JUDGMENT OF THE COURT (Second Chamber)

15 September 2022 (*)

(Reference for a preliminary ruling – State aid – Aid schemes implemented by the Government of Gibraltar concerning corporate income tax – Decision (EU) 2019/700 – Non-taxation of passive interest and royalty income – Decision of the European Commission declaring the aid scheme unlawful and incompatible with the internal market – Recovery obligation – Scope – Domestic provision which was not the subject of the Commission’s investigation concerning the State aid at issue – Set-off of the tax paid abroad in order to prevent double taxation)

In Case C?705/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Income Tax Tribunal of Gibraltar, made by decision of 16 December 2020, received at the Court on 21 December 2020, in the proceedings

Fossil (Gibraltar) Ltd

v

Commissioner of Income Tax

THE COURT (Second Chamber),

composed of A. Prechal, President of the Chamber, J. Passer, F. Biltgen, N. Wahl (Rapporteur) and M.L. Arastey Sahún, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Fossil (Gibraltar) Ltd, by D. Feetham KC, M. Levy, Solicitor, and R. Pennington-Benton, Barrister,

– the Commissioner of Income Tax, by M. Llamas KC, M. Petite, avocat, T. Rocca and Y. Sanguinetti, Barristers,

– the European Commission, by L. Flynn, P. N?me?ková and B. Stromsky, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 March 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Commission Decision (EU) 2019/700 of 19 December 2018 on the State aid SA.34914 (2013/C) implemented by the

United Kingdom as regards the Gibraltar Corporate Income Tax Regime (OJ 2019 L 119, p. 151).

2 The request has been made in proceedings between Fossil (Gibraltar) Ltd and the Commissioner of Income Tax (Gibraltar) concerning the implementation of the obligation to recover the State aid referred to in Article 1 of Decision 2019/700.

Legal context

European Union law

Regulation (EU) 2015/1589

3 Recital 25 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9) states:

'In cases of unlawful aid which is not compatible with the internal market, effective competition should be restored. For this purpose it is necessary that the aid, including interest, be recovered without delay. It is appropriate that recovery be effected in accordance with the procedures of national law. The application of those procedures should not, by preventing the immediate and effective execution of the [European] Commission decision, impede the restoration of effective competition. To achieve this result, Member States should take all necessary measures ensuring the effectiveness of the Commission decision.'

4 Article 16 of that regulation, entitled 'Recovery of aid', provides:

'1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary … The Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law.

…

3. Without prejudice to any order of the Court of Justice of the European Union pursuant to Article 278 TFEU, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Union law.'

Decision 2019/700

5 On 16 October 2013, the European Commission initiated a formal investigation procedure to verify whether the non-taxation of passive interest and intellectual property royalty income, laid down in the Income Tax Act 2010, which is the law concerning taxation of companies in Gibraltar ('the ITA 2010'), selectively favoured certain companies, in breach of EU State aid rules.

6 On 1 October 2014, the Commission informed the United Kingdom of Great Britain and Northern Ireland of its decision to extend the procedure laid down in Article 108(2) TFEU to include the tax ruling practice in Gibraltar and, more particularly, the adoption of 165 tax rulings.

7 On 19 December 2018, the Commission adopted Decision 2019/700. In essence, the Commission found, first, that the 'exemption' of passive interest and royalty income, applicable in Gibraltar between 2011 and 2013 under the ITA 2010, constituted a State aid scheme which was

unlawfully put into effect and was incompatible with the internal market and, second, that the tax treatment granted by the Government of Gibraltar, on the basis of the tax rulings granted to five Gibraltar companies with interests in Dutch limited partnerships (*Commanditaire Vennootschappen*) in receipt of passive interest and royalty income constituted individual State aid which was unlawful and incompatible with the internal market.

8 Article 1 of that decision provides:

‘1. The State aid scheme in the form of the passive interest income tax exemption applicable in Gibraltar under the [ITA 2010] between 1 January 2011 and 30 June 2013 and unlawfully put into effect by Gibraltar in contravention of Article 108(3) [TFEU] is incompatible with the internal market within the meaning of Article 107(1) [TFEU].

