JUDGMENT OF THE COURT (Second Chamber)

19 September 2024 (*)

(Appeal – State aid – Aid scheme implemented by the United Kingdom of Great Britain and Northern Ireland in favour of certain multinational groups – Taxation of the non-trading finance profits of controlled foreign companies (CFCs) – Exemptions – Significant people functions – Artificial diversion of profits – Erosion of the tax base – Decision declaring the aid scheme incompatible with the internal market and ordering the recovery of the aid paid – Reference framework – Applicable national law – 'Normal' taxation)

In Joined Cases C-555/22 P, C-556/22 P and C-564/22 P,

THREE APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought, respectively, on 16 August, 17 August and 25 August 2022,

United Kingdom of Great Britain and Northern Ireland, represented initially by L. Baxter, subsequently by L. Baxter and S. Fuller, and subsequently by R. Fadoju and S. Fuller, and lastly by S. Fuller, acting as Agents, and by P. Baker KC, and T. Johnston, Barrister,

appellant and applicant at first instance (C-555/22 P),

intervener at first instance (C-556/22 P and C-564/22 P),

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

appellant (C-556/22 P),

applicant at first instance (C-556 P and C-564/22 P),

and

LSEGH (Luxembourg) Ltd, established in London,

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

represented by O.W. Brouwer, A. Pliego Selie, advocaten, and A. von Bonin, Rechtsanwalt,

appellants (C-564/22 P),

interveners at first instance (C-556/22 P and C-564/22 P),

the other party to the proceedings being:

European Commission, represented by M. Farley, L. Flynn and B. Stromsky, acting as Agents,

defendant at first instance (C-555/22 P, C-556/22 P and C-564/22 P),

THE COURT (Second Chamber),

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

Advocate General: L. Medina,

Registrar: R. Stefanova-Kamisheva, Administrator,

having regard to the written procedure and further to the hearing on 10 January 2024,

after hearing the Opinion of the Advocate General at the sitting on 11 April 2024,

gives the following

Judgment

1 By their respective appeals, the United Kingdom of Great Britain and Northern Ireland (C-555/22 P), ITV plc (C-556/22 P) as well as LSEGH (Luxembourg) Ltd and London Stock Exchange Group Holdings (Italy) Ltd (together, 'LSEGH') (C-564/22 P) seek the setting aside of the judgment of the General Court of the European Union of 8 June 2022, *United Kingdom and ITV* v *Commission* (T-363/19 and T-456/19, 'the judgment under appeal', EU:T:2022:349), by which it dismissed the actions brought by the United Kingdom and ITV, supported by LSEGH, 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 decision at issue').

United Kingdom law

2 In the United Kingdom, the tax rules relating to controlled foreign companies (CFCs) are set out in Part 9A of the Taxation (International and Other Provisions) Act 2010 ('the TIOPA').

3 In so far as is relevant, Part 9A of the TIOPA provides:

'…

Chapter 1

Overview

371AA Overview of Part [9A of the TIOPA]

(1) A charge ("the CFC charge") is charged under this Part on UK resident companies which have certain interests in CFCs.

(2) The CFC charge is charged by reference to the chargeable profits of CFCs.

(3) A"CFC" is a non-UK resident company which is controlled by a UK resident person or persons …

(4) Chapter 2 sets out the basic details of the CFC charge, including[:]

(a) the CFC charge gateway (through which profits of a CFC must pass in order to be chargeable profits), and

(b) the steps to be taken for charging the CFC charge.

(5) Chapter 2 is supplemented by Chapters 3 to 17; in particular[:]

(a) Chapter 3 sets out how to determine which (if any) of Chapters 4 to 8 apply in relation to the profits of a CFC,

(b) so far as applicable, Chapters 4 to 8 set out how to determine which profits (if any) of a CFC pass through the CFC charge gateway …

(c) Chapter 9 sets out exemptions for profits from qualifying loan relationships,

(d) Chapters 10 to 14 set out full exemptions from the CFC charge,

…

(12) This Part [9A] is part of the Corporation Tax Acts.

Chapter 2

The CFC Charge

371BA Introduction to the CFC charge

(1) The CFC charge is charged in relation to accounting periods of CFCs in accordance with section 371BC.

…

371BB The CFC charge gateway

(1) Take the following steps to determine the extent to which a CFC's assumed total profits for an accounting period pass through the CFC charge gateway.

Step 1 In accordance with Chapter 3, determine which (if any) of Chapters 4 to 8 apply for the accounting period. If none of those Chapters applies, none of the CFC's assumed total profits pass through the CFC charge gateway and step 2 is not to be taken.

Step 2 Determine the extent to which the CFC's assumed total profits fall within any of the Chapters which applies for the accounting period. …

(2) Subsection (1) [above] is subject to[:]

(a) Chapter 9 (exemptions for profits from qualifying loan relationships) …

…

371BC Charging the CFC charge

…

(3) …

"the appropriate rate" … means[:]

…

(b) if there is more than one … rate, the average rate over the whole of the relevant corporation tax accounting period …

…

Chapter 3

The CFC charge gateway: Determining which (if any) of Chapters 4 to 8 applies

…

371CB Does Chapter 5 apply?

(1) … Chapter 5 (non-trading finance profits) applies for a CFC's accounting period if (and only if) the CFC has non-trading finance profits.

(2) In this section and Chapter 5 references to the CFC's non-trading finance profits are to those profits excluding any profits falling within subsection (3) or (4) or Chapter 8 …

…

(8) In the case of a chargeable company which makes a claim under Chapter 9, in this section and Chapter 5 references to the CFC's non-trading finance profits are to those profits excluding also the CFC's qualifying loan relationship profits (as defined in Chapter 9).

…

Chapter 4

The CFC charge gateway: Profits attributable to UK activities

371DA Introduction to Chapter [4]

(1) Take the steps set out in section 371DB(1) to determine the CFC's profits falling within this Chapter …

(2) In this Chapter references to the CFC's assumed total profits are to those profits excluding its non-trading finance profits …

(3) For the purposes of this Chapter[:]

(a) "the OECD Report" means the Report on the Attribution of Profits to Permanent Establishments of the Organisation for Economic Co-operation and Development ("OECD") dated 22 July 2010,

…

(f) "SPF" means a significant people function …

(g) an SPF is a "UK SPF" so far as the SPF is carried out in the United Kingdom …

(h) an SPF is a "non-UK SPF" so far as it is not a UK SPF.

…

371DB The steps

(1) Here are the [eight] steps referred to in section 371DA(1).

The steps are to be taken in accordance with the principles set out in the OECD Report (so far as relevant).

Step 1 Identify the assets which the CFC has or has had, and the risks which the CFC bears or has borne, and from which amounts included in the CFC's assumed total profits have arisen. The identified assets and risks are called "the relevant assets and risks"[.]

Step 2 …

Step 3 Identify the SPFs carried out by the CFC group which are relevant to[:]

(a) the economic ownership of the assets included in the relevant assets and risks, or

(b) the assumption and management of the risks included in the relevant assets and risks.

For this purpose, assume that the CFC group is a single company.

Step 4 Determine the extent to which the SPFs identified at step 3 are UK SPFs and the extent to which they are non-UK SPFs. If none of the SPFs is a UK SPF to any extent, then no profits fall within this Chapter and no further steps are to be taken.

Step 5 Assume that the UK SPFs determined at step 4 are carried out by a permanent establishment which the CFC has in the United Kingdom and, accordingly, determine the extent to which the assets and risks included in the relevant assets and risks would be attributed to the permanent establishment. …

…

Step 7 Re-determine the CFC's assumed total profits on the basis that the CFC[:]

(a) does not hold, or has not held, the assets included in the relevant assets and risks, and

(b) does not bear, or has not borne, the risks included in the relevant assets and risks,

so far as they would be attributed to the permanent establishment mentioned at step 5. "The provisional Chapter 4 profits" are the CFC's assumed total profits so far as they are left out of the re-determined profits.

