the tax system <sup>(253)</sup>. Thus, the application of the exemption under Article 166 LIR so as to avoid economic double or triple taxation may result directly from basic or guiding principles of its tax system.

<sup>(246)</sup> Joined cases C-20/15 P and C-21/15 P *World Duty Free* ECLI:EU:C:2016:981, paragraph 78.

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

<sup>(248)</sup> Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 69.

<sup>(249)</sup> Case C-88/03 *Portugal v Commission* ECLI:EU:C:2006:511, paragraph 81.

<sup>(250)</sup> Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 69.

<sup>(251)</sup> See recital 83.

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

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

- (232) However, the advantage granted on the basis of the contested tax rulings does not consist exclusively in the application of the participation exemption, but in its application at the level of the Holdings to an income which corresponds economically to amounts deducted as expenses (the ZORA Accretions) by the Subsidiaries, thus leading to the non-taxation in the hands of LNG Holding and CEF of virtually all the profit realised by LNG Supply and GSTM. In these circumstances, the tax treatment granted to LNG Holding and CEF on the basis of the contested tax rulings cannot serve the purpose of avoiding economic double taxation. The combined application of the exemption and the deduction is determined in the contested tax rulings and thus the Luxembourg tax administration was aware that there could never be any economic double taxation. As a consequence, the tax treatment granted on the basis of the contested tax rulings is unrelated to the objective of avoidance of (potential or actual) economic double or triple taxation or any other fiscal equity-related reasons. Therefore, these objectives cannot be validly invoked as justification for the difference in treatment that results from the contested measures.
- (233) In this regard, the Commission notes that, as the Court has underlined in the past, in order for tax exemptions to be justified by the nature or general scheme of the tax system of the Member State concerned, Member States must ensure that those exemptions are consistent with the principle of proportionality and do not go beyond what is necessary, in that the legitimate objective being pursued could not be attained by less far-reaching measures <sup>(254)</sup>. In this case, the application of the participation exemption to an income received by LNG Holding and CEF which corresponds economically to amounts deducted as expenses (the ZORA Accretions) by LNG Supply and GSTM can in no way be considered proportionate to avoid economic double taxation nor does it contribute to the principle of fiscal equity. The situation is rather the opposite: the contested measures allow LNG Holding and CEF, and Engie as a group, to benefit from double non-taxation. Therefore, the application of the tax exemption in the present case goes beyond what is necessary and proportionate to achieve such objective.
- (234) In this regard, according to the Court, a benefit must be consistent not only with the inherent characteristics of the tax system in question but also as regards the manner in which that system is implemented <sup>(255)</sup>. In this case, the tax advantage granted on the basis of the contested tax rulings is inconsistent not only with one of the objectives of the participation exemption but also with the logic of the system in which this regime is inserted, which is the taxation of the profit of all companies subject to tax in Luxembourg <sup>(256)</sup>.
- (235) In conclusion, the tax advantage granted to LNG Holding and CEF cannot be justified by the nature and logic of the system.

#### 6.2.4. CONCLUSION ON SELECTIVE ADVANTAGE AT THE LEVEL OF LNG HOLDING AND CEF

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

#### 6.3. SELECTIVE ADVANTAGE ESTABLISHED ANALYSING THE EFFECTS OF THE TAX TREATMENT AT GROUP LEVEL

- (237) Without prejudice to the conclusion in recital 236, an analysis of the effects of the contested tax rulings at the level of the group and not just of the individual legal entities leads to the same conclusion: the tax treatment granted on the basis of the contested tax rulings confers a selective advantage to Engie.
- (238) In this context, Engie argues that the selectivity in fiscal measures can only be assessed at the level of the individual taxpayer and not at group level and refers to the Commission decisions in *FIAT* <sup>(257)</sup> and *Groepsrentebox* <sup>(258)</sup>.

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

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

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

<sup>(257)</sup> Decision (EU) 2016/2326 (OJ L 351, 22.12.2016, p. 1).

<sup>(258)</sup> Decision 2009/809/EC, p. 26.

- (239) In this respect the Commission notes that, according to the tax returns provided by Luxembourg, from 2015 the entities GSTM, EIL, LNG Supply, LNG Luxembourg and LNG Holding formed a fiscal unity with CEF for Luxembourg tax purposes in which CEF operated as the parent of the unity <sup>(259)</sup>. Under Luxembourg tax law, therefore, those companies were not treated from 2015 as separate entities, but paid their taxes on a consolidated basis, i.e. as if they were one single taxpayer <sup>(260)</sup>. The Commission considers that only this circumstance would already justify a combined assessment, at least from 2015.
- (240) In any case, even if these entities did not form a fiscal unity, Engie's argument cannot be accepted. As explained also in Section 6.6, it is apparent from the very wording of Article 107 of the Treaty that State aid rules analyse the economic effects of state measures in relation to 'undertakings' and not of separate legal entities. An undertaking must be understood as an economic unit even if it consists of several legal persons <sup>(261)</sup>. To determine whether several entities form an economic unit, the Court of Justice looks at the existence of a controlling share or functional, economic or organic links <sup>(262)</sup>. In the present case, GSTM, EIL, LNG Supply, LNG Luxembourg and LNG Holding are fully controlled by CEF, which in its turn is controlled by Engie S.A. Therefore, all those entities must be considered as being part of a single undertaking.
- (241) In addition, the advantage granted on the basis of the contested tax rulings consists in the application of the participation exemption, at the level of the Holdings, to an income which corresponds economically to amounts deducted as expenses (the ZORA Accretions) by the Subsidiaries. Therefore, in order to determine the existence of an advantage it is logical to assess also the combined effects of the tax measures at both levels. The fact that Luxembourg income tax law concerns individual entities does not undermine this conclusion. In fact, the Commission notes that the tax rulings requests submitted by the tax advisor concern the tax treatment of all the legal entities of the Engie group involved in the transactions and that these entities are all subject to tax in Luxembourg.
- (242) This circumstance makes this case different from the *Groepsrentebox* and *FIAT* cases. In *Groepsrentebox*, the Commission decided to assess the scheme at individual level since the measure at stake applied to individual entities <sup>(263)</sup>. Likewise, in *FIAT*, the measure (the tax ruling) concerned only the taxable profit of one individual legal entity, whereas the counterparts in the transaction were resident in another Member State. Consequently, any reduced tax revenue, which was the basis of the advantage in that case, was necessarily based on the results of the entity resident in Luxembourg and did not need to take into account a possible neutral impact of the measure at the level of other FIAT group companies as a result of their treatment by other Member States <sup>(264)</sup>.
- (243) On the contrary, in this case the effect of the measure (non-taxation of part of the profit realised by some entities in Luxembourg) derives from the combined application of an exemption and a deduction at the level of different group entities, all of which are resident for tax purposes in Luxembourg. An assessment of the combined effect of the tax rulings at the level of Engie group in Luxembourg is thus adequate to fully appreciate the result of the tax treatment.
- (244) In any case, the Commission recalls that it is not bound by its decisional practice. Each potential aid measure must be assessed on the basis of its own merits under the objective criteria of Article 107(1) of the TFEU, so that even if a contrary decisional practice were shown to exist, that could not affect the findings of this Decision <sup>(265)</sup>.

<sup>(259)</sup> See LNG Luxembourg tax return for 2015, Annex 3.

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

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

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

<sup>(263)</sup> See *Groepsrentebox*, recital 80.

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

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

## 6.3.1. REFERENCE SYSTEM

- (245) As established in Section 6.2.1.1, in the present case the reference system is the Luxembourg corporate income tax system, which aims at taxing the profit of all companies subject to tax in Luxembourg. The basis for the calculation of the taxable profit is the accounting profit realised by the taxpayer (principle of linking the commercial and tax balance sheets). This objective applies to all corporate taxpayers in Luxembourg.
- (246) The transactions concerned by the contested tax rulings are intragroup transactions which consist in, first, the transfer of certain assets to the Engie Subsidiaries subject to tax in Luxembourg and, second, the financing of those transfers by the Holdings, which are also subject to tax in Luxembourg <sup>(266)</sup>.
- (247) Considering that the tax treatment of those intragroup transactions must be assessed against the background of the Luxembourg corporate income tax system and in order to determine whether the tax treatment granted to Engie on the basis of the contested tax rulings derogates from that reference system, the Commission will narrow its analysis to a comparison with other intragroup financing transaction of the same type and, consequently, will assess the rules of the Luxembourg corporate income tax system governing intragroup financing transactions between group entities resident in Luxembourg.
- (248) The Commission will establish that, under the Luxembourg corporate income tax system, the payment of a remuneration in the framework of a financing transaction <sup>(267)</sup> between two group entities subject to tax in Luxembourg cannot result in a reduction of the combined tax base of the group in Luxembourg, and this irrespective of the nature of the financing means used or of the level of the remuneration. 'Combined tax base' must in this context be understood as the sum of the tax bases of all the group entities involved in an intragroup financing transaction subject to tax in Luxembourg.
- (249) Under the Luxembourg corporate income tax system, financing means can be divided into two categories: first, participation instruments, such as shares, the profit of which can qualify for the participation exemption under Article 166 LIR ('participations'); and second, other instruments and contracts the profit of which cannot benefit from the participation exemption ('non-participation instruments').
- (250) In the case of non-participation instruments, in line both with Luxembourg and international accounting principles <sup>(268)</sup>, the payment of the remuneration (such as the payment of the interest of a loan) is booked in the accounts of the borrower as an expense. The same amount will be recorded at some stage as an income by the lender.
- (251) As regards the tax treatment, following the principle of linking the commercial and tax balance sheet <sup>(269)</sup>, the income booked by the lender will in principle be taxable, while the expense booked by the borrower will in principle be tax deductible. Therefore, the payment of the remuneration derived from a non-participation instrument does not lead to a reduction of the combined tax base of the group in Luxembourg as compared to the combined tax base before the payment <sup>(270)</sup>.

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

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

<sup>(268)</sup> See IAS 32 and *loi du 19 décembre 2002 concernant le registre des sociétés ainsi que la comptabilité et les comptes annuels des entreprises*.

<sup>(269)</sup> Article 40 LIR. See recital 81.

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

- (252) In the case of *participations*, such as shares, the payment of the remuneration takes the form of a distribution of profits. From an accounting perspective, the amounts distributed are booked by the beneficiary (the entity holding the participation) as an income. However, the sums distributed will by definition have been part of the profit of the distributing entity, i.e. they have not been booked as an expense <sup>(271)</sup>.
- (253) As regards the tax treatment, as explained in recitals 201 and 202, under Article 164(1) and (2) LIR the distributing entity cannot deduct from its tax base the profit distributed. Moreover, following the principle of linking the commercial and tax balance sheet, the beneficiary will also include the profit distributed in its tax base. This means that the distribution of profits will lead to economic double taxation unless it qualifies for the participation exemption under Article 166 LIR <sup>(272)</sup>. Therefore, the distribution of profits stemming from a participation does not lead to a reduction of the combined tax base of the group in Luxembourg as compared to the situation before the distribution.
- (254) In conclusion, according to the Luxembourg corporate income tax system, the payment of a remuneration in the framework of an intragroup financing transaction between entities tax resident in Luxembourg, whether by means of a participation or a non-participation instrument, cannot result in a reduction of the combined tax base of the group in Luxembourg.
- (255) Luxembourg argues that in the definition of the reference system the Commission must necessarily make reference to the text of the law. In this regard, it claims that the principle according to which the payment of the remuneration (or the distribution of profits) related to an intragroup financing transaction between entities resident in Luxembourg cannot lead to a reduction of the combined tax base of the group in Luxembourg is not stipulated in the law.
- (256) The Commission recalls, first, that contrary to what Luxembourg claims, the objective of the Luxembourg tax system, i.e. the taxation of the profits of all companies subject to tax in Luxembourg can be found in the law as explained in recitals 171 to 176. The principle that the payment of a remuneration related to an intragroup financing transaction between entities subject to tax in Luxembourg cannot result in a reduction of the combined tax base of the group can directly be deducted from this objective. Indeed, if the payment of a remuneration could give rise to a reduction of the combined tax base of the group in Luxembourg as compared to the tax base prior to the payment, then part of the profit of the lender and/or the borrower would escape taxation, as it would not be included in any tax base. This result would be in open contradiction with the objective of the system. Moreover, such possibility would make the Luxembourg tax system inherently discriminatory, as it would allow group companies to exclude part of their profit from their tax base, a possibility not afforded to standalone companies.
- (257) Second, if the LIR does not refer explicitly to financing transactions or to the remuneration of financing transactions, it sets out in a clear and unambiguous way how the payment of the remuneration should be taxed for each of the categories of financing instruments. The Commission has demonstrated in recitals 249 to 254, based on Luxembourg tax law, that the payment of a remuneration related to an intragroup financing transaction between entities subject to tax in Luxembourg cannot lead to a reduction of the combined tax base.

#### 6.3.2. COMPARABILITY WITH CORPORATE GROUPS ENGAGING IN INTRAGROUP FINANCING TRANSACTIONS BETWEEN GROUP ENTITIES RESIDENT IN LUXEMBOURG

- (258) The Commission considers that all corporate groups engaging in intragroup financing transactions between group entities resident in Luxembourg are in a comparable legal and factual situation to Engie, and this irrespective of the nature of the financing instrument used.
- (259) It has been explained in Section 6.3.1 that the objective of the tax system is the taxation of the profit of all companies subject to tax in Luxembourg. Against that principle, all corporate groups engaging in intragroup financing transactions between group entities resident in Luxembourg are necessarily comparable, since the financing instrument chosen and the amount of the remuneration for the financing are unrelated to this principle <sup>(273)</sup>.

<sup>(271)</sup> See IAS 32, paragraph 35 'Distributions to holders of an equity instrument shall be debited by the entity directly to equity, net of any related income tax benefit' and paragraph 36 'redemptions or refinancings of equity instruments are recognised as changes in equity'.

<sup>(272)</sup> This means that, from a group perspective, all the participation exemption does is eliminating a disadvantage caused by the economic double taxation.

<sup>(273)</sup> In fact, the combined tax base of the group in Luxembourg must remain the same after the payment of the remuneration. As explained in Section 6.3.1, as an exception to this rule, the combined tax base can in some exceptional situations *increase* giving rise to economic double taxation, namely in the case of distribution of profits when the participation does not qualify for the application of the participation exemption under Article 166 LIR.

- (260) The type of instrument chosen for the financing might have an impact on the type of the remuneration, the dates and modalities of payment of such remuneration, as well as the rights assigned to the 'lender' or the 'holder' of the instrument. For example, in the case of ordinary shares, which are participation instruments, the remuneration takes the form of a profit distribution, the amount and terms of which are typically decided by the corporate bodies of the entity issuing the shares. Furthermore, there is no obligation to reimburse the amount of the financing. Ordinary shares can also give the right to vote in the shareholders' meeting and to be represented in the board of directors, supervisory board or other corporate bodies. By contrast, in case of non-participating instruments, such as loans, the terms and amount of the remuneration (interest) are set by both parties in the agreement and the lender has in principle no right to participate in or control in any way the management of the borrower. Additionally, there is a contractual obligation to reimburse the nominal value of the loan.
- (261) The Commission considers that none of these differences affect in any way the basic principle that, according to the Luxembourg corporate income tax system, the entire profit realised by companies must be subject to taxation and that, therefore, the payment of the remuneration for intragroup financing transactions between companies resident in Luxembourg cannot lead to a reduction of the combined tax base of the group in Luxembourg. Against that principle, the choice of one financing instrument over another does not make an undertaking less comparable.
- (262) In fact, in the case of participation instruments, such as shares, it has already been explained in Section 6.3.1 that, according to Article 164(1) and (2) LIR, the profits distributed would need to be included, and therefore subject to tax, at least in the tax base of the participated entity. In the case of non-participations instruments, for example loans, the interests paid by the borrower are deducted from its tax base but are included as a taxable income in the tax base of the lender. Therefore, despite the differences in the terms and modalities of the remuneration and of the reimbursement of the financing, as well as in the rights and obligations of the parties, in both cases the payment of the remuneration would not lead to a reduction in the combined tax base of the companies involved in the transaction.
- (263) The Commission considers that the arguments made by Luxembourg that the structure implemented by Engie provides more flexibility than a direct transaction between the Holdings and the Subsidiaries and that it allows Engie to finance the businesses acquired and at the same time to limit the risk profile of the Subsidiaries <sup>(274)</sup> are ineffective, since none of these reasons have any bearing in relation to the principle that, according to the Luxembourg corporate income tax system, the payment of the remuneration for intragroup financing transactions between companies resident in Luxembourg cannot lead to a reduction of the combined tax base of the group in Luxembourg.
- (264) Therefore, it can be concluded that all corporate groups engaging in intragroup financing transactions between companies resident in Luxembourg are in a legal and factual situation comparable to Engie. The intervention of the Lenders in the structures set up by Engie does not affect this conclusion given that the Lenders are also resident in Luxembourg and the purpose of those structures is still to finance the transfer of assets, as admitted by Luxembourg and Engie.

### 6.3.3. DEROGATION FROM THE REFERENCE FRAMEWORK GIVING RISE TO DISCRIMINATION

- (265) The Commission considers that the tax treatment granted on the basis of the contested tax rulings derogates from the tax treatment of intragroup financing transactions between group entities resident in Luxembourg under the Luxembourg corporate income tax system.
- (266) On the one side, the ZORA Accretions, when positive, are recorded each year as a tax deductible expense by the Subsidiaries. On the other side, at conversion of the LNG ZORA, the LNG Supply Shares – which include the ZORA Accretions – are immediately transferred to LNG Holding pursuant to the LNG Forward Contract. Therefore, LNG Holding receives the remuneration for the financing provided to LNG Supply (which LNG Supply has deducted from its tax base). However, LNG Holding books the LNG Supply Shares in its accounts at the nominal value of the ZORA, i.e. not including the converted ZORA Accretions.

<sup>(274)</sup> See observations by Luxembourg to the Letter of 11 December 2017.

- (267) Therefore, the contested tax rulings allow a situation whereby the remuneration paid by LNG Supply for the financing it received, i.e. the issuance of shares for an amount equal to the ZORA Accretions, leads to a decrease in the tax base of LNG Supply (the value of the ZORA Accretions) which was not compensated (and will not be compensated in the future) by an increase in the tax base of LNG Holding (or an effective increase in the tax base of LNG Luxembourg).
- (268) The above reasoning has to be transposed *mutatis mutandis* to GSTM, EIL and CEF <sup>(275)</sup>,
- (269) In short, the tax rulings endorse a tax treatment of the remuneration paid by LNG Supply and GSTM for the financing provided, respectively, by LNG Holding and CEF, which allows a reduction in the combined tax base of the Engie group in Luxembourg.
- (270) In view of the foregoing, the Commission considers that the tax treatment granted to Engie on the basis of the contested tax rulings derogates from the reference system and hence constitutes an economic advantage to the Engie group.
- (271) According to the Court, the assessment of selectivity involves ‘ascertaining whether the exclusion of certain operators from the benefit of a tax advantage that arises from a measure derogating from an ordinary tax system constitutes discrimination with respect to those operators’ <sup>(276)</sup>.
- (272) As established in Section 6.3.2, all groups engaging in intragroup financing transactions between companies resident in Luxembourg are in a legal and factual situation comparable to Engie in the light of the objectives of the system. However, such groups would not have access to the advantage granted to Engie since, as it has been established in Section 6.3.1, under the Luxembourg corporate income tax system, the payment of a remuneration in the framework of a financing transaction between two group entities resident in Luxembourg cannot result in a reduction of the combined tax base of the group in Luxembourg, and this irrespective of the type of financing instrument or contract used or of the level of the remuneration. Therefore, the measures at stake constitute a discrimination with respect to these operators.
- (273) Consequently, the advantage granted to Engie on the basis of the contested tax rulings is *prima facie* selective.
- (274) Luxembourg <sup>(277)</sup> and Engie <sup>(278)</sup> claim that corporate groups using as a financing instrument a direct ZORA between two group entities resident in Luxembourg, i.e. without an intermediary entity and a prepaid forward contract, would have access to the same advantage than Engie, i.e. a reduction of the combined tax base of the group in Luxembourg, and that, consequently, there would be no derogation from the reference framework.
- (275) The Commission would like to recall at the outset that, in order to establish selectivity, it is not required to demonstrate that every single undertaking in a comparable legal and factual situation is excluded from the advantage granted to the beneficiary of the measure. It is sufficient to demonstrate, as the Commission has already done in recital 271, that ‘certain operators’ which are in a comparable legal and factual situation in the light of the objective of the system, are excluded from the benefit of the tax advantage granted to the beneficiary <sup>(279)</sup>. Therefore, even if a specific category of undertakings – corporate groups using a direct ZORA – could also benefit from the same tax treatment as Engie, this circumstance would in itself be insufficient to conclude that the advantage granted to Engie is not *prima facie* selective.
- (276) In any case, the Commission considers that, contrary to what Luxembourg and Engie argue, a group using a direct ZORA between two entities resident in Luxembourg would not benefit from the same tax treatment as Engie.

<sup>(275)</sup> Once there will be a conversion and cancellation of GSTM shares, as it is equally permitted by the contested tax rulings.

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

<sup>(277)</sup> See observations by Luxembourg to the Letter of 11 December 2017, page 8.

<sup>(278)</sup> See observations by Engie to the Letter of 11 December 2017, paragraphs 89, 93 and 94.

<sup>(279)</sup> Joined cases C-20/15 P and C-21/15 P *World Duty Free* ECLI:EU:C:2016:981, paragraph 71.

