Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 10 March 2022 [1]

Case C-705/20

Fossil (Gibraltar) Limited
v
Commissioner of Income Tax

(Request for a preliminary ruling from the Income Tax Tribunal of Gibraltar (United Kingdom))

(Request for a preliminary ruling – State aid – State aid in the form of non-taxation of passive interest and royalty income – Decision (EU) 2019/700 – National provision which was not the subject of the Commission's State aid investigation – Circumvention of the Commission's decision on State aid – Whether set-off of foreign taxes to avoid double taxation constitutes prohibited aid)

I. Introduction

1. The background to the present request for a preliminary ruling is a Commission decision categorising a 'passive interest and royalty income tax exemption' in Gibraltar tax law as State aid. [2] Following an action brought by another undertaking, that decision is currently still being reviewed before the General Court. [3] In essence, the request for a preliminary ruling revolves around the scope of that decision. At the same time, however, it shows the current uncertainty in dealing with national tax law in relation to EU law on State aid.

2. The uncertainty as to when a provision of tax law constitutes prohibited aid was apparently so great in Gibraltar that, before applying the national tax law, the tax authorities in that country asked the European Commission whether the provision of tax law in question could be applied. They did so even though that provision was not the subject of the abovementioned decision on State aid.

3. Strikingly, the regime in question is a form of set-off of tax paid abroad against income that is also taxed in Gibraltar. This is a technique that is quite common in international tax law as a means of avoiding double taxation. However, since the Commission's response to the tax

[1] Original language: German.

[2] Commission Decision (EU) 2019/700 of 19 December 2018 on the State Aid SA.34914 (2013/C) implemented by the United Kingdom as regards the Gibraltar Corporate Income Tax Regime (notified under document C(2018) 7848) (OJ 2019 L 119, p. 151).

[3] The case is pending before the General Court under reference number T-508/19.

authorities' query was that its decision precluded set-off of tax, the latter refused to apply the regime in favour of the taxable person. This led, in turn, to an appeal being brought by the taxable person, which considered that national tax law was applicable.

4. The Court of Justice is once again [4] given the opportunity to comment on the Commission's review, under State aid law, of generally applicable national tax laws and their effects on the taxpayer.

II. Legal context

A. European Union law

5. The legal context is formed by Article 108 TFEU and Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union. [5]

6. Recital 25 of Regulation 2015/1589 reads as follows:

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

7. Article 16(1) of that regulation, entitled 'Recovery of aid', stipulates:

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

B. Status and law of Gibraltar

8. Gibraltar was ceded by the King of Spain to the British Crown by the Treaty of Utrecht, concluded between the King of Spain and the Queen of Great Britain on 13 July 1713, which was one of the treaties bringing the War of the Spanish Succession to an end. Gibraltar is a colony of the British Crown. It does not form part of the United Kingdom.

9. As regards international law, Gibraltar is classified as a non-self-governing territory within the meaning of Article 73 of the Charter of the United Nations. As regards EU law, Gibraltar is a European territory to which the provisions of the Treaties apply, in principle, and for whose external relations a Member State is responsible (Article 355(3) TFEU).

[4] Most recently, progressive turnover-based income taxes from Poland and Hungary were the subject of its case-law – see judgments of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202), and of 16 March 2021, *Commission* v *Poland* (C-562/19 P, EU:C:2021:201).

[5] Council Regulation of 13 July 2015 (OJ 2015 L 248, p. 9).

10. The system of governance for Gibraltar is set out in the Gibraltar Constitution Order 2006, which entered into force on 1 January 2007. Under the terms of that order, executive authority is vested in a Governor, who is appointed by the Queen, and, for certain domestic matters, in Her Majesty's Government of Gibraltar, while legislative authority is vested in the Queen and in the Parliament of Gibraltar. Gibraltar has its own courts. It is possible to appeal against judgments of Gibraltar's highest courts to the Judicial Committee of the Privy Council.

11. In 2010, in exercise of the autonomy conferred by the United Kingdom, Gibraltar adopted a new income tax act (the Income Tax Act 2010; 'the ITA 2010'). It entered into force on 1 January 2011.

