Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

8 June 2022 *

(State aid – Aid scheme implemented by the United Kingdom in favour of certain multinational groups – Decision declaring the aid scheme incompatible with the internal market and unlawful and ordering the recovery of the aid paid – Advance tax rulings – Tax regime relating to the financing of groups and concerning in particular controlled foreign companies – Selective tax advantages)

In Cases T-363/19 and T-456/19,

**United Kingdom of Great Britain and Northern Ireland**, represented by F. Shibli and S. McCrory, acting as Agents, and by P. Baker QC, and T. Johnston, Barrister,

applicant in Case T-363/19,

**ITV plc**, established in London (United Kingdom), represented by J. Lesar, Solicitor, and K. Beal QC,

applicant in Case T-456/19,

supported by

**United Kingdom**, represented by F. Shibli and S. McCrory, acting as Agents, and by P. Baker QC, and T. Johnston, Barrister,

and by

**LSEGH (Luxembourg) Ltd**, established in London,

**London Stock Exchange Group Holdings (Italy) Ltd**, established in London,

represented by A. von Bonin, O. Brouwer and A. Pliego Selie, lawyers,

interveners in Case T-456/19,

v

**European Commission**, represented by L. Flynn, S. Noë and B. Stromsky, acting as Agents and, in Case T-456/19, by M. Clayton and M. Segura Catalán, lawyers

* Language of the case: English.

defendant,

APPLICATIONS under Article 263 TFEU seeking annulment of 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).

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of S. Papasavvas, President, V. Tomljenović (Rapporteur), F. Schalin, P. Škvařilová-Pelzl and I. Nõmm, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 18 October 2021,

gives the following

## Judgment

### I. Background to the dispute

#### A. The ITV Group

1 ITV plc, a tax resident in the United Kingdom, is the holding company at the head of the ITV Group, which is active in the creation, production and distribution of audiovisual content over various platforms throughout the world. That group includes inter alia controlled foreign companies (CFC), such as ITV Entreprises BV and ITV (Finance) Europe BV, two companies formed under Netherlands law which had granted several loans to other companies in the ITV Group.

2 For several accounting periods, until the 2016 accounting period at least, the profits from the interest on certain of the loans made by CFCs which were imputed to ITV were the subject of an application for exemption under Chapter 9 of Part 9A of the Taxation (International and Other Provisions) Act 2010 ('the TIOPA').

#### B. The rules applicable to CFCs

3 Under the United Kingdom corporation tax system, companies are taxed on their profits arising from United Kingdom activities and assets. In accordance with the principle of territoriality, the profits of foreign companies which are redistributed in the United Kingdom are not taxed. Likewise, profits attributable to foreign permanent establishments are not subject to corporation tax in the United Kingdom.

4 The rules applicable to CFCs determine generally whether the profits of a CFC can be regarded as having been artificially diverted from the United Kingdom and are therefore taxed in the United Kingdom by means of a specific charge on those profits.

5 Chapter 2 of Part 9A of the TIOPA defines, in general terms, in Section 371BA thereof, that specific charge as being the tax applied, for an accounting period, on a CFC's taxable profits, which are defined, in Section 371BB, as being those profits which are taxed under Chapters 4 to 8 of Part 9A of the TIOPA ('the CFC charge'), subject, in particular, to the application of Chapter 9 of that part, which provides for exemptions.

6 Within Chapter 5 of Part 9A of the TIOPA, Section 371EA provides that a CFC's non-trading finance profits are to be taxed in the United Kingdom in so far as they fall within the following situations:

– non-trading finance profits arising from activities where the significant people functions are carried out in the United Kingdom are covered by Section 371EB of Part 9A of the TIOPA, under the heading 'UK activities';

– non-trading finance profits arising from United Kingdom funds or assets are covered by Section 371EC of Part 9A of the TIOPA, under the heading 'Capital investment from the UK';

– non-trading finance profits arising from arrangements put in place by a CFC as an alternative to the distribution of dividends or other funds to a United Kingdom resident company or to a United Kingdom permanent establishment are covered by Section 371ED of Part 9A of the TIOPA;

– non-trading finance profits arising from certain finance lease relationships granted by a CFC to United Kingdom resident companies or to United Kingdom permanent establishments are covered by Section 371EE of Part 9A of the TIOPA.

7 In the present case, only the situations covered by Sections 371EB and 371EC of Part 9A of the TIOPA are concerned.

8 Chapter 9 of Part 9A of the TIOPA provides that taxable entities may submit an application for exemption from the CFC charge, which would have been payable under Chapter 5 of Part 9A of the TIOPA, in respect of non-trading finance profits arising from qualifying loans, if the CFC in question has, in its host country, premises occupied with a certain degree of continuity and from which the activities of the CFC are wholly or essentially carried out. Under Section 371IG of Part 9A of the TIOPA, qualifying loans are, in essence, intra-group loans granted by the CFC to other members of the multinational group which are not resident in the United Kingdom.

9 Three types of exemptions are provided for in Chapter 9 of Part 9A of the TIOPA, namely an exemption of up to 100%, where and to the extent that the qualifying loans are funded from the CFC's resources, an exemption which may affect 75% of the taxable non-trading finance profits arising from qualifying loans, and a third exemption, known as 'matched interest' exemption, which may be applied, under certain conditions, to the leftover taxable non-trading finance profits.

## C. The administrative procedure and the contested decision

10 After having first invited the authorities of the United Kingdom of Great Britain and Northern Ireland to provide information on their reform of the tax rules applicable to CFCs and, next, after having opened the formal investigation procedure under Article 108(2) TFEU by 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) ('the contested decision'), the European Commission found that the group financing exemption scheme, on account of the exemptions provided for in Chapter 9 of Part 9A of the TIOPA, constituted State aid within the meaning of Article 107(1) TFEU, in so far as it applied to non-trading finance profits from qualifying loans, which fall within Section 371EB (UK activities) of the TIOPA (the 'contested scheme' or the 'exemptions at issue').

11 However, the Commission concluded that the contested scheme did not constitute aid when applied to non-trading finance profits from qualifying loans that fell within Section 371EC (capital investments from the UK) of Part 9A of the TIOPA and did not fall within Section 371EB (UK activities) of Part 9A of the TIOPA.

12 In order to reach the conclusions set out in paragraphs 10 and 11 above, the Commission analysed the conditions that must be satisfied in order for the exemptions at issue to be classified as State aid within the meaning of Article 107(1) TFEU.

13 First, the Commission observed that, since the group financing exemption is based on Chapter 9 of Part 9A of the TIOPA – a legislative act that necessarily emanates from the State – and results in a reduction of the corporation tax liability for undertakings which had relied on that exemption, it constituted a measure imputable to the United Kingdom and financed through that State's resources.

14 Second, the Commission stated that the exemptions at issue benefited companies established in the United Kingdom that were part of a multinational group operating in several Member States, so that an advantage in favour of those companies was liable to affect trade between Member States.

15 Third, the Commission observed that the exemptions at issue were liable to improve the competitive position of the beneficiaries by comparison with that of other competing undertakings and, therefore, they distorted or threatened to distort competition.

16 Fourth, the Commission noted that the exemptions at issue constituted an aid scheme within the meaning of Article 1(d) 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).

17 As for the existence of an advantage, the Commission observed that the exemptions at issue allowed a company established in the United Kingdom, which would otherwise have been subject to a CFC charge under Chapter 5 of Part 9A of the TIOPA, to claim, under Chapter 9 of that act, that the CFC charge be applied to only 25% of a CFC's non-trading finance profits arising from qualifying loans, leading to a partial exemption in respect of 75% of the profits in question. In certain circumstances, a charge could be imposed on an even lower percentage, leading to an exemption that could affect up to 100% of the CFC profits concerned.

18 As regards the selective nature of the exemptions at issue, the Commission observed that, in this instance, the reference system consisted in the CFC rules, which determined the subject matter and chargeable basis for the CFC charge.

19 In Section 6.4.2 of the contested decision, the Commission found that the group financing exemption constituted a derogation from the reference system.

20 Thus, the Commission observed that Chapter 9 of Part 9A of the TIOPA provided for an exemption from the CFC charge for a specific category of non-trading finance profits, namely those derived from qualifying loans, when such a CFC charge would normally have been due under Chapter 5 of Part 9A of the TIOPA.

21 In that regard, the Commission maintained that the situation of a chargeable entity controlling a CFC that earns non-trading finance profits arising from a qualifying loan relationship was comparable to the situation of a chargeable entity controlling a CFC that earns other non-trading finance profits, especially in the context of loans granted by CFCs to related companies resident in the United Kingdom, known as 'upstream loans', and loans granted by CFCs to third parties, designated by the United Kingdom as 'money box loans'.

22 The Commission recalled that a measure which derogates from the reference system could still be justified by the nature or overall structure of that system and that it was for the Member State concerned to show that such justification exists. The United Kingdom claimed, first, that the exemptions at issue aimed to ensure that the system was manageable and administrable and, second, that they ensured freedom of establishment within the European Union.

23 The Commission acknowledged that, to the extent that the exemption provided for in Chapter 9 of Part 9A of the TIOPA was applied to situations that fell within the scope of the measures provided for in Chapter 5 of Part 9A of the TIOPA, under the test based on 'UK connected capital', that exemption might be considered to be aimed at the application, in an administrable way, of the CFC rules. In fact, such an exemption ensured that a CFC charge was owed only on profits arising from United Kingdom assets that could reasonably be said to be artificially diverted from the United Kingdom, without requiring the undertakings and the tax authorities of the United Kingdom to undertake a disproportionately burdensome tracing exercise, given the fungible nature of capital. For those reasons, the Commission considered that, in spite of the a priori selective nature of the exemption in question, it was justified and therefore not selective.

24 Conversely, the Commission considered that the contested scheme had given an a priori selective advantage to companies, subject to corporation tax in the United Kingdom, which controlled a CFC earning non-trading finance profits arising from qualifying loans in situations where relevant significant people functions were carried out in the United Kingdom. Those profits were subject to a CFC charge under Section 371EB of Part 9A of the TIOPA (UK activities). The Commission concluded that such an a priori selective advantage could not be justified by the need to have administrable and manageable anti-avoidance rules or by the need to comply with the freedoms enshrined in the Treaties.

25 The Commission stated that the beneficiaries of the contested scheme were United Kingdom entities controlling a CFC that earns non-trading finance profits arising from qualifying loans under Section 371EB (UK activities) of Part 9A of the TIOPA and which had claimed the exemptions at issue.

26 The Commission observed that, since the contested scheme had been implemented on 1 January 2013 without having been notified, it had to be regarded as an unlawful State aid scheme within the meaning of Article 1(f) of Regulation 2015/1589. However, it stated that, following the changes made to the rules applicable to CFCs as from 1 January 2019, and according to which it was no longer possible to claim the exemptions forming the subject matter of the contested scheme, the scheme had become compliant with the State aid rules.

