DECISIONS

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)

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.

(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.

([1]) OJ C 348, 28.11.2013, p. 184 and OJ C 369, 7.10.2016, p. 55.
([2]) OJ C 348, 28.11.2013, p. 184.
([3]) Spanish Confederation of Business Organisations (Confederacion Espagnola de Organizaciones Empresariales).

(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.

([4]) C(2014) 6851 final.
([5]) OJ C 369, 7.10.2016, p. 55.
([6]) Case T-783/16, Government of Gibraltar v Commission.

(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

(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.

([7]) 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'.

([8]) '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.

([9]) '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.

([10]) 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.

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

(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.

([12]) Section 74, as originally enacted, referred to the location of the activities or the preponderance of the activities, but the reference to the preponderance of activities was deleted by the Income Tax (Amendment) Act 2013.
([13]) 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.
([14]) Commissioner of Inland Revenue v Hang Seng Bank Ltd [1991] 1 AC 306.
([15]) Commissioner of Inland Revenue v HK-TVB International Ltd [1992] 2 AC 397.
([16]) United Kingdom submission, 14.11.2013, p. 2.
([17]) Table C of Schedule 1 to ITA 2010, as originally enacted, did not include this category of income.
([18]) 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.
([19]) Income Tax (Amendment) Regulations 2013, published in the Second Supplement to the Gibraltar Gazette No 4006 of 6 June 2013.
([20]) Income Tax (Amendment) Act 2013, published in the First Supplement to the Gibraltar Gazette No 4049 of 24 December 2013.

(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 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.

(38) In addition, section 42 of ITA 2010 provides for a specific procedure for clearance in relation to anti-avoidance issues. Such rulings can only be granted for the purpose of determining whether certain transactions or arrangements are taxable in accordance with section 40 of or Schedule 4 to ITA 2010, i.e. for determining whether or not an arrangement is artificial or fictitious for the purposes of eliminating or reducing the amount of taxation payable.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

3.1. **The passive interest and royalty income tax exemption**

(39) In the First Opening Decision, the Commission took the preliminary view that the tax exemption for passive (inter-company loan) interest and royalty income resulting from ITA 2010 constitutes State aid for the purposes of Article 107(1) of the Treaty and expressed doubts as to its compatibility with the internal market.

(40) With respect to the material selectivity of the measure, the Commission found that the passive income (interest, royalty and dividend) exemption was *prima facie* selective. However, with regard to dividends it found that the exemption was justified by the logic of preventing double taxation. By contrast, the Commission did not identify any justification for the exemption for passive interest or royalty income. In particular, it did not agree that the exemption for foreign source passive interest followed from the logic of the territorial system of taxation. Nor did it accept the argument that the exemption for domestic source passive interest would be justified by manageability concerns (excessive costs of collecting the tax). Finally, with regard to the royalty exemption, the Commission did not accept the need to make the Gibraltar tax system simple and effective as a valid justification for the exemption.

(41) On a preliminary basis, the Commission also concluded that the measure was financed through State resources, that it conferred an economic advantage to undertakings, that it affected trade between Member States and that it threatened to distort competition by favouring certain undertakings. Accordingly, it took the view that the tax exemption for passive interest and royalties constituted State aid for the purposes of Article 107(1) of the Treaty.

(42) The Commission also concluded that such aid constituted 'new aid' as the exemption for passive interest under ITA 1952 was not granted automatically and required an assessment of territoriality. In addition, ITA 2010 introduced an exemption for royalties, which did not previously exist under ITA 1952. In this regard, the Commission noted that the application of the territorial system meant that all royalty income received by a Gibraltar company accrues in and is derived from Gibraltar.

(43) Finally, the Commission expressed its doubts as to the compatibility of the exemption rule for the passive (inter-company loan) interest and royalty income with the internal market. In particular, it did not identify any possible compatibility grounds under Article 107(2) or (3) of the Treaty.

3.2. **The tax ruling practice**

(44) With the Decision to Extend Proceedings, the Commission decided to extend the formal investigation procedure to cover 165 tax rulings granted by the Gibraltar tax authorities between the period from 2011 to August 2013 (out of a total of 340 rulings granted during that period).

(45) The Commission considered that the four conditions for qualifying a measure as State aid were in principle met. In particular, it concluded on a preliminary basis that the tax ruling measures were materially selective as the Gibraltar tax authorities generally refrained from conducting a proper assessment of the company's tax obligations, in exercise of their discretionary powers. In the Commission's view, such a course of conduct was made possible because the legal provisions were formulated in a vague manner. The Commission also took the preliminary view that, in some cases, the Gibraltar tax authorities issued tax rulings that were inconsistent with the applicable tax provisions.

(46) To support its preliminary views on the selective nature of the tax ruling measures due to the existence of discretionary practices, the misapplication of the rules or the absence of proper verification as to where activities are effectively performed, the Commission outlined seven typical categories of cases on the basis of different types of ruling, activity or income.

(47) On a preliminary basis, the Commission considered that, by granting such tax rulings only to certain multinational companies, as opposed to other, purely domestic companies that do not ask for a tax ruling, the tax authorities treated companies that were in a similar legal and factual situation differently. Accordingly, the measures were found to be *prima facie* selective. Further, the Commission did not identify an acceptable justification based on the nature or the general scheme of the reference system (see recital 57 of the Decision to Extend Proceedings). In this respect, it also indicated that any possible justification would require the existence of appropriate control and monitoring procedures ([21]) (in order to ensure a coherent application of the tax system), which seemed to be lacking in the case in hand.

(48) As a preliminary conclusion, the Commission also found that the tax ruling measures were granted through State resources, that they conferred an economic advantage to undertakings, that they affected trade between Member States and that they threatened to distort competition by favouring certain undertakings. It expressed its doubts as to the compatibility of those measures with the internal market. Accordingly, it took the preliminary view that the tax ruling measures constituted State aid for the purposes of Article 107(1) of the Treaty. It also considered that such State aid constituted 'new aid'.

(49) The extended proceedings related not only to the 165 individual rulings but also more generally to the tax ruling practice under ITA 2010, which seemed to misapply the provisions of ITA 2010 on a recurrent basis.

(50) With regard to the compatibility of the 165 tax rulings and the general tax ruling practice with the internal market, the Commission did not identify any possible grounds for compatibility based on the exceptions laid down in Article 107(2) and (3) of the Treaty.

(51) In conclusion, the Commission expressed the preliminary view that the 165 tax rulings listed in the Annex to the Decision to Extend Proceedings and the tax rulings practice of Gibraltar constitute State aid for the purposes of Article 107(1) of the Treaty and expressed doubts about their compatibility with the internal market. It also invited the United Kingdom and the Gibraltar authorities to provide it with evidence of *ex post* controls. Finally, it invited the United Kingdom to explain whether and on what grounds the tax ruling practice or any of the 165 tax rulings assessed could be found compatible.

4. COMMENTS FROM THE UK

4.1. **Comments on the passive interest and royalty income tax exemption**

(52) The comments submitted by the United Kingdom on 20 December 2013 can be summarised as follows:

(1) ITA 2010 applies the territorial principle according to which the profits of companies are taxed in Gibraltar only if the income 'accrues in or is derived from' Gibraltar. This was also the situation under ITA 1952;

(2) the exemption for passive interest and royalty income cannot be considered selective as these provisions are open to all companies and apply generally to all sectors of industry, finance and commerce. The availability of the exemption is not limited in any way, either to any category of company or to any kind of activity. The fact that some companies benefit from a tax rule more than others does not make it selective. In addition, no particular group of companies benefiting from the measure can be identified. There are no other companies in similar factual or legal situations in Gibraltar to which these measures would not apply;

(3) it is incorrect to say that the exemption selectively favours in particular companies receiving royalties for intellectual property rights and intra-group interest paid by non-Gibraltar companies. There is nothing in the tax system which leads to any particular proportion of non-Gibraltar companies, or which gives any privilege to companies lending to foreign companies;

([21]) See e.g. Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* ECLI:EU:C:2011:550, paragraph 73 et seq.

(4) the reference to 'offshore companies' in recital 37 of the First Opening Decision is too ambiguous and unrelated to the tax treatment of passive income. In addition, the argument that the measure re-establishes the previous regime of exempt companies is irrelevant as it does not influence the selectivity assessment of the exemption;

(5) as regards de facto selectivity, no identifiable group or category of companies could be identified as beneficiaries. The way a given rule operates in practice from time to time does not make it selective unless the terms of the measure, or some identifiable and stable feature of the specific circumstances to which it applies, cause it to benefit only a limited category of companies. In the case in hand, the number of companies actually or potentially benefiting from the provisions is not limited in any way, in law or in fact. The provision is therefore not selective;

(6) the exemption for passive interest and royalty income is justified by the nature and general scheme of the Gibraltar tax system. First, the non-taxation of foreign-source passive interest is the logical consequence of the territoriality principle, which is based on the aim of avoiding double taxation. Second, the exemption for Gibraltar-source interest and royalties is justified by the logic of any tax system considering that cost of collection must not exceed expected revenue;

(7) if the Commission was to conclude that the treatment of foreign source loan interest is selective, it would have to be considered as 'existing' aid. The new aid element could only concern passive interest amounts 'that were taxable before the entry into force of ITA 2010' whereas under ITA 1952, foreign source loan interest was not taxable because of the 'situs of the loan' rule ([22]). This means that de facto the 'situs' of foreign-source inter-company loan interest has remained the same as under the previous legislation. Accordingly, it was legally incorrect for the Commission to initiate a formal investigation procedure on this particular aspect of the Gibraltar tax system;

(8) the Government of Gibraltar introduced legislation, with effect from 1 July 2013, so that all inter-company loan interest income exceeding GBP 100 000 per annum, both domestic and foreign-sourced, are subject to tax. Reference was also made to further legislation enacted on 24 December 2013 with effect from 1 January 2014 making royalties also liable to tax;

(9) in addition, if the Commission concluded that the tax treatment of interest and royalties was 'new' aid, the UK's understanding of Gibraltar's view is that recovery affecting the relevant periods would be difficult or impossible for practical reasons;

(10) finally, the Commission has departed from the normal practice under Council Regulation (EU) 2015/1589 ([23]) ('the Procedural Regulation') as it has initiated a formal investigation on a particular aspect of the Gibraltar tax system in parallel with a continued preliminary examination regarding the same tax system.

4.2. **Comments on the tax ruling practice**

(53) The arguments put forward by the United Kingdom on 31 March 2015 against the Decision to Extend Proceedings can be summarised as follows:

(1) there is no evidence that any tax rulings would be selective. The tax ruling practice in Gibraltar has never involved any element of individual or special treatment or any element of negotiation, or any influence or consideration except those resulting from the terms of the tax law applicable in Gibraltar. A tax ruling is simply a statement by the Gibraltar Commissioner of Income Tax that, on the basis of the facts explained to the Commissioner, and on the normal and correct interpretation of the legislation applicable, the company in question is not liable to income tax on the income or revenues described. There is no evidence that any of the rulings departed in any way from the normal and correct interpretation of the tax legislation. In addition, the tax authorities exercise no discretionary powers, nor is there any evidence that they have ever consciously or deliberately refrained from making proper assessments, or deliberately deviated from the applicable

([22]) This rule was applied in order to determine whether interest income was taxable as a result of the territoriality principle. The assessment is based on the following cumulative criteria: (a) the place of residence of the debtor; (b) the source from which the interest is paid; (c) the place where the interest is paid; and (d) the nature and location of the security for the debt.

([23]) 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).

national tax legislation. The seven categories of ruling identified by the Commission in the First Opening Decision are not selective when compared with other tax rulings as none of the rulings deviates from the applicable national tax provisions;

(2) there is no evidence that any of the tax rulings distorted competition. A measure can distort competition only in the sector in which it applies, or in some closely related sector. The tax rulings with which the decision is concerned apply in a large number of different sectors. The Commission has not suggested that any individual ruling distorted competition in the sector in which it applied, but merely indicates that there is an effect on trade between Member States that threatens to distort competition, without considering whether any ruling has done so;

(3) there is clear evidence that the rulings referred to in the Decision to Extend Proceedings are only part of a consistent practice which began long before the UK joined the Union. The practice was based on section 3(1) of ITA 1952, now reproduced in virtually identical form in section 2(1) and (2) of ITA 2010. Therefore, if there were found to be any element of State aid, it would necessarily be 'existing' aid, and not 'new' aid;

(4) the Decision to Extend Proceedings is based on an incorrect understanding of significant facts. The Commission was informed, unfortunately incorrectly, by the UK authorities on behalf of the Government of Gibraltar that the procedure allowing the Gibraltar Commissioner to grant tax rulings confirming whether or not a resident company is liable to tax in Gibraltar is set out in section 42 of ITA 2010, which was introduced by that Act and did not exist under ITA 1952, instead of being told that section 42 merely introduced an explicit legislative basis for a certain type of ruling that is not relevant to the case in hand and that rulings on the application of the territorial system have been given since 1952, under section 3(1) of ITA 1952 or section 2(1) and (2) of ITA 2010. Although that misunderstanding is due to incorrect information provided by the UK authorities, the United Kingdom considers that it was presumably this incorrect information that led the Commission to assume it might be possible to regard tax rulings given since 2010 as 'new aid';

(5) the Decision to Extend Proceedings suggests that the Commission considers that the practice could be a 'scheme' of aid and involves one or more individual State aids. There is no evidence to support either view. Such uncertainty questions the Decision procedurally, at least in part, since the scheme character of the practice of rulings cannot be dealt with by the chosen procedure, as it is evidently existing aid, if it is concluded to be aid at all. In addition, there is no evidence that suggests that tax rulings were intended to be anything except the normal and correct interpretation and application of the tax law in force;

(6) the Decision to Extend Proceedings was adopted before the Commission had all the information to be able to fully assess the position with respect to tax rulings. In particular, there had been only two exchanges between the Commission and the United Kingdom on the tax ruling practice before the Commission took the Decision to Extend Proceedings. During that period, the Commission never suggested on what basis any tax ruling could be regarded as distorting competition in any way.

5. COMMENTS FROM INTERESTED PARTIES

5.1. **Comments on the passive interest and royalty income tax exemption**

(54) The Commission received comments from four interested parties — Gibraltar, Spain, Germany and the Spanish Confederation of Business Organisations (CEOE).

5.1.1. *Comments from Gibraltar*

(55) In its comments, Gibraltar supported the line of argument put forward by the United Kingdom that the measure is not selective as it is applied universally and is open to all types of goods, services and companies and that, if it were found to be selective, it should be considered justified by the logic and general nature of the system as a consequence of the territoriality principle. It further pointed out that the exemption for passive interest and royalty income is justified by concerns about administrative manageability, since the costs associated with the collection of the tax are expected to be larger than the actual tax yields.

(56) With regard to the exemption for royalty income, Gibraltar further submitted that the exemption cannot be regarded as selective as the companies that were in receipt of royalties during the three year period when the non-chargeability to tax was in force were active in sectors as diverse as food retail, high street clothing, gaming and insurance. Furthermore, the type of royalty concerned was equally diverse, including copyright, trade mark, knowhow and patents.

(57) Gibraltar also maintained that, were the measure nonetheless found to be selective, it should be considered to be 'existing aid' as it is *de fact*o a continuation of the old regime under which foreign interest was exempt from taxation, based on an analysis of the 'situs of the loan'. For that reason, the measure could only be considered to be 'new aid' to the extent that it concerned domestic interest income.

(58) With respect to any potential recovery, Gibraltar also submitted that the amounts of tax foregone would fall below the *de minimis* threshold established by Commission Regulation (EU) No 1407/2013 ([24]). In particular, Gibraltar submitted that information collected from 18 companies in receipt of royalty income, who together accounted for GBP 90 million in gross royalty income, showed that the total net figure of royalty income, as a result of the deductible expenses, amounted to no more than GBP 18 million. In addition, with regard to Gibraltar-source passive interest, the maximum tax yield would be approximately GBP 250 000, spread across at least 17 companies. Furthermore, Gibraltar's view is that recovery is likely to be impossible for practical reasons and would meet insurmountable difficulties, due to the mobile character of the funds of the companies in question and in the light of the international law principle that courts of one State will not allow or enforce claims for taxes on behalf of another State.

(59) With regard to the procedure, Gibraltar asserted that the Commission departed from the normal practice under the Procedural Regulation, with arguments similar to those put forward by the UK authorities.

5.1.2. *Comments from Spain, Germany and CEOE*

(60) In their submissions, Spain, Germany and CEOE supported the Commission's analysis that the measure constituted State aid as it selectively excluded certain types of income from taxation, had a negative effect on intra-Union trade and distorted competition.

(61) In addition, Spain expressed concern about the effectiveness of the amendment of 7 June 2013 regarding taxation of passive interest, given that the exempted companies in Gibraltar who had received interest income did not have any tax filing obligations. In Spain's view, this would hinder identification of the potential beneficiaries of the measure and *ex post* controls on the reporting and taxation of interest income.

(62) Spain also maintained that the new GBP 100 000 threshold introduced by the 2013 amendment is high. Furthermore the anti-abuse provision, which requires the received interest from related companies to be aggregated, does not apply at the level of the recipient companies. Therefore, the threshold provision could be easily circumvented through a simple company group restructuring creating several Gibraltar companies and distributing the interest received amongst those.

(63) With respect to the exemption of dividends, Spain challenged the double-taxation prevention justification put forward by the Commission. In Spain's opinion, contrary to the Code of Conduct Group's Work Package 2011 on business taxation's guidance notes, Gibraltar had not enacted an effective anti-abuse provision to ensure taxation. In particular, it considered that Gibraltar's legislation failed to require the undertaking in question to be subject to tax (either in Gibraltar or in a foreign country) in order to benefit from the exemption. This failure gave rise, in Spain's view, to a risk of double non-taxation.