Step 8 Exclude from the provisional Chapter 4 profits any amounts which are required to be excluded by section 371DD, 371DE or 371DF. The remaining profits (if any) fall within this Chapter.

…

Chapter 5

The CFC charge gateway: Non-trading finance profits

371EA The basic rule

(1) The CFC's profits falling within this Chapter for the purposes of step 2 in section 371BB(1) (the CFC charge gateway) are its non-trading finance profits so far as they fall within any of sections 371EB to 371EE.

(2) In this Chapter references to the CFC's non-trading finance profits are to be read in accordance with section 371CB(2) and, so far as applicable, section 371CB(8).

371EB UK activities

(1) To determine the extent to which the CFC's non-trading finance profits fall within this section, take steps 1 to 5 and 7 in section 371DB(1) as if references in section 371DB to the CFC's assumed total profits were references to its non-trading finance profits.

(2) Non-trading finance profits fall within this section so far as they would be included in the provisional Chapter 4 profits as determined on the basis mentioned in subsection (1) [of this section].

371EC Capital investment from the UK

(1) Non-trading finance profits fall within this section so far as they arise from relevant UK funds or other assets.

…

Chapter 9

Exemptions for profits from qualifying loan relationships

371IA The basic rule

(1) This Chapter applies if[:]

(a) apart from this Chapter, Chapter 5 (non-trading finance profits) would apply for a CFC's accounting period,

(b) the CFC's non-trading finance profits include qualifying loan relationship profits, and

(c) the business premises condition … is met.

(2) A chargeable company ("company C") in relation to the accounting period may make a claim … for step 2 in section 371BB(1) (the CFC charge gateway) to be taken, in the case of company C only, subject to this Chapter.

(3) If company C makes a claim, in the case of company C only, the CFC's qualifying loan relationship profits pass through the CFC charge gateway so far as (and only so far as) they are not exempt under this Chapter.

…

371IG What is a "qualifying loan relationship"?

(1) In this Chapter "qualifying loan relationship" means a creditor relationship of the CFC[:]

(a) the ultimate debtor in relation to which is a qualifying company …

…

…

(8) In this section "qualifying company" means a company which[:]

(a) is connected with the CFC, and

(b) is controlled by the UK resident person or persons who control the CFC.

371IH Exclusions from definition of "qualifying loan relationship"

…

(2) If the ultimate debtor in relation to a creditor relationship of the CFC is a UK resident company, the creditor relationship can be a qualifying loan relationship only so long as[:]

(a) [the provisions on the] exemption for profits or losses of foreign permanent establishments [apply] in relation to [that] company, and

(b) all the company's debits are being brought into account [in view of the application of those provisions].

…'

4 Part 2 of the TIOPA concerns double taxation relief, as its title indicates.

Background to the dispute

5 For the purposes of the present proceedings, the background to the dispute, which is set out in paragraphs 1 to 28 of the judgment under appeal, may be summarised as follows.

The ITV group

6 ITV, 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, which notably includes CFCs.

7 For several accounting periods, until the 2016 accounting period at least, the profits imputed to ITV from the interest on certain of the loans granted by CFCs controlled by that company were the subject of an application for exemption under Chapter 9 of Part 9A of the TIOPA ('Chapter 9').

The national tax rules presented by the General Court

8 The General Court summarised the national tax rules in the following terms:

'(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[, namely the CFC charge referred to in section 371AA of Part 9A of the TIOPA].

5 Chapter 2 of Part 9A of the TIOPA defines, in general terms, in Section 371BA thereof, that … 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 …, subject, in particular, to the application of Chapter 9 …, 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 [SPFs] 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";

…

8 Chapter 9 … 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 …'

9 In that regard, the General Court stated, in the last sentence of paragraph 8 of the judgment under appeal, that 'under Section 371IG of [Chapter 9], 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'. That definition must be read in the light of paragraph 145 of that judgment, in which the General Court stated that, under section 371IH of Chapter 9, loans granted to a company established in the United Kingdom or to a permanent establishment in that State by a non-resident company are excluded from the definition of qualifying loans.

10 In addition, in paragraph 9 of that judgment, it stated that Chapter 9 provided the following three types of exemptions ('the exemptions at issue'):

– an exemption which may apply to 75% of the taxable non-trading finance profits arising from qualifying loans; and

– an exemption of up to 100%, where and to the extent that the qualifying loans are funded from the CFC's resources;

– an exemption, known as 'matched interest' exemption, which may be applied, under certain conditions, to the leftover taxable non-trading finance profits.

The decision at issue

11 In the decision at issue, adopted following a formal investigation procedure initiated under Article 108(2) TFEU, the European Commission found that the scheme resulting from the exemptions at issue ('the contested scheme') constituted State aid within the meaning of Article 107(1) TFEU, in so far as it applied to non-trading finance profits arising from qualifying loans, which fall within section 371EB of Chapter 5 of Part 9A of the TIOPA ('Chapter 5'). More specifically, it found 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), that that scheme was incompatible with the internal market and had been unlawfully put into effect by the United Kingdom in breach of Article 108(3) TFEU (Article 1 of the decision at issue).

12 The Commission concluded however that the contested scheme did not constitute aid when applied to non-trading finance profits arising from qualifying loans that satisfied the criterion in section 371EC of Chapter 5, based on capital connected with the United Kingdom ('the United Kingdom connected capital test'), and did not satisfy the criterion in section 371EB of that chapter, based on the fact that the SPFs were carried out in the United Kingdom ('the United Kingdom SPFs test').

13 In order to reach the conclusions set out in paragraphs 11 and 12 of the present judgment, 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.

14 After finding that the exemptions at issue constituted measures attributable to the United Kingdom and financed through resources of that State, that they were liable to affect trade between Member States and that they distorted or threatened to distort competition, the Commission focused on whether there was a selective advantage.

15 The Commission also found that the exemptions at issue conferred an economic advantage since they allowed a company established in the United Kingdom and controlling a CFC, which would otherwise have been subject to a CFC charge under Chapter 5, to request, under Chapter 9, that that charge be applied to only 25% of that CFC's non-trading finance profits, in so far as they arose from qualifying loans, with the result that 75% of those profits were exempt from that charge. In certain circumstances, that same charge could be applied to an even lower percentage, leading to an exemption covering up to 100% of the relevant profits of the CFC.

16 As regards the selective nature of the exemptions at issue, the Commission considered that the reference framework consisted of the rules applicable to CFCs, set out in Part 9A of the TIOPA, and that those exemptions constituted a derogation from that framework.

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

18 The Commission recalled that a measure which derogates from the reference framework could still be justified by the nature or overall structure of that framework and that it was for the Member State concerned to show that such justification exists. The United Kingdom had argued, first, that the

exemptions at issue were intended to ensure that the system was manageable and administrable. Second, they ensured the exercise of freedom of establishment within the European Union.

19 In that regard, the Commission accepted that, in so far as the contested scheme covered situations which fell within the scope of Chapter 5, under the United Kingdom connected capital test, it could be regarded as being intended to ensure the administrative practicability of the rules applicable to CFCs.

20 On the other hand, the Commission ruled out the possibility that that system, in so far as it was applicable to situations satisfying the United Kingdom SPFs test, could 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.

21 Furthermore, it stated that, following the amendments made to the rules applicable to CFCs, in the context of the transposition 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), with effect from 1 January 2019, and according to which it was no longer possible to apply for the exemptions at issue in respect of profits fulfilling the United Kingdom SPFs test, the contested scheme had become compliant with the State aid rules.

