Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 25 May 2023[1]

Case C-831/21 P

Fachverband Spielhallen eV,
LM
v

European Commission

(Appeal – State aid – Concept of aid – Advantage – Selectivity – Tax treatment of operators of public casinos in Germany – Rejection of a complaint by the Commission)

1. The Latin brocard '*Simul stabunt aut simul cadent*' ('They will either stand together or fall together') is attributed to Pope Pius XI, pronounced during negotiations undertaken to settle relations between the Roman Catholic Church and the former Kingdom of Italy and culminating in the signature, on 11 February 1929, of the Lateran pacts and the Concordat. It reflects the determination of the Supreme Pontiff to preclude irrevocability being exclusively ascribed to the Lateran pacts and, accordingly, the fate of those two agreements from being connected.

2. In the present case, the Court is asked, in particular, whether such a link exists between advantage and selectivity – conditions of the concept of 'State aid' – in the field of taxation. If that were the case, it would follow that a plea raised before the General Court challenging the European Commission's assessment with regard to compliance with one of those conditions must necessarily be regarded as also relating to the other.

3. By their appeal, Fachverband Spielhallen eV and LM ('the appellants') seek to have set aside the order of the General Court of the European Union of 22 October 2021, *Fachverband Spielhallen and LM* v *Commission* (T-510/20, 'the order under appeal', not published), by which the General Court dismissed their action for the annulment of Commission Decision C(2019) 8819 final of 9 December 2019 on State aid SA.44944 (2019/C), (ex 2019/FC) – Tax treatment of operators of public casinos in Germany and SA.53552 (2019/C) (ex 2019/FC) – Alleged guarantee for operators of public casinos in Germany (OJ 2020 C 187, p. 80; 'the contested decision'). In particular, the appellants challenge the General Court's decision not to examine their line of argument on the ground that it did not concern the Commission's finding relating to the absence of an advantage within the meaning of Article 107(1) TFEU.

[1] Original language: French.

Background to the dispute and the contested decision

4. On 22 March 2016, the appellants, Fachverband Spielhallen eV, a trade association with 88 operators of gaming machines, and LM, an operator of gaming machines, lodged three complaints with the Commission concerning the tax treatment of operators of public casinos in Germany.

5. The third complaint related, more specifically, to the Spielbank-Gesetz NRW (Law on public casinos in Land North Rhine-Westphalia; 'the Law on public casinos'), which was in force in Land North Rhine-Westphalia (Germany) until its replacement in 2020. Pursuant to that law, Westdeutsche Spielbanken GmbH & Co. KG ('WestSpiel') was the sole public casino licensee in Land North Rhine-Westphalia.

6. In accordance with the Law on public casinos, the revenue generated by casinos was subject to two different tax systems. On the one hand, gambling-related income was subject to a specific tax system (namely the casino tax). On the other, non-gambling-related income, such as restaurant and catering revenue, was subject to a normal tax system (for example, income or corporation tax and trade tax; 'the normal tax system').

7. In addition, Paragraph 14 of the Law on public casinos provided that 75% of the annual profits declared by operators of public casinos – whether or not gambling-related income – should be paid to Land North Rhine-Westphalia. In the event that the remaining quarter exceeded 7% of the sum of share capital, reserves and mutual funds, that paragraph provided that all of the profits should be paid to Land North Rhine-Westphalia ('levy on the profits').

8. The levy on the profits, up to the amount deriving from non-gambling related income, was nevertheless deductible from the tax bases for the income or corporation tax and the trade tax in respect of 'the costs associated with commercial transactions'. It is that deductibility ('the deductibility of the levy on the profits' or 'the contested measure') that the appellants challenged in their third complaint on the ground that it constitutes State aid.

9. After corresponding with the appellants, the Commission considered, on 9 December 2019, that the contested measure did not confer any selective advantage or, therefore, any aid and it thus decided, by the contested decision, not to initiate the formal investigation procedure provided for in Article 108(2) TFEU in relation thereto.

10. In the contested decision, the Commission found that the non-gambling related income of the operators of public casinos was subject, on the one hand, to the normal tax system and, on the other, to the levy on the profits, which it referred to as a 'specific tax'.