(64) Concerning the tax treatment of royalties, the Spanish authorities considered that the exemption selectively favoured companies receiving income from royalties and that such an exemption could not be justified by the avoidance of double taxation.

([24]) Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1).

(65) Both the Spanish authorities and CEOE also referred to the fact that the exemption for passive interest and royalty income must be examined in the light of the general effects of ITA 2010. In their opinion, the intention of ITA 2010 was to continue the effects of the previous tax system (already declared by the Court of Justice to be State aid) favouring offshore companies over those resident in Gibraltar.

(66) Finally, Spain also challenged the assessment made by the Commission with regard to regional selectivity, by distinguishing between the status of the Azores province (which the Commission referred to in its analysis in the First Opening Decision) and the status of Gibraltar. In particular, the Spanish authorities considered that, in addition to examining the three criteria of institutional, procedural and financial autonomy, the implicit criterion concerning tax harmonisation (which, according to the Spanish authorities, clearly does not exist in Gibraltar) should also be examined. Spain also referred to a number of other tax issues, such as the number of shell companies located in Gibraltar without being liable to tax.

5.2. **Comments on the tax ruling practice**

(67) The Commission received comments from six interested parties — Gibraltar, Spain, the Gibraltar Society of Accountants and three companies listed as possible recipients of tax rulings in the Decision to Extend Proceedings.

5.2.1. *Comments from Gibraltar*

(68) The comments made by Gibraltar relate to both procedure and substance. The comments follow the lines of argument put forward by the United Kingdom and can be summarised as follows:

(1) a State aid procedure should not be opened unless there is sufficient factual evidence that the measure in question confers an economic advantage and that the advantage is selective and distorts or threatens to distort competition. In this case, there is no such evidence of any of these points. The Commission's comments on the rulings merely amount to saying that the Commission thinks that more information should have been sought. That opinion does not constitute evidence of an advantage, of selectivity, or of distortion of competition;

(2) the Commission made a manifest error in stating in the Decision to Extend Proceedings that the tax ruling practice in Gibraltar was introduced by section 42 of ITA 2010;

(3) The tax ruling procedure has been in place since the 1960s, and, as such, if found to constitute aid, it should be considered as 'existing aid';

(4) there is no evidence that that any of the tax rulings are selective or distort competition. Each ruling is a matter of interpretation of the facts presented in the request. The lack of detailed analysis cannot of itself be considered to indicate selectivity;

(5) the tax ruling practice in Gibraltar has never involved any element of individual or special treatment or any element of negotiation, or any influence or consideration except to the extent they result from the terms of the tax law applicable in Gibraltar;

(6) the tax liability of the companies concerned would be identical regardless of whether they had requested a tax ruling or not;

(7) when applying the territoriality test, the tax authorities do not enjoy discretion and are bound by the applicable legislation and case-law in this regard;

(8) the Commission's effort to group the 165 rulings into seven distinct categories in order to establish selectivity on a group by group basis is unsupported as there is nothing that would indicate that these groups present any particular characteristics when compared to other uncontested rulings given during the same period or before.

5.2.2. *Comments from Spain*

(69) The comments provided by the Spanish authorities on 30 November 2016 can be summarised as follows:

(1) the Spanish authorities do not contest the territoriality principle itself but rather the way it is interpreted by the Gibraltar authorities. This general rule, combined with a lack of proper assessment, monitoring and legal enforcement of the tax provisions on the part of the Gibraltar tax administration (either *ex ante* or *ex post*), results in an arbitrary, favourable tax treatment to a vast number of companies in the territory;

(2) apart from the 165 companies listed in the Annex to the Decision to Extend Proceedings, intermediary companies operating in Gibraltar such as consultancy firms, fiduciaries and law firms specialised in fiscal planning and fiscal management, are also benefiting indirectly from the aid;

(3) Spain once again reiterated its understanding that the issue should also be analysed from the perspective of regional selectivity, which in its view would also address the argument that the measure constitutes existing aid.

5.2.3. *Comments from the Gibraltar Society of Accountants*

(70) On 3 November 2016, the Gibraltar Society of Accountants — the principal representative body for professional accountants working in Gibraltar, submitted its comments to the Decision to Extend Proceedings. The comments can be summarised as follows:

(1) the rulings listed were neither requested nor issued under section 42 of ITA 2010;

(2) the rulings selected cover a wide range of circumstances and topics, and lack the 'commonality' aspect to which the Decision to Extend Proceeding refers;

(3) tax rulings of this kind have been requested and issued in Gibraltar since as far back as the 1950s and the scheme, if it amounts to State aid, should be considered as existing aid;

(4) the rulings are interpretations of Gibraltar's tax law. They are not negotiated 'deals', or concessions. The issuing of a ruling does not confer favourable treatment. The Decision to Extend Proceedings provides no evidence that the interpretation would be any different in the absence of a ruling being requested;

(5) none of the criteria required for State aid to be present is demonstrated to be met. The measure is not granted out of State resources and does not confer an economic advantage to undertakings because there is no loss of tax revenue since the tax treatment without a ruling would be the same. The measure is not selective and there is no evidence that the measure distorts or threatens to distort competition or affects intra-Union trade;

(6) all but six of the 165 rulings listed in the Decision to Extend Proceedings were issued at a time when passive interest income was not assessable to tax under ITA 2010. Therefore, the vast majority of rulings could not give rise to any assessable interest income.

5.2.4. *Comments by or on behalf of companies listed as recipients of tax rulings in the Decision to Extend Proceedings*

(71) The Commission also received comments by or on behalf of three companies which were granted a tax ruling identified in the Decision to Extend Proceedings — International Power Ltd; a representative of a potential company at the time of the ruling request; and Hastings Insurance Group Ltd. Their comments can be summarised as follows:

(1) the rulings were intended to seek confirmation of the applicable tax regime and not as a way to obtain any tax benefit. The main reason for requesting the rulings was to ensure legal certainty on the application of the general tax rules and not to agree a specific alternative tax treatment for the company;

(2) tax rulings enable Member States to provide their taxpayers with legal certainty and predictability on the application of general tax rules. To view Gibraltar's tax ruling practice as a State aid scheme would prevent the Gibraltar tax authorities from providing legal certainty and would penalise taxpayers looking for legal certainty, whilst ignoring those taxpayers who benefit from the same treatment but decide not to seek confirmation as to the precise application of the law;

(3) the requests for rulings were not made further to section 42 of ITA 2010, but instead sought general confirmation on the tax treatment applicable under the law;

(4) the rulings do not constitute an advantage to the companies as they only confirmed the tax treatment that would have been applied under the legislation applicable in Gibraltar;

(5) the content of the requests for a ruling, and the rulings themselves, indicate that adequate consideration was given to all relevant factors by the Gibraltar tax authorities before providing the rulings.

6. RESPONSE OF THE UNITED KINGDOM TO THIRD PARTY COMMENTS

6.1. **Comments on the passive interest and royalty income exemption**

(72) The Commission forwarded the comments received from interested parties on the passive interest and royalty income exemption to the United Kingdom on 16 April 2014. The United Kingdom's response to those comments can be summarised as follows:

(1) no evidence has been given showing distortion of competition or effect on trade;

(2) the exemption for dividends is justified in order to avoid double taxation and is a direct result of the territoriality principle;

(3) following the June 2013 amendment, all companies registered in Gibraltar in receipt of passive interest income are subject to income tax and required to file a tax return;

(4) with respect to the GBP 100 000 threshold imposed by the legislation, the Gibraltar tax authorities have conducted an analysis which has shown that only 1 % of inter-company loan interest income will fall below the threshold and will therefore not be subject to taxation. The results of the analysis were presented to the Code of Conduct Group and to the Commission prior to enactment of the 2013 amendment in order to explain the reasons for introducing the limit and to quantify any possible tax leakage;

(5) regarding the Spanish comments that the exemption for royalty income selectively favours a group of companies in receipt of royalties, no such sector or grouping exists. All companies receiving royalties are treated the same;

(6) there is no variation or discretion in the concept of territoriality, which is applied consistently under ITA 2010 to all companies;

(7) Spain's comments concerning parts of Gibraltar tax law in respect of which the Commission has not initiated an investigation procedure are irrelevant and the Commission's investigation should be limited to the matters for which the procedure was initiated;

(8) finally, comments were provided on the status of Gibraltar as a British Overseas Territory, its executive, legislative and judiciary independent governance, thus showing that the measure cannot be treated as regional aid.

6.2. **Comments on the tax ruling practice**

(73) The Commission forwarded the comments made by interested parties on the tax ruling practice as set out in the Decision to Extend Proceedings to the United Kingdom on 7 December 2016. The United Kingdom's response to those comments can be summarised as follows:

(1) the comments made by the three addressees of tax rulings corroborate the submissions that the UK authorities have made to the Commission during the investigation procedure and constitute further evidence which supports the legality of the tax ruling practice in Gibraltar and the fact that that practice does not constitute State aid;

(2) the Government of Gibraltar carried out extensive reviews of all 165 rulings listed in the Decision to Extend Proceedings which, in the UK's view, confirm that none of the 165 rulings has exempted the recipient from tax that would otherwise have been due to, or has led to a loss of tax revenue for Gibraltar;

(3) the reviews carried out confirm that none of the rulings listed in the Decision to Extend Proceedings is selective and therefore none of them constitutes State aid on that basis;

(4) 14 of the rulings listed in the Decision to Extend Proceedings concerned transactions that never materialised and further three rulings concerned the taxation of employees' income and/or benefits in kind and neither of those categories raises State aid concerns;

(5) the position expressed by Gibraltar that its tax authorities do not enjoy wide discretion when issuing rulings, and do not issue rulings without checking or evaluating the requests, is correct. The rulings do not lead to a selective application of the tax regime since they just apply the law as set out in ITA 2010.

7. ASSESSMENT OF THE PASSIVE INTEREST AND ROYALTY INCOME EXEMPTION

(74) In the First Opening Decision, the Commission concluded on a preliminary basis that the tax exemption for passive (inter-company loan) interest and royalty income constituted State aid and expressed its doubts about its compatibility with the internal market.

(75) As from 1 July 2013, the passive interest income has been liable to tax (insofar as the interest received or receivable per source company exceeded GBP 100 000 per annum). As from 1 January 2014, the royalty income (received or receivable by a company registered in Gibraltar) has been subject to tax.

(76) The scope of this Decision (under section 7) is limited to the assessment of the passive interest and royalty income received or receivable between the entry into force of ITA 2010 (1 January 2011) and 30 June 2013 (as regards interest) or 31 December 2013 (as regards royalties) ([25]).

7.1. **Existence of aid**

(77) The classification of a national measure as State aid, within the meaning of Article 107(1) of the Treaty, requires the following conditions to be met. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition ([26]).

7.1.1. *State resources and imputability to the State*

(78) To constitute State aid, a measure must both be imputable to a Member State and financed through State resources.

([25]) Therefore the arguments put forward by the UK and the interested parties concerning other passive income or concerning a period after entry into force of the 2013 amendments are not addressed in this Decision.

([26]) See, inter alia, judgment of 21 December 2016, *Commission v World Duty Free Group and Others*, C-20/15 P and C-21/15 P, ECLI:EU:C:2016:981, paragraph 53.

(79) Since the exemption results from an Act of the Gibraltar Parliament, it can be regarded as imputable to Gibraltar.

(80) As regards the financing of the exemption 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 persons to whom it applies in a more favourable financial situation than other taxpayers constitutes State aid ([27]). The tax measure at issue results in Gibraltar waiving tax revenue that it would otherwise have been entitled to collect from companies resident in Gibraltar in receipt of passive interest or royalty income. By renouncing those revenues, the tax measure gives rise to a loss of State resources within the meaning of Article 107(1) of the Treaty ([28]).

7.1.2. *Advantage*

(81) According to the case-law of the Union Courts, the notion of aid embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking ([29]). An advantage may be granted through different types of reduction in a company's tax burden and, in particular, through a reduction in the applicable tax rate, taxable base or in the amount of tax due ([30]). A measure that entails a reduction of a tax gives rise to an advantage because it places the undertakings to which it applies in a more favourable financial position than other taxpayers and results in a loss of income to the State ([31]).

(82) In the case in hand, the measure contradicts the general principle that corporate income tax is collected from all taxable persons that receive income derived from or accruing in Gibraltar. In line with that principle, passive interest and royalty income should normally fall within the scope of taxation, subject to application of the territoriality principle. With regard to royalties, it must be noted that the territoriality principle deems royalty income received by a Gibraltar company to accrue in and be derived from Gibraltar. As for passive interest income, the chargeability of such income to tax under the territorial system depends on application of the 'situs of the loan' rule, which is based on four cumulative criteria ([32]) focusing on the source of the income. Accordingly, in a number of cases, foreign source passive interest income may, even in the absence of the contested tax exemption, not be subject to income tax in Gibraltar by virtue of the territorial system. However, relief from taxation under the territoriality principle is not automatic and criteria other than the source of the interest (e.g. the location of the security of the debt) need to be considered to determine if the interest accrued in or was derived from Gibraltar in accordance with the 'situs of the loan' rule.

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

7.1.3. *Selectivity*

(84) In order to be regarded as State aid within the meaning of Article 107(1) of the Treaty, a measure must be found to be selective in the sense that it favours certain undertakings or the production of certain goods.

([27]) 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.
([28]) See Case C-169/08 *Presidente del Consiglio dei Ministri* ECLI:EU:C:2009:709, paragraph 58.
([29]) Case C-143/99 *Adria-Wien Pipeline* ECLI:EU:C:2001:598, paragraph 38.
([30]) See 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; Case C-522/13 *Ministerio de Defensa and Navantia* ECLI:EU:C:2014:2262, paragraphs 21 to 31.
([31]) Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* ECLI:EU:C:2006:403, paragraph 30 and Case C-387/92 *Banco Exterior de España* ECLI:EU:C:1994:100, paragraph 14.
([32]) The assessment is based on the following cumulative criteria: (a) the place of residence of the debtor; (b) the source from which the interest is paid; (c) the place where the interest is paid; and (d) the nature and location of the security for the debt (if any).

(85) As a preliminary remark, with respect to the comments made by Spain on regional selectivity, it must be observed that, in the First Opening Decision, the Commission did not express doubts with regard to regional selectivity and considered that the reference framework for assessment of the exemption was confined exclusively to the geographical territory of Gibraltar ([33]). The Commission maintains its view that the passive interest and royalty income exemption does not involve regional selectivity. In particular, the three cumulative criteria of autonomy (institutional, procedural and financial autonomy), as devised by the Court of Justice in *Azores* ([34]) and *Union General de Trabajadores de la Rioja* ([35]), are fulfilled. Accordingly, the Gibraltar authorities are considered sufficiently autonomous from the United Kingdom central government and the reference framework therefore corresponds to the geographical limits of the territory of Gibraltar ([36]).

(86) For the purposes of establishing material selectivity, it is settled case-law that, as a first step, the common or normal tax regime applicable in the relevant tax jurisdiction must be identified ('the reference system'). Second, it must be determined whether a given measure differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If it does, the measure is then regarded as being *prima facie* selective ([37]). It then needs to be established, in the third step of the test, whether such *prima facie* selectivity is justified by the nature or the general scheme of the (reference) system ([38]). If a *prima facie* selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and will thus fall outside the scope of Article 107(1) of the Treaty.

(87) In this context, it is also important to note that for a tax measure to qualify as selective, the tax system does not need to be designed in such a way that companies benefiting from a selective advantage are, in general, subject to the same tax burden as other companies, but benefit from derogating rules, so that the selective advantage is the difference between the normal tax burden and that borne by these companies ([39]).

(88) Indeed, such an understanding of selectivity would mean that only a tax system designed according to a certain regulatory technique could qualify as selective, and that national tax rules that were designed differently would escape State aid control, even though they produced the same effects in law or in fact. That would go against well-established case-law, which provides that, when assessing selectivity, Article 107(1) of the Treaty does not distinguish between measures by reference to their causes or their aims, but instead defines them in relation to their effects, and thus, independently of the techniques used ([40]).

7.1.3.1. System of reference

(89) The reference system constitutes the benchmark against which the selectivity of a measure is assessed. It 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. Those rules define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of undertakings subject to it and the technicalities of the functioning of the system ([41]). In the case of taxes, the reference system is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates ([42]).

([33]) First Opening Decision, recitals 48 to 57.
([34]) Case C-88/03 Portugal v Commission, ECLI:EU:C:2006:511, paragraphs 57 et seq.
([35]) Cases C-428/06 to C-434/06, ECLI:EU:C:2008:488, paragraphs 47 et seq.
([36]) Such assessment of regional selectivity was confirmed by the General Court in Joined Cases T-211/04 and T-215/04, ECLI:EU:T:2008:595, paragraph 76 to 116. Although the judgment was appealed, the assessment of regional selectivity was not reviewed by the Court of Justice.
([37]) See Joined Cases C-20/15 P and C-21/15 P *Commission* v. *World Duty Free Group* ECLI:EU:C:2016:981, paragraph 57 and the case-law cited.
([38]) See Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 65.
([39]) Case C-106/09 P and C-107/09 P, *Commission & Spain/Government of Gibraltar & UK*, ECLI:EU:C:2011:732, paragraph 91; Case C-219/16 P, *Lowell Financial Services GmbH/Commission*, ECLI:EU:C:2018:508, paragraph 92.
([40]) Case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:757, paragraphs 85 and 89 and the case-law cited, and Case C-279/08 P *Commission v Netherlands (NOx)* ECLI:EU:C:2011:551, paragraph 51.
([41]) See Commission Notice on the Notion of State aid (OJ C 262, 19.7.2016, p. 1), paragraph 133.
([42]) Notice on the Notion of State Aid, paragraph 134.