- (277) This is in fact confirmed by the tax returns provided by Luxembourg, which show that the tax treatment of a ZORA follows the tax treatment of any non-participation instrument <sup>(280)</sup>: the Subsidiaries recorded each year as a tax deductible expense the provisions for the future payments of ZORA Accretions <sup>(281)</sup> and, at conversion, LNG Luxembourg recorded the ZORA Accretions as a taxable income <sup>(282)</sup>.
- (278) In other words, as in the case of any other non-participation instrument, the payment of the remuneration related to the ZORAs (i.e. the conversion of the ZORA Accretions) does not lead to the reduction of the combined tax base of the group in Luxembourg as compared to the tax base existing before that payment <sup>(283)</sup>.
- (279) Luxembourg argues <sup>(284)</sup> that in case of a conversion of a direct ZORA, the profit resulting from the payment of the remuneration, i.e. the conversion of the ZORA Accretions, would not be taxed at the level of the Lender if it opts for the application of the special regime under Article 22bis LIR. According to this provision, the conversion of a loan into participations in the capital of the company will not give rise to any capital gain, and therefore, no corporate income tax will be due upon conversion, just as it occurs in the structures set up by Engie.
- (280) The Commission rejects this argument. Article 22bis LIR would not lead to the non-taxation of the ZORA Accretions converted into shares. Firstly, because Article 22bis LIR would not be applicable to the ZORA Accretions; and secondly, because even if it was applicable, its effect would not be a permanent exemption from taxation of the ZORA Accretions at the level of the beneficiary.
- (281) Indeed, Article 22bis LIR would not be applicable to the ZORA Accretions. This provision clearly distinguishes the capital gains resulting from the conversion of the financing instrument into shares from the remuneration of this instrument before its conversion and expressly stipulates that the second cannot benefit from the exemption under Article 22bis LIR: *'en cas de conversion d'un emprunt capitalisant convertible, l'intérêt capitalisé se rapportant à la période d'exploitation en cours précédant la conversion est imposable au moment de l'échange'* <sup>(285)</sup>. The terms of *'emprunt capitalisant convertible'* and *'intérêt capitalisé'* are not defined in the law. However, according to Luxembourg, the ZORAs are convertible loans. Moreover, the ZORA Accretions are not paid annually but are accreted to the issue price of the ZORA only at conversion in order to determine the amount to be converted into shares. There is no difference between an *'intérêt capitalisé'* which would be converted into shares at the moment of the conversion of a loan and the ZORA Accretions. Consequently, at conversion, the part of the newly issued shares corresponding to the ZORA Accretions is *taxable* and should be included in the tax base of the beneficiary.
- (282) Therefore, in the present case, the exemption under Article 22bis LIR could in theory apply only to the shares corresponding to the *nominal* of the ZORA but not to the shares corresponding to the ZORA Accretions, which should be directly included in the tax base of the beneficiary.
- (283) Furthermore, even if Article 22bis LIR was applicable to the ZORA Accretions, it would not lead to the permanent exemption of this profit. Indeed, it is clear from the wording of Article 22bis (4) LIR that this provision merely allows a *temporary deferral of taxation* <sup>(286)</sup>. The fact that it is not intended to facilitate non-taxation, as Luxembourg and Engie suggest, is expressly confirmed by the Luxembourg tax administration in its

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

<sup>(281)</sup> See Sections 2.2.3.7.1 and 2.2.4.6.1.

<sup>(282)</sup> See Section 2.2.3.7.2.

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

<sup>(284)</sup> See observations by Luxembourg to the Letter of 11 December 2017, page 8.

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

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

Circular of 27 November 2002 concerning the application of this provision ('Circular 22bis') <sup>(287)</sup>. This Circular explains that capital gains arising from the conversion are only transferred to the assets received in exchange (in this case, the shares) but remain in principle taxable when they will be realized <sup>(288)</sup>.

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

#### 6.3.4. LACK OF JUSTIFICATION

- (285) Neither Luxembourg nor Engie have advanced any possible justification for the favourable treatment endorsed by the contested tax rulings in favour of Engie. The Commission recalls, in this respect, that the burden of establishing such a justification lies with the Member State.
- (286) Therefore, in the absence of any justification advanced by Luxembourg, the Commission must conclude that the tax advantage granted to Engie cannot be justified by the nature or general scheme of that system.
- (287) As regards any justifications that Luxembourg might hypothetically raise –which it has not – concerning the avoidance of economic double taxation, the Commission refers to its assessment in Section 6.2.3.

#### 6.3.5. CONCLUSION ON THE SELECTIVE ADVANTAGE AT GROUP LEVEL

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

#### 6.4. SELECTIVE ADVANTAGE RESULTING FROM THE NON-APPLICATION OF LUXEMBOURG TAX RULES ON ABUSE OF LAW (ARTICLE 6 StAnpG)

- (289) As an alternative line of reasoning, the Commission considers also that its doubts expressed in recital 158 of the Opening Decision i.e. whether with the non-taxation of the group Luxembourg derogated from its domestic rules on abuse of law in the field of taxation have not been allayed.
- (290) As established in Section 6.2.1.1, the reference framework is the Luxembourg corporate income tax system, which aims at the taxation of the profit of all companies subject to tax in Luxembourg. The basis for the calculation of the taxable profit is the profit determined in their accounts. This objective applies to all corporate taxpayers resident in Luxembourg.
- (291) Anti-abuse tax rules are the set of rules devised to avoid that taxpayers circumvent the main objective of the reference system, i.e. the taxation of corporate profit. Therefore, these rules must be understood as an inherent part of the reference system, as they ensure the internal consistency of the system and aim at achieving its fundamental objectives.

<sup>(287)</sup> *Circulaire du Directeur des Contributions Directes LIR n°22bis/1 du 27 novembre 2002.*

<sup>(288)</sup> See Circular 22bis: '*la plus-value inhérente aux titres donnés en changes est transférée sur les titres nouvellement acquis et devient en principe imposable lors de la réalisation ultérieure de ces derniers*' (emphasis added by the Commission).

It could be argued that, once realised, the profit would be exempted by application of the participation exemption under Article 166 LIR. This argument would also be flawed. In fact, Circular 22bis clarifies that, precisely to avoid the use of Article 22bis LIR to circumvent the obligation to subject all profit to taxation, this regime cannot be used to permanently exempt from taxation capital gains which would have been taxable if this provision had not been applied (See Circular 22bis: '*L'objectif de l'Article 22bis LIR consiste à déterminer les opérations d'échanges de titres qui peuvent être réalisées dans la neutralité fiscale. L'Article 22bis LIR ne vise cependant pas à exempter de manière définitive des plus-values, qui à défaut de cette mesure auraient été imposables dans le chef du cédant, mais à reporter leur imposition dans le temps*' (emphasis added by the Commission)).

In any case, the application of Article 166 LIR to an income temporarily deferred thanks to the application of Article 22bis LIR and corresponding to amounts deducted from the tax base of the borrower would constitute a selective advantage in line with the reasoning developed by the Commission in Section 6.2.

<sup>(289)</sup> Joined cases C-20/15 P and C-21/15 P *World Duty Free* ECLI:EU:C:2016:981, paragraph 80.

## 6.4.1. CONDITIONS FOR THE APPLICATION OF ANTI-ABUSE TAX RULES

- (292) Article 6 StAnpG prohibits that taxes are evaded or mitigated by abuse of forms or constructions which are legal under civil law. According to this provision, if the legal form or the construction surrounding a transaction is not appropriate in terms of its substance, tax should be assessed in accordance with the substance of the transaction, as if it had been concluded in the appropriate legal form <sup>(290)</sup>. According to Luxembourg, this provision allows the tax administration to disregard legal constructions or transactions concluded exclusively for tax reasons and not motivated by any economic consideration, however without limiting the choices available to the taxpayer <sup>(291)</sup>.
- (293) According to the Administrative Circular of 21 August 1989 (the '1989 Circular') <sup>(292)</sup>, Article 6 StAnpG is applicable to any tax procedure, including tax rulings issued by the Luxembourg tax administration. When issuing a ruling, the Luxembourg tax administration has to ensure that the structure and/or transactions as presented by the taxpayer in the ruling request do not constitute an abuse of law as described in Article 6 StAnpG. This means that the Luxembourg tax authorities should not give binding decisions such as tax rulings in case the main reason for the taxpayer to seek such decision is to obtain a tax benefit <sup>(293)</sup>. The 1989 Circular also confirms that it is a mandatory requirement for the Luxembourg tax administration to rule out the existence of a potential abuse of law before granting a tax ruling <sup>(294)</sup>.
- (294) According to Luxembourg, based on the relevant case law, in order for a measure to constitute an abuse of law, four criteria need to be fulfilled: first, the use of private law forms or institutions by the taxpayer; second, an outcome of tax avoidance or decrease in the tax liability of any kind for the taxpayer; third, the use of an inadequate legal means by the taxpayer; and fourth, the absence of non-tax related reasons to justify the legal means selected by the taxpayer <sup>(295)</sup>.
- (295) The first criterion requires that the structure of a given transaction, as designed by the taxpayer, uses private law forms or institutions ('*Formen und Gestaltungsmöglichkeiten des bürgerlichen Rechts*'). As there is no exact definition of the substance of private laws forms and institutions, neither in Article 6 StAnpG nor in the case law, it is nevertheless understood that they should be defined as any legal means that are not related to public law. As such, the incorporation of a company and the implementation of intragroup financing contracts are to be considered as the use by the taxpayer of a private law form or institution <sup>(296)</sup>.
- (296) The second criterion requires that through the abusive structure, the taxpayer is able to reduce his tax liability ('*Minderung der Steuerpflicht*') either via avoidance of tax, a tax exemption, or a reduction of the tax base <sup>(297)</sup>.
- (297) The third criterion requires that the taxpayer uses an inappropriate legal means ('*unangemessene rechtliche Gestaltung*') in the framework of the potentially abusive structure. According to Luxembourg <sup>(298)</sup>, this means that the means chosen must allow the taxpayer to obtain a tax effect that cannot be in conformity with the intention of the legislator <sup>(299)</sup>. According to Luxembourg, for this condition to be met, it is necessary that the pursued economic result can be achieved by at least two means, one of which would not be appropriate. The use of the non-appropriate means must allow tax savings which would have not been possible using any of the appropriate means.

<sup>(290)</sup> See Section 2.3.4.

<sup>(291)</sup> See observations by Luxembourg to the letter of 11 December 2017, response to question 2.a.

<sup>(292)</sup> Note de service du directeur des contributions L.G./N.S n° 3 du 21 août 1989.

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

<sup>(294)</sup> As only Article 6 StAnpG defines abuse of law in Luxembourg law, this provision is to be applied in the framework of the 1989 Circular.

<sup>(295)</sup> The Observations by Luxembourg to the Letter of 11 December 2017 include a description of these four criteria and an explanation of how they should be applied.

<sup>(296)</sup> See Observations by Luxembourg to the Letter of 11 December 2017, answer to question 2.a

<sup>(297)</sup> See Observations by Luxembourg to the Letter of 11 December 2017, answer to question 2.a

<sup>(298)</sup> See Observations by Luxembourg to the Letter of 11 December 2017, answer to question 2.a

<sup>(299)</sup> In its response to the Letter of 11 December 2017, Luxembourg cites the judgment of 1 August 2017 of the *Cour Administrative du Grand-Duché de Luxembourg*, n° 39009C: means allowing the taxpayer 'd'atteindre un objectif économique d'une manière telle que cette voie permet l'obtention d'un effet fiscal que le législateur ne peut pas être considéré comme ayant voulu accorder dans le cadre d'une application de la loi fiscale conforme à son intention'.

- (298) The fourth criterion is the absence of non-tax related reasons to justify the legal means selected by the taxpayer in order to achieve the economic objectives of the transaction or structure. According to Luxembourg <sup>(300)</sup> the case law states that non-tax reasons, such as economic reasons, have to be real and provide enough economic benefit to the taxpayer <sup>(301)</sup>. The existence of such economic reasons is sufficient to disregard the application of the anti-abuse provision.

#### 6.4.2. APPLICATION OF THE CONDITIONS TO THE PRESENT CASE

- (299) On the basis of the information provided by Luxembourg, the Commission concludes that the Luxembourg tax administration should not have issued the contested tax rulings, as the structures set up by Engie are abusive within the meaning of Article 6 StAnpG.
- (300) In fact, the transactions presented by Engie in the tax ruling requests meet the conditions described in Section 6.4.1 for the application of Article 6 StAnpG.

##### 6.4.2.1. *Use of private law forms or institutions*

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

##### 6.4.2.2. *Reduction of tax liability*

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

##### 6.4.2.3. *Use of inappropriate legal means*

- (303) The third criterion requires, as a first step, to establish the pursued economic objective of the transaction at stake. Only then will it be possible to determine whether such objective can be achieved by means different than the one chosen by the taxpayer. In the second step, it is necessary to establish whether the means chosen by the taxpayer is inappropriate, in the sense that it allows for a tax reduction that cannot be in conformity with the intention of the legislator and which would have not been possible using any of the other appropriate means.
- (304) In this case it is apparent, in the first place, that the economic result pursued by Engie with the structures described in the contested tax rulings is the financing of the acquisition by the Subsidiaries of the LNG Business and the Financing and Treasury Business. It is also not disputed that the same economic result could be achieved by several other financing means: direct equity or debt instruments between the Subsidiaries and the Holdings <sup>(302)</sup>.
- (305) In the second place, as the Commission has established Sections 6.2 and 6.3, the effect of the structures put in place by Engie is the virtual non-taxation of the profit realised by the Subsidiaries in Luxembourg. This result is incompatible with the fundamental objective of the Luxembourg corporate income tax system, which is the taxation of the profit of companies subject to tax in Luxembourg. Therefore, such an effect cannot be in conformity with the intention of the legislator. Moreover, such an effect would have not been possible if the transfer of activities to the Subsidiaries had been financed with a direct equity or debt instruments. Therefore, the structures implemented by Engie do not constitute appropriate legal means to finance the transfer of activities to the Subsidiaries.

<sup>(300)</sup> See Observations by Luxembourg to the Letter of 11 December 2017, answer to question 2.a.

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

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

#### 6.4.2.4. *Absence of non-tax related reasons*

- (306) Finally, the Commission has not been able to identify any economic reasons that are real and provide enough economic benefit for the complex structures devised by Engie other than the achievement of significant tax savings.
- (307) Luxembourg claims <sup>(303)</sup> that the structures implemented via the Forward Contracts and ZORAs would be necessary to finance the acquisition of the businesses by the Subsidiaries. This argument is flawed. In fact, as the contested tax rulings show, the financing is provided by the Holdings to the Lenders, which on the same day make it available to the Subsidiaries. In other words, it is the Holdings that provide financing to the Subsidiaries to acquire the assets.
- (308) The Commission notes that the LNG Transfer Agreement and the GSTM Transfer Proposal already included provisions regarding the financing of the transfer of businesses. The LNG Transfer Agreement specifies that in exchange for the assets received, LNG Supply should issue to LNG Trading promissory notes for an amount equivalent to the nominal amount of the ZORA <sup>(304)</sup>. In the same line, the GSTM Transfer Proposal states that CEF transfers a branch of activity in exchange of a promissory note from GSTM <sup>(305)</sup>. These provisions show that the transfer of assets had already been financed by the Holdings with debt instruments. In other words the Forward Contracts and ZORAs were purely redundant structures, replacing previously existing direct debt transactions between the Holdings and the Subsidiaries <sup>(306)</sup>. The role of the Lenders as mere pass-through entities with no possibility to make any profit confirms that their intervention has no other economic purpose but to enable the tax savings.
- (309) Luxembourg also argues that the complex structures implemented by Engie provide more flexibility and allow it to finance the businesses acquired while at the same time limiting the risk profile of the Subsidiaries. This argument is also unsubstantiated. In fact, the same purpose could have been achieved via the direct issuance of shares from the Subsidiaries to the Holdings. A direct equity transaction between the Holdings and the Subsidiaries would provide the same protection for the Subsidiaries than the complex structure set up by Engie. The structures set up by Engie can absorb losses for an amount equal to the nominal of the ZORAs. In case the loss exceeds the nominal of the ZORAs, the capital of the Subsidiaries would be impacted. In case of a capital injection for an amount equal to the nominal of the ZORA, the Subsidiaries would have exactly the same capital buffer, before the initial capital is impacted by losses. Moreover, the Commission rejects the argument that adding an additional layer (the Lenders) and using complex financial products (ZORA and Forward Contracts) instead of straightforward capital injections can increase the flexibility. On the contrary, it could raise some operational risk issues for the group: the use of pass-through entities, instead of providing flexibility, creates an administrative burden, entails an execution risk for the Holdings and adds transaction costs.
- (310) In conclusion, the complex structures set up by Engie could be seen as economically equivalent to direct financing transactions between the Holdings and the Subsidiaries, be it in the form of equity or debt instruments. Whatever form was to be considered economic equivalent to the complex structures set up by Engie, it would have led to the taxation of the underlying profit. This means that, in any case, there would be no economic reasons that are real and provide enough economic benefit for Engie to opt for the complex structures set up in the contested tax rulings other than the achievement of significant tax savings.
- (311) Therefore, the criteria of Article 6 StAnpG are met and thus the complex structures set up by Engie should have been considered abusive by the Luxembourg tax administration. According to the 1989 Circular, the tax administration should only grant a tax ruling when the main reason for obtaining such a ruling is not a tax benefit. Consequently, by endorsing the tax ruling requests, the Luxembourg tax administration misapplied the law and granted an advantage to Engie in the form of the exclusion from taxation of virtually all the profit realised by two of its subsidiaries (LNG Supply and GSTM) in Luxembourg <sup>(307)</sup>.
- (312) Since the advantage granted to Engie on the basis of the contested tax rulings is based on a misapplication of the law which, by definition, is not available to any other undertakings, the Commission concludes under this reasoning that this advantage is selective in nature.

<sup>(303)</sup> See observations by Luxembourg to the Opening decision, page 16.

<sup>(304)</sup> See recital 34(1).

<sup>(305)</sup> See recital 60(1).

<sup>(306)</sup> In the same line, the detailed implementation of the structures (see footnotes 35 and 90) shows that in both cases the businesses were transferred against promissory notes issued by the Subsidiaries to the Holdings. Therefore, the Forward Contracts and ZORAs merely replace the financing by the Holdings which were already in place.

<sup>(307)</sup> See also Communication Notion of Aid, recital 174(c).

#### 6.5. CONCLUSION ON THE EXISTENCE OF AID

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

#### 6.6. BENEFICIARY OF THE AID

- (314) In Section 6.2, the Commission has concluded that the tax treatment granted on the basis of the contested tax rulings confers a selective advantage to LNG Holding and CEF within the meaning of Article 107(1) of the Treaty, since they lead to a lowering of those entities' taxable profit and thus their corporate income tax liability in Luxembourg. LNG Holding and CEF form part of the Engie group.
- (315) The rules on participation exemption concern profit distributed by one group company to another. In the present case, the ruling endorses the exemption of an income at the level of LNG Holding and CEF which corresponds economically to amounts deducted as expenses at the level of, respectively, LNG Supply and GSTM, thereby giving rise to the effective non-taxation of virtually all the profit realised by LNG Supply and GSTM, apart from a limited margin. There is therefore a situation of deduction and exemption which, as indicated in recital 243, has a positive impact on the tax liability of Engie in Luxembourg.
- (316) In the same vein, separate legal entities may be considered to form one economic unit for the purpose of the application of State aid rules. That economic unit is then considered to be the relevant undertaking benefitting from the aid measure. As the Court of Justice has previously held, '[i]n competition law, the term 'undertaking' must be understood as designating an economic unit [...] even if in law that economic unit consists of several persons, natural or legal' <sup>(308)</sup>. To determine whether several entities form an economic unit, the Court of Justice looks at the existence of a controlling share or functional, economic or organic links <sup>(309)</sup>. In the present case, both LNG Holding and CEF are fully controlled by Engie S.A., the parent company of the Engie group.
- (317) Consequently, any favourable tax treatment afforded to LNG Holding and CEF by the Luxembourg tax administration benefits not only these entities, but Engie as a whole, by providing additional financial resources to the entire group. Therefore, notwithstanding the fact that that group is organised in different legal personalities and the contested tax rulings concern the tax treatment of individual entities, that group must be considered as a single economic unit benefitting from the contested aid measure <sup>(310)</sup>.
- (318) Additionally, the conclusion of recital 317 is reinforced by the findings of Sections 6.3 and 6.4, where the Commission has established that the tax treatment granted on the basis of the contested tax rulings confers a selective advantage within the meaning of Article 107(1) of the Treaty to the Engie group in Luxembourg, since they lead to a reduction of the combined tax base of the group in this Member State.

#### 6.7. COMPATIBILITY OF THE AID

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

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

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

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

- (320) Luxembourg has not invoked any of the grounds for a finding of compatibility under either of those provisions for the State aid it has granted on the basis of the contested tax rulings. Engie has not invoked any such grounds either.
- (321) Moreover, since the tax treatment granted on the basis of the contested tax rulings relieves Engie of a tax liability it would otherwise have been obliged to bear in their day-to-day management of normal activities, the aid granted on the basis of those tax rulings constitutes operating aid. As a general rule, such aid can normally not be considered compatible with the internal market under Article 107(3) of the Treaty in that it does not facilitate the development of certain activities or of certain economic areas. Furthermore, the tax advantages in question are not limited in time, declining or proportionate to what is necessary to remedy to a specific market failure or to fulfil any objective of general interest in the areas concerned. Therefore, they could not be considered compatible.
- (322) Consequently, the State aid granted to the Engie group by Luxembourg is incompatible with the internal market.

#### 6.8. UNLAWFULNESS OF THE AID

- (323) According to Article 108(3) of the Treaty, Member States are obliged to inform the Commission of any plan to grant aid (notification obligation) and they may not put into effect any proposed aid measures until the Commission has adopted a final decision on the aid in question (standstill obligation).
- (324) The Commission notes that Luxembourg did not notify the Commission of any plan to grant the contested aid measure, nor did it respect the standstill obligation laid down in Article 108(3) of the Treaty. Therefore, in accordance with Article 1(f) of Council Regulation (EU) 2015/1589 <sup>(311)</sup>, the tax treatment granted on the basis of the contested tax rulings constitutes unlawful aid, put into effect in breach of Article 108(3) of the Treaty.

#### 7. ALLEGED PROCEDURAL IRREGULARITIES

- (325) Luxembourg claims <sup>(312)</sup> that the Commission has infringed its right to be heard, since the focus of the Commission's investigation had allegedly changed since the adoption of the Opening decision, as demonstrated by the Letter of 11 December 2017. According to Luxembourg, the Commission should have either closed the ongoing procedure and re-opened a new case or adopted a decision to extend the Opening decision in order to afford Luxembourg the opportunity to properly make its views known on the Commission's alleged new focus of the investigation.
- (326) In addition, Engie claims <sup>(313)</sup> that its right of defence has been infringed as it was not given the opportunity to present its observations on the Commission's analysis of other Luxembourg tax rulings in the period 2009 to 2016 that refer to the existence of ZORA or 'Mandatorily Exchange Loan Agreements' and their respective tax and accounting treatment.
- (327) The Commission considers that the procedural rights of Luxembourg and Engie have been fully respected in this case.
- (328) The Commission notes, first and foremost, that the scope of the Commission's State aid investigation has remained the same between the Opening decision and the adoption of this Decision. Both decisions concern the same contested tax rulings, the same beneficiaries (LNG Holding, CEF as well as the Engie group) and the same State aid concerns (whether the tax treatment granted to LNG Holding, CEF and the Engie group on the basis of the contested tax rulings, complies with the State aid rules pursuant to Article 107(1) of the Treaty).
- (329) In the Opening decision, the Commission expressed its initial doubts as to the compatibility with State aid rules of the tax treatment granted on the basis of the contested tax rulings to the different entities of the Engie group in Luxembourg. The purpose of an in-depth investigation phase following an Opening decision is to bring additional elements of fact and law to the Commission's attention. Those elements can further develop or address

<sup>(311)</sup> 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).

