V

(Ogłoszenia)

POSTĘPOWANIA ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

KOMISJA EUROPEJSKA

POMOC PAŃSTWA – ZJEDNOCZONE KRÓLESTWO

Pomoc państwa SA.34914 (2013/C) – Zjednoczone Królestwo – System poboru podatku dochodowego od osób prawnych w Gibraltarze

Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej

(Tekst mający znaczenie dla EOG)

(2023/C 52/02)

Pismem z dnia 31 października 2022 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Zjednoczone Królestwo o swojej decyzji o rozszerzeniu formalnego postępowania wyjaśniającego wszczętego 16 października 2013 r., zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej, dotyczącego zwolnienia z podatku dochodowego od osób prawnych przyznanego spółce MJN Holdings (Gibraltar) Limited („MJN GibCo") w odniesieniu do dochodów z tytułu opłat licencyjnych uzyskanych przez niderlandzką spółkę komandytową, której głównym udziałowcem była spółka MJN GibCo. Zwolnienie to wynikało z dalszego stosowania interpretacji indywidualnej prawa podatkowego wydanej (w 2012 r.) dla spółki MJN GibCo po wejściu w życie w 2013 r. nowelizacji ustawy i pomimo tego, że nowelizacja wprowadziła opodatkowanie dochodów z tytułu opłat licencyjnych (od 1 stycznia 2014 r.).

Zainteresowane strony mogą zgłaszać uwagi na temat środka, w odniesieniu do którego Komisja wszczyna postępowanie, w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i towarzyszącego mu pisma na następujący adres lub numer faksu:

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Otrzymane uwagi zostaną przekazane władzom Zjednoczonego Królestwa. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie klauzulą poufności ich tożsamości lub fragmentów zgłaszanych uwag.

16 października 2013 r. Komisja wszczęła formalne postępowanie wyjaśniające w celu sprawdzenia, czy zwolnienie podatkowe dotyczące dochodów z tytułu odsetek biernych i opłat licencyjnych przewidziane w gibraltarskiej ustawie o podatku dochodowym od osób prawnych z 2010 r. („ITA 2010") stanowi selektywną korzyść dla niektórych przedsiębiorstw z naruszeniem unijnych zasad pomocy państwa. 1 października 2014 r. Komisja podjęła decyzję o rozszerzeniu formalnego postępowania wyjaśniającego na 165 interpretacji indywidualnych prawa podatkowego wydanych dla różnych przedsiębiorstw gibraltarskich w okresie od stycznia 2011 r. do sierpnia 2013 r. W ostatecznej decyzji z 19 grudnia 2018 r. (zamykającej formalne postępowanie wyjaśniające) Komisja stwierdziła istnienie pomocy niezgodnej z prawem i z rynkiem wewnętrznym w związku z 1) zwolnieniem podatkowym dotyczącym dochodów z tytułu odsetek biernych i opłat licencyjnych; oraz 2) traktowaniem podatkowym za zgodą rządu Gibraltaru na podstawie

interpretacji indywidualnych wydanych dla pięciu spółek z siedzibą w Gibraltarze (w tym MJN GibCo), posiadających udziały w niderlandzkich spółkach komandytowych uzyskujących dochody z tytułu odsetek biernych i opłat licencyjnych. Od tej decyzji odwołało się kilka spółek należących do grupy Mead Johnson Nutrition. Wyrokiem z dnia 6 kwietnia 2022 r. (T-508/19 – *Mead Johnson Nutrition (Asia Pacific) Pte Ltd i in. przeciwko Komisji Europejskiej*) Sąd Unii Europejskiej stwierdził częściową nieważność ostatecznej decyzji Komisji dotyczącej wydania interpretacji indywidualnych prawa podatkowego w zakresie, w jakim dotyczyła ona pomocy indywidualnej przyznanej spółce MJN GibCo na podstawie interpretacji indywidualnej prawa podatkowego wydanej w 2012 r.

W następstwie częściowego unieważnienia ostatecznej decyzji Sądu Komisja ponownie zbadała informacje przedłożone zarówno przez władze Zjednoczonego Królestwa, jak i władze Gibraltaru w odniesieniu do interpretacji indywidualnej prawa podatkowego wydanej dla spółki MJN GibCo w 2012 r. (i jej dalszego stosowania od 1 stycznia 2014 r.).

Do czasu jej likwidacji 16 października 2018 r. MJN GibCo była mającą siedzibę w Gibraltarze spółką należącą do wielonarodowej grupy Mead Johnson Nutrition. Działalność MJN GibCo sprowadzała się do posiadania, w charakterze komandytariusza, udziałów w kapitale niderlandzkiej spółki komandytowej *(commanditaire vennootschap,* „CV"), Mead Johnson Three CV („MJT CV"), która do czasu jej likwidacji 15 grudnia 2017 r. miała siedzibę w Niderlandach.

Przedmiotowa interpretacja indywidualna prawa podatkowego dotyczy traktowania pod względem podatkowym w Gibraltarze dochodów z tytułu opłat licencyjnych uzyskanych przez MJN GibCo za pośrednictwem MJT CV. Zgodnie z przepisami dotyczącymi podatku dochodowego w Gibraltarze niderlandzka CV jest uznawana za podmiot „transparentny podatkowo", tj. zyski osiągnięte przez CV w Niderlandach uznaje się za osiągnięte przez partnera lub partnerów gibraltarskich, tj. MJN GibCo w przedmiotowej sprawie. Zgodnie z odpowiednią interpretacją indywidualną gibraltarskie organy podatkowe potwierdziły, że spółka MJN GibCo była zwolniona z opodatkowania dochodów z opłat licencyjnych uzyskanych na poziomie CV. O ile interpretacja indywidualna prawa podatkowego była zgodna z prawodawstwem Gibraltaru w momencie jej wydania (2012 r.), ponieważ dochody z tytułu opłat licencyjnych w tym czasie nie podlegały opodatkowaniu w Gibraltarze, to nadal miała ona zastosowanie i zwalniała z opodatkowania opłaty licencyjne po przyjęciu w 2013 r. nowelizacji ustawy (i pomimo jej przyjęcia), która opodatkowaniem objęła tego rodzaju dochody uzyskane od 1 stycznia 2014 r.,

W związku z tym Komisja ma wątpliwości, czy spółka MJN GibCo zapłaciła kwotę podatku dochodowego od osób prawnych faktycznie należnego w Gibraltarze w związku z dochodami uzyskanymi od 1 stycznia 2014 r. do czasu likwidacji tej spółki.

Na obecnym etapie Komisja ma powody, aby uznać, że dalsze stosowanie przyznanej MJN GibCo interpretacji indywidualnej prawa podatkowego od 1 stycznia 2014 r. (dnia wejścia w życie nowelizacji ustawy) stanowi pomoc państwa w rozumieniu art. 107 ust. 1 Traktatu.

Komisja uważa, że powyższe nieprawidłowe zastosowanie przepisów dotyczących podatku dochodowego od osób prawnych można przypisać Gibraltarowi i że oznaczałoby to zaangażowanie zasobów państwowych odpowiadających utraconym dochodom podatkowym. Ponadto traktowanie podatkowe spółki MJN GibCo (od 1 stycznia 2014 r.) wiąże się z istnieniem selektywnej korzyści. Ponadto Komisja stwierdza, że występuje zakłócenie konkurencji i wpływ na wymianę handlową między państwami członkowskimi, ponieważ spółka MJN GibCo jest częścią wielonarodowej grupy działającej w kilku państwach członkowskich i na kilku rynkach, na których istnieją intensywne stosunki handlowe na rynku wewnętrznym.

Biorąc pod uwagę, że pomoc taka stanowiłaby nową pomoc oraz że zdaniem Komisji na tym etapie żadne z odstępstw przewidzianych w art. 107 ust. 2 i 3 nie ma zastosowania, Komisja podjęła decyzję o rozszerzeniu zakresu formalnego postępowania wyjaśniającego.

Zgodnie z art. 16 rozporządzenia Rady (UE) 2015/1589 [1] wszelka niezgodna z prawem pomoc może podlegać odzyskaniu od przedsiębiorstwa będącego beneficjentem.