(90) In the case in hand, the reference system is ITA 2010. The long title of that Act describes it as 'an Act to Impose Taxation on Income and to Regulate the Collection thereof' ([43]). With regard to the taxable basis for companies, section 16 of ITA 2010 provides that 'save as otherwise provided hereafter, the assessable profits or gains of a company shall be the full amount of the profits or gains of the company for any accounting period of that period'. As a result, subject to any adjustments up or down provided for in ITA 2010, accounting profits are to constitute the basis of assessment for the calculation of corporate income tax in Gibraltar.

(91) On the other hand, as the UK authorities pointed out ([44]), it is within the inherent logic of the territorial system of taxation in Gibraltar that all income, whether active or passive, with a source outside Gibraltar falls outside the scope of Gibraltar tax and remains subject to tax in the jurisdiction where the income accrued or is derived.

(92) To define the general Gibraltar corporate income tax system as the 'reference framework' is in line with the Court's case-law, which has consistently held that, in the case of measures concerning the determination of corporate income tax liability, the reference system to be considered is the corporate income tax system of the Member State in question that applies to undertakings in general, and not the specific provisions of that system applicable only to certain taxpayers or certain transactions. For instance, in *World Duty Free*, a case concerning the rules governing investments in shareholdings, the Court endorsed the Commission's position that the reference system was the Spanish corporate income tax system and not the specific rules governing the tax treatment of those investments ([45]).

(93) While the objective of ITA 2010 is to collect revenue from taxpayers taxable in Gibraltar (i.e. taxpayers receiving income derived from or accruing in Gibraltar) ([46]), Schedule 1 to that Act did not include within the categories of income taxable in Gibraltar certain categories of income ([47]). Accordingly, the passive interest and royalty income exemption did not follow from a formal derogation from the tax system, but rather from the non-inclusion of such income in the categories of income falling within the scope of the Gibraltar tax system (an implicit exemption).

7.1.3.2. Different tax treatment of companies in comparable situations

(94) In accordance with the territorial system of taxation generally applicable in Gibraltar ([48]), only income that is derived from or accrues in Gibraltar is subject to corporate income tax. ITA 2010, however, provided on entry into force for an automatic exemption from corporate income tax for passive interest-loan and royalty income, without consideration needing to be given to the elements which are generally relevant for determining the territorial scope of taxation in Gibraltar, in line with the territoriality principle. In this regard, it is particularly relevant to note that, in the absence of the exemption for royalty income, the territorial system of taxation would deem royalty income received by a Gibraltar company as always accruing in and derived from Gibraltar ([49]). As for passive interest, a case-by-case assessment of the territoriality principle would be needed in order to determine the location of the activities giving rise to the income and hence the existence or otherwise of a taxable income.

([43]) http://www.gibraltarlaws.gov.gi/articles/2010-21o.pdf, see p. 16

([44]) United Kingdom submission of 14 September 2012.

([45]) See in this sense Joined Cases C-20/15 P and C-21/15 P *Commission* v. *World Duty Free Group* ECLI:EU:C:2016:981, paragraph 92: '*[i]n the contested decisions, the Commission, in order to classify the measure at issue as a selective measure, relied on the fact that the tax advantage conferred by that measure did not indiscriminately benefit all economic operators who were objectively in a comparable situation, in the light of the objective pursued by the ordinary Spanish tax system, since resident undertakings acquiring shareholdings of the same kind in companies resident for tax purposes in Spain could not obtain that advantage*' (emphasis added by the Commission); in the same line, see paragraphs 22 and 68. In the same line, see also Case C-217/03 *Belgium and Forum 187 v. Commission* ECLI:EU:C:2005:266, paragraph 95; Case C-88/03 *Portugal v Commission* ECLI:EU:C:2006:511, paragraph 56; Case C-519/07 P *Commission v Koninklijke FrieslandCampina* ECLI:EU:C:2009:556, paragraphs 2 to 7; and Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 50. See also Notion of aid Notice, paragraph 134.

([46]) In their submission of 18 April 2013, the UK authorities confirmed that the reference system under ITA 2010 is the territorial system of taxation pursuant to which income accruing in or derived from Gibraltar is subject to tax in Gibraltar. They also indicated that this system applies to all companies in all sectors of industry, finance and commerce, and is universal in its application.

([47]) Before the entry into force of the amendments which brought inter-company loan interest and royalties into the scope of taxation, passive interest and royalty income was not included in any of the income types specified in Schedule 1 of ITA 2010 and therefore was not subject to taxation in Gibraltar.

([48]) Section 11(1) and 74 ITA 2010.

([49]) Submission from the UK authorities, 14 September 2012.

(95) In the First Opening Decision, the Commission found that the corporate income tax exemption for passive interest and royalty income, in differentiating between companies in a comparable legal and factual situation, should be considered *prima facie* selective in the light of the objective of ITA 2010, which is to tax income accruing in or derived from Gibraltar.

(96) The Commission further noted in the First Opening Decision that the exemption seemed to significantly favour a group of 529 companies that receive passive interest or royalty income, in particular interest from other companies of the same group or royalty income. The Commission also noted that the largest part of loan interest received by Gibraltar companies resulted from inter-company loans granted to foreign group entities ([50]).

(97) In a case such as this where the measure does not arise from a formal derogation from the tax system, the Commission is of the view that, in assessing selectivity, it is particularly relevant to consider the effects of the measure in order to assess whether the measure significantly favours a particular group of undertakings.

(98) With regard to royalties, the Commission's analysis of the effects of the measure ([51]) shows that it only benefited 10 companies (out of 8 003 active companies operating in Gibraltar), all being part of multinational groups. In addition, it appears that at least 8 of them belong to large multinationals operating worldwide. By contrast, no stand-alone company was in receipt of royalty income in Gibraltar.

(99) As regards interest, the information provided by the UK authorities shows that, of the total amount of inter-company loan interest income received by Gibraltar companies (GBP 1 400 million), 99,8 % derives from loans granted to foreign (group) companies. By contrast, only two Gibraltar companies, accounting for no more than GBP 3 256 834 in total (GBP 222 169 in terms of tax forgone) (corresponding to 0,2 % of the total amount of inter-company loans), benefited from domestic sourced interest.

(100) Those figures demonstrate that the measure significantly favoured companies belonging to multinational groups entrusted with certain functions (the granting of intra-group loans and/or the right to use intellectual property (IP) rights). In particular, the measure benefited (i) a small number of multinational companies, most of which are part of large multinational groups operating worldwide (in receipt of royalty income); and (ii) companies that are part of multinational groups and provide loans to foreign companies that are part of their group. In the light of the objective of ITA 2010 (namely taxing income accruing in or derived from Gibraltar), these companies are in a similar legal and factual situation to all other Gibraltar companies generating income accruing in or derived from Gibraltar (or carrying on activities requiring a licence under Gibraltar law, such as banking, insurance or gambling).

(101) The United Kingdom and the Gibraltar authorities consider that the exemption constitutes a general measure applied to all companies in a similar situation, regardless of the sector. They further point out that the fact that it is possible to identify some companies which benefit from a tax rule more than others does not make the rule selective *per se*. The rule would only be selective if it was inherently likely to benefit an identifiable category of companies. In the view of the UK and the Gibraltar authorities, that is not the case with the measure in hand as there are no other companies in a similar factual or legal situation in Gibraltar to which the exemption does not apply.

(102) The Commission considers that the United Kingdom's assertion that the measure *prima facie* applies to all companies, regardless of their sector or activity, is not relevant for the purposes of assessing selectivity. It is settled case-law that the fact that the number of undertakings able to claim entitlement under a national measure is large, or that those undertakings belong to various economic sectors, is not sufficient to call into question the selective nature of the measure ([52]).

([50]) See Commission Decision of 16 October 2013 in State Aid case SA.34914 (2013/C) (ex 2013/NN) — Gibraltar Corporate Income Tax Regime (OJ C 348, 18.11.2013, p. 189).

([51]) For the reasons outlined in section 8.3.1.2, the analysis of the companies in receipt of royalty income includes the five Gibraltar companies, which were granted tax rulings, as part of the 165 rulings falling within the scope of the extended procedure opened in October 2014 and benefited from royalties and interest income through their interest in Dutch partnerships.

([52]) See Joined Cases C-20/15 P and C-21/15 P, *World Duty Free Group*, paragraph 80.

(103) A measure that differentiates between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation is *a priori* selective. In the case in hand, it has been established that the exemption from corporate income tax for passive interest and royalty income mainly benefits multinational groups. As noted in recital 100, in the light of the objective of the reference tax system (ITA 2010), namely taxing income accruing in or derived from Gibraltar, multinational groups are in a similar legal and factual situation to all other Gibraltar companies generating income accruing in or derived from Gibraltar. Therefore, the exemption from corporate income tax for passive interest and royalty income is *prima facie* selective.

(104) In addition, it must be noted that the fact that the exemption benefits mainly multinational groups is not a random consequence of the regime ([53]). The exemption, in a small tax jurisdiction like Gibraltar, with no consideration given to the place where the R & D activities were performed, by definition offered more opportunities for international groups which, due to their international structure and size, are easily able to move intangibles and capital (and then to grant loans and/or the right to use intellectual property rights) within the group. Such findings sufficiently demonstrate that the measure was designed to attract or favour group companies and in particular multinational groups entrusted with certain activities (the granting of intra-group loans and/or the right to use IP rights). On that basis, the Commission concludes that the measure is *prima facie* selective as its effects, which significantly favoured a particular category of companies, are the inevitable consequence of the design of the measure.

7.1.3.3. Absence of justifications for the measure

(105) A measure which is *prima facie* selective can be justified by the nature or general scheme of the tax system, if it derives directly from its intrinsic basic or guiding principles or is the result of inherent mechanisms necessary for its functioning and effectiveness. This can be the case for the principle of neutrality, the objective of optimising the recovery of fiscal debts or administrative manageability.

(106) The UK authorities have argued that the exemption is the logical consequence of the territoriality principle, which is based on the aim of avoiding double taxation. In this respect, the Commission notes that the exemption for passive interest and royalty income introduced in ITA 2010 cannot be viewed as a mere application of the territoriality principle. In particular, as already explained in section 7.1.3.2, it must be noted that the territorial system of taxation deems royalty income received by a Gibraltar company to accrue in and be derived from Gibraltar. With regard to interest, a case-by-case assessment of the territoriality principle is needed in order to determine the location of the activities giving rise to the income and hence the existence or otherwise of a taxable income. Therefore, the exemption for passive interest and royalty income, as introduced in ITA 2010, cannot be considered as merely reflecting the application of the territoriality principle.

(107) Moreover, the argument that the application of the territoriality principle would rely on the need to prevent double taxation does not hold up as the (foreign) paying entity is generally allowed to deduct the interest or royalties for tax purposes ([54]). In addition, within the framework of Council Directive 2003/49/EC ([55]) (Interest and Royalties Directive) certain intra-group interest and royalty payments are exempt from withholding taxes (at the level of the foreign paying entity) on the basis of national rules transposing the before mentioned Directive 2003/49/EC into domestic law. Accordingly, in view of the limited risk of double taxation, a full and automatic exemption measure is disproportionate and the prevention of double taxation cannot be seen as an acceptable justification.

(108) Furthermore, in the context of the formal investigation, the UK authorities also argued that the passive interest and royalty income exemption is justified by reasons of administrative manageability, since the proceeds of the tax would not be sufficient to justify the administrative burden of enforcing taxation of passive interest and royalty income. They noted in this regard that foreign-sourced interest would be exempted in any event under the normal Gibraltar territoriality principle. As regards Gibraltar-sourced interest and royalties, they consider the tax exemption justified by the fact that the cost of collection would exceed expected revenues.

([53]) 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 106.

([54]) In certain situations, depending on the applicable tax rules, the deductibility of the interest or royalty payments may be limited at the level of the paying company as a result of interest limitation rules, transfer pricing rules or other anti-abuse rules.

([55]) Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, as lastly amended by Council Directive 2013/13/EU of 13 May 2013 (OJ L 157, 26.6.2003, p. 49).

(109) The Commission invited the UK authorities to demonstrate, with concrete elements, the assertion that the administrative cost of enforcing corporate income tax on passive interest and royalty income would outweigh any resulting proceeds. However, the UK authorities did not put forward any concrete elements to substantiate their claim. In the absence of any evidence, the Commission cannot accept the assertion that the passive interest and royalty income exemption is justified by reasons of administrative manageability.

7.1.3.4. Conclusion on selectivity

(110) In light of the considerations set out in this section, the Commission considers that the measure is selective as it significantly favours a particular set of companies belonging to multinational groups entrusted with certain functions (the granting of intra-group loans or the right to use IP rights), as compared with other companies that are in a similar factual and legal situation given the intrinsic objective of ITA 2010.

7.1.4. *Potential distortion of competition and effect on intra-Union trade*

(111) According to Article 107(1) of the Treaty, in order to constitute State aid, a measure must distort or threaten to distort competition, and it must affect intra-Union trade.

(112) In the course of the investigation, it was established that most of the companies that benefited from the passive interest and royalty income exemption form part of international groups of companies active in sectors in which intra-Union trade occurs ([56]).

(113) Even if the Gibraltar companies subject to the exemption were not involved in the trade directly, the Court of Justice has maintained that when aid is granted to an undertaking, thereby strengthening its position as compared with other companies engaged in intra-Union trade, the measure should be regarded as affecting trade and distorting competition ([57]).

(114) Furthermore, it must be noted that the corporate income tax exemption for passive interest and royalty income is not related to any specific investment and simply alleviates the beneficiaries from costs that they would normally have had to bear in their day-to day business. Therefore, if the exemption is found to involve State aid, it would involve operating aid. Operating aid is more likely to distort or threaten to distort competition as it does not address a particular market failure and is not limited in time.

(115) The United Kingdom and the Gibraltar authorities also argued that any aid resulting from the exemption for royalties would be *de minimis* and would fall outside the scope of State aid rules in accordance with Regulation (EU) No 1407/2013. In the context of the formal investigation, the UK authorities were invited to demonstrate that the conditions for the measure to be considered as *de minimis* and therefore as falling outside the scope of State aid rules would be met for all companies concerned. However, the information provided only concerned a handful of companies and the UK authorities did not substantiate their claim that the *de minimis* conditions would be met for all aid beneficiaries. Therefore, the Commission cannot accept the argument that the exemption would involve no aid on the ground that the advantage obtained would always be *de minimis*.

([56]) The UK submitted that the exemption applies generally to all sectors of industry, finance and commerce and does not favour any particular sector of the economy. In addition, with particular regard to the royalty exemption, Gibraltar indicated that the companies that were in receipt of royalties during the three year period when the non-chargeability to tax was in force were active in sectors as diverse as food retail, high street clothing, gaming and insurance. Such sectors are liberalised sectors subject to competition and involve intra-Union trade. Publicly available information in relation to the beneficiaries of the royalty exemption also shows that the benefiting companies are part of groups active on Union markets.

([57]) Case C-518/13 *Eventech v The Parking Adjudicator* ECLI:EU:C:2015:9, paragraph 66; Joint Cases C-197/11 and C-203/11 *Libert and others*, ECLI:EU:C:2013:288, paragraph 77; and C-128/16 P *Commission v Lico Leasing SA and others*, ECLI:EU:C:2018:591, paragraph 84.

(116) Consequently, the Commission considers that the measure distorts or threatens to distort competition and that it affects intra-Union trade.

7.1.5. *Conclusion on the existence of State aid*

(117) Since all the conditions laid down in Article 107(1) of the Treaty are met, the Commission therefore concludes that the passive interest and royalty income exemption scheme, as it existed before entry into force of the relevant amendments made in 2013, constitutes State aid within the meaning of that Article.

7.2. **New aid character of the measure**

(118) According to Article 1(c) of the Procedural Regulation, 'new aid' means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid. 'Existing aid' refers to authorised aid or aid which is deemed to have been authorised as provided for in Article 1(d) of the Procedural Regulation.

(119) The United Kingdom authorities and Gibraltar assert that if the exemption for foreign-source interest constitutes State aid, it would be existing aid as the status of such interest under the exemption has remained the same *de facto* as under the previous 1952 legislation (as a result of the territoriality principle).

(120) In that regard, the Commission notes that, under the territorial system of taxation, a case-by-case assessment of the interest income would need to be performed in order to determine whether there was any taxable income. This would not lead to automatic exemption of the relevant income. Therefore, the exemption for passive interest income (before 1 July 2013), as introduced under ITA 2010, substantially differs from the tax treatment of passive interest income before ITA 2010 and cannot be considered as having the same effect as application of the territoriality principle had.

(121) In addition, should the territoriality principle result effectively in the exemption of foreign-source interest, that would not be sufficient to establish the 'existing aid' nature of the measure since the previous exemption was not limited to foreign-source interest income (it covered both foreign and domestic sourced interest). Any possible justification for the exemption (and its conformity with the territoriality principle) must be based on reasoning that is applicable to all interest income, not on a specific part (foreign-source interest) of it only.

7.3. **Compatibility of the aid with the internal market**

(122) State aid is deemed to be compatible with the internal market if it falls within any of the categories listed in Article 107(2) of the Treaty ([58]) and it may be considered to be compatible with the internal market if it falls within any of the categories listed in Article 107(3) of the Treaty ([59]). However, 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) of the Treaty ([60]).

(123) The Commission notes that the UK authorities have not provided any arguments as to why the corporate income tax exemption for passive interest and royalty income should be considered compatible with the internal market. In particular, the United Kingdom did not comment on the doubts expressed in the First Opening Decision as regards the compatibility of the measure.

([58]) The exceptions provided for in Article 107(2) of the Treaty 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.

([59]) The exceptions provided for in Article 107(3) of the Treaty 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.

([60]) Case T-68/03 *Olympiaki Aeroporia Ypiresies v Commission* ECLI:EU:T:2007:253, paragraph 34.