22 As regards the compatibility of the contested scheme with the internal market, the Commission stated, in essence, that the aid granted under it did not facilitate the development of certain economic activities or of certain economic areas, with the result that it was not covered by Article 107(3)(c) TFEU.

23 Lastly, 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.

The actions before the General Court and the judgment under appeal

24 By application lodged at the Registry of the General Court on 12 June 2019 the United Kingdom brought the action in Case T-363/19 seeking annulment of the decision at issue.

25 By application lodged at the General Court Registry on 4 July 2019, ITV brought the action in Case T-456/19 seeking annulment of that decision.

26 By decision of 29 January 2020, the United Kingdom was granted leave to intervene in Case T-456/19 in support of the form of order sought by ITV.

27 By order of 24 November 2020, *ITV* v *Commission* (T-456/19, EU:T:2020:640), the General Court granted LSEGH leave to intervene in Case T-456/19 in support of the form of order sought by ITV.

28 By decision of 21 July 2021, Cases T-363/19 and T-456/19 were joined for the purposes of the oral part of the procedure.

29 By the judgment under appeal, the General Court, after joining Cases T-363/19 and T-456/19 for the purposes of that judgment, dismissed the actions.

30 To that end, the General Court examined, inter alia, the condition relating to the existence of a selective advantage, by applying the three-step analysis, required in accordance with the 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, paragraphs 57 and 58), cited in paragraph 61 of the judgment under appeal, which consists in, as a first step, identifying the reference framework, then ascertaining whether the scheme at issue derogated from that framework in the light of the objective pursued by it, and, as the final step, establishing whether the Member State concerned had demonstrated that the differentiation introduced by that scheme was justified, since it flows from the nature or general structure of the framework of which that scheme forms part. Following those three steps, in paragraphs 63 to 203 of the judgment under appeal, the General Court confirmed the findings made in the decision at issue with regard to that condition.

31 In particular, in the context of the first step referred to in the preceding paragraph of the present judgment, the General Court rejected the pleas by which the United Kingdom and ITV submitted that the Commission had made an error of assessment in concluding that the reference framework did not consist of the general corporation tax system of the United Kingdom ('the GCTS') but solely of the rules applicable to CFCs.

32 In that regard, in the first place, the General Court stated that the GCTS was based on the principle of territoriality, under which only profits made in the United Kingdom are taxed. Second, it noted that the rules applicable to CFCs were intended to ensure that profits made by a CFC which, under that principle, would not normally be taxed in the United Kingdom would nevertheless be taxed, when they were considered to have been artificially diverted from the United Kingdom. The General Court concluded that the rules applicable to CFCs were severable from the GCTS (paragraphs 77, 78 and 80 to 83 of the judgment under appeal).

33 In the second place, the General Court considered that the rules applicable to CFCs formed a complete body of rules, distinct from the GCTS, in particular as regards the tax base, the taxable persons, the taxable event and the tax rate. It also pointed out that those rules provided for a mechanism for the avoidance of double taxation, which was not relevant to the calculation of the tax under the GCTS (paragraphs 85 to 90 of the judgment under appeal).

34 In the context of the second step referred to in paragraph 30 of the present judgment, in the first place, the General Court rejected the arguments of the United Kingdom and ITV that the United Kingdom tax authorities could not grant any advantage by the application of Chapter 9, since the provisions of that chapter could not be considered in isolation from those of Chapter 3 of Part 9A of the TIOPA ('Chapter 3) and those of Chapter 5.

35 In that regard, the General Court, in essence, found that the rules laid down in Part 9A of the TIOPA provided criteria for identifying situations giving rise to an artificial diversion of profits, such as, inter alia, those covered by Chapter 5. Thus, according to the General Court, where one of the criteria laid down by those rules is met, the profits made by the CFCs in question are taxed in the United Kingdom by means of the CFC charge. It concluded from this that the fact of providing, in Chapter 9, exemptions from that charge for profits which would otherwise have been subject to it, by virtue of the abovementioned criteria, constituted an advantage (paragraphs 96 and 100 to 108 of the judgment under appeal).

36 In the second place, the General Court examined the arguments of the United Kingdom and ITV, supported by LSEGH, that the Commission had wrongly considered 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.

37 In that regard, the General Court held that the protection of the tax base of the United Kingdom corporation tax was a broad objective, within which falls the more specific objective of taxing profits artificially diverted from the United Kingdom. It pointed out that, although several measures had been adopted to protect that tax base, the documents before the Court showed that the specific objective of the relevant reference framework, consisting of the rules applicable to CFCs, was to contribute to that protection by taxing profits of CFCs that were artificially diverted from the United Kingdom (paragraphs 109 and 114 to 120 of the judgment under appeal).

38 In the third place, the General Court analysed the arguments of the United Kingdom and ITV, supported by LSEGH, according to which, in essence, the contested scheme was not, a priori, selective, on the ground that the purpose of the rules applicable to CFCs is to impose a tax liability only in cases where there was a high risk of abuse or artificial diversion of profits from the United Kingdom.

39 To that end, the General Court noted, inter alia, that the exemptions at issue applied to CFCs' non-trading finance profits arising from loans granted by them, in respect of which the United Kingdom SPFs test or the United Kingdom connected capital test was satisfied (paragraph 131 of the judgment under appeal).

40 Following its examination of a priori selectivity, the General Court concluded that the exemptions at issue, in that they were applicable only to CFCs' non-trading finance profits arising from qualifying loans, to the exclusion of those arising from loans granted by United Kingdom connected companies and those granted by third-party companies, led to a difference in treatment of comparable situations with the result that the Commission had not made an error of assessment when it concluded that there was an advantage in the present case and that that advantage was a priori selective (paragraphs 167 to 182 of the judgment under appeal).

41 In the context of the third step referred to in paragraph 30 of the present judgment, the General Court rejected the arguments of the United Kingdom and ITV that the exemptions at issue were justified by reasons relating, first, to administrative practicability and, second, to respect for the freedom of establishment.

42 In particular, as regards that freedom, the General Court recalled that, 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 had held that, to the extent that the CFC legislation in force at the time restricted the application of the taxation of profits of CFCs to wholly artificial arrangements, it was compatible with the provisions of the Treaties ensuring freedom of establishment. It concluded from this that, since the CFC charge applied to profits which, under the United Kingdom SPFs test, had to be regarded as having been artificially diverted, that charge did not constitute an obstacle to freedom of establishment and, consequently, that the exemptions at issue could not be justified by the need to ensure respect for that freedom (paragraphs 200 and 201 of the judgment under appeal).

43 In the light of all those factors, the General Court concluded that the Commission had not made an error of assessment in finding that the exemptions at issue conferred a selective advantage on their beneficiaries.

The procedure before the Court and the forms of order sought by the parties to the appeals

44 By documents lodged at the Registry of the Court of Justice on 16 August, 17 August and 25 August 2022 respectively, the United Kingdom, ITV and LSEGH brought the present appeals, registered as Cases C-555/22 P, C-556/22 P and C-564/22 P respectively.

45 By decision of the President of the Court of 6 October 2022, Cases C-555/22 P, C-556/22 P and C-564/22 P were joined for the purposes of the written and the oral procedure and the judgment.

46 The United Kingdom contends that the Court should:

– set aside the judgment under appeal and grant the form of order sought before the General Court;

– in the alternative, set aside the judgment under appeal and refer the case back to the General Court for final judgment; and

– order the Commission to pay the costs of this appeal and the proceedings before the General Court.

47 ITV contends that the Court should:

– set aside the judgment under appeal in that it rejected the actions and ordered it to pay the costs;

– annul the decision at issue; and

– order the Commission to pay the costs of this appeal and the proceedings before the General Court.

