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State aid & taxation

State aid & taxation: an overview of EU and national case law

BURDEN OF PROOF, UNDERTAKING (NOTION), STATE AID (NOTION), CORPORATE GROUP, FOREWORD, COMPETENCE, STATE RESOURCES, STATE AID LEGALITY, STATE AID (TAX EXEMPTION), TRANSFER PRICING, TAXES, STATE AID (TAX RULING)

Hendrik Viaene | McDermott Will & Emery (Brussels)

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This Special Issue collects all contributions available in the e-Competitions database relating to State aid and taxation. This topic has been at the source of many a heated debate. When reviewing the existing European Commission ('Commission') decisional practice and the case-law of the European Courts, it is clear that the final outcome of an investigation started by the Commission is difficult to predict, even though the key concepts for State aid and taxation in the meantime appear to be clearly defined.

1. Introduction

The list of contributions starts with a discussion of a judgment of the French Administrative Court, rendered on 2 June 1993, and the subsequent evolutions in that French case-law, with regard to the consequences of the legality of tax measures that constitute State aid, and that have been put into effect prior to the European Commission having declared the aid to be compatible with the Treaty. [*1*] This contribution brings back some classics of the European Court of Justice ('ECJ') case-law, such as *Costa/ENEL [2]*, *Lorenz [3]*, and *Salmon [4]*. The last contribution included in this overview, not surprisingly, concerns State aid and tax rulings from the 14 July 2021 judgment of the General Court ('GC') in *Nike*. [*5*] However, one must treat the latter judgment with care as Nike's appeal was directed against the Commission decision opening the formal investigation procedure, not against the final Commission decision.

Much of the debate in the area of State aid and taxation in the last few years has focused on so-called tax rulings. These Commission decisions, and the subsequent Court judgments, grabbed the headlines, not only of the specialized press, but also of regular newspapers. The aid amounts that have to be recovered are staggering, and, if nothing else, DG COMP, led by Mrs. Vestager, has demonstrated that they are not a victim of an ivory tower syndrome: generous tax breaks are no longer applauded by the general public as making clever use of the prevailing rules. The only tool the Commission could use independently to go after this type of arrangements are the State aid rules. It is clear that, regardless of the outcome of the ongoing investigations and litigation, companies are becoming more careful in their tax structuring, and important changes are taking place in the world of international taxation. [*6*]

The challenge in writing this Foreword, and for the reader when perusing all the articles bundled in this Special Issue, is to structure the developments in the field of State aid and taxation in a digestible manner, without too much repetition. With this in mind, I will refer to and sometimes borrow from earlier excellent Forewords in order to bring things together, and to highlight the evolution in the case-law of the European Courts, even though these previous Forewords date from 1 August 2019 ('2019 Foreword'), [*7*] and from 19 November 2020 [*8*] ('2020 Foreword'), respectively.

2. Lessons from recent cases on State aid and taxation?

While output from the Commission and the European Courts on State aid and taxation appeared to have slowed down in 2020, it is clear that especially the European Courts have been issuing a number of very important judgments in the first half of 2021. Indeed, there have been a number of interesting judgments and opinions since the 2020 Foreword and I will highlight their key learnings when discussing a number of recurring themes on the issue of State aid and taxation.

Involvement of state resources

For State aid to be found to exist under Article 107(1) TFEU the measure under investigation should involve State resources. It is not disputed that the tax rulings involve the foregoing of revenue by the Member State that gives a tax ruling. For a more detailed explanation of the state of the case-law on State resources in a broader context, I refer to the 2020 Foreword.

Competence of the Commission to apply State aid to matters of taxation

When the Commission launched its first investigations into tax rulings, one of the arguments raised against this initiative was that the Commission had no competence to do so, and that the Commission was engaging in disguised tax harmonisation. It is established case-law that direct taxation falls within the competence of the Member States, but they have to exercise that competence in compliance with State aid law, and the Commission can verify whether that has actually occurred. [*9*]

In two recent judgments, *Poland (retail sector) [10]* and *Hungary (advertisement) [11]*, this principle played a crucial role in the ECJ's ruling finding that selectivity of both progressive tax measures could not be established. I will discuss this in more detail in the following section.

Selective Advantage

The crux of the State aid law and taxation debate is whether any of the tax measures, be it rulings or other measures, grant a selective advantage to the undertaking(s) concerned. For a more in-depth overview of the Commission decisions and the earlier case-law, I refer to the 2020 and 2019 Forewords.