27 In addition, the Commission observed that the aid granted under the contested scheme, which does not facilitate the development of certain activities or of certain economic areas, cannot be considered compatible with the internal market under Article 107(3) TFEU.

28 Furthermore, in the absence of an infringement of the fundamental principles of EU law, the Commission ordered recovery of the aid granted in application of the contested scheme from its beneficiaries.

## II. Procedure and forms of order sought

### A. The written part of the procedure in Case T-363/19

29 By application lodged at the Court Registry on 12 June 2019, the United Kingdom brought the action in Case T-363/19.

30 On 8 June 2021, the President of the Second Chamber of the General Court decided, pursuant to Article 67(2) of the Rules of Procedure of the General Court, that the case would be given priority over others.

31 On 16 June 2021, the Plenum decided to refer the case to a Chamber sitting with five judges, pursuant to Article 28(3) of the Rules of Procedure.

32 The United Kingdom claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

33 The Commission contends that the Court should:

– dismiss the action;

– order the United Kingdom to pay the costs.

### B. The written part of the procedure in Case T-456/19

34 By application lodged at the Court Registry on 4 July 2019, ITV brought the action in Case T-456/19.

35 On 8 June 2021, the President of the Second Chamber of the General Court decided, pursuant to Article 67(2) of the Rules of Procedure, to give the case priority over others.

36 On 16 June 2021, the Plenum decided to refer the case to a Chamber sitting with five judges, pursuant to Article 28(3) of the Rules of Procedure.

### *1. The applications to intervene*

37 By document lodged at the Court Registry on 4 November 2019, the United Kingdom applied for leave to intervene in Case T-456/19 in support of the form of order sought by ITV. By decision of 29 January 2020, the President of the Second Chamber of the General Court granted the United Kingdom leave to intervene.

38 By document lodged at the Court Registry on 15 October 2019, Compass Overseas Holdings Ltd, Compass Overseas Holdings No.2 Ltd and Hospitality Holdings Ltd (together, 'Compass Overseas') applied for leave to intervene in Case T-456/19 in support of the form of order sought by ITV. By order of 24 November 2020, *ITV* v *Commission* (T-456/19, not published, EU:T:2020:659), the Court granted Compass Overseas leave to intervene. By document lodged at the Court Registry on 24 March 2021, Compass Overseas withdrew its application for leave to intervene.

39 By document lodged at the Court Registry on 30 October 2019, LSEGH (Luxembourg) Ltd and London Stock Exchange Group Holdings (Italy) Ltd (together, 'LSEGH') applied for leave to intervene in Case T-456/19 in support of the form of order sought by ITV. By order of 24 November 2020, *ITV* v *Commission* (T-456/19, not published, EU:T:2020:640), the Court granted LSEGH leave to intervene.

40 By document lodged at the Court Registry on 23 October 2019, Eland Oil & Gas plc applied for leave to intervene in Case T-456/19 in support of the form of order sought by ITV. By order of 24 November 2020, *ITV* v *Commission* (T-456/19, not published, EU:T:2020:641), the General Court granted Eland Oil & Gas leave to intervene. By document lodged at the Court Registry on 1 March 2021, Eland Oil & Gas withdrew its application for leave to intervene.

41 By document lodged at the Court Registry on 7 November 2019, WPP Jubilee Ltd applied for leave to intervene in Case T-456/19 in support of the form of order sought by ITV. By order of 24 November 2020, *ITV* v *Commission* (T-456/19, not published), the General Court granted WPP Jubilee leave to intervene. By document lodged at the Court Registry on 1 March 2021, WPP Jubilee withdrew its application for leave to intervene.

42 By order of 8 July 2021, the General Court took note of the withdrawal of the applications for leave to intervene of Compass Overseas, Eland Oil & Gas and WPP Jubilee.

43 In the course of the proceedings, ITV lodged applications for confidential treatment of certain procedural documents, notably vis-à-vis LSEGH.

### *2. Forms of order sought*

44 ITV, supported by LSEGH, claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

45 The United Kingdom claims that the Court should annul the contested decision in accordance with the form of order sought by ITV.

46 The Commission contends that the Court should:

– dismiss the action;

– order ITV to pay the costs;

– order the United Kingdom and LSEGH to bear their own costs.

### C. The oral part of the procedure

47 On a proposal from the Judge-Rapporteur, the General Court decided to open the oral part of the procedure in Cases T-363/19 and T-456/19 and to hear the parties on the possible joinder of those cases for the purposes of that phase and of the decision closing the proceedings.

48 In addition, in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, the Court requested the parties to reply to written questions. The parties submitted their observations on the possible joinder of Cases T-363/19 and T-456/19 and responded to the measure of organisation of procedure within the prescribed periods.

49 By decision of the President of the Second Chamber, Extended Composition, of the General Court of 21 July 2021, the parties having been heard, Cases T-363/19 and T-456/19 were joined for the purposes of the oral part of the procedure, in accordance with Article 68 of the Rules of Procedure.

50 The hearing, held on 20 September 2021, had to be interrupted because one of the members of the Second Chamber, Extended Composition, was prevented from acting.

51 By decision of 13 October 2021, as a result of that member being prevented from acting, the President of the General Court designated the Vice-President of the General Court to complete the Second Chamber, Extended Composition. The latter also presided over that chamber, in accordance with Article 11(4) of the Rules of Procedure.

52 A further hearing was held on 18 October 2021, at which the parties presented oral argument and replied to a measure of organisation of procedure provided for in Article 89 of the Rules of Procedure and to the oral questions put by the Court. At the hearing, the United Kingdom made certain observations on the report for the hearing, formal note of which was taken by the Court in the minutes of the hearing.

## III. Law

### A. Joinder of Cases T-363/19 and T-456/19 for the purposes of the decision closing the proceedings

53 In accordance with Article 19(2) of Rules of Procedure, the President of the Second Chamber, Extended Composition, of the General Court referred the decision as to whether Cases T-363/19 and T-456/19 should be joined for the purposes of the decision closing the proceedings, which fell within his remit, to the Second Chamber, Extended Composition, of the General Court.

54 The parties having been heard with respect to a possible joinder of the cases, it is appropriate for Cases T-363/19 and T-456/19 to be joined for the purposes of the decision closing the proceedings, on account of the connection between them.

## B. Substance

55 In support of their actions, the United Kingdom, in Case T-363/19, and ITV, in Case T-456/19, rely on 4 and 11 pleas in law, respectively, which overlap in part.

56 By their pleas, the United Kingdom and ITV complain, in essence, that the Commission committed errors of law and of assessment and breached the principle of non-discrimination by classifying the exemptions at issue as a State aid scheme and by ordering, subsequently, the recovery of the aid in question from the beneficiaries.

57 In that regard, it should be borne in mind that classification as State aid requires all the conditions set out in Article 107 TFEU to be satisfied. Thus, for a measure to be classified as State aid within the meaning of that provision, there must, first, 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; and, fourth, it must distort or threaten to distort competition (see judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 40 and the case-law cited).

58 It is appropriate, first, to examine the pleas relied on by the United Kingdom and ITV based on errors of assessment vitiating the identification by the Commission of a selective advantage in the present case, next, to consider the pleas alleging errors of assessment concerning the lack of an effect on trade between Member States, a breach of the principle of non-discrimination and an error of law stemming from the incorrect application, by analogy, of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ 2016 L 193, p. 1) and, last, to examine the pleas alleging errors of assessment in identifying the beneficiaries of the contested scheme and the recovery of the aid ordered by the Commission in the contested decision.

59 As regards, more specifically, the existence of a selective advantage, it should be noted that, in the context of the analysis of tax measures from the point of view of Article 107(1) TFEU, both the examination of the criterion of advantage and that of selectivity involve, at the outset, determining the normal taxation rules forming the relevant reference framework for that examination.

60 First, in the case of tax measures, the very existence of an advantage may be established only when compared with 'normal' taxation (judgment of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 56). Such a measure confers an economic advantage on its recipient if it mitigates the burdens normally included in the budget of an undertaking and which, accordingly, without being subsidies in the strict meaning of the word, are similar in character and have the same effect (judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 22). Thus, it is precisely the 'normal' taxation which is established by the reference framework.

61 Second, in tax matters, the case-law requires an analysis of selectivity in three stages. That analysis entails, as a first step, identifying the ordinary or 'normal' tax system applicable in the Member State concerned, which constitutes the reference framework, and, as a second step,

demonstrating that the tax measure at issue is a derogation from that reference framework, in so far as it differentiates between operators who, in the light of the objective pursued by that reference framework, are in a comparable legal and factual situation (judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 57). As a third step, it is for the Member State to demonstrate that the differentiation introduced by the measure at issue, which is 'a priori selective', is justified, since it flows from the nature or general structure of the framework of which that measure forms part (judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 58).

62 For the purposes of assessing the pleas disputing the existence of a selective advantage in the present case, it is necessary to examine, first, the pleas of the United Kingdom and ITV alleging an error of assessment vitiating the identification of the reference system adopted by the Commission, before examining, in turn, second, the various pleas alleging errors of assessment vitiating the Commission's finding of that advantage.

### *1. The plea alleging an error of assessment vitiating the definition of the reference system (first plea in Case T-363/19 and in Case T-456/19)*

63 The United Kingdom and ITV maintain, in essence, that the Commission made an error of assessment in finding that the reference system consisted solely of the rules applicable to CFCs and claimed that the appropriate reference system for the purposes of assessing the selectivity of the contested scheme consists of the United Kingdom corporation tax system.

64 The Commission disputes the arguments of the United Kingdom and ITV, arguing that the rules applicable to CFCs constitute a complete body of rules, distinct from the general United Kingdom corporation tax system, even if they constitute an extension of that system and not an exception to it.

65 In that regard, it should be borne in mind that the determination of the reference framework is of particular importance in the case of tax measures, since the existence of an economic advantage for the purposes of Article 107(1) TFEU may be established only when compared with so-called 'normal' taxation. Furthermore, it must be observed that since outside the spheres in which EU tax law has been harmonised, it is the Member State concerned which defines, by exercising its exclusive competence in the matter of direct taxation, the characteristics constituting the tax, the determination of the reference system or the 'normal' tax regime, from which it is necessary to analyse the condition relating to selectivity, must take account of those characteristics (see, to that effect, judgment of 16 March 2021, *Commission* v *Poland*, C-562/19 P, EU:C:2021:201, paragraphs 38 and 39).

66 Thus, it is necessary to determine the 'normal' taxation rules to which the recipient of the measure considered to constitute State aid is subject. Moreover, as for a tax measure of general application, it is necessary to identify the ordinary tax system or the reference system applicable in the Member State concerned, since it constitutes the starting point for the comparative examination to be carried out in the context of the assessment of the selectivity of an aid scheme (see, to that effect, 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 61).