2. The State aid scheme in the form of the royalty income tax exemption applicable in Gibraltar under the Income Tax Act 2010 between 1 January 2011 and 31 December 2013 and unlawfully put into effect by Gibraltar in contravention of Article 108(3) [TFEU] is incompatible with the internal market within the meaning of Article 107(1) [TFEU].’

9 Article 2 of that decision states:

‘The individual State aids granted by the Government of Gibraltar, on the basis of the tax rulings … to five Gibraltar companies with interests in Dutch limited partnerships (*Commanditaire Vennootschappen*) in receipt of royalty and passive interest income, which were unlawfully put into effect by the United Kingdom in contravention of Article 108(3) [TFEU], are incompatible with the internal market within the meaning of Article 107(1) [TFEU].’

10 Under Article 5(1) of Decision 2019/700, the United Kingdom is required to recover, in particular, all incompatible aid granted on the basis of, in particular, the aid schemes referred to in Article 1 of that decision.

11 Under Article 7(1) of Decision 2019/700:

‘1. Within two months from the date of notification of this Decision, the United Kingdom shall submit the following information to the Commission:

…

(b) a list of beneficiaries that have received aid on the basis of the aid schemes referred to in Article 1, together with the following information for each of them and for each relevant tax year:

– the amount of profits achieved (indicating separately the profits achieved from royalty income and the profits achieved from passive interest income), the tax basis, the applicable income tax rate, the amount of income tax paid and the amount of the tax foregone,

– the total amount of aid received;

…

(d) the total amount (principal and recovery interests) to be recovered from each beneficiary (for all tax years subject to recovery);

…

(f) documents demonstrating that the beneficiaries have been ordered to repay the aid.'

12 Section 10, entitled 'Recovery of aid', of Decision 2019/700 contains information on the amount of individual aid which the national authorities must recover from the recipients of the aid. For example, recitals 223, 224 and 226 are worded as follows:

'(223) In relation to unlawful State aid in the form of tax measures, the amount to be recovered should be calculated on the basis of a comparison between the tax actually paid and the amount which should have been paid in the absence of the preferential tax treatment.

(224) In this case, in order to arrive at an amount of tax which should have been paid in the absence of the preferential tax treatment, the UK authorities should reassess the tax liability of the entities benefiting from the measures in question for each tax year for which they benefited from those measures.

…

(226) The amount of tax foregone with respect to a specific tax year should be calculated as follows:

– first, the UK authorities should establish the overall profit of the relevant company for that tax year (including the profit achieved from royalty and/or passive interest income),

– based on that profit, the UK authorities should calculate the taxable basis of the relevant company for that tax year,

– the taxable basis should be multiplied by the corporate income tax rate applicable for that tax year,

– finally, the UK authorities should deduct the corporate income tax which the company has already paid with respect to that tax year (if any).'

National law

The Gibraltar Constitution Order 2006

13 The system of governance for Gibraltar is set out in the Gibraltar Constitution Order 2006 (order establishing the Constitution of Gibraltar of 2006), which entered into force on 1 January 2007.

14 Section 47(3) of that order provides:

'Without prejudice to the United Kingdom's responsibility for Gibraltar's compliance with European Union law, matters which under this Constitution are the responsibility of [Gibraltar Government] Ministers shall not cease to be so even though they arise in the context of the European Union.'

The ITA 2010

15 The ITA 2010 entered into force on 1 January 2011 and replaced the previous Gibraltar law on taxation of companies, dating from 1952 (the Income Tax Act 1952). The ITA introduced a general income tax rate of 10% applying to all companies across the Gibraltar economy, except for utility companies, telecommunication services and companies enjoying and abusing a dominant market position, which are subject to a rate of 20%.

16 Companies which are taxable under the ITA 2010 are companies which are ordinarily resident in Gibraltar and those which are not ordinarily resident there but which carry on a trade there through a branch or agency.