12. The ITA 2010 is based on a territorial system of taxation of profits or gains that are accrued in or derived from Gibraltar. Table C of Schedule 1 of the ITA 2010 lists different types of income that are taxed. In the original version of the ITA 2010, passive interest and royalty income were not listed in that table and thus did not constitute taxable income. In 2019, however, retrospective taxation of royalty income earned from 1 January 2011 to 31 December 2013 was included in that act.

13. In addition, section 37 of that act, entitled 'Relief in respect of foreign tax paid', provides for a form of tax relief for taxpayers who have paid income tax both in Gibraltar and in other countries in respect of the same profits derived from sources within Gibraltar or within other countries. In accordance with that provision, the taxpayer is entitled to an exemption in an amount equal to the amount of tax paid abroad up to the amount of tax payable in Gibraltar in respect of the income in question.

III. Facts of the case

14. The starting point of the present request for a preliminary ruling is a dispute between Fossil (Gibraltar) Limited ('the appellant') and the Gibraltar tax authorities concerning the obligation to pay tax in Gibraltar under the ITA 2010 in view of tax already paid in the United States in respect of royalty income.

15. The appellant is a wholly owned subsidiary of Fossil Group Inc., a company established in the United States. The appellant itself is a Gibraltar company that receives royalty income from the worldwide use of certain trade marks and design intangibles associated with the brands owned by it.

16. The background to that dispute, in turn, is the fact that the Commission initiated a formal investigation procedure on 16 October 2013 in order to verify, inter alia, whether the passive interest and royalty taxation not provided for in the ITA 2010 favoured certain companies.

17. Article 1 of the State aid decision subsequently adopted on 19 December 2018[6] ('Decision 2019/700') reads as follows:

'1. The State aid scheme in the form of the passive interest income tax exemption applicable in Gibraltar under the Income Tax Act 2010 between 1 January 2011 and 30 June 2013 and

[6] Commission Decision (EU) 2019/700 of 19 December 2018 on the State Aid SA.34914 (2013/C) implemented by the United Kingdom as regards the Gibraltar Corporate Income Tax Regime (notified under document C(2018) 7848) (OJ 2019 L 119, p. 151).

unlawfully put into effect by Gibraltar in contravention of Article 108(3) of the Treaty is incompatible with the internal market within the meaning of Article 107(1) of the Treaty.

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

18. Article 5(1) of Decision 2019/700 provides:

'1. The United Kingdom shall recover all incompatible aid granted on the basis of the aid schemes referred to in Article 1 or on the basis of the tax rulings referred to in Article 2, from the beneficiaries of that aid.'

19. The following recitals of Decision 2019/700 describe the measure under review:

'(30) ITA 2010 is based on a territorial system of taxation, meaning that profits or gains are taxed only if the income "accrues in or is derived from" Gibraltar. …'

'(33) Under ITA 2010, as originally enacted, passive interest and royalties were not chargeable to tax, irrespective of the source of the income or the application of the territoriality principle [footnote 17: Table C of Schedule 1 of the ITA 2010, as originally enacted, did not include this category of income.] …'

20. The Commission provides the following justification for the selective advantage conferred by that measure:

'(82) In the case in hand, the measure contradicts the general principle that corporate income tax is collected from all taxable persons that receive income derived from or accruing in Gibraltar. In line with that principle, passive interest and royalty income should normally fall within the scope of taxation, subject to application of the territoriality principle. …'

'(83) As a result, the exemption introduces a mitigation of a charge that companies benefiting from the exemption would otherwise have to bear. This gives rise to an advantage as the companies are relieved of costs inherent to their economic activities and are therefore placed in a more favourable financial position than other taxpayers (who are in receipt of active income).'

21. The justification put forward is rejected, inter alia, as follows:

'(107) Moreover, the argument that the application of the territoriality principle would rely on the need to prevent double taxation does not hold up as the (foreign) paying entity is generally allowed to deduct the interest or royalties for tax purposes. … Accordingly, in view of the limited risk of double taxation, a full and automatic exemption measure is disproportionate and the prevention of double taxation cannot be seen as an acceptable justification.'