Zgodnie z art. 92 umowy o wystąpieniu Zjednoczonego Królestwa z Unii Europejskiej („umowa o wystąpieniu") Komisja jest właściwa w odniesieniu do postępowań administracyjnych wszczętych przed zakończeniem okresu przejściowego 31 grudnia 2020 r. Ponadto zgodnie z tym samym postanowieniem umowy o wystąpieniu przepisami proceduralnymi mającymi zastosowanie do niniejszej sprawy są przepisy prawa Unii regulujące postępowania administracyjne w dziedzinie pomocy państwa.

[1] Rozporządzenie Rady (UE) 2015/1589 z dnia 13 lipca 2015 r. ustanawiające szczegółowe zasady stosowania art. 108 Traktatu o funkcjonowaniu Unii Europejskiej (Dz.U. L 248 z 24.9.2015, s. 9).

PISMO

The Commission wishes to inform the United Kingdom that, following the judgment of the General Court of the European Union of 6 April 2022 in case T-508/19 — *Mead Johnson Nutrition (Asia Pacific) and Others v Commission* ('the GC judgment'), it has re-examined the information supplied by your authorities on the measure referred to above.

After re-examination of that information, the Commission has decided to extend the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU). In particular, this extension will cover the income tax treatment (income tax exemption) of MJN Holdings (Gibraltar) Limited ('MJN GibCo') from 1 January 2014. Such tax treatment relates to the exemption granted to royalty income received by a Dutch limited partnership, of which MJN GibCo was the main shareholder. That exemption resulted from the continued application of a tax ruling granted (in 2012) to MJN GibCo, after, and in spite of, a legislative amendment enacted in 2013 that brought royalty income within the charge of taxation (as from 1 January 2014).

The Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community entered into force on 1 February 2020 (the 'Withdrawal Agreement'). In accordance with Article 92 of the Withdrawal Agreement, the Commission is competent for administrative procedures that were initiated before the end of the transition period on 31 December 2020. According to Article 92 (3) a), a state aid administrative procedure governed by Regulation (EU) 2015/1589 ([1]) shall be considered as having been initiated at the moment at which the procedure has been allocated a case number. In the present case, this was done before the end of the transition period and in consequence this procedure shall be considered as an ongoing administrative procedure under the Withdrawal Agreement. As such, the Commission remains competent to investigate these measures. Furthermore in line with Article 92 of the Withdrawal Agreement, the procedural rules applicable to the present case shall be the provisions of Union law governing the state aid administrative procedures.

1. **PROCEDURE**

(1) On 16 October 2013, the Commission initiated a formal investigation procedure to verify whether the passive interest and royalty income tax exemption ([2]) in Gibraltar's Income Tax Act 2010 ('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) In parallel with the preliminary investigation preceding the formal investigation procedure, following requests made by the Commission, the Gibraltar tax authorities had provided information about Gibraltar's tax rulings procedure, by letters dated 3 December 2012, 13 September 2013, 14 November 2013, 31 January 2014 and 20 June 2014. Such information included general information regarding the tax ruling procedure and a list of advanced tax rulings ('ATR') granted in 2011, 2012 and 2013 (up to 31 August 2013) as well as explanations in relation to a selection of 165 rulings.

(3) On 1 October 2014, the Commission informed the United Kingdom of its decision to extend the procedure laid down in Article 108(2) of the Treaty to include the tax ruling practice in Gibraltar, in particular 165 ATR granted to different companies between January 2011 and August 2013 ('the First Decision to Extend Proceedings').

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

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

(6) On 7 October 2016, the First Decision to Extend Proceedings was published in the Official Journal.

(7) In October and November 2016, six interested third parties, including Gibraltar and Spain, submitted their observations on the First Decision to Extend Proceedings. The United Kingdom submitted its comments on the interested third parties' observations on 31 January 2017.

([1]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

([2]) The aid scheme did not result from a formal exemption from taxation but from an implicit exemption (as passive interest and royalty income was not part of the positively defined list of chargeable income). However, for the sake of simplification and consistency with the terms used by the Commission in both the First Opening Decision and the final decision, the present decision refers to an 'exemption' when reference is made to the aid scheme.

(8) In the course of the extended proceedings, the United Kingdom submitted further information in relation to the tax ruling practice in Gibraltar as well as specific explanations regarding some of the 165 ATR referred to above. Such information was provided on 8 December 2014, 9 March 2015, 23 April 2015, 24 November 2015, 3 December 2015, 19 February 2016, 31 August 2016, 31 March 2017 and 3 May 2017.

(9) 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 tax audits performed in relation to the 165 ATR listed in the First Decision to Extend Proceedings.

(10) Following requests from the Commission, the United Kingdom provided supplementary explanations on factual or legal aspects of some of the tax ruling reviews, including the ATR granted to MJN Holdings (Gibraltar) Limited ('MJN GibCo'), by letters dated 21 February 2018, 15 March 2018 and 24 May 2018.

(11) 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.

(12) On 19 December 2018, the Commission adopted Decision (EU) 2018/7848 final of 19 December 2018 on State aid SA.34914 (2013/C) implemented by the United Kingdom in respect of the Gibraltar corporate tax regime (OJ 2019 L 119, p. 151) ('the final decision'). In essence, the Commission found, first, that the 'exemption' for passive interest and royalty income applicable to Gibraltar between 2011 and 2013 under the ITA 2010 constituted an unlawfully implemented State aid scheme which was incompatible with the internal market and, secondly, that the tax treatment authorised by the Government of Gibraltar on the basis of advance tax rulings granted to five Gibraltar-based companies holding shares in Dutch limited partnerships and receiving passive interest and royalty income ('the five advance tax rulings') constituted unlawful and incompatible individual State aid.

(13) The final decision was appealed by Mead Johnson Nutrition (Asia Pacific) Pte Ltd, established in Singapore (Singapore), MJN Global Holdings BV, established in Amsterdam (Netherlands), Mead Johnson BV, established at Nijmegen (Netherlands), and Mead Johnson Nutrition Co., established in Chicago, Illinois (United States). With its judgment of 6 April 2022, the General Court annulled Article 2 as well as Article 5(1) and (2) of the final decision, to the extent those articles relate to the individual aid granted to MJN GibCo and to the Applicants on the basis of an ATR granted to MJN GibCo in 2012.

(14) In summary, the General Court considered that the assessments, factual or legal, contained in the First Decision to Extend Proceedings ([3]) were not sufficient to make it clear that the formal review procedure concerned not only the grant of ATR, but also the continued effect of some of those rulings, including the 2012 MJN GibCo ATR, after the 2013 amendment to the ITA 2010 (which brought royalty income within the charge of taxation), despite the inclusion of royalties in the categories of taxable income in Gibraltar (listed in Schedule 1 of the ITA 2010). In the General Court's view, those latter elements were decisive in identifying the measure under examination by the Commission and in finding, in Article 2 of the final decision, that individual State aid had been granted to MJN GibCo, on the basis of the 2012 MJN GibCo ATR, after 31 December 2013. In that context, the General Court found that the identified discrepancies between the First Decision to Extend Proceedings and the contested final decision in relation to those decisive elements of assessment justify the annulment of Article 2 of the final decision (breach of the procedural rights of interested parties under Article 108(2) TFEU and Article 6 of of Council Regulation (EU) 2015/1589).

(15) Following the partial annulment of the final decision by the General Court, the Commission re-examined the information submitted by both the United Kingdom and the Gibraltar authorities in relation to the 2012 MJN GibCo ATR (and its continued application as of 1 January 2014) and has decided to extend the formal investigation proceedings under Article 108(2) TFEU.

2. **DESCRIPTION OF THE MEASURE**

(16) 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.

([3]) In the First Decision to Extend Proceedings, with respect to 165 tax rulings granted by the Gibraltar tax authorities between January 2011 and August 2013, the Commission concluded on a preliminary basis that the tax rulings were materially selective as the Gibraltar tax authorities generally refrained from a proper assessment of the companies' tax obligations, exercising their discretionary powers. The Commission also took the preliminary view that, in some cases, the Gibraltar tax authorities would issue tax rulings that were inconsistent with the applicable tax provisions. Those doubts are set out in detail in Recital 32 of that decision.

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

(17) ITA 2010 ([4]) 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*

(18) Both a company ([5]) ordinarily resident ([6]) 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 ([7]).

(b) *Tax base*

(19) For the purposes of computing the tax base (or '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 (21) to (23).

(20) However, only the income, which is specified exhaustively in Tables A, B and C of Schedule 1 to ITA 2010, is chargeable to tax. 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 ([8]), 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).