67 Furthermore, it is apparent from the case-law that, where there is a general tax rule applicable to all undertakings subject to corporation tax, a rule which constitutes an exception to the general rule cannot be used as a relevant reference system for the purposes of analysing selectivity, even though an overall examination of the content of all those provisions should have made it possible to find that the effect of the tax measure at issue was to define a situation covered by the general rule (see, to that effect, judgment of 28 June 2018, *Germany* v *Commission*, C-208/16 P, not published, EU:C:2018:506, paragraphs 99 to 101).

68 In addition, it should be recalled that the selectivity of a tax measure cannot be assessed on the basis of a reference framework consisting of some provisions of the domestic law of the Member State concerned that have been artificially taken from a broader legislative framework. Where the tax measure in question is inseparable from the general tax system of the Member State concerned, reference must be made to that system. On the other hand, where it appears that such a measure is clearly severable from that general system, it cannot be ruled out that the reference framework to be taken into account may be more limited than that general system, or even that it may equate to the measure itself, where the latter appears as a rule having its own legal logic and it is not possible to identify a consistent body of rules external to that measure (see 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, paragraphs 62 and 63 and the case-law cited).

69 It is apparent from settled case-law that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects, and thus independently of the techniques used (see judgment of 28 June 2018, *Andres (insolvency of Heitkamp Bauholding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 91 and the case-law cited).

70 It follows from that case-law that if the use of a regulatory technique cannot enable national tax rules to escape from the outset the scrutiny concerning State aid provided for under the FEU Treaty, resorting to the regulatory technique used is not sufficient to define the relevant reference framework for the purposes of assessing the condition relating to selectivity, since that would cause the form of State intervention to prevail decisively over its effects. Consequently, the regulatory technique used cannot be decisive for the purposes of the determination of the reference framework (judgment of 28 June 2018, *Andres (insolvency of Heitkamp Bauholding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraphs 89 to 91).

71 The Commission itself clarified its interpretation of the concept of reference system in its Notice on the notion of State aid as referred to in Article 107(1) TFEU (OJ 2016 C 262, p. 1; 'the 2016 Notice'). In that regard, that notice, although it cannot bind the Court, may nevertheless be used as a useful source of guidance (see, to that effect and by analogy, judgment of 26 July 2017, *Czech Republic* v *Commission*, C-696/15 P, EU:C:2017:595, paragraph 53).

72 It is stated in particular in paragraph 133 of the 2016 Notice that the reference system is composed of a coherent set of rules which apply generally – on the basis of objective criteria – to all undertakings within its scope as defined by its objective. Typically, those rules define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of undertakings subject to it and the technicalities of the functioning of the system.

73 In addition, paragraph 134 of the 2016 Notice states that, in the case of taxes or levies, the reference system is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates. In that regard, it is apparent from the case-law that, in particular, the tax rate, as

well as the determination of the tax base and the taxable event are characteristics constituting the tax that define the reference system or the 'normal' tax regime, from which it is necessary to analyse the condition relating to selectivity (see, to that effect, judgment of 16 March 2021, *Commission* v *Poland*, C-562/19 P, EU:C:2021:201, paragraphs 38 and 39).

74 It is in the light of those considerations that it is necessary to assess whether the Commission correctly identified the reference system in the present case.

75 As is apparent in particular from recital 107 of the contested decision, the Commission stated that the reference system consisted of the rules applicable to CFCs which, taken together, determined the subject matter or chargeable basis for the CFC charge.

76 In the present case, the measures at issue are the exemptions provided for in Chapter 9 of Part 9A of the TIOPA for certain types of CFCs profits which would otherwise have been subject to a CFC charge under Chapter 5 of Part 9A of the TIOPA. They are therefore part of the rules applicable to CFCs, which are codified in Part 9A of the TIOPA.

77 In essence, the rules applicable to CFCs provide for the taxation in the United Kingdom of profits made by the CFC which are, in reality, attributable to their related company, taxable in the United Kingdom, in so far as that company is responsible for the activities or assets which generated those profits or in so far as the profits of the CFC are part of arrangements for the diversion of funds which would otherwise have been taxable in the United Kingdom.

78 The rules applicable to CFCs, for their part, form part of the general United Kingdom corporation tax system.

79 It is necessary to examine to what extent those rules are severable from that general tax system, in that they appear to be a consistent body of rules with its own legal logic, as provided for in the case-law referred to in paragraph 68 above, in particular as regards factors such as the tax base, the taxable persons, the taxable event and the tax rates.

80 First, as regards the underlying logic of the rules applicable to CFCs, it should be recalled, as the United Kingdom rightly states, that the general corporation tax system of that State is based on the principle of territoriality, under which only profits made in the United Kingdom are taxed, namely profits made by companies established in that State or profits made by foreign companies arising from their activities in the United Kingdom through a permanent establishment in that State.

81 Under the rules applicable to CFCs, certain profits made by CFCs which, according to the principle of territoriality, are not normally taxed in the United Kingdom may nevertheless be taxed when they are considered to have been artificially diverted from the United Kingdom.

82 Thus, the rules applicable to CFCs are based on a logic distinct from that of the general tax system in the United Kingdom. That logic is admittedly supplementary or, as the Commission states in recital 105 of the contested decision, a corollary to the general tax system based on the principle of territoriality, however it is severable from it.

83 Those rules do not constitute an exception to the general tax system, since they may rather be regarded as an extension thereof. The rules applicable to CFCs are intended to tax profits which have been artificially diverted from the United Kingdom and, as a result, have artificially

increased the profits of the CFC, which will then distribute dividends which are not taxable in the United Kingdom. Thus, the logic of the rules applicable to CFCs is linked to the diversion of profits to CFCs, so that, in practice, they are accrued outside the United Kingdom. It is therefore distinct from that underlying the general United Kingdom corporation tax system, which is based on profits made in the United Kingdom.

84 Second, it must be ascertained whether, in the light of the characteristics constituting the tax that define the 'normal' tax regime, the rules applicable to CFCs may be regarded as constituting a complete body of rules, distinct from the general United Kingdom corporation tax system.

85 As regards the tax base, it should be noted that the rules applicable to CFCs cover CFCs profits which are artificially diverted and accrued by subsidiaries established outside the United Kingdom. Thus, they are accounting profits made by CFCs outside the United Kingdom and their taxation, under Chapters 4 to 8 of Part 9A of the TIOPA, is based on the condition that they have been artificially diverted from the United Kingdom. By contrast, United Kingdom corporation tax applies to profits made in the United Kingdom by companies established therein or by permanent establishments of companies established abroad.

86 As regards the taxable person, the rules applicable to CFCs apply where companies resident in the United Kingdom have certain interests in subsidiaries outside the United Kingdom. That special feature distinguishes those taxable persons individually from taxable persons under the general United Kingdom corporation tax system, that is to say companies making profits in the United Kingdom, directly or, in the case of foreign companies, through a permanent establishment in the United Kingdom. Moreover, where a company in the United Kingdom is subject to a CFC charge, it is precisely in respect of the profits made by its CFC, whereas, under the general United Kingdom corporation tax system, a company established therein is taxable in respect of its own profits that it makes itself or through a permanent establishment in the United Kingdom.

87 As regards the taxable event, it should be noted that the taxation of a CFC charge under the rules applicable to CFCs arises when the CFCs make profits outside the United Kingdom and those profits are regarded as arising from artificial arrangements or diversions of resources or profits which should have been taxed in the United Kingdom. By contrast, in the case of United Kingdom corporation tax, it is the making of profits in the United Kingdom which gives rise to the tax liability. Since they were artificially diverted, the profits made by CFCs should, by their nature, have been subject to tax in the United Kingdom. Thus, the decisive factor for the purposes of imposing a CFC charge is the artificial diversion of profits from the United Kingdom.

88 As regards the tax rate, it should be noted that the rules applicable to CFCs provide, in Section 371BC of Part 9A of the TIOPA, that the applicable tax rate for the calculation of the CFC charge is that provided for by the corporation tax system for the profits of the related company that is taxable in the United Kingdom and, if there are several applicable rates, it is the average of all those rates over the relevant tax period. It is true that the rules applicable to CFCs do not contain any specific rate applicable to CFCs profits and refer to the rate provided for by the general corporation tax system. However, as a whole, the CFC charge is determined by a specific calculation mechanism which entails, where appropriate, calculating the average of several tax rates applicable to the profits of the related company that is taxable in the United Kingdom.

89 Last, the rules applicable to CFCs contain, in particular in Chapters 15 to 21 of Part 9A of the TIOPA, specific provisions concerning the calculation of the CFC charge, the management and collection of that charge and, more specifically, its relationship with the taxes payable by the

company resident in the United Kingdom and those paid by the CFC in its country of residence. Those provisions enable the application of Part 9A of the TIOPA for the purposes of the taxation of CFCs, alongside the application of the general United Kingdom corporation tax system. It is true that the rules applicable to CFCs are based on the general United Kingdom corporation tax system to which they refer. However, that does not prevent them from being regarded as an autonomous body of specific rules governing the taxation in the United Kingdom of profits made by CFCs.

90 Furthermore, it must be noted that, when calculating the amount of tax payable by the resident company which is taxable on account of the profits made by its CFC, relief in the form of a deduction is provided for in respect of any taxes which have been paid in the CFC's host country. That mechanism, which is not relevant in calculating tax liability under the general United Kingdom corporation tax system, is crucial in the context of the taxation of CFCs profits, in order to avoid double taxation. The very existence of that mechanism attests to the special nature of the rules applicable to CFCs.

91 In those circumstances, it must be found that the Commission did not make an error of assessment in considering that the rules applicable to CFCs constituted a separate body of tax rules within the general United Kingdom corporation tax system and adopting those rules as reference system for the purposes of its analysis.

92 Accordingly, the present plea, alleging an error of assessment vitiating the identification of the reference system, must be rejected.

### *2. The pleas alleging an error of assessment vitiating the Commission's findings as to the existence of an advantage and the a priori selectivity of the contested scheme owing to a derogation from the reference system (second plea in Case T-363/19 and second and third pleas in Case T-456/19)*

93 The United Kingdom and ITV submit, in essence, that, even if the regime applicable to CFCs is the appropriate reference system, application of Chapter 9 of Part 9A of the TIOPA does not lead to the grant of an advantage and does not constitute a derogation from that system.

94 The Commission disputes the arguments of the United Kingdom and ITV.

95 In the present case, it is necessary to examine in turn the arguments of the United Kingdom and ITV, itself supported by that State and LSEGH, disputing, first, the Commission's conclusion relating to the existence of an advantage, second, the objective of the reference system considered by the Commission for the purposes of the comparison inherent to the analysis of selectivity and, third, the Commission's conclusion relating to the a priori selectivity of the contested scheme because of a derogation from the reference system.

