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)

COMMISSION DECISION (EU) 2019/421

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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[1] 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')[2] regarding its tax ruling practice in relation to the Engie group (then GDF Suez)[3]. 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')[4] and GDF Suez Treasury Management S.à.r.l. ('GSTM')[5]. 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, respectively,

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LNG Supply and GSTM. In both cases, the transfers were financed by interest-free mandatorily convertible loans denominated as 'ZORA'[6] (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')[7].

(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*[8]. 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.

(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)[(9)]. Engie is headquartered in France. Engie S.A. is listed on the Paris, Brussels and Luxembourg stock exchanges[(10)].

(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[(11)] 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[(12)]. In 2016, the revenues of Engie amounted to EUR 66,6 billion[(13)]. Of the total revenues recorded by the group, EUR 52,2 billion were realised in Europe[(14)]. In 2016, 67,3 % of the group's earnings before interest, tax, depreciation and amortisation (EBITDA) were generated in Europe[(15)].

(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')[(16)] 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[(17)]. 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[(18)].

(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

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pooling activity […]. The cash pooling activity of GSTM generally varies between EUR [2-7] and [7-12] EUR 10 billion'[19].

(21) GDF Suez LNG Holding S.à.r.l. ('LNG Holding')[20] 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[21]. LNG Holding is wholly-owned by CEF.

(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[22]. In 2018, Engie announced its intention to sell parts of its LNG business, including LNG Supply, to Total S.A.[23].

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[24] 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')[25].

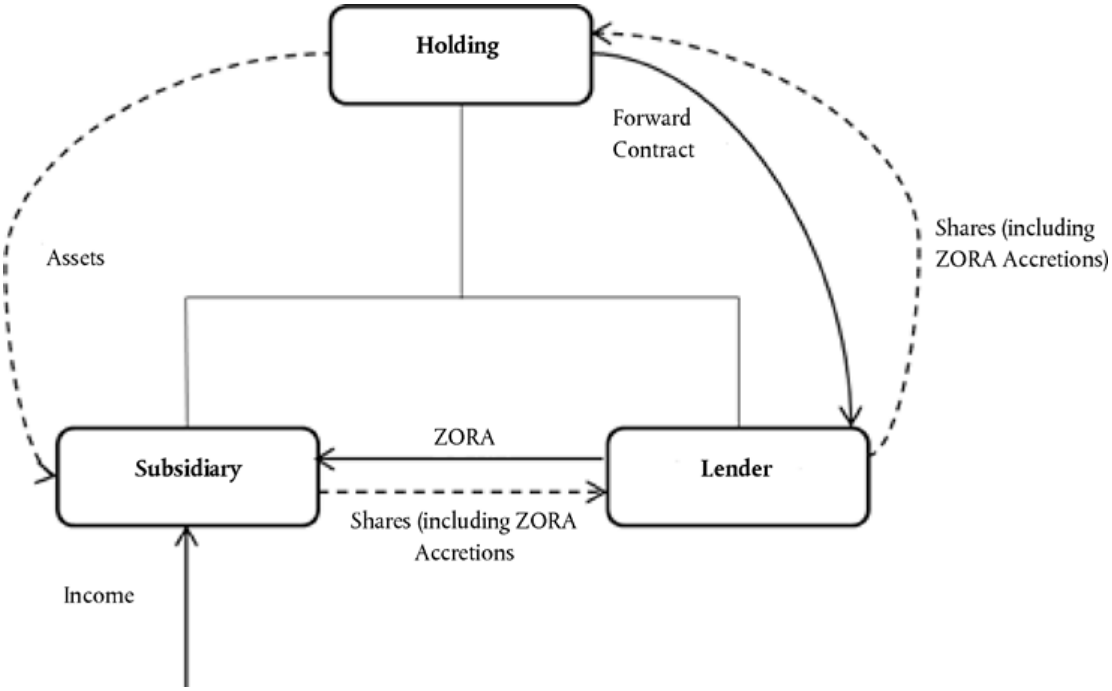
(25) In turn, the intermediary entity simultaneously finances this loan by means of a Prepaid Forward Sale Contract (the Forward Contract) entered into with a holding also resident in Luxembourg which is the sole shareholder of both the subsidiary and the intermediary entity. Under the Forward Contract, 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[26], 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[27]. The final result is that the ZORA Accretions are deducted at the level of the subsidiary and 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[28].

(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')[29] 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').