11. The Commission noted that the deductibility of the levy on the profits from the tax bases for the corporation tax and the trade tax was not derived from a specific provision, but from the application of general taxation rules under the normal tax system, according to which taxes are calculated on the basis of net profits, after the deduction of 'the costs associated with commercial transactions', such as, in the present case, the levy on the profits. It followed, according to the Commission, that the deductibility of the levy on the profits confers no selective advantage.

12. Following the contested decision, the Commission continued to analyse the contested measure in the light of the arguments put forward by the appellants during the preliminary examination stage.

13. The Commission observed, in the first place, that, by their arguments, the appellants implicitly maintained that the levy on the profits amounted to a taxation on profits, which were not deductible under the general taxation rules of the normal tax system, in particular in accordance with Paragraph 4(5b) of the Einkommensteuergesetz (Law on income tax). By contrast, according to the Commission, the levy on the profits could be regarded as a special tax on the profits. In that regard, it submitted that Paragraph 4(5b) of the Law on income tax ruled out the qualification of a deductible occupational charge in respect only of the trade tax, and not in respect of all the taxes on the profits. According to the Commission, there is no provision that precludes, in general terms, the deductibility of a specific tax on the profits.

14. In the second place, the Commission responded to an argument that the appellants based on Paragraph 10(2) of the Körperschaftsteuergesetz (Law on corporation tax), according to which income tax and other personal taxes were not deductible for the purposes of establishing the tax base of the corporation tax. In particular, it pointed out that that provision related to general taxes on the profits and that there was no indication that it also applied to an additional special tax, such as the levy on the profits paid only by operators of public casinos and the tax base of which did not correspond exactly to the income generated by the activity of those operators.

15. In the third place, and in response to another argument put forward by the appellants, alleging that dividends were not deductible from the tax bases of the trade tax and income tax in accordance with general taxation rules under the normal tax system, the Commission argued that the levy on the profits was not a dividend.

16. In the light of the foregoing, the Commission took the view, in the contested decision, that the deductibility of the levy on the profits was consistent with the general rule of deductibility of the costs associated with commercial transactions and that it thus conferred no selective advantage.

17. Lastly, the Commission noted, in paragraph 159 of the contested decision, that, so far as concerns, more specifically, the criterion of advantage, other economic operators, and in particular operators of gaming machines, were not subject to the levy on the profits. Therefore, the fact that the amount of that specific tax was deducted from the tax base of other taxes could not confer any advantage on WestSpiel over the normal tax system.

18. In that regard, the Commission argued that, in 2014, the levy on the profits amounted to EUR 82.02 million and that the rate of trade and corporation taxes was 17.7% and 15.6% respectively. It therefore pointed out that the deductibility of that levy, within the limits of Paragraph 14 of the Law on public casinos, precluded the application of those rates to the amount in question. Consequently, the total sum payable by WestSpiel by way of trade and corporation taxes was reduced by EUR 27.3 million. However, the overall tax burden that WestSpiel had to bear was increased, at the same time, by a much higher amount; that is to say EUR 82.02 million corresponding to the levy on the profits.

19. Accordingly, the Commission concluded, in the contested decision, that the alleged advantage resulting from the possibility for an operator such as WestSpiel to deduct in part the levy on the profits from the taxable bases of corporation tax and trade tax was in any event outweighed by the heavier burden associated with the payment of that levy, which was specific to the operators of public casinos and always much higher than those two taxes.

20. In footnote 87 to the contested decision, the Commission stated that, in so far as corporation tax and trade tax are proportional and personal income tax is based on a progressive scale, the advantage conferred on operators of public casinos by the reduction in the tax base in the amount of part of the levy on the profits was less than the disadvantage resulting from the obligation on those operators to pay the levy.

The procedure before the General Court and the order under appeal

21. By application lodged at the General Court Registry on 14 August 2020, the appellants brought an action for annulment of the contested decision.

22. In support of their action, they relied on a single plea in law alleging infringement of their procedural rights on account of the Commission's refusal to initiate the formal investigation procedure provided for in Article 108(2) TFEU, since the Commission was not able, at the end of the preliminary examination stage, to overcome all the serious difficulties which, according to the appellants, it had encountered.

