

APPENDIX

Arguments relied on by the European Commission (EC)	Judgment of the General Court
The EC has the competence to classify national tax measures as State aid within the meaning of Article 107(1) TFEU, by assessing whether the tax measure establishes an advantage when compared with 'normal taxation'	
Article 107(1) TFEU allows the EC to check whether intra-group pricing corresponds to pricing under market conditions	
The OECD TP Guidelines have practical significance in the interpretation of issues relating to transfer pricing	
Primary line of reasoning	
The EC is entitled to base its assessments not only on the 1995 OECD TP Guidelines , but also on the 2010 and 2017 versions of those guidelines, although these versions were published after the relevant period to which the contested tax ruling applies	
SCS should have been chosen as the tested party for applying the TNMM	
Assuming that SCS had to be the tested party, SCS' remuneration should have consisted of (i) the re-charge of the pass-through costs it bore in relation to the licensing agreements and (ii) an arm's length mark-up of 5% on the costs of external services (maintenance costs) related to the intangibles	
<i>The EC did not succeed in showing that the Luxembourg tax authorities granted an advantage to OpCo for the purposes of Article 107(1) TFEU</i>	
Subsidiary line of reasoning	
It was incorrect to use the TNMM to determine the amount of the royalty and remuneration for OpCo; the profit split method on the basis of the contribution analysis should have been used instead	
Assuming the application of the TNMM, the choice of a profit level indicator based on operating expenses (Berry ratio) was inappropriate, whereas mark-up on total costs should have been used instead	
The inclusion of a ceiling mechanism in the transfer pricing arrangement was inappropriate	
The inclusion of a ceiling mechanism in the transfer pricing arrangement conferred an advantage to OpCo that led to a reduction in its taxable income	
<i>The EC found, at most, a methodological error in the calculation of OpCo's remuneration, without succeeding in showing that that error had the effect of artificially reducing OpCo's remuneration to such an extent that the level of remuneration could not have occurred under market conditions</i>	
Conclusion	
By issuing the contested tax ruling, the Luxembourg tax authorities granted an advantage to OpCo for the purposes of Article 107(1) TFEU	