17 The ITA 2010 establishes a territorial system of taxation, in that profits or gains are taxed only if the income from them 'accrues in or is derived from' Gibraltar. In accordance with section 74 of the ITA 2010, the expression 'accrues in or is derived from' refers to the place where the activities which give rise to the profits or gains are carried out, which is normally determined on a case by case basis. That provision also deems activities requiring a licence and regulation under any law of Gibraltar to take place in Gibraltar.

18 Under the ITA 2010, as initially enacted (entry into force on 1 January 2011), passive interest and royalties were not chargeable to tax, irrespective of the source of the income or the application of the territoriality principle. Following amendments to the ITA 2010 in 2013, with effect from 1 July 2013, all inter-company loan interest was liable to tax at the general rate of 10% in so far as the interest received or receivable per source company exceeded GBP 100 000 per annum. Furthermore, following amendments to the ITA 2010 in 2013, with effect from 1 January 2014, all royalties received or receivable by a company registered in Gibraltar were also liable to tax at the same rate of 10%.

19 Section 37(1) of the ITA 2010, entitled 'Relief in respect of foreign tax paid', provides:

'Subject to subsections (2) and (8), any person who has paid, by deduction or otherwise, or is liable to pay, taxation under this Act in respect of any profits or gains derived from sources within Gibraltar or within any other country, territory or jurisdiction and who proves to the satisfaction of the Commissioner [of Income Tax] that he or it has paid by deduction or otherwise, or is liable to pay income tax in the other country, territory or jurisdiction in respect of the same profits or gains, shall be entitled to relief from taxation under this Act paid or payable by him in respect of those profits or gains of an amount equal to the lesser of the two following amounts:

(a) the taxation under this Act in respect of the said profits or gains, or

(b) the income tax in the other country, territory or jurisdiction in respect of that income.'

20 Section 37(8) ITA 2010 states:

'This section shall apply only to tax paid in a country in, or from, which the revenue generated by the underlying business activity which has given rise to the profits or gains referred to in subsection (1) has arisen.'

21 The Income Tax (Amendment) Regulations 2019 ('the ITR 2019') amended the ITA 2010 to permit retrospective taxation of royalty income earned from 1 January 2011 and 31 December 2013 in implementation of Decision 2019/700.

The dispute in the main proceedings and the question referred for a preliminary ruling

22 Fossil (Gibraltar), a company established in Gibraltar, is a wholly owned subsidiary of Fossil Group Inc., a company which has its registered office in the United States of America and which is active in the design and manufacture of fashion items. Fossil (Gibraltar) receives royalty income from the worldwide use of a number of trade marks and design intangibles owned by Fossil Group.

23 Fossil (Gibraltar), which is not on the list of 165 tax rulings mentioned in paragraph 6 of the present judgment, obtained royalty income which was not taxed under the ITA 2010. However,

Fossil (Gibraltar) did declare all of that income received to the United States tax authorities, where tax on that income was paid at the rate of 35 %.

24 On 19 February 2019, the Commissioner of Income Tax, who, in Gibraltar, is the authority responsible for collecting tax on income and profits, sent the Commission a list of aid recipients, which included Fossil (Gibraltar), and provided it with the calculation of the amount of aid to be recovered from Fossil (Gibraltar).

25 By letter of 8 April 2019, the Commissioner of Income Tax proposed to the Commission an adjustment of the amount of aid to be recovered from Fossil (Gibraltar). The proposed adjustment took into account an additional tax which had been paid in the United States by Fossil Group following the application of the US rules on controlled foreign companies.

26 By letters of 13 May and 6 June 2019, the Commission's Directorate-General (DG) for Competition expressed the view that that adjustment ought to be refused.

27 By letter of 26 March 2020, DG Competition stated that, for the purposes of assessing the tax payable, the Commissioner of Income Tax could not take into account the tax paid in the United States on Fossil's (Gibraltar) royalty income.