22. In addition, specific requirements for the recovery of the benefit are also established:

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

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

(225) …

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

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

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

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

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

23. The appellant was not one of the 165 companies investigated by the European Commission and listed at the end of Decision 2019/700. It did, however, have royalty income that had hitherto not been taxed under the ITA 2010. However, all royalty income received by the appellant was declared to the United States tax authorities by Fossil Group Inc. Tax on that income was paid in the United States at the rate of 35%.

24. With the publication of the Income Tax (Amendment) Regulations 2019, retrospective taxation of royalty income earned from 1 January 2011 to 31 December 2013 was established in the ITA 2010 in implementation of Decision 2019/700.

25. This resulted in retroactive tax liability for the appellant. The appellant now requests, in application of section 37 of the ITA 2010, that it be granted tax relief on any tax paid in the United States, by Fossil Group Inc., on the appellant's royalty income (tax relief by way of set-off). Thus, the retroactively prescribed taxation of the royalty income would to a certain extent be rendered ineffective in its case.

26. It is probably for that reason that, before providing the appellant with tax relief by way of set-off under section 37 of the ITA 2010, the tax authorities entered into communication with and sought guidance from the Commission's Directorate-General for Competition. On 26 March 2020, the Directorate-General for Competition wrote to the tax authorities informing them that they could not take tax paid in the United States on the appellant's royalty income into account in the tax assessments. Consequently, the tax authorities refused to provide the appellant with tax relief by way of set-off under section 37 of the ITA 2010.

27. The appellant brought an appeal against that refusal. It takes the view that Decision 2019/700 does not preclude tax relief by way of set-off under section 37 of the ITA 2010.

IV. The request for a preliminary ruling and the procedure before the Court

28. Against that background, the Income Tax Tribunal of Gibraltar (United Kingdom) stayed the proceedings and referred the following question to the Court of Justice under the preliminary ruling procedure under Article 267 TFEU by order of 16 December 2020, received on 21 December 2020 – doing so, in its own words, for 'the first time (and due to the United Kingdom's exit from the [European Union], the last time)':

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

29. In the proceedings before the Court, the appellant, the Gibraltar tax authorities and the European Commission submitted written observations. In accordance with Article 76(2) of the Rules of Procedure, the Court did not consider it necessary to hold a hearing.

V. Legal assessment

A. Admissibility of the request for a preliminary ruling

30. The request for a preliminary ruling is admissible. It is true that the Act concerning the Conditions of Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the Adjustments to the Treaties[7] provides that certain parts of the Treaty are not to apply to Gibraltar. However, they do not include State aid control pursuant to Article 107 et seq. TFEU.

31. Even though the United Kingdom had withdrawn from the European Union at the time of receipt of the request for a preliminary ruling, the Court retains jurisdiction under Article 86(2) of the Withdrawal Agreement[8] in respect of requests for preliminary rulings submitted up to the end of the transitional period (that is to say, 31 December 2020). That was the case here.

B. The question referred for a preliminary ruling

32. By its question, the referring court seeks, in essence, clarification as to the scope of the Commission's Decision 2019/700 on State aid. That decision complains of the absence of taxation of passive interest and royalty income in Gibraltar law. The Commission refers to this as a tax exemption[9] and an implicit exemption[10] in Decision 2019/700. Strictly speaking, it involves the non-taxation of certain income.

7 OJ 1972 L 73, p. 14.

8 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2019 C 384 I, p. 1).

9 See recital 2 of Decision 2019/700 (OJ 2019 L 119, p. 151).

10 See recital 93 of Decision 2019/700 (OJ 2019 L 119, p. 151).

33. Whether the non-taxation of individual types of income in fact constitutes aid which is incompatible with the internal market within the meaning of Article 107 TFEU need not be decided in the present case.[11] The question as to whether EU law can in fact require retroactive taxation of income that was previously non-taxable by law need not be clarified in the present case either.[12]

34. Both of those questions can be left open, as the appellant does not seek non-taxation of such income, but rather set-off against the tax paid on that royalty income in the United States. Such set-off is in principle provided for in section 37 of the ITA 2010. By that provision, Gibraltar has opted for the set-off method (as opposed to the exemption method). Both methods are common in international tax law[13] and serve to avoid undesirable double taxation. According to the referring court, the conditions for such set-off are also met.