48 LSEGH contends that the Court should:

– set aside the judgment under appeal;

– give final judgment and annul the decision at issue or, in the alternative, refer the case back to the General Court for judgment in accordance with the judgment of the Court of Justice; and

– order the Commission to pay the costs of these appeal proceedings and of the proceedings before the General Court, including the costs relating to any intervening parties.

49 The Commission contends that the Court should:

– dismiss the appeals; and

– order the United Kingdom, ITV and LSEGH to pay the costs.

The appeals

50 In support of its appeal, the United Kingdom relies on five grounds of appeal, alleging: (i) an error of law, distortion and incorrect characterisation of the facts as regards the identification of the reference framework; (ii) an error of law, distortion and incorrect characterisation of the facts as regards the existence of an advantage; (iii) an error of law, distortion and incorrect characterisation of the facts and infringement of the obligation to state reasons as regards selectivity; (iv) an error of law, distortion of the facts and infringement of the obligation to state reasons as regards administrative practicability; and (v) an error of law as regards freedom of establishment.

51 ITV raises four pleas in law, alleging: (i) an error in the determination of the reference framework; (ii) an error in the determination of a selective advantage; (iii) an error in the treatment of the justification for the exemptions at issue; and (iv) an error in the application of the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544).

52 LSEGH advances five grounds of appeal, alleging: (i) an error of law as regards the determination of the reference framework; (ii) an error of law as regards the identification of the objective of that framework; (iii) an error of law as regards the existence of discrimination between economic operators; (iv) infringement of Articles 263 and 296 TFEU on account of the failure to respond to certain pleas in law and the substitution by the General Court of its own reasoning for that of the Commission in the decision at issue; and (v) an error of law as regards the justification of the exemptions at issue.

53 As the Advocate General noted, in essence, in points 41 to 45 of her Opinion, although the appellants do not all raise the same number of grounds of appeal and, within those grounds, each appellant may have attributed greater or lesser weight to certain arguments or put forward specific arguments, their arguments relate, fundamentally, to four issues, namely, first, the determination of the reference framework, second, the existence of a selective advantage, third, the justification for the contested scheme by the need to enable the administrative practicability of the CFC rules and, fourth, the justification of that scheme by the need to respect freedom of establishment.

54 Moreover, the main part of the appeals concerns the challenge to the determination of the reference framework, it being noted that the appellants' arguments relating to the need to read Chapters 5 and 9 together, in so far as they reflect the risk-based approach followed by the United Kingdom, are also relevant for the purposes of assessing that challenge, even where they have been formulated, or developed in more detail, in the context of the dispute as to the existence of a selective advantage or that concerning the justification of the exemptions at issue by the need to respect freedom of establishment.

The challenge to the determination of the reference framework

Admissibility

55 The Commission submits that the assessment of national law is a question of fact which falls within the exclusive jurisdiction of the General Court, except where the interpretation of that law is based on a distortion of evidence. It accepts that, according to the guidance provided, inter alia, in the judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission* (C-885/19 P and C-898/19 P,

EU:C:2022:859), the correct determination of the reference framework, the first step of the analysis relating to the selectivity of a national tax measure, is a question of law, but submits that, in that judgment, the error found by the Court of Justice related not to the interpretation of national law but rather to whether the General Court had taken into account the appropriate factors in that determination.

56 By contrast, in the present cases, the appellants do not allege that the General Court relied on incorrect elements when it assessed whether the Commission had correctly defined the reference framework. They merely challenge the interpretation of national law adopted by the General Court, whereas, in order for their line of argument to be regarded as admissible, they must demonstrate that that national law has been distorted, in the sense that it has been the subject of an interpretation which is manifestly contrary to the content of the relevant provisions or which amounts to attributing to them a meaning which they clearly do not have.

57 In that regard, it must be borne in mind that the jurisdiction of the Court of Justice ruling on an appeal against a decision given by the General Court is defined by the second subparagraph of Article 256(1) TFEU. That provision states that an appeal is to be on points of law only and that it must be made 'under the conditions and within the limits laid down by the Statute [of the Court of Justice of the European Union]'. In a list setting out the grounds that may be relied upon in that context, the first paragraph of Article 58 of that statute states that an appeal may be based on the infringement of EU law by the General Court.

58 It is true that, in principle, with respect to the assessment in the context of an appeal of the General Court's findings on national law, which, in the field of State aid, constitute findings of fact, the Court of Justice has jurisdiction only to determine whether that law was distorted. The Court of Justice cannot, however, be deprived of the possibility of reviewing whether such assessments themselves constitute an infringement of EU law by the General Court (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 77 and the case-law cited).

59 The question whether the General Court adequately defined the relevant reference framework and, by extension, correctly interpreted the constituent provisions, is a question of law which can be reviewed by the Court of Justice on appeal. The arguments aimed at calling into question the choice of reference framework or its meaning in the first step of the analysis of the existence of a selective advantage are admissible, since that analysis derives from a legal classification of national law on the basis of a provision of EU law (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 78 and the case-law cited).

60 To concede that the Court of Justice is not in a position to determine whether the General Court made no error of law when it endorsed the definition of the relevant reference framework, the interpretation thereof and the application thereof as the decisive parameter for the purpose of examining whether there was a selective advantage would be tantamount to accepting that the General Court may have infringed a provision of primary EU law, namely Article 107(1) TFEU, without any possibility of that infringement being found in an appeal, which would contravene the second subparagraph of Article 256(1) TFEU, as has been pointed out in paragraph 57 of the present judgment (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 79).

61 It must therefore be held that it is admissible for the appellants to seek the review by the Court of Justice of whether the General Court was correct in law, for the purposes of the analysis relating to the existence of a selective advantage within the meaning of Article 107(1) TFEU, to confirm the Commission's limitation of the reference framework solely to the rules applicable to CFCs.

Substance

– *Arguments of the parties*

62 The appellants submit, in essence, that the General Court made an error of law, distorted the national law or made an incorrect legal characterisation of that law when it found, as the Commission did in the decision at issue, that the reference framework in relation to which it was necessary to determine

whether the exemptions at issue gave rise to a selective advantage was comprised not of the GCTS but rather of the rules applicable to CFCs, set out in Part 9A of the TIOPA.

63 In that regard, in the first place, the appellants submit that the General Court wrongly assumed that it was 'normal' for a company subject to the GCTS to be taxed on profits generated by a CFC arising from activities or assets in the United Kingdom. In their view, first, that system is essentially, but not purely, territorial, in the sense that, with a few exemptions relating in particular to dividends from foreign subsidiaries, the worldwide profits made by taxpayers established in the United Kingdom are taxable. Second, that system is based not on the basis of the taxation of the group but on the principle of the separate taxation of companies, on the basis solely of their own profits. An approach which treats the rules applicable to CFCs as a 'normal' tax system necessarily fails to place those rules in their relevant context, as a tightly limited exception to the general principle of broadly territorial taxation.

64 More specifically, ITV states, inter alia, that it is because of the exceptional nature of extra-territorial taxation that the exemptions at issue were drafted widely. They are in fact intended to make the taxation of income of CFCs generated outside the United Kingdom consistent with the essentially territorial nature of the GCTS. The United Kingdom legislature drew the net widely in terms of the potential application of the CFC charge, but also provided for exemptions serving as 'holes' in the net, through which CFCs' profits could pass and not be subject to that charge where they did not, in reality, undermine the United Kingdom tax base or constitute wholly artificial diverted profits.

65 LSEGH, for its part, recalls that the determination of the reference framework must be carried out following an objective examination of the content, the structure and the specific effects of the applicable rules under the national law of the Member State concerned. Thus, in its view, the rules applicable to CFCs concerning non-trading finance profits must be interpreted together, in particular, with the rules relating to dividends received by companies established in the United Kingdom from their foreign subsidiaries.

