Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

6 April 2022*

State aid – Aid scheme implemented by the Government of Gibraltar concerning corporation tax – Tax exemption for interest income and royalties – Advance tax rulings benefiting multinationals – Commission decision declaring the aid incompatible with the internal market – Obligation to state reasons – Manifest error of assessment – Selective advantage – Right to submit comments

In Case T-508/19,

Mead Johnson Nutrition (Asia Pacific) Pte Ltd, established in Singapore (Singapore),

MJN Global Holdings BV, established in Amsterdam (Netherlands),

Mead Johnson BV, established at Nijmegen (Netherlands),

Mead Johnson Nutrition Co., established in Chicago, Illinois (United States),

represented by C. Quigley, Barrister, M. Whitehouse and P. Halford, Solicitors,

applicants,

v

European Commission, represented by L. Flynn, B. Stromsky and P. Němečková, acting as Agents,

defendant,

APPLICATION based on Article 263 TFEU and seeking partial annulment of 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 (OJ 2019 L 119, p. 151),

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of V. Tomljenović (Rapporteur), President, F. Schalin, P. Škvařilová-Pelzl, I. Nõmm and G. Steinfatt, Judges,

Registrar: I. Pollalis, Administrator,

* Language of the case: English.

having regard to the written part of the procedure and further to the hearing on 28 June 2021,

gives the following

Judgment

I. Background to the dispute

A. Adoption of the Income Tax Act 2010 and granting of the 2012 MJN GibCo advance tax ruling

1 On 1 January 2011, the Income Tax Act 2010 (Gibraltar Corporation Tax Act 2010 ('the ITA 2010'), came into force and repealed the Income Tax Act 1952 (Gibraltar Corporation Tax Act 1952) ('the ITA 1952'). The ITA 2010 introduced a general corporate tax rate of 10%. Until the amendment to the ITA 2010, which came into force on 30 June 2013 in respect of passive interest and on 31 December 2013 in respect of royalty income ('the 2013 amendment to the ITA 2010'), such income was not included in the categories of income chargeable to tax in Gibraltar listed in Schedule 1 of the ITA 2010.

2 Until its dissolution on 16 October 2018, MJN Holdings (Gibraltar) Ltd ('MJN GibCo') was a Gibraltar-based company belonging to the international Mead Johnson Nutrition group ('the MJN group'), which was active in the manufacture of infant and child nutrition products. MJN GibCo's business was to hold, as a limited partner, an interest in the capital of Mead Johnson Three CV ('MJT CV'), a limited partnership under Dutch law (Commanditaire vennootschap; 'Dutch CV'), established in the Netherlands until its dissolution on 15 December 2017.

3 MJT CV held licences for intellectual property rights (including patents, trade marks and technical information) which it sub-licensed to Mead Johnson BV ('MJ BV'), a company incorporated in the Netherlands, in consideration of royalty fees.

4 The shareholders of MJT CV were, first, MJN GibCo (99.99%) and, secondly, MJN Asia Pacific Holding LLC (0.01%), a US limited liability company. MJN GibCo's shareholding in MJT CV entitled it to 99.99% of the latter's profits.

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

6 On 11 September 2012, following an application made on the same day by counsel for MJN US, the parent company of the MJN Group ('the application for an advance tax ruling'), the Gibraltar tax authorities granted MJN GibCo an advance tax ruling confirming the non-taxation, in respect of MJN GibCo, of MJT CV's royalty income ('the 2012 MJN GibCo ATR').

7 The application for an advance tax ruling stated that MJT CV was considered to be a limited partnership for the purposes of Gibraltar tax law. According to the authors of the application for an advance tax ruling, since such a partnership was transparent for Gibraltar tax purposes, any

royalty income received by MJT CV should be treated as being received directly by MJN GibCo. However, it was stated that, in their view, any royalty income that could be received would not fall within the heads of charge taxable under the ITA 2010. Accordingly, the Gibraltar authorities were asked to confirm that interpretation of the ITA 2010 and that any royalty income received by MJN GibCo as a result of its shareholding in MJT CV would not give rise to any liability to tax.

8 By the 2012 MJN GibCo ATR, the Income Tax Office responded that, ‘on the basis of the facts and circumstances set out in the [application for an advance tax ruling], [it was] confirmed on behalf of the Commissioner [of Gibraltar Income Tax] that … future royalty income received by [MNJ GibCo] would [not] be subject to tax under the provisions of [the ITA 2010]’.