#### *(a) The existence of an advantage*

96 According to the United Kingdom and ITV, the provisions of Chapter 9 of Part 9A of the TIOPA could not be considered in isolation from the provisions of Chapters 3 and 5 thereof, since they form a coherent whole which defines the scope of the taxation of CFCs profits in the United Kingdom. Accordingly, the United Kingdom tax authorities cannot confer any advantage as a result of the application of Chapter 9 of Part 9A of the TIOPA.

97 In that regard, it should be noted that, according to settled case-law, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or which fall to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (see judgment of 2 September 2010, *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 40 and the case-law cited; judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 21).

98 Thus, a State measure confers an economic advantage on its recipient if it mitigates the burdens normally included in the budget of an undertaking and which, accordingly, without being subsidies in the strict meaning of the word, are similar in character and have the same effect (judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 22). A measure by which the public authorities grant certain undertakings favourable tax treatment which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than other taxpayers amounts to State aid within the meaning of Article 107(1) TFEU (judgment of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 14; see, also, judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 46 and the case-law cited).

99 Consequently, in order to determine whether there is a tax advantage, the position of the recipient as a result of the application of the measure at issue must be compared with his position in the absence of the measure at issue and under the normal rules of taxation (see judgment of 24 September 2019, *Netherlands and Others* v *Commission*, T-760/15 and T-636/16, EU:T:2019:669, paragraph 147 and the case-law cited).

100 In the present case, in recitals 96 to 101 of the contested decision, the Commission considered that the exemptions at issue allowed a company established in the United Kingdom which was subject to a CFC charge under Chapter 5 of Part 9A of the TIOPA to request that that CFC charge be set at 25% of the CFCs non-trading finance profits arising from qualifying loans, or even a lower percentage which can be as low as 0% where those profits were financed from 'qualifying resources' or where the 'matched interest' rule applied. Thus, the exemptions at issue confer an advantage on the recipient companies in so far as the exempt profits were otherwise subject to a CFC charge under Chapter 5 of Part 9A of the TIOPA.

101 In that regard, it is apparent from Part 9A of the TIOPA, as described in paragraphs 3 to 9 above, that the rules laid down therein provide for a number of situations which are regarded as part of an artificial diversion of profits, such as, in particular, those covered by Chapter 5, which concerns the performance of activities by means of significant people functions in the United Kingdom, resulting in the making of CFCs non-trading finance profits outside the United Kingdom.

102 Thus, where one of the criteria laid down by the abovementioned rules to identify an artificial diversion of profits is fulfilled, those rules provide for the taxation in the United Kingdom of the profits made by the CFCs in question by means of a CFC charge.

103 Therefore, the scheme of the system resides in the taxation applicable to those situations which constitute an artificial diversion of the profits from the United Kingdom, whether in order to reintegrate those profits into the United Kingdom tax base which had been eroded, or to discourage arrangements leading to such diversion from being set up.

104 In those circumstances, the fact of providing for an exemption for 75%, or even 100%, of those CFCs profits, which would have been regarded as having been artificially diverted from the United Kingdom and, therefore, which should have been taxed there on that basis, reduces the charges which are normally included in the budget of the company taxable in the United Kingdom as a result of those profits.

105 Contrary to what ITV claims, the exemptions at issue cannot be regarded as a variation in the taxation of CFCs profits. In so far as those exemptions disregard the very nature of the rules applicable to CFCs, namely the taxation of artificially diverted profits from the United Kingdom, they cannot be regarded as being a variation in the application of those rules.

106 Similarly, the argument that Chapters 3 and 5 of Part 9A of the TIOPA are parts of the same piece of legislation which define the scope of the taxation of CFCs profits in the United Kingdom cannot succeed. The fact that both chapters form part of that piece of legislation and that they are necessarily both applicable under the legislation in force does not alter the fact that the measures provided for in Chapter 9 of Part 9A of the TIOPA, in so far as they exempt from taxation the profits which have been regarded as artificially diverted from the United Kingdom, do not correspond to the nature and general scheme of the system of which they form part. Thus, rather than defining the scope of the taxation of CFCs profits, the exemptions provided for in Chapter 9 of Part 9A of the TIOPA remove from taxation profits which should have been taxed as profits artificially diverted from the United Kingdom.

107 If it were accepted that, by simply being included in the same legislative text, a derogation from a tax system would not constitute such a derogation, but rather a variation delimiting the scope of that tax system, it would be very simple for Member States to conceal derogations from normal taxation by means of such a legislative technique and, as a result, avoid the application of the rules on State aid control.

108 In those circumstances, the arguments of the United Kingdom and ITV challenging the Commission's finding of the existence of an advantage as a result of the exemptions at issue must be rejected.

### *(b) The objective of the rules applicable to CFCs*

109 The United Kingdom and ITV claim, in essence, that the Commission was wrong to take the view that the objective of the rules applicable to CFCs was limited to the taxation of artificially diverted profits, whereas those rules seek to protect the United Kingdom corporation tax base, which may be eroded by artificial diversions of profits, but also by deductions in the United Kingdom following circular arrangements.

110 The Commission contends that the objective of the rules applicable to CFCs is to tax profits arising from United Kingdom activities and assets artificially diverted to a CFC.

111 For the purposes of the comparability analysis inherent to the examination of selectivity in the context of the second step of the analysis set out in the case-law described in paragraph 61 above, the determination of the objective of the tax system concerned is of decisive importance, since it is in the light of that objective that the legal and factual situation of the economic operators concerned must be compared.

112 It follows from case-law that the condition relating to the selectivity of the advantage, inherent in the concept of a 'State aid' measure within the meaning of Article 107(1) TFEU, requires a determination as to whether, under a particular legal regime, the national measure at issue is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory (judgment of 16 March 2021, *Commission* v *Poland*, C-562/19 P, EU:C:2021:201, paragraph 28 and the case-law cited).

113 In recital 105 of the contested decision, it is stated that 'the objective of the [United Kingdom's] CFC rules is to protect the [United Kingdom] corporation tax base thereby ensuring that the [United Kingdom] corporation tax system achieves its objective' and that that system achieves 'this objective by bringing into charge profits from [United Kingdom] activities and assets which are considered to have been *artificially diverted* from the [United Kingdom] to non-resident associated entities'. That objective is set out in slightly different terms in recital 114 of the contested decision.

114 In the present case, the parties disagree, essentially, on whether the objective of the rules applicable to CFCs is to protect the tax base of United Kingdom corporation tax, as claimed by the United Kingdom and ITV, or the taxation of artificially diverted profits from the United Kingdom, as argued by the Commission.

115 In that regard, it should be noted at the outset that the two positions summarised in paragraph 114 above do not in actual fact constitute opposing positions, since the protection of the tax base of United Kingdom corporation tax is a broad objective, within which falls the more specific objective of taxing profits artificially diverted from the United Kingdom.

116 As stated in paragraph 3 above, the United Kingdom corporation tax system is based on the principle of territoriality, according to which only the profits arising from activities and assets in the United Kingdom generated either by companies established therein or by permanent establishments of foreign companies are taxed. Consequently, under the principle of territoriality, dividends distributed by controlled foreign companies, such as CFCs, are not taxed in the United Kingdom. As the United Kingdom argued in the administrative procedure, in particular in response to the decision to initiate the formal investigation procedure, in order to prevent, in the context of the territorial tax system, the United Kingdom corporation tax base from being eroded inter alia for the benefit of CFCs subject to low tax rates outside the United Kingdom, a number of measures were put in place, such as those designed to cap interest deductions in the United Kingdom, the restrictions on interest rates applied in intra-group relationships or the rules applicable to CFCs.

117 It is true that those measures all contribute to the general objective of protecting the tax base of United Kingdom corporation tax.

118 However, for the purposes of analysing the selectivity of the tax measures at issue, it is necessary to determine the specific objective of the rules applicable to CFCs, which constitutes the relevant reference system in the present case.

119 It is apparent from the various documents stemming from the consultation conducted prior to the adoption in the United Kingdom of rules applicable to CFCs that they were intended to protect the tax base of United Kingdom corporation tax from the erosion generated by the artificial

diversion of profits from the United Kingdom. Similarly, it is apparent from the replies submitted by the United Kingdom in the administrative procedure and from its pleadings in the present action that the rules applicable to CFCs are specifically intended to tax CFCs profits that have been artificially diverted from the United Kingdom.

120 In those circumstances, the arguments of the United Kingdom and ITV challenging the objective of the rules applicable to CFCs relied on by the Commission for the purposes of its comparability analysis in the present case, namely the protection of the tax base of United Kingdom corporation tax, by taxing the profits arising from United Kingdom activities and assets which are artificially diverted from that State to CFCs must be rejected.

### *(c) The a priori selectivity of the contested scheme owing to a derogation from the reference system*

121 According to the United Kingdom and ITV, supported in that regard by LSEGH, the Commission made an error of assessment in finding, in the contested decision, that the contested scheme was a priori selective, in so far as it failed to take sufficient account of the fact that the rules applicable to CFCs sought to impose tax liability only in cases where there was a high risk of abuse or artificial diversion of profits from the United Kingdom. By contrast, the exemption provided for in Chapter 9 of Part 9A of the TIOPA applies only in cases where there is a low risk of erosion of the United Kingdom corporation tax base.

122 Thus, the United Kingdom, ITV and LSEGH claim that the factual and legal situation of CFCs which have made profits from non-qualifying loans, namely those granted to related United Kingdom companies or to third-party companies, is different from that of CFCs which made profits as a result of qualifying loans. Thus, the loans granted by CFCs to related companies in the United Kingdom constitute circular arrangements designed to reduce the United Kingdom corporation tax base and the loans granted by CFCs to third parties usually constitute arrangements which have no economic purpose and are therefore comparable to 'money box loans'; this is not the case in situations involving qualifying loans, in particular because of the condition relating to the pursuit of an economic activity in the CFC's State of residence.

123 The Commission disputes those arguments and submits, in essence, that the situations involving upstream loans and 'money box loans', on the one hand, and those involving qualifying loans, on the other, are comparable, since both those types of loans could have given rise to non-trading finance profits as a result of significant people functions carried out in the United Kingdom. The criterion relating to those functions is one of the criteria laid down in Chapter 5 of Part 9A of the TIOPA for the purpose of identifying situations where there has been artificial diversion of profits, which must be subject to a CFC charge. Moreover, both qualifying loans and non-qualifying loans can be justified by valid commercial reasons.

124 In that regard, it should be recalled that, in the context of the second stage of the analysis of the selectivity of tax measures, as provided for by the case-law referred to in paragraph 61 above, the Commission must demonstrate that the tax measure at issue derogates from the reference system identified in the first stage, in so far as it introduces a differentiation between operators who, in the light of the objective assigned to the relevant tax system, are in a comparable factual and legal situation.