28 According to DG Competition, the purpose of the method of calculating the tax payable with a view to recovering the aid described in recital 226 of Decision 2019/700 was not to authorise the deduction of taxes paid in the United States under the US rules on controlled foreign companies. The tax envisaged by those rules has its own taxable logic, namely combating fraud, with the result that it has no bearing on the reasoning of Decision 2019/700 or on the method of calculating the aid to be recovered from Fossil (Gibraltar). The Commission's services stated, inter alia, that paragraph 102 of the Commission Notice on the recovery of unlawful and incompatible State aid (OJ 2019 C 247, p. 1) – which allows a Member State to take account, when calculating the amount of aid to be recovered, of whether the recipient of unlawful aid has paid tax on the aid received – was not applicable to the case at issue in the main proceedings because Fossil (Gibraltar) had not paid such taxes.

29 On 31 October 2020, following the Commission's refusal of the calculation by the Commissioner of Income Tax of the aid to be recovered from Fossil (Gibraltar), the Commissioner of Income Tax sent Fossil (Gibraltar) new recovery orders.

30 On 4 December 2020 Fossil (Gibraltar) brought an action against those recovery orders before the referring court.

31 Before that court, the Commissioner of Income Tax argued that he must follow the position of DG Competition. The Commissioner of Income Tax takes the view that, although the tax relief provided for in section 37 of the ITA 2010 was not, as such, examined by DG Competition, the position adopted by DG Competition makes it impossible to apply that provision.

32 Fossil (Gibraltar) maintains, for its part, that, while the national legislation on income tax referred to in paragraph 21 of the present judgment, now allows the retrospective taxation of royalty income generated between 2011 and 2013, the Commissioner of Income Tax remains entitled, under domestic law and in accordance with Article 16(3) of Regulation 2015/1589, to grant any tax relief available under the ITA 2010 when that income is taxed. It notes, in that regard, that Decision 2019/700 did not rule on the application of section 37 of the ITA 2010 or on whether that section complies with EU law. According to Fossil (Gibraltar), the Commissioner of Income Tax confuses the calculation of the tax payable for the purposes of recovering the aid, as prescribed in Decision 2019/700, and the tax relief which may be applied by the Gibraltar

authorities on the gross amount to be recovered, pursuant to the ITA 2010.

33 In those circumstances, the referring court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Would the provision of tax relief by the Commissioner of Income Tax under the ITA 2010 for tax paid in the [United States] in respect of the Appellant’s royalty income infringe [Decision 2019/700] or is [it] otherwise prevented by it?’

Consideration of the question referred

34 By its question, the referring court asks, in essence, whether Decision 2019/700 must be interpreted as meaning that it precludes the national authorities responsible for the recovery from the beneficiary of aid which is unlawful and incompatible with the internal market from applying a domestic provision which prescribes a mechanism for the set-off of taxes paid by that beneficiary abroad against taxes for which it is liable in Gibraltar.

35 At the outset, it should be noted that the question, as formulated by the referring court and to which the Court is asked to provide an answer, is based on the premiss that section 37 of the ITA 2010, which prescribes a mechanism for the set-off of tax paid in a third State with a view to avoiding double taxation, is applicable in the case in the main proceedings.

36 It is true that the Commissioner of Income Tax and the Commission have argued that the conditions required to benefit from the set-off mechanism under section 37 of the ITA 2010 appear not to be met in the main proceedings. However, the considerations put forward in that regard amount to calling into question the assessment of domestic law made by the referring court, which concluded that the conditions for the application of section 37 of the ITA 2010 were met in relation to the main proceedings.

37 It is for the referring court alone, and not for the Court of Justice, to determine whether that assessment of domestic law is well founded. In that regard, Article 267 TFEU establishes a procedure for direct cooperation between the Court and the courts of the Member States. In that procedure, which is based on a clear separation of functions between the national courts and the Court, any assessment of the facts in the case is a matter for the national court, which must determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court, whilst the Court is empowered to give rulings on the interpretation or the validity of an EU provision only on the basis of the facts which the national court puts before it (judgments of 16 June 2015, *Gauweiler and Others*, C?62/14, EU:C:2015:400, paragraph 15, and of 20 April 2021, *Repubblika*, C?896/19, EU:C:2021:311, paragraph 28).

38 In the present case, and taking as a basis the premiss that section 37 of the ITA 2010 is applicable in the case in the main proceedings, it is necessary to determine whether the grant of a reduction in the amount of aid to be recovered from Fossil (Gibraltar) based on that provision, is liable to compromise the effective enforcement of the recovery order contained in Decision 2019/700.