(124) The Commission itself has not identified any possible grounds for compatibility and it considers that none of the exceptions listed in Article 107(2) or (3) of the Treaty applies, since the measure does not appear to be aiming to achieve any of the objectives listed in those provisions. Moreover, as the corporate income tax exemption for passive interest and royalty income is not related to any specific investment and simply alleviates the beneficiaries from costs that they would normally have to bear in their day-to day business, it is considered to involve operating aid. As a general rule, such aid can normally not be considered compatible with the internal market under Article 107(3) of the Treaty in that it does not facilitate the development of certain activities or of certain economic areas. Furthermore, the tax advantages in this case are not limited in time, declining or proportionate to what is necessary to remedy a specific market failure or to fulfil any objective of general interest in the areas concerned. Consequently, the measure cannot be considered compatible with the internal market in accordance with Article 107(2) or (3) of the Treaty.

8. ASSESSMENT OF THE TAX RULING PRACTICE IN GIBRALTAR

(125) As a preliminary matter, it should be recalled that 'in the absence of EU rules governing the matter, it falls within the competence of the Member States or of infra-State bodies having fiscal autonomy to designate the bases of assessment and to spread the tax burden across the various sectors of production and economic sectors' ([61]). At the same time, in line with well-established case-law, 'the exercise of reserved powers cannot permit the unilateral adoption of measures prohibited by the Treaty' ([62]).

(126) In particular, the Commission does not call into question the granting of tax rulings by the tax administrations of the Member States. It recognises the importance of advance rulings as a tool to provide legal certainty to taxpayers. Provided they do not grant a selective advantage to specific economic operators, tax rulings do not raise issues under Union State aid law ([63]).

(127) However, where a tax ruling endorses a result that does not reflect in a reliable manner what would result from a normal application of the ordinary tax system, that ruling may confer a selective advantage upon the addressee, in so far as that selective treatment results in lowering that addressee's tax liability in the Member State as compared with other companies in a similar factual and legal situation ([64]).

8.1. **Introduction**

(128) In the 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 ([65]).

(129) As a preliminary view, the Commission considered that, by granting such tax rulings only to certain multinational companies as opposed to other, purely domestic companies that do not ask for a tax ruling, the tax authorities treated companies that were in a similar legal and factual situation differently. Accordingly, the measures were considered to be *prima facie* selective. Further, the Commission did not identify any acceptable justification resulting from the nature or the general scheme of ITA 2010.

([61]) See Joined Cases C-236/16 and C-237/16, *ANGED v. Disputacion de Aragon*, ECLI:EU:C:2018:291, paragraph 38, Joined Cases C-106/09 P and C-107/09 P, *Commission v. Government of Gibraltar*, ECLI:EU:C:2011:732, paragraph 97.

([62]) See Joined Cases 6/69 and 11/69, *Commission v. France*, ECLI:EU:C:1969:68, paragraph 17 and Case 173/73, *Italy v. Commission*, ECLI:EU:C:1974:71, paragraph 13. See also Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 ASBL v. Commission*, ECLI:EU:C:2006:416, para. 81; Joined Cases C-106/09 P and C-107/09 P, *Commission v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732; Case C-417/10 *3M Italia*, ECLI:EU:C:2012:184, para. 25, and Order in Case C-529/10, *Safilo*, ECLI:EU:C:2012:188, para. 18; See also Case T-538/11, *Belgium v. Commission*, ECLI:EU:T:2015:188, para. 66.

([63]) See DG Competition Internal Working Paper on State aid and Tax Rulings, paragraph 5, http://ec.europa.eu/competition/state_aid/legislation/working_paper_tax_rulings.pdf

([64]) See Commission Notice on the notion of State aid ('Notion of aid Notice') (OJ C 262, 19.7.2016, p. 1), paragraph 170.

([65]) Those doubts are set out in detail in recital 32 of the said Decision.

(130) As part of the formal investigation, the Commission analysed the relevant documentation provided by the UK authorities in relation to the 165 rulings 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 Commission included the following:

(1) the 165 rulings themselves and the applications for those rulings;

(2) *ex post* audit reports performed by the Gibraltar authorities in 2015 with respect to all beneficiaries of the 165 rulings. Such audits (or reviews) were carried out with a view to assessing whether any of the provisions of ITA 2010 had been wrongly applied. The audit reports include background information on the companies concerned and on their activities, as well as possible changes in their organisation, activities and functions that had occurred since the ruling was granted, and also some factual information on the activities of the companies and a legal assessment of whether the companies and/or activities were taxable in accordance with ITA 2010. The main issue assessed by the audits was whether any income derived from the activities met the conditions for being considered to accrue in or be derived from Gibraltar. The audits relied on extensive searches of all documents filed by the audited companies, replies to questionnaires, site visits and meetings with the companies or their representatives. More detailed financial information regarding 25 companies, including financial accounts and, for some of them, copies of their tax returns were even provided;

(3) factual information on all 165 companies for the purposes of assessing whether the allegation that such companies do not carry on activities in Gibraltar is sufficiently substantiated, including information on the number of staff and directors, personal expenses, amortisation costs, other operating expenses related to Gibraltar operations and operating expenses not related to Gibraltar activities.

(131) Analysis of that information allowed the Commission to assess whether the relevant companies generated income taxable in Gibraltar in accordance with the territorial system of taxation and/or whether any tax ruling had been granted or implemented in a manner that was inconsistent with the applicable tax provisions.

8.2. **The unproblematic tax rulings**

(132) In the vast majority of cases (160 out of the 165 rulings under investigation), that analysis did not show that the rulings had been granted in a manner that was inconsistent with the applicable general tax rules. In most cases, the income generated by the companies in question did not meet the territorial requirements to be taxable in Gibraltar. In particular, the audit reports and the other documents provided by the UK authorities showed that the Gibraltar activities of the companies were limited and in general could not lead the tax authorities to conclude that income-generating activities had effectively taken place in Gibraltar. In other words, there was sufficient evidence that the activities that gave rise to the profits, did not take place in Gibraltar. Several rulings confirmed the non-taxation of passive interest, royalties and/or dividends which was consistent with the applicable tax provisions, since, at the time the tax rulings were granted, the applicable tax provisions did not provide for the taxation of royalties and passive interest income. As shown in recitals 145 to 147, appropriate justifications have been provided in relation to the other cases. The above conclusions are illustrated by the following examples, which reflect the various categories of business activity (covered by the 165 tax rulings) identified in the Decision to Extend Proceedings ([66]).

(133) The first example relates to a ruling granted to a company providing management and consultancy services to hotels and casinos in Africa. The audit report concluded that the services were provided in Africa through staff employed by the company in Africa. The audit showed that the company carried on no trade activities in or from Gibraltar. The company's activity in Gibraltar was limited to basic administrative support provided by one single staff member in the role of an administrative secretary, without any significant activity being performed in Gibraltar. Such basic secretarial duties were not found to be income-generating activities in Gibraltar. This was corroborated by a site visit to the company's premises in Gibraltar, which were found to consist of an office facility exclusively laid out for hosting board meetings. Surveillance of the premises on other days by the tax

([66]) See in particular recital 53 of the Decision to Extend Proceedings.

authorities showed that the premises were not used for any other purposes. On that basis, the report concluded that the company was outside the scope of taxation in Gibraltar on account of the fact that no income accrued in or was derived from Gibraltar (as the company carried on no income-generating activities in Gibraltar).

(134) In the second example, a ruling was granted to a company providing shipping brokerage services to customers on behalf of ship-owners. The audit confirmed that the services were performed in or from the group's various locations within London, Singapore, Australia or Monaco, without any income-generating activities taking place in Gibraltar. The audit did not find any evidence to indicate that the company had engaged in any activity in Gibraltar. On that basis, the audit report considered that the company did not have a presence or permanent establishment in Gibraltar other than its server. Accordingly, it concluded that the company was outside the scope of taxation in Gibraltar on account of the fact that no income accrued in or was derived from Gibraltar (as the company carried on no income-generating activities in Gibraltar).

(135) The third example relates to a ruling granted to a company providing administrative and support services to a related Luxembourg company. The services were carried on by two of its Gibraltar resident directors. The company also held loans granted to various group companies located mainly in the Netherlands. The security and collateral for those loans was held outside Gibraltar ([67]). The investigative review carried out in 2015 concluded that the company had a physical presence in Gibraltar by virtue of the professional management services carried on by its resident directors, who make management decisions. Until 30 June 2013, the company was taxed on income resulting from administrative and support services only, as the inter-company loan interest was not taxable in Gibraltar ([68]) (in line with the passive interest exemption under ITA 2010). Since 1 July 2013, the company has been chargeable to tax on interest income too (Class 1A, Table C of Schedule 1 to ITA 2010) as a result of the amendment which brought inter-company loan interest into the scope of taxation under ITA 2010. The company has been fully regularised for all taxation purposes in Gibraltar since 1 July 2013.

(136) By way of a fourth example, a ruling was granted to a company which, under a joint venture agreement, contracted with third parties established outside Gibraltar for the provision of advertising, marketing and promotional services in relation to remote gaming activities, including recognition and development of the brand. The company received a share of the revenues generated from the operation of the remote gaming business carried on in Malta by the counterparty to the joint venture agreement. The review, which included a site visit and a roving investigation undertaken by the Gibraltar tax officials within Gibraltar's financial business, banking and office accommodation sectors within Gibraltar, showed that the company did not have a physical presence or a permanent establishment in Gibraltar and that its corporate directors did not perform income-generating activities in or from Gibraltar. The report concluded that the company was outside the scope of taxation on account of the fact that no income accrued in or was derived from Gibraltar. The ruling was revoked by the Gibraltar tax authorities on 17 July 2015 since the company's representatives confirmed at the site meeting that they no longer had a relationship with the company.

(137) In the fifth example, a ruling was granted to a company active in the procurement of petroleum products directly from refineries in Asia and in the subsequent storage, transportation and delivery of those products from the company's storage terminals located within Asia to customers in Italy, Greece, Israel and Turkey. The review showed that the company had no physical presence or permanent establishment in Gibraltar and that its sole director had not performed income-generating activities in or from Gibraltar. The review also found that, as shown by the website of the group of which the company was a part, the trading activity was carried on in various geographical locations through offices located in Hong Kong, the United Kingdom, Dubai, Oman and Afghanistan. On that basis, the review concluded that the company was outside the scope of taxation under section 11 of ITA 2010 on account of the fact that no income accrued in or was derived from Gibraltar.

(138) In the sixth example, a ruling was granted to a company carrying on a trade in non-pharmaceutical medical and health related products from South Korea to Germany. The audit showed that the management and commercial decisions were outsourced to a person resident in Namibia. The audit also showed that the company's sole director residing in Gibraltar provided general consultancy services to the company and was not actively involved in the day-to-day trading activities undertaken by the company. No physical presence in Gibraltar could be

([67]) The source of the income and the location of the security are of particular relevance for determining whether interest income accrues in or derives from Gibraltar (application of the 'situs of the loan' rule).

([68]) In the absence of the exemption of passive interest income under ITA 2010, the income would have been subject to the territoriality principle and therefore the 'situs of the loan' rule. Given the foreign source of the interest and the location of the security of the loan, most likely the interest income would have been considered to accrue in or derive from outside Gibraltar.

identified on the basis of a site visit, a meeting with the company, responses to additional written questions and systematic checks carried out on the web. The investigative review considered that the company did not render a service in or from Gibraltar and therefore concluded that the company had no sources of income accruing in or derived from Gibraltar.

(139) In the seventh example, the company engaged in the operation of internet games via a website. The company's income comprised charges received from end-users for non-basic features and rights, commissions received from betting trading under licence to third party providers and the sale of games-related products. Analysis of the available information showed that, until 1 January 2014, all activities were carried on outside Gibraltar. In particular, software development was performed by the company's subsidiary in another Member State, while the host server was located in Switzerland. The customer service function was carried out by three freelance individuals in another Member State and in a third country. The subscription fees were processed in the Netherlands. In this context, the investigative review considered that the company was not taxable on income generated until 1 January 2014 ([69]). Since 2 January 2014, the business has had a physical presence in Gibraltar, and it has income that accrues in and is derived from Gibraltar, it files full and complete returns of its income and is fully regularised for all taxation purposes in Gibraltar. The tax ruling was revoked in January 2014.

(140) In the eighth example, the audit confirmed that the company carried on a trade in agricultural chemicals from Hungary, Belgium and Israel to customers in the Former Yugoslav Republic of Macedonia, Bosnia and Herzegovina, and Slovakia. After examination of all the documents filed by the company as well as additional information provided by the company in writing and in the context of a meeting with the company's representatives (and on the basis of other investigative functions), the audit found that no income-generating activities took place in Gibraltar (in the absence of any services rendered in or from Gibraltar or any activity performed in or from Gibraltar) and it therefore concluded that the company was outside the scope of taxation under section 11 of ITA 2010.

(141) The ninth and final example relates to a ruling granted to a company chartering a luxury yacht (registered in the UK) in the British Virgin Islands. The business had a website which showed that the chartering was carried on in the Caribbean. The Gibraltar tax authorities' review showed that the company carried on no trade in Gibraltar and had no physical presence or permanent establishment in Gibraltar. It therefore concluded that there were no income-generating activities that rendered the company chargeable to tax under the territoriality principle. The ruling lapsed in October 2015 as the company had been struck off the Company Register by the Registrar of Companies in Gibraltar.

(142) These nine examples are only illustrative. The Commission assessed the information and documents available in relation to all 160 rulings to make sure that the rulings were granted in conformity with the applicable tax rules in Gibraltar and that the activities carried on by the companies in question fairly reflected the activities described in the request for a ruling.

(143) Out of those 160 tax rulings, 98 actually related to the territoriality principle (and the reviews made by the Gibraltar tax authorities found that no income-generating activities were carried on in Gibraltar). Accordingly, the revenues generated by the companies concerned did not in any event fall within the scope of the territorial system of taxation in Gibraltar.

(144) In 34 cases, the addressees were in receipt of passive interest, royalties and/or dividends ([70]) and it appears that either their situations were regularised or their activities ceased after the 2013 amendments. However, to the extent the tax treatment of these companies is the result of the implementation of the aid scheme examined in section 7 of this Decision, the Commission refers to that section. Accordingly, any aid granted on the basis of these rulings (during the period preceding entry into force of the 2013 amendments) is treated in the operational part of this Decision as being part of the aid scheme identified in section 7.

([69]) United Kingdom submission of 21.2.2018.

([70]) Rulings related to the taxation of such income potentially fall within the scope of the investigation procedure in relation to the passive interest and royalty income exemption (in particular with regard to passive interest and royalty income generated before 1 July 2013 and 1 January 2014 respectively) and any tax forgone as a result of the exemption for such income may be subject to recovery in accordance with section 10 of this Decision. These 34 rulings are referred to in the Annex as rulings No 7, 33, 35, 45, 47, 57, 58, 81, 82, 86, 89, 95, 100, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 120, 121, 122, 123, 126, 127, 128, 129, 130, 131 and 158.

(145) In 19 cases, either the company was not incorporated, or the activities described in the tax ruling requests did not materialise, or the company was dormant. There was therefore nothing to tax in those cases and, regardless of the position taken by the tax authorities, the rulings could not involve the granting of any advantage to the companies concerned.

(146) In four other cases, the rulings concluded that the relevant income accrued in and was derived from Gibraltar and was therefore taxable in accordance with section 11 of ITA 2010. In this regard, it is relevant to note that, in such cases, the audit reports by the Gibraltar tax authorities stressed that the tax rulings had been revoked as a result of legislative or material changes. It also appears that the revocations were not the result of the audits performed in 2015 but of earlier examinations, e.g. when the 2013 amendments in relation to interest and royalty income came into force. In other words, in these four cases, the relevant companies were liable to tax on their income accruing in or derived from Gibraltar.

(147) The remaining five rulings relate to personal income tax issues such as the taxation of employees. Those rulings do not affect the level of taxation of the relevant companies and therefore do not fall within the scope of corporate income taxation.

(148) The table in the Annex provides an overview of the Commission's findings in relation to the 160 unproblematic tax rulings, with reference to the categories described in this section. It shows that no case has been found where any of the rulings were inconsistent with the normal application of the Gibraltar tax system ([71]).

(149) As a result, even if it had been found that the Gibraltar authorities had issued the 160 tax rulings without following any designated procedure or without conducting any substantive analysis at the time the rulings were granted, it would have had no impact in practice and would not have resulted in the granting of any advantage since the activities (or absence of activities) of the companies concerned did not generate income liable to tax in accordance with the Gibraltar income tax rules ([72]).

(150) Accordingly, after having carefully examined the evidence provided by the UK authorities, the Commission has come to the conclusion that the 160 tax rulings reflected in a reliable manner what would have resulted from a normal application of the ordinary Gibraltar tax system, without involving any misapplication of the law or other indication of existence of State aid. It follows that the granting and implementation of such rulings does not raise any State aid issues ([73]).

8.3. **The contested tax rulings**

(151) The Commission investigation has shown that five rulings granted to Gibraltar corporate partners of Dutch limited partnerships (*Commanditaire vennootschap* or 'CV') did raise issues with regard to State aid rules.