In its recent *Engie* judgment, [*12*] the GC once more confirmed that 'selectivity' and 'advantage' are two separate constitutive elements for finding State aid. Broadly speaking, an advantage is present when the measure at hand improves the beneficiary's financial situation. Selectivity is proven when the Commission can demonstrate that the advantage cannot be enjoyed by other undertakings that are, in light of the objective assigned to the tax system of the Member State concerned, in a comparable factual and legal situation. [*13*]

Specifically in taxation matters, the GC recognizes that assessments of 'advantage' and of 'selectivity' coincide in the sense that the assessment of a tax measure under State aid rules aims at demonstrating whether the measure has reduced the amount of taxation that was due by the beneficiary ('advantage') if the normal system of taxation applicable to all tax payers had been applied to the beneficiary as well ('selectivity'). [*14*] This approach is particularly valid when it concerns individual rulings, which – by definition – are addressed to one undertaking. This is even more so in light of the ECJ position, once more confirmed in *Nike*, that in a case of individual aid, the identification of the advantage is sufficient to support the presumption that it is selective. [*15*] This presumption of selectivity even applies regardless of whether other undertakings active in the relevant market(s) are in a comparable factual and legal situation. [*16*]

In State aid and taxation cases, both the concepts of advantage and of selectivity are difficult to apply in practice. In *Amazon*, [*17*] the GC gave a nice summary of the different steps in the reasoning one should follow, based on earlier case-law. I will follow that structure as much as possible in the discussion of the concept of selective advantage. [*18*]

The general test is whether the tax treatment of a company places that company in a more favourable financial position than other companies. If that is the case, then the tax ruling constitutes State aid in the sense of Article 107(1) TFEU. [*19*]

In order to assess whether a financial position is more favourable, in the case of tax measures, one has to compare the position of the beneficiary as a result of the measure under investigation with the situation of that same beneficiary in the absence of the measure under investigation, and under the so-called 'normal rules of taxation'. [*20*]

Specifically with regard to the position of an integrated company that is part of a group of undertakings, the GC states that such intra-group pricing has never been subject to market forces, and, therefore, one cannot presume that such pricing is in line with the market economy operator ('MEOP') principle. [*21*]

In *Amazon*, the GC makes the statement that "*where national tax law does not make a distinction between integrated undertakings and stand-alone undertakings for the purpose of their liability to corporate income tax, that law is intended to tax the profit arising from the economic activity of such an integrated undertaking as though it had arisen from transactions carried out at market prices*". [*22*]

The case-law, therefore, seems to leave room for a claim that for national tax systems, where stand-alone companies and integrated companies are treated entirely differently under national corporate tax law, there would *not* be an issue of advantage, since the tax outcomes for both types of companies in that scenario would not be comparable. So far, this factual scenario has not yet played out in the cases reviewed. Also in *Amazon*, as there is no such distinction in national tax law, the Commission is allowed to compare the fiscal burden resting on an integrated company and resulting from the tax measure at issue with the fiscal burden resulting from the application of the normal rules of taxation under national law on a company, placed in a comparable factual situation, carrying on its activities under market conditions. [*23*]

Put differently, the Commission is allowed to check whether the level of pricing that a national authority has accepted in the case of an integrated company corresponds to a pricing under market conditions in order to verify whether an advantage has been granted. [*24*] The 'arm's length principle' is a tool that enables the Commission to carry out this assessment. [*25*]

However, in doing so, when the Commission uses this arm's length principle to check the level of pricing in both scenarios, it can identify an advantage *only if the variation between the two comparables goes beyond the inaccuracies inherent in the methodology used to obtain that approximation*. [***26***]

The Commission cannot stop at simply identifying "non-compliance with methodological requirements", as these do not necessarily lead to a reduction in the tax burden. Therefore, the Commission has to show two things:

- that the methodological errors it has identified in the tax ruling do not allow a reliable approximation of an arm's length outcome to be reached; and
- that the methodological errors lead to a reduction in the taxable profit compared with the tax burden resulting from the application of normal taxation rules under national law to an undertaking placed in a comparable factual situation to the company concerned and carrying out its activities under market conditions. [***27***] The explanation for this approach is very logical: an advantage is defined in relation to an investigated measure's effect. [***28***] Therefore, the advantage cannot be presumed or inferred from a calculation error that has no impact on the result. [***29***]

In relation to the arm's length principle, the GC confirms that the Commission formally cannot be bound by the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ('OECD Guidelines'), but accepts that they reflect the international consensus achieved with regard to transfer pricing, and that they have a practical significance in the interpretation of issues related to transfer pricing. [***30***]