39 In that regard, it should be recalled that recovery of unlawful aid is the logical consequence of the finding that it is unlawful. Consequently, the Member State to which a decision requiring recovery of illegal aid is addressed is obliged under Article 288 TFEU to take all measures necessary to ensure implementation of that decision. This must result in the actual recovery of the sums owed in order to eliminate the distortion of competition caused by the competitive advantage procured by the unlawful aid (judgment of 24 January 2013, *Commission* v *Spain*, C?529/09,

EU:C:2013:31, paragraphs 90 and 91 and the case-law cited). By repaying, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (judgment of 15 December 2005, *Unicredito Italiano*, C?148/04, EU:C:2005:774, paragraph 113).

40 Under Article 16(3) of Regulation 2015/1589, the recovery of aid declared unlawful and incompatible with the internal market by a decision of the Commission must, as is also apparent from recital 25 of that regulation, be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of that decision, a condition which reflects the requirements of the principle of effectiveness laid down by the case-law of the Court (see, by analogy, judgment of 24 January 2013, *Commission* v *Spain*, C?529/09, EU:C:2013:31, paragraph 92 and the case-law cited).

41 For the purposes of quantifying the amount of aid to be recovered, the national court must take into account all the relevant information of which it has been made aware. It cannot be excluded that, having regard to all those factors, that calculation made by the national court may result in an amount of aid lower than that resulting from taking into account, in isolation, the Commission decision ordering the recovery of the aid declared incompatible with the internal market, or even an amount equal to zero (see, to that effect, judgment of 13 February 2014, *Mediaset*, C?69/13, EU:C:2014:71, paragraphs 36 and 37).

42 The Court has accordingly stated that re-establishing the status *quo ante* means returning, as far as possible, to the situation which would have prevailed if the operations at issue had been carried out without the aid measure in question having been granted (see, to that effect, judgment of 15 December 2005, *Unicredito Italiano*, C?148/04, EU:C:2005:774, paragraph 117).

43 If the amounts to be repaid cannot be determined in the light of various hypothetical operations which could have been implemented by the undertakings if they had not opted for the type of operation coupled with the aid, the beneficiaries of an aid scheme may, at the recovery stage, rely on the deductions and reliefs provided for by domestic law if it is established, having regard to the operations actually carried out, that they were in fact entitled to benefit from them. Re-establishing the status *quo ante* merely enables account to be taken, at the stage of recovery of the aid by the national authorities, of tax treatment which may be more favourable than the ordinary treatment which, in the absence of unlawful aid and in accordance with domestic rules which are compatible with EU law, would have been granted on the basis of the operation actually carried out (see, to that effect, judgment of 15 December 2005, *Unicredito Italiano*, C?148/04, EU:C:2005:774, paragraphs 114 to 119).

44 That being said, as regards, in the first place, the question whether Decision 2019/700 precludes, as such, the relief sought under section 37 of the ITA 2010, it must be recalled that, by that decision, the Commission declared to be unlawful and incompatible with the internal market, first, the scheme granted in the form of non-taxation of passive interest income and royalty income and, second, the individual aid measures consisting of five tax rulings out of the 165 referred to in the Commission Decision of 1 October 2014 to extend the formal examination procedure under Article 108(2) TFEU, as referred to in paragraph 6 of the present judgment.

45 As regards the measures taken in the form of non-taxation of passive interest income and royalty income, which are the only measures at issue in the main proceedings, it is apparent from Decision 2019/700 that those measures were classified as State aid prohibited by Article 107(1) TFEU, in particular on the ground that they conferred a selective advantage.

46 In particular, account was taken of the fact that that non-taxation contradicted the general principle that corporate income tax is collected from all taxable persons which receive income

derived from or accruing in Gibraltar. Therefore, according to the Commission, ‘passive interest and royalty income should normally fall within the scope of taxation’ (recital 82 of Decision 2019/700). The mitigation of a charge which companies would otherwise have to bear gives rise to an advantage (recital 83 of that decision) which is a priori selective in so far as it primarily benefits multinational groups (recitals 103 and 104 of that decision). The Commission stated in recital 107 of that decision, as regards non-taxation, that the argument based on the need to prevent double taxation does not hold up ‘as the (foreign) paying entity is generally allowed to deduct the interest or royalties for tax purposes’.