B. Administrative procedure before the Commission

9 On 1 June 2012, the Kingdom of Spain filed a complaint with the European Commission regarding the State aid allegedly received by Gibraltar’s offshore companies under the tax regime established by the ITA 2010.

10 On 16 October 2013, the Commission initiated the formal investigation procedure (‘the opening decision’), in order to verify whether the non-taxation (‘tax exemption’ in the text of the opening decision) of passive interest and royalty income, provided for by the ITA 2010, selectively favoured certain undertakings, in breach of the European Union’s State aid rules.

11 On 1 October 2014, the Commission informed the United Kingdom of its decision to extend proceedings laid down in Article 108(2) TFEU to include the practice of advance tax rulings in Gibraltar and, more particularly, the adoption of 165 advance tax rulings (‘the decision to extend proceedings’).

C. The contested decision

12 On 19 December 2018, the Commission adopted Decision (EU) 2019/700 of 19 December 2018 on State aid SA.34914 (2013/C) implemented by the United Kingdom in respect of the Gibraltar corporate tax regime (OJ 2019 L 119, p. 151) (‘the contested decision’). In essence, the Commission found, first, that the ‘exemption’ for passive interest and royalty income applicable to Gibraltar between 2011 and 2013 under the ITA 2010 constituted an unlawfully implemented State aid scheme which was incompatible with the internal market and, secondly, that the tax treatment granted by the United Kingdom to Gibraltar was not compatible with the internal market, that the tax treatment adopted by the Government of Gibraltar on the basis of advance tax rulings granted to five Gibraltar-based companies holding shares in Dutch CVs and receiving passive interest and royalty income (‘the five advance tax rulings’) constituted unlawful and incompatible individual State aid.

1. ‘Exemption’ of passive interest and royalty income (aid scheme)

13 In the opening decision, the Commission concluded, on a preliminary basis, that the ‘exemption’ of passive interest (‘the non-taxation of passive interest’) and the ‘exemption’ of royalty income (‘the non-taxation of royalty income’) each constituted an aid scheme. In order to take account of the 2013 amendment to the ITA 2010 whereby royalty income and passive interest were introduced among the categories of income taxable in Gibraltar listed in Schedule 1 of the ITA

2010, which took place after the opening decision, the Commission limited the scope of the contested decision to passive interest and royalty income received or receivable between the entry into force of the ITA 2010 (1 January 2010) and 30 June 2013 (for passive interest) or 31 December 2013 (for royalty income).

14 As regards the assessment of the advantage criterion, the Commission found, in essence, that passive interest and royalty income received by an undertaking in Gibraltar was normally considered to be accrued in or derived from Gibraltar and, therefore, normally subject to tax in Gibraltar under the territoriality principle. Accordingly, it concluded that that ‘exemption’ introduced a mitigation from a charge which the companies benefiting from it would otherwise have had to pay (see recitals 81 to 83 of the contested decision).

15 As regards the analysis of selectivity, in application of the case-law on the material selectivity of tax measures, the Commission considered, first, that the reference framework to be taken into account in examining the non-taxation of passive interest and royalty income was the ITA 2010, the objective of which was to collect tax on the income of taxpayers receiving income accruing in or derived from Gibraltar. Furthermore, it clarified that the ‘exemption’ of passive interest and royalty income was not the result of a formal derogation provided for by the tax regime, but of the non-inclusion of such income in the categories of income chargeable to tax in Gibraltar listed in Schedule 1 of the ITA 2010, in other words, an ‘implicit exemption’ (recitals 89 to 93 of the contested decision).

16 Next, the Commission examined whether the non-taxation of passive interest and royalty income gave rise to a different tax treatment of companies in a comparable situation. It noted that, in the absence of the ‘exemption’ for royalty income and passive interest, those would have been subject to tax in Gibraltar in accordance with the territoriality principle.

17 In addition, after stating that, where the measure under examination did not arise from a formal derogation from the tax system, it was necessary to consider the effects of that derogation in order to assess whether it significantly benefited a particular group of undertakings, the Commission considered, in support of the figures, that the non-taxation of passive interest and royalty income favoured companies belonging to multinational groups carrying out activities such as the granting of intra-group loans or rights to use intangible assets. As those companies were, in the light of the objective of the ITA 2010, in the same legal and factual situation as other companies receiving income accruing in or derived from Gibraltar, the Commission concluded that those measures were a priori selective (see recitals 94 to 104 of the contested decision).