66 In the second place, the appellants submit that, contrary to the General Court's finding, the rules applicable to CFCs are not severable from the GCTS, but constitute, according to the wording used by the United Kingdom and ITV, an exception to the principle of territoriality which largely characterises the GCTS or, according to the wording used by LSEGH, a remedy which is inseparable from that system, which is intended to protect the United Kingdom corporation tax base from abuses involving CFCs.

67 In order to substantiate their challenge to the severability of the rules applicable to CFCs recognised by the General Court, first of all, the United Kingdom and, although in a less detailed way, ITV call into question the findings in the judgment under appeal concerning the tax base, the taxable person, the taxable event and the tax rate.

68 Next, the United Kingdom and ITV submit that the existence of rules for the avoidance of international double taxation is not a special feature specific to the CFC rules, as the General Court held, but is a central feature of the GCTS, as is apparent from Part 2 of the TIOPA.

69 Lastly, the United Kingdom states that, although Part 9A of the TIOPA contains specific provisions concerning the calculation of the CFC charge, those rules are, in essence, identical to those of the GCTS in many respects.

70 In the third place, the appellants submit that the General Court wrongly held that Chapter 9 provides for exemptions to the CFC charge in favour of non-trading finance profits of CFCs which would otherwise be taxable under Chapter 5. The General Court overestimated the role of the United Kingdom SPFs test by holding that any non-trading finance profits of a CFC which satisfy that criterion should automatically be classified as artificially diverted from the United Kingdom and, consequently, be subject to the CFC charge under Chapter 5. Certain types of arrangements, namely qualifying loans, do not pose a high risk of artificial diversion of profits, irrespective of the presence of SPFs in the United Kingdom. Other types of arrangements, namely those not covered by qualifying loans, would entail such a risk, again irrespective of the presence of SPFs in the United Kingdom.

71 In that regard, the appellants point out that Chapters 5 and 9 do not set out, respectively, rules and exceptions to those rules, in the sense that the latter chapter results in a reduction of the tax otherwise due under the former. Those two chapters complement each other and form a uniform and united set of rules for taxing CFC's non-trading finance profits. Thus, taken as a whole, those chapters define the scope of application of the CFC charge, taking into account the assessment of the risk for the tax base in the United Kingdom posed by the sources and uses of the capital from which those non-trading finance profits are made.

72 In that context, the appellants rely in particular on section 371CB(1) and (8) of Chapter 3. ITV and LSEGH also refer to section 371BB of Chapter 2 of Part 9A of the TIOPA ('Chapter 2').

73 In particular, according to the United Kingdom and ITV, the fact that section 371EA(2), of Chapter 5 refers to that section 371CB(8) means that, where a CFC makes non-trading finance profits, Chapter 9 is to be considered first, and only any residual non-trading finance profits which are not covered by that chapter are then, as a second step, examined under Chapter 5.

74 The United Kingdom and, in essence, ITV, as well as LSEGH, add that section 371IA of Chapter 9, relied on by the Commission, does not call into question the fact that consideration should first of all be given to the latter chapter.

75 Similarly, the appellants raise arguments by which, in essence, they complain that the General Court failed to take account of the fact that the rules applicable to CFCs, as a whole and in the light of their objective, were conceived in accordance with an approach based on the assessment of the risks that CFCs' profits pose for the taxation of companies in the United Kingdom.

76 The United Kingdom submits that the objective of the rules applicable to CFCs is to prevent both the erosion of the tax base, arising from the fact that companies established in the United Kingdom which form part of a group may deduct from their profits the interest which they pay to companies in the same group not established in that State, and the transfer of profits outside that State in the form of an artificial diversion.

77 ITV and, in essence, LSEGH submit that the provisions of Chapter 9 contain their own assessment of the risk associated with qualifying loans, which does not depend on the United Kingdom SPFs test set out in Chapter 5.

78 ITV adds, in essence, that those provisions of Chapter 9 are necessary to ensure that the rules applicable to CFCs allow only wholly artificial arrangements to be taxed, in accordance with the guidance provided in the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544).

79 The Commission submits, in the first place, that the GCTS seeks to tax companies established in the United Kingdom, as well as non-resident companies with a permanent establishment in that State, on their profits from assets or activities in that State. Because of the largely territorial nature of that system, profits made outside the territory of the United Kingdom are not, in principle, subject to corporation tax. Since United Kingdom companies could thus have an incentive to create CFCs in countries with favourable taxation and artificially divert profits generated from United Kingdom assets or activities to them, that State has adopted specific rules to prevent the corporate tax base from being eroded through CFCs. The rules applicable to those CFCs make it possible to determine, on the basis of criteria chosen by the United Kingdom, the existence of such diversion, which would result from the fact that the profits made by a CFC come from United Kingdom assets or activities, as the United Kingdom confirmed during the administrative procedure. The imposition of the CFC charge on those profits makes it possible to remove the tax advantage of that diversion.

80 In that context, the Commission emphasises that the General Court did not consider it 'normal' to tax all CFCs' profits, but found that the profits of CFCs are subject to a CFC charge, notwithstanding the fact that they were made by companies not established in the United Kingdom, where they result from an artificial diversion. In that way, the rules applicable to CFCs make it possible to bring within the United Kingdom tax base profits from assets or activities situated in that State which would otherwise be excluded from it. The Commission infers from this that the CFC charge applies only in exceptional

circumstances, namely those in which there is a sufficiently high risk of artificial diversion. That is the case for profits that fulfil the Chapter 5 criteria.

81 In the second place, the Commission submits that the General Court was fully entitled to find that the rules applicable to CFCs were severable from the GCTS on the ground that they followed a logic distinct from that system and, second, that they are supplementary to, or a corollary of, the GCTS, to which they are not an exception, but an extension.

82 In that regard, first of all, the Commission submits that the severability of the rules applicable to CFCs results not only from the provisions of those rules relating to the tax base, the taxable person, the taxable event and the tax rate, but also from the fact that those rules allow account to be taken of possible issues of double taxation, which are not relevant in the context of the GCTS.

83 Next, the Commission stresses that that severability is not called into question by the presence, within the rules applicable to CFCs, of references to provisions of the GCTS. It would be unrealistic to expect those rules to be completely autonomous.

84 Lastly, that severability is also not undermined by the alleged existence of a link between the rules applicable to CFCs and the rules under which, first, dividends paid by CFCs to parent companies established in the United Kingdom are not taxed and, second, the latter may deduct certain interest.

85 In the third place, the Commission submits that Chapters 5 and 9 are not required to be read together. In its view, Chapter 5 sets out general rules, in particular the criteria for SPFs in the United Kingdom and United Kingdom connected capital, which makes it possible to identify situations in which the authorities of that State, in the exercise of their discretion, consider that there is a sufficiently high risk that the non-trading finance profits generated by a CFC constitute profits which are artificially diverted from the United Kingdom and must therefore be subject to a CFC charge. Chapter 9, for its part, introduces, by means of the exemptions at issue, a total or partial derogation from that charge for CFCs non-trading finance profits made by granting certain types of loans, despite the fact that those profits would normally fall within Chapter 5.

86 In that context, the Commission relies on section 371IA(1) of Chapter 9, which it argues shows that the profits covered by the exemptions at issue would normally have been subject to a CFC charge under Chapter 5 and constitute a subset of the profits falling within the latter chapter. Paragraphs 2 and 3 of that section support that view. By contrast, there is no provision in Part 9A of the TIOPA which substantiates the United Kingdom's submission that non-trading finance profits must first of all be examined in accordance with Chapter 9 criteria; in particular, section 371CB(8) of Chapter 3 does not support that submission. In any event, the interpretation according to which Chapter 5 should be applied before Chapter 9 remains within the limits of a reasonable assessment of the relevant provisions. The appellants have thus failed to show that the General Court distorted the national legislation.