23. According to the General Court, that single plea in law consisted, in essence, of five parts.

24. By the first part, the appellants maintained that the Commission was wrong to assume that they considered the levy on the profits to be a tax. By the second part, they claimed that the Commission had categorisedthe levy on the profits as a 'special tax' by wrongly considering that the way national law categorises a measure is not decisive. By the third part, they disputed the criteria used by the Commission to categorise the levy on the profits as a tax. By the fourth part, they claimed, in a series of arguments, that, even if the levy on the profits constituted a tax, it could not have been deducted from the tax bases for income or corporation and trade tax. By the fifth part, they put forward arguments directed against the comparison, set out in footnote 77 to the contested decision, between the levy on the profits and the special payments imposed on undertakings, for example for anticompetitive behaviour, which are deductible under German law.

25. In paragraphs 48 and 57 of the order under appeal, the General Court found that the appellants exclusively criticised the alleged shortcomings of the contested decision in that it had denied the selective nature of the contested measure, and to the extent that, in that decision, the Commission had not carried out an overall examination of the criteria for the existence of advantage or selectivity. By contrast, the Commission sought to demonstrate, on the one hand, in response to the appellants' arguments, that the alleged selectivity was lacking in the present case and, on the other and on a separate note, that there was no economic advantage, irrespective of any selectivity.

26. In paragraph 58 of the order under appeal, the General Court observed that, in particular, the appellants had not disputed the finding, set out in recital 159 of and footnote 87 to the contested decision, that the deductibility of the levy on the profits was not such as to confer an advantage on a public casino operator such as WestSpiel, since the burden on that operator in terms of the levy on the profits is inevitably always much greater than the tax that would have been due on the amount corresponding to that levy.

27. In paragraphs 60 to 66 of the order under appeal, the General Court nevertheless examined the relevance, for the purposes of establishing the existence of an advantage resulting from the deductibility of the levy on the profits, of annexes to the reply describing different 'tax scenarios' based on accounting data concerning the financial years 2014 and 2019. In that regard, it held that the information appearing in those annexes could not be taken into account for the purposes of establishing the existence of that advantage and that it was, in any event, out of time and inadmissible.

28. After recalling, in paragraph 67 of the order under appeal, that the existence of an advantage must be assessed independently of the condition relating to selectivity, the General Court found in paragraph 68 of that order that the appellants were manifestly not justified in maintaining that the contested decision infringed their procedural rights, in so far as they had not established that the assessment of the information and evidence before the Commission, during the preliminary examination stage in respect of the contested measure, should have given rise to doubts and serious difficulties as to whether the deductibility of the levy on the profits constituted an advantage for WestSpiel.

29. Lastly, the General Court concluded, in paragraph 71 of the order under appeal, that the single plea in law and, therefore, the action as a whole had to be dismissed as manifestly lacking any foundation in law.

Forms of order sought by the parties:

30. The appellants claim that the Court should:

– set aside the order under appeal;

– annul the contested decision; and

– order the Commission to pay the costs.

31. The Commission contends that the Court should:

– dismiss the appeal; and

– order the appellants to pay the costs.

Appeal

Summary of the arguments of the parties

32. In support of their appeal, the appellants put forward a single ground of appeal alleging, in essence, that, by dismissing their action on the ground that the contested measure is not such as to confer an advantage, the General Court erred in law in applying the conditions that must be met for a measure to be considered State aid within the meaning of Article 107(1) TFEU. If it had not erred in law and thus found there to be an advantage, the General Court should also have assessed whether that advantage is materially selective and might thus have concluded that it is.

33. As the General Court acknowledged, moreover, in paragraph 52 of the order under appeal, the conditions relating to advantage and selectivity must be examined together.

34. In that regard, the appellants note that, according to settled case-law, a national tax measure can be considered selective only on the basis of a three-step analysis, the first step of which involves identifying the 'normal' tax system applicable in the Member State concerned. It follows from that three-step method for examining the condition of selectivity that, in order to draw the conclusion that there was no advantage, the General Court should necessarily have started by defining the 'normal' tax system.

35. According to the appellants, a contentious issue in the proceedings at first instance was specifically whether, as the Commission maintained in paragraph 159 of the contested decision, the levy on the profits provided for in Paragraph 14 of the Law on public casinos is a 'specific tax' which is deductible from the tax bases for the income or corporation tax and the trade tax in accordance with general taxation rules under German law.