35. It is true that the Commission and the Gibraltar tax authorities dispute this in their written observations. However, according to settled case-law of the Court, Article 267 TFEU establishes a procedure for direct cooperation between the Court and the courts of the Member States. In that procedure, any assessment of the facts of the case is a matter for the national court or tribunal, which must determine, in the light of the particular circumstances of each case, both the need for a preliminary ruling to enable it to give judgment and the relevance of the questions which it submits to the Court. However, the Court is empowered to rule only on the interpretation or the validity of EU acts on the basis of the facts placed before it by the national court or tribunal.[14] Therefore, the question referred must be answered on the premiss that the conditions for offsetting tax under section 37 of the ITA 2010 are met.

36. The regime under section 37 was not challenged by the Commission in Decision 2019/700. However, set-off of the tax paid abroad against the taxation of royalty income carried out retroactively after the amendment of the ITA 2010 leads to a similar outcome. The appellant is not required to pay tax on that income in Gibraltar.

37. It is probably for that reason that the Commission, in a letter responding to queries from the Gibraltar tax authorities, took the view that the State aid decision also covered that set-off under section 37 of the ITA 2010. Consequently, the tax authorities now consider that they are prevented from applying the tax law in force, which had been passed by parliament.

38. However, in accordance with the case-law of the Court, letters sent by the Commission to the Member State after the adoption of its decision in order to ensure execution of that decision are not binding.[15] In particular, such statements of position by the Commission are not acts which can be adopted on the basis of Regulation 2015/1589.[16] The (contested) Decision 2019/700 is binding as long as it is not annulled by the EU Courts.

[11] This is a point of tension, as income tax law falls within the competence of the Member States and there is not in fact any obligation whatsoever, at least under EU law, to tax all conceivable sources of tax and thus all conceivable taxable income, and so forth.

[12] Article 16(1) of *Regulation 2015/1589 prohibits the recovery of* aid if this would be contrary to a general principle of Union law. However, retroactive taxation without a legal basis with regard to taxable events that have already occurred could possibly infringe general principles of the rule of law (such as certainty, legal certainty, legality).

[13] See the 'method articles' (Articles 23A and 23B) in the OECD Model Tax Convention.

[14] Settled case-law – see, inter alia, judgments of 25 October 2017, *Polbud – Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 27); of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 15); and of 11 September 2008, *Eckelkamp and Others* (C-11/07, EU:C:2008:489, paragraph 52).

[15] See, expressly, judgment of 13 February 2014, *Mediaset* (C-69/13, EU:C:2014:71, paragraph 24).

[16] See judgment of 13 February 2014, *Mediaset* (C-69/13, EU:C:2014:71, paragraph 26).

39. Consequently, the scope of Decision 2019/700 must first be clarified (see section C). If it does not cover the set-off of tax under section 37 of the ITA 2010, it needs to be clarified whether this might constitute either a circumvention of that decision (see section D) or otherwise prohibited State aid within the meaning of Article 107 TFEU (see section E).

C. Scope of the Commission's decision on State aid of 19 December 2018 (Decision 2019/700)

40. The decisive question, therefore, is what Decision 2019/700 relates to. Does it also cover the set-off of foreign tax against a Gibraltar tax liability in respect of certain income – in line with the view taken by the Commission – or only the non-taxability (non-taxation) of that income – in line with the view taken by the appellant? The former necessarily presupposes an incurred tax liability against which another tax liability could be offset, whereas the latter precisely does not.

41. Article 1(2) of Decision 2019/700 states that the 'State aid scheme in the form of the royalty income tax exemption' is prohibited aid within the meaning of Article 107(1) TFEU. Although this does not precisely identify which provision in the ITA 2010 grants the selective advantage, it is clear from the recitals – in particular recital 33 – that the 'royalty income tax exemption' refers to the lack of coverage of that type of income in Table C of Schedule 1 of the ITA 2010.