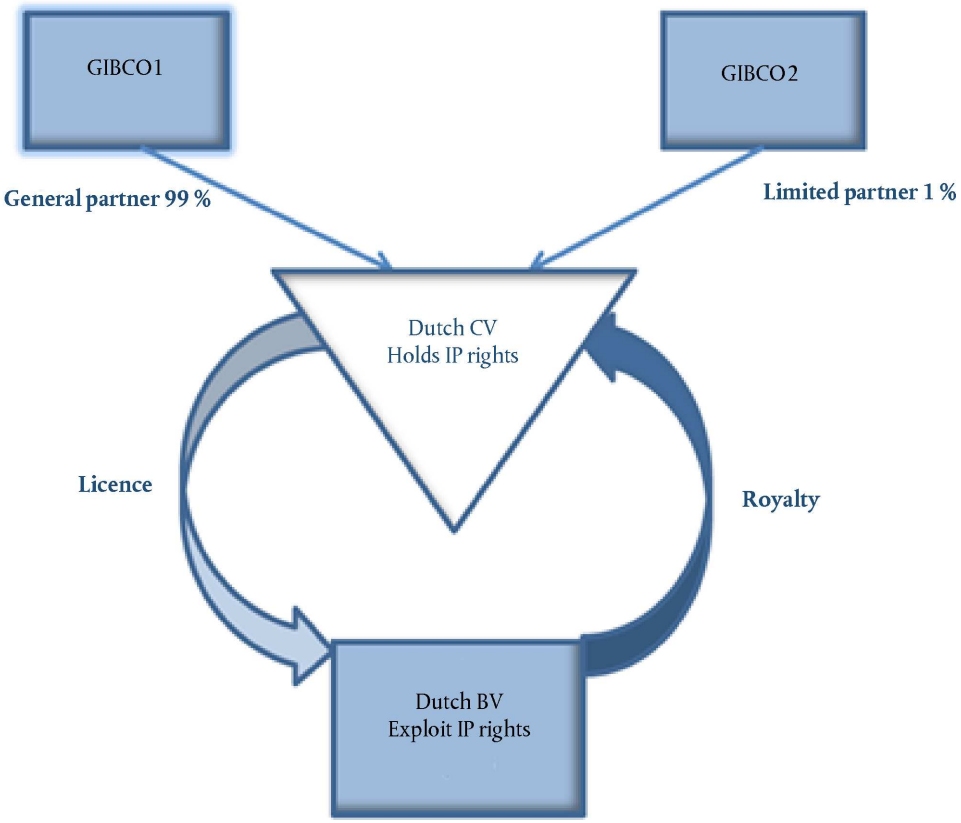
(152) The relevant rulings were granted in 2011 or 2012 and confirmed that royalties (and passive interest income to a lesser extent) generated at the level of the Dutch CVs was not taxable under ITA 2010. Those rulings remained in effect and were not revoked by the tax authorities either as a result of the amendments to ITA 2010 in 2013 that brought interest and royalties into the scope of taxation, or as a result of the audits carried out in 2015.

([71]) In accordance with recital 144, this is without prejudice to any aid granted in relation to the 34 rulings involving passive income as a result of the implementation of the aid scheme examined in section 7 of this Decision.

([72]) In accordance with recital 144, this is without prejudice to any aid granted in relation to the 34 rulings involving passive income as a result of the implementation of the aid scheme examined in section 7 of this Decision.

([73]) In accordance with recital 144, this is without prejudice to any granted aid in relation to the 34 rulings involving passive income as a result of the implementation of the aid scheme examined in section 7 of this Decision.

(153) The situations referred to in the requests for ruling typically involved the following structure:



(154) 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 ([74]). 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 are Dutch resident persons or companies.

(155) As to the tax treatment in Gibraltar, it appears from the UK submissions that, in the absence of specific rules in ITA 2010, Gibraltar applies common law principles and therefore considers Dutch CVs as transparent entities in accordance with the rules and case-law applicable in the UK ([75]). The relevant share of any income received by the CVs will therefore be deemed to be received directly by the Gibraltar companies with an interest in the Dutch CV.

(156) In the absence of any bilateral tax convention between Gibraltar and the Netherlands, chargeability to tax in Gibraltar would in principle depend on whether the share of the relevant income generated by the Dutch CV fell within the scope of taxation under ITA 2010. As passive interest and royalty income was not subject to tax until June 2013 (in the case of passive interest) and January 2014 (in the case of royalty income), any such income received by the Dutch CV was not taxable at the level of the Gibraltar partners. By contrast, following the amendments to ITA 2010 which subjected royalty and passive interest income to tax irrespective of its source (Class 1A and 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) and passive interest (received as from 1 July 2013) as taxable income at the level of the Gibraltar partners ([76]).

([74]) 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).

([75]) 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

([76]) With respect to passive interest income, this would apply only to the extent the interest received or receivable from any one company is GBP 100 000 or more.

(157) In their submission of 21 February 2018, the UK authorities confirmed that the Gibraltar Income Tax Office views Dutch CVs as tax transparent entities. However, they concluded that no taxation arises in Gibraltar since there is no specific provision in ITA 2010 that defines and prescribes how the Gibraltar partner should be taxed. The reason for this is 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.

(158) The Commission fails to understand the reasoning of the United Kingdom and the Gibraltar tax authorities for the following reasons. First, the relevant question is not whether Dutch CVs should be taxed in Gibraltar or not, but whether the corporate partners (resident in Gibraltar) of such CVs should be taxed on their share of the income generated by such CVs. Since CVs are considered transparent for tax purposes in Gibraltar (under common law principles), the corporate partners resident in Gibraltar should be taxed on their share of the CVs' income to the extent that the income falls within the scope of taxation under ITA 2010 (for interest income, that would be the case since 1 July 2013 and for royalties, since 1 January 2014) ([77]). The Commission expressed doubts on the reasoning put forward by the United Kingdom but did not receive any convincing arguments supporting its reasoning.

(159) Second, even if the definition of a 'person' in section 74 were relevant for the cases in hand (in the Commission's view, this is the case for the relevant Gibraltar companies with interest in Dutch CVs only, not for the Dutch CVs as such), it must be noted that the definition in section 74 ([78]) is very generic and sufficiently broad to include a Dutch CV.

(160) The beneficiaries of the five contested tax rulings are as follows:

(1) MJN Holdings (Gibraltar) Limited (ruling No 144, granted on 11 September 2012);

(2) Heidrick & Struggles (Gibraltar) Holdings Limited ([79]) (ruling No 83, granted on 2 June 2011);

(3) Heidrick & Struggles (Gibraltar) Limited ([80]) (ruling No 84, granted on 2 June 2011);

(4) Ash (Gibraltar) One Limited (ruling No 139, granted on 8 May 2012);

(5) Ash (Gibraltar) Two Limited (ruling No 140, granted on 8 May 2012).

(161) The amount of profits made at the level of the CVs and the relevant shares of those profits assessable at the level of those five beneficiaries (in accordance with their respective interests in the CVs) for the period 2014-2016 ([81]) are as follows ([82]):

Gibraltar company	Interest in C.V. (%)	2014		2015		2016	
		Profit of the CV (interest and royalties) (USD)	Proportion of CV's profit (Profit × interest %) (USD)	Profit of the CV (interest and royalties) (USD)	Proportion of CV's profit (Profit × interest %) (USD)	Profit of the CV (interest and royalties)	Proportion of CV's profit (Profit × interest %)
MJN Holdings (Gibraltar) Ltd	99,99	330 819 000,00	330 785 918,10	254 354 000,00	254 328 564,60	232 398 464,00 USD	232 375 224,15 USD

([77]) 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.

([78]) 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'.

([79]) Referred to as 'prospective company' in the Decision to Extend Proceedings.

([80]) Referred to as 'prospective company' in the Decision to Extend Proceedings.

([81]) The amounts of profits made by the relevant CVs for the fiscal years 2012, 2013 and 2017 are not known.

([82]) The annual accounts of the relevant CVs are denominated in USD. The accounting period for MJN Holdings (Gibraltar) Ltd, Heidrick & Struggles (Gibraltar) Holdings Ltd and Heidrick & Struggles (Gibraltar) Ltd ends on 31 December. By contrast, the accounting period for Ash (Gibraltar) One Ltd and Ash (Gibraltar) Two Ltd ends on 30 September.

Gibraltar company	Interest in C.V. (%)	2014		2015		2016	
		Profit of the CV (interest and royalties) (USD)	Proportion of CV's profit (Profit × interest %) (USD)	Profit of the CV (interest and royalties) (USD)	Proportion of CV's profit (Profit × interest %) (USD)	Profit of the CV (interest and royalties)	Proportion of CV's profit (Profit × interest %)
Heidrick & Struggles (Gibraltar) Holdings Ltd	95,00	1 290 000,00	1 225 500,00	586 000,00	556 700,00	25 682 000,00 USD	24 397 900,00 USD
Heidrick & Struggles (Gibraltar) Ltd	5,00	1 290 000,00	64 500,00	586 000,00	29 300,00	25 682 000,00 USD	1 284 100,00 USD
Ash (Gibraltar) One Ltd	98,79	– 3 053 497,00	– 3 016 549,69	3 860 930,00	3 814 212,75	1 785 671,00 EUR	– 1 764 064,38 EUR
Ash (Gibraltar) Two Ltd	1,21	– 3 053 497,00	– 36 947,31	3 860 930,00	46 717,25	1 785 671,00 EUR	– 21 606,62 EUR

(162) The relevant shares of the profit amounts referred to in the above table should have been incorporated in the assessable basis of the five Gibraltar companies and taxed in accordance with the normal Gibraltar tax rules.

8.3.1. *Existence of aid*

8.3.1.1. Conditions for assessing State aid

(163) As already outlined in recital 77, for a measure to be categorised as State aid, there must, first, be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on an undertaking and, fourth, it must distort or threaten to distort competition ([83]).

(164) As regards intervention by the State or through State resources, the contested tax rulings were issued by the Gibraltar tax authorities, which are part of the Government of Gibraltar. The tax rulings amounted to an acceptance by those authorities of a particular tax treatment. On the basis of those rulings, the beneficiaries of the rulings have determined their corporate income tax liability in Gibraltar (for each tax year). Where the beneficiary was required to submit a tax return ([84]), the tax ruling has subsequently been used by the beneficiary to fill in its returns and these returns have been accepted by the Gibraltar tax authorities as corresponding to the beneficiary's corporate income tax liability in Gibraltar. Where there was no requirement to file a tax return because of the absence of assessable income as a result of the ruling, no tax liability arose either. Any tax advantage granted on the basis of the contested tax rulings is therefore imputable to Gibraltar.

(165) As regards the financing of the measures 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 ([85]). In this case, the contested tax rulings confirm that the relevant share of the royalty and interest income generated by the Dutch partnerships is not taxable at the level of the Gibraltar resident companies with interests in those partnerships. Therefore, the tax treatment granted on the basis of the contested tax rulings can be said to reduce the corporate income tax liability in Gibraltar of the beneficiaries of

([83]) See Case C-399/08 P *Commission v Deutsche Post* ECLI:EU:C:2010:481, paragraph 39 and the case-law cited therein.
([84]) 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.
([85]) 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.

those rulings and hence to give rise to a loss of State resources. That is because any exemption granted as a result of the contested tax rulings results in a loss of tax revenue that would otherwise have been available to Gibraltar in the absence of the exemption ([86]). Therefore, the measures are financed through State resources.

(166) As regards the need for an effect on trade, the five companies benefiting from the contested tax rulings are part of multinational groups operating on various markets in several Member States, so any aid in their favour is liable to affect intra-Union trade. In the same vein, by providing favourable tax treatment to the relevant multinational group companies, Gibraltar has potentially drawn investment away from Member States that cannot or will not offer a similarly favourable tax treatment. Since the contested tax rulings strengthen the competitive position of the beneficiaries as compared with other undertakings competing in intra-Union trade, they must be considered as being liable to affect such trade ([87]).

(167) Similarly, as regards the need for distortion on competition, 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 ([88]).

(168) The UK authorities argue that there is no evidence that any of the tax rulings distorted competition. In their view, a measure can distort competition only in the sector in which it applies, or in some closely related sector. Such a distortion is not obvious from the Decision to Extend Proceedings as the tax rulings apply in a large number of different sectors.

(169) The investigation has shown that the beneficiaries of the five contested tax rulings are all active in global markets such as paediatric nutrition, executive search, chemical products for consumers and industrial applications, in both several Member States and in third countries. These are all markets in which those beneficiaries face competition from other undertakings. The tax treatment granted on the basis of the contested tax rulings relieves the beneficiaries of a tax liability that they would have otherwise been obliged to bear in their day-to-day management of normal activities. Therefore, the aid granted on the basis of the tax rulings should be considered to distort or threaten to distort competition by strengthening the financial position of the beneficiaries in the markets in which they operate. By relieving them of a tax liability they would otherwise have had to bear, and which competing undertakings have to bear, the tax treatment granted on the basis of the contested tax rulings frees up resources which the companies could use, for instance, to invest in their business operations, to undertake further investments or to improve the remuneration of shareholders, thereby distorting competition on the markets where they operate. Therefore, the fourth condition for a finding of State aid is also fulfilled in this case.

8.3.1.2. Selective advantage

(170) As regards the third condition — the existence of a selective advantage — it must be recalled that the function of a tax ruling is to confirm in advance the way the ordinary tax system applies to a particular case given its specific facts and circumstances. However, like any other tax measure, the tax treatment granted on the basis of a tax ruling must respect State aid rules. As already explained in recital 127, where a tax ruling endorses a tax treatment that does not reflect what would result from a normal application of the ordinary tax system, without justification, the measure confers a selective advantage on its beneficiary insofar as that tax treatment improves the financial position of that undertaking in the Member State as compared with other undertakings in a comparable factual and legal situation, having regard to the objective of the tax system.

(171) Whenever a measure adopted by a State improves the net financial position of an undertaking, an advantage is present for the purposes of Article 107(1) of the Treaty ([89]). In establishing the existence of an advantage, regard must be had to the effect of the measure itself ([90]). In the case of fiscal measures, an advantage may be granted through different types of reduction of an undertaking's tax burden and, in particular, through a reduction in the taxable base or in the amount of tax due ([91]).

([86]) 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.
([87]) Case C-126/01 *GEMO SA* ECLI:EU:C:2003:622, paragraph 41 and the case-law cited.
([88]) 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.
([89]) See 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 ('Notion of aid Notice') (OJ C 262, 19.7.2016, p. 1), paragraph 67 and the case-law cited.
([90]) Case 173/73 *Italy v. Commission* ECLI:EU:C:1974:71, paragraph 13.
([91]) See 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; Case C-522/13 *Ministerio de Defensa and Navantia* ECLI:EU:C:2014:2262, paragraphs 21 to 31.

(172) The contested tax rulings granted in 2011 or 2012 confirmed that the royalty and passive interest income received by the Gibraltar companies through their interests in the relevant CVs is not taxable under ITA 2010. That tax treatment determined their corporate income tax liability in Gibraltar during the period covered by the contested tax rulings ([92]) and was thus able to provide a selective advantage.

(173) Article 107(1) of the Treaty only prohibits aid 'favouring certain undertakings or the production of certain goods', that is to say, it prohibits measures conferring a selective advantage ([93]). As mentioned in recital 86, in order to assess selectivity, it is necessary to establish the reference framework and a derogation from it that is not justified by logic of the tax system.

(174) Therefore, analysis of the existence of a selective advantage must begin by identifying the reference system applicable in the Member State or, in the case in hand, in the overseas territory in question. It is then necessary to determine whether the measure amounts to a derogation from that reference system, giving rise to a more favourable treatment as compared with other undertakings in a comparable factual and legal situation, having regard to the objectives of the system (*prima facie* selectivity) ([94]). Finally, a tax measure which constitutes a derogation from the reference system may nonetheless be justified if the Member State can show that that the measure results directly from the basic or guiding principles of that tax system ([95]). If that is the case, the tax measure is not selective.

System of reference

(175) As already explained in recital 89, a reference system comprises 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.

(176) With regard to the application of corporate income tax rules in Gibraltar, as already indicated in recital 90, the reference system is ITA 2010, the objective of which is to collect revenues from taxpayers that receive income accruing in or derived from Gibraltar. Section 7.1.3.1 defines the reference system in more detail.

(177) Section 16(1) of ITA 2010 provides that, subject to the other provisions of ITA 2010, the assessable profits or gains of a company in Gibraltar for an accounting period shall be the full amount of the profits or gains of the company for that accounting period. In accordance with common law rules ([96]), when it comes to the profits or gains derived from a partnership (of which a Gibraltar company is a partner), it is necessary to consider the share to which the Gibraltar company is entitled in the profits or gains of the partnership and to assess 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 from the system of reference

(178) As a second step, it is necessary to determine whether the measure derogates from the normal application of the rules of the reference system in favour of certain undertakings which are in a similar factual and legal situation to other undertakings, having regard to the intrinsic objective of the reference system.

(179) In their comments on the Decision to Extend Proceedings, the Gibraltar Society of Accountants submitted that most of the rulings listed in that Decision were issued at a time when passive interest income was not assessable to tax under ITA 2010, and, therefore, the vast majority of the rulings could not give rise to any assessable interest income.

([92]) Such rulings were still in force at the time the audits were carried out.
([93]) See Case C-6/12 *P Oy* ECLI:EU:C:2013:525, paragraph 17; Case C-522/13 *Ministerio de Defensa and Navantia* ECLI:EU:C:2014:2262, paragraph 32.
([94]) See Joined Cases C-20/15 P and C-21/15 P *Commission* v. *World Duty Free Group* ECLI:EU:C:2016:981, paragraph 57 and the case-law cited.
([95]) See Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 65.
([96]) 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

(180) As already explained in recital 156, it is indeed the case that, at the time the tax rulings were granted, they were consistent with the applicable tax provisions, since the applicable tax provisions did not provide for the taxation of royalties and passive interest income.

(181) Nevertheless, as established in section 7 of this decision, this exemption resulting from the legislation of Gibraltar was a State aid scheme. Therefore, the argument put forward by the Gibraltar Society of Accountants demonstrates that the tax treatment provided by these rulings was State aid. Indeed the application, in individual cases, of an aid scheme is an individual aid measure.

(182) Furthermore, by allowing the beneficiaries of the rulings to continue to benefit from the rulings after entry into force of the 2013 amendments for interest and royalties, the Gibraltar tax authorities prolonged the existence of this scheme in five individual cases. Moreover, they have even failed to comply with the national rules. The prolongation of this favourable tax treatment is clearly a derogation from the ordinary tax system.