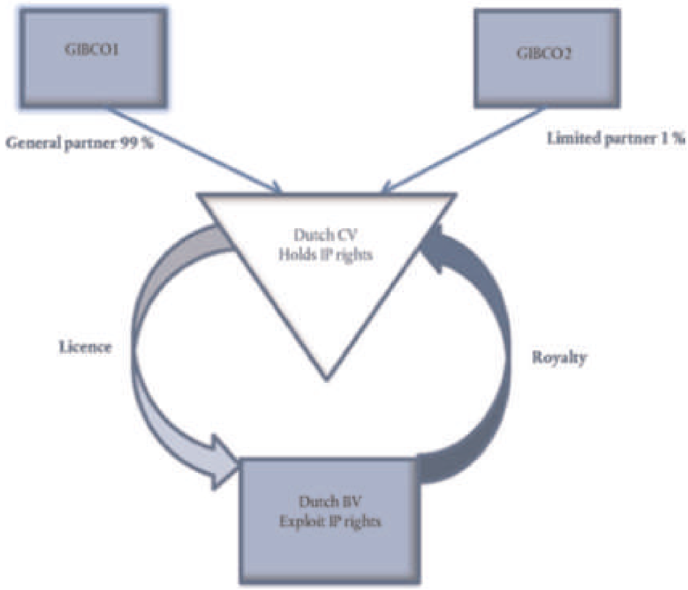
18 Finally, the Commission considered that the non-taxation of passive interest and royalty income was not justified by the intrinsic logic of the ITA 2010 tax system. In particular, it rejected the justifications put forward by the United Kingdom authorities, such as sound administrative management (see recitals 105 to 109 of the contested decision). Consequently, the Commission considered that each of those measures constituted an unlawful aid scheme that was incompatible with the internal market.

2. Five advance tax rulings (individual aid measures)

19 In the decision to extend proceedings, the Commission had identified 165 advance tax rulings granted by the Gibraltar tax authorities, which it had preliminarily concluded were materially selective and potentially constituted State aid.

20 In the contested decision, the Commission considered that 160 of the 165 advance tax rulings assessed corresponded to a normal application of Gibraltar's ordinary tax system, without it being possible to conclude that there was State aid for any other reason (recitals 132 to 150 of the contested decision). By contrast, it considered that the five advance tax rulings, including the 2012 MJN GibCo ATR, which remained to be examined constituted individual aid measures. By the five advance tax rulings, which had remained in force after the 2013 amendment of the ITA 2010, including after audits conducted in 2015, the Gibraltar tax authorities had confirmed to their addressees that royalty income accrued at the level of Dutch CVs in which they held shares was not taxable under the ITA 2010.

21 First of all, the Commission stated, in recital 153 of the contested decision, that the five advance tax rulings related generally to the following group structure:



22 The Commission stated that, according to the communications from the United Kingdom authorities, the Gibraltar tax authorities considered that the income received by Dutch CVs was received directly by the Gibraltar companies holding an interest in those CVs. It added that, to the extent that, following the amendments to the ITA 2010, passive interest and royalty income was included in the categories of income listed in Schedule 1 of the ITA 2010 and was taxable in Gibraltar, irrespective of its origin, such income was taxable at the level of the Gibraltar-based partners. The Commission then identified, in recitals 161 and 162 of the contested decision, the shares of profits derived from passive income or intellectual property royalties which should have been included in the taxable base of the five Gibraltar-based recipient companies of those decisions and taxed under the 'normal Gibraltar' taxation rules. In the case of MJN GibCo, it stated that it held 99.99% of the shares and that its Gibraltar taxable profits were 330 785 918.10 United States dollars (USD) for 2014, USD 254 328 564.60 for 2015, and USD 232 375 224.15 for 2016. Those shares should, in its view, have been included in MJN GibCo's taxable base and taxed under Gibraltar's tax rules.