<sup>(312)</sup> See observations by Luxembourg to the Letter of 11 December of 2017, page 3.

<sup>(313)</sup> See observations by Engie to the Letter of 11 December of 2017, paragraphs 98 to 102.

the Commission's initial doubts as set out in an opening decision. Accordingly, at the end of that procedure, the Commission's analysis may have changed, which implies that the final decision may differ somewhat from the opening decision, without those differences affecting the legality of the final decision <sup>(314)</sup>.

- (330) It is as a consequence of the written submissions that were provided by Luxembourg and Engie on the State aid concerns raised by the Commission in the Opening decision that the Commission's analysis further developed in this case. For instance, Luxembourg clarified during the administrative procedure <sup>(315)</sup> that following the partial reimbursement of the LNG ZORA that took place in 2014, LNG Luxembourg did not opt for the optional regime of Article 22bis (2) LIR but that any taxable profit stemming from the conversion of the ZORA was mirrored by a corresponding tax deductible loss on the LNG Forward Contract. The text of the Forward Contracts was provided by Luxembourg after the Opening decision, on 21 November 2016, and the role of LNG Luxembourg and EIL as intermediary entities and the functioning of Article 22bis (2) was explained in detail by Luxembourg and Engie to the Commission during the meeting of 1 June 2017.
- (331) However, the subject matter of the Commission's State aid investigation, i.e. the tax treatment of different entities of the Engie group in Luxembourg as a result of the contested tax rulings, has never changed since the adoption of the Opening decision. The same holds for the main doubts of the Commission as to the compliance of the contested measures with the State aid rules <sup>(316)</sup>. It was only in the interest of transparency that the Commission services sent the Letter of 11 December 2017 to Luxembourg, which the latter transmitted to Engie.
- (332) As regards Engie, the Commission recalls that, as an interested party, it only has the right to submit observations in response to the Opening decision and not on the information submitted by Luxembourg after the Opening decision. Nevertheless, Engie was given and has effectively made use of the opportunity to submit its observations to the Commission on several occasions, both in writing and orally.
- (333) Consequently, the Commission considers that Luxembourg's and Engie's procedural rights have been respected in this case.

## 8. RECOVERY

- (334) Article 16(1) of Regulation (EU) 2015/1589 establishes an obligation on the Commission to order recovery of unlawful and incompatible aid. That provision also provides that the Member State concerned shall take all necessary measures to recover unlawful aid that is found to be incompatible. Article 16(2) of Regulation (EU) 2015/1589 establishes that the aid to be recovered includes interest from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its effective recovery. Commission Regulation (EC) No 794/2004 <sup>(317)</sup> elaborates on the methods to be used for the calculation of recovery interest. Finally, Article 16(3) of Regulation (EU) 2015/1589 states that 'recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow for the immediate and effective execution of the Commission decision'.

### 8.1. NEW AID

- (335) According to Article 1(c) of Regulation (EU) 2015/1589 'new aid' means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid.
- (336) In accordance with Article 17 of Regulation (EU) 2015/1589, the power of the Commission to recover aid is subject to a limitation period of 10 years. The limitation period begins on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid interrupts the limitation period. Each interruption starts time running afresh. The limitation period is suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice. Finally, any aid with regard to which the limitation period has expired is deemed to be existing aid.

<sup>(314)</sup> Case T-424/05 *Italy v Commission* ECLI:EU:T:2009:49, paragraph 69; and Cases T-231/06 and T-237/06 *Netherlands and NOS v Commission* ECLI:EU:T:2010:525, paragraph 50. See also Case T-242/12 (*SNCF*) v *Commission* ECLI:EU:T:2015:1003, paragraphs 345 to 367.

<sup>(315)</sup> See recital 113.

<sup>(316)</sup> See Opening decision, recitals 152, 156, 158 and 160.

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

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

## 8.2. NO GENERAL PRINCIPLE OF LAW PREVENTS RECOVERY

- (338) Article 16(1) of Regulation (EU) 2015/1589 provides that the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law.

### 8.2.1. LEGAL CERTAINTY AND LEGITIMATE EXPECTATIONS

#### 8.2.1.1. Arguments submitted by Luxembourg and Engie

- (339) Luxembourg and Engie invoke the principles of legal certainty and legitimate expectations to prevent recovery of the unlawful and incompatible aid using similar arguments.
- (340) As regards *legal certainty*, Luxembourg argues that this principle stands in the way of recovery in the present case due to the 'complexity of the analysis of the tax schemes under State aid' and because the Commission would be imposing its own interpretation of Luxembourg law <sup>(319)</sup>. Luxembourg invokes its good faith when applying the contested tax rulings in a manner corresponding strictly to its consistent application by Luxembourg <sup>(320)</sup>. It then refers <sup>(321)</sup> to the Commission decisions of 17 July 2013 regarding the *Spanish tax lease system* <sup>(322)</sup> and the decisions in the *1929 Holding* <sup>(323)</sup> and *Belgian Coordination Centres* <sup>(324)</sup> and argues that, in view of these cases, any negative decision should only take effect for the future after a transitional period.
- (341) Engie also claims that the Commission is adopting an innovative approach <sup>(325)</sup> and imposing retroactively its own interpretation of Luxembourg tax law, departing from some principles of Luxembourg tax law (the principle of linking the balance sheet with the commercial balance sheet) and showing lack of consistency with the reference framework defined in the Commission decision in the *FIAT* case <sup>(326)</sup>. It also refers to the Commission decision on the tax scheme applicable to economic interest groupings <sup>(327)</sup> in which the Commission would have limited recovery on the basis that the allegedly poor management of the file had created legal uncertainty <sup>(328)</sup>.
- (342) Finally, Luxembourg <sup>(329)</sup> and Engie <sup>(330)</sup> argue that recovery would lead to a risk of serious economic repercussions or serious disruption both for Luxembourg and for Engie.
- (343) As regards the principle of legitimate expectations, Engie invokes arguments and precedents similar to those raised by Luxembourg in relation to legal certainty (Luxembourg's good faith in implementing the tax rulings and the reference to the *1929 Holding* and *Belgian Coordination Centres* decisions) <sup>(331)</sup>. It also claims that recovery is prevented by the *Unicredito* <sup>(332)</sup> judgment, which allegedly allows an undertaking to choose the least-taxed option for a transaction <sup>(333)</sup>.

<sup>(318)</sup> See Section 1 for Procedure and Section 2 for the timing of both the rulings and the granting of the aid.

<sup>(319)</sup> Luxembourg observations to the Opening decision, page 20.

<sup>(320)</sup> Luxembourg observations to the Opening decision, page 21.

<sup>(321)</sup> Luxembourg observations to the Opening decision, page 20.

<sup>(322)</sup> Commission Decision 2014/200/EU of 17 July 2013 on the aid scheme SA.21233 C/11 (ex NN/11, ex CP 137/06) implemented by Spain — Tax scheme applicable to certain finance lease agreements also known as the Spanish Tax Lease System (OJ L 114, 16.4.2014, p. 1).

<sup>(323)</sup> Decision 2006/940/EC, recitals 102-113.

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

<sup>(325)</sup> Engie's observations to the Opening decision, paragraphs 336-339.

<sup>(326)</sup> Engie's observations to the Opening decision, paragraphs 346 and 349.

<sup>(327)</sup> Commission Decision 2007/256/EC of 20 December 2006 on the aid scheme implemented by France under Article 39 CA of the General Tax Code — State aid C 46/2004 (ex NN 65/2004) (OJ L 112, 30.4.2007, p. 41).

<sup>(328)</sup> Engie's observations to the Opening decision, paragraphs 354.

<sup>(329)</sup> Luxembourg observations to the Opening decision, page 21.

<sup>(330)</sup> Engie's observations to the Opening decision, paragraphs 356.

<sup>(331)</sup> Engie's observations to the Opening decision, paragraphs 323-333.

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

<sup>(333)</sup> Engie's observations to the Opening decision, paragraphs 334.

8.2.1.2. *Assessment*

- (344) While the general principles of Union law inspire the whole Union legal framework, the Court has given a very restrictive interpretation to these principles in the context of recovery. The principle of legal certainty is a general principle of Union law that predicates the predictability of rules and their legal effects. According to the case law, the principle of legal certainty prevents the Commission from indefinitely delaying the exercise of its powers <sup>(334)</sup>. The Court of Justice has also stated that the only grounds on which, in exceptional cases, that principle may be invoked, is when the Commission has manifestly failed to act and has clearly breached its duty of diligence in the exercise of its supervisory powers <sup>(335)</sup>.
- (345) In the present case, since the contested tax rulings were never notified to the Commission by Luxembourg, nor otherwise were publicly available, the Commission could have only learnt of their existence on 25 June 2015, when Luxembourg responded to its request for information of 25 March 2015. Therefore, there have not been any unjustified delays nor any breach by the Commission of its duty of diligence in the exercise of its powers that can justify the application of this principle to prevent recovery.
- (346) The fact that Luxembourg considers that it has applied in good faith its own law in a way which it considers correct and consistent with its previous practice, or that it disagrees with the interpretation of the reference system adopted by the Commission, is irrelevant for the purposes of its recovery obligation. Accepting Luxembourg's argument would lead to the unacceptable result that a Member State which consistently grants unlawful and incompatible aid would not be obliged to recover any of it. It would also mean that the mere fact that an aid measure has been implemented in compliance with the Member State's interpretation of its own national law could be invoked to prevent recovery. This conclusion would jeopardise the enforcement of State aid rules in relation to any aid measure that has been deemed unlawful and incompatible, as the recovery obligation cannot be based on the intention of the Member States when the aid was granted, but on the distortions of competition created by that aid. Moreover, the alleged 'complexity' of the analysis of the tax measures by the Commission is not an acceptable argument with respect to the obligation of recovery established by Regulation (EU) 2015/1589.
- (347) As regards the alleged 'new approach' on which the present decision would be based, the Commission rejects this claim. The analysis carried out by the Commission is consistent with its previous decisions and with the case law: the existence of a selective advantage has been assessed against the ordinary rules of taxation of corporate profit in Luxembourg. In this regard, while the Member States enjoy fiscal autonomy in the field of direct taxation, any fiscal measure a Member State adopts must comply with the Union State aid rules, which bind the Member States and enjoy primacy over their domestic legislation <sup>(336)</sup>. The fact that Luxembourg or Engie may not agree with the interpretation of certain provisions or that the facts on which this Decision is based are different than those on which other previous decisions are based does not make the Commission approach 'innovative'. Moreover, as already demonstrated, the reference framework defined by the Commission in this Decision is fully consistent with its previous decisions not only in the *FIAT* case, but also in the *Amazon* case and in the Court's case law <sup>(337)</sup>.
- (348) As regards the principle of legitimate expectations, this principle can be invoked by any person in a situation where a Union institution 'has caused him to entertain expectations which are justified' <sup>(338)</sup>. Important limitations apply to invoking that principle. First, the Court has stated that that principle cannot be invoked unless the person invoking it 'has been given precise assurances by the administration' <sup>(339)</sup>. These assurances should have been given by the institutions of the Union <sup>(340)</sup>. Second, Member States cannot invoke that principle

<sup>(334)</sup> Case C-74/00 *Falck y A. di Bolzano v Commission* ECLI:EU:C:2002:524, paragraph 140.

<sup>(335)</sup> Case C-408/04 P *Commission v Salzgitte*, ECLI:EU:C:2008:236, paragraphs 100-107.

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

<sup>(337)</sup> See recital 174.

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

<sup>(339)</sup> *Id.*

<sup>(340)</sup> See for instance Case T-243/09, *FEDECOM v Commission*, ECLI:EU:T:2012:497, paragraph 91 and quoted case-law.

in cases where they have failed to notify the aid measure to the Commission <sup>(341)</sup>. Third, the Commission's alleged failure to act is irrelevant when an aid measure has not been notified to it <sup>(342)</sup> and, consequently, the Commission's silence cannot be interpreted as an implicit authorisation of the measure that may give rise to legitimate expectations <sup>(343)</sup>. In this case, neither did Luxembourg notify the contested tax ruling to the Commission nor did the Commission give precise assurances to Luxembourg that the contested tax rulings do not constitute aid. Therefore, Luxembourg cannot rely on the principle of legitimate expectations.

- (349) As regards Luxembourg's and Engie's reliance on the Commission's previous decision-making practice both in the context of legal certainty and legitimate expectations, the Commission recalls, as a preliminary matter, that it is not bound by its decision-making practice <sup>(344)</sup>. Moreover, the cases referred to do not sustain Luxembourg and Engie's arguments.
- (350) In *Belgian Coordination Centres*, the reason why the Commission did not order the recovery of the aid was because it had raised no objections in a previous decision concerning a Belgian scheme with similar characteristics. The Commission therefore deemed its previous decision on the Belgian measure to confer a legitimate expectation on the beneficiaries of the new scheme it assessed at the time. Similarly, in its Decision on the tax scheme applicable to economic interest groupings, the Commission considered that two exceptional circumstances justified the non-recovery of the aid granted: first, the Commission had delayed exercising its powers when it came to examining the scheme, as it had not followed up on several letters submitted by France, and second, the beneficiaries under the scheme had been misled as to its lawfulness due to a previous Commission decision considering that a similar measure did not constitute aid. Precisely, the uncertainty created by this previous decision justified the Commission's decision in the *Spanish tax lease* not to recover the aid granted before the publication of the Decision on the tax scheme applicable to economic interest groupings. None of these circumstances is present in this case. Neither has the Commission incurred any exceptional delays nor have Luxembourg or Engie been misled by any prior Commission decision concerning a similar tax arrangement.
- (351) The reference to *1929 Holding* is equally ineffective. In this case, the Commission considered that no aid would be recovered given the nature of existing aid of the scheme which had been adopted in 1929, i.e. prior to the Treaty's entry into force. It then decided to grant a transitional period to put an end to the scheme given some exceptional circumstances that concurred in the case, namely the exceptionally long period during which the scheme had been in place (76 years) and the fact that an immediate abolishment of the measure could have relatively serious consequences for employment and economic growth in Luxembourg, where 13 000 exempt holding companies were active in a country with an active population of no more than 110 000 workers. Again, none of these exceptional circumstances are present in this case: neither can the aid granted in the present case be considered as existing aid, nor can any serious economic consequences be derived for Luxembourg from the recovery of the aid from Engie. The Commission also rejects the arguments concerning the serious economic consequences of the recovery for Engie. As the Court has already established, recovery cannot be affected by circumstances linked to the economic situation of the beneficiary <sup>(345)</sup>.
- (352) Recovery is not prevented either by the Court's case-law in *Unicredito*. All this judgment states is that, at the stage of the recovery, the national authorities can take into account a more favourable tax treatment than the ordinary treatment which would have been granted to the beneficiary 'in the absence of unlawful aid and in accordance

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

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

<sup>(343)</sup> See Joined Cases C-471/09 P to C-473/09 P *Territorio Histórico de Vizcaya – Diputación Foral de Vizcaya and Others v Commission* ECLI:EU:C:2011:521, paragraph 76.

<sup>(344)</sup> See C-138/09 *Todaro Nunziatina & C. ECLI:EU:C:2010:291*, paragraph 21.

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

with domestic rules which are compatible with Community law' <sup>(346)</sup>. Therefore, the fact that an undertaking can choose the 'least-taxed option' for a transaction or a 'more favourable tax treatment than the ordinary system' in no way prevents recovery when such option or treatment constitutes precisely the unlawful aid measure addressed by the Commission decision.

#### 8.2.2. PRINCIPLE OF GOOD ADMINISTRATION

- (353) Engie argues that the Opening Decision lacks sufficient reasoning. In particular, according to Engie, the Commission dedicated only one paragraph to the application to the contested tax rulings of the presumption of selectivity of individual measures and to the claim of an alleged derogation from the Luxembourg rules of abuse of law. This lack of reasoning would lead to a violation of the principle of good administration which would also prevent recovery <sup>(347)</sup>.
- (354) The Commission cannot accept that there has been any violation of the principle of good administration. The Commission learnt about the existence of the aid measures only on 25 June 2015, when Luxembourg responded to its request for information of 25 March 2015. Therefore, there have not been any unjustified delays in the procedure.
- (355) As to the lack of reasoning, the Commission recalls that the Opening Decision must only 'summarise the relevant issues of fact and law, include a preliminary assessment as to the aid character of the State measure in question and set out its doubts as to the measure's compatibility with the common market' <sup>(348)</sup>. Given the preliminary nature of the assessment, recovery cannot be prevented by a perceived lack of reasoning in the Opening Decision. In any case, the Commission recalls that the alleged insufficient reasoning of the presumption of selectivity of individual measures is an ineffective argument since the Commission does not base this Decision on that presumption.

#### 8.2.3. PRINCIPLE OF EQUAL TREATMENT

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

#### 8.3. METHODOLOGY FOR RECOVERY

- (358) The obligation on a Member State to abolish unlawful aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing competitive situation on the market. In this context, the Court of Justice has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it has enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored.
- (359) No provision of Union law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to quantify the exact amount of the aid to be recovered <sup>(351)</sup>. Rather, it is sufficient that the Commission's decision include information enabling the addressee of the decision to determine that amount without difficulty <sup>(352)</sup>. Union law merely requires the recovery of unlawful aid to restore the position to the *status quo ante* and that repayment be made in accordance with the rules of national law <sup>(353)</sup>. Accordingly, the Commission may confine itself to declaring that there is an obligation to repay the aid at issue and leave it to the national authorities to calculate the exact amount of aid to be repaid <sup>(354)</sup>.

<sup>(346)</sup> See Case C-148/04 *Unicredito Italiano SpA v Agenzia delle Entrate* ECLI:EU:C:2005:774, paragraph 119.

<sup>(347)</sup> Observations by Engie to the Opening decision, paragraphs 358-367.

<sup>(348)</sup> C-194/09 P *Alcoa Trasformazioni* ECLI:EU:C:2011:497, paragraph 102.

<sup>(349)</sup> Observations by Engie to the Opening decision, paragraphs 368-372.

<sup>(350)</sup> Case T-214/95 *Het Vlaamse Gewest (Flemish Region) v Commission* ECLI:EU:T:1998:77, paragraph 54.

<sup>(351)</sup> Albeit in the context of 'impossibility to recover' and not 'difficulty to quantify the aid amount'.

<sup>(352)</sup> See Case C-441/06 *Commission v France* ECLI:EU:C:2007:616, paragraph 29 and the case-law cited.

<sup>(353)</sup> Joined Cases T-427/04 and T-17/05 *France and France Telecom v Commission* ECLI:EU:T:2009:474, paragraph 297.

<sup>(354)</sup> Joined Cases T-427/04 and T-17/05 *France and France Telecom v Commission* ECLI:EU:T:2009:474, paragraph 299.

- (360) In relation to unlawful State aid in the form of tax measures, the amount to be recovered should be calculated on the basis of a comparison between the tax actually paid and the amount which should have been paid in the absence of the contested tax rulings. The difference between the two values represents the aid granted to the beneficiary, which must be entirely recovered.
- (361) As explained in Section 6, the aid granted on the basis of the contested tax rulings consists, essentially, in the application of the participation exemption at the level of LNG Holding and CEF to an income which corresponds economically to amounts deducted as expenses at the level of, respectively, LNG Supply and GSTM <sup>(355)</sup>. Such combined application of exemption and deduction to the same amounts has left virtually the entire profit realised by LNG Supply and GSTM untaxed. Therefore, the advantage effectively materialises at the moment in which the participation exemption is applied, at the level of LNG Holding and CEF, on the income corresponding to the ZORA Accretions that were previously deducted at the level of, respectively, LNG Supply and GSTM. In this regard, the Commission notes that, until 31 December 2016 <sup>(356)</sup>, the GSTM ZORA had not yet been converted into GSTM Shares, which means that, in relation to this transaction, the participation exemption had not been applied yet. As a consequence, the aid granted on the basis of the GSTM tax rulings has not yet materialised and therefore, there are no amounts to recover (except if the GSTM ZORA has been converted into GSTM Shares, those shares have been cancelled or sold and the participation exemption has been applied on the corresponding profit between 31 December 2016 and the date of this Decision).
- (362) By contrast, the LNG ZORA was partially converted in 2014 and the LNG Supply Shares received by LNG Holding at conversion were cancelled on the same year, giving rise to an income of USD 506,2 million for LNG Holding. This income remained untaxed pursuant to the application of the participation exemption. This amount corresponds to the expense deducted, as ZORA Accretions, at the level of LNG Supply.
- (363) In light of the foregoing considerations, the amount to be recovered should be determined: first, by taking any income recorded in the tax returns of LNG Holding that corresponds to converted ZORA Accretions which were previously deducted at the level of LNG Supply <sup>(357)</sup>; and second, by applying to the resulting amount the ordinary rules of taxation of corporate profit in Luxembourg, including the standard corporate income tax, municipal tax, surcharges and wealth tax. The resulting sum constitutes the amount of aid to be recovered to eliminate the selective advantage granted by Luxembourg on the basis of the contested tax rulings. Until fiscal year 2016 included, the Commission takes note that the amount of income recorded in the tax returns of LNG Holding that corresponds to converted ZORA Accretions deducted at the level of LNG Supply was USD 506,2 million, awarded in fiscal year 2014 <sup>(358)</sup>.
- (364) The methodology described in recital 363 should apply to CEF, in case any amount of aid had materialised via a (total or partial) conversion of the GSTM ZORA into GSTM Shares, their cancellation or sale, and the subsequent application of the participation exemption in the tax returns of CEF at the date of adoption of this Decision. The same applies to any additional aid awarded to LNG Holding at the date of adoption of the present Decision as a result of any further conversions of the LNG ZORA, the cancellation or sale of the corresponding LNG Supply Shares, and the application of the participation exemption in the tax returns of LNG Holding.

#### 8.4. ENTITY FROM WHOM THE AID IS TO BE RECOVERED

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

<sup>(355)</sup> In particular, see recitals 157, 192 and 241.

<sup>(356)</sup> The date of the most recent financial statements of GSTM submitted by Luxembourg.

<sup>(357)</sup> To this regard, the qualification of this income in the statutory accounts or in the tax returns of LNG Holding as 'capital gains', 'dividends' or otherwise is irrelevant.

<sup>(358)</sup> See recital 56.

<sup>(359)</sup> Also from GSTM if any amount of aid had materialised at the date of publication of the present Decision.