As to which version of the OECD Guidelines must be used, the GC takes the position that one should use the version of the Guidelines that was in place when the tax ruling was granted. [***31***] In the case of *Amazon* this was the 1995 version of the OECD Guidelines. However, in as far as subsequent Guidelines provide for a useful *clarification*, without further *elaboration*, then these clarifications from the later versions of the Guidelines can be used. [***32***] As will be explained below under '*Intensity of review by the GC*' the GC will review the Commission's reasoning, choice and application of the relevant arm's length principle in a high degree of detail in order to find whether any errors were made. This explains the different outcomes achieved on appeal against the Commission decisions: in *Apple, [33] Starbucks*, [***34***] and *Amazon*, the GC annulled the Commission's decisions because of errors in the Commission's approach, not because of errors on the principles. In *Fiat Chrysler* and *Engie*, the GC dismissed the applications for annulment as, based on the same principles, the Commission was able to demonstrate that the tax ruling at hand resulted in a selective advantage.

In one of its most recent judgments, the GC also has confirmed the Commission's reasoning that a tax ruling constitutes State aid when that tax ruling does not apply other binding national legislation where all conditions for applying that legislation are met. In *Engie* the Commission had found that the Luxembourg anti-abuse law is an integral part of the Luxembourg tax system. Even though the criteria for applying the Luxembourg anti-abuse law were met, the legislation was not applied in the tax ruling. This of itself also constitutes State aid as other undertakings – in particular holding companies – that find themselves in a similar factual and legal situation could not benefit from a non-application of the anti-abuse law. This finding was further strengthened by the fact that the anti-abuse law had already been applied by Luxembourg national courts vis-à-vis other companies. [***35***] The exact scope and impact of this part of the *Engie* judgment remains to be seen, but it could have a serious impact on the decision-making process of national tax authorities, and for that matter other decision-making bodies in other areas as well. One could infer that tax authorities no longer have a discretionary power to, e.g., weigh chances of

success in invoking certain provisions, but that they would have to justify why they decided not to apply the anti-abuse act or any other relevant legislation for that matter. If that is the appropriate reading of the judgment, then it adds an additional layer of complexity to any national tax authority's tax ruling practice.

Specifically on the issue of selectivity, the ECJ's judgments in *Hungary (advertising)* and *Poland (retail sector)* ***[36]*** repeat the required test for establishing selectivity to then assess whether the progressive taxation schemes both countries introduced were selective. In order to establish selectivity, the Commission first has to identify the reference system or 'normal tax system'. It then has to demonstrate that the measure under investigation 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. If the Commission succeeds in doing this, the Member State can still avoid a finding of selectivity if it can demonstrate that that differentiation is justified in that it follows from the nature or general structure of the system of which the measures form part.

The ECJ reminds everyone about the fact that, outside of the spheres where EU tax law has been harmonized, Member States are still entirely free to determine how they want to organize particular taxes. They can decide to opt for progressive taxation, even if that is more common in the taxation of natural persons, or to tax turnover rather than profits. The assessment would be different only when the characteristics chosen are manifestly discriminatorily intended to circumvent State aid law.

Consequently, the characteristics of both the systems reviewed in *Hungary (advertising)* and *Poland (retail sector)*, i.e. progressive taxation of turnover, concern the reference systems, and not a deviation from another reference system. Therefore, the condition of selectivity was not met, and the ECJ annulled the Commission decisions.

Burden of proof for "advantage"

There is no doubt that the Commission must prove that a measure constitutes State aid. [***37***] As in any State aid investigation, the Commission must conduct an impartial and diligent examination of the tax measures under review, with the aim to having the "most complete and reliable information possible". [***38***] However, at the same time, the GC stresses that, even if a Member State has a margin of discretion in the approval of a transfer pricing, the Commission cannot be deprived of its power to check whether the transfer pricing under investigation does not result in a selective advantage being granted to the recipient. Therefore, the Commission must verify whether the transfer pricing accepted by a Member State corresponds to a reliable approximation of a market-based outcome, and whether any variation that may be identified in the course of that verification amounts to more than the inaccuracies inherent in the methodology used to obtain the approximation (§126 and references). [***39***]

Intensity of review by the GC

The object of an application for annulment based on Article 263 TFEU is to review the legality of the acts of the Commission. As a result, an analysis of any of the pleas in law raised has neither the object nor the effect of replacing a full investigation already conducted by the Commission. [***40***]

Therefore, the GC's review of the Commission analysis has to verify whether the errors identified in the Commission decision, leading the Commission to find an advantage, go beyond the inaccuracies inherent in the application of a method designed to obtain a reliable approximation of a market-based outcome. [***41***]

