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) (Only the English text is authentic)

COMMISSION DECISION (EU) 2019/700

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on the State Aid SA.34914 (2013/C) implemented by the United Kingdom as regards the Gibraltar Corporate Income Tax Regime

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having given notice to the parties concerned to submit their comments[(1)],

Whereas:

1. PROCEDURE

(1) On 1 June 2012, the Commission received a complaint from the Spanish authorities concerning the new income tax act in Gibraltar, the Income Tax Act 2010 (hereinafter referred to as 'ITA 2010').

(2) On 16 October 2013, the Commission initiated a formal investigation procedure to verify whether the passive interest and royalty income tax exemption in ITA 2010 selectively favours certain companies, in breach of Union State aid rules (the decision taken to initiate that procedure is referred to in this Decision as 'the First Opening Decision')[(2)].

(3) On 4 December 2013, the United Kingdom ('UK') authorities provided the Commission with a note on the exemption of royalties, together with draft legislation prepared by the Government of Gibraltar amending ITA 2010 in order to bring royalty income within the charge to taxation in Gibraltar. On request, this information was supplemented by the Gibraltar authorities by emails dated 6, 12 and 16 December 2013.

(4) On 16 December 2013, Gibraltar asked for an extension of the deadline to provide comments on the First Opening Decision until 17 January 2014. That request was accepted by the Commission the same day.

Changes to legislation: *There are currently no known outstanding effects for the Commission Decision (EU) 2019/700. (See end of Document for details)*

(5) On 20 December 2013, the United Kingdom submitted comments concerning the opening of the procedure pursuant to Article 108(2) of the Treaty. Third party comments on that procedure were received from the Spanish Confederation of Employers (C.E.O.E)[(3)], Germany, Spain and the Government of Gibraltar, on 27 December 2013, 27 December 2013, 6 January 2014 and 17 January 2014 respectively.

(6) By email dated 7 January 2014, the Gibraltar authorities provided the Commission with a copy of the Income Tax (Amendment) Act 2013 of 24 December 2013, which introduced an amendment to ITA 2010 in relation to the taxation of royalties.

(7) By letter of 16 April 2014, the Commission invited the United Kingdom to submit its comments on the observations raised by third parties concerning the opening of the formal procedure. The United Kingdom replied by letter dated 2 June 2014 within the extended deadline.

(8) On 1 October 2014, the Commission informed the United Kingdom of its decision[(4)] to extend the procedure laid down in Article 108(2) of the Treaty to include the tax ruling practice in Gibraltar (that decision is referred to in this Decision as 'the Decision to Extend Proceedings').

(9) On 10 November 2014, the Commission requested further information in relation to the tax ruling practice in Gibraltar. That information was provided by the United Kingdom on 8 December 2014.

(10) On 4 March 2015, a corrigendum of the Decision to Extend Proceedings was communicated to the United Kingdom.

(11) On 23 March 2015, additional information in relation to the tax ruling practice was requested by the Commission. That information was submitted by the United Kingdom on 23 April 2015.

(12) On 31 March 2015, the United Kingdom submitted its comments on the Decision to Extend Proceedings.

(13) Following an email from the United Kingdom dated 9 March 2015 with proposals for draft legislation and guidance notes in relation to both the territoriality principle and the tax ruling practice, the Commission provided the UK with a number of suggestions on the draft legislation and guidance notes by letter of 3 September 2015.

(14) On 19 October 2015, the United Kingdom provided the Commission with a revised draft regulation and guidance notes on the tax ruling practice as well as 20 tax ruling reviews. On 11 November 2015, the Commission requested information on 2 299 companies with income accruing in or derived from Gibraltar. The requested information was submitted by the United Kingdom on 24 November 2015. Additional tax ruling reviews were sent to the Commission on 3 December 2015, 19 February 2016 and 31 August 2016.

(15) On 14 July 2016, a new request for information on both the tax ruling practice and the passive interest and royalty income tax exemption was sent to the United Kingdom. The United Kingdom replied by letter dated 31 August 2016.

(16) On 7 October 2016, the Decision to Extend Proceedings was published in the Official Journal[(5)].

(17) In October and November 2016, six interested parties, including Gibraltar and Spain, submitted their observations on the Decision to Extend Proceedings.

(18) On 9 November 2016, Gibraltar lodged an application for annulment of the Decision to Extend Proceedings before the General Court of the European Union[(6)].

(19) On 7 December 2016, the Commission invited the United Kingdom to comment on the third parties comments received. The United Kingdom submitted its comments on 31 January 2017.

(20) On 16 February 2017, the Commission requested further clarifications from the United Kingdom regarding the Gibraltar tax rulings. The UK authorities replied on 31 March 2017, and submitted further information on 3 May 2017, within the extended deadline.

(21) On 29 November 2017, the United Kingdom submitted a copy of all reports drawn up by the Gibraltar tax authorities as a result of the reviews performed in relation to the 165 tax rulings listed in the Decision to extend proceedings.

(22) Further to comments made by the Commission on 7 December 2017, additional information, including draft legislation and guidance notes, were provided by the UK on 18 January 2018.

(23) On 9 February 2018, the Commission requested further clarifications of the draft legislation sent by the United Kingdom. It also requested supplementary explanations on factual or legal aspects of some of the tax ruling reviews submitted by the United Kingdom in November 2017.