## 9. MONITORING OF THE IMPLEMENTATION OF THE DECISION

- (366) As explained in Section 6.2, it is the application of the participation exemption at the level of LNG Holding and CEF to income which corresponds economically to amounts deducted as expenses at the level of LNG Supply and GSTM (the ZORA Accretions) that generates an undue advantage and materially constitutes the aid granted by Luxembourg on the basis of the contested tax rulings. The Commission does not call into question as such the legality under Luxembourg tax law of the entire structure set up by Engie for the transfer of the two businesses. It merely objects to the practical effects of this structure on the total tax liability of the Engie group, i.e. that virtually all the profits realised by LNG Supply and GSTM are effectively left untaxed. In particular, the Commission requires Luxembourg, *inter alia*, not to apply the participation exemption at the level of the Holdings to any income which corresponds to amounts previously deducted from the tax base of the Subsidiaries.
- (367) As the ZORA Agreements are due to expire in 2024 and 2026 <sup>(360)</sup>, a large part of the advantage granted to Engie via the contested rulings would effectively materialise in the future, depending on the choices of Engie regarding the timing of the conversion of the ZORAs into shares of LNG Supply and GSTM, and their subsequent cancellation or sale. For this reason, the Commission considers that, on top of the obligation to recover the aid already materialised as described in Section 8, Luxembourg must not accept the application of the participation exemption, at the level of LNG Holding and CEF, to income corresponding to ZORA Accretions already deducted by, respectively, LNG Supply and GSTM, irrespectively of whether this happens on the due dates of the ZORA Agreements in 2024 and 2026, earlier in time, or even beyond 2026 <sup>(361)</sup>.
- (368) As a large part of the aid awarded to Engie has not materialised yet, and in order to verify that this will not happen in the future, the Commission will need to receive from Luxembourg, *inter alia*, the tax returns, statutory accounts and final tax assessments of the following entities of the Engie group: Engie LNG Supply, S.A., Engie Treasury Management S.à.r.l., Engie LNG Holding S.à.r.l., Engie Invest International S.A. (including tax returns and tax assessments under the fiscal unity regime) <sup>(362)</sup>, Engie LNG (Luxembourg) S.à.r.l. and Electrabel Invest Luxembourg S.A. The Commission will also need to receive any new tax rulings, issued by Luxembourg in favour of the entities listed above or any other entities of the Engie group, concerning the tax treatment of the structures set up by Engie in the contested tax rulings. This information is required to ensure the continuous implementation of this Decision over time. Indeed, the Commission will then verify for each financial year that, *inter alia*, no participation exemption is applied at the level of Engie LNG Holding S.à.r.l. and Engie Invest International S.A. on income corresponding to ZORA Accretions deducted at the level of, respectively, Engie LNG Supply, S.A., and Engie Treasury Management S.à.r.l. This monitoring obligation stands irrespective of whether the proposed transaction described in recital 22 is finalised or not, i.e. if the parent company of Engie LNG Supply, S.A., belongs to the Engie group or the Total group. Additionally, should Engie decide to revise the structures set up in the contested tax rulings, Luxembourg shall inform the Commission of the relevant changes and their impact on the total fiscal liability in Luxembourg of the Engie group. The obligations set out in this recital stand until the shares of LNG Supply and GSTM are entirely converted and subsequently cancelled or sold.

## 10. CONCLUSION

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

HAS ADOPTED THIS DECISION:

### Article 1

The State aid granted in favour of Engie S.A., and all companies directly or indirectly controlled by Engie S.A. on the basis of the tax ruling issued by the Luxembourg tax administration on 9 September 2008 as amended and

<sup>(360)</sup> See recitals 34 and 60.

<sup>(361)</sup> This means, in practical terms, that Luxembourg must not issue any tax assessment for LNG Holding and CEF where it accepts the participation exemption under these conditions.

<sup>(362)</sup> These are the new names of the relevant companies: see footnotes 4, 5, 16 and 20.

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

#### *Article 2*

1. Luxembourg shall recover the incompatible and unlawful aid referred to in Article 1 from Engie LNG Holding S.à.r.l.
2. Any sums that remain unrecoverable from Engie LNG Holding S.à.r.l, following the recovery referred to in the preceding paragraph, shall be recovered from Engie S.A. or/and any of its successors, or group companies.
3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
4. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.
5. Luxembourg shall cease granting the aid measure referred to in Article 1 with effect from the date of adoption of this Decision.

#### *Article 3*

1. Recovery of the aid granted under the measures referred to in Article 1 shall be immediate and effective.
2. Luxembourg shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

#### *Article 4*

1. Within two months following notification of this Decision, Luxembourg shall submit information regarding the methodology used to calculate the exact amount of aid.
2. Luxembourg shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the measures referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision.

#### *Article 5*

This Decision is addressed to the Grand Duchy of Luxembourg.

Done at Brussels, 20 June 2018.

*For the Commission*  
Margrethe VESTAGER  
*Member of the Commission*

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**COMMISSION DECISION (EU) 2019/422****of 20 September 2018****on the State aid SA 36112 (2016/C) (ex 2015/NN) implemented by Italy for the Port Authority of Naples and Cantieri del Mediterraneo S.p.A.***(notified under document C(2018) 6037)***(Only the Italian version is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union ("TFEU"), 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 provision(s) cited above <sup>(1)</sup> and having regard to their comments,

Whereas:

**1. PROCEDURE**

- (1) In March 2006, the Commission requested information from the Italian authorities on potential State support to Cantieri del Mediterraneo S.p.A. ("CAMED") concerning planned works on a dry-dock located in the Port of Naples (dry-dock No 3). Following the reply of the Italian authorities of 3 April 2006, the Commission did not act nor investigate the matter further to the Italian comments, and the Commission services closed the file internally, as the support was considered not to involve State aid. Italy has never formally notified to the Commission the measures at stake.
- (2) On 21 January 2013, a ship repairer active in the Port of Naples expressed concerns in respect of funding provided by public authorities in Italy to three investment projects allegedly carried out between 2006 and 2014 for the refurbishment of three dry-docks (*bacini di carenaggio*) operated by CAMED by means of a concession contract. The case was registered as SA.36112 (2013/CP) – Alleged aid to Cantieri del Mediterraneo. On 27 June 2013, the complainant provided the Commission with additional information.
- (3) Between 28 February 2013 and 12 June 2013 the Commission requested information from the Italian authorities in the light of the complainant's allegations.
- (4) On 21 October 2013 the Commission services communicated to the complainant their preliminary findings concerning the alleged State aid to CAMED and informed the complainant that, based on the information available at the time, the alleged measures did not seem to constitute aid within the meaning of Article 107(1) TFEU since the presence of an advantage to CAMED appeared to be excluded. The Commission services explained that at that stage there were no indications that operating aid had been granted at the level of the operator, since CAMED did not appear to be released from costs which it would normally have had to bear in its day-to-day management or normal activities.
- (5) Between 19 November 2013 and 10 February 2015 the complainant submitted further information. In particular, the complainant expressed concerns that the measures represented illegal investment aid to the Port Authority of Naples and illegal operating aid to CAMED. The Commission services requested additional information from the Italian authorities on 17 June 2014, 14 November 2014, and 12 March 2015, to which the Italian authorities replied on 1 August, 3 and 29 September 2014, 11 February 2015, and 10 June 2015. Since the information available showed that the public funding had already been granted, on 4 June 2015 the Commission services informed Italy that the measures would be registered as unlawful aid (2015/NN) – Investment Aid to the Port Authority of Naples and Cantieri del Mediterraneo S.p.A., and the procedural rules applicable would be those laid down in Chapter III of Council Regulation (EC) No 659/1999 <sup>(2)</sup>.

<sup>(1)</sup> OJ C 369, 7.10.2016, p. 78.

<sup>(2)</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (OJ L 83, 27.3.1999, p. 1). That Regulation has been 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) On 21 September 2015, the Commission services met the Italian authorities and the Commission requested additional information on 7 October 2015, to which the Italian authorities replied on 9 November 2015. On 11 November 2015 the Commission services met the complainant.
- (7) By letter dated 28 June 2016, the Commission informed the Italian authorities that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the aid.
- (8) The Commission decision to initiate the procedure ('the Opening Decision') was published in the *Official Journal of the European Union* <sup>(3)</sup> on 7 October 2016. The Commission invited interested parties to submit their comments on the aid/measures.
- (9) The Commission received comments from two interested parties: CAMED and the complainant. It forwarded them to the Italian authorities, which was given the opportunity to react; its comments were received by letter dated 12 January 2017.
- (10) The Commission sent additional questions to Italy on 9 and 16 November 2017, to which they replied on 24 November 2017.

## 2. DETAILED DESCRIPTION OF THE AID

### 2.1. Background and recipients of aid

- (11) The Port of Naples is located in the Campania region and is administered by PAN.
- (12) In the Port of Naples, there are three dry-docks owned by the State (dry-docks Nos 1, 2, and 3) and two floating docks owned by two private operators (docks Nos 5 and 6).
- (13) Dry-docks Nos 1, 2, and 3 are used to provide ship repair activities by CAMED and in principle any other ship repairer in compliance with 'Regulation for the operation of ship-repairing docks of the Port of Naples' <sup>(4)</sup> adopted in 2002 and later modified (the '2002 Regulation') <sup>(5)</sup>. According to the Italian authorities, all dry-docks in the Port of Naples must be made available to all interested users (e.g. other ship-repairers) on the basis of certain pre-defined and objective rules.
- (14) The Italian authorities explained that, following the decision to withdraw from the Port of Naples by the Fincantieri Group – one of the largest operators of the shipbuilding sector at that time – at the end of the last century, the docks were in a very poor state. At that time, CAMED <sup>(6)</sup> was active as a port repairer in the Port of Naples by virtue of a land concession act valid from 1909 to 2008. According to the Italian authorities, CAMED agreed to invest in the area, provided that PAN undertook a number of structural investments on the dry-docks Nos 1, 2, and 3. Following a request filed by CAMED in 1999 to PAN, the latter agreed to perform works to modernise and make the dry-dock No 3 adequate for use ('the 2001 Agreement') <sup>(7)</sup>.
- (15) In 2001 CAMED requested from PAN the authorisation to perform a number of works on the docks in exchange for a 40 years prolongation of the existing land concession (*concessione demaniale*). Following CAMED's request, PAN started the administrative procedure under Italian law for the award of a land concession contract <sup>(8)</sup>. PAN published in the Municipality's register and in its own register CAMED's request for a land concession together with the business plan for a period of 20 days (from 18 January 2002 until 6 February 2002). The publication invited interested parties to present their observations or alternative proposals. According to the procedure, in case of objections or complaints, the decision on the award of the concession is taken by the competent Minister.
- (16) Since PAN received no observations following the publication of CAMED's request, it granted to CAMED the land concession act (*atto di concessione demaniale*) No 125 of 29 July 2004 ('the 2004 Concession') for the operation and use of the three dry-docks, with the obligation to make them available to all interested users (e.g. other ship-repairers) in compliance with the 2002 Regulation. CAMED agreed to terminate the previous land concession

<sup>(3)</sup> Cf. footnote 1.

<sup>(4)</sup> *Regolamento per l'esercizio dei bacini di carenaggio*, <http://porto.napoli.it/wp-content/uploads/2015/05/RegolamentoBacini.pdf>.

<sup>(5)</sup> The latest modification of the Regulation occurred in 2012, [http://porto.napoli.it/wp-content/uploads/2015/06/Ordinanza\\_N.6\\_03-04-2012.pdf](http://porto.napoli.it/wp-content/uploads/2015/06/Ordinanza_N.6_03-04-2012.pdf).

<sup>(6)</sup> The Italian authorities explained that the company undertook a number of corporate transformations and changed name several times. For the sake of simplicity, the decision uses the name 'CAMED' to refer to the company, even if in the past it was called differently (Bacini Napoletani S.p.A.).

<sup>(7)</sup> Agreement (*Convenzione*) between the Port Authority of Naples and Bacini Napoletani S.p.A. (i.e. CAMED) of 12 June 2001. According to the 2001 Agreement, CAMED has been operating dry-dock 3 at least since 1959.

<sup>(8)</sup> Article 36 of the Naval Code (*Codice navale*) and Article 18 of the Naval Code Regulation (*Regolamento per l'esecuzione del codice della navigazione marittima*).

valid from 1909. According to the 2004 Concession, CAMED has the right to operate and use the dry-docks for 30 years, starting from 28 July 2003 instead of the requested 40 years, in exchange of a yearly land use fee, calculated on the basis of fixed legal parameters (EUR/sqm) and annually adjusted to inflation pursuant to Ministerial Decree of 15 November 1995. The land use fee paid over the period 2004-2017 is presented in Table 1.

Table 1  
Concession fees

(in EUR)

| Year | Yearly concession fee |
|------|-----------------------|
| 2004 | 124 117               |
| 2005 | 103 300               |
| 2006 | 139 900               |
| 2007 | 147 800               |
| 2008 | 146 341               |
| 2009 | 154 392               |
| 2010 | 149 148               |
| 2011 | 153 321               |
| 2012 | 159 071               |
| 2013 | 143 671               |
| 2014 | 142 178               |
| 2015 | 132 664               |
| 2016 | 133 658               |
| 2017 | 133 257               |

- (17) According to Article 1 of the 2004 Concession, the duration of the concession allows the amortisation of previous investments and a new programme of investments by CAMED with a value of EUR 24 million (Italian lira 47 662 million) <sup>(9)</sup>. According to the 2004 Concession, CAMED also provided a guarantee (*cauzione*) of EUR 275 000 in respect of the obligations provided for under the concession.
- (18) According to Article 3 of the 2004 Concession, PAN also committed to perform structural works on the area granted to CAMED by 2006 and more specifically to: (i) adapt the pumping plant of docks Nos 1 and 2; (ii) build a new certified dry-dock caisson (*barche-porte*) for docks Nos 1, 2 and 3; (iii) redevelop walls (*paramenti*) and bedding (*platea*) for dock No 2; (iv) conduct structural redevelopment of quays (*banchine*) and walls for dock No 2 and quay 33b.
- (19) After the Opening Decision, the Italian authorities clarified that CAMED carried out investments in the amount of EUR 24 610 420 in accordance with the 2004 Concession and additional investments in the amount of EUR 17 931 075 until 2016.

## 2.2. Allegation of State aid by the complainant

- (20) In the first submission, the complainant argued that CAMED received aid at both levels: (i) as an operator (i.e. manager of the dry-docks), by means of a reduction of the costs for the refurbishment of the infrastructure (operating aid); and (ii) as a user of the infrastructure (e.g. as a ship-repairer), because the infrastructure, which should in principle be open to all business end-users on a non-discriminatory basis, was in fact solely used by CAMED. The complaint also contained antitrust allegations that are not relevant for the present decision and for which the complainant has been the addressee of a separate decision adopted on 24 July 2014.

<sup>(9)</sup> The amount of investment specified in the 2004 Concession is indeed EUR 24 million and not EUR 24 000 as stated in the Opening Decision.

- (21) According to the complainant, the advantage received by CAMED derived from the performance of the following works ('the Interventions'):
- (1) Intervention No 1: Structural refurbishment of some parts of dock No 3 (aid amount: EUR 12 928 537).
  - (2) Intervention No 2: Adaptation of the pumping plant of docks Nos 1 and 2, renewal of pier walls adjacent to dock No 2 (aid amount: EUR 23 170 000).
  - (3) Intervention No 3: Repair and strengthening of the internal pier of dock No 3 (*Molo Cesario Console*) (aid amount: EUR 13 000 000).
- (22) With the submission of 19 November 2013, the complainant extended the scope of the complaint claiming that the Interventions conferred aid to PAN, in line with the Commission's case practice<sup>(10)</sup>. According to the complainant there would also be aid at the level of the concessionaire (CAMED) because the concession was not entrusted by means of a public, open, transparent and non-discriminatory tender. The complainant further underlined the absence of any evidence to conclude that the land use fee paid by CAMED could exclude any advantage. According to the complainant, the methodology foreseen by the national legislation for setting the land use fees (see recital 16) does not allow to reflect the increased value of the infrastructure after possible interventions, since it consists in a fixed amount of EUR/sqm.
- (23) On 1 October 2015 the complainant also provided a list of PAN's decisions (delibere No 308/2015, No 181/2015, No 233/2015, No 277/2015, No 279/2015, No 281/2015, No 293/2015, No 302/2015) for works to be carried out in the dry-docks, as evidence of the breach of the standstill obligation.

### 2.3. Italy's comments on the alleged State aid measure/Financing of the investment project and legal basis

- (24) The Italian authorities clarified before the adoption of the Opening Decision that only part of the works foreseen for the refurbishment of dry-dock No 3 have been completed in 2006, following a public procurement procedure (Intervention No 1), while the works foreseen by Interventions 2 and 3 had not been completed at that time. Of the whole project agreed with CAMED in the 2001 Agreement and the 2004 Concession, only one part had actually been fully performed.
- (25) According to Italy, the legal right to receive the financing had already been granted to PAN in 1998 pursuant to Article 9 of Law 413/1998, which provides that the Ministry of Transport and Shipping (the 'Ministry') shall adopt a programme of investments in ports on the basis of the requests of Port Authorities<sup>(11)</sup>. It appears that the programme of investments was adopted by means of two decrees issued by the Ministry, and was modified subsequently. The first decree of 27 October 1999<sup>(12)</sup> (the 'Ministerial Decree of 27 October 1999') lists 20 ports benefiting from the national funding and the second decree<sup>(13)</sup> (the 'Ministerial Decree of 2 May 2001') extends that list to 25 ports. On the basis of those decrees, Port Authorities are authorised to borrow or to request other financial operations for a total amount of 100 billion Italian lira (around EUR 51 million). The Ministry would directly repay the financial institutions every year<sup>(14)</sup>. Therefore, according to Italy, the measures in favour of PAN were granted in 1998 by means of Law 413/1998.
- (26) After the Opening Decision, the Italian authorities provided additional clarifications on the amounts of investments by the Italian State and PAN.

#### Intervention No 1

- (27) The Italian authorities indicated that the works on Intervention No 1 started on 21 October 2002 and were completed on 24 January 2006. The costs incurred at the time when the present decision has been adopted amount to EUR 12 859 854,50.

<sup>(10)</sup> The complainant referred, inter alia, to the Commission Decision in State aid Case No SA.34940 (N/2012) - Italy - Port of Augusta of 19 December 2012 (OJ C 77, 15.3.2013, p. 1).

<sup>(11)</sup> 'Per la realizzazione di opere infrastrutturali di ampliamento, ammodernamento e riqualificazione dei porti, il Ministero dei trasporti e della navigazione adotta un programma sulla base delle richieste delle autorità portuali o, laddove non istituite, delle autorità marittime, sentite le regioni interessate'.

<sup>(12)</sup> 'Decreto 27 ottobre 1999 Adozione del programma di opere infrastrutturali di ampliamento, ammodernamento e riqualificazione dei porti. (GU Serie Generale n.10 del 14-01-2000)'.

<sup>(13)</sup> 'Decreto 2 maggio 2001 Ripartizione delle risorse di cui all'art. 9 della legge n. 413 del 1998, rifinanziate dall'art. 54, comma 1, della legge n. 488 del 1999 e dall'art. 144, comma 1, della legge n. 388 del 2000 per la realizzazione di opere infrastrutturali di ampliamento, l'ammodernamento e riqualificazione dei porti. (GU Serie Generale n.199 del 28-08-2001)'.

<sup>(14)</sup> Additional funding was later granted also by means of Article 54, paragraph 1, of Law No 488/1999, Article 144, paragraph 1, of Law No 388/2000 and Article 36 of Law No 166/2002.

**Intervention No 2**

- (28) Intervention No 2 has been co-financed by the Ministry in the amount of EUR 14 971 621,41. The amount of EUR 5 498 378,59, to be partly advanced by PAN and then reimbursed through cash grants by the Ministry, however has not been paid by the Ministry.
- (29) For Intervention No 2, PAN provided own resources of EUR 2 700 000 (Delibera 89/2016 of 22 March 2016) and EUR 5 830 000 (Delibera 175/2017 of 31 May 2017).
- (30) The works on Intervention No 2 started on 5 November 2012 and have not been completed yet. The costs incurred at the time of adoption of this Decision amount to EUR 11 192 515,79. The total costs for this intervention are projected to come to EUR 29 000 000.

**Intervention No 3**

- (31) Finally, Intervention No 3 is funded partly through PAN's own resources (EUR 5 091 000, provided in Delibera 356/2014 of 24 December 2014).
- (32) As of December 2017, the works in respect of Intervention No 3 had not started yet (the works were awarded on 19 July 2017) and the costs incurred amounted to EUR 6 880,50. The total costs for this intervention are projected to come to EUR 15 900 000.
- (33) The total cost of the investment project (namely, all three intervention) is EUR 57 759 874,5, which was divided into three parts as demonstrated in Table 2.

Table 2

**Planned public investments**

| Intervention                                                                                         | Amounts                                                                  | Paid? | Date of payment                                                 | Planned investment cost |
|------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------|-------|-----------------------------------------------------------------|-------------------------|
| 1. Structural refurbishment of some parts of dock No 3                                               | 9 760 629,57                                                             | Yes   | 8.1.2003<br>21.12.2004<br>14.7.2005<br>26.10.2005<br>12.12.2011 | 12 859 854,50           |
|                                                                                                      | 3 099 224,93                                                             | Yes   | 31.12.2002<br>26.4.2004<br>19.4.2005<br>6.10.2005<br>24.4.2006  |                         |
| 2. Adaptation of the pumping plant of docks Nos 1 and 2, renewal of pier walls adjacent to dock No 2 | 8 300 000,00                                                             | Yes   | 4.8.2006<br>27.12.2006<br>29.12.2006                            | 29 000 000,00           |
|                                                                                                      | 6 671 621,41                                                             | Yes   | 1.9.2011<br>22.3.2013<br>17.12.2014                             |                         |
|                                                                                                      | 2 700 000,00 (own contribution PAN)                                      | Yes   | 23.3.2016                                                       |                         |
|                                                                                                      | 5 498 378,59 (to be advanced by PAN and reimbursed by the Italian State) | No    | N/A                                                             |                         |
|                                                                                                      | 5 830 000,00 (own contribution PAN)                                      | Yes   | 31.5.2017                                                       |                         |

| Intervention                                                  | Amounts                             | Paid? | Date of payment | Planned investment cost |
|---------------------------------------------------------------|-------------------------------------|-------|-----------------|-------------------------|
| 3. Repair and strengthening of the internal pier of dock No 3 | 10 809 000,00                       | Yes   | 18.11.2014      | 15 900 000              |
|                                                               | 5 091 000,00 (own contribution PAN) | Yes   | 24.12.2014      |                         |
| Total funding by PAN                                          |                                     |       |                 | 13 621 000,00           |
| Total funding by Italian State                                |                                     |       |                 | <b>44 138 854,50</b>    |
| <b>Total</b>                                                  |                                     |       |                 | <b>57 759 854,50</b>    |

- (34) In the light of the above, the funding by the Italian State already granted or committed for this project amounted to EUR 44 138 854,50. It mainly took the form of direct reimbursement made to the financial institutions for the loans entered into by PAN by the Ministry as well as direct grants to PAN from the Italian national budget. The Italian authorities explained that the remaining amount of EUR 13 621 000 (of which EUR 2 700 000 and EUR 5 830 000 for Intervention No 2 and EUR 5 091 000 for Intervention No 3) was provided by PAN from their own resources, accumulated in the context of the exercise of its economic activity of managing the port.