(c) *Territorial basis*

(21) 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 ([9]) 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.

(22) The application by the Gibraltar tax authorities of the concepts of accrual and derivation also finds its source in principles established by the jurisprudence of the Judicial Committee of the Privy Council ([10]) in several landmark cases, such as *Hang Seng* ([11]) and *HK-TVB* ([12]), 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 ([13]).

([4]) ITA 2010 charges to tax the income (accruing in or derived from Gibraltar) of a 'person'. The definition of the term 'person' is set out in section 74 of ITA 2010 as follows: '*"person" includes any corporation either aggregate or sole and any club, society or other body, or any one or more persons of any age, and either of the male or female sex and includes any company and a body of persons*'.

([5]) 'Company' is defined in section 74 of ITA 2010 to mean any company which is a company incorporated or registered under any law in force in Gibraltar or elsewhere.

([6]) 'Ordinarily resident', in relation to a company, is defined in section 74 of ITA 2010 to mean either a company whose management and control is in Gibraltar or a company the management and control of which is exercised outside Gibraltar by persons who are ordinarily resident in Gibraltar for the purpose of ITA 2010.

([7]) In accordance with section 11(4) of ITA 2010, if a company not ordinarily resident in Gibraltar carries on a trade in Gibraltar through a branch or agency, the chargeable profits are calculated by reference to any trading income arising through or from the branch or agency, and, in so far is chargeable to tax, any income from property or rights used by, or held by or for, the branch or agency.

([8]) However, dividends paid or payable by a company to another company are not subject to tax.

([9]) Section 74, as originally enacted, referred to the location of the activities or the preponderance of the activities. The reference to the preponderance of activities was deleted by the Income Tax (Amendment) Act 2013.

([10]) The Judicial Committee of the Privy Council sits in London and is the final court of appeal in Gibraltar. Its judgments on Gibraltar legislation bind the Gibraltar Income Tax Office and the other Gibraltar courts.

([11]) Commissioner of Inland Revenue v Hang Seng Bank Ltd [1991] 1 AC 306.

([12]) Commissioner of Inland Revenue v HK-TVB International Ltd [1992] 2 AC 397.

([13]) United Kingdom submission, 14/11/2013, p. 2.

(23) According to the case law mentioned in Recital (22), in deciding whether the profits of any person accrue in and are derived from Gibraltar, the Gibraltar tax authorities should review 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 where the activity and the relevant transactions that produced the profits took place. 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.

(d) *Tax exemption for passive interest and royalty income*

(24) Under ITA 2010, as originally enacted, passive interest and royalties were not chargeable to tax ([14]), irrespective of the source of the income or the application of the territoriality principle. The notion of passive interest refers mainly to interest charged for inter-company loans. By contrast, interest was subject to tax if considered trading income, i.e. if it formed an integral part of a company's revenue stream ([15]).

(25) 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 ([16]). 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 general rate of 10 % as from 1 January 2014 ([17]).

(26) Following the latter amendment, Schedule 1 ([18]) of the ITA 2010 includes the following income within the heads of charge subject to income tax in Gibraltar:

(a) Subject to (b) below, royalties received or receivable by a company.

(b) For the purposes of (a) royalties will be deemed to accrue and derive in Gibraltar where the company in receipt of the royalty is a company registered in Gibraltar.

(27) 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.

(e) *Tax ruling practice*

(28) The Gibraltar Commissioner of Income Tax is entitled to grant advance tax rulings (rulings or ATRs) 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(2) of ITA 2010.

(29) Between 1 January 2011 and 31 August 2013, the Gibraltar tax authorities issued 335 ATRs. With respect to the 165 rulings listed in the First Decision to Extend Proceedings, in most cases, requests for rulings sought confirmation of whether or not a resident company is liable to tax in Gibraltar as a result of the basic legal taxation principles, i.e. accrual and derivation of income in accordance with the territorial system.

(30) In the course of its formal investigation as extended by the First Decision to Extend Proceedings, the Commission had analysed the relevant documentation provided by the UK authorities in relation to the 165 ATRs falling within the scope of the investigation, in order to identify any possible discretionary practices, misapplication of the rules or absence of proper checks as to where the activities were effectively performed. The documentation assessed by the

([14]) Table C of Schedule 1 to ITA 2010, as originally enacted, did not include this category of income. Therefore, the non-taxation of passive income and royalties did not formally result from an express exemption from taxation but rather from an implicit one. In the above-referred judgment of 6 April 2022 (T-508/09), the General Court found that 'non-taxability' and 'exemption' produce the same effects, namely non-taxation (see par. 135). On that basis, the General Court concluded that the existence of a 'schedular' tax system (defining positively the tax liability) is only the choice of a legislative technique and not a decisive tax rule for the purpose of analysing the Gibraltar tax regime.

([15]) This applies to companies engaged in money lending activities to the general public or to companies that are in receipt of interest on funds derived from deposit taking activities.

([16]) Income Tax (Amendment) Regulations 2013, published in the Second Supplement to the Gibraltar Gazette No 4006 of 6 June 2013.

([17]) Income Tax (Amendment) Act 2013, published in the First Supplement to the Gibraltar Gazette No 4049 of 24 December 2013.

([18]) See Schedule 1, Table C, Class 3A ('Royalties')

Commission included the 165 rulings themselves and the applications for those rulings as well as ex post reviews performed by the Gibraltar tax authorities and additional factual information in relation to all of the 165 companies concerned.

2.2. **The ATR granted to MJN GibCo**

(31) In the final decision, the Commission had identified five problematic ATRs in favour of five Gibraltar companies with interests in Dutch *Commanditaire vennootschaps* (CV) in receipt of royalty income. One of those five ATRs had been granted to MJN GibCo in 2012 ([19]). Following the annulment by the General Court of Article 2 of the final decision (to the extent that Article 2 refers to the 2012 MJN GibCo ATR), it must be considered that the particular State aid issue identified by the Commission in relation to the ATR granted to MJN GibCo, i.e. the continued application of the ATR after the 2013 amendment that brought royalty income within the charge of taxation, was not sufficiently explained by the First Decision to Extend Proceedings.

(32) In its ATR application of 11 September 2012, MJN GibCo's counsel referred to the recent incorporation of MJN GibCo as well as the corporate shareholding of that company. The application also provided that board meetings would take place in Gibraltar and that the management and control of the company would be exercised from Gibraltar. It further explained that MJN GibCo, together with MJN Asia Pacific Holding LLC (a group company registered in the US), had formed a Dutch *commanditaire vennootschap* (CV), Mead Johnson Three C.V. ('MJT CV'), of which MJN GibCo is the limited partner and holds an interest of 99,99 % ([20]). The US LLC is the general partner and holds the remaining interest (0,01 %). The CV in turn has a wholly owned investment in an underlying registered company, Mead Johnson B.V. ('MJ BV'). Finally, it was explained that under the terms of a royalty agreement, MJT CV received royalty income from MJ BV in return for the use of the intellectual property ('the IP'), which includes patent rights, trademarks and technical information necessary for the manufacturing, sales and distribution activities undertaken by MJ BV in the Asian and European markets ([21]).

(33) Until its dissolution on 16 October 2018, MJN GibCo was a Gibraltar-based company belonging to the international Mead Johnson Nutrition group ('the MJN group') ([22]), which was active in the manufacture of infant and child nutrition products. MJN GibCo's business was to hold, as the limited partner, an interest in the capital of MJT CV, established in the Netherlands until its dissolution on 15 December 2017.

(34) The ATR application further explained that a Dutch CV is regarded as a limited partnership from a Gibraltar legal and tax perspective and therefore that MJT CV must be regarded as being fiscally transparent for the purposes of Gibraltar tax law. On that basis, it formed the view that any royalty income received by MJT CV should be treated as being received directly by MJN GibCo (the limited partner). However, the application concluded that any such royalty income would not be taxable as it did not fall within the heads of charge taxable under the ITA 2010. Accordingly, the Gibraltar authorities were asked to confirm that interpretation of the ITA 2010 and that any royalty income received by MJN GibCo as a result of its shareholding in MJT CV would not give rise to any tax liability under the ITA 2010.