42. It is clear from recital 82 of that decision that the Commission considers that the selective advantage resides in the fact that that non-taxation 'contradicts the general principle that corporate income tax is collected from all taxable persons that receive income derived from or accruing in Gibraltar'. Therefore, according to the Commission, 'passive interest and royalty income' should be taxed. In recital 107, the Commission states that, as regards non-taxation, the argument based on the need to prevent double taxation does not hold up 'as the (foreign) paying entity is generally allowed to deduct the interest or royalties for tax purposes'. Accordingly, in view of the only 'limited risk of double taxation, a full and automatic exemption measure is disproportionate' and cannot be seen as justification.

43. It is apparent from those statements that, in Decision 2019/700, the Commission regards the non-taxation of certain types of income as the selective advantage, since those types of income should in fact have been taxed in a coherent tax system. It is not necessary to consider whether that is the case. The decisive factor is that the content of the decision relates only to the non-taxability of certain income.

44. By contrast, section 37 of the ITA 2010 concerns the offsetting of taxes paid abroad in respect of royalty income against the tax payable in respect of that royalty income in Gibraltar. However, such offsetting presupposes the taxability of the income in Gibraltar, especially since the offsetting is limited to the amount thereof. In that regard, section 37 of the ITA 2010 is consistent with Decision 2019/700. Contrary to the view taken by the Gibraltar tax authorities in their observations, the recovery amount in particular was calculated in accordance with recital 226 of that decision. The actual amount (that is to say, the tax in respect of that income) thus appears to have been calculated in exactly the same way as that proposed by the Commission in that recital. The decision was therefore complied with in that regard.

45. By contrast, the offset of foreign taxes under section 37, under consideration in the present case, comes into play only in a second step. The same would apply, for example, to set-off against a tax credit established for another reason or to set-off against losses subsequently found to still exist.

46. Even if the result is the same (no tax is payable in Gibraltar), section 37 of the ITA 2010 concerns a very different case from that which led the Commission to its finding of prohibited aid in Decision 2019/700. This is because it follows from recital 107 of Decision 2019/700 that the Commission justifies its decision on the basis of the fact that the limited risk of double taxation alone does not justify a full and automatic 'exemption measure'. However, that relates to the old legal situation, in which certain income was not generally taxed. Section 37 of the ITA 2010, on the other hand, presupposes taxation and therefore applies only in the case of actual double taxation. Moreover, the set-off does not take place automatically, but, rather, the taxable person is required to prove that the conditions for it are met, that is to say, that the taxable person has been taxed elsewhere in the specific case.

47. Thus, despite section 37 of the ITA 2010, royalty income is taxed (that is to say, taxable) in Gibraltar. Only taxation that has already taken place elsewhere (*in casu*, the United States) is set off against that tax liability. Consequently, the set-off of taxes paid abroad in respect of royalty income against the corresponding tax in Gibraltar is not covered by Decision 2019/700. Decision 2019/700 therefore does not preclude the application of section 37 of the ITA 2010.

D. Existence of a circumvention of the Commission's decision of 19 December 2018 through the set-off under section 37 of the ITA 2010

48. A different outcome could be conceivable only if the set-off under section 37 of the ITA 2010 constituted a circumvention of Decision 2019/700. As follows from recital 25 of Regulation 2015/1589, the Member State concerned should take all necessary measures ensuring the effectiveness of the Commission decision.

49. This precludes circumvention by way of compensatory measures. However, from a temporal perspective, such circumvention would be conceivable only if section 37 had been enacted after the adoption of that decision, in order to render ineffective the legal consequences prescribed in it (that is to say, retroactive taxation). That does not seem to be the case in this instance. A regime which already existed and was not objected to by the Commission in its decision can hardly be described as a circumvention of the decision. At most, it could itself constitute aid.