47 It follows from those considerations that Decision 2019/700 relates only to the finding that certain categories of income, in the present case those generated by passive interest and royalties, are not subject to corporate income tax in Gibraltar.

48 While Decision 2019/700 requires, therefore, the competent national authorities to recover the tax which should have been levied in the absence of the exemption for passive interest and royalty income (recital 223 of that decision), it does not however address the possible discretion to rely on deductions and reliefs laid down in Gibraltar legislation, which could have been applied when calculating the tax due. That decision, and in particular recital 226 thereof, therefore do not preclude, in accordance with the principle laid down in the case-law cited in paragraph 43 of the present judgment, reliance on a mechanism such as that laid down in section 37 of the ITA 2010. Consequently, it also does not call into question the possibility, for the Gibraltar tax authorities pursuant to that mechanism to set-off taxes relating to royalty income paid abroad against the tax relating to those royalties to be paid in Gibraltar.

49 As regards the statements of position apparent from the letters sent by the Commission to the national authorities in the context of exchanges seeking to ensure the immediate and effective execution of Decision 2019/700, as referred to in paragraphs 26 to 28 of the present judgment, they are not acts which can be adopted on the basis of Regulation 2015/1589, they cannot have the effect of supplementing or amending the content of that decision and must be regarded as devoid of any binding effect (see, to that effect, judgment of 13 February 2014, *Mediaset*, C?69/13, EU:C:2014:71, paragraphs 24 and 28).

50 In the second place, it is necessary to examine whether taking into account, at the stage of recovery of the aid, a tax credit granted on the basis of section 37 of the ITA 2010 would undermine the effectiveness of Decision 2019/700, in that such taking into account amounts to placing Fossil (Gibraltar) in a more advantageous position than would have prevailed if the operations in question had been carried out without the grant of the aid measures at issue in the main proceedings.

51 In that regard, as stated in recital 25 of Regulation 2015/1589, the Member State concerned should ‘take all necessary measures ensuring the effectiveness of the Commission decision’ ordering the recovery of aid incompatible with the internal market.

52 As was pointed out in paragraph 39 of the present judgment, the Member State in question must actually recover the sums owed in order to eliminate the distortion of competition caused by the competitive advantage procured by the unlawful aid. While it is true that such a requirement necessarily implies that a Member State cannot circumvent the scope of a Commission decision by adopting compensatory measures intended to render ineffective the consequences of that decision, it cannot prevent the recipients of the aid in question from relying, at the recovery stage, on the deductions and reliefs provided for by domestic law if it is established, having regard to the operations actually carried out, that they were in fact entitled to benefit from them on the date of those operations.

53 In particular, that requirement does not a priori compromise the application of a mechanism, such as that prescribed in section 37 of the ITA 2010, which makes it possible, in order to avoid double taxation of the same income, to grant tax relief in relation to the tax paid by a legal or natural person in a country or territory in which that income is derived or accrues.

54 In the third and final place, it is necessary to examine whether Decision 2019/700 – which classifies the system of non-taxation of passive interest and royalty income as State aid in so far as it, inter alia, deviates from the principle of territoriality laid down in Gibraltar's tax legislation – implies, by extension, that section 37 of the ITA 2010, on which Fossil (Gibraltar) relies in the main proceedings, must be treated in the same way as such a regime and, consequently, must be regarded as prohibited State aid for the purpose of Article 107(1) TFEU.

55 Accordingly, where, at the date of the operations in question, Fossil (Gibraltar) was in fact able to rely on the application of section 37 of the ITA 2010, which it is for the referring court to ascertain, it is necessary to examine whether the set-off of a tax paid abroad relating to royalty income, as provided for by that provision, is capable of constituting prohibited State aid for the purpose of Article 107(1) TFEU.