(35) In its ATR dated 11 September 2012 (same day as the application), the Gibraltar Income Tax Office confirmed that 'the described future royalty income received by the Company [MJN GibCo] through its interest in the CV would not be taxable under the provisions of the Act'. In that same ATR, the Income Tax Office further explained that 'the Commissioner reserves the right to revoke this letter and to invoke the provisions of section 40 of the Act if any fact or circumstance upon which decisions have been based should change or not materialise or if found to be inaccurate' ([23]).

(36) In other words, the 2012 MJN GibCo ATR confirmed that royalties generated at the level of MJT CV was not taxable under the ITA 2010. This ATR remained in effect as it was not revoked by the tax authorities after the 2013 amendment to ITA 2010 that brought royalties into the scope of taxation. Nor was the application of the ATR denied or questioned by the tax authorities in the context of the tax audit performed in 2015.

([19]) The ATR granted to MJN GibCo was listed in the Annex of the First Decision to Extend Proceedings (No 144).

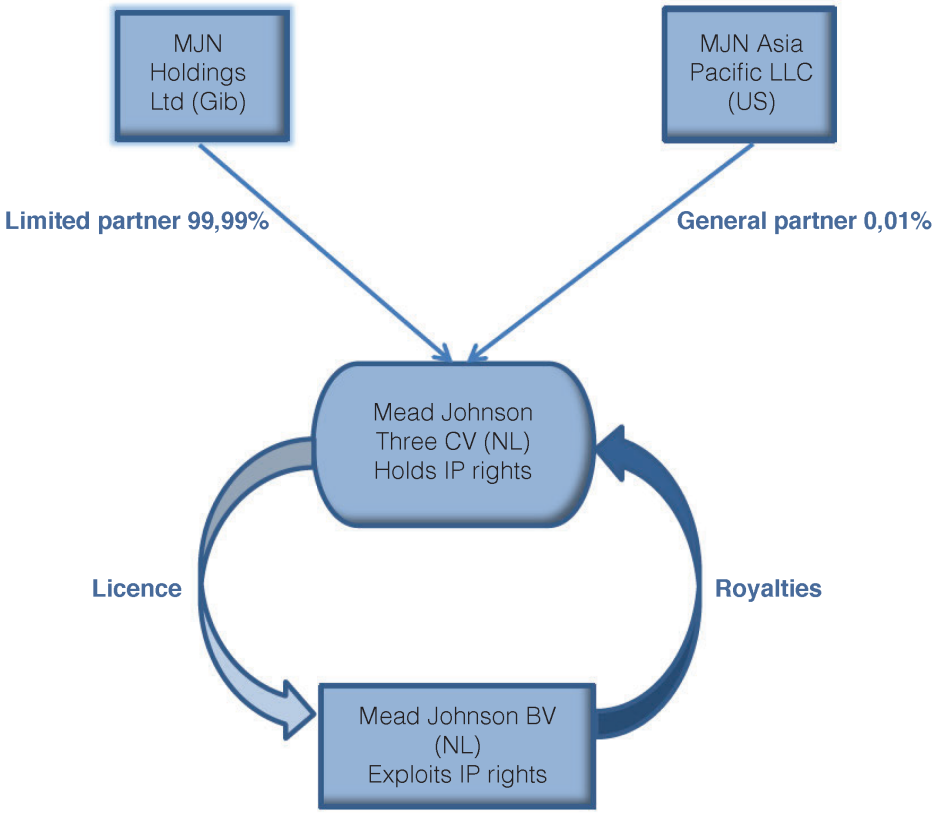
([20]) MJN GibCo's shareholding in MJT CV entitled it to 99,99 % of MJT CV's profits.

([21]) MJT CV held licences for such intellectual property rights, which it sub-licensed to MJ BV, in consideration of royalty fees.

([22]) Until June 2017, the parent company of the MJN group was Mead Johnson Nutrition Co. ('MJN US'), a company established in Delaware (USA). Mead Johnson Nutrition (Asia Pacific) Pte Ltd, based in Singapore (Singapore) and engaged in the manufacture and sale of infant nutrition products, was, in turn, the wholly owned parent company of MJN GibCo, until the latter's dissolution.

([23]) Section 40 ITA 2010 is an anti-abuse rule that allows the Commissioner of Income Tax to disregard artificial or fictitious arrangements.

(37) The situation referred to in MJN GibCo's application for an ATR involved the following structure:



(38) Under Dutch law, a CV is a limited partnership, which is generally considered a transparent entity for tax purposes and therefore not liable to corporate income tax in the Netherlands ([24]). Accordingly, the income of the CV is not taxed in the Netherlands at the level of the CV but at the level of the participants in the CV, according to their share in the CV. In other words, a tax liability in relation to the income of such CVs arises in the Netherlands only if one or more participants in the CV is/are Dutch resident(s).

(39) As to the tax treatment (of the CV's partners) in Gibraltar, it appears from the UK submissions that, in the absence of specific rules in the ITA 2010, Gibraltar applies common law principles and therefore considers a Dutch CV as a transparent entity in accordance with the rules and case-law applicable in the UK ([25]). The relevant share of any income received by the CV will therefore be deemed to be received directly by the Gibraltar partner with interests in the relevant Dutch CV.

(40) In the absence of any bilateral tax convention between Gibraltar and the Netherlands, chargeability to tax in Gibraltar would in principle depend on whether MJN GibCo's share in the relevant income generated by the Dutch CV fell within the scope of taxation under ITA 2010. As royalty income was not subject to tax until December 2013, any such income received by the Dutch CV before 31 December 2013 was not taxable at the level of the Gibraltar partner ([26]). By contrast, following the 2013 amendment to ITA 2010 which subjected royalty income to tax irrespective of its source (Class 3A, Table C of Schedule 1 to ITA 2010), a correct application of the Gibraltar tax rules should have led the Gibraltar tax authorities to consider the relevant royalties (received as from 1 January 2014) as taxable income at the level of the Gibraltar partner (MJN GibCo) ([27]).

([24]) In reality, under Dutch law, a distinction must be made between open CVs and closed CVs. Such a distinction depends on whether or not the access of new partners and the transfer of the partnership shares is subject to the permission of all the other partners. While an open CV is considered to be a taxable entity (opaque) in itself, a closed CV is considered to be a transparent entity and therefore not liable to corporate income tax. In the case in hand, the relevant CVs are closed CVs. This classification however is irrelevant for the Gibraltar tax treatment of the CV (in accordance with common law principles).

([25]) See in particular the internal manual published by HM Revenues & Customs on Foreign Entity Classification for UK Tax Purposes, as lastly updated on 9 January 2018, https://www.gov.uk/hmrc-internal-manuals/international-manual/intm180010

([26]) However, such income benefitted from the interest and royalty exemption scheme, which was found to constitute unlawful and incompatible aid under the final decision.

([27]) The conditions of Class 3A of Table C under Schedule 1 seem to be met as (1) the Gibraltar partner is a resident company registered in Gibraltar; (2) the relevant royalty income is deemed to be received by the Gibraltar company in accordance with the tax transparency rules applicable in Gibraltar; and (3) the royalties at issue are those that were received by MJT CV as from 1 January 2014.

(41) Accordingly, the continued application of the 2012 MJN GibCo ATR after — and in spite of — the 2013 legislative amendment of the ITA 2010 (that brought royalty income within the charge of taxation) must be seen as the relevant measure ('the contested measure') whereby the Gibraltar authorities could be liable to have granted individual aid to MJN GibCo. Accordingly, any such aid would have been granted to MJN GibCo in relation to the royalty income received by MJT CV (as from 1 January 2014), which was not incorporated in the assessable basis of MJN GibCo and was therefore not subject to income tax in Gibraltar, in contradiction with the normal Gibraltar tax rules. As from that date, the 99,99 % share of the net profits resulting from the royalty income received by MJT CV (after deduction of the related costs) should have been incorporated in the assessable basis of MJN GibCo and taxed in accordance with the normal Gibraltar tax rules. As it was not incorporated in MJN GibCo's assessable basis, neither as a result of the entry into force of the legislative amendment subjecting royalties to income tax nor as a result of the tax audit performed in 2015, such continued application of the tax ruling resulted in reducing MJN GibCo's tax base and liability.

(42) The financial accounts of MJT C.V. show that the CV generated the following amounts of royalty income between 2014 and 2016:

— USD 397,692,000 for 2014,

— USD 323,286,000 for 2015 and

— USD 325,905,955 for 2016 ([28]).