125 In recitals 124 to 151 of the contested decision, in order to establish the existence of a selective advantage, the Commission compared the situation of the companies able to rely on the exemptions at issue, namely those whose CFCs made non-trading finance profits arising from qualifying loans, with that of the companies to which such an exemption does not apply, namely those whose CFCs made profits arising from non-qualifying loans.

126 In that regard, it is necessary to examine, first of all, the conditions required for the grant of the exemptions at issue, in particular those relating to whether loans are qualifying or non-qualifying loans, so as to concentrate next on the inherent characteristics of non-qualifying loans, in order to examine, finally, whether the Commission was correct in finding that the contested measures had introduced differentiations between operators in a comparable situation.

*(1) Conditions for the grant of the exemptions in question*

127 In the contested decision, the Commission considered three exemptions, laid down in Chapter 9 of Part 9A of the TIOPA and affecting CFCs profits that are liable to be subject to a CFC charge under Chapter 5 of that act, as conferring a selective advantage on their beneficiaries.

128 The first exemption is laid down in Section 371IB of Part 9A of the TIOPA, which may concern up to 100% of the non-trading finance profits of a CFC, arising from qualifying loans, provided that they were financed by qualifying resources, that is to say, in essence, those derived from the CFC's profits or other own resources.

129 The second exemption, which concerns 75% of a CFC's non-trading finance profits, is provided for in Section 371ID of Part 9A of the TIOPA. Under that exemption, 75% of the profits from qualifying loans may be the subject of an exemption, without it being necessary to demonstrate that the resources were allocated to the CFC and irrespective of the significant people functions carried out in relation to the loans in question. For that reason, it is considered that that exemption is automatically granted in the case of qualifying loans.

130 The third exemption is set out in Section 371IE of Part 9A of the TIOPA and is known as the 'matched interest' exemption. That exemption may be relied on in respect of the balance of the non-trading finance profits arising from qualifying loans which were not covered by the other two exemptions, in so far as, for the group of undertakings concerned as a whole, the amount of taxable income on account of the interest received is greater than the amount of interest paid and therefore deducted by that group from its tax base in the United Kingdom. In so far as that exemption may be relied on in respect of all the non-trading finance profits of the CFC concerned, arising from qualifying loans, it was treated by the Commission as a full exemption in the same way as that provided for in Section 371IB.

131 In the first place, it must be borne in mind that the exemptions at issue affect non-trading finance profits, that is to say, in essence, profits from loans granted by a CFC which is not active in the banking sector, and which are considered to be taxable in the United Kingdom, and therefore liable to be subject to a CFC charge under Chapter 5 of Part 9A of the TIOPA. Thus, those profits were regarded as being taxable in the United Kingdom, since the most important activities for the creation and management of the loans in question, namely the significant people functions, were carried out in the United Kingdom (that situation corresponds to what is referred to as the 'UK activities test', provided for in Section 371EB of Part 9A of the TIOPA) or the loans

were financed by funds or assets which stem from injections of capital from the United Kingdom (that situation corresponds to what is referred to as the 'United Kingdom connected capital test', laid down in Section 371EC of Part 9A of the TIOPA).

132 In the second place, in order to benefit from the three exemptions at issue, the condition relating to the place of establishment of the CFC must be satisfied. That condition, laid down in Section 371IA of Part 9A of the TIOPA, in conjunction with Section 371DG of that act, requires the CFC in question to carry out its activities in its country of establishment, at least mainly, in premises occupied and used on a permanent basis. It is presented by the United Kingdom in its written pleadings as a requirement for the CFC to actually exist, to the exclusion of 'letter box' or 'brass plate' companies. It is clear, however, that the scope of that condition, as interpreted by the United Kingdom tax authorities, remains relative. It is apparent from point INTM200810 of *HMRC International Manual/INTM 190000 Controlled Foreign Companies* that, for that condition to be satisfied, it suffices that the premises be in use with 'a reasonable degree' of permanence – that is to say for a period of at least 12 months or that there is an 'intention' to that effect. Moreover, additional conditions capable of demonstrating that the activity in the country of establishment is genuine are not attached to that residence requirement, contrary to what is provided for in Section 371DF(1) of Part 9A of the TIOPA with regard to trading profits.

133 Furthermore, as the United Kingdom acknowledged in reply to the questions put by the Court at the hearing, the fact that a CFC meets the condition relating to the place of establishment does not mean that the significant people functions relevant to that CFC's activity, in particular those relating to the loans which it grants (and which are likely to generate non-trading finance profits), are carried out in the CFC's country of residence. In that regard, the Commission observed, in recitals 165 and 166 of the contested decision, that the United Kingdom tax authorities took the view that, for larger, medium- to long-term loans funded by equity, it was expected that, in most cases, the management of the loan will rest with a group's finance function rather than the CFCs themselves.

134 Accordingly, it is possible that a CFC that meets the condition relating to the place of establishment may make non-trading finance profits arising from lending activities in relation to which the significant people functions were carried out in the United Kingdom.

135 Furthermore, the fact of satisfying such a condition does not mean either that the other conditions necessary to benefit from the exemptions in question are met. Therefore, it cannot be ruled out that a CFC which meets the condition relating to the place of establishment may make non-trading finance profits arising from non-qualifying loans to which the exemption at issue may therefore not be applied.

136 In those circumstances, as the Commission rightly noted, in particular in recital 149 of the contested decision, the condition relating to the business premises test is not decisive for the purposes of assessing the comparability which must be made in the context of the analysis of selectivity, since it may be met both by companies that are able to rely on the exemptions at issue and by companies which are excluded from doing so.

137 In the third place, in order to benefit from the exemptions at issue, the non-trading finance profits in question must have arisen from qualifying loans. Under Section 371IG of Part 9A of the TIOPA, qualifying loans are loans granted by a CFC to other companies that are not resident in the United Kingdom and controlled by the same company or companies as that or those that control the CFC. Therefore, as is apparent from point INTM216450 of *HMRC International*

*Manual/INTM 190000 Controlled Foreign Companies*, in essence, qualifying loans are loans granted by the CFC to companies in the same group which are not resident in the United Kingdom.

138 The condition relating to whether loans are qualifying loans or not is relevant to the three exemptions concerned. However, in connection with the exemption laid down in Section 371ID of Part 9A of the TIOPA, that condition is, in essence, the only condition, other than that relating to the place of establishment, applicable in order for taxable companies to be able to rely on the exemption in respect of 75% of the non-trading finance profits made by their CFCs as a result of the grant qualifying loans, irrespective of the fact that, inter alia, significant people functions relating to the loans in question were carried out in the United Kingdom.

139 In the fourth place, to qualify for the exemption provided for in Section 371IB of Part 9A of the TIOPA, which may affect up to 100% of the non-trading finance profits of a CFC, it is also necessary to prove that the resources underlying the qualifying loan in question are 'qualifying' resources. Section 371IB of Part 9A of the TIOPA provides that taxable companies may apply for an exemption from the CFC charge on non-trading finance profits arising from qualifying loans if and to the extent that they succeed in showing that those profits derive from qualifying resources. Under Section 371IB of Part 9A of the TIOPA, qualifying resources correspond, in essence, to those derived from the profits of the CFC or from funds and other assets received by the CFC in connection with the shares it holds in members of the group to which it belongs or which it has issued to those members. That exemption may therefore cover up to 100% of taxable non-trading finance profits if all the qualifying loans concerned have been funded out of qualifying resources.

140 In that regard, as the United Kingdom and ITV stated in their answers to the questions put by the Court, it cannot be ruled out that loans were funded out of qualifying resources, and therefore the CFC's own resources, while the significant people functions relating to those loans had been carried out centrally in the United Kingdom. Therefore, the exemption provided for in Section 371IB of Part 9A of the TIOPA, like that provided for in Section 371ID of Part 9A of the TIOPA, is granted irrespective of whether significant people functions relating to the loans in question have been carried out in the United Kingdom.

141 In the fifth place, the exemption provided for in Section 371IE of Part 9A of the TIOPA, known as 'matched interest' exemption, may be relied on in respect of the balance of the non-trading finance profits, arising from qualifying loans, which were not covered by the other two exemptions, in so far as, for the group of undertakings concerned taken as a whole, the amount of income taxable on account of the interest received is higher than the interest paid and therefore deducted by that group from its taxable base in the United Kingdom.

142 It is therefore an exemption supplementary to the other two exemptions, but which is also granted irrespective of the fact that the significant people functions relating to the loans from which the non-trading finance profits in question stem were carried out in the United Kingdom.

143 In the light of the foregoing considerations, it must be observed that, apart from the various conditions which are relevant to each of the exemptions at issue, those exemptions are granted irrespective of whether significant people functions have been carried out in the United Kingdom as regards the loans from which the non-trading finance profits in question arise.

*(2) The exclusions from the grant of the exemptions at issue*

144 As has been pointed out in paragraphs 127 to 143 above, the condition common to the three exemptions at issue is that of whether the loans are qualifying or non-qualifying loans. Accordingly, non-trading finance profits arising from non-qualifying loans are excluded from those exemptions.

145 Under Section 371IH of Part 9A of the TIOPA, loans granted to a company established in the United Kingdom or to a permanent establishment, in that State, of a non-resident company are excluded from the definition of qualifying loans. Loans granted to another CFC which enable a company in the United Kingdom to deduct interest paid under that loan when calculating a CFC charge are also excluded. Loans granted to a beneficiary that uses those funds to grant other loans are also excluded.

146 Since qualifying loans must be granted to qualifying companies, under Section 371IG(8) of Part 9A of the TIOPA, namely those connected with the CFC and controlled by the same company or companies as those controlling the CFC, loans to companies outside the group are excluded from the definition of qualifying loans.

147 Thus, in essence, loans granted by CFCs to companies in the group resident in the United Kingdom, known as 'upstream loans', loans granted by CFCs to third-party companies, known as 'money box loans', and those whose interest is used as a deduction from another CFC charge or serve to fund other loans are regarded as non-qualifying loans.

148 First of all, as regards upstream loans, the particular feature highlighted by the United Kingdom in order to explain their exclusion from the exemptions at issue is the additional risk that that type of loan represents for the tax base because of the possibility for the United Kingdom company which benefited from the loan to deduct interest paid under the loan in question.

149 In that regard, it should be noted that, although the possibility of deducting in the United Kingdom the interest paid in connection with the loans in question characterises upstream loans, the fact that the non-trading finance profits from the loans in question are subject to a CFC charge, under Section 371EB in Chapter 5 of Part 9A of the TIOPA, implies that significant people functions relating to those loans have been carried out in the United Kingdom.

150 Next, as regards loans to third parties, it must be borne in mind that they cannot benefit from the exemptions at issue, since they are not qualifying loans. In order to be qualifying loans, the beneficiary of the loan in question must also be a qualifying company, that is to say, in essence, a company forming part of the same group as the CFC in question.