50. Even if section 37 had been inserted subsequently, Decision 2019/700 could be said to have been circumvented only if that set-off provision itself were to be regarded as constituting aid. This is because, if section 37 of the ITA 2010 does not constitute prohibited aid when considered in isolation, it cannot serve to circumvent a finding that another provision constitutes aid, which must be recovered.

E. Existence of State aid under Article 107 TFEU through the set-off under section 37 of the ITA 2010

51. Consequently, the only question still to be clarified is whether State aid law precludes the application of section 37 of the ITA 2010, that is to say whether the set-off of a tax paid abroad in respect of royalty income, as provided for by law in section 37 of the ITA 2010, is to be regarded as prohibited aid within the meaning of Article 107 TFEU. The Commission appears to proceed on the basis of that assumption in its observations. However, according to the information available to the Court, that question must be answered in the negative.

52. In that regard, it follows from the settled case-law of the Court of Justice that the classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition. [17]

53. In order to assess the selectivity of the advantage, it is necessary to determine whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' over others, which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which are accordingly subject to different treatment that can, in essence, be classified as 'discriminatory'. [18]

54. Further, where the measure at issue is conceived as an aid scheme – as with section 37 of the ITA 2010 in the present case – and not as individual aid, it is for the Commission to establish that that measure, although it confers an advantage of general application, confers the benefit of that advantage exclusively on certain undertakings or certain sectors of activity. [19]

55. Thus, measures which mitigate the charges that are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effects are considered to constitute State aid. [20] On the other hand, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute such aid within the meaning of that provision. [21]

56. As regards the fundamental freedoms of the internal market, the Court of Justice has held that, given the current state of harmonisation of EU tax law, the Member States are free to establish the system of taxation which they deem most appropriate. [22] The same is true in the field of State aid. [23]

57. It follows that, outside the spheres in which EU tax law has been harmonised, the determination of the characteristics constituting each tax falls within the discretion of the Member States, in accordance with their fiscal autonomy. This includes, in particular, the choice

[17] Judgments of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202, paragraph 33); of 16 March 2021, *Commission* v *Poland* (C-562/19 P, EU:C:2021:201, paragraph 27); and 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 53).

[18] Judgments of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202, paragraph 34); of 16 March 2021, *Commission* v *Poland* (C-562/19 P, EU:C:2021:201, paragraph 28); and of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024, paragraph 35).

[19] Judgments of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202, paragraph 35); of 16 March 2021, *Commission* v *Poland* (C-562/19 P, EU:C:2021:201, paragraph 29); and of 30 June 2016, *Belgium* v *Commission* (C-270/15 P, EU:C:2016:489, paragraph 49).

[20] Judgments of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202, paragraph 36); of 16 March 2021, *Commission* v *Poland* (C-562/19 P, EU:C:2021:201, paragraph 30); and of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 71).

[21] Judgments of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202, paragraph 36), and of 16 March 2021, *Commission* v *Poland* (C-562/19 P, EU:C:2021:201, paragraph 30); see also, to that effect, judgment of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024, paragraph 23).

[22] Judgments of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202, paragraph 43); of 16 March 2021, *Commission* v *Poland* (C-562/19 P, EU:C:2021:201, paragraph 37); of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139, paragraph 49); and of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140, paragraph 69).

[23] Judgments of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202, paragraph 43), and of 16 March 2021, *Commission* v *Poland* (C-562/19 P, EU:C:2021:201, paragraph 37); see also judgment of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraph 50 and the case-law cited).

of tax rate and also the determination of the basis of assessment and the taxable event.[24] Those characteristics constituting the tax therefore, in principle, define the reference system or the 'normal' tax regime, from which it is necessary to analyse the condition relating to selectivity.[25]

58. That said, it cannot be ruled out that those characteristics may, in certain cases, also reveal a manifestly discriminatory element, which it is, however, for the Commission to demonstrate.[26] Therefore, general differentiations, which are applicable without distinction to all and are part of a consistent tax system, cannot normally constitute a selective advantage.[27]

59. However, the decision as to which foreign taxes can be set off against domestic tax liability and under which conditions this should be possible is such a decision of a general nature, which falls within the abovementioned discretion of the Member State. Its purpose is to avoid double taxation. This is a recognised objective, both in the OECD[28] and in the European Union.[29] Double taxation affects competitive neutrality and creates obstacles to cross-border investment and services.