36. In the order under appeal, the General Court did not address, in its legal assessment, that point of contention and it therefore adopted the definition of the 'normal' tax system set out in paragraph 159 of the contested decision.

37. If the 'specific tax' status were incorrect and if, on the contrary, as the appellants submitted before the General Court, the levy on the profits constituted a transfer or distribution of profits, the deductibility of that levy would amount to a derogation from the 'normal' tax system and the contested measure would thus be selective.

38. The appellants draw the conclusion that, in the order under appeal, the General Court misapplied the concept of 'State aid' referred to in Article 107(1) TFEU by denying the existence of an advantage without having first identified the 'normal' tax system independently of the Commission's assessment in the contested decision, such identification being an essential step in establishing whether there is an advantage.

39. The Commission contends that the single ground of appeal is ineffective and, in any event, totally unfounded.

Assessment

40. It is necessary at the outset briefly to address the Commission's argument that the single ground of appeal is based on an incorrect understanding of the order under appeal.

41. In that regard, it is observed that the reason for the General Court's dismissal of the action is not, as the appellants submit, the lack of advantage conferred by the contested measure as found in the contested decision. As is apparent, in particular, from paragraph 58 of the order under appeal, that dismissal is justified by the fact that the appellants did not put forward, in their action, any plea alleging there to be such an advantage. According to the General Court, they merely challenged the finding that the measure is not selective.

42. The General Court held, in essence, that, even if the condition of selectivity were met, as the appellants argued before the General Court, the contested measure cannot constitute State aid, within the meaning of Article 107(1) TFEU, in the absence of any advantage for the recipients. Consequently, the appellants failed to demonstrate that the Commission's negative conclusion refuting the existence of State aid was incorrect.

43. It is, however, apparent from the appeal that the appellants criticise the General Court for failing to examine their arguments concerning the selectivity of the contested measure. If it had examined, and necessarily upheld, those arguments, the General Court would also have had to find there to be an advantage for the recipients of the measure at issue. The conditions relating to advantage and selectivity in tax matters both depend, according to the appellants, on the fact that effective taxation results from a derogation from the 'normal' tax system and must therefore be examined together.

44. The question whether those two conditions must be assessed together where the contested measure is of a fiscal nature is at the heart of the present case.

45. To that end, it is important to consider the premiss on which the General Court's reasoning set out in paragraphs 49 to 53 of the order under appeal is based.

46. First of all, the General Court stated that the requirement of selectivity established by Article 107(1) TFEU 'must be clearly distinguished from the concurrent identification of an economic advantage' in so far as, where the Commission has detected the presence of an advantage, it is also required to establish that that advantage specifically benefits one or more undertakings.

47. Next, the General Court has acknowledged that, in tax matters, the conditions relating to advantage and selectivity 'may be examined together' in so far as, for those two conditions to be satisfied, 'it must be shown that the tax measure at issue results in a reduction in the amount of tax which would normally have been payable by the recipient of the measure under the ordinary tax system', as was the case in the judgment of 12 May 2021, *Luxembourg and Others* v *Commission* (T-516/18 and T-525/18, EU:T:2021:251).

48. The General Court considered, on the one hand, that this does not mean, however, that the existence of an advantage 'can be ignored', and, on the other, that the factual context of the present case differs from that which gave rise to the judgment in *Luxembourg* v *Commission*.[2]

49. The reasoning followed by the General Court in that part of the order under appeal can be summarised, in my view, as follows. First, the General Court seems to consider that, *according to a general rule* which also applies in tax matters, the assessment of the existence of an advantage cannot overlap with that of selectivity. Second, it seems to indicate that, *in some cases relating to taxation*, those two conditions may be assessed together on the ground that for both conditions to be satisfied, it must be verified whether the contested measure has the effect of mitigating the tax burden that the recipient would normally have to bear.

50. That view of the relationship between examining the conditions relating to advantage and selectivity in tax matters is, in my opinion, incorrect.

[2] Judgment of 12 May 2021 (T-516/18 and T-525/18, EU:T:2021:251).