(24) By letter dated 21 February 2018, the United Kingdom replied to that information request. By email of 1 March 2018, the Commission invited the United Kingdom to provide clarification on certain specific tax rulings. The United Kingdom replied to that request on 15 March 2018. Further clarifications on the same issues were provided by the United Kingdom on 24 May 2018, following a request from the Commission dated 3 May 2018.

(25) Meetings were held on 5 December 2013, 12 March 2015, 28 May 2015 and 29 November 2017 and 5 October 2018 with the United Kingdom, together with representatives of the Gibraltar authorities.

2. DESCRIPTION OF THE MEASURES

Changes to legislation: *There are currently no known outstanding effects for the Commission Decision (EU) 2019/700. (See end of Document for details)*

(26) Gibraltar is a British Overseas Territory. It has full internal self-government with respect to tax matters, while the United Kingdom government is responsible for its international relations, for example for the negotiation of tax treaties.

2.1. **Overall description of the Gibraltar corporate income tax system**

(27) ITA 2010[7] entered into force on 1 January 2011 and replaced the former Income Tax Act 1952 ('ITA 1952'). It introduced a general income tax rate of 10 % applying to companies across the whole Gibraltar economy, except for utility companies, telecommunication services and companies enjoying and abusing a dominant market position, which are subject to a rate of 20 %.

(a) *Corporate taxpayers*

(28) Both a company[8] ordinarily resident[9] in Gibraltar and a company not ordinarily resident in Gibraltar may be a Gibraltar taxpayer but, in the latter case, only if the company carries on a trade in Gibraltar through a branch or agency[10].

(b) *Tax basis*

The income which is chargeable to tax is specified exhaustively in Tables A, B and C of Schedule 1 to ITA 2010. This applies to both legal and natural persons. When ITA 2010 was enacted, Tables A, B and C specified the following categories of income:

— Table A: trade, business, profession, vocation and real property,

— Table B: employment and self-employment,

— Table C: other income (dividends[11], fund income, income from rights, pensions and a general 'Sweeping Up Class' in relation to items of income caught under the anti-avoidance provisions in section 40 of and Schedule 4 to ITA 2010).

(29) For the purposes of computing the basis of assessment for companies, section 16 of ITA 2010 provides that, subject to certain exceptions, the assessable profits or gains of a company for an accounting period are to be the full amount of the profits or gains of the company for that accounting period, applying the territorial basis of taxation outlined in recitals 30 to 32.

(c) *Territorial basis*

(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. According to section 74 of ITA 2010, 'accrued in and derived from' is to be defined by reference to the location of the activities[12] which give rise to the profits, normally determined on a case by case basis. That provision also deems activities requiring a licence and regulation under any law of Gibraltar to take place in Gibraltar.

(31) The application by the Gibraltar tax authorities of the concepts of accrual and derivation also finds its source in principles derived from the jurisprudence of the Judicial Committee of the Privy Council[13] in several landmark cases, such as

Hang Seng[14] and *HK-TVB*[15], which both relate to the application of the principle of territoriality in Hong Kong. While the judgments of the Judicial Committee of the Privy Council concerning jurisdictions other than Gibraltar are not binding on Gibraltar, they may be relied upon by the Gibraltar courts if they are considered relevant. In the view of the United Kingdom, that would clearly be the case for the judgments referred to in this recital because of the similarity of the legislation in the two jurisdictions[16].

(32) According to the case-law mentioned in recital 31, in deciding whether profits of any person accrue in and are derived from Gibraltar, the Gibraltar tax authorities should look at what the person has done, or proposes to do, to earn the profits in question, and where that person has done it, or intends to do it. The focus is therefore on establishing the geographical location of the activity that produced the profits for the relevant transactions. With regard to the provision of services by a company, the Gibraltar authorities have indicated that they would rely in particular on the geographical location where all the income-generating activities (and not simply the back-office or administrative support functions) take place in order to determine the place where the services giving rise to fees are performed.

2.2. **Tax exemption for passive interest and royalty income**

(33) Under ITA 2010, as originally enacted, passive interest and royalties were not chargeable to tax[17], irrespective of the source of the income or the application of the territoriality principle. The notion of passive interest refers mainly to inter-company loan interest. By contrast, interest was subject to tax if it was considered trading income, i.e. if it forms an integral part of a company's revenue stream[18].

(34) ITA 2010 was amended in June 2013, with effect from 1 July 2013, to make all inter-company loan interest (both domestic and foreign sourced) liable to tax at the general rate of 10 % insofar as the interest received or receivable per source company exceeded GBP 100 000 per annum[19]. With regard to royalty income, further legislation was enacted on 24 December 2013 subjecting royalties (received or receivable by a company registered in Gibraltar) to tax at the rate of 10 % as from 1 January 2014[20].

(35) Pursuant to Table C of Schedule 1 to ITA 2010, dividends paid or payable by a company to another company are not subject to tax. That is the general rule irrespective of the location of the company and regardless of the activity of the companies involved (holding companies or active trading companies). The same applies to dividends received by a permanent establishment (situated in Gibraltar) of a non-resident company.

2.3. **Tax ruling practice**

(36) The Gibraltar Commissioner of Income Tax is entitled to grant tax rulings under his general duty to ensure the due administration of the Income Tax Act and his responsibility for the assessment and collection of income tax in Gibraltar. Such general powers follow from section 2(1) and (2) of ITA 2010.

(37) With respect to the tax rulings listed in the Decision to Extend Proceedings, in most cases, requests for tax rulings seek confirmation of whether or not a resident