Obviously, when reviewing the Commission analysis, the GC will also check whether the Commission has applied the relevant transfer pricing method correctly. In doing so, it will go into much detail reviewing the Commission's reasoning, and pointing out any mistakes the Commission makes. In assessing whether the Commission committed any errors, the GC will review and interpret the OECD Guidelines. In *Amazon*, the GC, among other points, disagreed with the Commission's functional assessment of LuxSCS and disagreed with the Commission finding that LuxSCS should have been chosen as the tested party for the purposes of the Transactional Net Margin Method ('TNMM') test, which is one of the transfer pricing tests allowed for by the OECD Guidelines. However, the GC went further, and also checked whether – assuming that LuxSCS had been the tested party – the remuneration the Commission had calculated contained many errors. Consequently, the results of that calculation cannot be considered as sufficiently reliable or as capable of achieving an arm's length outcome. [***42***] In *Engie*, on the other hand, the GC did not take any issue with the Commission's approach even though Engie's and the Luxembourg government's pleas in law were reviewed at length.

State aid schemes or individual aid decisions

Although also involving tax rulings, in *Excess Profit Rulings* ***[43]*** and in *UK CFC* ***[44]***, the debate turns on the issue of the existence of a State aid scheme. As so far only in *Excess Profit Rulings* the GC has rendered its judgment, and, on appeal, Advocate General Kokott has issued her opinion siding with the Commission and opining to annul the GC's judgment, [***45***] I will not discuss *UK CFC*.

The discussion of whether there is a case of a State aid scheme, versus a large number of individual State aid decisions is not a neutral one. When the Commission can prove the existence of a scheme, it does not have to assess the amount of aid granted to each company that has used the scheme. That is a debate that is moved to the stage of the recovery proceedings, which then pits the Member State against the beneficiary companies. The Commission can limit itself to proving that the scheme will give an appreciable advantage to beneficiaries. Interestingly, in *Nike* the applicant criticized the Commission for not reviewing its tax ruling as part of a State aid scheme. The GC, careful not to give a final ruling on issues on which the Commission has only formed a provisional view – the appeal was against the decision to open the formal investigation procedure, not against a final Commission decision – confirmed that the Commission is not obliged as a matter of priority to verify whether a measure, currently treated as an individual aid measure, is in fact derived from a State aid scheme. [***46***]

The GC annulled the Commission's decision in *Excess Profit Rulings*, essentially because the requirements for a scheme, as defined in Article 1(d) Regulation 2015/1589 were not met. The GC found that rulings were granted on a case-by-case basis, that some of the elements that were a constitutive part of the scheme did not follow from the acts the Commission had identified as forming the basis of the scheme, and because the Commission had a margin of discretion when deciding on the requested tax ruling. The Commission appealed the judgment, and AG Kokott issued her opinion in December 2020, siding with the Commission and proposing to annul the GC judgment. [***47***] AG Kokott comes to the conclusion that a sample of one third of all tax rulings concerned is a sufficiently representative sample that proves the existence of a consistent administrative practice that can constitute an 'act' for the purposes of defining a scheme. For those acts, AG Kokott opines, no implementing measures are required and the beneficiaries can be determined by applying that act. Therefore, the excess profit rulings constitute a scheme.

In *Fútbol Club Barcelona*, [***48***] the ECJ rendered another interesting ruling in relation to State aid schemes. The Commission found that all the constitutive elements for finding a scheme were present, contrary to the ongoing debate concerning the *Excess Profit Rulings*. Therefore, I will focus on two important lessons one should take away after reading the judgment.

First, whether or not a tax scheme constitutes a State aid scheme is something that must be assessed at the time of the adoption of the scheme, taking into account the characteristics of the scheme in order to assess whether the scheme grants an appreciable advantage to the beneficiaries in relation to their competitors. [***49***] Only at the stage of the recovery does one have to look at the individual situation of each undertaking. [***50***] This explains why in this particular case the Commission was right in looking at the aid scheme, and in merely checking the existence of an advantage from the scheme's perspective, and not looking at the individual aid awards to the individual clubs. [***51***] That is an exercise that needs to be carried out at the recovery stage.