51. It should be noted at the outset that, in order to categorise such a measure as selective, the Commission must, according to settled case-law, carry out a three-step analysis. In particular, the Commission must, as a first step, by identifying the reference framework, that is the 'normal' tax system applicable in the Member State concerned, and by verifying, as a second step, whether the tax measure differentiates between economic operators who, in the light of the objective pursued by the reference framework are in a comparable factual and legal situation. Should this be the case, the Member State concerned only has the possibility of demonstrating, as a third step, that that measure is justified on the ground that it flows from the nature or general structure of that framework In other words, the question whether the tax measure examined is selective in nature depends on the prior assessment of the reference framework, which implies that an error made in that determination necessarily vitiates the whole of the analysis of the condition relating to selectivity. [3]

52. In the context of the present proceedings, it should be noted that, again in accordance with the case-law, the determination of the reference framework for the purposes of assessing selectivity 'is of particular importance in the case of [national] tax measures, since the existence of an economic advantage for the purposes of Article 107(1) TFEU may be established only when compared with "normal" taxation'. [4]

53. In so far as the Court of Justice thus clearly establishes a link between the concept of 'advantage' and that of 'selectivity', [5] that determination constitutes a necessary prerequisite for the purposes of assessing not only the selective nature of a tax measure, but also the existence of an advantage. As with the assessment carried out in order to identify any unjustified differences of treatment for the purpose of the assessment of selectivity in the context of taxation, the counterfactual assessment aimed at detecting the existence of an advantage is made having regard to the 'normal' tax system. Accordingly, the existence of a reduction in the tax burden of undertakings benefiting from the tax measure at issue necessarily implies that the conditions of selectivity and advantage have both been met.

54. It follows that the examination of those two conditions must be carried out together in the context of taxation, *with the sole exception being* where an aid scheme confers an advantage the granting of which depends on the broad discretionary powers of the tax administration with regard to its beneficiaries and its conditions. In that situation, the Court of Justice has very recently confirmed that the determination of the reference framework is not necessary in order to assess the condition of selectivity, since the exercise of that discretionary power necessarily favours the beneficiaries of the scheme over other undertakings which are in a comparable factual and legal situation. [6] Clearly, the application of the aid scheme at issue in the present case is in no way conditional on the exercise of that discretionary power.

55. Furthermore, the Court of Justice has stated that the determination of the reference framework must follow from an objective examination of the content, the structure and the specific effects of the applicable rules under the national law of each Member State. Outside the

[3] Judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission* (C-885/19 P and C-898/19 P, 'the judgment in *Fiat Chrysler Finance Europe*', EU:C:2022:859, paragraph 71 and the case-law cited).

[4] Judgment in *Fiat Chrysler Finance Europe* (paragraph 69 and the case-law cited).

[5] As I pointed out in point 54 of my Opinion in *Fiat Chrysler Finance Europe* v *Commission* (C-885/19 P, EU:C:2021:1028).

[6] See, inter alia, judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60, paragraphs 48 and 68).

spheres in which EU tax law has been harmonised, the determination of characteristics constituting the tax, which define, in principle, the reference framework, falls within the discretion of the Member States.[7]

56. In the present case, it is common ground that, as the General Court essentially found in paragraphs 47 and 48 of the order under appeal, the appellants expressly criticised in their written pleadings at first instance the accuracy of the Commission's assessment that the contested measure is not selective, and referred on several occasions to the 'normal' tax system to demonstrate that that measure amounts to a derogation from general taxation rules under the normal tax system applicable in the Member State concerned, which form the basis of the assessment of selectivity.

57. In essence, the appellants reiterated before the General Court the argument, already put forward during the preliminary examination stage and rejected by the Commission in the contested decision, that the deductibility of the levy on the profits from the tax bases for the income or corporation tax and the trade tax derogates from the 'normal' tax system applicable in Germany. More specifically, the appellants maintained that, according to general taxation rules under the 'normal' tax system, that levy was not deductible from the aforementioned tax bases on the ground that it constituted a transfer or distribution of profits, and not a 'special tax', as it was characterised in the contested decision, and that, even if that levy constituted a tax, it could not be deducted by way of 'the costs associated with commercial transactions'.