60. The extent to which a Member State therefore seeks to avoid double taxation by itself and another State through unilateral measures (for example, set-off or exemption regimes in national law) or bilateral measures (for example, the conclusion of appropriate double taxation treaties) is a decision which each tax legislature must take when drafting its own tax law. The fact that that basic decision 'only' covers undertakings that operate across borders – that is to say, are also covered by two tax jurisdictions – is in the nature of things.

61. As the Gibraltar tax authorities correctly point out in their observations, unilateral measures such as section 37 of the ITA 2010 are the usual way for jurisdictions that do not have a developed network of double taxation treaties to be able to avoid double taxation.

62. No selectivity can be derived from the fact that only those taxpayers satisfying the conditions of double taxation are covered by the set-off. This is because the mere fact that only taxpayers satisfying the conditions for the application of a measure can benefit from a measure cannot, in itself, make it into a selective measure.[30] It must be ruled out that the set-off of taxes paid abroad against income that is also taxed domestically is inconsistent. It is certainly not discernible here, let alone proven by the Commission, that section 37 has manifestly discriminatory parameters by which the prohibition of State aid was supposedly circumvented.

[24] Judgments of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202, paragraph 44), and of 16 March 2021, *Commission* v *Poland* (C-562/19 P, EU:C:2021:201, paragraph 38).

[25] Judgments of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202, paragraph 45), and of 16 March 2021, *Commission* v *Poland* (C-562/19 P, EU:C:2021:201, paragraph 39).

[26] Judgments of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202, paragraph 48), and of 16 March 2021, *Commission* v *Poland* (C-562/19 P, EU:C:2021:201, paragraph 42).

[27] See, in that regard, my Opinion in *Commission* v *Hungary* (C-596/19 P, EU:C:2020:835, point 53 et seq.); in *Commission* v *Poland* (C-562/19 P, EU:C:2020:834, point 46 et seq.); and in *Tesco-Global Áruházak* (C-323/18, EU:C:2019:567, point 150).

[28] See the title of the OECD Model Tax Convention (version of July 2017): 'OECD Model Tax Convention for the elimination of double taxation with respect to taxes on income and on capital and the prevention of tax evasion and avoidance'.

[29] See recital 3 of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), in respect of double taxation of distributions within the group. From the case-law: judgments of 16 July 2009, *Damseaux* (C-128/08, EU:C:2009:471, paragraph 28), and of 11 September 2008, *Arens-Sikken* (C-43/07, EU:C:2008:490, paragraph 62).

[30] Judgments of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202, paragraph 58); 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 59); and of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraph 42).

63. In so far as the Commission, on the other hand, argues in its observations that a selective advantage does not cease to exist merely because the advantage compensates for certain burdens, that argument is not convincing. First, undertakings that are subject to special burdens (in this case, for example, due to an additional tax liability in the United States) are certainly in a different situation with regard to the objective of measures to avoid double taxation than undertakings that are taxed only once (in Gibraltar). Second, the basic decision as to the extent to which a Member State takes into account tax liabilities in other countries and thus avoids double taxation is at the discretion of that Member State. Furthermore, the avoidance of double taxation is a recognised objective of the European Union – as stated above. The Commission also does not explain, in its observations, why Gibraltar therefore supposedly exceeded the limits of its discretion in that respect.

64. Consequently, the set-off of royalty income tax paid in the United States under section 37 cannot be assessed as constituting aid or a circumvention of Decision 2019/700.

VI. Conclusion

65. I therefore propose that the Court answer the question referred for a preliminary ruling by the Income Tax Tribunal of Gibraltar (United Kingdom) as follows:

Neither Commission Decision (EU) 2019/700 of 19 December 2018 nor Article 107 TFEU preclude the tax paid in the United States on the appellant's royalty income from being set off against the tax payable in Gibraltar under section 37 of the Income Tax Act 2010.