Second, the ECJ stresses the need to engage in a global assessment of the scheme, taking into account both the favourable and the unfavourable features for beneficiaries. [***52***] However, when it concerns a scheme that applies on an annual or periodic basis and for an indefinite period of time, the Commission has to show that the scheme, at the time of its adoption, and given its characteristics, is capable of resulting in a tax liability being lower than it would have been had the general tax regime been applied. [***53***] Even if for an individual beneficiary the scheme provided for a lower rate of deduction for reinvestment of extraordinary profits than would be the case under the general tax regime, this is not relevant for the question of whether the system constitutes an aid scheme. In assessing the scheme, the Commission did not have to consider whether these other deductions under the general tax regime would neutralize the advantage resulting from the reduced tax rate introduced by the aid scheme. [***54***]

3. Conclusion

At the time of writing, mid-July 2021, a number of cases are still pending before the European Courts or are still being investigated by the Commission.

Three investigations are still pending at the Commission: Nike, Inter IKEA, and Huhtamäki, each concerning tax rulings and transfer pricing questions.

The Commission will have learned a great deal from the different judgments that were rendered. Even if the Commission lost a particular case, it normally won on the legal principles. It is a reasonable expectation that the Commission will make sure that the ongoing investigations meet the burden of proof imposed by the GC and the ECJ, and that they may better withstand the intense GC scrutiny.

We are awaiting important judgments from the ECJ in *Apple* [***55***], *Fiat Chrysler* [***56***], and *Amazon* [***57***] for a general validation of the Commission's and General Court's approach to tax rulings and State aid. In addition, in the discussion on whether a number of measures constitutes a State aid scheme or rather a bundle of individual aid measures, we are eagerly awaiting a ruling by the ECJ in relation to the Belgian *Excess Profit Rulings*. [***58***]

For State aid practitioners and for tax advisers this remains an area where further legal developments are to be expected.

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

[1] See ***Stéphane Laget***, *The French Supreme Administrative Court implements the EU Court of Justice "Saumon" ruling while limiting the time-period of annulment of the unnotified aid (Saumon), 2 June 1993, e-Competitions June 1993, Art. N° 13354.*

[2] Case 6/64, *Costa v E.N.E.L.*, 15 July 1964.

[3] Case 120/73, *Gebrüder Lorenz GmbH v Federal Republic of Germany and Land Rheinland-Pfalz*, 11 December 1973.

[4] Case C-354/90, *FNCEPA and Syndicat national des négociants et transformateurs de saumon*, 21 November 1991.

[5] Case T-648/19, *Nike European Operations Netherlands and Converse Netherlands v Commission*, 14 July 2021. See ***General Court of the European Union***, *The EU General Court dismisses the action brought against the Commission's decision to initiate the formal investigation procedure against two shoe retail companies for transfer pricing (Nike / Converse), 14 July 2021, e-Competitions August 2021, Art. N° 101842.*

[6] See, for example, the *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy*, issued by the OECD/G20 on 1 July 2021 (*https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf*).

[7] See ***Nicole Robins***, *Tax rulings: An overview of EU State aid cases, 1 August 2019, e-Competitions Tax rulings, Art. N° 90750.*

[8] See ***Isabel Taylor***, *State aid and judicial review: An overview of EU and national case law, 19 November 2020, e-Competitions State aid judicial review, Art. N° 95541.*

[9] Cases T-760/15, *Netherlands v Commission* and T-636/16, *Starbucks and Starbucks Manufacturing EMEA v Commission*, 24 September 2019, §142 – see, e.g. ***Nathaniel Carden, Paul W. Oosterhuis, Niels Baeten, Giorgio Motta, Alex Jupp, James Anderson***, *The EU General Court delivers two judgments providing guidance on the application of the arm's length principle in the context of State aid investigations (Fiat / Starbucks), 24 September 2019, e-Competitions September 2019, Art. N° 91998*, ***Matthew Levitt, David Gabathuler, Daniel Vasbeck, Leigh Hancher, Brian R. Byrne, Ella Adler***, *The EU General Court delivers two judgements clarifying how State aid rules apply to national tax rulings and determines whether a transfer pricing ruling in respect of intra-group transactions confers a selective advantage under the State aid rules (Fiat / Starbucks), 24 September 2019, e-Competitions September 2019, Art. N° 92043*, and ***Daniel Beeton, Philippe-Emmanuel Partsch***, *The EU General Court delivers two judgments providing guidance on the application of the arm's length principle in the context of State aid investigations (Fiat / Starbucks), 24 September 2019, e-Competitions September 2019, Art. N° 92105*; Cases T-816/17, *Luxembourg v Commission* and T-318/18, *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §§112-113; Cases T-516/18, *Luxembourg v Commission* and T-525/18, *Engie, Engie Global LNG Holding Sàrl and Engie Invest International SA v Commission*, 12 May 2021, §§138 – 153. See, e.g. ***General Court of the European Union***, *The EU General Court annuls the Commission's decision declaring the aid granted in favour of a Luxembourg subsidiary of a big tech company incompatible with the internal market (Amazon), 12 May 2021, e-Competitions May 2021, Art. N° 100785*, ***Denis Waelbroeck***, *The EU General Court overrules the Commission's decision which found that Luxembourg granted*