(183) With regard to the period between 1 January 2011 (entry into force of ITA 2010) and the day preceding entry into force of the amendments for passive interest and royalties (30 June 2013 and 31 December 2013 respectively), the part of the tax rulings that concerned the exemption for passive interest and royalties merely confirmed the application of the tax provisions applicable at the time ([97]), i.e. that such income did not fall within the scope of taxation in Gibraltar. Accordingly, the exemption granted under the relevant tax rulings (during the period preceding the 2013 amendments) should therefore be considered as being part of the State aid identified in section 7.

(184) As from 1 July 2013 and 1 January 2014 respectively, passive interest income and royalties have been part of the categories of income subject to taxation in Gibraltar ([98]). Accordingly, any exemption granted to the five Gibraltar companies on their share of the income generated by the Dutch CVs did not reflect the normal application of the ordinary tax system. The continued application of the tax rulings, even after the amendments that brought interests and royalties into the scope of taxation entered into force, and even after the audits performed by the Gibraltar authorities in 2015 to assess whether the tax treatment of the relevant companies complied with the applicable tax rules, gave rise to a selective advantage in favour of those five companies.

(185) Even if the said exemptions were the result of a mere misapplication of the law through a *de facto* continuation of the previous exemption regimes and were not the direct result of the five tax rulings as such, it would not modify this conclusion since the effects of the measure would be the same.

(186) In the light of the objective of the Gibraltar corporate income tax system (taxing income accrued in or derived from Gibraltar), the five companies concerned are in a comparable legal and factual situation to all corporate taxpayers (with income accrued in or derived from Gibraltar) subject to corporate income tax in Gibraltar. The tax rulings at issue relate to companies in receipt of royalty and passive interest income, which was liable to tax in all cases (subject to the GBP 100 000 threshold with respect to interest) after entry into force of the relevant legislative amendments. In that respect, no difference can be made with other companies in receipt of the same categories of income or in receipt of other categories of income subject to tax (including where such income is received through a fiscally transparent structure). The fact that the income was obtained through interests in Dutch CVs does not make a difference as the Gibraltar tax rules, which rely on common law principles in the absence of specific rules for the taxation of partnerships, provides for the taxation of such income at the level of the Gibraltar partners. Therefore, the tax treatment granted on the basis of the contested tax rulings confers an advantage on those five companies as compared to all other corporate taxpayers in receipt of income accrued in or derived from Gibraltar, the latter being in a comparable legal and factual situation in the light of the objective pursued by the Gibraltar corporate income tax.

(187) In light of the foregoing, the Commission concludes that the advantages granted on the basis of the contested tax rulings are *prima facie* selective.

([97]) Although very concise, the relevant five rulings seem to rely on the fact that passive income (including royalties) was not subject to tax under ITA 2010.

([98]) Since 1 July 2013, passive interest income is subject to taxation to the extent the amount received or receivable from any one source is equal or more than GBP 100 000 per annum.

Absence of justifications for the measure

(188) According to settled case-law, the concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, *prima facie* selective, where that differentiation arises from the nature and the logic of the system, which it is for the Member State concerned to demonstrate ([99]).

(189) A measure which creates an exception to the application of the general tax system may be justified by the nature and overall structure of the tax system if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system ([100]). In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax regime, which are extrinsic to it, and, on the other hand, the mechanisms inherent in the tax system itself, which are necessary for the achievement of such objectives ([101]).

(190) To the extent that the tax treatment of the five Gibraltar companies with interest in Dutch CVs is the result of the implementation of the aid scheme examined in section 7 of this Decision, the Commission refers to the part of that section dealing with the alleged justifications of this scheme.

(191) Furthermore, neither the UK nor third parties have advanced any possible justification for the favourable treatment endorsed by the contested tax rulings in favour of the five Gibraltar companies with interest in Dutch CVs. The Commission recalls, in this respect, that the burden of establishing such a justification lies with the Member State. Therefore, in the absence of any justification advanced by the UK, the Commission must conclude that the tax advantage granted to the five beneficiaries of the tax rulings at issue cannot be justified by the nature or general scheme of the Gibraltar corporate income tax system.

(192) In any event, the Commission has not been able to identify any possible ground for justifying the preferential treatment for the five companies concerned that could be said to derive directly from the intrinsic, basic or guiding principles of the reference system or that is the result of inherent mechanisms necessary for the functioning and effectiveness of the system ([102]).

(193) Furthermore, the reasons invoked by the UK authorities for not taxing the income generated at the level of the Dutch CVs (i.e. that there is no specific provision in ITA 2010 that defines and prescribes how a Gibraltar partner of a Dutch CV should be taxed), do not conform with the applicable Gibraltar tax rules (and the applicable common law principles) and cannot be seen as a justification deriving directly from the intrinsic, basic or guiding principles of the reference system.

(194) In conclusion, the tax advantage granted to the five beneficiaries of the tax rulings cannot be justified by the nature and logic of the system.

8.3.1.3. Conclusion on the existence of a selective advantage

(195) In the light of the foregoing, the Commission concludes that the tax advantages granted to the five companies identified in recital 160 on the basis of the contested tax rulings are selective in nature.

8.3.1.4. Conclusion on the existence of aid

(196) Since the tax treatment granted on the basis of the five contested tax rulings fulfils all the conditions of Article 107(1) of the Treaty, it must be considered that the non-taxation of royalty and interest income granted to the beneficiaries of the five tax rulings (as part of the 165 rulings identified in the Decision to Extend Proceedings) in receipt of such income through their interest in Dutch CVs constitutes State aid within the

([99]) Case C-88/03 *Portugal v Commission* ECLI:EU:C:2006:511, paragraphs 52 and 80 and the case-law cited.
([100]) Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 69.
([101]) Case C-88/03 *Portugal v Commission* ECLI:EU:C:2006:511, paragraph 81.
([102]) Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 69.

meaning of that provision, either on the basis of the assessment under section 7 of this Decision (with regard to the advantages obtained by the beneficiaries of the problematic tax rulings before entry into force of the 2013 amendments), or on the basis of section 8 (with regard to the advantages granted after entry into force of the 2013 amendments).

8.3.2. *Beneficiaries of the aid*

(197) The Commission notes that all five Gibraltar companies benefiting from the contested tax rulings are part of large multinational groups. The Commission further notes that the group corporate set-up involving the Dutch CV, the Dutch BV and the Gibraltar partners, as illustrated in recital 153, benefits the owner of the Gibraltar partners ('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 partnership and one or two Gibraltar holding companies) which allows the parent company to generate profits from the IP rights exploitation without those profits being taxed. Given the (fiscally) transparent character of the Dutch CV and the fact that the Gibraltar companies do not carry out any other activity than holding a participation in the Dutch CV, the ultimate beneficiary of the non-taxed profits stemming from the exploitation of the IP rights is the parent company.

(198) For the purpose of the application of State aid rules, separate legal entities may be considered to form one economic unit. That economic unit is then considered to be the relevant undertaking benefiting 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' ([103]). To determine whether several entities form an economic unit, the Court of Justice looks at the existence of a controlling share and functional, economic or organic links ([104]). In the present case, 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, this whole corporate structure, i.e. the Dutch BV, the Dutch CV, the Gibraltar partners and the parent company form a single economic unit and should all be seen as the undertakings benefiting from the aid measure.

(199) Consequently, in addition to the Gibraltar corporate partners of the Dutch CVs who are the beneficiaries of the aid, the Commission considers also the Dutch BVs, the Dutch CVs, and the parent companies of the Gibraltar partners as benefiting from State aid granted on the basis of the contested tax rulings within the meaning of Article 107(1) of the Treaty.

8.3.3. *New aid character of the measures*

(200) The UK authorities as well as Gibraltar, the Gibraltar Society of Accountants and third parties representing some of the companies listed in the Decision to Extend Proceedings argue that the Decision to Extend Proceedings is based on an incorrect understanding of the applicable legal framework in relation to the tax ruling procedure. Although they acknowledge such misunderstanding is due to incorrect information provided by the UK authorities (the incorrect reference to section 42 of ITA 2010), the UK authorities and Gibraltar consider that it was that incorrect information that led the Commission to assume that it might be possible to regard tax rulings given since 2010 as 'new aid'.

(201) In this respect, it must be noted first that it was only after adoption of the Decision to Extend Proceedings that the United Kingdom and Gibraltar informed the Commission that the ruling practice was based on section 2 of ITA 2010. As section 2 does not explicitly grant the Commissioner the power to issue rulings, it was not obvious to the Commission that such a power resulted from the general powers to administer ITA 2010 set out in that provision.

(202) Second, in the Commission's view, it is irrelevant for the purposes of the investigation procedure in this case whether the tax ruling practice was based on section 42 of ITA 2010 or on the general power of the Gibraltar Tax Commissioner to administer that Act. The Decision clearly identified the tax ruling practice and the 165 individual tax rulings to which it related. Hence the reference to section 42 of ITA (2010) cannot have misled any interested parties as to the measures that would be investigated in the formal investigation procedure.

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

([104]) 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.

(203) More importantly, nowhere in that Decision is any reliance placed on the fact that there was no provision in ITA 1952 corresponding to section 42 of ITA 2010 as a reason to support the conclusion that the tax ruling practice and the 165 individual tax rulings constituted 'new aid'.

(204) The UK authorities also claim that the rulings are only part of a consistent practice which began long before the UK acceded to the European Communities in 1973. The practice was based on section 3(1) of ITA 1952, now reproduced in virtually identical form in section 2(1) and (2) of ITA 2010, which provides the Commissioner of Income Tax with a general power to ensure the due administration of the Acts for the assessment and collection of income tax in Gibraltar. Therefore, in the United Kingdom's view, if there were found to be any element of State aid, it would necessarily be 'existing aid', and not 'new aid'. In addition, the economic, legal and financial effects of the rulings would have always been based on the Commissioner's understanding of the applicable law and the rulings before 2010 were substantially identical in every respect to the rulings given after enactment of ITA 2010. Similar comments were made by the Gibraltar authorities and the Gibraltar Society of Accountants.

(205) The arguments from the United Kingdom and some interested parties assume that the Decision to Extend Proceedings relates to the practice of issuing tax rulings as such. The Commission disagrees with that assumption as it is clear from the wording of that Decision that it relates to the 165 tax rulings issued in the period 2011-2013 mentioned in the Annex to that Decision and to the tax ruling practice under ITA 2010 evidenced by those rulings. In the Decision to Extend Proceedings, the Commission took the preliminary position that the tax rulings constituted State aid because (i) they were given without there being a designated procedure for the request of information by the Gibraltar tax authorities; and (ii) the Gibraltar tax authorities 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 issued tax rulings that were inconsistent with the applicable tax provisions.

(206) In order to succeed in claiming that the practice constitutes 'existing aid', the UK authorities or interested parties would have to establish that, before 1 January 1973, there existed a practice, amounting to a *de facto* aid scheme, of granting tax rulings that possibly misapply ITA 1952. The UK authorities have provided no indications that such a practice existed prior to the UK's accession.

(207) Consequently, even if the pre-accession rulings were based on a general power of the Gibraltar Commissioner to administer the Income Tax Act, which has existed since 1953, they are clearly not part of the measures described in the Decision to Extend Proceedings. In this context, it must be underlined that the legal framework under which the aid was granted (ITA 2010) is substantially different from ITA 1952. The changes include the non-taxation of passive income under ITA 2010, and the repeal of the measures in favour of 'exempt companies' and 'qualifying companies', which existed under ITA 1952.

8.3.4. *Compatibility of the aid with the internal market*

(208) State aid is deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2) of the Treaty and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the categories listed in Article 107(3) of the Treaty. However, 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) of the Treaty.

(209) The UK has not invoked any of the grounds for a compatibility finding under either of those provisions for the State aid that it has granted on the basis of the contested tax rulings. The third parties have not invoked any such grounds either.

(210) Moreover, since the tax treatment granted on the basis of the contested tax rulings relieves the relevant companies of a tax liability that they would otherwise have been obliged to bear in their day-to-day management of normal activities, the aid granted on the basis of those tax rulings constitutes operating aid. As a general rule, such aid is normally not considered compatible with the internal market under Article 107(3) of the Treaty in that it does not facilitate the development of certain activities or of certain economic areas. Furthermore, the tax advantages in question are not limited in time, declining or proportionate to what is necessary to remedy a specific market failure or to fulfil any objective of general interest in the areas concerned. Therefore, they cannot be considered compatible.

(211) Consequently, the State aid granted to the relevant five companies by the Gibraltar tax authorities is incompatible with the internal market.

8.4. **Absence of an aid scheme**

(212) In the Decision to Extend Proceedings, the Commission expressed doubts not only in relation to the 165 individual rulings identified in the Annex to that Decision, but also more generally in relation to the tax ruling practice under ITA 2010. This was because the Gibraltar tax authorities seemed to misapply the provisions of the ITA 2010 on a recurrent basis. In that regard, the Commission expressed the preliminary view that the 165 tax rulings and the tax ruling practice of Gibraltar constituted State aid measures for the purposes of Article 107(1) of the Treaty and expressed doubts about their compatibility with the internal market.

(213) While the Commission was justified in having doubts at the time that it opened the formal investigation procedure, it must be noted that the findings referred to in sections 8.3.1 and 8.3.2 are not sufficient to show the existence of an aid scheme based of the tax ruling practice in Gibraltar. In particular, such findings do not point to a recurrent practice of misapplying ITA 2010 through the granting of tax rulings.

(214) Moreover, the legislative and regulatory amendments enacted by Gibraltar in relation to the tax ruling procedure, the territoriality principle and the anti-avoidance provision (see section 11 of this Decision), reduce the level of discretion of the Gibraltar tax authorities in the granting of tax rulings and in the enforcement of corporate income tax rules.

(215) Accordingly, the Commission concludes that the tax ruling practice, as investigated in this case, does not involve the existence of an aid scheme.

9. UNLAWFULNESS OF THE AID

(216) According to Article 108(3) of the Treaty, Member States are obliged to inform the Commission of any plan to grant aid (notification obligation) and they may not put into effect any proposed aid measures until the Commission has adopted a final decision on the aid in question (standstill obligation).

(217) The Commission notes that the United Kingdom did not notify the Commission of any plan to grant the passive interest and royalty income exemption or the contested tax rulings, nor did it respect the standstill obligation laid down in Article 108(3) of the Treaty. Therefore, in accordance with Article 1(f) of Regulation (EU) 2015/1589, the passive interest and royalty income exemption that existed under ITA 2010 and the tax treatment granted on the basis of the contested tax rulings constitute unlawful aid, put into effect in breach of Article 108(3) of the Treaty.

10. RECOVERY OF THE AID

(218) According to the Treaty and the Court's established case-law, the Commission is required to decide that the Member State concerned must abolish or alter aid if it has found that the aid is incompatible with the internal market ([105]). The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the situation previously existing ([106]).

(219) The Court has established that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored ([107]).

([105]) See Case C-70/72 *Commission v Germany*, ECLI:EU:C:1973:87, paragraph 13.
([106]) See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission*, ECLI:EU:C:1994:325, paragraph 75.
([107]) See Case C-75/97 *Belgium v Commission*, ECLI:EU:C:1999:311, paragraphs 64 and 65.

(220) In line with the case-law, Article 16(1) of the Procedural Regulation states that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary […]'.

(221) Thus, given that the measures in question were implemented in violation of Article 108(3) of the Treaty, and are considered to be unlawful and incompatible aid, the Member State should be required to recover the aid in order to re-establish the situation that existed on the market prior to the granting of that aid. Recovery should cover the time from when the advantage accrued to the beneficiary, that is to say from when the aid was put at the disposal of the beneficiary, until effective recovery has taken place, and the sums to be recovered should bear interest until effective recovery.

(222) No provision of Union law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to quantify the exact amount of the aid to be recovered. Rather, it is sufficient for the Commission's decision to include information enabling the addressee of the decision to work out that amount itself without overmuch difficulty ([108]).

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

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

(225) Individual aid should be deemed to be put at the disposal of the beneficiary on the day that the tax foregone would have fallen due, for each tax year, in the absence of those measures.

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

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

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

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

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

(227) With regard to the aid granted through the passive interest and royalty income exemption, the United Kingdom and the Gibraltar authorities have argued that recovery is likely to be impossible for practical reasons, due to the mobile character of the funds of the companies in question, and the international law principle that courts of one State will not allow or enforce claims for taxes on behalf of another State. However, neither the United Kingdom nor the Gibraltar authorities have provided any proof of concrete difficulties in practice which could lead to the conclusion that it is absolutely impossible to recover the aid. Indeed, it is settled case-law that the condition that it be 'absolutely impossible' to implement a decision is not fulfilled where the Member State merely informs the Commission of the legal, political or practical difficulties involved in implementing the decision, without taking any real steps to recover the aid from the undertakings concerned, and without proposing to the Commission any alternative arrangements for implementing the decision which could have enabled those difficulties to be overcome ([109]). Consequently, the Commission concludes that the United Kingdom and the Gibraltar authorities have not demonstrated that it would be absolutely impossible to recover the aid granted through the exemption.

([108]) See Case C-441/06 *Commission v France*, ECLI:EU:C:2007:616, paragraph 29 and the case-law cited.
([109]) See Case C-622/16 P, *Scuola Elementare Maria Montessori v Commission*, ECLI:EU:C:2018:873, paragraph 91; C-37/14, *Commission v France*, ECLI:EU:C:2015:90, paragraph 66; C-411/12, *Commission v Italy*, ECLI:EU:C:2013:832, paragraph 37.

10.1. **Recovery of the aid granted through the exemption**

(228) Any tax forgone as a result of the passive interest and royalty income exemption between 1 January 2011 and the day preceding the entry into force of the respective amendments which brought passive interest and royalties into the scope of taxation should be recovered to the extent that the income accrued in or was derived from Gibraltar ([110]).