#### 2.4. Grounds for initiating the procedure

- (35) On 28 June 2016, the Commission adopted a decision to open formal investigation with respect to the above mentioned measures in order to address its doubts whether these measures constitute State aid within the meaning of Article 107(1) TFEU and whether they are compatible with the internal market.

##### 2.4.1. Doubts on the presence of aid to PAN

- (36) In the Opening Decision, the Commission took the preliminary view that the measures constitutes State aid within the meaning of Article 107(1) TFEU because PAN received State resources to upgrade ship repair facilities which are commercially exploited by it. PAN – as an entity performing an economic activity on behalf of the owner, i.e. the Italian State – can be qualified as an undertaking. Therefore, that transfer seems to amount to a transfer of State resources and is imputable to the State.
- (37) Furthermore, according to the Opening Decision, the public funding seems to confer a selective economic advantage to PAN. The Commission raised doubts whether PAN is required to discharge public service obligations ('PSO') that have been clearly defined and that fulfil the four cumulative Altmark conditions. The service provided by PAN (i.e. the rental of ship-repairing facilities in exchange for remuneration) does not exhibit any special characteristics compared with those of other economic activities. The Commission raised doubts as to whether (i) PAN is actually required to discharge a PSO and those obligations have been clearly defined, (ii) the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner, (iii) the compensation does not exceed what is necessary to cover the costs incurred in discharging the PSO, taking into account the relevant receipts and a reasonable profit for discharging those obligations, (iv) the operator has been chosen on the basis of a public procurement procedure or the costs of discharging the PSO are limited to the costs of a typical undertaking (well-run and adequately provided with means of transport so as to be able to meet the necessary public service requirements).
- (38) The Commission preliminarily considered that the investment project will allow PAN to continue the economic activity of renting out the dry-docks, which is a sector open to competition and trade at Union level and that the measure is liable to distort competition and affect intra-Union trade.
- (39) In the Opening Decision, the Commission found that qualifying the measures as State aid would not result in a violation of Article 345 TFEU, setting out the principle of neutrality between public and private entities. The Commission preliminarily noted that considering the measures as State aid does not seem to discriminate against public owners, since private owners in the same business would also have to prepare an *ex ante* business plan and would carry out the investment only if it was profitable on that basis. If this is not the case, both public and private owners could potentially receive compatible aid if all the conditions foreseen in the applicable State aid rules in the shipbuilding sector are respected.

- (40) Furthermore, in the Opening Decision, the Commission took the preliminary view that the measures at issue could not be classified as existing aid within the meaning of Article 1(b) of Regulation (EU) 2015/1589 ('the Procedural Regulation') since public support to shipbuilding and ship repair facilities had been considered to constitute State aid even before the Leipzig Halle judgment.

#### 2.4.2. Doubts on the presence of aid to CAMED

- (41) Concerning possible aid to CAMED, the Commission noted in the Opening Decision that the public support to PAN partly relieved it from investment costs that any other private owner of ship-repairing facilities in the market would have to pay in full, thus allowing it to charge lower fees to CAMED.
- (42) The measures at issue are imputable to the State (i.e. granted by PAN, which forms part of the State administration even if the entity in question enjoys legal autonomy from other public authorities). In addition, the Commission found in the Opening Decision that by providing the dry-docks to CAMED potentially below market rates, PAN could have waived State resources.
- (43) In the absence of a tender and since the land use fee that CAMED pays to PAN was calculated on the basis of fixed legal parameters, the Commission took the preliminary view that the contractual arrangements between PAN and CAMED may bestow a possible economic advantage above market conditions on CAMED by providing refurbished dry-docks potentially below market rates. Moreover, even if it could be accepted that CAMED undertook some investments in exchange for the completion of the interventions, there was no indication that the value of the investments carried out by CAMED for PAN, together with the land use fee, correspond to the value of the interventions performed by PAN for CAMED. The Commission thus invited the Italian authorities and third parties to comment on these preliminary conclusions.
- (44) In the Opening Decision, the Commission raised doubts whether the four Altmark conditions are cumulatively fulfilled with respect to the measures in support of CAMED.
- (45) The Commission also noted that the measures were liable to distort competition and affect intra-Union trade.

#### 2.4.3. Doubts on compatibility of the aid

- (46) On compatibility, the Commission preliminarily considered that dry-docks are not transport infrastructures, but production facilities for shipyards as they are used for ship building or ship repairing and not for transport purposes. Consequently, the aid could not be assessed directly under Article 107(3)(c) TFEU as an investment aid for transport infrastructure.

##### 2.4.3.1. Compatibility of the aid to PAN

- (47) The Commission expressed doubts on the compatibility of the aid to PAN under the 2011 SGEI Framework and under the State aid rules for the shipbuilding sector applicable at the time of granting each measure. In the Opening Decision, the Commission took the preliminary view that the granting in principle occurred when each of the investments was included in the programme of investments on the basis of the Port Authorities' request. The Commission considered that the information in this respect was insufficient and invited Italy to provide the relevant granting dates for each measure/intervention.
- (48) Nevertheless, the Commission raised doubts as to the full compliance of the measures at issue as the aid intensity seemed to exceed the maximum permissible aid intensity for regional investment aid for shipbuilding facilities (to which reference is made in the successive frameworks), irrespective of the precise date of granting of each measure and under the following compatibility bases that could be applicable for shipbuilding aid:

— Council Regulation (EC) No 1540/98, which entered into force on 1 January 1999 until 31 December 2003 <sup>(15)</sup>;

<sup>(15)</sup> Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding (OJ L 202, 18.7.1998, p. 1).

- The 2004 Framework on State aid to shipbuilding, which was originally applicable from 1 January 2004 until 31 December 2006, and was later prolonged twice until 31 December 2008 and until 31 December 2011 <sup>(16)</sup>;
- The 2011 Framework on State Aid to shipbuilding <sup>(17)</sup>, which was applicable to non-notified aid granted after 31 December 2011. The application of this Framework has been extended until 30 June 2014 <sup>(18)</sup>;
- The Guidelines on regional State aid for 2014-2020 as from 1 July 2014 <sup>(19)</sup>.

- (49) As Italy did not provide the information necessary to establish the clear date of granting, the Commission was not in a position to perform a complete compatibility assessment as it could not identify the correct legal basis. In the Opening Decision, the Commission noted that it could not be excluded that at least part of the measures could be declared compatible under the relevant State aid rules and invited the Italian authorities to provide a compatibility analysis for each measure.

#### 2.4.3.2. Compatibility of the aid to CAMED

- (50) The Commission raised doubts as to the compatibility of the measures under the 2011 SGEI Framework with regard to the alleged aid to CAMED.
- (51) However, as the Commission could not exclude entirely that at least part of the measures to PAN could be declared compatible under the relevant State aid rules which were applicable in the shipbuilding sector at the time of granting the measures, it was not excluded that such assessment could also influence the compatibility assessment regarding aid to CAMED. The Commission invited the Italian authorities to provide a compatibility analysis for each measure (regarding CAMED) on the basis of the applicable law, depending on the dates of granting of each measure.

### 3. COMMENTS FROM ITALY

#### 3.1. Comments on the Opening Decision

- (52) In the view of the Italian authorities, the Opening Decision infringes the primary sources of Union law and the general principles of sound administration, legal certainty, legitimate expectation and effective judicial protection. Italy argues that any Commission decision would in effect revoke a prior decision to close the case, which the Commission had taken in 2006 <sup>(20)</sup>.
- (53) Italy further argues that the completion of proceedings within a reasonable length of time is a general principle of Union law <sup>(21)</sup>, preventing the Commission from extending at its own discretion the length of the preliminary stage of the investigation initiated following receipt of a complaint relating to alleged aid which has not been notified unless such a measure was unlawful <sup>(22)</sup>. According to the Italian authorities this is not the case in the current proceedings.
- (54) The Italian authorities refer to Article 16(1) of the Procedural Regulation, according to which the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law.

##### 3.1.1. On the presence of aid to PAN

- (55) With regard to the existence of aid to PAN, Italy explained that the port authorities are not undertakings, but non-economic public entities (*enti pubblici non economici*), governed by public law (e.g. Law No 84/1994, the Italian framework law on ports) <sup>(23)</sup>. The national port authorities possess administrative, organisational, regulatory, budgetary and financial independence. The Italian State gave the port authorities the institutional mandate of carrying out, on its behalf and solely in the public interest, the functions of administration, regulation and control of Italian ports. The port authorities, therefore, do not commercially exploit the property assets owned by the State, but merely administer them, in fulfilment of the institutional mandate given to them.

<sup>(16)</sup> OJ C 317, 30.12.2003, p. 11. See also Commission communication concerning the prolongation of the Framework on State aid to shipbuilding (OJ C 260, 28.10.2006, p. 7) and the Communication from the Commission concerning the prolongation of the Framework on State aid to shipbuilding (OJ C 173, 8.7.2008, p. 3).

<sup>(17)</sup> OJ C 364, 14.12.2011, p. 9.

<sup>(18)</sup> See Communication from the Commission concerning the prolongation of the application of the Framework on State aid to shipbuilding (OJ C 357, 6.12.2013, p. 1).

<sup>(19)</sup> OJ C 209, 23.7.2013, p. 1.

<sup>(20)</sup> See judgment in case C-222/92, *SFEI* ECLI:EU:C:1994:396.

<sup>(21)</sup> See judgment in case T-156/94, *Aristrain v Commission* ECLI:EU:T:1999:53.

<sup>(22)</sup> See judgment in case C-362/09 P, *Athinaiki Techniki v Commission* ECLI:EU:C:2010:783.

<sup>(23)</sup> See Legge 28 gennaio 1994, n. 84: *Riordino della legislazione in materia portuale*, Gazzetta Ufficiale n.28 del 4-2-1994 — Supplemento Ordinario n. 21.

- (56) The Italian authorities argue that port authorities do not offer goods or services on any market and therefore do not perform an economic activity. Pursuant to Article 6 of Law No 84/1994, port authorities cannot perform port activities directly or indirectly <sup>(24)</sup>. Moreover, the administration of Italian ports is reserved by law for the port authority with responsibility in the area. Therefore, according to Italy, while performing the institutional mandate of administering Italian ports, the port authorities do not act on a market open to competition since (i) no other party may carry out that activity and (ii) they are prohibited from performing economic activities in sectors open to competition.
- (57) According to the Italian authorities, the land use fee (*canone demaniale*) is not a compensation for the provision of an economic service, but rather a consideration for the private occupation of publicly-owned property. The collection of the fee, on behalf of the State, falls within the institutional mandate given to port authorities.
- (58) According to the Italian authorities, only commercial fees, which can be decided independently by the port authorities and calculated in accordance with values on the market could qualify the activity as economic <sup>(25)</sup>. In the present case however the fee is determined by Ministerial Decree No 595/1995 on the basis of fixed parameters that relate to the area of the property over which a concession has been granted. The fees are applied by all Italian port authorities for all concessions, irrespective of the use that the concessionaire intends to make of the area in question, or of any profits or losses that may be obtained. The fee is therefore part of the overall tax burden imposed on entities operating on land owned by the State, not just in the shipbuilding sector. Furthermore, the Italian authorities note that the fee cannot be set on the basis of market values as there is no market relating to the ownership and/or management of public assets.
- (59) Italy further explains that the measures were not selective as the works on the dry-docks of the Port of Naples is one of the numerous investments that the Italian State made in assets that it owns, which do not solely relate to ports. The Italian State finances the specific maintenance of a large variety of assets belonging to the public, among which (under the Navigation Code and the Civil Code) are the Italian ports, including masonry docks.
- (60) Furthermore, public funding for works to expand, modernise and upgrade ports allocated on the basis of Law 413/1998 (and refinanced under Law No 388/2000 and Law No 166/2002) have been available to all Italian port authorities <sup>(26)</sup>. The specific maintenance on dry-docks Nos 1, 2 and 3 is not an *ad hoc* investment decision but it constitutes an internal fund transfer to public authorities in compliance with the national legal system, which stipulates that the State has ownership and is responsible for the administration of ports. The Italian authorities argue that the Commission cannot challenge under Article 107 TFEU measures that are not selective but are of general scope and which represent an expression of economic and industrial policy choices of individual Member States.
- (61) Regarding a possible economic advantage to PAN, the Italian authorities consider that – pursuant to Law No 84/1994 and Law No 112/1998 <sup>(27)</sup> – the specific refurbishing works are borne by the owner, i.e. the Italian state, and not the infrastructure manager. Therefore, the public funding of the specific maintenance costs does not mitigate any burden on the port authority, nor does it confer any advantage to it.
- (62) Furthermore, according to Italy, there is no economic advantage for PAN as the measures are necessary for the execution of SGEL, i.e. for the management of dry docks (within the mandate conferred and the prohibitions imposed on the port authority as per Law No 84/1994). According to Italy, this activity carried out by all Italian port authorities is expressly described by national law as falling within the scope of SGEL. Therefore, the measures do not confer any selective advantage upon PAN as compared with other Italian port authorities.

<sup>(24)</sup> Under this law, the main functions of Italian port authorities are: (a) programming, coordination and promotion of the commercial and industrial activities carried out in the port; (b) maintenance of open access to infrastructures and spaces; (c) entrustment to third parties and control of port activities aimed at providing services of general interest to port users for money.

<sup>(25)</sup> The Italian authorities refer to the judgement in Case T-128/98 *Aéroports de Paris v. Commission* ECLI:EU:T:2000:290. According to Italy, the possibility of freely setting the amount of the fee requested from potential users by a manager of infrastructure is a necessary and indispensable precondition for classifying the fee as commercial and the activity as economic.

<sup>(26)</sup> According to Italy, within the framework of the national plan for upgrading Italian ports, through the adoption of Law No 413/1998, the national authorities have allocated funds for carrying out infrastructure work to expand, modernise and upgrade ports, authorising the port authorities to invest in infrastructure works in ports a total amount of approximately EUR 50 million annually.

<sup>(27)</sup> Under Article 5 of Law No 84/1994 and Article 104 of Legislative Decree No 112/1998, the economic burden of carrying out specific restructuring works on publicly owned infrastructure, of which it is the sole owner, falls solely upon the Italian state.

- (63) The Italian authorities refer to protocol 26 to the TFEU which grants wide discretion to national authorities regarding SGEI and consider that the Commission's role is limited to the control of a manifest error. According to Italy, the SGEI activity does not consist in the rental of an infrastructure against remuneration nor in the direct use of the infrastructure by PAN to carry out shipbuilding activities. The scope of the SGEI is the obligation imposed on Italian port authorities by Law No 84/1994 to manage dry-docks on behalf of the Italian State, and in particular the duty to perform and take care of the specific maintenance of these assets owned by the State, in accordance with the public interest.
- (64) The public finance granted by the State to allow the repair of dry docks Nos 1, 2 and 3 did not confer any advantage upon PAN, since it merely constituted a transfer of resources within the public domain for the performance of specific functions granted by the State to the port authorities, or alternatively, the repayment of costs incurred by PAN in meeting the obligations imposed by Law No 84/1994 on all Italian port authorities.
- (65) Regarding the refurbishment works, the Italian authorities explained that the public financing does not exceed what is strictly necessary to repay the costs incurred by PAN. The contracts for the works were awarded on the basis of a public tender process (resulting in a reduction in the costs compared with what had initially been estimated). In addition, CAMED has made significant investments complementary to those made by PAN in the amount of more than EUR 40 million.
- (66) Regarding the institutional task of managing the ports on behalf of the State, Italy further stated that, in accordance with Articles 28 and 29 of the Navigation Code and with Articles 822 and 823 of the Civil Code, this task cannot be conferred upon other entities than the port authorities and much less through a tender procedure. By contrast, the concession of the State-owned assets in question was awarded to CAMED pursuant to national law <sup>(28)</sup> and in a competitive and non-discriminatory manner and in accordance with the principles of the Union.
- (67) Italy also claims that the measures did not distort competition nor affect trade among Member States. The port sector in Italy is not liberalised, therefore the Italian port authorities do not operate in a sector open to competition. According to the Italian authorities, the Commission erred in the Opening Decision in classifying the activity as 'renting out' rather than as 'granting a concession over state assets'. In contrast to a tenant renting an asset, a concessionaire has to abide by the public interest and undergo checks by the port authority in compliance with public law.
- (68) Furthermore, Italy claims that the Commission neglected to take into account the differences between Member States in the way they manage ports. In the absence of a uniform approach at Union level, Italy opted to retain the management of the port sector within the public remit. Therefore, since the port sector in Italy is not liberalised, and since the port authorities do not operate in a sector open to competition, according to Italy, the measures did not distort competition nor affect trade among Member States within the meaning of Article 107(1) TFEU.
- (69) The Italian authorities believe that classifying the measures as State aid would be a violation of Article 345 TFEU, setting out the principle of neutrality between private and public entities. A private owner could invest as much as he desires in its assets, while investments by the State in its own infrastructure would always be State aid. The Italian authorities disagree with the preliminary consideration by the Commission that private owners would normally only undertake investments that are profitable (an example could be investments for image enhancing purposes).
- (70) Italy further states that, according to Article 345 TFEU, Union law cannot impose any privatisation on Member States, nor require the sale of assets that the Member State decided to retain in public ownership, especially in the absence of common measures to liberalise the sector. Any different interpretation would infringe the general principle of equal treatment which makes it illegal to treat in the same way facts that are markedly different.
- (71) The Commission, furthermore, may not prevent Member States from carrying out the maintenance of such assets. The right to preserve one's own assets in an operational state and to ensure they work efficiently lays at the heart of the right of ownership, which is now also protected by the Charter of Fundamental Rights of the European Union, a primary source of law that is also binding upon Union institutions.

<sup>(28)</sup> The concession was awarded pursuant to Article 36 of the Naval Code (*Codice navale*) and Article 18 of the Naval Code Regulation (*Regolamento per l'esecuzione del codice della navigazione marittima*).

- (72) Regarding the classification of the measures as existing aid, Italy points out that the Commission – in the preliminary conclusions sent to the complainant in 2013 – stated that the dry docks concerned are part of the maritime state property. The Italian authorities point out that until the *Leipzig Halle* judgement, the Commission itself considered investment in infrastructure, including in port areas, to be an activity falling outside the scope of Article 107 TFEU. In the period in which the works on docks Nos 1, 2 and 3 in the Port of Naples were decided upon, (i.e. before 2001), public support for infrastructure did not normally constitute aid, but rather general measures derived from the State's sovereignty in respect of economic policy, land planning and development.
- (73) The Italian authorities refer further to the Notice on the notion of aid <sup>(29)</sup>, which states that due to the uncertainty that existed prior to the *Aéroports de Paris* judgment, public authorities could legitimately consider that the public funding of infrastructure granted prior to that judgment did not constitute State aid and that, accordingly, such measures did not need to be notified to the Commission. Therefore, Italy considers that those measures cannot be put into question on the basis of State aid rules in view of the principles of legal certainty and legitimate expectations <sup>(30)</sup>.
- (74) Concerning the preliminary conclusion of the Commission in the Opening Decision that State support to shipbuilding and ship repair facilities has always been considered State aid (even before the *Leipzig Halle* judgement), the Italian authorities made the following observations. According to Italy, the Commission wrongfully refers in the Opening Decision to Commission Decision No 94/374/EC <sup>(31)</sup>. Italy states that pursuant to that Decision, various public support measures to assist 'ship-repair facilities at [a] dry-dock' could fall within the scope of Article 107 TFEU. The Decision thus related to the 'facilities', i.e. port superstructures (moveable structures, cranes etc.) owned by individual concessionaires, and not to State-owned port infrastructure. The Decision expressly states that (i) public finance to the entity managing an Italian port 'relates to the management of regional infrastructures and does not therefore constitute State aid' and (ii) measures for 'the financing of infrastructures to be set up by a public body ... cannot be regarded as State aid within the meaning of Article' 107(1) TFEU, confirming that until the *Leipzig Halle* judgment the Commission itself considered investment in infrastructure, including in port areas, to be an activity not falling within the scope of Article 107 TFEU.
- (75) Italy reiterates the argument that the Italian port authorities do not operate on a market that is open to competition. In accordance with well-established case law, aid implemented in non-liberalised markets constitutes existing aid which may only be held incompatible *ex nunc* and as such is not required to be repaid.

### 3.1.2. On the presence of aid to CAMED

- (76) As regards the alleged aid to CAMED, the Italian authorities explained that under Italian law, the extraordinary works for the refurbishment of the dry-docks fall within the area of responsibility of the owner (i.e. the State), and not of the operator of the infrastructure. Similarly to a rental contract, ordinary works are within the area of responsibility of the operator, whereas the owner must ensure that the infrastructure remains adequate for the use that is allowed to the operator under the concession contract for its entire duration. At the end of the concession period, the infrastructure will remain property of the State. According to the Italian authorities, this is the case not only for the 2004 Concession awarded to CAMED, but for all the concessions for the use and operation of State properties <sup>(32)</sup>.
- (77) Italy claims therefore that the measures have a general, cross-cutting scope, because in line with the public model under which the Italian legislature has organised the ports sector, every Italian port authority (not just the PAN) has always received, and continues to receive public funds intended to finance infrastructure work on state-owned assets. It follows from this that all undertakings (not just CAMED) operating in the port area in all Italian ports (not just Naples) and in all economic sectors (not just shipbuilding) have 'benefitted' from 'aid' that is identical to

<sup>(29)</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1).

<sup>(30)</sup> Italy notes that the *Aéroports de Paris* judgment described the management of airports and not the construction of infrastructure as an economic activity. Thus it is necessary to at least refer to the *Leipzig Halle* judgment. The Italian authorities continue to argue against the transposition of this judgment to the port sector, since there is a very great risk that applying it would draw Member States' entire economic and industrial policy in the port sector within the scope of State aid rules, having an effect on the relative spheres of responsibility of the Union and of Member States in a manner detrimental to Member States.

<sup>(31)</sup> Commission Decision 94/374/EC of 2 February 1994 on Sicilian Regional Law No 23/1991 concerning extraordinary assistance for industry and Article 5 of Sicilian Regional Law No 8/1991 concerning, in particular, financing for Sitas (OJ L 170, 5.7.1994, p. 36).