State aid to a big tech company (Amazon), 12 May 2021, e-Competitions May 2021, Art. N° 101200, and ***Phedon Nicolaides***, *The EU General Court annuls the Commission's decision that ordered the recovery of 283€ million from a big tech company back to a country for State aid (Amazon), 12 May 2021, e-Competitions May 2021, Art. N° 101348.*

[***10***] Case C-562/19 P, *Commission v Poland*, 16 March 2021, §26. See ***Francesco Pili, Markus Wellinger***, *The EU Court of Justice confirms shortcomings of the Commission's State aid investigation into progressive turnover-based taxes adopted by Hungary and Poland, 16 March 2021, e-Competitions March 2021, Art. N° 100266.*

[***11***] Case C-596/19 P, *Commission v Hungary*, 16 March 2021, §32. See ***Francesco Pili, Markus Wellinger***, *The EU Court of Justice confirms shortcomings of the Commission's State aid investigation into progressive turnover-based taxes adopted by Hungary and Poland, 16 March 2021, e-Competitions March 2021, Art. N° 100266.*

[***12***] Cases T-516/18, *Luxembourg v Commission* and T-525/18, *Engie, Engie Global LNG Holding Sàrl and Engie Invest International SA v Commission*, 12 May 2021.

[***13***] Cases C-78/08 to C-80/08, *Paint Graphos and others*, 8 September 2011, §49.

[***14***] Cases T-516/18, *Luxembourg v Commission* and T-525/18, *Engie, Engie Global LNG Holding Sàrl and Engie Invest International SA v Commission*, 12 May 2021, §241.

[***15***] Case T-648/19, *Nike European Operations Netherlands and Converse Netherlands v Commission*, 14 July 2021, §130.

[***16***] Case T-648/19, *Nike European Operations Netherlands and Converse Netherlands v Commission*, 14 July 2021, §130 with reference to Greece v Commission.

[***17***] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021. See ***Phedon Nicolaides***, *The EU General Court annuls the Commission's decision that ordered the recovery of 283€ million from a big tech company back to a country for State aid (Amazon), 12 May 2021, e-Competitions May 2021, Art. N° 101348.*

[***18***] On 22 July 2021, the Commission announced that it will appeal the GC's *Amazon* judgment to the European Court of Justice. At the time of writing the case number at the European Court of Justice is not yet known.

[***19***] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §114, with references to Cases C-78/08 to C-80/08 *Paint Graphos and Others*, 8 September 2011 .§46, and to Cases T-760/15 and T-636/16, *Netherlands and Others* v *Commission*, 24 September 2019, §145 and case law cited there.

[***20***] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §§115-116, with references to Case C-522/13, *Ministerio de Defensa and Navantia*, 9 October 2014, §22, and to Cases T-760/15 and T-636/16, *Netherlands and Others* v *Commission*, 24 September 2019, §146.

[21] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §117, with reference to Cases T-760/15 and T-636/16, *Netherlands and Others* v *Commission*, 24 September 2019, §148.

[22] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §118, with reference to Cases T-760/15 and T-636/16, *Netherlands and Others* v *Commission*, 24 September 2019, §149.

[23] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §118.

[24] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §120

[25] Cases T-778/16, *Ireland v Commission*, and T-892/16, *Apple Sales International and Apple Operations Europe v Commission Apple*, 15 July 2020, §214, judgment is currently under appeal to the European Court of Justice and has case number C-465/20 P. See, e.g. ***Dimitrios Kyriazis***, *The EU General Court overturns the Commission's biggest State aid recovery order worth over €13 billion in tax advantages (Apple), 15 July 2020, e-Competitions July 2020, Art. N° 95825*, ***Sean Mernagh, Richard Sultman, François-Charles Laprévote***, *The EU General Court strikes down the Commission's decision ordering Ireland to recover €13 billion from a big tech company for illegal State aid (Apple), 15 July 2020, e-Competitions July 2020, Art. N° 96013*, and ***Denis Waelbroeck, Donald Slater***, *The EU General Court quashes a €13 billion tax ruling fine on a multinational technology company (Apple), 15 July 2020, e-Competitions July 2020, Art. N° 96107*.

[26] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §121, with reference to Cases T-760/15 and T-636/16, *Netherlands and Others* v *Commission*, 24 September 2019, §152. See also Cases T-778/16, *Ireland v Commission*, and T-892/16, *Apple Sales International and Apple Operations Europe v Commission Apple*, 15 July 2020, §216.