151 It is true that throughout the proceedings, the United Kingdom described the loans granted by CFCs to third-party companies as 'money box loans' or forming part of 'money box' companies. According to the United Kingdom and ITV, where a CFC grants a loan to a third party, that loan consists of surplus monetary assets deposited with third parties, in the form of a bank deposit or other safe investment.

152 However, it should be noted that those considerations are not, in themselves, those which render the loan a non-qualifying loan. Under Section 371IG(8) of Part 9A of the TIOPA, a loan is a non-qualifying loan where the beneficiary of the loan in question is not part of the group to which the CFC granting it belongs.

153 In any event, the exclusion in question is not intended to cover a situation of artificial diversion of profits which is linked to the fact that the beneficiary of the loan from which the profits in question stem does not belong to the same group as the CFC, whereas such artificial diversion is not likely to arise in cases where the beneficiary of the loan in question belongs to the same group as the CFC.

154 Whether or not the beneficiary of the loan belongs to the CFC group granting it, significant people functions may have been carried out in the United Kingdom so far as concerns that loan, while the non-trading finance profits arising from that loan were made by the CFC. Thus, whether or not the beneficiary of the loan in question belongs to the same group as the CFC has no influence over such profits being made by the CFC.

155 Finally, the United Kingdom and ITV highlight other exclusions from the definition of qualifying loans, which are laid down in Section 371IH of Part 9A of the TIOPA.

156 Thus, under Section 371IH(3) of Part 9A of the TIOPA, the definition of qualifying loans excludes, inter alia, situations in which interest paid under the loan in question serve to reduce the profits underlying the CFC charge. That exclusion is additional to that relating to upstream loans, in that, in essence, it seeks to ensure that the exemptions at issue are not combined with deductions or other exemptions applied in the United Kingdom.

157 Moreover, under Section 371IH(5) of Part 9A of the TIOPA, situations in which the loan granted by the CFC subsequently allows the company in receipt of the loan to grant further loans are also excluded. As the United Kingdom and ITV have observed, that exclusion, in essence, seeks to ensure that the loans granted by the CFC are used to finance group commercial activities carried out outside the United Kingdom.

158 In that regard, as the Commission rightly submits, it must be observed that, while it may be legitimate to grant an exemption for non-trading finance profits arising from loans which have served to finance the group's activities abroad, the fact is that the return obtained from United Kingdom resources or significant people functions carried out in the United Kingdom will have been made by the CFC and could therefore be regarded as having been artificially diverted from the United Kingdom under Chapter 5 of the TIOPA.

159 With regard to the various exclusions described in paragraphs 147 to 157 above, it should be noted that they relate to situations in which, admittedly, additional deductions within the United Kingdom could be made or in which the funding offered by the CFC would have benefited companies outside the group whose resources or significant people functions from the United Kingdom would have been mobilised for the purpose of creating and managing the loans in question. However, in all those circumstances, the exclusions from the exemptions were not linked to the existence of an artificial diversion of profits as a result of the significant people functions carried out in the United Kingdom.

160 In those circumstances, the arguments of the United Kingdom, ITV and LSEGH that those exclusions sought to prevent the exemptions at issue from being granted in specific situations of artificial diversion of profits must be rejected.

*(3) The existence of a derogation from the reference system and the comparability of the operators concerned, in the light of the objective of that system*

161 As a preliminary point, it should be borne in mind that, in the present case, the reference system in relation to which the exemptions at issue must be analysed consists of the rules applicable to CFCs, which seek to protect the tax base of the United Kingdom corporation tax, by taxing the profits arising from United Kingdom activities and assets which are artificially diverted from the United Kingdom to CFCs.

162 Furthermore, it should be borne in mind that, within the rules applicable to CFCs, the non-trading finance profits made by the latter, relating to significant people functions carried out in the United Kingdom, were regarded as profits artificially diverted from the United Kingdom and, therefore, taxable under Chapter 5 of Part 9A of the TIOPA.

163 The existence of significant people functions carried out in the United Kingdom is one of the four situations, provided for in Chapter 5 of Part 9A of the TIOPA and summarised in paragraph 6 above, regarded as constituting an artificial diversion of profits and, therefore, as having to be taxed in the United Kingdom.

164 In other words, the United Kingdom legislature considered that CFCs profits, in so far as they are generated by significant people functions carried out in the United Kingdom, must be taxed therein. For that reason, the non-trading finance profits generated in the context of both non-qualifying loans and qualifying loans may be subject to a CFC charge, under Section 371EB in Chapter 5 of Part 9A of the TIOPA.

165 As has just been concluded in paragraph 143 above, it must be held that, by applying the exemptions concerned, it cannot be ruled out that situations in which significant people functions were carried out in the United Kingdom, and therefore regarded as constituting an artificial diversion of profits, may be partially or totally exempt from taxation in the United Kingdom.

166 In those circumstances, the fact of exempting only CFCs non-trading finance profits arising from qualifying loans could lead to different treatment as opposed to CFCs non-trading finance profits in the context of non-qualifying loans which, since they do not benefit from the exemptions concerned, would be taxed under the rules applicable to CFCs, in the event that those two situations were comparable, in the light of the objective of the rules applicable to CFCs.

167 Thus, it is necessary to examine whether companies taxable in the United Kingdom which may benefit from the exemptions at issue in respect of their CFCs non-trading finance profits arising from qualifying loans are in the same situation as companies whose CFCs have made non-trading finance profits arising from non-qualifying loans, in the light of the objective of the reference system, namely the protection of the tax base of United Kingdom corporation tax through the taxation of artificially diverted profits.

168 First, both upstream loans and qualifying loans may be subject to a CFC charge, under Section 371EB of Part 9A of the TIOPA, on account of the significant people functions carried out in the United Kingdom under those loans. An artificial diversion of profits as a result of the activities carried out in the United Kingdom is considered to have taken place in those two situations, although only the profits arising from qualifying loans are exempt.

169 As the United Kingdom asserts, the rules applicable to CFCs constitute the response to artificial diversion arising from the transfer of funds to the CFC, which is initially carried out by the company taxable in the United Kingdom; where relevant, those funds will be repatriated to the United Kingdom only by way of untaxed dividends. That reasoning also applies, inter alia, to situations in which significant people functions are carried out in the United Kingdom for loans granted by the CFC, which subsequently makes non-trading finance profits as a result of those loans. The profits generated by those loans from the activities carried out in the United Kingdom will be repatriated therein only in the form of non-taxable dividends, irrespective of whether the beneficiaries of the loans in question are established in the United Kingdom or in another State.

170 Thus, as regards profits which are artificially diverted as a result of activities carried out in the United Kingdom, the taxation of which is covered by the rules applicable to CFCs, qualifying loans and upstream loans are in equivalent situations, irrespective of the fact that, in the case of upstream loans, the possibility of deducting in the United Kingdom interest paid under those loans exacerbates the erosion of the tax base of United Kingdom corporation tax.

171 In that regard, it should be noted that the erosion of the tax base of the company which is a beneficiary of the loan in the United Kingdom, as a result of the deductions by the latter of the interest paid to the CFC, is a separate problem from the erosion linked to the artificial diversion of the company's profits from the United Kingdom which is the source of the funds paid and the significant people functions carried out in relation to the loan in question.

172 Furthermore, as the Commission has rightly pointed out, the risk of erosion of the tax base of United Kingdom corporation tax linked to the deduction of loan interest can be managed at the level of the company which relies on it abusively, for example by limiting possible deductions. Provision may be made, where appropriate, for such a limitation at group level. As the United Kingdom itself acknowledges, its tax law contains a whole series of measures which complete each other and are designed to protect the tax base of United Kingdom corporation tax. Measures capping the deduction of loan interest, which prevent certain deductions, motivated purely by tax reasons, from being made are included amongst those measures mentioned by the United Kingdom. Therefore, that type of measure may apply in order to deal with deductions in the context of upstream loans, since they are regarded by the United Kingdom tax authorities as being circular arrangements established solely for the purpose of making tax deductions.

173 Second, as regards loans to third parties, it should be noted that, in the light of Section 371IG(8) of Part 9A of the TIOPA, the key element which makes that type of loan a non-qualifying loan is the fact that the beneficiaries of the loans granted by the CFC from which the non-trading finance profits in question stem are third parties which are not related to the CFC.

174 The United Kingdom and ITV have highlighted the fact that, while the funds which made it possible to finance the loan in question could have been retained in the United Kingdom and been invested by companies belonging to the same group established in the United Kingdom in order to ensure that the return on excess funds is repatriated to companies established in the United Kingdom, loans to third parties constitute 'money box' arrangements which have no economic purpose, in order to generate non-trading finance profits at the level of the CFC in question and, therefore, outside the United Kingdom.

175 However, as has just been observed in paragraph 152 above, the allegedly fictitious nature of the loans to third parties and their alleged lack of economic purpose are not apparent, as exclusions, from the provisions relating to the exemptions at issue. Moreover, as the Commission rightly

noted, the United Kingdom and ITV have not adduced any evidence showing that the loans granted by CFCs to third-party companies are necessarily 'money box' arrangements which cannot be based on legitimate economic reasons.

176 Moreover, whether the recipient is a company outside the group or a company within the group to which the CFC belongs does not alter the fact that the transfer of funds from the company established in the United Kingdom to that CFC will not generate profits that are taxable in the United Kingdom, since the return from those funds, in both cases, will be repatriated to the United Kingdom only in the form of non-taxable dividends. The latter situation arises in both scenarios. Thus, a CFC charge should arise as a consequence of such a diversion.

177 The same reasoning applies where the non-trading finance profits arising from a loan were made by a CFC by relying on significant people functions carried out in the United Kingdom. The non-trading finance profits arising from a loan granted by the CFC, whether to a third party or to a company in the same group, for which significant people functions were carried out in the United Kingdom, are regarded as having been artificially diverted and, for that reason, liable to be subject to a CFC charge, under Section 371EB in Chapter 5 of Part 9A of the TIOPA.

178 Therefore, as regards profits artificially diverted as a result of significant people functions carried out in the United Kingdom, the taxation of which is governed by the rules applicable to CFCs, qualifying loans and loans to third parties are in equivalent situations, irrespective of the fact that in the case of loans to third parties the profits made by the CFC were generated by interest paid by a third party and not by a company belonging to the same group.

179 Third, as regards the exclusions from the definition of qualifying loans which, according to the United Kingdom, seek to encourage the use of qualifying loans to finance the activities of the CFC group outside the United Kingdom, it must be borne in mind, as has been stated in paragraph 158 above, that such an exclusion is unrelated to the fact that significant people functions were carried out in the United Kingdom as regards the loans in question.