It is unknown whether any further royalty income was generated at the level of MJT CV for the following accounting periods (or at the level of any other CV held or partially held by MJN GibCo). A consultation of public databases suggests that MJT CV was dissolved on 15 December 2017.

3. POSITION OF THE UNITED KINGDOM

(43) The UK authorities confirmed that the Gibraltar Income Tax Office views Dutch CVs as tax transparent entities ([29]). However, they consider that no taxation arises in Gibraltar (as from 1 January 2014) in relation to the royalty income generated at the level of the Dutch CV since there is no specific provision in ITA 2010 that defines and prescribes how the Gibraltar partner should be taxed. The reason for this would be that the definition of a 'person' in section 74 of ITA 2010 does not explicitly refer to Dutch limited partnerships and therefore no specific mechanism on how to tax income from participations held in a CV exists. Accordingly, neither the ATR nor its continued application after the entry into force of the 2013 amendment would involve State aid.

4. ASSESSMENT OF THE MEASURE

4.1. Existence of aid

(44) Article 107(1) TFEU states that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market'.

(45) Accordingly, for a measure to be categorised as aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. First, the measure must be the result of an intervention by the State which is financed through State resources. Second, the measure must be liable to affect trade between Member States. Third, it must confer a selective advantage on its recipient. Fourth, it must distort or threaten to distort competition ([30]).

4.1.1. *Imputability and State resources*

(46) As regards the first condition, the contested measure was granted by the Gibraltar tax authorities, which are part of the Government of Gibraltar. The (continued application of the) 2012 MJN GibCo ATR — or the absence of a repeal of the ATR — after 1 January 2014 amounted to an acceptance by those authorities of a particular tax treatment. Based on that ATR, the recipient of the ATR has determined its corporate income tax liability in Gibraltar (for each tax year). Where the beneficiary was required to submit a tax return ([31]), the ATR has subsequently been used by the beneficiary to fill in its income tax return(s) and to exclude the relevant royalty income from any assessable basis. These tax returns have been accepted by the Gibraltar tax authorities as corresponding to the beneficiary's corporate income tax liability in Gibraltar. According to the information available to the Commission, those authorities failed to question the continued application of the 2012 MJN GibCo ATR and the resulting exclusion of the relevant

([28]) See annexes 5, 6 and 7 of Gibraltar's submission dated 15 March 2018.
([29]) See United Kingdom's submission of 21 February 2018.
([30]) Joined Cases C-20/15 P *Commission* v *World Duty Free* ECLI:EU:C:2016:981, paragraph 53 and the case law cited.
([31]) Until 31 December 2015, a Gibraltar company that did not have any assessable income, e.g. because it only receives dividends from another company, was not required to file a tax return.

royalty income from MJN GibCo's assessable basis. Where no requirement to file a tax return was imposed by law because of the absence of assessable income as a result of the continued acceptance by the authorities of the validity of the ruling, no tax liability arose either. In any case, the Gibraltar tax authorities failed to revoke the ATR despite the legislative change that entered into force on 1 January 2014. The Commission therefore provisionally concludes that the measure identified in Recital (41) is imputable to Gibraltar.

(47) As regards the financing of the measure through State resources, the Court of Justice has consistently held that a measure by which public authorities grant certain undertakings a tax exemption which, although not involving a positive transfer of State resources, places the said undertakings in a more favourable financial situation than other taxpayers constitutes State aid ([32]). In this case, the contested ATR confirms that the relevant share of the royalty income generated by the Dutch CV is not taxable at the level of the Gibraltar resident company with interests in that CV (MJN GibCo). Therefore, the continued application of the 2012 MJN GibCo ATR can be said to reduce the corporate income tax liability in Gibraltar of the recipient of that ATR and hence to give rise to a loss of State resources. That is because any exemption granted as a result of the contested measure results in a loss of tax revenue that would otherwise have been available to Gibraltar in the absence of the exemption ([33]). The Commission therefore provisionally concludes that the contested measure gives rise to a loss of State resources.

4.1.2. *Effect on trade between Member States*

(48) As regards the need for an effect on trade, the Gibraltar company that was the recipient of the contested measure (MJN GibCo) is part of a multinational group operating on various markets in several Member States, so any aid in its favour is liable to affect trade between Member States. In the same vein, by providing favourable tax treatment to the relevant multinational group company, Gibraltar has potentially drawn investment away from Member States that cannot or will not offer a similarly favourable tax treatment. Since the (continued application of the) contested ATR strengthens the competitive position of the beneficiary(ies) as compared with other undertakings competing in trade in the internal market, the Commission provisionally concludes that the second condition for a finding of State aid is met.

4.1.3. *Distortion of competition*

(49) Similarly, a measure granted by a State is considered to distort or threaten to distort competition where it is liable to improve the competitive position of the beneficiary of that measure as compared with that of other undertakings with which it competes ([34]). To the extent the contested measure relieved MJN GibCo of corporate income taxes it would normally have been obliged to pay in its absence, the potential aid granted as a result of that measure constitutes operating aid ([35]), in that it relieved MJN GibCo from a charge that it would normally have to bear. The Court of Justice has consistently held that operating aid distorts or threatens to distort competition by strengthening the financial position of its recipient on the markets on which it operates. The Commission therefore provisionally concludes that the fourth condition for a finding of aid is present as regards the contested measure.

4.1.4. *Selective advantage*

(50) Only those measures that grant an advantage in a selective manner to certain undertakings, certain categories of undertakings, or certain economic sectors constitute State aid ([36]).

4.1.4.1. Advantage

(51) An advantage is present for the purposes of Article 107(1) TFEU whenever a measure adopted by the State improves the net financial position of an undertaking ([37]). In establishing the existence of an advantage, reference is to be made to the effect of the measure itself ([38]). As regards fiscal measures, an advantage may be granted through different types of reduction in a company's tax burden and, in particular, through an exemption or reduction in the applicable tax rate, taxable base or in the amount of tax due ([39]).

([32]) See Joined Cases C-106/09 P and C-107/09 P *Commission v. Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, paragraph 72 and the case-law cited therein.

([33]) See Joined Cases C-106/09 P and C-107/09 P *Commission v. Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, paragraph 72 and the case-law cited.

([34]) See Case 730/79 *Phillip Morris* ECLI:EU:C:1980:209, paragraph 11 and Joined Cases T-298/97, T-312/97 etc. *Alzetta* EU:T:2000:151, paragraph 80.

([35]) Case C-128/16 P *Commission* v. *Spain* ECLI:EU:C:2018:591 paragraph 84. See also C-271/13 P *Rousse Industry v Commission* ECLI:EU:C:2014:175, paragraph 44; Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others v Commission* ECLI:EU:C:2011:368, paragraph 136; Case C-172/03 *Heiser* ECLI:EU:C:2005:130, paragraph 55; and Case C-156/98 *Germany* v *Commission* ECLI:EU:C:2000:467, paragraph 30, and the case-law cited.

([36]) See Case C-20/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981, paragraph 56 and Case C-6/12 *P Oy* ECLI:EU:C:2013:525, paragraph 18.

([37]) Case C-417/10 *3M Italia* EU:C:2012:184, paragraph 38.

([38]) Case 173/73 *Italy v. Commission* ECLI:EU:C:1974:71, paragraph 13.

([39]) Case C-66/02 *Italy v Commission* ECLI:EU:C:2005:768, paragraph 78; Case C-222/04 *Cassa di Risparmio di Firenze and Others* ECLI:EU:C:2006:8, paragraph 132; and Case C-522/13 *Ministerio de Defensa and Navantia* ECLI:EU:C:2014:2262, paragraphs 21 to 31.

(52) The Commission takes the provisional view that the contested measure conferred an advantage on MJN GibCo in that it allowed that undertaking to exempt from corporate income taxation in Gibraltar the royalty income recorded in the financial accounts of the relevant Dutch CV (in which MJN GibCo holds a 99,99 % interest).