(229) As explained in recital 82, *royalty income* received by a Gibraltar company is deemed to accrue in and be derived from Gibraltar. The UK authorities should therefore be required to recover the tax foregone by any Gibraltar company which was in receipt of royalty income during the period between 1 January 2011 and 31 December 2013.

(230) As regards *passive interest income* received by Gibraltar companies during the period between 1 January 2011 and 30 June 2013, in order to determine whether such income accrued in or was derived from Gibraltar, the UK authorities will need to apply the 'situs of the loan' rule described in recital 82, in line with the territoriality principle.

(231) Where the UK authorities conclude that the passive interest income accrued in or was derived from Gibraltar, the tax foregone as a result of the non-taxation of that income should be recovered from the company in question.

10.2. **Recovery of the aid granted to the five Gibraltar companies in relation to their participation in Dutch CVs**

(232) The UK authorities should be required to abolish the practice of not taxing the share of each Gibraltar company identified in recital 160 in the royalty and passive interest income generated by the Dutch CV in which the company participates.

(233) The UK authorities should further be required to recover the tax forgone by those five Gibraltar companies as a result of the non-taxation of their shares in the royalty and passive interest income generated by the relevant Dutch CVs.

(234) The recovery should cover the tax foregone in the period between 1 January 2011 and the date when the UK authorities abolish the practice of not taxing the income of the Gibraltar companies resulting from their participation in the Dutch CVs as referred to in recital 232.

(235) As regards the *royalty income* of the Gibraltar companies resulting from their participation in the Dutch CVs, the UK authorities should recover the amounts corresponding to the tax foregone in relation to such income during the whole period defined in the preceding recital.

(236) As regards the *passive interest income* of the Gibraltar companies resulting from their participation in the Dutch CVs, the aid should be recovered from those Gibraltar companies as follows:

— for the period between 1 January 2011 and 30 June 2013, the UK authorities should first determine whether the interest accrued in or was derived from Gibraltar. This assessment should be done by applying the 'situs of the loan' rule described in recital 82. To the extent that the interest income accrued in or was derived from Gibraltar, the UK authorities should recover the tax foregone as a result of the non-taxation of that income,

— for the period from 1 January 2014, the UK authorities should recover the tax foregone as a result of the non-taxation of such income if the income amounts to at least GBP 100 000 per annum per source company.

([110]) As explained in recital 144 of this Decision, any aid granted on the basis of the 34 rulings regarding the tax treatment of passive income (during the period preceding entry into force of the 2013 amendments) is treated as being part of the aid identified under section 7 and may involve aid that must be recovered in accordance with recitals 229 and 230.

(237) In the light of the observations in the recitals in section 8.3.2, the Commission considers that the United Kingdom should, in the first place, recover the unlawful and incompatible aid granted to the Gibraltar companies from those Gibraltar companies. Should it not be possible to recover the full amount of the aid from the relevant Gibraltar company, the United Kingdom should recover the remaining amount of that aid from other entities forming a single economic unit with that Gibraltar company, i.e. the relevant Dutch BV, the Dutch CV or the parent company of the Gibraltar company, so as to ensure that the advantage granted is eliminated and the situation previously existing on the market is restored through the recovery.

11. LEGISLATIVE AND REGULATORY AMENDMENTS ENACTED BY GIBRALTAR

(238) Although in most cases the granting of tax rulings falling within the scope of the formal proceedings did not result in the granting of State aid, the Commission investigation revealed certain weaknesses in the tax system operated in Gibraltar, which could be exploited by multinationals for tax planning purposes. In particular, it found that the territorial system of taxation operated in Gibraltar could create opportunities for cross-border tax planning (with a significant risk of non-taxation of the relevant companies' profits in both Gibraltar and the countries where the activities are actually performed). In addition, it found that the territorial system may potentially give too large a discretion to the tax authorities in the absence of clear guidelines on how the territoriality principle should be applied in practice.

(239) Moreover, the investigation also brought to light some weaknesses in the procedure for the granting of tax rulings, in particular the absence of any designated procedure providing clear requirements for both the applicant and the tax authorities and the absence of adequate *ex ante* and *ex post* control procedures.

(240) Finally, weaknesses were also identified in relation to the general anti-avoidance provision, including the transfer pricing rules, provided for in section 40 of ITA 2010 since application of the provision is conditional on the existence of an 'artificial arrangement'.

(241) None of those weaknesses constitutes State aid in their own right. However, in the absence of appropriate measures to address those weaknesses, the tax authorities may enjoy an excessive level of discretion in the enforcement of the rules, which may increase the risk of State aid being granted. In addition, those weaknesses have contributed to the doubts raised by the Commission in the Decision to Extend Proceedings.

(242) With a view to addressing those weaknesses, the Gibraltar's Government has agreed to introduce legislative and regulatory changes in relation to their tax ruling procedure, the territoriality principle and the anti-abuse/transfer pricing rules. In the Commission's view, the changes, which were adopted in October 2018, constitute a significant step forward to improve transparency and reduce discretion in the application of Gibraltar's income tax rules.

(243) The changes, that were published and adopted on 25 October 2018, can be summarised as follows:

— adoption of a guidance note ([111]) on the application of the territoriality principle providing concrete examples on a broad range of activities and introducing explicit monitoring requirements in relation to companies not chargeable to tax in Gibraltar,

— adoption of legislation and regulation ([112]) on the procedural aspects of tax rulings, including the following requirements: (1) the application for a tax ruling must include a detailed description of the business activities with a clear indication of where the activities take place; (2) the ruling can be granted for a period of maximum three years only and must include a full statement of the reasons for which it is given, including, where relevant, a comprehensive transfer pricing analysis; (3) introduction of a control system with both *ex ante* and *ex post* verifications on tax rulings; and (4) publication by the tax authorities at least once a year of anonymised compilations of tax rulings or summaries,

([111]) See Guidance Accrued and Derived 2018. The full text is available here: https://www.gibraltar.gov.gi/new/downloads-ito

([112]) See Income Tax (Tax Rulings) Rules 2018. The full text is available here: http://www.gibraltarlaws.gov.gi/articles/2018s227.pdf See also Guidance on Tax Rulings (Procedure) 2018, the full text of which is available here: https://www.gibraltar.gov.gi/new/downloads-ito

— adoption of legislation to amend ITA 2010 ([113]) in order to ensure that the anti-avoidance provision and transfer pricing rules apply regardless of whether the relevant arrangement is artificial or not.

(244) Finally, it is also relevant to note that Gibraltar enacted an amendment of section 29 of ITA 2010 ([114]) to require all companies registered in Gibraltar to submit a tax return irrespective of whether the companies have income that accrues in and is derived from Gibraltar and irrespective of whether or not they apply for a tax ruling. The amendment came into effect on 1 January 2016.

12. CONCLUSION

(245) The Commission finds that the United Kingdom has unlawfully implemented the passive interest and royalty income exemption scheme in Gibraltar, in breach of Article 108(3) of the Treaty. The Commission also finds that that scheme is State aid that is incompatible with the internal market within the meaning of Article 107(1) of the Treaty.

(246) The Commission considers that the tax treatment granted by the Government of Gibraltar on the basis of the tax rulings in favour of five Gibraltar companies with interests in Dutch limited partnerships (*Commanditaire Vennootschappen*) in receipt of royalty and passive interest income constitutes individual State aid measures, which were unlawfully implemented in breach of Article 108(3) of the Treaty and which are incompatible with the internal market within the meaning of Article 107(1) of the Treaty.

(247) The United Kingdom should be required to recover that State aid from the beneficiaries by virtue of Article 16 of the Procedural Regulation. The United Kingdom should also ensure that no additional aid is granted in the future to the beneficiaries or to any of their group companies as a result of the passive interest and royalty income exemption or the tax treatment set out in the contested tax rulings.

(248) Since the United Kingdom notified on 29 March 2017 its intention to leave the European Union, pursuant to Article 50 of the Treaty on European Union, the Treaties will cease to apply to the United Kingdom from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification, unless the European Council in agreement with the United Kingdom decides to extend this period. As a consequence, and without prejudice to any provisions of the withdrawal agreement, this Decision only applies until the United Kingdom ceases to be a Member State,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid scheme in the form of the passive interest income tax exemption applicable in Gibraltar under the Income Tax Act 2010 between 1 January 2011 and 30 June 2013 and unlawfully put into effect by Gibraltar in contravention of Article 108(3) of the Treaty is incompatible with the internal market within the meaning of Article 107(1) of the Treaty.

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

Article 2

The individual State aids granted by the Government of Gibraltar, on the basis of the tax rulings (referred to in the Annex as rulings No 83, 84, 139, 140 and 144) to five Gibraltar companies with interests in Dutch limited partnerships (*Commanditaire Vennootschappen*) in receipt of royalty and passive interest income, which were unlawfully put into effect by the United Kingdom in contravention of Article 108(3) of the Treaty, are incompatible with the internal market within the meaning of Article 107(1) of the Treaty.

([113]) See Income Tax (Amendment) Regulations 2018. The full text is available here: http://www.gibraltarlaws.gov.gi/articles/2018=228.pdf
([114]) Income Tax (Amendment) Act 2015 of 6 August 2015.

Article 3

1. The tax ruling practice under the Income Tax Act 2010 does not constitute a State aid scheme within the meaning of Article 107(1) of the Treaty.

2. The 126 rulings, listed in the Annex to this Decision, other than the five rulings covered by Article 2 and the 34 rulings referred to in recital 144 ([115]), do not constitute individual State aids within the meaning of Article 107(1) of the Treaty.

Article 4

1. Articles 1 and 2 of this Decision shall not apply to individual aid granted on the basis of the aid schemes referred to in Article 1 or on the basis of the tax rulings referred to in Article 2 if, at the time the individual aid was granted, it fulfilled the conditions laid down by the Regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98 ([116]) which was applicable at the time the aid was granted.

2. For the purposes of this Article and Article 5, individual aid is deemed to be put at a beneficiary's disposal, with respect to each tax year, on the day that the tax foregone for that tax year as a result of the aid schemes referred to in Article 1 or the tax rulings referred to in Article 2 would have fallen due in the absence of that scheme or ruling.

Article 5

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

2. Any individual aid granted on the basis of the tax rulings referred to in Article 2 which cannot be recovered from the Gibraltar company in question shall be recovered from other entities forming a single economic unit with that Gibraltar company, i.e. the relevant Dutch BV, the Dutch CV or the parent company of the Gibraltar company.

3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

4. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([117]).

5. The United Kingdom shall cease granting the aid on the basis of the aid schemes referred to in Article 1 or the tax rulings referred to in Article 2, with effect from the date of notification of this Decision.

Article 6

1. Recovery of the aid in accordance with Article 5 shall be immediate and effective.

2. The United Kingdom shall ensure that this Decision is implemented within four months from the date of notification of this Decision.

Article 7

1. Within two months from the date of notification of this Decision, the United Kingdom shall submit the following information to the Commission:

(a) an assessment, for each Gibraltar company that generated passive interest income in the period between 1 January 2011 and 30 June 2013, of whether such interest income accrued in or was derived from Gibraltar, based on the 'situs of the loan' rule;

([115]) The 34 rulings (referred to in the Annex as rulings No 7, 33, 35, 45, 47, 57, 58, 81, 82, 86, 89, 95, 100, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 120, 121, 122, 123, 126, 127, 128, 129, 130, 131 and 158) relate to the tax treatment of passive income. The aid in relation to these rulings (during the period preceding entry into force of the 2013 amendments) is treated under Article 1 of this Decision.

([116]) Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

([117]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

(b) a list of beneficiaries that have received aid on the basis of the aid schemes referred to in Article 1, together with the following information for each of them and for each relevant tax year:

— the amount of profits achieved (indicating separately the profits achieved from royalty income and the profits achieved from passive interest income), the tax basis, the applicable income tax rate, the amount of income tax paid and the amount of the tax foregone,

— the total amount of aid received;

(c) the following information for each of the five Gibraltar companies that received aid on the basis of the tax rulings referred to in Article 2 and for each relevant tax year:

— the amount of profits achieved (indicating separately the profits achieved from royalty income and the profits achieved from passive interest income), the tax basis, the applicable income tax rate, the amount of income tax paid and the amount of the tax foregone,

— the total amount of aid received;

(d) the total amount (principal and recovery interests) to be recovered from each beneficiary (for all tax years subject to recovery);

(e) a detailed description of the measures already taken, and of those planned, in order to comply with this Decision;

(f) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. The United Kingdom shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid in accordance with Article 5 has been completed. On request by the Commission, it shall submit to the Commission information on the national measures already taken, and on those planned, in order to comply with this Decision.

Article 8

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 19 December 2018.

For the Commission
Margrethe VESTAGER
Member of the Commission

ANNEX

Company Name	Granting Date	Description of the activities	Classification of Ruling (in light of Section 8.2.1)
1. KaiRo Management Limited	7.1.2011	Services, management consultancy	Application of territoriality principle. No income accrued in or derived from Gibraltar.
2. Thurlestone Shipping (Overseas) Limited	10.1.2011	Services, shipping intermediary	Application of territoriality principle. No income accrued in or derived from Gibraltar.
3. Mina Corp Limited	10.1.2011	Trade, sale of petroleum products	Application of territoriality principle. No income accrued in or derived from Gibraltar.
4. Red Star Enterprises Limited	10.1.2011	Trade, sale of petroleum products	Application of territoriality principle. No income accrued in or derived from Gibraltar.
5. BO (Middle East) Limited	12.1.2011	Trade, importation of furniture	Application of territoriality principle. No income accrued in or derived from Gibraltar.
6. THE One (Middle East) Limited	12.1.2011	Trade, importation of furniture	Application of territoriality principle. No income accrued in or derived from Gibraltar.
7. THE One Retail Network (International) Limited	12.1.2011	Holding company, licensing intellectual property	Passive income exemption. Situation regularised after legislative changes or activities ceased.
8. THE One Music Limited	12.1.2011	Trade, manufacture and sale of CDs	Application of territoriality principle. No income accrued in or derived from Gibraltar.
9. Prospective Company	12.1.2011	Holding company, licensing intellectual property	Company was not incorporated, activities did not materialise or the company was dormant
10. Link Holdings (Gibraltar) Limited	14.1.2011	Trade, income from rents	Application of territoriality principle. No income accrued in or derived from Gibraltar.
11. European Mail Union Limited	28.1.2011	Trade, provision of mail forwarding	Application of territoriality principle. No income accrued in or derived from Gibraltar.
12. Ansellia Aviation Limited	31.1.2011	Holding of assets, property (aircraft)	Application of territoriality principle. No income accrued in or derived from Gibraltar.
13. Prospective Company	4.2.2011	Beneficiary in a trust	Company was not incorporated, activities did not materialise or the company was dormant
14. Prospective Company	7.2.2011	Provision of loan(s)	Company was not incorporated, activities did not materialise or the company was dormant
15. Zartello Limited	7.2.2011	Trade, marketing services	Application of territoriality principle. No income accrued in or derived from Gibraltar.
16. Gol International Limited	10.2.2011	Trade, sports agent	Application of territoriality principle. No income accrued in or derived from Gibraltar.
17. Graf Von Bismark and Associated Limited	21.2.2011	Trade, provision of asset managers	Application of territoriality principle. No income accrued in or derived from Gibraltar.

Company Name	Granting Date	Description of the activities	Classification of Ruling (in light of Section 8.2.1)
18. Medifour Limited	25.2.2011	Trade, sale of medical products	Application of territoriality principle. No income accrued in or derived from Gibraltar.
19. Current Technology (Europe) Limited	25.2.2011	Trade, marketing	Company was not incorporated, activities did not materialise or the company was dormant
20. Corporate Consultants Limited	25.2.2011	Services, consultancy	Application of territoriality principle. No income accrued in or derived from Gibraltar.
21. Alphasol Limited	25.2.2011	Services, consultancy	Application of territoriality principle. No income accrued in or derived from Gibraltar.
22. Akasha Charters Limited	25.2.2011	Trade, yacht chartering	Application of territoriality principle. No income accrued in or derived from Gibraltar.
23. Osato Industries Limited	28.2.2011	Services, consultancy	Application of territoriality principle. No income accrued in or derived from Gibraltar.
24. Gambit Management Services Limited	1.3.2011	Holding of property and consultancy	Application of territoriality principle. No income accrued in or derived from Gibraltar.
25. Greatheart Underwriting Limited	4.3.2011	Investment holding company	Application of territoriality principle. No income accrued in or derived from Gibraltar.
26. UNILOG, United Logistics & Shipping Operators Limited	9.3.2011	Trade, management of shipping line	Application of territoriality principle. No income accrued in or derived from Gibraltar.
27. Continental Maritime Limited	15.3.2011	Provision of loan(s)	Application of territoriality principle. No income accrued in or derived from Gibraltar.
28. Baby Basics Limited	15.3.2011	Trade, marketing	Application of territoriality principle. No income accrued in or derived from Gibraltar.
29. Baby Basics (Iberia) Limited	15.3.2011	Trade, marketing and sales, training	Company was not incorporated, activities did not materialise or the company was dormant
30. Baby Basics (International) Limited	15.3.2011	Trade, distribution of products	Application of territoriality principle. No income accrued in or derived from Gibraltar.
31. Baby Basics (Asia) Limited	15.3.2011	Trade, marketing and sales, training	Application of territoriality principle. No income accrued in or derived from Gibraltar.
32. Family Roots Limited	15.3.2011	Trade, marketing	Application of territoriality principle. No income accrued in or derived from Gibraltar.
33. Western Mediterranean Holdings Limited	16.3.2011	Investment holding company	Passive income exemption. Situation regularised after legislative changes or activities ceased.
34. M. Benady & Company (Gibraltar) Limited	16.3.2011	Trade, management services	Application of territoriality principle. No income accrued in or derived from Gibraltar.
35. Prime Ideas Limited	18.3.2011	Holding intellectual property rights	Passive income exemption. Situation regularised after legislative changes or activities ceased.