87 As regards the application of the CFC charge only to financial profits which present a sufficiently high risk of artificial diversion, the Commission submits that the United Kingdom legislature designed the rules applicable to CFCs on the basis of the fundamental premiss that they cover profits from assets and risks which are managed and controlled in the United Kingdom. Thus, those rules have a broad scope and could cover situations in which it is likely that the CFC was created for genuine business reasons and the risk of an artificial diversion of profits from the United Kingdom is low. However, in order to take those situations into account, the United Kingdom authorities included, first, in Chapter 3, criteria for determining whether the profits made by CFCs must be examined in the light of the subsequent chapters and, second, the exemptions listed in recital 19 of the decision at issue.

88 The result is that, if a CFC's non-trading finance profits are not exempt from that examination and do not fall within those exemptions, even though they satisfy one of the criteria laid down in Chapter 5, those profits must, under the system devised by the United Kingdom itself, be regarded as presenting a sufficiently high risk of artificial diversion to trigger the imposition of a CFC charge. Accordingly, that chapter permits taxation only of profits that have been diverted, without any further adjustment under Chapter 9 being required in order to avoid taxing profits that have not been diverted.

89 In addition, the Commission accepts that the tax base in the United Kingdom may also be eroded otherwise than by artificial diversions, in particular by the deduction of interest, but maintains that combating the other risks of erosion of that tax base does not fall within the objective of the rules applicable to CFCs and that specific measures may be, or have been, adopted for that purpose.

– *Findings of the Court*

90 It should be borne in mind that, according to settled case-law, action by Member States in areas that are not subject to harmonisation by EU law is not excluded from the scope of the provisions of the FEU Treaty on monitoring State aid. The Member States must thus refrain from adopting any tax measure liable to constitute State aid that is incompatible with the internal market (judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 65 and the case-law cited).

91 In that regard, it follows from the well-established case-law of the Court 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 the Member States. Third, it must confer a selective advantage on the beneficiary. Fourth, it must distort or threaten to distort competition (judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 66 and the case-law cited).

92 So far as concerns the condition relating to selective advantage, it 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 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 67 and the case-law cited).

93 In that regard it should be borne in mind that, in order to classify a national tax measure as 'selective', the Commission must begin by identifying the reference framework, that is the 'normal' tax system applicable in the Member State concerned, and demonstrate, as a second step, 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 system, are in a comparable factual and legal situation. The concept of 'State aid' does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned is able to demonstrate, as a third step, that that differentiation is justified, in the sense that it flows from the nature or general structure of the system of which those measures form part (judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 68 and the case-law cited).

94 In that context, it must be recalled 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 'normal' taxation. Thus, determination of the set of undertakings which are in a comparable factual and legal situation depends on the prior definition of the legal regime in the light of whose objective it is necessary, where applicable, to examine whether the factual and legal situation of the undertakings favoured by the measure in question is comparable with that of those which are not (judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 69 and the case-law cited).

95 The determination of the reference framework, which must be carried out following an exchange of arguments with the Member State concerned, must follow from an objective examination of the content, the structure and the specific effects of the applicable rules under the national law of that State. In that regard, the selectivity of a tax measure cannot be assessed on the basis of a reference framework consisting of some provisions of the national law of the Member State concerned that have been artificially taken from a broader legislative framework. Consequently, 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 (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).

96 It should also be borne in mind that, outside the spheres in which EU tax law has been harmonised, it is the Member State concerned which determines, by exercising its own competence in the matter of direct taxation and with due regard for its fiscal autonomy, the characteristics constituting the tax, which define, in principle, the reference framework or the 'normal' tax regime, from which it is necessary to analyse the condition relating to selectivity. This includes the determination of the tax base, the taxable event and any exemptions to which the tax is subject (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 112 and the case-law cited).

97 It follows that, when determining the reference framework for the purpose of applying Article 107(1) TFEU to tax measures, the Commission is in principle required to accept the interpretation of the relevant provisions of national law given by the Member State concerned in the exchange of arguments referred to in paragraph 95 of this judgment, provided that that interpretation is compatible with the wording of those provisions (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 120).

98 The Commission may depart from that interpretation only if it is able to establish, on the basis of reliable and consistent evidence that has been the subject of that exchange of arguments, that another interpretation prevails in the case-law or the administrative practice of that Member State (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 121).

99 In accordance with Article 4(3) TEU, that Member State is bound by a duty of sincere cooperation throughout the procedure for the examination of a measure by reference to the provisions of EU law on State aid. That duty implies, in particular, that that Member State must in good faith provide the Commission with all relevant information requested by it concerning the interpretation of the provisions of national law that are relevant for the purpose of determining the reference framework, as derived from national case-law or administrative practice (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 122).

100 It is in the light of those principles that it is necessary to ascertain whether the appellants have demonstrated that the General Court erred in confirming that, as the Commission found in the decision at issue, the reference framework in the present case was limited to the rules applicable to CFCs.

101 To that end, it should be recalled that, in paragraph 80 of the judgment under appeal, as regards the underlying logic of the rules applicable to CFCs, the General Court noted that the GCTS was 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'.

102 In paragraph 81 of that judgment, the General Court pointed out that, 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'. It concluded from this, in paragraph 82 of that judgment, that the rules applicable to CFCs were based 'on a logic distinct from that of the [GCTS]', whilst specifying that 'that logic [was] admittedly supplementary or … a corollary to the [GCTS] based on the principle of territoriality, however it [was] severable from it'.

103 In paragraph 83 of the judgment under appeal, the General Court added, first, that the rules applicable to CFCs '[did] not constitute an exception to the [GCTS], since they [might] rather be regarded as an extension thereof', next, that those rules were 'intended to tax profits which [had] been artificially

diverted from the United Kingdom and, as a result, [had] artificially increased the profits of the CFC, which [would] then distribute dividends which [were] not taxable in the United Kingdom' and, lastly, that 'the logic of [those] rules [was] linked to the diversion of profits to CFCs, so that, in practice, they are accrued outside the United Kingdom'. It concluded that that logic was 'distinct from that underlying the general United Kingdom [GCTS], which [was] based on profits made in the United Kingdom'.

104 In that regard, it should be observed that an element classified as 'a corollary to', 'supplementary to' or 'an extension of' a main element can hardly be regarded as being clearly severable from that latter element or as following its own legal logic, within the meaning of the case-law cited in paragraph 95 of the present judgment.

105 Owing to the close relationship which normally exists between those two elements, the fact of creating a separation between them amounts, in principle, to artificially removing certain provisions of the national law of the Member State concerned from the broader legislative framework of which they form part, in breach of the principles recalled in paragraph 95 of the present judgment.

106 In the present case, it is common ground that the GCTS is largely territorial, in the sense that, with a few exceptions, it provides for the taxation of worldwide profits of companies established in the United Kingdom or profits made by foreign companies generated by their activities carried out in the United Kingdom through the intermediary of a stable establishment in that State. Thus, unless it is supplemented by other rules, the GCTS does not make it possible for the profits made by CFCs of United Kingdom companies to be taxed, despite the fact, highlighted by the General Court, that those companies receive from their CFCs dividends, which are not taxable in the United Kingdom, by virtue of the provisions of the GCTS.

107 According to the appellants, in essence, the rules applicable to CFCs are an exception to the principle of territoriality which largely characterises the GCTS and are intended to supplement it, with a view to taxing, by means of the CFC charge to which United Kingdom companies which control CFCs are subject, the profits of those CFCs in the same way as they would have been if they had been made by those United Kingdom companies, where there is a sufficiently high risk that those profits result from arrangements which give rise to artificial diversion of profits or erosion of the tax base of United Kingdom corporation tax. On the other hand, the exemptions at issue allow, in the absence of a sufficiently high risk, the profits concerned not to be subject to any CFC charge, in the same way as they would not have been taxed under the GCTS, or even though that charge applies to only part of the profits, in accordance with a flat-rate estimate of the effects of those arrangements on the tax base.