[27] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §123, with reference to Cases T-760/15 and T-636/16, *Netherlands and Others* v *Commission*, 24 September 2019, §201.

[28] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §124, with reference to Case C-487/06 P, *British Aggregates* v *Commission*, 22 December 2008, §85.

[29] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §123.

[30] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §122.

[31] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §154.

[32] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §154.

[33] See also ***Aleksei Matiushenko, Nicole Robins***, *The EU General Court annuls the Commission's decision that Ireland had granted illegal State aid of at least €13bn (Apple), 15 July 2020, e-Competitions July 2020, Art. N° 100723.*

[34] See, e.g. ***Nathaniel Carden, Paul W. Oosterhuis, Niels Baeten, Giorgio Motta, Alex Jupp, James Anderson***, *The EU General Court delivers two judgments providing guidance on the application of the arm's length principle in the context of State aid investigations (Fiat / Starbucks), 24 September 2019, e-Competitions September 2019, Art. N° 91998*, ***Matthew Levitt, David Gabathuler, Daniel Vasbeck, Leigh Hancher, Brian R. Byrne, Ella Adler***, *The EU General Court delivers two judgements clarifying how State aid rules apply to national tax rulings and determines whether a transfer pricing ruling in respect of intra-group transactions confers a selective advantage under the State aid rules (Fiat / Starbucks), 24 September 2019, e-Competitions September 2019, Art. N° 92043*, and ***Pauline Van Sande, José Rivas***, *The EU General Court orders Luxembourg and Netherlands to recover millions of euros from two companies on the basis of State aid rules (Fiat / Starbucks), 24 September 2019, e-Competitions September 2019, Art. N° 94038.*

[35] Cases T-516/18, *Luxembourg v Commission* and T-525/18, *Engie, Engie Global LNG Holding Sàrl and Engie Invest International SA v Commission*, 12 May 2021,§§384-478.

[36] See also ***Francesco Pili, Markus Wellinger***, *The EU Court of Justice confirms shortcomings of the Commission's State aid investigation into progressive turnover-based taxes adopted by Hungary and Poland, 16 March 2021, e-Competitions March 2021, Art. N° 100266.*

[37] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §125, with reference to Case T-68/03 *Olympiaki Aeroporia Ypiresies* v *Commission*, 12 September 2007, §34, and to Case T-305/13, *SACE and Sace BT* v *Commission*, 25 June 2015, §95.

[38] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §125, with reference to Cases T-760/15 and T-636/16, *Netherlands and Others* v *Commission*, 24 September 2019, §194, to Case C-290/07 P *Commission* v *Scott*, 2 September 2010, §90, and to Case C-559/12 P *France* v *Commission*, 3 April 2014, §63.

[39] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §126, with reference to Cases T-760/15 and T-636/16, *Netherlands and Others* v *Commission*, 24 September 2019, §196.

[40] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §127, with reference to Cases T-760/15 and T-636/16, *Netherlands and Others* v *Commission*, 24 September 2019, §197.

[41] Cases T-816/17 *Luxembourg v Commission* and T-318/18 *Amazon EU Sàrl and Amazon.com, Inc. v Commission*, 12 May 2021, §129, with reference to Cases T-760/15 and T-636/16, *Netherlands and Others* v *Commission*, 24 September 2019, §199.

[42] See also ***Phedon Nicolaides***, *The EU General Court annuls the Commission's decision that ordered the recovery of 283€ million from a big tech company back to a country for State aid (Amazon), 12 May 2021, e-Competitions May 2021, Art. N° 101348.*

[**43**] Commission Decision (EU) 2016/1699 on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium (OJ 2016 L 260, p. 61), annulled by the GC in Cases T-131/16 and T-263/16 *Belgium and Magnetrol International v Commission*, 14 February 2019 (all other appeals before the GC by other beneficiaries are currently stayed at the GC) – The Commission appealed the GC judgment before the ECJ, where a judgment is expected in the third quarter of 2021, Case C-337/19 P *Commission v Belgium and Magnetrol International NV*. See, e.g. ***Mathieu Vancaillie, Koen Platteau***, *The EU General Court annuls the Commission's State aid decision regarding Belgian excess profits tax ruling system (Magnetrol International), 14 February 2019, e-Competitions February 2019, Art. N° 89684*, ***José Rivas***, *The EU General Court annuls the Commission's State aid decision on Belgian express profit rulings (Magnetrol International), 14 February 2019, e-Competitions February 2019, Art. N° 94660*, and ***Thomas Vinje***, *The EU General Court delivers its first judgment on State aid through tax rulings by annulling the Commission's decision on the Belgian excess profit ruling system (Magnetrol International), 14 February 2019, e-Competitions February 2019, Art. N° 96733*.