<sup>(32)</sup> The Italian authorities have also provided examples of similar situations where other concessionaires active in the Port of Naples have signed similar agreements, under which works carried out on various items of infrastructure have been financed by the Port Authority. Specifically, the Italian authorities refer to a concession contract signed by the Port Authority with the complainant in this case for the pursuit of shipbuilding activities in the Port of Naples, where (routine) maintenance work is the responsibility of the concessionaire, while the Port Authority has agreed to finance the construction of a new dock (specific work).

that which CAMED has allegedly enjoyed. The Italian authorities argue that all economic operators that have obtained a concession over state property: (i) participated in an open and competitive process, (ii) have been able to use areas, assets and infrastructure built and repaired using public funds and (iii) paid a land use fee in accordance with national law. Therefore, CAMED has not obtained any selective advantage as compared with other undertakings that are in comparable factual and legal situations such as other shipbuilders, terminal operators, shipping companies etc. <sup>(33)</sup>. Furthermore, CAMED is required by the 2002 Regulation to grant access to the State-owned infrastructure to other operators under equal conditions and on the basis of transparent and non-discriminatory priority criteria, in accordance with published tariffs, which in the view of the Italian authorities, further reiterates the non-selectivity of the measures.

- (78) The land use fee paid by CAMED for the use of the State property is established in compliance with national law and in particular with the Ministerial Decree No 595/1995. PAN did not have the possibility to charge CAMED lower fees also as this is not a commercial fee negotiated between the parties in line with market fees. The land use fees are determined in an objective way and are identical for all maritime land concessions for this type of activities, thus in a non-selective manner. Therefore, the measure did not reduce the costs to be borne by PAN nor did it enable it to charge CAMED lower fees.
- (79) Furthermore, the Italian authorities consider that it is not necessary, during the concession period, for the concessionaire of State-owned assets to invest an amount which when combined with the fee paid, would equal the amount of any specific maintenance carried out by the State as the sole owner of the asset. The concessionaire – for the temporary use of the asset – does not have a duty to bear the same financial burdens as an owner would in order to maintain these assets in an operational condition, thus increasing their value.
- (80) The Italian authorities further state that the Opening Decision does not take into account the fact that, although it was not necessary, CAMED has carried out a considerable plan of investments complementary to those carried out by PAN, exceeding EUR 40 million.
- (81) The Italian authorities are of the opinion that with the investment project CAMED did not obtain any advantage, since the 2004 Concession was awarded to CAMED through an open and public procedure (see recital 15) and CAMED has the right to operate an infrastructure which must be adequate for the agreed use. Moreover, in the view of the Italian authorities, Directive 2014/23/EU of the European Parliament and of the Council <sup>(34)</sup> on the award of concession contracts does not apply to tenders regarding concessions of port areas. Therefore, PAN was not required to issue a call for tender for the award of the concession relative to those dry-docks, and in particular in relation to a concession granted more than 10 years before that Directive entered into force.
- (82) Italy also argues that the measures neither distort competition nor affect trade among Member States since they do not strengthen the position of one undertaking against others active in the same sector. Under the conditions laid down in the 2002 Regulation, any undertaking may ask to use the docks, irrespective of its place of establishment. According to the Italian authorities, the measures, therefore, do not have any effect on cross-border investment and/or establishment conditions.
- (83) According to Italy, the Commission cannot challenge a general public measure that is applicable across all of the national territory and to all undertakings operating there, by claiming that the measure confers an advantage on those operators as compared with the conditions enjoyed by undertakings established and operating in other Member States. Whether or not a selective advantage is conferred should be determined, in fact, solely on a national basis, since in the absence of common Union-wide rules, a comparison with the conditions offered to undertakings in different Member States would in effect compare different factual and legal situations arising from legislative and regulatory disparities between the Member States, and would thus distort the aim and functioning of State aid control.
- (84) The Italian authorities repeat the arguments concerning the classification of the measures as existing aid (see recital 75).

<sup>(33)</sup> The Italian authorities explained that especially at local level in application of Law No 413/1998, the Port Authority of Naples has carried out a number of measures, using public funds to refurbish and modernise a large number of state-owned assets and pieces of infrastructure, used by undertakings operating in all economic sectors and not only by shipbuilding firms and provided specific examples.

<sup>(34)</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

### 3.1.3. *On compatibility of the alleged aid to PAN and CAMED*

- (85) Italy disagrees with the Commission's assessment that the granting occurred when each of the investments was included in the programme of investments on the basis of the Port Authorities' requests. Italy reiterates that the date of the award of a State aid scheme must be identified as the time at which the legal basis entered into force that created an entitlement for the alleged beneficiary to obtain the support measures, and not the date of adoption of subsequent, potentially numerous, implementing measures. Italy notes that all the implementing measures identified by the Commission make express reference to the refinancing acts under Law No 413/1998, which is therefore the genuine sole legal basis for the action, as well as to the various decisions by PAN in 2001 and the concession granted to CAMED in 2004.
- (86) According to Italy, the measures should not be assessed on the basis of the Shipbuilding Frameworks (see recital 48), because the measures concern merely the specific maintenance of State-owned port infrastructure. In the view of the Italian authorities, the alleged aid is not designed to promote an increase in productivity of the existing installations in a shipyard, i.e. of port superstructure (moveable structures, cranes, etc.), but rather to carry out specific maintenance to certain items of port infrastructure that are the sole property of the State. This is in order to stop them becoming obsolescent, particularly in terms of safety, and in view of the fact that all port users can access them on an equal footing and under non-discriminatory conditions. Thus, the compatibility of the measures in question cannot be assessed on the basis of sectoral rules regarding aid for shipbuilding.
- (87) According to Italy, the measures are compatible with the internal market according to both Article 107(2)(b) and Article 107(3)(c) TFEU, because they aim at restoring State-owned property following the Second World War and the earthquake of 1980 that affected the city of Naples. The alleged aid measures are proportionate as the public funding is limited to what was strictly necessary and the works for the specific maintenance were awarded through an open, competitive tender procedure that made it possible to reduce costs compared with the original estimates. The Italian authorities further note that CAMED has carried out significant investments, reducing the intensity of the public contribution to approximately 40 % of the total investment costs. The measures are further proportionate as – based on the law applicable to public concessions – the works carried out by the concessionaire remain in the State ownership at the end of the concession and CAMED would not be entitled to any compensation or repayment. Italy reiterates that the alleged aid measures benefit the economy of a disadvantaged region which is an assisted region in accordance with Article 107(3)(a) TFEU.
- (88) The Italian authorities submitted further information in November 2017, in which they reiterated their view that the State aid rules applicable to shipbuilding do not constitute the correct legal basis to assess the compatibility of the aid. Nevertheless, the Italian authorities provided the following comments.
- (89) With regard to the compatibility of the aid granted to PAN, Italy confirmed that PAN did not submit aid applications (invoking the relevant shipbuilding rules) before the start of works on each of the investments. The Italian authorities confirmed their position that the funds were used for the maintenance of the existing port infrastructure and do not constitute aid to shipbuilding facilities.
- (90) Finally, Italy argues that the amounts under assessment could not be recovered, as the statute of limitations established by Article 17 of the Procedural Regulation expired.

## 4. COMMENTS FROM INTERESTED PARTIES

### 4.1. **Comments from CAMED**

- (91) CAMED argues that the legality of the measures in question has already been examined and was ascertained in 2006, when the Commission requested information from the Italian authorities and subsequently terminated the procedure. The Opening Decision thus constitutes an unlawful revocation of that termination decision, made more than 10 years after the first measure, which violates the general principles of Union law of sound administration, legal certainty and effective judicial protection.
- (92) Moreover, CAMED considers that the measures in question do not constitute State aid either for PAN or itself as it concerns the ordinary management and administration of a particular asset category rather than a specific economic activity, namely, public property belonging to the State. None of the conditions of Article 107(1) TFEU are met.

- (93) CAMED repeats Italy's arguments that port authorities are non-economic public entities prohibited under Law No 84/1994 from engaging in any economic activity or from providing port services. Nor are Italian port authorities, according to CAMED, free to determine the amount of State fees collected from concessionaires on behalf of the State, since these were established in Ministerial Decree No 595/1995.
- (94) According to CAMED, the work does not confer an economic advantage on PAN or itself. The remedial maintenance of the public assets in question by law falls exclusively to the State as their owner and in addition is necessary and instrumental for the provision of PSO. As such, the measures do not relieve CAMED of any financial burden or confer any advantage on it.
- (95) CAMED further points out that when the public measures were planned and approved, it was not the concessionaire of the public land concerned, since the open and competitive tendering procedure was yet to take place. Therefore, PAN committed to the investment regardless of the future concessionaire's identity. Any undertaking could have submitted a competing bid for the concession, and could have obtained the assets under concession. Hence the procedure passes the market economy operator test and confers no advantage on the successful bidder.
- (96) CAMED further states that the measures at hand are not selective as this is a standard method of intervention by the State which, in general (and not just for ports or the shipbuilding industry), seeks to maintain a vast quantity and variety of public assets and infrastructure in safe working order. This particularly applies to those assets that the state has decided should be publicly owned – a decision exempt from review by the Commission under Article 345 TFEU. In the present case, the work was also planned and authorised as part of a funding programme launched in 1998 by national law for the construction of infrastructure for the expansion, modernisation and redevelopment of all Italian ports.
- (97) According to CAMED, this further demonstrates the non-selective nature of the measures, both with regard to (i) the position of PAN relative to all other port authorities, which received the same public funding to carry out work on publicly owned assets and infrastructure in ports within their territorial jurisdiction; and (ii) CAMED's position relative to other companies operating in the shipbuilding industry and elsewhere, whether in the Port of Naples or in any other Italian port.
- (98) Moreover, in CAMED's view, under the rules governing the use of the public infrastructure on which the maintenance work was carried out, any undertaking is entitled to have access on request to the docks operated by it under the concession, on the basis of transparent and non-discriminatory criteria and in return for the payment of public tariffs. Access to the infrastructure is on a level playing field with other potential users, not only other ship repairers, but any party interested in using the infrastructure, for example shipping companies, port service operators, shipping agents and vessel management companies. CAMED considers that this serves as further confirmation of the non-selective nature of the measures to renovate the docks, which do not favour 'certain undertakings or the production of certain goods'.
- (99) CAMED also repeats Italy's arguments on the lack of distortion of competition or effect on trade among Member States.
- (100) CAMED believes that the measures would in any case be compatible with the internal market under both Article 107(2) TFEU, as it is aimed at recovering '*the damage caused by a natural disaster or exceptional occurrences*', in this case the bombing and the earthquake of 1980; and Article 107(3) TFEU, as the measures pursue an objective of common interest. Furthermore, the measures are proportionate due to the investments carried out by CAMED itself (in the amount of EUR 42 541 495) that reduced the intensity of the State intervention to approximately 40 % of total costs. According to the information provided, CAMED invested EUR 11,1 million in the docks, and the remaining amounts in other items relating to for example, the goods/land covered by the concession fee, warehousing and buildings, transport costs, IT and office equipment.
- (101) Finally, CAMED states that if the measures are considered aid, the aid would constitute existing aid, given that the statute of limitations of Article 17 of the Procedural Regulation has expired.

#### 4.2. Comments from the Complainant

- (102) The complainant agrees with the preliminary assessment of the Commission that PAN should be considered as an undertaking engaged in economic activities. The complainant considers that it should be an undisputed fact by now that national ports carry out economic activities, in competition with each other and with other European

and Mediterranean ports, considering the clarifications brought by the Commission in its case practice. For example, in its decision dating from 2012 <sup>(35)</sup>, the Commission considered that the Port Authority of Augusta was an undertaking in carrying out its economic activity consisting of the exploitation of port infrastructure owned by the State through the leasing of this infrastructure to port operators, in exchange for a concession fee. This is a precedent for PAN as the Port Authority of Augusta operates on the basis of the same national rules <sup>(36)</sup>.

- (103) Regarding the concession fee, the complainant believes that it has been determined under national legislation <sup>(37)</sup> which was wrongly held to be applicable since the concession does not exclusively concern the use of the docks for shipbuilding purposes, but also the management of the dry docks by CAMED. As such, the complainant alleges that by granting the direct award of the concession to CAMED without organising a tender, PAN waived its right to receive a fee for the dry docks management, since PAN only perceives a fee for the land concession. The complainant also specifies that Article 6 of the concession contract expressly provides that CAMED shall pay the fee to PAN 'as consideration for this concession' and not by way of a taxation.
- (104) The complainant agrees with the preliminary assessment of the Commission regarding the public nature of the resources and the selectivity of the measures that benefit PAN. The complainant also specifically alleges that the measures cannot represent a mere transfer of resources among public administrations. Indeed, according to Law No 84/1994, although port authorities are non-economic public entities having legal personality under public law, they have large administrative and monetary autonomy and the ministerial scrutiny does not apply to the award of concessions relating, inter alia, to the management of dry-docks.
- (105) The complainant agrees with the preliminary assessment of the Commission that the measures do not satisfy the four condition of the *Altmark* case and therefore that the administration of dry-docks carried out by PAN does not represent a service of general economic interest and granted PAN an economic advantage.
- (106) The complainant agrees with the preliminary assessment of the Commission that the measures are liable to distort competition among European ports and affect trade among Member States. In particular, the complainant reiterates that the Italian ports compete with various European ports within a competitive market and consequently that the argument of the Italian authorities that the demand for ship-repair infrastructure is local in scale must be rejected.
- (107) The complainant agrees with the preliminary assessment of the Commission regarding the existence of State aid for CAMED because PAN may have waived public resources by assigning to CAMED the concession of the dry-docks for a price which is below the market price. The complainant also supports the preliminary assessment of the Commission that CAMED received an economic advantage both because the concession was assigned not through a proper tender but by means of a different procedure (whose publicity was deemed to be only local), and because the concession fee was determined on a fixed parameter basis (without consideration for the infrastructure with which the area is equipped) and not on a market price basis. The complainant explains again that the concession includes not only the right to use the State-owned infrastructure for shipbuilding, but also for dry-docks management. Indeed, the way the concession fee is determined does reflect the two activities carried out by CAMED and the true economic value of the concession.
- (108) The complainant also alleges that the management of the dry-docks is a service of considerable economic value that could be estimated to represent an annual turnover for CAMED between EUR 6 million and EUR 9 million (versus an yearly fee paid by CAMED amounting to EUR 137 409,68) and therefore that the value over the total duration of the concession for the management of the public dry-docks is between EUR 180 million and EUR 270 million. In particular, the fee revenue received by CAMED is made up of the fees paid for: (i) the use of the dry-docks and (ii) the provision by CAMED of other associated services (e.g. activity necessary for the entry, exit and maintenance of a vessel in a dock or supply of electricity). The complainant underlines that CAMED can set up the fees freely without any control of PAN and that the fees charged by CAMED are excessive and far higher than the fees charged by managers of similar type of infrastructure located in other ports (in November 2012, CAMED increased the fees by over 300 %).
- (109) The complainant agrees with the preliminary assessment of the Commission that the cumulative conditions of the *Altmark* case are not fulfilled for CAMED and consequently that it cannot be considered that CAMED's

<sup>(35)</sup> Commission Decision of 19 December 2012, SA.34940 – Port of Augusta (OJ C 77, 15.3.2013, p. 1).

<sup>(36)</sup> Law No 84/1994, the Italian framework law on ports.

<sup>(37)</sup> Decree of the Minister for Transport and Shipping No 595 of 15 November 1995, in consultation with the Treasury Minister for Finance, entitled 'Regulation laying down rules for the establishment of the fees for maritime public concessions' in GURI No 158 of 8 July 1996.

activities represent a PSO. The complainant considers that, if at all, only the operation of the dry-dock number 3 may constitute a public service since it represents the largest basin in the Port of Naples. In addition, as a matter of fact, the dry-docks managed by CAMED are not really open to third users. CAMED is a privileged user that prevents other port operators from having free access. In addition, the fees CAMED requires to grant access to third users to the infrastructure are allegedly over the market price.

- (110) According to the complainant, the measures distort competition on two levels. Firstly, as infrastructure manager, CAMED received an advantage over its potential competitors by (i) having been granted the concession to manage the dry-docks without a tender procedure and (ii) paying an unjustifiably low level of fees to PAN while charging excessive fees to other ship-repairers wanting to use the docks. Secondly, as a ship-repair undertaking, CAMED received an advantage as an unduly privileged user of the public docks.
- (111) Concerning the effect on trade, the complainant underlines that the demand for shipbuilding infrastructure comes mainly from international operators, often belonging to big multinational groups.
- (112) On the compatibility of the aid measures with the internal market, the complainant agrees with the preliminary assessment of the Commission the dry-docks are not transport infrastructures and, as such, do not fall into the scope of Article 107(3)(c) TFEU. Moreover, the complainant considers that the measures do not meet the compatibility criteria of (i) Article 107(3)(a) or (c) relating to regional aid or (ii) the 2011 SGEI framework or (iii) the sectoral rules concerning State aid in the shipbuilding sector.
- (113) Finally, the complainant supports the Commission's view that the aid measures were granted at the time when the relevant works were included in the investment programme drawn up on the basis of PAN's requests, and not in 1998 (as argued by the Italian authorities) by means of Article 9 of Law No 413/1998.

## 5. ASSESSMENT

- (114) According to Article 107(1) TFEU, '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 shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (115) The qualification of a measure as aid within the meaning of this provision therefore presupposes that the following cumulative conditions are 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 affect trade between Member States.

### 5.1. Existence of aid to the Port Authority of Naples

#### 5.1.1. *Notion of undertaking*

- (116) Under Italian law, port authorities are non-economic public entities aiming to ensure the overall maintenance and development of port infrastructure. To that end, the financial resources at the disposal of a port authority may be used exclusively for the management of the port and for the performance of the functions attributed to it by the law (see recital 55).
- (117) The Court of Justice of the European Union <sup>(38)</sup> (the 'Court of Justice') has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed. The Court of Justice has consistently held that any activity consisting in offering goods and services on a market is an economic activity <sup>(39)</sup>.
- (118) The classification of a particular entity as an undertaking therefore depends entirely on the nature of its activities. This general principle has three important consequences: (i) the status of the entity under national law is not decisive, (ii) the application of the State aid rules as such does not depend on whether the entity is set up to generate profits, and (iii) the classification of an entity as an undertaking is always relative to a specific activity.

<sup>(38)</sup> See e.g. judgment in Case C-41/90 *Hofner et Elsner v Macrotron* ECLI:EU:C:1991:161, para. 21; judgment in Case C-160/91 *Poucet and Pistre v AGF and Cancava* ECLI:EU:C:1993:63, para. 17; judgment in Case C-35/96 *Commission v. Italy* ECLI:EU:C:1998:303.

<sup>(39)</sup> See judgment in Case 118/85 *Commission v Italy* ECLI:EU:C:1987:283, para. 7; judgment in Case C- 35/96 *Commission v Italy* ECLI:EU:C:1998:303, para. 36; judgment in Joined Cases C-180/98 to C-184/98 *Pavlov and Others* ECLI:EU:C:2000:428, para. 75.

- (119) The measures at hand concern funding for the structural refurbishment of ship-repair infrastructure (dry-docks) located in a port that is owned by the Italian State, which exercises its ownership rights through PAN, acting as a manager. The Commission finds that dry-docks are not port infrastructure but production facilities for shipyards to be used for shipbuilding or ship-repairing activities. It has been long held in the Commission's decisional practice that shipbuilding is an economic activity involving trade between Member States <sup>(40)</sup>.
- (120) The dry-docks are commercially exploited by PAN which charges land use fees for their use. In this respect, contrary to what the Italian authorities claim (see recitals 57 and 58), those fees represent a compensation for the provision of an economic service (i.e. the leasing ship-repairing facilities for remuneration). The fees constitute one of the sources of income for PAN allowing it to finance its activities, which include investments to maintain the dry-docks operational. By maintaining the dry-docks in an operational state to accommodate ship-repair, allows PAN to avoid a reduction in its management activities in respect of the Port and to attract ship repairers. In fact, without performing such works, the dry-docks could not be properly operated and, in the long term, PAN would not be able to continue its business activity of leasing them for remuneration. In this respect, the 2004 Concession specifies in Art. 1 that 'the concession is granted for the purposes of carrying out ship and pleasure craft conversion and repair activities, as well as for the management of the dry-docks ...' <sup>(41)</sup>, thereby specifying in advance the exact use of the public land in question.
- (121) Although it cannot be excluded that, given its public functions, PAN may also perform activities in the public remit, the present decision only concerns the management of the aided dry-dock facilities and renting them out for remuneration. In accordance with established case-law, the classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former. Therefore, the Commission does not have to take a position on whether the remaining activities of PAN (i.e. other than the renting of ship-repairing facilities against remuneration) constitute economic activities.

#### 5.1.2. *Imputability and State resources*

- (122) The resources granted for the investment projects have been transferred to PAN from the State budget. As indicated in section 5.1.1, PAN can be qualified as an undertaking for the purposes of the present decision, being an entity performing an economic activity on behalf of the owner, which is the Italian State. Therefore, that transfer amounts to a transfer of State resources and is imputable to the State.

#### 5.1.3. *Selectivity*

- (123) To be considered State aid, a measure must be specific or selective in that it favours only certain undertakings and/or the production of certain goods.
- (124) Since the present case concerns the aid measures granted individually to PAN, the existence of economic advantage leads to the presumption that the measures are selective <sup>(42)</sup>.
- (125) In any event, the Commission finds that the measures at stake favour PAN as compared to other undertakings that are in a factual and legal situation comparable to that of PAN. Law 413/1998 provides that the Ministry, following the requests from Port Authorities, shall issue a programme of investments. Upon the request of PAN, the programme of investments was adopted with two Ministerial Decrees (27 October 1999 and 2 May 2001) (see recital 25). Even if a number of other port authorities listed in that Programme of Investment <sup>(43)</sup> were also able to use public funds to carry out investments in other Italian ports, the Commission finds that the measures selectively favour PAN's shipbuilding facility. Indeed, PAN received State funding to expand, modernise and

<sup>(40)</sup> See for example Commission Decision of 12 May 2004 on the State aid implemented by Spain for further restructuring aid to the public shipyards, State aid case C 40/00 (ex NN 61/00) (2005/173/EC).

<sup>(41)</sup> 'la concessione è assentita allo scopo di esercitarvi un cantiere di trasformazioni e riparazioni di navi e/o imbarcazioni da diporto nonché per la gestione dei bacini di carenaggio in muratura ...'

<sup>(42)</sup> Judgment in Case T-314/15 *Greece v Commission* ECLI:EU:T:2017:903, para. 79.