108 If that interpretation of the rules applicable to CFCs and their relationship with the GCTS were to be upheld, those rules would have to be regarded as following the same logic as the GCTS. By virtue of that interpretation, first, they introduce an exception to the principle of territoriality which largely characterises the GCTS in order to prevent profits which, in the absence of diversion or erosion of the tax base, would have been taxed under that system from escaping the United Kingdom taxation authorities. Second, through the exemptions at issue, they form part of the largely territorial nature of the GCTS, in the sense that the CFC charge is not, or is not fully, applied where the risk of artificial diversion of profits or the erosion of the tax base of United Kingdom corporation tax is not sufficiently high. In other words, according to the appellants' interpretation, the GCTS and the rules applicable to CFCs are inseparable within the meaning of the case-law referred to in paragraph 95 of the present judgment.

109 It is therefore necessary to establish which interpretation of national law must prevail: the interpretation on which the decision at issue is based, confirmed by the General Court in the judgment under appeal, or that advocated by the Member State concerned.

110 In that context, it should be noted that it follows from the principles established by the case-law cited in paragraphs 97 to 99 of the present judgment that, where, in relation to an aid scheme, the Commission does not have case-law or an administrative practice of the Member State concerned which substantiates its own interpretation of the national law, and where that Member State informed it, during the administrative procedure, that there is no such case-law or practice, that interpretation can

prevail over that advocated by that Member State only if the Commission is able to demonstrate that the Member State's interpretation is incompatible with the wording of the relevant provisions.

111 As regards the debate between the Commission and the United Kingdom concerning the correct interpretation of the rules applicable to CFCs, in particular as regards the interaction between Chapter 5 and Chapter 9, it follows from what has been stated in paragraph 110 of the present judgment that it is necessary to examine whether the interpretation advocated by the United Kingdom, which is the author of those rules, is compatible with the wording of the relevant provisions of those rules.

112 It should be noted that, as is apparent from recital 72 of the decision at issue, the United Kingdom had argued that Chapters 5 and 9 reflected an approach based on risk and the impact of different arrangements on the United Kingdom's tax base. Similarly, before the General Court, the United Kingdom clearly criticised the Commission for not having read those chapters together, which made it possible to identify arrangements presenting a sufficiently high risk of abuse or artificial diversion.

113 In that regard, first, section 371BB of Chapter 2, after indicating, in subsection 1 thereof, the steps to be taken to determine, in accordance with Chapter 3, whether and, if so, which of Chapters 4 to 8 of Part 9A of the TIOPA apply to profits of a CFC (step 1), as well as the extent to which those profits fall within one of those chapters (step 2), states in subsection 2 that subsection 1 applies 'subject to', inter alia, Chapter 9.

114 Nothing in those subsections, read together, precludes the interpretation of the rules applicable to CFCs advocated by the United Kingdom, according to which Chapters 5 and 9 complement each other and define, together, the scope of the CFC charge, taking into account an assessment of the risk that non-trading finance profits result from arrangements which give rise to the artificial diversion of profits or the erosion of the tax base of United Kingdom corporation tax. Accordingly, where profits fulfil the conditions of Chapter 9, there is no need to examine them in the light of the other chapters of Part 9A of the TIOPA. Thus, where Chapter 9 applies, it is not necessary to ascertain whether the profits concerned meet one of the criteria in Chapter 5, since, whether or not that is the case, those profits may, on request, be exempted in accordance with the rules laid down in Chapter 9.

115 Second, section 371CB of Chapter 3, which sets out how to determine whether Chapter 5 applies, states, in subsection 8 that, 'in the case of a chargeable company which makes a claim under Chapter 9, in this section and Chapter 5 references to the CFC's non-trading finance profits are to those profits excluding also the CFC's qualifying loan relationship profits (as defined in Chapter 9).'

116 As confirmed at the hearing, the presence of the adverb 'also' in section 371CB(8) of Chapter 3 is due to the fact that subsections 2 to 7 of that section lay down rules permitting certain other benefits to be excluded from the scope of that section and Chapter 5.

117 Accordingly, nothing in section 371CB of Chapter 3 precludes the United Kingdom's interpretation according to which, in essence, subsections 1 and 8 thereof mean that Chapter 9 may apply without Chapter 5 being taken into consideration.

118 Third, section 371EA(1) of Chapter 5 provides that, for the purposes of step 2 of section 371BB(1) of Chapter 2, the profits of a CFC covered by Chapter 5 are its non-trading finance profits in so far as they fulfil the criteria of that chapter. Subsection 2 of that section 371EA states that 'references to … non-trading finance profits are to be read in accordance with section 371CB(2) and, so far as applicable, section 371CB(8)'.

119 Since it refers to section 371CB(8) of Chapter 3, section 371EA, which, according to its title, is 'the basic rule' of Chapter 5, dealing with CFCs' non-trading finance profits, may be read as making the application of the criteria set out in that chapter conditional on the non-trading finance profits being examined not falling within Chapter 9, with the result that the wording of that section is compatible with the interpretation advocated by the United Kingdom.

120 Fourth, section 371IA of Chapter 9 provides, in subsection 1(a) thereof, that this chapter applies if, 'apart from this [present] Chapter, Chapter 5 … would apply' to the profits of a CFC. Subsection 2 of that section adds that 'a chargeable company … may make a claim … for step 2 in section 371BB(1)

(the CFC charge gateway) to be taken … subject to this Chapter.' Subsection 3 of that section states that 'if [that company] makes a claim …, the CFC's qualifying loan relationship profits pass through the CFC charge gateway so far as (and only so far as) they are not exempt under this Chapter.'

121 According to the Commission, that section shows that the non-trading finance profits covered by Chapter 9 are those which, in the absence of the exemption provided for in that chapter, would be subject to a CFC charge in accordance with Chapter 5.

122 It must be observed that that interpretation implies that Chapter 9 provides for an exemption from taxation due, where appropriate, pursuant to Chapter 5, which, according to section 371IA(3) of Chapter 9, may result in the taxation of non-trading finance profits which are not, or not wholly, covered by Chapter 9. However, the application of the exemptions at issue to non-trading finance profits that are capable of fulfilling, in addition to the conditions laid down in Chapter 9, one of the Chapter 5 criteria, does not contradict the interpretation advocated by the United Kingdom, summarised in paragraph 114 of the present judgment. Where and in so far as a CFC's non-trading finance profits fulfil the conditions laid down in Chapter 9, they may be exempted, in whole or in part, from the CFC charge, even if they meet one of the criteria in Chapter 5, on the ground that, according to the assessment made by the United Kingdom legislature, the fact that those conditions are satisfied makes it possible to rule out the existence of a sufficiently high risk that those profits result from arrangements which give rise to the artificial diversion of profits or the erosion of the tax base of United Kingdom corporation tax.

123 Accordingly, the provisions of section 371IA of Chapter 9 relied on by the Commission also do not make it possible to infer that the interpretation of the rules applicable to CFCs relied on by the United Kingdom is incompatible with the wording of those rules.

124 In addition, ITV submits, in essence, that the interpretation of the rules applicable to CFCs must take account of the guidance provided in the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544).

125 The operative part of that judgment rules that Articles 49 and 54 TFEU must be interpreted as precluding the inclusion in the tax base of a resident company established in a Member State of profits made by a CFC in another Member State, where those profits are subject in that State to a lower level of taxation than that applicable in the first State, unless such inclusion relates only to wholly artificial arrangements intended to escape the national tax normally due. Accordingly, such a tax measure must not be applied where it is proven, on the basis of objective factors which are ascertainable by third parties, that despite the existence of tax motives that CFC is actually established in the host Member State and carries on genuine economic activities there.