180 Thus, whether or not the loans granted by a CFC were used to finance the group's activities outside the United Kingdom does not alter the fact that, since significant people functions relating to those loans were carried out in the United Kingdom, the resulting profits are regarded, under the rules applicable to CFCs, as having been artificially diverted from the United Kingdom. Thus, in the light of the objective of those rules, namely the protection of the tax base of United Kingdom corporation tax through the taxation of artificially diverted profits, the two situations are comparable.

181 It follows from the foregoing that the exemptions at issue, in so far as they exempt only CFCs non-trading finance profits arising from qualifying loans, to the exclusion of those arising from non-qualifying loans, lead to a difference in treatment of the two situations even though they are comparable, in the light of the objective pursued by those rules, consisting in protecting the tax base of the corporation tax in the United Kingdom through the taxation of artificially diverted profits.

### *(d) Conclusion on the existence of an advantage and derogation from the reference system*

182 In the light of the considerations set out in paragraphs 108, 120, 143, 160 and 181 above, it must be held that the Commission did not commit any errors of assessment when it concluded that there was an advantage in the present case and that it was a priori selective, since the exemptions at

issue derogated from the United Kingdom rules applicable to CFCs, in that they introduced a difference in treatment between taxable companies in a comparable situation, in the light of the objective of those rules. Accordingly, the present pleas, based on such errors, must be rejected.

### *3. Pleas alleging errors of assessment concerning the existence of justifications for the exemptions at issue (third plea in Case T-363/19 and fourth to sixth pleas in Case T-456/19)*

183 In the context of the present pleas, which are based on arguments which may be grouped into two parts, the United Kingdom and ITV claim that the Commission vitiated the contested decision with errors of assessment by rejecting the justifications put forward for the exemptions at issue by the United Kingdom, namely, first, those based on reasons of administrative practicability (first part) and, second, those relating to compliance with freedom of establishment (second part).

#### *(a) The first part, alleging an error of assessment of the justification for the measures at issue for reasons of administrative practicability*

184 The United Kingdom and ITV, in essence, claim that, if the exemptions at issue could be regarded as having conferred an a priori selective advantage on companies which had relied on them, the Commission made an error of assessment in the contested decision in refusing to consider that those exemptions had been justified by reasons relating to the need to render the system for the taxation of CFCs profits administrable, given the complexity of the exercise consisting in determining the significant people functions carried out in the context of intra-group loans and their location.

185 The Commission disputes those arguments, in particular, by arguing that the justification relating to the difficulty in identifying significant people functions carried out in the context of intra-group loans was not put forward during the administrative procedure and that, in any event, by its arguments, the United Kingdom has not put forward any convincing reason in order to establish that there is such a difficulty to identify significant people functions in the context of qualifying loans, whereas such identification is normally possible and carried out in the case of non-qualifying loans. Moreover, it is even recognised in the United Kingdom tax authorities' guidance that significant people functions in the context of intra-group loans are generally carried out at the level of the group's central structures.

186 In that regard, it should be recalled that it is apparent from the case-law that a measure which creates an exception to the application of the general tax system may be justified by the nature and overall structure of that tax system if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system, in particular the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives (judgments of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 81; of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 69; and of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraph 48).

187 It has been accepted that objectives inherent in the general tax system concerned could justify an a priori selective tax regime (see, to that effect, judgments of 29 April 2004, *GIL Insurance and Others*, C-308/01, EU:C:2004:252, paragraphs 74 to 76, and of 8 September 2011, *Paint Graphos*

*and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraphs 64 to 76), in particular the objectives linked to the proper functioning of the tax system in question (see, to that effect, judgment of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraphs 50 to 53).

188 First, it should be noted that, in the observations submitted on 15 January 2018 following the Commission's decision to initiate the formal investigation procedure, the United Kingdom argued that, if the rules applicable to CFCs are considered to include provisions derogating from the reference system, those provisions were justified in particular by the need to put in place rules which can be easily applied, without having to carry out a complex exercise consisting in identifying the significant people functions carried out in connection with the loans in question.

189 Second, although it is admittedly apparent from the replies to the consultation conducted by the United Kingdom authorities before the adoption of the rules applicable to CFCs that, inter alia, the proposal relating to a partial exemption of 75% was mostly supported because of its simplicity and ease of application, the United Kingdom has not provided any evidence to quantify the administrative costs relating to the identification and location of significant people functions in the context of intra-group loans.

190 In the administrative procedure, the United Kingdom merely asserted that the fact of laying down automatic mechanisms, such as the 75% exemption threshold, made the application of the rules relating to CFCs simpler. As regards specifically the identification and location of the significant people functions carried out in the context of intra-group loans, the United Kingdom merely stated that this was a costly exercise, without adducing any other concrete evidence in support of its assertion.

191 In addition, although the documents of the consultation preceding the adoption of the rules applicable to CFCs, which were placed on the files in the present cases, contain responses in favour of the proposed automatic exemption, those replies are based on general assertions. Moreover, their significance is limited, in so far as it is clear that an automatic exemption is simpler to manage both for the tax authorities and for taxable persons than a situation in which it is necessary to prove and verify that the conditions for benefiting from such an exemption are met. Such assertions are not sufficient to prove that a case-by-case examination undertaken in order to establish whether CFCs profits have been artificially diverted from the United Kingdom as a result of significant people functions carried out in that State would involve complex, costly and burdensome formalities to the point of rendering the system administratively unmanageable.

192 As stated in paragraph 186 above, it is for the Member State claiming that a priori selective measures are justified to show that those measures result directly from the basic or guiding principles of its tax system.

193 Furthermore, as has been noted in paragraph 133 above, the United Kingdom tax authorities themselves acknowledged that for larger, medium- to long-term loans funded by equity, it was generally expected that, in most cases, the management of those loans would be part of a group's financing function and that experience had shown that this type of loan was planned and managed at the level of the group's central structures. Such a consideration is indicative of the fact that, for a large part of intra-group loans, the question of the identification and location of the significant people functions does not even arise, since those functions can be presumed to have been carried out at central level in the United Kingdom.

194 Third, as regards more specifically the partial exemption of 75% of the non-trading finance profits, as the Commission rightly states, no evidence shows the extent to which the 75% exemption threshold was necessary or appropriate in cases where a CFC charge would have been payable on the basis of the general criterion of significant people functions carried out in the United Kingdom. In addition, no evidence has been adduced to establish the relevance of the equity ratio, which gave rise to such a threshold, in order to answer the question relating to the difficulty of identifying and locating the significant people functions carried out in the context of intra-group loans generating non-trading finance profits.

195 Even if it were to be accepted that there is a risk of overcapitalisation in the context of CFCs and that the taxation in the United Kingdom of 25% of their non-trading finance profits is an effective response to such a risk, the United Kingdom and ITV themselves acknowledged in their answers to the General Court's questions that that risk of overcapitalisation existed irrespective of the existence of the intra-group loans which gave rise to the non-trading finance profits made by the CFCs.

196 In those circumstances, the first part of the present pleas, based on errors of assessment concerning the justification of the exemptions at issue for reasons of administrative practicability, must be rejected.

***(b) Second part, based on an error of assessment concerning the justification relating to the need to comply with freedom of establishment***

197 The United Kingdom and ITV maintain that, in the contested decision, the Commission made an error of assessment in refusing to find that the exemptions at issue were also justified in that they aimed at compliance with freedom of establishment. The United Kingdom submits that it adopted a reasonable approach in order to comply with the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544), since the distinction between qualifying loans and non-qualifying loans is based precisely on the artificial nature of the latter, in particular as far as concerns 'money box' arrangements and upstream loans.

198 The Commission disputes the arguments of the United Kingdom and ITV.

199 It should be borne in mind that the United Kingdom tax system is based on the principle of territoriality and that, according to that principle, the profits made by CFCs are not taxed in that State. However, where those profits are in fact profits attributable to an entity resident in the United Kingdom which was responsible for the funds or significant people functions carried out in connection with the loans which generated those profits, they are regarded as having been artificially diverted and, therefore, as being taxable in the United Kingdom, through a CFC charge. Thus described, that system cannot be regarded as constituting an obstacle to freedom of establishment.

200 In paragraphs 72 and 73 of the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544), the Court of Justice held that, to the extent that the CFC legislation restricted the application of the taxation to wholly artificial arrangements, it was compatible with Articles 49 and 54 TFEU guaranteeing freedom of establishment.

201 In those circumstances, although, under Section 371EB of Part 9A of the TIOPA, a CFC charge is provided for in respect of loan profits, in the context of which it was determined that significant people functions had been carried out in the United Kingdom and that, for that reason, those

profits had to be regarded as having been artificially diverted, the imposition of such a charge cannot be regarded as constituting an obstacle to freedom of establishment, pursuant to the case-law referred to in paragraph 200 above. Therefore, an exemption from that tax cannot be justified in order to ensure freedom of establishment.

202 In those circumstances, the second part of the present pleas relating to an error of assessment concerning the justification based on the need to comply with freedom of establishment and, therefore, those pleas must be rejected in their entirety.

203 Accordingly, it must be held that the Commission did not err in finding that the exemptions at issue conferred a selective advantage on the beneficiaries thereof and, consequently, all the pleas relating thereto must be rejected.

### *4. The plea alleging an error of assessment concerning the effect on trade between Member States (fourth plea in Case T-363/19)*

204 The United Kingdom claims, in essence, that the Commission made an error of assessment by failing to demonstrate that, in the present case, multinational groups were encouraged to relocate the group's finance functions as a result of the exemptions at issue and therefore that trade between Member States was affected by the measures at issue.

205 In that regard, it must be borne in mind that, according to settled case-law, as regards the condition that trade between Member States must be affected, referred to in Article 107(1) TFEU, the Commission is not required to establish that a State measure has a real effect on trade between Member States and that competition is actually being distorted. The Commission is required only to establish that that measure is liable to have such effects (see judgment of 5 March 2015, *Banco Privado Português and Massa Insolvente do Banco Privado Português*, C-667/13, EU:C:2015:151, paragraph 46 and the case-law cited).

206 Thus, it has been held that, when aid granted by a Member State strengthens the position of certain undertakings compared with other undertakings competing in trade between Member States, such trade must be regarded as having been affected by that aid (judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 66).

207 In that regard, it is apparent from paragraph 182 above that the Commission correctly concluded that the exemptions at issue constituted a selective advantage benefiting companies which had relied on them. In those circumstances, it is also necessary to endorse the Commission's assessment that that advantage is liable to have an effect on trade between Member States because it strengthens the position of the recipient companies. Furthermore, that selective advantage is liable to affect decisions to relocate capital and activities within multinational groups established within the European Union, and more particularly treasury functions.

208 Moreover, contrary to what the United Kingdom claims, the Commission is not required to prove actual movements by international groups, or to compare the different tax systems within the European Union, provided that it is able to demonstrate the existence of an advantage capable of strengthening the competitive position of its beneficiaries, within the meaning of the case-law cited in paragraph 205 above.

209 In those circumstances, the present plea, alleging an error of assessment concerning the effect on trade between Member States, must be rejected.