(53) The application of the corporate income tax rules should have led the Gibraltar tax authorities to consider that MJN GibCo was taxable in Gibraltar on the royalty income generated at the level of MJT CV as from 1 January 2014 (until MJN GibCo's dissolution on 6 October 2018). Such provisional assessment should have been based on the following preliminary reasoning:

— MJN GibCo is a resident company registered in Gibraltar;

— In accordance with the common law provisions, a Dutch CV is regarded as a transparent entity for tax purposes and therefore income generated at the level of a Dutch CV is deemed to be received by its Gibraltar partner. In this regard, it must be noted that section 18 ITA 2010 ([40]), which relates to a trade, business or profession carried out by two or more persons jointly, only applies to income derived from a trade, business or profession and not to passive income such as passive interest and royalties, which cannot be seen as resulting from a business. Accordingly, in the absence of specific rules in the ITA 2010 regarding the tax treatment of limited partnerships (and their partners) in receipt of passive income, royalty income generated by a partnership follows the common law principles, and not any other provisions of the ITA 2010, as confirmed by the Gibraltar authorities. It follows that MJN GibCo was deemed to receive the income generated at the level of the Dutch CV as if such income had been received by MJN GibCo itself.

— In accordance with section 11 ITA 2010, income specified in tables A to C of Schedule 1 accruing in or derived from Gibraltar (of any person) is chargeable to tax. As from 1 January 2014, Class 3A of Table C under Schedule 1 includes royalties received by a company within the categories of taxable income. The rule provides that royalties are deemed to accrue and derive in Gibraltar where the company in receipt of the royalty is a company registered in Gibraltar. That condition must be considered to be met in the case at issue as the royalty income received by MJT CV is deemed to be received by MJN GibCo.

— In accordance with the above preliminary findings, it can be provisionally concluded that the relevant share (99,99 % as the share of MJN GibCo's interest in MJT CV) of the royalty income received by MJT CV as from 2014 is chargeable to tax in Gibraltar (tax liability at the level of MJN GibCo).

(54) As explained in Recitals (40) and (41), the continued application of the 2012 MJN GibCo ATR after the 2013 amendment resulted in the non-taxation of royalty income (misapplication of the corporate income tax rules in Gibraltar under the ITA 2010 following the entry into force of the 2013 amendment) and therefore in the reduction of the company's tax liability, in contradiction with the Gibraltar tax rules. The Commission's provisional conclusion is therefore that the contested measure confers an advantage upon MJN GibCo, since that undertaking's net financial position was improved as a result of it, in the form of a tax base reduction.

4.1.4.2. Selectivity

(55) As regards the selectivity of the contested measure, the Commission provisionally considers the aforementioned advantage to be selective because it is granted to MJN GibCo by means of an individual measure. The Court of Justice has made a distinction between general schemes and individual measures for establishing whether a particular measure discriminates in favour of its beneficiary/-ies. According to the Court, when examining a general scheme, '*it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity*' ([41]). In contrast, when assessing an individual measure, '*the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective*' ([42]).

(56) Given that the Commission has provisionally concluded that the contested measure grants an advantage to MJN GibCo in the form of a reduction of its corporate income tax base and given that this measure should be considered individual in nature, the Commission may provisionally presume that it is also *prima facie* selective.

([40]) Where a trade, business or profession is carried on by two or more persons jointly, section 18 ITA 2010 provides that 'the profits or gains of any person from the partnership for any period shall be deemed to be the share to which the person was entitled during that period in the profits or gains of the partnership, such profits or gains being ascertained in accordance with the provisions of this Act (…)'.

([41]) Case C-15/14 P *Commission v. MOL* ECLI:EU:C:2015:362, paragraph 60. See also Joined C-20/15 P and C21/15 P *Commission v. World Duty Free Group* ECLI: EU:C:2016:981, paragraph 55; Case C-211/15 P *Orange v. Commission* ECLI:EU:C:2016:798, paragraph 53 and 54; and Case C-270/15 P *Belgium v. Commission* ECLI:EU:C:2016:489, paragraph 49.

([42]) *Ibid.*

(57) Where the presumption of selectivity is relied upon, it is not necessary for the Commission to effectively demonstrate that the measure places its beneficiary in a more favourable position compared to other economic operators which are in a comparable factual and legal situation ([43]). Rather, it is for the Member State to demonstrate that all companies in a comparable legal and factual situation can benefit from a similar advantage ([44]). Nevertheless, for the sake of completeness, the Commission will also demonstrate why it provisionally considers the contested measure to discriminate in favour of MJN GibCo as compared to undertakings in a comparable factual and legal situation in the light of the objective of the Gibraltar corporate income tax system.

(58) Accordingly, the Commission will explain hereinafter why it considers, at this stage, that the measure discriminates in favour of MJN GibCo as compared to all other corporate income taxpayers, because it allows that undertaking to reduce its taxable base although there is no legal basis to do so in Gibraltar tax law. That is because the contested measure misapplies the Gibraltar tax rules.

(59) In order to classify a national tax measure as selective, the Commission must begin by identifying the ordinary or 'normal' tax system applicable in the Member State concerned, i.e. the 'reference system', and thereafter demonstrate that the tax measure at issue is a derogation from that system, 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 ([45]). The reference system constitutes the framework against which the existence of a selective advantage is to be assessed ([46]). It defines the boundaries for examining whether certain undertakings benefit from a derogation from the normal rules forming that reference system as a result of which those undertakings are treated in an advantageous way as compared to other undertakings subject to the normal rules of the reference system in otherwise comparable legal and factual situations.

Reference system

(60) It follows from the above considerations that the reference system is composed of a consistent set of rules that generally apply — on the basis of objective criteria — to all undertakings falling within its scope as defined by its objective. Typically, those rules define not only the scope of that system, but also the conditions under which the system applies, the rights and obligations of undertakings subject to it, and the technicalities of the functioning of the system. In the case of fiscal measures, the identification of the reference system is based on factors establishing inter alia what is taxed (the taxable event or object), who the tax is levied upon (the taxable persons or subjects), and how the tax due is calculated (the tax base and the tax rates) ([47]).

(61) The contested measure allowed MJN GibCo to exempt from corporate income taxation in Gibraltar the profit resulting from its interest in MJT CV (net royalty income received by MJT CV, which was deemed to be received directly by MJN GibCo and fell within the scope of taxation as from 1 January 2014) after and despite the 2013 amendment.

(62) With regard to the application of corporate income tax rules in Gibraltar, the Commission considers that the reference system is the ITA 2010, the objective of which is to collect revenues from taxpayers that receive income accruing in or derived from Gibraltar. The following provisions form an integral part of that reference system:

(a) the territorial basis of taxation under section 11 ITA 2010, which provides for taxation of income accruing in or derived from Gibraltar;

(b) section 16(1) of ITA 2010, entitled 'Basis of assessment', which provides that, subject to the other provisions of ITA 2010, the assessable profits or gains of a company in Gibraltar for an accounting period is the full amount of the profits or gains of the company for that accounting period;

(c) the standard corporate income tax rate in Gibraltar (10 %); and

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([43]) Case T-314/15 *Greece v. Commission* ECLI:EU:T:2017:903, paragraph 79.

([44]) In which case, the measure could either be part of a State aid scheme or it is a general (non-selective) measure.

([45]) Case C-374/17 *A Brauerei* ECLI:EU:C:2018:1024, paragraph 36 and the case-law cited.

([46]) See Case C-203/16 P Dirk Andres v Commission ('Sanierungsklausel') ECLI:EU: C:2018:505, paragraph 88: 'The examination of the selectivity condition therefore implies, in principle, the determination, first, of the reference framework within which the measure concerned falls, that determination being of greater importance in the case of tax measures, since the very existence of an advantage may be established only when compared with "normal" taxation.' See also Case C-88/03 Portugal v Commission, ECLI:EU:C:2006:511, paragraph 56 and Case C-524/14 P Commission v Hansestadt Lübeck, EU:C:2016:971, paragraph 55.

([47]) See Case C-374/17 *A Brauerei* ECLI:EU:C:2018:1024, paragraph 37, and Joined Cases C-51/19 P and C-64/19 P, World Duty Free, paragraph 62-65. See also, Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1), paragraph 134.

(d) the common law provision, according to which the profits or gains derived from a Dutch limited partnership (of which a Gibraltar company is a partner) are taxable at the level of the corporate Gibraltar partner (considering the share to which the Gibraltar company is entitled in the profits or gains of the partnership and assessing such profits or gains in accordance with the provisions of ITA 2010, as though such share were profits or gains of the Gibraltar company).

Derogation

(63) Given that the measure (continued application of the 2012 MJN GibCo ATR as from 1 January 2014) allowed MJN GibCo to exempt its share in the profits (net royalty income) recorded by MJT CV from taxation, the Commission takes the provisional view that the Gibraltar corporate income tax rules (royalty income falling within the heads of charge in accordance with Class 3A, Table C of Schedule 1 ITA 2010) as well as the common law rules (providing that a Dutch CV is transparent for the purposes of Gibraltar corporate income tax law) have been misapplied by the contested measure.