126 The interpretation of the rules applicable to CFCs set out in Part 9A of the TIOPA invoked by the appellants reflects those principles, since, by Chapters 5 and 9, that part seeks to tax profits arising from abusive practices, such as wholly artificial arrangements, by allowing taxpayers the possibility of making a claim in order to avoid or reduce that tax where certain conditions, which, in the opinion of the national legislature, eliminate or reduce the risk of the existence of such arrangements, are satisfied.

127 It follows that, as the Advocate General noted, in essence, in points 87 to 90 of her Opinion, the rules applicable to CFCs, taken as a whole and, in particular, as regards non-trading finance profits, set out in Chapters 5 and 9, supplement the GCTS, and follow the same logic which is largely based on the principle of territoriality. The CFC charge is not applied, or is applied only at a reduced level, to CFCs' non-trading finance profits, such as those arising from qualifying loans, which do not have a sufficient territorial connection with the United Kingdom and which therefore do not constitute artificially diverted profits or an erosion of the tax base of United Kingdom corporation tax.

128 That conclusion is not called into question by the analysis set out in paragraphs 85 to 90 of the judgment under appeal. The General Court, in order to find that the rules applicable to CFCs constituted a complete body of rules distinct from the GCTS, emphasised, first, the differences between the GCTS and those rules as regards the tax base, the taxable person, the taxable event and the tax rate, next, the presence in Part 9A of the TIOPA of specific provisions concerning the CFC charge and, lastly, the existence, in that part, of a mechanism for the avoidance of double taxation.

129 In that regard, first, as regards the tax base, as the United Kingdom submits, the General Court wrongly distinguishes between profits made in that State and profits artificially diverted from it, in order to consider them to be two different tax bases. In both cases, the tax base corresponds to the profits made.

130 Second, as regards taxable persons, it should be noted that the persons liable to pay the CFC charge are parent companies established in the United Kingdom, namely companies which are also subject to corporation tax in the United Kingdom. It is true that that represents a subset of companies established in the United Kingdom, since all those companies do not necessarily control CFCs whose profits trigger a CFC charge. The fact remains however that, within that subset, the same companies are subject to both corporation tax and to the CFC charge. The General Court was therefore wrong to consider that there was a relevant distinction between those liable to pay the CFC charge and those liable to pay the tax resulting from the GCTS.

131 Third, as regards the taxable event, the General Court found that a CFC charge is applied where CFCs make profits outside the United Kingdom arising from purely artificial arrangements or diversions of resources or profits which should have been taxed in the United Kingdom. It concluded that the taxable event for that charge did not correspond to the making of profits in the United Kingdom taxable under the GCTS. In so doing, the General Court misinterpreted the concept of the taxable event, since, in both cases, the event justifying the imposition of tax on a person is the making of profits by that person.

132 Fourth, as regards the tax rate of the CFC charge, that rate is the same as for the tax laid down in the GCTS, as the General Court accepted. It is true that the General Court added that, as regards the CFC charge, there is a specific calculation mechanism in which account may be taken of the average of several tax rates applicable to the profits of the company taxable in the United Kingdom. However, as the United Kingdom submits without being contradicted by the Commission, the possibility that the tax rate corresponds to the average of several rates exists both for the CFC charge and for corporation tax established in the United Kingdom. Section 8(5) of the Corporation Tax Act 2009 provides for a mechanism equivalent to that under section 371BC of Chapter 2, referred to by the General Court in paragraph 88 of the judgment under appeal.

133 Fifth, while it is common ground that Part 9A of the TIOPA contains specific provisions concerning the calculation of the CFC charge, those rules are, in essence, identical to those of the GCTS in many respects, as the United Kingdom submits and as the Commission acknowledges.

134 Sixth, as regards double taxation, the United Kingdom and ITV rightly submit that that issue is dealt with in Part 2 of the TIOPA, with the result that the General Court was wrong to find that the existence of a mechanism for the avoidance of double taxation was a specific feature of the rules applicable to CFCs.

135 It follows from all those considerations that the rules applicable to CFCs form an integral part of the GCTS, which they supplement, following the same logic as the latter, according to which profits with a sufficient territorial link with the United Kingdom are subject to tax. Therefore, as the appellants submit by their first challenge referred to in paragraph 53 of the present judgment, the General Court erred in law when it confirmed that, as the Commission had found in the decision at issue, the reference framework for the purposes of examining the selectivity of the exemptions at issue in the light of Article 107(1) TFEU consisted solely of the rules applicable to CFCs, set out in Part 9A of the TIOPA.

Conclusion on the appeals

136 The Court's case-law makes clear that, since the determination of the reference framework constitutes the starting point for the comparative examination to be carried out in the context of the assessment of selectivity, an error made in that determination necessarily vitiates the whole of the analysis of the condition relating to selectivity (judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 71 and the case-law cited).

137 Consequently, the error of law found in paragraph 135 of the present judgment is sufficient to set aside the judgment under appeal in its entirety, without it being necessary to examine the other challenges referred to in paragraph 53 of the present judgment.

The actions before the General Court

138 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.

139 That is so in the present case, since the pleas in law of the actions seeking annulment of the decision at issue were the subject of an exchange of arguments before the General Court and examining them does not require the adoption of any additional measure of organisation of procedure or inquiry.

140 In that regard, it is sufficient to note that, for the reasons set out in paragraphs 90 to 135 of the present judgment, the decision at issue must be annulled in so far as the Commission erred in law in finding that there was a selective advantage in the light of a reference framework limited to the rules applicable to CFCs listed in Part 9A of the TIOPA, even though those rules are not severable from the GCTS.

141 As follows from the case-law cited in paragraph 136 of the present judgment, such an error in determining the rules actually applicable under the relevant national law and, therefore, in identifying the 'normal' taxation in the light of which the exemptions at issue had to be assessed necessarily invalidates the entirety of the reasoning relating to the existence of a selective advantage.

Costs

142 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs.

143 Article 138(1) and Article 140(1) of those rules, which apply to appeal proceedings by virtue of Article 184(1) thereof, provide, first, that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings and, second, that the Member States and institutions which have intervened in the proceedings are to bear their own costs.

144 In the present case, as regards the appeals brought in Cases C-555/22 P, C-556/22 P and C-564/22 P, since the United Kingdom, ITV and LSEGH have each been successful, the Commission must, in accordance with the forms of order sought by them, be ordered to bear its own costs and to pay those incurred by the appellants.

145 Furthermore, since the actions before the General Court have been upheld, the Commission is ordered to bear, in addition to its own costs, those incurred by the United Kingdom in Case T-363/19 and those incurred by ITV and LSEGH in Case T-456/19.

146 The United Kingdom shall bear its own costs in Case T-456/19.

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

1. Sets aside the judgment of the General Court of the European Union of 8 June 2022, *United Kingdom and ITV* v *Commission* (T-363/19 and T-456/19, EU:T:2022:349);

2. Annuls 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;

3. Orders the European Commission to pay the costs of the appeals in Cases C-555/22 P, C-556/22 P and C-564/22 P;

4. Orders the European Commission to pay the costs in Case T-363/19;

5. Orders the European Commission to bear, in addition to its own costs, those incurred by ITV plc and by LSEGH (Luxembourg) Ltd and London Stock Exchange Group Holdings (Italy) Ltd in Case T-456/19;

6. **Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs in Case T-456/19.**

Prechal Biltgen Wahl

Gratsias Arastey Sahún

Delivered in open court in Luxembourg on 19 September 2024.

A. Calot Escobar A. Prechal

Registrar President of the Chamber

---

* Language of the case: English.