23 As regards selective advantage, the Commission first considered that the relevant reference framework for the selectivity assessment was the ITA 2010 and referred, in that regard, to the considerations set out in section 7.1.3.1 of the contested decision, concerning the assessment of the selectivity of aid schemes consisting in the non-taxation of passive interest and royalty

income. It added that it would have been necessary, under the rules of common law, to take into account the share of the profits or gains derived from a CV, as a partner undertaking, as if that share represented the profits or gains of undertakings established in Gibraltar.

24 The Commission then found, for the period prior to the 2013 amendment, that the advance tax rulings applied the aid schemes providing for the exemption of passive interest and royalty income, which had been examined in section 7 of the contested decision. For the period after that amendment, it noted that the five advance tax rulings allowed their beneficiaries to continue to benefit from the passive interest and royalty income exemption schemes and concluded that the Gibraltar tax authorities had extended the existence of that scheme in five individual cases, which constituted a derogation from the ordinary tax regime.

25 Finally, the Commission considered that the five Gibraltar companies which benefited from the five advance tax rulings were in a legal and factual situation comparable to that of all corporate taxpayers, accruing income in or from Gibraltar, subject to tax in Gibraltar, and that that derogation could not be justified by the nature and logic of the system.

26 As regards the beneficiaries of the aid measures identified, the Commission considered that the parent companies, owners of the partner companies established in Gibraltar, were ultimately beneficiaries of those measures. It noted that the five Gibraltar companies benefiting from the five advance tax rulings, including MJN GibCo, were part of large international groups and that the structure of the groups, which included a Dutch CV, favoured the parent companies by allowing them to generate profits from the exploitation of intellectual property rights without being taxed. The Commission added that the group structure comprising a Dutch limited liability company, a Dutch CV, Gibraltar partner companies and a parent company constituted a single economic unit within the meaning of the case-law, so that those different companies should all be considered beneficiaries of the aid measure from which that undertaking benefited.

D. The operative part of the contested decision

27 The operative part of the contested decision reads as follows:

‘Article 1

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

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

Article 2

The individual State aids granted by the Government of Gibraltar, on the basis of the tax rulings … to five Gibraltar companies with interests in Dutch [CVs] … in receipt of royalty and passive interest income, which were unlawfully put into effect by the United Kingdom in contravention of

Article 108(3) [TFEU], are incompatible with the internal market within the meaning of Article 107(1) [TFEU].

…

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 [five] tax rulings referred to in Article 2, from the beneficiaries of that aid.

2. Any individual aid granted on the basis of the [five] 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.

…'

II. Procedure and forms of order sought

28 By application lodged at the Registry of the Court on 15 July 2019, the applicants, Mead Johnson Nutrition (Asia Pacific), MJN Global Holdings BV, MJ BV and MJN US, brought the present action.

29 Pursuant to Article 106(2) of the Rules of Procedure of the General Court, the applicants submitted a reasoned request for a hearing on 27 March 2020.

30 On a proposal from the Second Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

31 On 12 May 2021, the Court put written questions to the parties by way of a measure of organisation of procedure, provided for in Article 89(3) of the Rules of Procedure. The parties complied with the Court's request within the prescribed period.

32 The parties presented oral argument and replied to the questions put by the Court at the hearing on 28 June 2021.

33 The applicants claim that the Court should:

– annul Article 1(2), Article 2 and Article 5(1) and (2) of the contested decision in so far as they apply to them;

– order the Commission to pay the costs.

34 The Commission contends that the Court should:

– dismiss the action as inadmissible or unfounded;

– order the applicants to pay the costs.

III. Law

35 It should be noted at the outset that, in its rejoinder, the Commission waived the inadmissibility of the action as being out of time.

A. The structure of the action

36 As is clear from the operative part of the contested decision and from paragraphs 13 to 26 above, the contested decision relates, first, to two aid schemes, namely, on the one hand, the non-taxation of passive interest, referred to in Article 1(1) of that decision, and, on the other hand, the non-taxation of royalty income, referred to in Article 1(2) of that decision, and, secondly, to five individual measures granted on the basis of five advance tax rulings, referred to in Article 2 of that decision.

37 The classification of the five advance tax rulings as individual aid measures for the period after 31 December 2013 (the date from which the aid schemes were terminated) is entirely independent of the classification of the non-taxation of passive interest and royalty income as an aid scheme. The contested decision thus contains two separate sections in which the different criteria for the existence of State aid are examined separately.