(64) As from 1 January 2014, royalties have been part of the categories of income subject to taxation in Gibraltar. Accordingly, as already explained in Recital (53), any exemption granted to MJN GibCo on its share of the income generated by MJT CV (or any other CV, of which MJN GibCo was a partner) did not reflect the normal application of the ordinary tax system. The continued application of the tax rulings, even after the amendments that brought royalty income into the scope of taxation entered into force, and even after the audit performed by the Gibraltar authorities in 2015 to assess whether MJN GibCo's tax treatment under the 2012 ATR complied with the applicable tax rules, resulted in a misapplication of the Gibraltar tax rules. In that regard, it must be underlined that the relevant audit report of 16 December 2015, which followed a comprehensive audit of the 2012 ruling by the Gibraltar Income Tax Office, confirmed that the ruling was still active and *'remains in effect subject to the terms and conditions contained therein*'.

(65) The Commission fails to understand the reasoning of the United Kingdom and the Gibraltar tax authorities, as outlined in Recital (43), according to which no taxation would arise in Gibraltar as from 1 January 2014 (in relation to the royalty income generated at the level of the Dutch CV) since there is no specific provision in ITA 2010 that defines and prescribes how the Gibraltar partner should be taxed. First, the relevant question is not whether the Dutch CV should be taxed in Gibraltar or not, but whether the corporate partner (resident in Gibraltar) of such a CV should be taxed on its share of the income generated by that CV. Since CVs are considered transparent for tax purposes in Gibraltar (under common law rules), the corporate partner (resident in Gibraltar) of a CV should be taxed on its share of the CV's income to the extent that income falls within the scope of taxation under ITA 2010 (since 1 January 2014 with regard to royalty income) ([48]). The Commission asked for clarifications in relation to the reasoning put forward by the United Kingdom but did not receive any convincing arguments supporting that reasoning.

(66) Second, even if the definition of a 'person' in section 74 ([49]) were relevant for the cases at hand (in the Commission's preliminary view, this is the case for the Gibraltar company with interests in a Dutch CV only, not for the Dutch CV as such), it must be noted that the definition in section 74 ([1]) is very generic and sufficiently broad to include a Dutch CV.

(67) It follows that such non-taxation of the net royalty income generated at the level of MJT CV (or any other CV or transparent entity that would have been set up by MJN GibCo for the purposes of collecting royalties) as from 1 January 2014 constitutes both a misapplication of the then applicable Gibraltar tax rules and a derogation from the reference tax system.

([48]) Class 3A, (b), Table C of Schedule 1 provides that royalties will be deemed to accrue and derive in Gibraltar where the company in receipt of the royalty income is a company registered in Gibraltar. This rule does not affect the conclusion that the relevant Gibraltar registered companies are taxable on their share of the royalty income generated at the level of the Dutch CVs, as the relevant share of any income received by the CVs is deemed to be received directly by the Gibraltar companies with interest in the Dutch CVs.

([49]) Section 11(1) defines tax liability in relation to 'income specified in tables A to C inclusive of Schedule 1 accruing in or derived from Gibraltar of any **person**'. Section 74 defines the notion of 'person' as 'any corporation either aggregate or sole and any club, society or other body, or any one or more persons of any age, and either of the male or female sex and includes any company and a body of persons, and any other entities as defined in regulations made under this Act'. The Gibraltar authorities have argued that the definition of a 'person' in section 74 of ITA 2010 does not explicitly refer to Dutch limited partnerships and therefore no specific mechanism on how to tax income from participations held in a CV exists.

([1]) Section 74 defines the notion of persons as 'any corporation either aggregate or sole and any club, society or other body, or any one or more persons of any age, and either of the male or female sex and includes any company and a body of persons, and any other entities as defined in regulations made under this Act'

(68) To establish the *prima facie* selectivity in cases in which the presumption invoked in Recital (56) is not relied upon, it must be further demonstrated that a measure discriminates in favour of one or several undertakings as compared to other undertakings that are in a comparable factual and legal situation. According to the case-law, the comparability analysis for the purposes of establishing selectivity depends on the objective of the reference system under which the measure was adopted ([50]).

(69) In Recital (62), the Commission provisionally concluded that the reference system against which the contested measure should be assessed is the ITA 2010 (including section 16 as well as the common law rule determining that Dutch CVs are fiscally transparent for the purposes of the Gibraltar corporate income tax rules), the objective of which is to collect revenues from taxpayers that receive income accruing in or derived from Gibraltar.

(70) Recitals (53) and (54) provisionally concluded that the contested measure misapplies the above Gibraltar and common law tax rules in favour of MJN GibCo as a result of which that undertaking is granted a tax base reduction for which there is no legal basis under Gibraltar tax law. The contested measure therefore constitutes a derogation from the general rules for establishing a corporate taxpayer's income tax base and thus its income tax liability under the Gibraltar corporate income tax system. By granting MJN GibCo a tax base reduction for which there is no legal basis under Gibraltar tax law, the contested measure discriminates in favour of that undertaking as compared to all other corporate taxpayers in Gibraltar (in receipt of royalty income or other categories of taxable income), which cannot reduce their taxable profits without an explicit provision in fiscal law and which are therefore taxed, as a starting point and notwithstanding general adjustments provided by law, on the total of (1) the profit recorded in their commercial accounts as well as (2) the (relevant share of the) profits received through a fiscally transparent structure (profits made by transparent legal entities, of which the Gibraltar corporate taxpayer is the partner).

(71) Furthermore, even if the contested measure was consistent with section 11 and Schedule 1 (Table C, Class 3A) ([51]), which is clearly not the case, it could be regarded as a *de facto* continuation of the previous royalty exemption scheme, which was found to constitute incompatible aid under Decision (EU) 2018/7848 final of 19 December 2018 on State aid SA.34914 (2013/C). In that case, such tax treatment would still constitute a derogation to the normal rules. In particular, it would constitute a derogation to the following rules which form an integral part of the reference system identified in Recital (62): (1) section 16(1) of ITA 2010, which provides that in principle the assessable profits or gains of a company in Gibraltar for an accounting period is the full amount of the profits or gains of the company for that accounting period; and (2) the common law rules that confirm the tax treatment of a Dutch CV as a transparent entity for tax purposes, which results in the allocation of the (relevant share of the) CV's profits to its Gibraltar based owner. It would also involve a discrimination as Gibraltar companies benefitting from that tax treatment would be in the same legal and factual situation as other Gibraltar companies in receipt of royalty income or other categories of income.

(72) In light of the foregoing, the Commission concludes on a provisional basis that the advantage granted on the basis of the contested measure is *prima facie* selective.

Justification

(73) A measure that creates an exception to the application of a general rule may be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of the reference system. In that connection, a distinction must be drawn between, on the one hand, the objectives attributed to a particular reference system which are extrinsic to it and, on the other, the mechanisms inherent in the system itself which are necessary for the achievement of such objectives ([52]). It is also necessary to ensure that the measure is proportionate and it does not go beyond what is necessary to achieve the legitimate objective being pursued, in that the objective could not be attained by less far-reaching measures ([53]).

(74) The Commission takes the provisional view that it is not possible to objectively justify a misapplication of the law, since such a misapplication can never result directly from the basic or guiding principles of the reference system. Since the contested measure misapplies the ITA 2010 (sections 11, 16 and Class 3A, Table C of Schedule 1) as well as the common law rules (fiscal transparency) in favour of MJN GibCo, as a result of which that undertaking is granted a tax reduction with no legal basis in Gibraltar tax law, the Commission provisionally considers that the *prima facie* selectivity to which this measure gives rise cannot be objectively justified.

([50]) Joined Cases C-106/09 P and C-107/09 P *Commission v. Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, paragraph 75; Joined Cases C-20/15 P and C-21/15 P *World Duty Free Group*, ECLI:EU:C:2016:981, paragraph 54 and Case C-374/17 *A Brauerei* ECLI:EU:C:2018:1024, paragraphs 33, 36 and 38.