Company Name	Granting Date	Description of the activities	Classification of Ruling (in light of Section 8.2.1)
36. Hattrick Limited	21.3.2011	Services, consultancy and advisory	Application of territoriality principle. No income accrued in or derived from Gibraltar.
37. Tubingen Limited	22.3.2011	Asset holding company, motor yacht	Application of territoriality principle. No income accrued in or derived from Gibraltar.
38. Channel Energy (Eire) Limited	24.3.2011	Trade, storage and handling of petroleum	Application of territoriality principle. No income accrued in or derived from Gibraltar.
39. Crane Trading Corporation Limited	24.3.2011	Trade, motors	Application of territoriality principle. No income accrued in or derived from Gibraltar.
40. Europe Income Real Estate Limited	25.3.2011	Provision of loan(s)	Company was not incorporated, activities did not materialise or the company was dormant
41. IMAAG Limited	25.3.2011	Services, consultancy and advisory	Company was not incorporated, activities did not materialise or the company was dormant
42. Prospective Company	28.3.2011	Trade, marketing services	Application of territoriality principle. No income accrued in or derived from Gibraltar.
43. Jonsden Properties Limited	28.3.2011	Trade, marketing services	Application of territoriality principle. No income accrued in or derived from Gibraltar.
44. Ellise Trading Group Limited	28.3.2011	Holding, intellectual property	Application of territoriality principle. No income accrued in or derived from Gibraltar.
45. Kamakura Investments Limited	29.3.2011	Investment holding	Passive income exemption. Situation regularised after legislative changes or activities ceased.
46. Prospective Company	1.4.2011	Trade, advertising	Company was not incorporated, activities did not materialise or the company was dormant
47. Roxbury Limited	1.4.2011	Holding of patents and trademarks	Passive income exemption. Situation regularised after legislative changes or activities ceased.
48. Roger Bullivant Holdings Limited	1.4.2011	Group Holding	Application of territoriality principle. No income accrued in or derived from Gibraltar.
49. Horizon Ventures Limited	1.4.2011	Services, consultancy	Application of territoriality principle. No income accrued in or derived from Gibraltar.
50. Nidham Holdings Limited	1.4.2011	Services, consultancy	Application of territoriality principle. No income accrued in or derived from Gibraltar.
51. AMD Limited	1.4.2011	Trade, sale of agricultural products	Application of territoriality principle. No income accrued in or derived from Gibraltar.
52. Cookstown Properties Limited	5.4.2011	Holding, company shares	Application of territoriality principle. No income accrued in or derived from Gibraltar.
53. Burlington English Limited	7.4.2011	Services, consultancy and advisory	Company was not incorporated, activities did not materialise or the company was dormant
54. Burlington Marketing Limited	7.4.2011	Services, consultancy and advisory	Application of territoriality principle. No income accrued in or derived from Gibraltar.

Company Name	Granting Date	Description of the activities	Classification of Ruling (in light of Section 8.2.1)
55. Burlington English Limited	11.4.2011	Services, consultancy and advisory	Company was not incorporated, activities did not materialise or the company was dormant
56. Burlington Marketing Limited	11.4.2011	Services, consultancy and advisory	Application of territoriality principle. No income accrued in or derived from Gibraltar.
57. Eastcheap Trading Corporation Limited	14.4.2011	Provision of loan(s)	Application of territoriality principle. No income accrued in or derived from Gibraltar.
58. Horizon Ventures Limited	14.4.2011	Services, consultancy	Application of territoriality principle. No income accrued in or derived from Gibraltar.
59. Keystone Shipping Limited	4.5.2011	Trade, bareboat chartering	Application of territoriality principle. No income accrued in or derived from Gibraltar.
60. World Rugby League (Europe) Limited	6.5.2011	Trade, marketing services	Application of territoriality principle. No income accrued in or derived from Gibraltar.
61. World Rugby League Limited	6.5.2011	Trade, marketing services	Application of territoriality principle. No income accrued in or derived from Gibraltar.
62. Lobric Properties Limited	6.5.2011	Trade, sale of agricultural products	Application of territoriality principle. No income accrued in or derived from Gibraltar.
63. Bushman Limited	6.5.2011	Services, consultancy	Application of territoriality principle. No income accrued in or derived from Gibraltar.
64. Key Retail Technologies Limited	9.5.2011	Services, management and consultancy	Application of territoriality principle. No income accrued in or derived from Gibraltar.
65. Kinsman Trustees Limited	11.5.2011	Services, provision of trustees	Application of territoriality principle. No income accrued in or derived from Gibraltar.
66. Amicus Trustees Limited	11.5.2011	Services, provision of trustees	Application of territoriality principle. No income accrued in or derived from Gibraltar.
67. Benamara Limited	11.5.2011	Investment holding	Passive income exemption. Situation regularised after legislative changes or activities ceased.
68. Halstead Investments Limited	11.5.2011	Investment holding	Passive income exemption. Situation regularised after legislative changes or activities ceased.
69. Nightingale Investments Limited	11.5.2011	Trade, supply of oil and gas equipment	Application of territoriality principle. No income accrued in or derived from Gibraltar.
70. JST (International) Company Limited	11.5.2011	Services, consultancy and advisory	Application of territoriality principle. No income accrued in or derived from Gibraltar.
71. The Consultants Limited	11.5.2011	Services, consultancy and advisory	Application of territoriality principle. No income accrued in or derived from Gibraltar.
72. Birchall Properties Limited	17.5.2011	Provision of loan(s)	Application of territoriality principle. No income accrued in or derived from Gibraltar.
73. Cookstown Properties Limited	19.5.2011	Property and investments holding	Application of territoriality principle. No income accrued in or derived from Gibraltar.

Company Name	Granting Date	Description of the activities	Classification of Ruling (in light of Section 8.2.1)
74. Paramount Healthcare Consulting Limited	20.5.2011	Services, consultancy	Application of territoriality principle. No income accrued in or derived from Gibraltar.
75. Swerford Holdings Limited	20.5.2011	Trade, gaming	Ruling related to personal income tax and does not involve a company subject to corporate income tax
76. Orios Limited	23.5.2011	Trade, online flower and gift retailer	Application of territoriality principle. No income accrued in or derived from Gibraltar.
77. Bushman Limited	23.5.2011	Services, consultancy	Application of territoriality principle. No income accrued in or derived from Gibraltar.
78. Nautilus Limited	1.6.2011	Asset holding, motor yacht	Application of territoriality principle. No income accrued in or derived from Gibraltar.
79. Salamba Shipping Limited	1.6.2011	Asset holding, motor yacht	Application of territoriality principle. No income accrued in or derived from Gibraltar.
80. Repset Limited	1.6.2011	Group Holding	Application of territoriality principle. No income accrued in or derived from Gibraltar.
81. McWane (Gibraltar) Holdings Limited	2.6.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
82. McWane (Gibraltar) Limited	2.6.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
83. Heidrick and Struggles (Gibraltar) Holdings Limited.	2.6.2011	Provision of loan(s)	Contested ruling
84. Heidrick and Struggles (Gibraltar) Limited. Limited, GibCo2)	2.6.2011	Provision of loan(s)	Contested ruling
85. Walstead Limited	8.6.2011	Trade, marketing, sales and research	Application of territoriality principle. No income accrued in or derived from Gibraltar.
86. Meritas (Gibraltar) Holdings Limited	8.6.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
87. Perpetual Systems Limited	9.6.2011	Trade in Gibraltar	Ruling related to personal income tax and does not involve a company subject to corporate income tax
88. Loksys (International) Limited	15.6.2011	Trade in Gibraltar	Ruling related to personal income tax and does not involve a company subject to corporate income tax
89. Lawnsvale Investments Limited	16.6.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
90. Oilcom Agency Limited	24.6.2011	Trade, buying and selling of clothing	Application of territoriality principle. No income accrued in or derived from Gibraltar.

Company Name	Granting Date	Description of the activities	Classification of Ruling (in light of Section 8.2.1)
91. CT Marketing Limited	30.6.2011	Services, consultancy and marketing	Application of territoriality principle. No income accrued in or derived from Gibraltar.
92. Navigia Limited	5.7.2011	Services, consultancy	Application of territoriality principle. No income accrued in or derived from Gibraltar.
93. Ocean Pride Shipping Co. Limited	5.7.2011	Asset holding, motor yacht	Application of territoriality principle. No income accrued in or derived from Gibraltar.
94. Equilibrium Management Limited	11.7.2011	Provision of loan(s)	Application of territoriality principle. No income accrued in or derived from Gibraltar.
95. Taylan Limited	11.7.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
96. Prospective Company	12.7.2011	Trade, currency exchange	Company was not incorporated, activities did not materialise or the company was dormant
97. Galva Investments Limited	13.7.2011	Investment holding	Application of territoriality principle. No income accrued in or derived from Gibraltar.
98. Uniphos Limited	13.7.2011	Services, consultancy and marketing	Application of territoriality principle. No income accrued in or derived from Gibraltar.
99. Prospective Company (Advisory Limited)	14.7.2011	Provision of loan(s)	Company was not incorporated, activities did not materialise or the company was dormant
100. Prospective company	22.7.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
101. Prospective company	5.8.2011	Trade, marketing	Application of territoriality principle. No income accrued in or derived from Gibraltar.
102. Hastings Insurance Group Limited	11.8.2011	Group Holding	Ruling related to personal income tax and does not involve a company subject to corporate income tax
103. Patron Capital G.P. III Limited	17.8.2011	Provision of loan(s)	Application of territoriality principle. No income accrued in or derived from Gibraltar.
104. Vantini Spur Limited	14.9.2011	Holding intellectual property	Passive income exemption. Situation regularised after legislative changes or activities ceased.
105. Tubman (International) Limited	14.9.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
106. Tubman (Holdings) Limited	14.9.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
107. Broadstreet (Gibraltar) Limited	30.9.2011	Services, consultancy and loan interest	Passive income exemption. Situation regularised after legislative changes or activities ceased.
108. Biomet (International) Limited	6.10.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.

Company Name	Granting Date	Description of the activities	Classification of Ruling (in light of Section 8.2.1)
109. Biomet (Gibraltar) Holdings Limited	6.10.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
110. Biomet Inc	6.10.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
111. Biomet S.a.r.l	6.10.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
112. Waterside (International) Limited	8.11.2011	Services, management advisory	Application of territoriality principle. No income accrued in or derived from Gibraltar.
113. Prospective Company International Law Firm)	16.11.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
114. Infor (Gibraltar) Limited	22.11.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
115. Miller International Limited	24.11.2011	Trade, sale of earth moving products	Application of territoriality principle. No income accrued in or derived from Gibraltar.
116. Tipico Services Limited	29.11.2011	Services, administrative support	Application of territoriality principle. No income accrued in or derived from Gibraltar.
117. Select Sports Management Limited	16.12.2011	Services, consultancy football agent	Application of territoriality principle. No income accrued in or derived from Gibraltar.
118. Allabroad Limited	16.12.2011	Trade, sailing tuition and yacht charters	Effectively subject to tax. Income accrued and derived in Gibraltar and therefore taxable in Gibraltar
119. Prospective Company	16.12.2011	Services, administrative support	Company was not incorporated, activities did not materialise or the company was dormant
120. Delphi Automotive Services (Gibraltar) Limited	20.12.2011	Subsidiary company	Passive income exemption. Situation regularised after legislative changes or activities ceased.
121. 8F Leasing (Gibraltar) Limited	22.12.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
122. 8F Leasing S.A.	22.12.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
123. 8F leasing (Bermuda) Limited	22.12.2011	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
124. Scan Truck & Trailer Rental Limited	3.1.2012	Trade, truck and trailer rental	Application of territoriality principle. No income accrued in or derived from Gibraltar.
125. Matterhorn Holdings Limited	16.1.2012	Trade, Sale of IT materials	Application of territoriality principle. No income accrued in or derived from Gibraltar.

Company Name	Granting Date	Description of the activities	Classification of Ruling (in light of Section 8.2.1)
126. 8F Leasing (Gibraltar) Limited	3.2.2012	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
127. 8F Leasing (Bermuda) Limited	3.2.2012	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
128. 8F Leasing S.A.	3.2.2012	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
129. 8F Leasing (Gibraltar) Limited	20.2.2012	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
130. 8F Leasing (Bermuda) Limited	20.2.2012	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
131. 8F Leasing S.A.	20.2.2012	Provision of loan(s)	Passive income exemption. Situation regularised after legislative changes or activities ceased.
132. Zaida Company Limited	2.3.2012	Trade, fees and commissions on payments	Application of territoriality principle. No income accrued in or derived from Gibraltar.
133. Rowan Gorilla V (Gibraltar) Limited	29.3.2012	Trade, oil well drilling rig (charter)	Application of territoriality principle. No income accrued in or derived from Gibraltar.
134. Rowan Gorilla VII (Gibraltar) Limited	29.3.2012	Trade, oil well drilling rig (charter)	Application of territoriality principle. No income accrued in or derived from Gibraltar.
135. Rowan Cayman Limited	29.3.2012	Trade, oil well drilling rig (charter)	Company was not incorporated, activities did not materialise or the company was dormant
136. Rowan Drilling (Gibraltar) Limited	29.3.2012	Trade, oil well drilling rig (charter)	Application of territoriality principle. No income accrued in or derived from Gibraltar.
137. Rowan Drilling Norway AS	29.3.2012	Trade, oil well drilling rig (charter)	Application of territoriality principle. No income accrued in or derived from Gibraltar.
138. Kiluya Employment Management Limited	3.5.2012	Services, provision of engineers	Application of territoriality principle. No income accrued in or derived from Gibraltar.
139. Ash (Gibraltar) One Limited	8.5.2012	Subsidiary of chemical company	Contested ruling
140. Ash (Gibraltar) Two Limited	8.5.2012	Subsidiary of chemical company	Contested ruling
141. Prospective Company	12.6.2012	Holding intellectual property	Company was not incorporated, activities did not materialise or the company was dormant
142. Partner Invest Limited	21.8.2012	Trade, company incorporation	Effectively subject to tax. Income accrued and derived in Gibraltar and therefore taxable in Gibraltar
143. Partner Invest Limited	21.8.2012	Trade, company incorporation	Application of territoriality principle. No income accrued in or derived from Gibraltar.

Company Name	Granting Date	Description of the activities	Classification of Ruling (in light of Section 8.2.1)
144. MJN Holdings (Gibraltar) Limited	11.9.2012	Subsidiary in group structure	Contested ruling
145. Fidux Trust Company Limited	9.10.2012	Trade, provision of trust services	Effectively subject to tax. Income accrued and derived in Gibraltar and therefore taxable in Gibraltar
146. OED Limited	4.1.2013	Trade, software development	Application of territoriality principle. No income accrued in or derived from Gibraltar.
147. Sunbreeze Limited	12.2.2013	Trade, online broker	Application of territoriality principle. No income accrued in or derived from Gibraltar.
148. Prospective Company	12.4.2013	Holding intellectual property	Company was not incorporated, activities did not materialise or the company was dormant
149. Promo 6000 International Limited	22.4.2013	Trade, marketing and advertising	Application of territoriality principle. No income accrued in or derived from Gibraltar.
150. Visavi 5x5 Limited	22.4.2013	Trade, website portals	Application of territoriality principle. No income accrued in or derived from Gibraltar.
151. Visavi Activities Limited	22.4.2013	Holding company shares	Application of territoriality principle. No income accrued in or derived from Gibraltar.
152. Visavi Spins Limited	22.4.2013	Trade, website portals	Application of territoriality principle. No income accrued in or derived from Gibraltar.
153. Visavi Portals Limited	22.4.2013	Trade, website portals	Application of territoriality principle. No income accrued in or derived from Gibraltar.
154. Prospective Company	10.5.2013	Holding intellectual property	Company was not incorporated, activities did not materialise or the company was dormant
155. Scanlan Worldwide Limited	21.5.2013	Trade, buying, importing and exporting	Application of territoriality principle. No income accrued in or derived from Gibraltar.
156. Rebecca (Holdings) Limited	10.6.2013	Provision of loan(s)	Application of territoriality principle. No income accrued in or derived from Gibraltar.
157. IAPA (Global) Limited	24.6.2013	Trade, master policy insurance cover	Application of territoriality principle. No income accrued in or derived from Gibraltar.
158. Collinson Group (Trademarks) Limited	24.6.2013	Holding intellectual property	Passive income exemption. Situation regularised after legislative changes or activities ceased.
159. Rebecca (Holdings) Limited	28.6.2013	Provision of loan(s)	Application of territoriality principle. No income accrued in or derived from Gibraltar.
160. Innophus (Gibraltar) Limited	2.8.2013	Trade, industrial manufacturing	Company was not incorporated, activities did not materialise or the company was dormant
161. Stabalis Limited	22.11.2013	Services, provision of consulting intra-group services	Application of territoriality principle. No income accrued in or derived from Gibraltar.

Company Name	Granting Date	Description of the activities	Classification of Ruling (in light of Section 8.2.1)
162. J Domains Limited	20.12.2013	Services, management of domain sales	Application of territoriality principle. No income accrued in or derived from Gibraltar.
163. Prospective Company	23.12.2013	Trade, supply of merchandise	Company was not incorporated, activities did not materialise or the company was dormant
164. Potential immigrant	23.12.2013	Employee	Ruling related to personal income tax and does not involve a company subject to corporate income tax
165. British Virgin Islands Company	23.12.2013	Trade, provision of digital products such as online training courses	Effectively subject to tax. Income accrued and derived in Gibraltar and therefore taxable in Gibraltar

Note: the numbering of the companies follows the numbering of the annex of the decision to extend proceedings.
For the sake of completeness, the table includes the five contested tax rulings with numbers 83, 84, 139, 140 and 144.