56 In that regard, it should be noted that, in accordance with the Court's case-law, although the Court may not, in proceedings under Article 267 TFEU, rule upon the compatibility of a provision of domestic law with EU law or interpret domestic legislation or regulations, it may nevertheless provide the national court with an interpretation of EU law on all such points as may enable that court to resolve the case before it. In State aid matters, the Court has jurisdiction, inter alia, to give the national court guidance on interpretation to enable it to determine whether a national measure may be classified as State aid under EU law (judgment of 8 September 2011, *Paint Graphos and Others*, C?78/08 to C?80/08, EU:C:2011:550, paragraphs 34 and 35 and the case-law cited).

57 It should be noted that classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (judgment of 6 October 2021, *World Duty Free Group and Spain* v *Commission*, C?51/19 P and C?64/19 P, EU:C:2021:793, paragraph 30 and the case-law cited).

58 As regards, in particular, national measures that confer a tax advantage, it must be stated that a measure of that nature which, although not involving the transfer of State resources, places the recipients in a more favourable position than other taxpayers is capable of procuring a selective advantage for the recipients and, consequently, constitutes 'State aid', within the meaning of Article 107(1) TFEU. Accordingly, a measure that mitigates the financial burdens which are normally borne by the budget of an undertaking and which thus, without being a subsidy in the strict sense of the word, is similar in character and has the same effect is also regarded as State aid. On the other hand, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute such aid (judgment of 16 March 2021, *Commission* v *Poland*, C?562/19 P, EU:C:2021:201, paragraph 30 and the case-law cited).

59 That being the case, outside the spheres in which EU tax law has been harmonised, the determination of the characteristics constituting each tax falls within the discretion of the Member States, in accordance with their fiscal autonomy, that discretion having, in any event, to be exercised in accordance with EU law. This includes, in particular, the determination of the basis of assessment and the taxable event (judgment of 16 March 2021, *Commission* v *Poland*, C?562/19 P, EU:C:2021:201, paragraph 38).

60 As the Advocate General observed, in essence, in point 59 of her Opinion, deciding which foreign taxes may be set off against domestic tax liability and under which conditions such set-off is possible is a decision of a general nature which falls within the discretion of the Member States in determining the characteristics constituting the tax.

61 A measure such as that referred to in section 37 of the ITA 2010, which seeks to avoid double taxation by prescribing a mechanism for the set-off of tax paid by a taxpayer abroad against taxes for which such taxpayer is liable in Gibraltar, falls, in principle, within the scope of the fiscal autonomy of the Member States and cannot, unless it is established that it is based on discriminatory parameters, be classified as prohibited State aid within the meaning of Article 107(1) TFEU. In that context, it should be recalled that EU law on that matter seeks only to remove the selective advantages from which certain undertakings might benefit to the detriment of others which are placed in a comparable situation (judgment of 16 March 2021, *Commission* v *Poland*, C?562/19 P, EU:C:2021:201, paragraph 41).

62 In the light of the foregoing considerations, the answer to the question referred is that Decision 2019/700 must be interpreted as meaning that it does not preclude the national authorities responsible for the recovery from the beneficiary of aid which is unlawful and incompatible with the internal market from applying a domestic provision which prescribes a mechanism for the set-off of taxes paid by that beneficiary abroad against taxes for which it is liable in Gibraltar, where it appears that that provision was applicable on the date of the operations in question.

Costs

63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Commission Decision (EU) 2019/700 of 19 December 2018 on the State aid SA.34914 (2013/C) implemented by the United Kingdom as regards the Gibraltar Corporate Income Tax Regime

must be interpreted as meaning

that it does not preclude the national authorities responsible for the recovery from the beneficiary of aid which is unlawful and incompatible with the internal market from applying a domestic provision which prescribes a mechanism for the set-off of taxes paid by that beneficiary abroad against taxes for which it is liable in Gibraltar, where it appears that that provision was applicable on the date of the operations in question.

Prechal

Passer

Biltgen

Wahl

Arastey Sahún

Delivered in open court in Luxembourg on 15 September 2022.

A. Calot Escobar

A. Prechal

Registrar

President of the Second Chamber

* Language of the case: English.