[**44**] Commission Decision (EU) 2019/1352 of 2 April 2019 on the State aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption (OJ 2019 L 216, p.1), appeals pending before the GC. The appeal by the UK is known as case T-363/19. See also ***Kate Habershon, Neil McKnight, Leonidas Theodosiou***, *The EU Commission concludes that aspects of UK controlled foreign company rules constitute unlawful State aid, 2 April 2019, e-Competitions April 2019, Art. N° 96732*.

[**45**] Opinion Advocate General Kokott in Case C-337/19 P *Commission v Belgium and Magnetrol International NV*, 3 December 2020. See ***European Court of Justice***, *The EU Court of Justice AG Kokott thinks the Commission is right to consider that the Belgian practice of making downward adjustments to the profits of undertakings forming part of multinational groups constitutes an aid scheme (Magnetrol International), 3 December 2020, e-Competitions December 2020, Art. N° 98223*, ***Francesco Pili, Markus Wellinger***, *The EU Court of Justice AG Kokott suggests annulling the judgment of the General Court and provides guidance on the concept of "aid scheme" in cases of tax rulings (Magnetrol International), 3 December 2020, e-Competitions December 2020, Art. N° 98581*, and ***Álvaro López Usatorre, Paula Pernas Castrillo***, *The EU Court of Justice AG Kokott discusses the criteria to consider consistent administrative practices as aid schemes under Article 1(d) of Regulation 2015/1589 (Magnetrol International), 3 December 2020, e-Competitions December 2020, Art. N° 100423*.

[**46**] Case T-648/19, *Nike European Operations Netherlands and Converse Netherlands v Commission*, 14 July 2021, § 104; with reference by analogy to Cases C-71/09 P, C-73/09 P and C-76/09 P, *Comitato 'Venezia vuole vivere' and Others v Commission*, 9 June 2011, §63. See ***Napoleon Ruiz García***, *The EU Court of Justice upholds the General Court's decision addressing the issue of the admissibility of action in state aid cases under the Plaumann test (Comitato Venezia vuole vivere), 9 June 2011, e-Competitions June 2011, Art. N° 37168*.

[**47**] Opinion Advocate General Kokott in Case C-337/19 P *Commission v Belgium and Magnetrol International NV*, 3 December 2020.

[**48**] Case C-362/19 P *Commission v Fútbol Club Barcelona*, 4 March 2021. See ***Phedon Nicolaides***, *The EU Court of Justice decides that the various components of a tax system form an indivisible whole and the effect they produce differ (Fútbol Club Barcelona), 4 March 2021, e-Competitions March 2021, Art. N° 100055*, ***Markus Wellinger, Francesco Pili***, *The EU Court of Justice further relaxes the standards of review of "aid schemes" and annuls the General Court's judgment on Spanish football clubs (Fútbol Club Barcelona), 4 March 2021, e-Competitions March 2021, Art. N° 100258*, and ***Markus Wellinger, Francesco Pili***, *The EU*

Court of Justice further relaxes the standards of review of "aid schemes" and annuls the General Court's judgment on Spanish football clubs (Fútbol Club Barcelona), 4 March 2021, e-Competitions March 2021, Art. N° 100258.

[**49**] Case C-362/19 P *Commission v Fútbol Club Barcelona*, 4 March 2021, §65

[**50**] Case C-362/19 P *Commission v Fútbol Club Barcelona*, 4 March 2021, §65

[**51**] Case C-362/19 P *Commission v Fútbol Club Barcelona*, 4 March 2021, §76

[**52**] Case C-362/19 P *Commission v Fútbol Club Barcelona*, 4 March 2021, §85

[**53**] Case C-362/19 P *Commission v Fútbol Club Barcelona*, 4 March 2021, §87.

[**54**] Case C-362/19 P *Commission v Fútbol Club Barcelona*, 4 March 2021, §101.

[**55**] Case C-465/20 P, *Commission v Ireland and Others*.

[**56**] Case C-885/19 P, *Fiat Chrysler Finance Europe v Commission*.

[**57**] On 22 July 2021, the Commission announced that it will appeal the GC's *Amazon* judgment to the European Court of Justice. At the time of writing the case number at the European Court of Justice is not yet known.

[**58**] Case C-337/19 P *Commission v Belgium and Magnetrol International NV*.