([51]) That would be the case if Class 3A of Table C under Schedule 1 did not include royalties. However, as already explained in Recital (53), following the 2013 legislative amendment, Class 3A of Table C under Schedule 1 includes royalties received (as from 1 January 2014) by a company. Accordingly, such income has been within the categories of taxable income since 1 January 2014.

([52]) Case C-374/17 *A Brauerei* ECLI:EU:C:2018:1024, paragraph 48 and the case-law cited.

([53]) Joined Cases C-78/08 to - 80/08, *Paint Graphos* ECLI:EU:C:2011:550, paragraphs 73 and 75.

(75) For the above reason and in the absence of any objective justification advanced either by the United Kingdom authorities or by third parties, the Commission provisionally concludes that the tax reduction granted by the contested measure does not derive directly from the intrinsic basic or guiding principles of the reference system and is not the result of inherent mechanisms necessary for the functioning and effectiveness of that system. The discrimination to which this measure gives rise therefore cannot be objectively justified.

4.1.4.3. Provisional conclusion on the existence of a selective advantage

(76) In the light of the foregoing, the Commission provisionally concludes that the tax advantage granted to MJN GibCo on the basis of the contested measure constitutes a selective advantage.

4.1.5. *Provisional conclusions on the existence of aid and the beneficiaries of that aid*

(77) For all the foregoing reasons, the Commission provisionally concludes that the contested measure confers State aid to MJN GibCo in the form of a corporate income tax exemption.

(78) For the purpose of the application of the State aid rules, separate legal entities may be considered to form one economic unit. That economic unit is then considered the relevant undertaking benefitting from the aid measure. As the Court of Justice has previously held, *'[i]n competition law, the term "undertaking" must be understood as designating an economic unit […] even if in law that economic unit consists of several persons, natural or legal'* ([54]). To determine whether several entities form an economic unit, the Court of Justice looks at the existence of a controlling share or functional, economic or organic links ([55]).

(79) In the case at issue, the Commission notes that MJN GibCo is part of a large multinational group. The Commission further notes that the group corporate set-up involving the MJT CV, the MJ BV and MJN GibCo, as illustrated in Recital (37), benefits MJN GibCo's owner ([56]) ('the parent company'). Instead of exploiting the IP rights itself, the parent company places the IP rights in a complex corporate structure (involving a Dutch company, a Dutch limited partnership and a Gibraltar holding company) which allows the parent company to generate profits from the IP rights exploitation without those profits being taxed. Given the fiscally transparent nature of the Dutch CV and the fact that MJN GibCo does not carry out any other activity than holding a participation in the MJT CV, the ultimate beneficiary of the non-taxed profits stemming from the exploitation of the IP rights is the parent company. However at this stage, the Commission cannot exclude that other members of the MJN group benefitted from the advantage conferred on MJN GibCo.

(80) The Commission further notes that the corporate set-up of the Dutch and the Gibraltar entities is established and fully controlled by the parent company for the purposes of IP rights exploitation and tax optimisation. Accordingly, the Commission provisionally considers that this whole corporate structure, i.e. the Dutch BV, the Dutch CV, the Gibraltar corporate partner (MJN GibCo) and the parent company form a single economic unit and should all be seen as the undertakings benefiting from the aid measure. However, it cannot be ruled out that other members of the MJN group, such as MJN (Asia Pacific) PTE Ltd's parent as well as the MJN group's ultimate parent company, also form part of that single economic unit. Such an extension of the economic unit may also be justified by MJN GibCo's and MJT CV's dissolution in October 2018 and December 2017 respectively (and possibly by the current status of the other legal entities involved in the corporate set-up) ([57]).

(81) Consequently, in addition to MJN GibCo, the Commission provisionally considers also the relevant Dutch BV, the Dutch CV, and MJN GibCo's (intermediary and ultimate) parent company/-ies as benefiting from State aid granted on the basis of the contested measure within the meaning of Article 107(1) of the Treaty.

4.2. **Unlawfulness of the aid**

(82) Article 108(3) TFEU and Article 2 of Regulation 2015/1589 provides that the Member States must notify any plans to grant new aid in advance to the Commission in sufficient time to allow the Commission to form a view on whether it constitutes State aid and, if so, whether it is unlawful or compatible State aid (the notification

([54]) Case C-170/83 *Hydrotherm* ECLI:EU:C:1984:271, paragraph 11. See also Case T-137/02 *Pollmeier Malchow v. Commission* ECLI:EU:T:2004:304, paragraph 50.

([55]) Case C-480/09 P *Acea Electrabel Produzione SpA v. Commission* ECLI:EU:C:2010:787 paragraphs 47 to 55; Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others* ECLI:EU:C:2006:8, paragraph 112.

([56]) MJN (Asia Pacific) PTE Ltd Singapore or any other company of the group that would have taken over the holding in MJN GibCo.

([57]) The current status of the other entities involved in the corporate set-up is unknown. In particular, it is unknown whether such entities have been dissolved in the meantime.

obligation) ([58]). It further provides that notifiable new aid must not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid (standstill obligation) ([59]). Article 1(f) of Regulation 2015/1589 defines new aid put into effect in contravention of Article 108(3) TFEU as 'unlawful aid'.

(83) Since the Commission has provisionally concluded that the contested measures give rise to State aid, it may also provisionally conclude that that aid is unlawful in nature, since those measures were not notified to the Commission before they were put into effect.

4.3. **Compatibility with the internal market**

(84) State aid is deemed compatible with the internal market if it falls within any of the grounds listed in Article 107(2) TFEU ([60]) and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the grounds listed in Article 107(3) TFEU ([61]). It is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Article 107(2) or (3) TFEU ([62]).

(85) The United Kingdom has not invoked any compatibility grounds for the State aid granted to MJN GibCo and to the MJN Group as a whole through the contested measure, nor is the Commission able to identify any.

(86) The Commission notes, in particular, that since the tax treatment afforded through the contested measure appears to result in a reduction of charges that should normally be borne by the undertaking concerned in the course of its business, that reduction should therefore be considered to constitute operating aid. According to the case-law, such aid cannot normally be considered compatible with the internal market in that it does not facilitate the development of certain activities or of certain economic areas, nor are the tax reductions in question limited in time, digressive or proportionate to what is necessary to remedy to a specific economic handicap of the areas concerned ([63]).

5. **CONCLUSION**

In light of the foregoing, the Commission's preliminary view is that the continued application of the advance tax ruling granted to MJN GibCo (which was the corporate partner of a Dutch CV in receipt of royalty income) by Gibraltar and the resulting non-taxation of that royalty income as from 1 January 2014 constitutes a State aid measure according to Article 107(1) TFEU and has doubts about the compatibility of such State aid measure with the internal market. The Commission, acting under the procedure laid down in Article 108(2) TFEU, therefore requests the United Kingdom to submit its comments and to provide all such information as may help to assess the contested measure. This concerns in particular:

— MJN GibCo's as well as MJT CV's annual accounts (and directors' reports) covering the period between 1 January 2014 and their respective dissolutions;

— Confirmation that MJT CV was the only limited partnership held or partially held by MJN GibCo during the above period. In the absence of such confirmation, please provide the annual accounts of any such limited partnership for this period;

— Copies of MJN GibCo's corporate income tax returns (and the corresponding tax assessments) for the fiscal years covering the period between 1 January 2014 and the date of MJN GibCo's dissolution;

— An updated structure chart describing the ownership structure of the MJN Group (including MJN Asia Pacific Holding LLC and MJN (Asia Pacific) PTE Ltd Singapore) after the dissolution of both MJN GibCo and Mead Johnson Three CV;

— An update on the status of the other entities involved in the corporate set-up illustrated in Recital (37).

([58]) Regulation No 2015/1589, Article 2.
([59]) Article 108(3) TFEU; Regulation No 2015/1589, Article 3.
([60]) The exceptions provided for in Article 107(2) TFEU concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.
([61]) The exceptions provided for in Article 107(3) TFEU concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.
([62]) Case T-68/03 *Olympiaki Aeroporia Ypiresies v. Commission* ECLI:EU:T:2007:253, paragraph 34.
([63]) Case T-308/11 *Eurallumina* v *Commission*, ECLI:EU:T:2014:894, paragraphs 85 and 86.

The United Kingdom is requested to provide this information within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind the United Kingdom that Article 108(3) TFEU has suspensory effect, and would draw your attention to Article 16 of Council Regulation (EU) 2015/1589, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns the United Kingdom that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries, which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.