<sup>(43)</sup> The Programme of 27 October 1999 lists 20 ports benefitting from the national funding and the Programme of 2 May 2001 further enlarges that list (to 25 ports).

upgrade the shipbuilding facility it manages, as opposed to other managers of shipbuilding facilities not enlisted in the programme of investments, e.g. because they did not constitute port authorities. Such non-enlisted managers of shipbuilding facilities are in a factual and legal situation comparable to PAN, but they had to expand, modernise or upgrade the shipbuilding infrastructure without receiving that State funding. According to the Court, neither a large number of eligible undertakings (which can even include all undertakings of a given sector), nor the diversity and size of the sectors to which they belong, provide grounds for concluding that a State measure constitutes a general measure of economic policy <sup>(44)</sup>. Finally, the Commission notes that the measures are selective also because they favour a manager of shipbuilding and ship repair facilities in comparison to managers of manufacturing or repair facilities in other sectors of the economy. The latter are in a comparable factual and legal situation since they also exercise their economic activity on the basis of the manufacturing or repair facilities they manage. However, they have to pursue their economic activity without benefitting from the investment support granted to PAN.

#### 5.1.4. *Economic advantage*

(126) The public funding of EUR 44 138 854,50 is provided through grants or repayments of loans contracted by PAN with financial institutions as presented in Table 2 above. A grant is a non-refundable financial instrument which bears no financing cost. Similarly, repayment by the State of loans entered into by an undertaking which results in no financial costs being borne by that undertaking as beneficiary is not available under normal market conditions as it relieves the undertaking from the financial obligations it would normally have to face. In the market, such financing instruments would not be available to the beneficiary. The public financing provided, therefore, confers an economic advantage on PAN.

(127) However, it follows from the Altmark judgment that compensation granted by the State or through State resources to undertakings in consideration for PSOs imposed on them does not confer such an advantage on the undertakings concerned, and hence does not constitute State aid within the meaning of Article 107(1) TFEU, provided four cumulative conditions are satisfied <sup>(45)</sup>:

- First, the recipient undertaking is actually required to discharge PSOs and those obligations have been clearly defined. As the definition of the SGEL is within the Member States' competence, the Commission's powers are, in principle, limited to checking whether the Member State has made a manifest error when defining the service as an SGEL.
- Secondly, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner. The need to establish the compensation parameters in advance does not mean that the compensation has to be calculated on the basis of a specific formula. Rather, what matters is that it is clear from the outset how the compensation is to be determined. Typically, the relevant act entrusting the PSOs must at least specify the content and duration of the PSOs, the undertaking and territory concerned, the parameters for calculating, controlling and reviewing the compensation, and the arrangements for avoiding and recovering any overcompensation.
- Thirdly, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.
- Fourthly, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

(128) In this case (see recital 62), Italy argued that Article 1.g) of Ministerial Decree of 14 November 1994 imposed a PSO on all Italian port authorities. The Commission will therefore assess whether all four Altmark criteria are met.

<sup>(44)</sup> See for instance judgment in Case C-75/97 *Belgium v Commission* ECLI:EU:C:1999:311, para. 32; judgment in Case C-143/99 *Adria-Wien Pipeline et Wietersdorfer & Peggauer Zementwerke* ECLI:EU:C:2001:598, para. 48.

<sup>(45)</sup> See judgment in Case C-280/00 *Altmark Trans v Regierungspräsidium Magdeburg* ECLI:EU:C:2003:415, paras 87-88.

- (129) According to the case-law <sup>(46)</sup>, since the first Altmark condition is designed to ensure transparency and legal certainty, it requires that two minimum criteria be met: (i) the undertaking must be actually entrusted with the implementation of public service obligations, and (ii) the nature, duration and scope of those obligations must be clearly defined. In the absence of a clear definition of such objective criteria, it is not possible to verify whether a particular activity may be covered by the concept of an SGEI. Those two minimum criteria are of strict application and they are not covered by the Member States' wide discretion. Therefore, the Commission controls their fulfilment strictly and at this stage does not apply the manifest error test. That manifest error test is applied only at a subsequent stage, in order to control whether the actually entrusted and clearly defined services and obligations are suitable for designation as an SGEI. It is only in that latter stage that the existence of a market failure can be relevant.
- (130) In the present case, the nature, duration and scope of the public service obligation allegedly entrusted to PAN has not been clearly defined. Contrary to what the Italian authorities claim (see recital 63), the national law (Article 1.g) of Ministerial Decree of 14 November 1994) describes only in very general terms the obligation imposed on all port authorities, which consists in the management of dry docks (*'gestione di (...) bacini di carenaggio per il settore industriale'*), without further specifications. Article 1.g does not define at all the duration of the alleged public service obligation. Moreover, such generally phrased provision does not define in any clear manner the nature and scope of the obligation.
- (131) In any event, with respect to whether the alleged public service obligations are suitable for designation as an SGEI, the Commission finds that the Italian authorities made a manifest error. The Italian authorities have not provided evidence showing that PAN, by renting ship-repairing facilities against remuneration, provides an activity which is not available in the market under comparable conditions of price, quality, continuity and access to the service. The Commission considers that the existence of (or the possibility to build) other dry-docks and floating docks of the same size in the Port of Naples and other neighbouring ports can exclude the classification of the management of a specific dry-dock by the Port Authority as an SGEI. In addition, the subsidised facilities do not provide any general benefit for society but rather a mere service to ship repairers in the area of Naples <sup>(47)</sup>. In *Enirisorse* <sup>(48)</sup>, the Court confirmed that the operation of any commercial port does not automatically constitute the operation of a service of general economic interest. The Commission consequently considers that the economic services provided by PAN do not exhibit any special characteristics compared with the rental of ship-repairing facilities in the market <sup>(49)</sup> and do not address any market failure.
- (132) With respect to the second and third Altmark conditions, the Commission observes the following. The Ministerial Decree of 14 November 1994 does not provide any quantification or any objective and transparent parameters to calculate beforehand the compensation for the PSO allegedly provided by PAN. Also the granting acts (see recital 125) do not specify further the alleged PSO compensation.
- (133) Therefore, it cannot be established whether any compensation granted does not exceed what is necessary to cover the relevant costs incurred in discharging the alleged PSO, including a reasonable profit.
- (134) With respect to the fourth Altmark condition, the Commission notes that, according to Italy, the PSO was not and cannot be entrusted to PAN via a public procurement procedure pursuant to Italian law (see recital 66).
- (135) According to the Altmark judgment, where the undertaking that is to discharge a PSO is not chosen following a public procurement procedure to select a tenderer capable of providing these services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided with means to meet the PSO, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

<sup>(46)</sup> Judgment in Joined Cases C-66/16 P to C-69/16 P *Comunidad Autónoma del País Vasco and Itelazpi v Commission* ECLI:EU:C:2017:999, paras 72, 73 and 75; See also the Opinion of Advocate-General Wathelet in Joined Cases C-66/16 P to C-69/16 P *Comunidad Autónoma del País Vasco and Itelazpi v Commission* ECLI:EU:C:2017:654, paras 112, 114-117 and 121-122.

<sup>(47)</sup> See the 2011 SGEI Communication, paragraph 50.

<sup>(48)</sup> Judgment in joined cases C-34/01 to C-38/01 *Enirisorse* ECLI:EU:C:2003:640, para. 33.

<sup>(49)</sup> See Communication C (2011) 9404 final on the application the European Union State aid rules to compensation granted for the provision of services of general economic interest, of 20 December 2011 (the 2011 SGEI Communication), paragraph 45.

- (136) The Italian authorities have not provided any comprehensive analysis of the costs of such an undertaking that is adequately provided with means to discharge the alleged PSO. Neither have they indicated that such an analysis has been performed for the purpose of determining the methodology for the calculation of the compensation.
- (137) In view of the above, the Commission finds that the four conditions are not cumulatively met; hence, the measures at hand entail an economic advantage.

#### 5.1.5. *Distortion of competition and effect on trade*

- (138) According to established case law, when financial support granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, there is at least a potential effect on trade between Member States and competition <sup>(50)</sup>.
- (139) The Commission notes Italy's arguments that the under national law, the management of ports falls within the public remit and port authorities do not operate in a sector that is liberalised and open to competition and trade between Member States.
- (140) As indicated in recitals 118 and 119, this investment project, by restoring the dry-docks to adequate conditions, will allow PAN to continue the economic activity of renting out the dry-docks and thus improve its competitive position. Although PAN is active on an upstream market of renting shipbuilding/ship repair infrastructure, the fact that such infrastructure is subsidised and then used to provide shipbuilding and ship-repair services at the downstream level distorts competition and affects trade at EU Union level. This is because the shipbuilding/ship-repair sector is open to competition and trade at Union level. For that reason, sector specific rules applicable to shipbuilding set a framework for a possible public intervention in those facilities <sup>(51)</sup>. Moreover, PAN competes against other managers that can rent shipbuilding/ship repair infrastructure in the Union, and thus operates in a market that is open to competition and trade at Union level.
- (141) Therefore, the Commission concludes that the measures in question are liable to distort competition and affect intra-Union trade.

#### 5.1.6. *On the alleged violation of Article 345 TFEU*

- (142) The Italian authorities claim that considering the measures as State aid would be a violation of Article 345 TFEU setting out the principle of neutrality between private and public entities. A private owner could invest as much as he desires in ship-repairing facilities, while investments by the State on its own infrastructure would always be State aid.
- (143) The Commission notes that the Union legal order is neutral with regard to the system of property ownership and does not in any way prejudice the right of Member States to act as economic operators. However, when public authorities directly or indirectly carry out economic transactions in any form <sup>(52)</sup>, they are subject to Union State aid rules. Economic transactions carried out by public bodies (including public undertakings) do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions <sup>(53)</sup>.
- (144) The Commission finds that in providing State funding to PAN the Italian State did not carry out the investment in compliance with the 'market economy investor principle'. First of all, that principle is not applicable in a situation where a public authority presents itself as the organising and delegating authority of a public service. The applicability of that principle is necessarily ruled out, since by definition the Member State is acting as a public authority in organising and delegating the alleged public service <sup>(54)</sup>. Secondly, even if the market economy investor principle were applicable, the Commission considers that a private operator in the same sector would have prepared *ex ante* a business plan and would have carried out the investment only if it was profitable on that basis. Other considerations (e.g. image enhancing, as mentioned by Italy, see recital 69) could exceptionally be taken into account in the profitability analysis, but would have to be substantiated by objective evidence, which was not provided by the Italian authorities.

<sup>(50)</sup> See e.g. judgment in Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:209, para. 11 and judgment in Case C-372/97 *Italy v Commission* ECLI:EU:C:2004:234, para. 44.

<sup>(51)</sup> See Commission decision of 12 May 2004 on the State aid implemented by Spain for further restructuring aid to the public Spanish shipyards; State aid case C 40/00 (ex NN 61/00), (2005/173/EC).

<sup>(52)</sup> See, for instance Judgment in Case 40/85 *Belgium v Commission* ECLI:EU:C:1986:305, para. 12.

<sup>(53)</sup> Judgment in Case C-39/94 *SFEI and Others* ECLI:EU:C:1996:285, para. 60-61.

<sup>(54)</sup> Judgment in Case T-454/13 *SNCM v Commission* ECLI:EU:T:2017:134, para. 233.

- (145) As stated in the Opening Decision, the Italian authorities presented a financial analysis based on the funding gap calculated as the difference between the discounted value of the expected operating profits of the investment and the discounted investment costs of the project. The results of this calculation show that over a reference period of 25 years the project has a negative financial net present value of – EUR 44 274 286,68.
- (146) Therefore, the Commission is of the view that by qualifying the measures as State aid there would be no violation of Article 345 TFEU.

#### 5.1.7. Classification of the measures as existing aid

- (147) Italy claims that the measures at issue constitute existing aid within the meaning of Article 1(b)(v) of the Procedural Regulation, which defines existing aid as ‘aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the internal market and without having been altered by the Member State.’ Article 1(b)(v) further provides that ‘[w]here certain measures become aid following the liberalisation of an activity by Union law, such measures shall not be considered as existing aid after the date fixed for liberalisation’.
- (148) The Commission is of the view that the aid cannot be classified as existing aid as State support to shipbuilding and ship-repair facilities has always been considered State aid, even before the Leipzig Halle judgment <sup>(55)</sup>.
- (149) The Commission notes the arguments of Italy that Decision 94/374/EC on Sicilian Regional Law, (quoted in the Opening Decision, see recital 74) does not support the conclusion that public support measures for ship-repair facilities at a dry-dock always fell within the scope of Article 107(1) TFEU. However, the Commission finds that this decision draws a clear distinction between the public support provided to the body responsible for the port administration (that was not classified as State aid) and the public support provided to the same public body for the maintenance work on the dry-dock (that was classified as State aid). In any event, the concept of State aid is an objective notion which is influenced only by whether a State measure confers an advantage on one or more particular undertakings, whereas that objective notion is not affected by the Commission’s decision-making practice <sup>(56)</sup>.
- (150) Therefore, the Commission reiterates its conclusion that the measures at hand constituted State aid also prior to the Leipzig Halle judgment.

#### 5.2. Existence of aid to CAMED

- (151) Since PAN received and will continue to receive public support to fund the interventions agreed with CAMED, CAMED did not have to cover the entire investment costs like any other private operator of ship-repairing facilities in the market. The Commission finds that by providing the dry-docks to CAMED below market rates Italy granted a selective economic advantage in favour of CAMED.

##### 5.2.1. Imputability and State resources

- (152) Since PAN is a public entity that forms part of the State administration (even if it is considered as acting as a private undertaking, see recital 118), the Commission finds that the measures are imputable to the State. In cases where a public authority grants aid to a beneficiary this transfer is imputable to the State, even if the body in question enjoys legal autonomy from other public authorities.
- (153) State resources include all resources of the public sector, including resources of intra-State entities (decentralised, federated, regional or other). In addition, waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources. If public authorities provide goods or services at a price below market rates, that implies a waiver of State resources (as well as the granting of an advantage).
- (154) Therefore, the Commission finds that by providing the dry-docks to CAMED below market rates, PAN waived State resources.

<sup>(55)</sup> See e.g. Decision 94/374/EC.

<sup>(56)</sup> Judgment in Case T-445/05 *Associazione italiana del risparmio gestito kai Fineco Asset Management v Commission* ECLI:EU:T:2009:50, para. 145.

### 5.2.2. Selectivity

- (155) To be considered State aid, a measure must be specific or selective in that it favours only certain undertakings and/or the production of certain goods. Italy claims that the measures have a general, cross-cutting scope, because in line with the public model under which the Italian legislature has organised the ports sector, all undertakings (not just CAMED) operating in the port area in all Italian ports (not just Naples) and in all economic sectors (not just shipbuilding) have 'benefitted' from 'aid' that is identical to that which CAMED has allegedly enjoyed. The Commission disagrees with this assessment for the reasons below.
- (156) First, since the concession contract was signed specifically with CAMED, the advantage is presumed to have been granted to CAMED in a selective manner. In individual aid measures, the existence of economic advantage leads to the presumption that the measure is selective <sup>(57)</sup>. Secondly, and in any event, the measures are selective because they favour CAMED in relation to other undertakings in a comparable legal and factual situation. As demonstrated in section 5.2.3 of the present Decision, CAMED can operate the shipbuilding and ship repair facilities in the port of Naples by paying only a small fraction of their cost. By contrast, other shipyards (in other ports or outside the area of ports), which operate non-State-owned facilities and thus fall outside the scope of Ministerial Decree No 595/1995, must in principle bear themselves the full cost of setting up their own shipbuilding and ship repair facilities, which they operate to provide such services. Finally, the Commission notes that the measures are selective also because they favour an operator of shipbuilding and ship repair facilities in comparison to operators of manufacturing or repair facilities in other sectors of the economy. The latter are in a comparable factual and legal situation since they also exercise their economic activity on the basis of the manufacturing or repair facilities they operate. However, contrary to CAMED, they have to pursue their economic activity without benefitting from below-cost rental prices for their facilities.

### 5.2.3. Economic advantage

- (157) As regards CAMED, the Commission notes that the concession contract was not granted by means of an open tender but rather through a different type of procedure where other operators could present observations or alternative proposals against an individual application for a concession (sort of 'opposition procedure', see recital 15).
- (158) The Commission also notes that the fee paid by CAMED in accordance with the 2004 Concession does not correspond to a market-conform fee. The land use fee paid by CAMED to the PAN is calculated on the basis of fixed legal parameters and amounts to around EUR 140 201,29 on average per year which for the concession period of 30 years would amount to around EUR 4,2 million <sup>(58)</sup>. That fee is determined on the basis of Decree No 595 of 15 November 1995 and takes into account the number of square metres of the public area to which the concession relates multiplied by a unit amount in euros, which is increased yearly on the basis of coefficient expressed as a percentage. The unit amount in euros varies according to the activities covered by the concession. One of the activities referred to in that decree is 'shipyard activities' (i.e. shipping repairs/conversions). However, the activity of managing dry-docks that was also entrusted upon CAMED on the basis of the Concession is not mentioned in that decree.
- (159) The Commission is of the view that the fee determined on the basis of the method above is merely a consideration for the occupation of State-owned property but does not take into account the actual subject and resulting economic value of the concession. Specifically, the fee does not take into account the fact that the concession allows CAMED not only to carry out ship-repair activities, but also the sole management of the State-owned dry-docks. This allows CAMED to charge other port operators wishing to carry out repair work on those docks a fee <sup>(59)</sup>.
- (160) Moreover, the Commission notes that according to the 2004 Concession, CAMED undertook to carry out investments in the amount of EUR 24 610 420. According to the Italian authorities and CAMED, CAMED's investment programme in reality amounted to EUR 42 541 495 million (see recitals 80 and 100).
- (161) The Commission concludes that CAMED, as the manager and operator of the dry-docks (i.e. provider of ship-repair services) would be responsible for bearing the full costs of the renovation works. Alternatively, if the

<sup>(57)</sup> Judgment in Case T-314/15 *Greece v Commission* ECLI:EU:T:2017:903, para. 79.

<sup>(58)</sup> This figure results from the extrapolation over a period of the 30 years of the average concession fee that CAMED already paid for the period 2004-2017.

<sup>(59)</sup> In particular, the fee paid by other port operators to CAMED covers: (i) the use of the dry-docks and (ii) the provision by CAMED of 'associated services' such as entry, exit and maintenance of vessel in the dock, supply of electricity, compressed air, dock crane, monitoring and environmental safety.

renovated facilities are put at its disposal, CAMED would be required to pay a (concession) fee that reflects at least the value of the investment made by the Italian State and PAN for the renovations. This is because CAMED uses the subsidised infrastructure for its lifespan, therefore at the end of the concession period the State will retain only a limited residual value.

- (162) The Commission notes that only part of CAMED's investments concern the renovation of the dry-docks (see recital 100). The remaining (major) part of the investments is directly incurred for the day-to-day operation and management of the facilities for which CAMED would in any event be responsible.
- (163) Therefore, the investments in the amount of EUR 42 million that CAMED carried out for its own benefit (i.e. to cover costs that it would anyway be responsible to bear) is an additional private investment on top of all public interventions mentioned in Table 2 and cannot be considered as a contribution towards a market concession fee. Neither the part of this amount (EUR 11,1 million) carried out by CAMED for investments in docks (see recital 15) can be deemed as own contribution, since at the end of the concession contract no (or very minimal value) accrued to PAN, due to amortisation of all assets.
- (164) Furthermore, as stated in the Opening Decision, the Commission had doubts whether a PSO was imposed on CAMED in the context of the Concession agreement. Italy had argued prior to the Opening Decision that, since dry-docks are used by CAMED for the provision of SGEL, any investment needed to provide that service represents a compensation for that service.
- (165) Although after the Opening Decision Italy did not claim anymore that a PSO was imposed on CAMED, for the sake of completeness the Commission assesses in the following recitals whether the four Altmark conditions are cumulatively fulfilled with respect to the measures in support of CAMED.
- (166) Regarding the first Altmark condition, the minimum criteria mentioned in recital 129 are not fulfilled. Specifically, the nature and scope of the public service obligation allegedly entrusted to CAMED has not been clearly defined. The obligation is defined in the Concession by mere reference to the generally phrased provision of Article 1.g of Ministerial Decree of 14 November 1994. Therefore, although it could be argued that the duration of the obligation is defined through the 30 year duration of the Concession, there is still no clear definition of the nature and scope of the alleged public service obligation for the reasons explained in recital 130 of the present Decision.
- (167) In any event, with respect to whether the alleged public service obligations are suitable for designation as an SGEL, the Commission does not consider that CAMED is required to discharge obligations that can be defined as public service obligations. Indeed, the service (management of dry docks) is already provided and can be provided satisfactorily by other undertakings operating under normal market conditions. The service does not exhibit any special characteristics compared with those of private owners of ship-repairing services and managers of such facilities and it does not address any market failure. The Italian authorities have not provided evidence showing that CAMED provides an activity not provided in the market under comparable conditions of price, quality, continuity and access to the service. In addition, the subsidised facilities do not provide any general benefit for society but rather a mere service to ship owners in the area of Naples <sup>(60)</sup>.
- (168) Regarding the second Altmark condition, the 2004 Concession does not explicitly provide any quantification or parameters established beforehand in an objective and transparent manner to calculate the amount of compensation that PAN should pay to CAMED in exchange for the obligation to grant open access to the dry-dock to any other ship-repairers. The 2004 Concession does not make any express link between that obligation and PAN's commitment to perform the Interventions at stake. Also, the 2004 Concession does not clearly identify the operating loss allegedly suffered by CAMED nor the amount of the Interventions.
- (169) Moreover, the Commission notes that the funding of the Interventions as a compensation to CAMED for the obligation to grant open access to the dry-docks cannot exclude the risk of overcompensation as required by the third Altmark criterion. In fact, in the absence of any calculation or estimate of the operating loss allegedly incurred in discharging the PSO, it does not appear possible to verify that the amount of investments granted for the Interventions correspond to such operating loss, taking into account a reasonable profit.

<sup>(60)</sup> See the 2011 SGEL Communication, paragraph 50.

- (170) Regarding the fourth Altmark condition, the land concession was awarded to CAMED without a public procurement procedure and Italy never provided the necessary information to assess whether the amount of investments granted for the Interventions corresponds to the level of costs of a typical, well-run undertaking which grants open access to the dry-docks to any other ship-repairers.
- (171) Therefore, the Commission finds that the four conditions are not cumulatively met; hence, the measures at hand entail an economic advantage to CAMED.

#### 5.2.4. *Distortion of competition and effect on trade*

- (172) Ship-repairing represents an economic activity in a sector open to competition and trade at Union level. Therefore, any advantage granted to CAMED is liable to distort competition and affect intra-Union trade.