58. In paragraphs 10 to 12 of the order under appeal, the General Court reproduced the reasoning by which, in the contested decision, the Commission had refuted that argument on the basis of an interpretation of German law, in particular Paragraph 4(5b) of the Law on income tax and Paragraph 10(2) of the Law on corporation tax.[8] However, it did not examine the appellants' arguments seeking to challenge the accuracy of such an interpretation in the light of certain principles and provisions of German tax law because such arguments referred only to the selective nature of the contested measure.

59. More specifically, the General Court noted, in paragraph 48 of the order under appeal, that the appellants had criticised the contested decision only to the extent that that decision had denied the selective nature of the contested measure, and, in paragraph 58 of that order, that those appellants had not challenged the finding, set out in paragraph 159 of and footnote 87 to the contested decision, that the contested measure was not such as to confer an advantage.

60. The approach adopted by the General Court is, in my opinion, in contradiction with the case-law set out in points 51 to 55 of this Opinion. According to that case-law, the examination that the Commission must carry out in order to establish the selectivity of a fiscal aid scheme *coincides*, so far as concerns the determination of the reference framework (or 'normal' tax system), with the examination that must be carried out in order to verify whether the contested measure has the effect of conferring an advantage on its beneficiaries.

7 Judgment in *Fiat Chrysler Finance Europe* (paragraphs 72 and 73 and the case-law cited).

8 See paragraphs 155 to 157 of the contested decision.

61. That reading cannot be invalidated by the arguments put forward by the Commission in its written pleadings, which refer to a conceptual difference between the conditions of advantage and selectivity [9] without attempting to explain, in particular by reference to the Court's case-law, the reason why those conditions must, in a case such as the present one, be assessed separately.

62. Moreover, I would add that, if the General Court had examined the appellants' arguments criticising the Commission's interpretation of German tax law in the contested decision, it might have considered, as the case may be, that the determination of the reference framework constituting the 'normal' tax system, as is apparent from that decision, was incorrect. Such an error would necessarily have vitiated not only the assessment of the condition of selectivity in its entirety, but also the assessment of the condition of advantage, since, as stated above, the 'normal' tax system is the comparator used in the counterfactual assessment to determine whether any economic advantage has been granted. Accordingly, the conclusion drawn by the General Court, in paragraph 68 of the order under appeal, that the appellants had failed to demonstrate that the assessment of the information and evidence before the Commission should have given rise to doubts and serious difficulties as to whether the deductibility of the levy on the profits constituted an advantage within the meaning of Article 107(1) TFEU, and that they were therefore manifestly unfounded in claiming that the contested decision infringed their procedural rights, would not have been justified.

63. In the light of the foregoing, I take the view that the General Court erred in law in declaring the action brought by the appellants to be manifestly unfounded.

64. That conclusion cannot run counter, as claimed in essence by the Commission in its written pleadings, to the principle *ne ultra petita*, according to which the power of the General Court to adopt a decision is limited to the questions submitted to it by the parties. According to the Commission, the General Court could not examine the question relating to existence of an advantage without disregarding that principle, since the criticisms put forward before the General Court by the appellants directed against the determination of the reference framework formally targeted the *sole* finding of non-selectivity in respect of the contested measure.

65. I am convinced that that argument confuses the obligation on the part of the General Court to keep to the subject matter of the action (*petitum*) with the obligation, also on the General Court, to respond to the pleas raised by applying all the relevant rules of law. It is apparent, moreover, from settled case-law that, although the EU judicature must rule only on the heads of claim put forward by the parties, whose role it is to define the framework of the dispute, it must, beyond the arguments put forward by the parties, apply the rules of law relevant to the outcome of the dispute to the facts before it. If it were otherwise, it might be forced to base its decisions on erroneous legal considerations. [10]

66. Irrespective of the fact that the appellants' criticisms referred only to the assessment of the condition of selectivity in the contested decision, the General Court was thus required to consider, by applying the case-law that has been crystallised by the judgment in *Fiat Chrysler*

[9] To that end, the Commission cites, by way of example, an individual measure, which is presumed to be selective without necessarily granting an advantage, and a measure justified by the nature or general scheme of the reference framework, which is not selective but may confer an advantage on its beneficiary. In that regard, it suffices to note, on the one hand, that the contested measure is an aid scheme and, on the other, that it is for the Member States to provide evidence of justification by the nature or general scheme of the reference framework and it is not therefore an essential part of the Commission's assessment of selectivity (see judgment of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202, paragraph 38 and the case-law cited)).