38 Furthermore, Article 5(1) and (2) of the contested decision relates to the recovery of the aid measures referred to in Articles 1 and 2 of that decision.

39 By their application, the applicants seek the partial annulment of the contested decision and, more specifically, the annulment of Article 1(2), Article 2 and Article 5(1) and (2) of that decision in so far as they apply to them.

40 The application is divided into three parts. The first part of the application seeks the annulment of Article 1(2) of the contested decision, in so far as the Commission classified as an aid scheme the non-taxation of royalty income and the recovery order linked to that measure. The second part of the application seeks the annulment of Article 2 of the contested decision in so far as the Commission found that MJN GibCo had benefited from aid measures for the period up to 31 December 2013 and, for the period after that date, on the basis of the 2012 MJN GibCo ATR, as well as the recovery order linked to those measures. The third part of the application seeks the annulment of Article 5(2) of the contested decision in so far as the Commission ordered the recovery of the aid measures from MJN GibCo and, failing that, from the applicants.

41 It will therefore be appropriate to examine each of those parts in turn.

42 In that regard, the Commission submits that, in order for the present action to be successful, the applicants must effectively challenge both Article 1(2) and Article 2 of the contested decision. Furthermore, it stresses that, even if the action is partially upheld, the challenge to the recovery order in Article 5 of the contested decision can be accepted only in respect of the part of the aid for which the action was upheld and only in so far as the applicants are concerned. The applicants maintain that, since the application contains separate parts which seek to challenge different articles of the operative part of the contested decision, they could succeed on one or both of the articles which are the subject of the action.

43 According to the case-law, the mere fact that the Court considers a plea in law put forward by the applicant in support of its action for annulment to be well founded does not enable it automatically to annul the contested measure in its entirety. Annulment of the act in its entirety is not acceptable where it is obvious that that plea, directed only at a specific part of the challenged act, is such as to provide a basis only for partial annulment (judgment of 11 December 2008, *Commission* v *Département du Loiret*, C-295/07 P, EU:C:2008:707, paragraph 104).

44 However, partial annulment of an EU act is possible only if the elements of which the annulment is sought may be severed from the remainder of the act. That requirement of separability is not satisfied where the partial annulment of an act would have the effect of altering its substance (see judgment of 11 December 2008, *Commission* v *Département du Loiret*, C-295/07 P, EU:C:2008:707, paragraphs 105 and 106 and the case-law cited).

45 It should be noted, first of all, that the various parts of the action each seek partial annulment of the contested decision and relate to different parts of the operative part of that decision, each of which concerns completely separate and independent aid measures, so that, if some of the pleas in law relied on in support of those parts were to be upheld, they could only result in partial annulment of the contested decision. Next, as the applicants confirmed at the oral hearing, their action seeks only the annulment of Article 2 of the contested decision in so far as it relates to the aid granted to MJN GibCo and not to the individual aid granted to the beneficiaries of the other four advance tax rulings, so that, if the pleas in law seeking the annulment of that article were to be upheld, it would lead only to the annulment of that article in so far as it relates to the aid measure benefiting MJN GibCo and the applicants. Furthermore, if the pleas in law, seeking annulment of Article 1(2) of the contested decision or of Article 2 of that decision, in so far as it applies to the applicants, were to be upheld, that would have the effect of annulling Article 5 of the contested decision in so far as it seeks the recovery of the sums paid in respect of the aid measures referred to in those various parts of the operative part.

B. The first part of the application for annulment of Article 1(2) of the contested decision concerning the non-taxation of royalty income and the recovery order relating to that measure

46 In support of the first part of their application, seeking annulment of Article 1(2) and Article 5(1) of the contested decision, in so far as those provisions apply to the applicants, the latter raise, in substance, three sets of pleas in law.

47 The first plea in law alleges manifest errors of assessment, infringement of the principle of conferral of powers enshrined in Article 5 TEU, disregard for the principle of fiscal autonomy and fiscal sovereignty of the Member States and misuse of powers by the Commission (section (b) of the first part of the application).

48 The second, third and fourth pleas in law allege manifest errors of assessment and infringement of Article 107(1) TFEU, in that the Commission failed to establish the existence of an advantage or its selective nature (sections (c), (d) and (e) of the first part of the application).