#### 5.2.5. *Classification of the measures as existing aid*

- (173) For the reasons analysed in section 5.1.7 of this Decision regarding PAN, the Commission also considers that the measures in favour of CAMED cannot be considered as existing aid.

### 5.3. **Compatibility**

- (174) The Commission finds that dry-docks are not transport infrastructures, but production facilities for shipyards as they are used for ship-building or ship-repairing and not for transport purposes. Therefore, the Commission is of the opinion that the measures cannot be assessed directly under Article 107(3)(c) TFEU as investment aid for transport infrastructure, as the Italian authorities claim (see recital 86).
- (175) The Commission also finds that the aid cannot be assessed on the basis of Article 107(2)(b) TFEU, concerning aid to make good the damage caused by natural disasters or exceptional occurrences. The Commission notes that aid can be found compatible under that Article only if very strict conditions are fulfilled, inter alia, that the aid only compensates for the damage directly caused by the event in question and does not result in overcompensation, which were not proved in this case <sup>(61)</sup>.
- (176) Therefore, the Commission considers that the examination of the compatibility of the measures for PAN and for CAMED should be conducted first under the Communication from the Commission — European Union framework for State aid in the form of public service compensation ('2011 SGEI Framework') <sup>(62)</sup>.
- (177) If the compatibility conditions set out in the 2011 SGEI Framework are not complied with, the Commission is of the view that the examination of the compatibility of the measures granted to PAN and CAMED could also be conducted under the State aid rules for the shipbuilding sector applicable at the time of the granting of each measure.
- (178) The Commission finds that the date of grant of the individual aids to PAN is not the date of entry into force of Law No 413/1998, as Italy claims (see recital 85). That law is too general and cannot confer on a beneficiary the legal right to receive the aid since it has not enumerated specific beneficiaries or the aid amounts <sup>(63)</sup>. Instead, the Commission finds that the right to receive the aid in question derives from the Ministerial Decree of 27 December 1999, adopted within the scope of the general framework set by Law 413/1998, read in conjunction with the Ministerial Decree of 2 May 2001, which are the effective implementing acts of the measure, as required by Law No 413/1998.
- (179) Pursuant to Article 9 of Law 413/1998, on the basis of a request by the relevant Port Authorities, article 1 of Ministerial Decree of 27 October 1999 provides for the adoption of an infrastructural works programme for the expansion, modernisation and redevelopment of ports and the allocation of resources set out in an annex thereto. According to that annex, the Ministry was to make available to PAN EUR 51,403 million (Italia lira 99,53 billion) for investment works for the dry docks in the Port of Naples. The amounts to be made available to all port infrastructural investment from 2001 until 2017 were set out in the annex to the Ministerial Decree of 2 May 2001, adopted also on the basis of Law 413/1998. In respect of PAN, this decree set the overall financing ceiling at EUR 102 million (Italian lira 197,5 billion). These decrees conferred on PAN, inter alia, the right to obtain the repayment by the Ministry of loans in respect of the port infrastructure projects set out in the annex

<sup>(61)</sup> Commission Decision SA.39622 (2014/N), Republic of Slovenia — Aid to make good the damage caused by glaze ice in Slovenia in January and February 2014 (all sectors except agriculture, forestry, fisheries and aquaculture).

<sup>(62)</sup> OJ C 8, 11.1.2012, p. 15.

<sup>(63)</sup> See judgment in case C-245/16 NEREA ECLI:EU:C:2017:521, para. 32.

to the ministerial decrees, including those relating to the dry docks at stake. These investments were already provided for at the time of the 2004 Concession to CAMED and the concession itself refers to these investments already set out in the 2001 Agreement. Accordingly, the following compatibility base could be applicable for the shipbuilding aid (regional aid for investment in upgrading or modernising existing yards with the objective of improving the productivity of existing installations) to PAN and CAMED:

- (1) Regulation (EC) No 1540/98, which entered into force on 1 January 1999 until 31 December 2003;
  - (2) The 2004 Framework on State aid to shipbuilding, which was originally applicable from 1 January 2004 until 31 December 2006, and was later prolonged twice until 31 December 2008 and until 31 December 2011;
  - (3) The 2011 Framework on State Aid to shipbuilding, which was applicable to non-notified aid granted after 31 December 2011. The application of this Framework has been extended until 30 June 2014;
  - (4) The Guidelines on regional State aid for 2014-2020 as from 1 July 2014.
- (180) Italy has argued that the above compatibility base for aid to shipbuilding should not be applied as such and that compatibility should instead be assessed directly on the basis of Articles 107 TFEU, and in the light of other provisions of secondary law adopted in the sector of State aid <sup>(64)</sup>. Italy has mentioned the bombardments of the Second World War, earthquakes, the development of the economy of an assisted region and the modernisation and development of port infrastructure.
- (181) According to the case-law, it is up to the Member State to show that the circumstances of a national measure are different from those envisaged in the relevant guidelines, and thus that the Commission should assess the measure directly under Article 107(3) TFEU <sup>(65)</sup>. To the extent that Italy argues the bombardments of the Second World War and earthquakes as a reason for deviating from the above guidelines, the Commission has already explained in recital 175 why the conditions of Article 107(2)(b) TFEU are anyway not fulfilled for the measures at issue. As regards the argument on modernisation and development of port infrastructure as a ground for assessing the measures directly under the Treaty, the Commission has also explained in recital 174 that dry-docks are not transport infrastructures and therefore they cannot be assessed directly under Article 107(3)(c) TFEU. Finally, as to Italy's argument on the development of the economy of the relevant assisted region, the Commission notes that such aid would not be assessed under the regional aid guidelines applicable at the time the measures were granted since aid to shipbuilding was governed by sectoral rules as presented in recital 176 a fact clearly acknowledged by each of the regional aid guidelines applicable at the time of granting the aid <sup>(66)</sup>. It also makes sense that aid on shipbuilding assets is assessed under the specific sectoral rules on shipbuilding rather than on the basis of the more general regional aid rules, as only the sectoral guidelines can cover the specific features of the sector and therefore address in the best way the common objective pursued by the aid.

### 5.3.1. Compatibility assessment of the aid to PAN

- (182) One of the conditions to consider the aid compatible under the 2011 SGEI Framework is that the aid must be granted for a genuine and correctly defined SGEI as referred to in Article 106(2) TFEU. In addition, the SGEI should be entrusted through an act specifying the PSOs and the methods of calculating compensation, and the amount of compensation must not exceed what is necessary to cover the net cost of discharging the PSOs, including a reasonable profit.
- (183) The arguments included in section 5.1.4 show that the Commission finds that Italy made a manifest error of appreciation in the definition of the public service imposed on PAN. In addition, the relevant acts do not give any indication of the amount of compensation to be granted to PAN for the management of dry-docks or how such compensation should be calculated and therefore do not allow to conclude on whether any compensation

<sup>(64)</sup> Here Italy refers to Notice No 2003/C 317/06 (OJ C 317, 30.12.2003, p. 11) and in particular to paragraph 12 which states that 'aid to shipbuilding may be granted in accordance with Articles [107 and 108 TFEU] and all legislation and measures adopted on those bases.'

<sup>(65)</sup> Case C-431/14 P *Greece v Commission* ECLI:EU:C:2016:145, paragraphs 70-72.

<sup>(66)</sup> See point 8 (and footnote 9) of the Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13): '(...) some other sectors [transport and shipbuilding] are also subject to specific rules which take account of the particular situation of the sectors concerned and which may totally or partially derogate from these guidelines', see point 2 of the Guidelines on national regional aid (2000-2006) (OJ C 74, 10.3.1998, p. 9): 'In addition, some of the sectors they cover are also governed by rules aimed specifically at the sectors in question'.

granted is limited to what is necessary to cover the relevant costs incurred in discharging the alleged PSO. Furthermore, as explained in recital 167, the nature, duration and scope of the alleged public service obligations of PAN have not been clearly defined.

- (184) Therefore, the Commission is of the opinion that the measures do not comply with all compatibility conditions and thus cannot be declared compatible under the 2011 SGEI Framework with regard to the aid to PAN.
- (185) The Commission has also assessed whether the measures can be declared as compatible on the basis of the applicable shipbuilding rules.
- (186) The Commission notes that, having regard to the granting acts of the aid (see recitals 25 and 179), the legal bases applicable to the various aid are the Regulation (EC) No 1540/98 and the Framework on State aid to shipbuilding, indicated as (i) and (ii) in recital 179 <sup>(67)</sup>. The Commission has verified below whether the conditions under each of the listed compatibility bases are respected.
- (187) In order to be eligible for aid under the shipbuilding rules, the aid must be granted for investments in upgrading or modernising existing yards, not linked to a financial restructuring of the yard(s) concerned, with the objective of improving the productivity of existing installations (excluding mere replacements of depreciated assets) <sup>(68)</sup>.
- (188) The Italian authorities stated (see recital 86) that the alleged aid is not designed to promote an increase in the productivity of the existing installations in a shipyard, but rather to carry out specific maintenance of certain items of port infrastructure that are the sole property of the Italian state and to prevent them from becoming obsolete. The investments are therefore not eligible for aid under the shipbuilding rules.
- (189) Furthermore, Italy has not demonstrated that the aid has an incentive effect, i.e. that an aid application has been submitted before the date of the start of works or that the aid is limited to support eligible expenditure as defined in the applicable regional aid guidelines (see recital 89).
- (190) The public funding already granted for this project (EUR 44 138 854,50, namely 76,42 % of the total investment costs) exceeds the maximum permissible aid intensity for regional investment aid for shipbuilding facilities under all three subsequent Shipbuilding frameworks (which varied between 12,5 % and 22,5 % of the total investment costs depending on the regional aid status of the relevant region).
- (191) In view of the fact that the above-mentioned compatibility conditions are not fulfilled, the Commission concludes that the aid measures in favour of PAN are not compatible with the internal market.

#### 5.3.2. *Compatibility assessment of the aid to CAMED*

- (192) As demonstrated in section 5.2.3, Italy made a manifest error of appreciation in the qualification of ship-repair services to CAMED as a PSO. Furthermore, the relevant acts do not give any indication of the amount of compensation to be granted to CAMED for the obligation to keep open access to the dry-docks and therefore do not allow to conclude on whether any compensation granted does not exceed what is necessary to cover the relevant costs incurred in discharging the PSO. The Commission notes that considering the funding of the Interventions (in the amount of EUR 44 138 854,50 provided by the Italian State and EUR 13 621 000 provided by the own resources of PAN) as a compensation for the obligation imposed on CAMED to keep an open access to the dry-docks cannot exclude the risk of overcompensation (see recital 169). Furthermore, as explained in recital 162, the nature and scope of the alleged public service obligations has not been clearly defined.
- (193) Therefore, the Commission concludes that the measures cannot be declared compatible under the 2011 SGEI Framework with regard to the alleged aid to CAMED.

<sup>(67)</sup> See (i) Regulation (EC) No 1540/98, which entered into force on 1 January 1999 until 31 December 2003; (ii) the 2004 Framework on State aid to shipbuilding, which was originally applicable from 1 January 2004 until 31 December 2006, and was later prolonged twice until 31 December 2008 and until 31 December 2011.

<sup>(68)</sup> See Article 7 of Regulation (EC) No 1540/98; paragraph 26 of the Framework on State Aid to Shipbuilding of 2003; recital 13 of Framework on State Aid to Shipbuilding of 2011; See also Commission decision on C21/2006 (ex N 635/2005) to be implemented by the Slovak Republic for Slovene lodenice Komarno, 2007/529/EC

- (194) As regards the compatibility of the aid to CAMED on the basis of the shipbuilding rules, the Commission notes that CAMED – as the manager and operator of the aided facilities – benefited from operating aid (in the form of reduced concession fees) aimed at reducing the expenditure that CAMED would have to bear. The State aid rules for the shipbuilding sector applicable at the time of the granting of each measure (see recital 179) do not provide for operating aid to managers or users of shipbuilding facilities. Therefore, the Commission concludes that the aid to CAMED cannot be declared as compatible aid.

## 6. CONCLUSION ON THE EXISTENCE AND COMPATIBILITY OF AID

- (195) The Commission finds that Italy has unlawfully put into effect investment aid to PAN in breach of Article 108(3) TFEU.
- (196) The Commission also finds that Italy has unlawfully put into effect operating aid to CAMED in breach of Article 108(3) TFEU.
- (197) Since no grounds can be identified for finding the measures to be compatible with the internal market, they must be held to be incompatible.

## 7. RECOVERY

### 7.1. Limitation period

- (198) The Commission notes that according to the Italian authorities, the public support under assessment cannot be recovered as the statute of limitations established by Article 17 of the Procedural Regulation has expired.
- (199) Article 17(1) states that ‘the powers of the Commission to recover aid shall be subject to a limitation period of 10 years’. However, according to Article 17(2): ‘the limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Union’.
- (200) The Commission takes the view that the arguments of the Italian authorities cannot be accepted. Indeed, the Commission’s actions in sending a request for information in March 2006, two preliminary assessment letters to the complainant in 2013 and 2014 and requests for further information to the Italian authorities (see recitals 3, 5 and 6) interrupted the limitation period and therefore the statute of limitations period of 10 years has not expired.

### 7.2. Legitimate expectations and legal certainty

- (201) Pursuant to Article 16(1) of the Procedural Regulation, any aid found to be incompatible with the internal market must be recovered.
- (202) Article 16(1) provides, however, that ‘[t]he Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law’. In this respect, the Court of Justice established that the Commission is required to take into consideration on its own initiative exceptional circumstances that provide justification, pursuant to Article 16(1), for it to refrain from ordering the recovery of unlawfully granted aid where such recovery is contrary to a general principle of Union law <sup>(69)</sup>.
- (203) The Commission notes that Italy and CAMED put forward in their comments to the Opening Decision the argument that the Commission’s decision is unlawful and represents a breach of the general principles of sound administration, legal certainty and legitimate expectations (see recitals 52-54 and 91).

<sup>(69)</sup> Judgment in Case 223/85 RSV v Commission ECLI:EU:C:1987:502.

- (204) According to the case-law of the Court of Justice, the right to rely on the principle of the protection of legitimate expectations presupposes that precise, unconditional and consistent assurances originating from authorised, reliable sources have been given to the person concerned by the competent authorities of the Union <sup>(70)</sup>. These assurances, according to the case-law, can be either explicit (e.g. direct communication to Member State on the validity of a certain measure) <sup>(71)</sup> or implicit (e.g. undue delay in the proceedings, approval of similar schemes in the past) <sup>(72)</sup>. A legitimate expectation that the aid granted is lawful cannot, barring exceptional circumstances, be entertained unless the aid has been granted in compliance with the notification requirements of Article 108 TFEU <sup>(73)</sup>.
- (205) The Commission finds that there is no breach of the principle of legitimate expectation in the case at hand. Indeed, as explained in recitals 147 to 150, the aid was never notified to the Commission by the Italian authorities. Furthermore, the Commission has not given any precise, unconditional and consistent assurances about the measure being no-aid or compatible aid <sup>(74)</sup>.
- (206) The fundamental requirement of legal certainty, also covered by Article 16 of the Procedural Regulation, is designed to ensure the foreseeability of legal situations and relationships governed by Union law and hence has the effect of preventing the Commission from indefinitely delaying the exercise of its powers <sup>(75)</sup>.
- (207) The Commission is of the opinion, in the light of the highly specific circumstances of this case, that the principle of legal certainty has not been taken proper account of vis-à-vis the Italian authorities.
- (208) The Commission finds that there is a body of evidence to suggest, (i), that the Commission delayed exercising its powers when it came to examining the measures at issue and, (ii), that the implicit indication given by the Commission to the Italian authorities before the reopening of the file in 2013 could have misled them as to the lawfulness of those measures <sup>(76)</sup>.
- (209) Firstly, the Commission delayed exercising its powers when it came to examining the measures at issue: the Commission sent a request for information in March 2006, to which Italy replied on 3 April 2006 providing exhaustive information which should have led the Commission to conclude that the measure under scrutiny was in fact public support. Nevertheless, the Commission services did not follow up that letter by any means and furthermore the file was closed. The file was reopened only seven years later, after a formal complaint in February 2013. The Opening Decision was issued ultimately in June 2016.
- (210) Secondly, the implicit indication given by the Commission to the Italian authorities before the reopening of the file in 2013 could have misled those authorities as to its lawfulness. By their letter dated 3 April 2006, the Italian authorities claimed that the dry docks at stake were public infrastructure and as such, not subject to Shipbuilding Guidelines. Nevertheless, the information which the Italian authorities provided to the Commission should have led the Commission to conclude that the measure under scrutiny was in fact public support to shipbuilding and ship-repair facilities that constituted State aid, which ought to have been notified to the Commission. So, even if the Commission was made aware of the nature of the aided investment project, it did not take any further actions or undertake any further investigation during the 2006-2013 period, giving Italy the implicit signal that their characterisation of dry docks as port infrastructure was correct.
- (211) The seven years which elapsed between the reply from the Italian authorities to the Commission's letter and the further request for information sent by the Commission to Italy, could have led Italy — in this specific case — to assume that, due to Commission's silence, Italy's original position, according to which the measure fell outside the remit of State aid control and hence no notification was required, had been implicitly endorsed by the Commission. While it is true that, in principle, the absence of a reaction by the Commission to the answer of a Member State cannot, in itself, constitute an infringement of the principle of legal certainty, it is nevertheless clear that this particular case does not merely involve inaction on the part of the Commission, but also

<sup>(70)</sup> Judgment in Case C-537/08 P *Kahla Thüringen Porzellan* ECLI:EU:C:2010:769, para. 63 and case-law cited.

<sup>(71)</sup> Judgment in Case 267/85 *Van den Bergh en Jurgens v Commission* ECLI:EU:C:1987:121, para. 44.

<sup>(72)</sup> Judgment in Case 223/85 *RSV v Commission* ECLI:EU:C:1987:502.

<sup>(73)</sup> Judgment in Joined Cases C-630/11 P to C-633/11 P *HGA Srl and others* ECLI:EU:C:2013:387, para. 134.

<sup>(74)</sup> See, on the definition of the principle of legitimate expectation, the judgments of the Court of Justice in Cases 265/85 *Van den Bergh en Jurgens v Commission* ECLI:EU:C:1987:121, para. 44, and C-152/88 *Sofrimport v Commission* ECLI:EU:C:1990:259, para. 26; judgments of the Court of First Instance in Cases T-290/97 *Mehibas Dordtselaan v Commission* ECLI:EU:T:2000:8, para. 59, and T- 223/00 *Kyowa Hakko Kogyo v Commission* ECLI:EU:T:2003:194, para. 51; see, on the absence of a legitimate expectation on the part of recipients of aid unlawfully implemented, the judgment of the Court of Justice in Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava v Commission* ECLI:EU:C:2004:701, paras 44 and 45, and the case law cited therein.

<sup>(75)</sup> See the judgment of the Court of Justice in Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* ECLI:EU:C:2002:524, para. 140.

<sup>(76)</sup> See Commission Decision 2007/256/EC of 20 December 2006 on the aid scheme implemented by France under Article 39 CA of the General Tax Code — State aid C 46/2004 (ex NN 65/2004) (OJ L 112, 30.4.2007, p. 41) and judgment in Case C-408/04 P *Commission v Salzgitte* ECLI:EU:C:2008:236, para. 106.

an implicit indication given by the Commission services to Italy, resulting in an exceptional combination of circumstances. Consequently, (i) the seven-year delay in the initial Commission's decision-making process (by not following up the initial letter of the Italian authorities dated 3 April 2006), in combination with (ii) the Commission's inaction that, in the specific circumstances of the present case, could have been interpreted as a tacit acceptance of the Italian authorities' position concerning the identification and interpretation of the legal framework for the assessment of the measure, could have left room for doubt as to the lawfulness of the measures and prevented the Italian authorities from taking steps to bring the measures concerned in line with State aid rules in a timely fashion.

- (212) Therefore, on the basis of the specific circumstances of the present case and of the elements above taken together, in order to ensure the foreseeability of legal situations and relationships governed by Union law, the Commission concludes that the specific circumstances of the present case mean that Italy shall not be required to recover any incompatible aid referred to in section 5 in favour of PAN or CAMED that was granted before the request for information sent by the Commission to Italy on 28 February 2013, by which the present case has been reopened.
- (213) As regards the aid granted after 28 February 2013, any incompatible aid is recoverable from its recipients. Indeed, the Commission finds that after the detailed request for information were sent on 28 February 2013, the Italian authorities were fully informed of the Commission's doubts regarding the lawfulness and compatibility of the aid.
- (214) However, as noted in recital 178 above, the Commission finds that all the measures at stake were granted to PAN before 28 February 2013, the date of the request for information sent by the Commission to Italy after the 2013 formal complaint. CAMED was also granted all the measures at stake prior to 28 February 2013, since it obtained the legal right to receive the aid by virtue of the 2004 Concession agreement. Therefore, none of the aid measures that have been the subject-matter of the present case was granted after 28 February 2013.

### **7.3. Aid to be recovered from PAN and CAMED**

- (215) In the light of the specific circumstances presented in this case, as explained in recitals 207 to 211 and the conclusion in recital 214, Italy shall not recover any amount from either PAN or CAMED. For the same reasons, the present decision does not preclude future payments concerning the specific amounts of aid that were already granted to PAN (by virtue of the Ministerial Decree of 27 October 1999, adopted within the scope of the general framework set out in Law 413/1998, read in conjunction with the Ministerial Decree of 2 May 2001) and to CAMED (by virtue of the 2004 Concession agreement) prior to 28 February 2013.
- (216) Nevertheless, should Italy contemplate the granting of other aid measures in the Port of Naples, Italy would obviously be obliged under Article 108(3) TFEU to notify such measures to the Commission for assessment of their compatibility with the internal market (except, of course, if such measures are block-exempted from notification),

HAS ADOPTED THIS DECISION:

#### *Article 1*

(1) The State aid in the form of investment aid from Italy in favour of PAN granted through the Ministerial Decree of 27 October 1999, adopted within the scope of the general framework set out in Law 413/1998, read in conjunction with the Ministerial Decree of 2 May 2001, unlawfully put into effect by Italy in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.

(2) The State aid in the form of unduly low concession fees from the Port Authority of Naples in favour of CAMED, unlawfully put into effect by Italy through the 2004 Concession agreement signed by CAMED and PAN on 29 July 2004, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.

#### *Article 2*

Italy is not obliged to recover the aid referred to in Article 1.

*Article 3*

This Decision is addressed to the Italian Republic.

Done at Brussels, 20 September 2018.

*For the Commission*  
Margrethe VESTAGER  
*Member of the Commission*

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