### *5. The plea alleging breach of the principle of non-discrimination (seventh plea in Case T-456/19)*

210 ITV complains that the Commission breached the principle of non-discrimination in that it applied more favourable treatment from a State aid perspective to other intra-group finance transactions, in particular in two previous decisions, than the treatment which emerges from its position in the present case.

211 The Commission disputes those arguments by contending that, in the present case, it adequately demonstrated the existence of an infringement of the rules on State aid and that, in any event, the decisions relied on by ITV concerned situations different from that in the present case.

212 According to settled case-law, the principle of equal treatment and non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see judgment of 14 April 2005, *Belgium* v *Commission*, C-110/03, EU:T:2005:223, paragraph 71 and the case-law cited).

213 It should be observed that it is only in the context of Article 107(3)(c) TFEU that the validity of a Commission decision finding that a State measure constitutes State aid must be examined, not by reference to an earlier practice of the Commission in taking decisions. The concept of State aid meets an objective situation which is assessed on the date on which the Commission adopts its decision. Thus, the reasons why the Commission had made a different assessment of the situation in a previous decision cannot therefore have any effect on the assessment of the legality of the contested decision (judgments of 17 July 2014, *Westfälisch-Lippischer Sparkassen- und Giroverband* v *Commission*, T-457/09, EU:T:2014:683, paragraph 368, and of 11 December 2014, *Austria* v *Commission*, T-251/11, EU:T:2014:1060, paragraph 125).

214 Thus, the fact that the Commission recognised, in other decisions, the existence of differences between intra-group loans and loans between third-party companies does not in itself mean that, in the present case, the existence of a selective advantage cannot be established.

215 Such a conclusion must be based on a detailed analysis of the taxation regarded as normal in the State concerned and on the question whether, as a result of the State measure in question, there was a derogation from that taxation which introduced differences in treatment between economic operators which, in the light of the objective assigned to the relevant tax system, were in a comparable factual and legal situation.

216 Moreover, as the Commission rightly submits, the comparability between operators must be made precisely in the light of the objective of the system at issue. Therefore, in view, in particular, of the fact that the objective of the systems at issue in each of the Commission's decisions was different, no conclusion can be drawn from any differences in the Commission's assessment in the context of the decisions relied on by ITV and in the present case.

217 It follows that ITV cannot usefully rely on the outcome of other Commission decisions in order to infer that the principle of non-discrimination was breached in the present case.

218 Therefore, the plea alleging breach of the principle of non-discrimination must be rejected.

### *6. The plea alleging an error of law resulting from the application, by analogy, of the provisions of Directive 2016/1164 (eighth plea in law in Case T-456/19)*

219 ITV submits that the Commission was wrong to rely, if only by analogy, on Directive 2016/1164. That directive did not enter into force until 1 January 2019 and is therefore not applicable *ratione temporis* in the present case. Furthermore, that directive does not specifically address the question of the identification of the significant people functions in the context of intra-group financing.

220 It is true that, in the contested decision, the Commission referred to Directive 2016/1164, in particular in recital 38 of that decision, when it stated that the amendment of the rules applicable to CFCs in 2019 had been presented as seeking to implement Directive 2016/1164. In addition, the Commission described in general terms the scope of Directive 2016/1164, in its description of the international and EU regulatory context in Section 2.4 of the contested decision, in order to illustrate that many States, including within the European Union, had adopted rules relating to CFCs to prevent the transfer of profits to low-taxed foreign subsidiaries. Moreover, the Commission included an express reference to Article 7 of that directive, to which reference was subsequently made in footnote 86 to the contested decision.

221 However, those references to Directive 2016/1164 are contextual and seek only to describe the income attribution criterion relating to significant people functions in general terms. By contrast, for the purposes of its conclusions in the contested decision, the Commission relied on the rules applicable to CFCs in the United Kingdom, which themselves lay down, in particular in Section 371EB of Part 9A of the TIOPA, such a criterion based on significant people functions.

222 Therefore, contrary to ITV's claim, since the Commission did not base the contested decision on Directive 2016/1164, the legality of that decision cannot be called into question on the basis of that directive.

223 In those circumstances, the plea alleging an error of law resulting from the application by analogy of the provisions of Directive 2016/1164 must be rejected.

### *7. The plea alleging, in essence, errors of assessment concerning the identification of ITV as a beneficiary of the contested scheme, and the obligation to recover the aid granted under that scheme, ordered by the Commission in the contested decision (ninth plea in Case T-456/19)*

224 In essence, ITV criticises the Commission for having wrongly identified a class of beneficiaries, in which ITV was included, solely because those beneficiaries relied on the exemptions at issue and for ordering the recovery of the aid from such a class of beneficiaries without providing for a derogation from that recovery, for those cases in which no selective advantage had been received, as is the case for ITV. The group to which ITV belongs adapted its financing structure in order to be able to rely on the exemptions at issue, solely for reasons of administrative simplification. The amount of tax payable by ITV would not have been lower than it would have been required to pay if it had not made such an adjustment to its structure and had not relied on the exemptions at issue.

225 In that regard, it should be recalled that, according to settled case-law, in the case of an aid scheme, the Commission may confine itself to studying the characteristics of the scheme at issue in order to assess, in the grounds for its decision, whether, by reason of the arrangements provided for under that scheme, the latter gives an appreciable advantage to the beneficiaries in relation to their competitors and is likely to benefit in particular undertakings engaged in trade between

Member States. Thus, in a decision which concerns such a scheme, the Commission is not required to carry out an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned (see judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 63 and the case-law cited).

226 In the present case, since the Commission identified an aid scheme, it was not required to identify, for each recipient, the extent of the advantage received.

227 Therefore, by invoking the particular features of its own situation, ITV cannot challenge the legality of the contested decision inasmuch as it ordered recovery from the beneficiaries of the aid scheme at issue. It was only in the context of the recovery procedure, following the contested decision, that the United Kingdom had to begin the analysis of each individual situation and, where appropriate, the calculation of the advantage from which each company could have actually benefited, on the basis of the guidelines provided by the Commission in the contested decision.

228 In any event, ITV cannot rely on the fact that it submitted the applications for exemption solely for reasons of administrative simplicity. It must be borne in mind that the concept of State aid is an objective concept and that, in so far as the Commission manages to demonstrate that a selective advantage has been granted to beneficiaries in a situation comparable to that of other companies which are in comparable factual and legal circumstances, the aid in question must be recovered. Consequently, the reasons which led a company to rely on the aid in question, just like the fact that that company could have relied on other provisions within the applicable tax system, are irrelevant for the purposes of examining the legality of the decision ordering recovery of the aid in question.

229 In those circumstances, the plea put forward by ITV alleging an error of assessment concerning its identification as a recipient of the aid scheme at issue and the recovery obligation ordered by the Commission in the contested decision must be rejected.

### *8. General conclusion*

230 Since all the pleas in law relied on by the parties have been rejected, the action must be dismissed in its entirety.

## Costs

231 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the United Kingdom and ITV have been unsuccessful in Case T-363/19 and Case T-456/19 respectively, they must be ordered to bear their own costs relating to those cases, and to pay those incurred by the Commission, in accordance with the form of order sought by the Commission.

232 Furthermore, under Article 138(3) of the Rules of Procedure, the Court may order an intervener other than those referred to in paragraphs 1 and 2 of that article to bear its own costs. In the present case, it is appropriate to order LSEGH to bear its own costs.

233 In accordance with Article 138(1) of the Rules of Procedure, the United Kingdom must bear its own costs in Case T-456/19.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. **Joins Cases T-363/19 and T-456/19 for the purposes of the present judgment;**

2. **Dismisses the actions;**

3. **Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs and to pay those incurred by the European Commission in Case T-363/19;**

4. **Orders ITV plc to bear its own costs and to pay those incurred by the Commission in Case T-456/19;**

5. **Orders LSEGH (Luxembourg) Ltd and London Stock Exchange Group Holdings (Italy) Ltd to bear their own costs;**

6. **Orders the United Kingdom to bear its own costs in Case T-456/19.**

Papasavvas Tomljenović Schalin

Škvařilová-Pelzl Nõmm

Delivered in open court in Luxembourg on 8 June 2022.

E. Coulon S. Papasavvas
Registrar President

# Table of contents

I. Background to the dispute . . . 2

A. The ITV Group . . . 2

B. The rules applicable to CFCs . . . 2

C. The administrative procedure and the contested decision . . . 3

II. Procedure and forms of order sought . . . 6

A. The written part of the procedure in Case T-363/19 . . . 6

B. The written part of the procedure in Case T-456/19 . . . 6

1. The applications to intervene . . . 7

2. Forms of order sought . . . 7

C. The oral part of the procedure . . . 8

III. Law . . . 8

A. Joinder of Cases T-363/19 and T-456/19 for the purposes of the decision closing the proceedings . . . 8

B. Substance . . . 9

1. The plea alleging an error of assessment vitiating the definition of the reference system (first plea in Case T-363/19 and in Case T-456/19) . . . 10

2. The pleas alleging an error of assessment vitiating the Commission's findings as to the existence of an advantage and the a priori selectivity of the contested scheme owing to a derogation from the reference system (second plea in Case T-363/19 and second and third pleas in Case T-456/19) . . . 14

(a) The existence of an advantage . . . 14

(b) The objective of the rules applicable to CFCs . . . 16

(c) The a priori selectivity of the contested scheme owing to a derogation from the reference system . . . 18

(1) Conditions for the grant of the exemptions in question . . . 19

(2) The exclusions from the grant of the exemptions at issue . . . 22

(3) The existence of a derogation from the reference system and the comparability of the operators concerned, in the light of the objective of that system . . . 24

(d) Conclusion on the existence of an advantage and derogation from the reference system . . . 26

3. Pleas alleging errors of assessment concerning the existence of justifications for the exemptions at issue (third plea in Case T-363/19 and fourth to sixth pleas in Case T-456/19) . . . 27

(a) The first part, alleging an error of assessment of the justification for the measures at issue for reasons of administrative practicability . . . 27

(b) Second part, based on an error of assessment concerning the justification relating to the need to comply with freedom of establishment . . . 29

4. The plea alleging an error of assessment concerning the effect on trade between Member States (fourth plea in Case T-363/19) . . . 30

5. The plea alleging breach of the principle of non-discrimination (seventh plea in Case T-456/19) . . . 31

6. The plea alleging an error of law resulting from the application, by analogy, of the provisions of Directive 2016/1164 (eighth plea in law in Case T-456/19) . . . 32

7. The plea alleging, in essence, errors of assessment concerning the identification of ITV as a beneficiary of the contested scheme, and the obligation to recover the aid granted under that scheme, ordered by the Commission in the contested decision (ninth plea in Case T-456/19) . . . 32

8. General conclusion . . . 33

Costs . . . 33