[10] See judgment of 20 January 2021, *Commission* v *Printeos* (C-301/19 P, EU:C:2021:39, paragraph 58 and the case-law cited).

Finance Europe, that challenging the determination of the reference framework necessarily involves the examination of the existence of an advantage, in addition to the examination of the selective nature of the contested measure.

67. It also follows from those considerations that the General Court should have ruled on the arguments put forward by the appellants, even if they did not call into question the finding, set out in paragraph 159 of and footnote 87 to the contested decision, according to which the contested measure was not such as to confer an advantage on its beneficiaries, as the General Court noted in paragraph 48 of the order under appeal.

68. For the sake of completeness, one further clarification appears necessary to me.

69. I note that, in that paragraph 159 and footnote 87, the Commission maintained that the deductibility of the levy on the profits is not such as to grant an advantage to an operator of a public casino such as WestSpiel. It compared the amount paid in 2014 by way of (i) the levy on profits (EUR 82.02 million) with (ii) the amount of that levy deducted from the income tax base and or corporation tax base together with the trade tax (EUR 27.3 million) and accordingly concluded that the economic benefit result from that deduction was exceeded by the burden, always greater, linked to the payment of that levy and specifically on operators of public casinos.

70. The basis of that interpretation lies in the reading that the Commission proposes, and to which the General Court implicitly subscribes, of the judgment in *Commission* v *Fútbol Club Barcelona*.[11] According to paragraph 63 of that judgment, the Commission must, for the purposes of examining the various constituent elements of a measure likely to constitute State aid, consider all points of law or fact which are attached to that measure, in particular, the profits and costs resulting therefrom.

71. In my view, that principle is manifestly not relevant in the present case. It follows, it seems to me, from that judgment that, in order to verify whether the conditions of the concept of 'State aid', including the condition of advantage, are met, the profits and costs resulting from a national tax measure must be taken into account as *necessary consequences of the tax measure in question*.

72. In other words, those profits and costs must result from a measure whose effect of providing tax relief to the beneficiaries in comparison to 'normal taxation' is under discussion, and not from the combination of that measure and the tax rules constituting the 'normal' tax system.

73. In the present case, it is the profits and costs resulting from the deductibility of the levy on the profits which must be taken into account in examining whether there is an advantage, and not the combination of that measure and the levy on the profits itself, there being no doubt that the latter falls within the 'normal' tax system.

74. I am therefore convinced that, if it were endorsed, the interpretation set out in point 69 of the present opinion would be such as to reverse the logic underlying State aid control in the context of taxation, in so far as it would allow the Member States to preclude any tax measure from categorisations State aid by demonstrating that the tax burden payable by the undertaking concerned is greater than the economic benefit obtained by that undertaking pursuant to that measure.

[11] Judgment of 4 March 2021 (C-362/19 P, EU:C:2021:169).

75. At this stage, it should be borne in mind that, pursuant to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, where the Court of Justice sets aside the decision of the General Court, as proposed in this Opinion, it may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

76. I take the view that, in the present case, the Court of Justice should refer the present case back to the General Court for it to examine the single plea in law put forward by the appellants before it.

77. As has already been stated, that plea sought to challenge, in the light of certain principles and provisions of German tax law, the accuracy of the interpretation of national law provided by the Commission in the context of the determination of the reference framework constituting the 'normal' tax system. It follows from the Court's case-law that the review of the interpretation of national law adopted by the Commission in that context constitutes a *finding of fact* and the Court thus has jurisdiction, in the context of an appeal, only to determine whether the national law was distorted.[12] However, I note that no argument seeking a declaration of distortion has been raised by the appellants in the context of the present appeal.

Conclusion

78. In the light of the foregoing considerations, I propose that the Court of Justice should set aside the order of the General Court of the European Union of 22 October 2021, *Fachverband Spielhallen and LM* v *Commission* (T-510/20) and refer the case back to the General Court for it to rule on the single plea in law raised before it by Fachverband Spielhallen eV and LM.

[12] Judgment in *Fiat Chrysler Finance Europe*, paragraph 82 and the case-law cited.