49 The fifth plea in law alleges manifest errors of assessment and infringement of Article 1(c) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 [TFEU] (OJ 1999 L 83, p. 1), in that the Commission considered that the exemption scheme constituted existing aid (section (f) of the first part of the application).

50 Furthermore, in section (a) of the first part of the application, the applicants identify a number of manifest errors of assessment in relation to the interpretation of the provisions of the ITA 2010 and the ITA 1952, to which reference is made in the various pleas in law, seeking annulment of Article 1(2) of the contested decision.

51 The Court will examine in turn the various pleas in law identified in paragraphs 47 to 49 above, and will consider, in that context, the various errors identified in section (a) of the first part of the application.

1. The plea in law alleging a manifest error of assessment, infringement of Article 5 TEU, disregard of the principle of fiscal sovereignty and misuse of powers (first plea in law, seeking annulment of Article 1(2) of the contested decision)

52 In the context of their first plea in law, seeking annulment of Article 1(2) of the contested decision, the applicants claim, in essence, that the Commission infringed the principle of attribution of powers laid down in Article 5 TEU, pursuant to which the field of direct taxation falls within the sovereignty and competence of the Member States, and committed an abuse of power, in the light of Article 17(1) TEU, by using its powers in the field of State aid to combat an apparent double exemption. The Commission thus circumvented the procedure laid down in Article 116 TFEU, which allows it to act when it finds that a disparity between the laws of the Member States distorts the conditions of competition in the internal market.

53 The applicants emphasise that the control of State aid is without prejudice to the power of Member States to choose the tax system which they consider to be the most appropriate and, within that framework, to determine in a sovereign manner the categories and method of calculation of taxable income and profits (the tax base). It is clear from the case-law that the existence of an advantage must be established by reference to so-called ‘normal’ taxation as defined by national tax rules, as the Commission has no competence to define autonomously so-called ‘normal’ taxation. Therefore, while Member States must exercise their competence in tax matters in accordance with EU law, that does not give the Commission the power to extend the scope of the normal tax rules constituting the relevant reference framework, nor to interfere with the sovereign decisions of a Member State beyond the elimination of derogations from the rules constituting that framework.

54 First, the applicants claim that the Commission committed a manifest error of assessment by holding that the objective of the ITA 2010 is to tax companies on the full value of their profits or gains and in considering that the non-taxation of (passive) royalty income constitutes an exemption from the ITA 2010. Secondly, they argue that the Commission applied Article 107(1) TFEU and the principle that State aid is determined by its effects too broadly and that the present case is different from those which gave rise to the judgments of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732), and of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981), invoked in the contested decision.

55 The Commission contests those arguments.

56 In the first place, as regards the allegation of an infringement of Article 5 TEU, it should be recalled that, apart from the areas in which EU tax law is harmonised, the determination of the constituent features of each tax is a matter for the discretion of the Member States, with due regard for their fiscal autonomy, and that discretion must, in any event, be exercised in

accordance with EU law. That applies, in particular, to the choice of the rate of tax, which may be proportional or progressive, but also to the determination of the tax base and the chargeable event (judgment of 16 March 2021, *Commission* v *Poland*, C-562/19 P, EU:C:2021:201, paragraph 38).

57 However, according to settled case-law, even if direct taxation falls, in the current state of development of EU law, within the competence of the Member States, the latter must nevertheless exercise that competence in compliance with EU law (see judgment of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 47 and the case-law cited). Therefore, interventions by Member States in areas which have not been subject to harmonisation within the European Union, such as direct taxation, are not excluded from the scope of the rules on State aid control.

58 Member States must exercise their competence in tax matters in accordance with EU law and, in that context, refrain from taking any measure which might constitute State aid incompatible with the internal market (see, to that effect, judgment of 3 June 2010, *Commission* v *Spain*, C-487/08, EU:C:2010:310, paragraph 37).

59 Accordingly, the Commission may classify a tax measure as State aid provided that the conditions for such classification are met (see, to that effect, judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 28; of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 81; and of 25 March 2015, *Belgium* v *Commission*, T-538/11, EU:T:2015:188, paragraphs 65 and 66).

60 With regard to the condition that the measure at issue must grant an economic advantage, it should be recalled that, according to settled case-law, interventions which, in whatever form, are capable of favouring undertakings directly or indirectly, or which must be regarded as granting the recipient undertaking an economic advantage which it would not have obtained under normal market conditions, are to be regarded as State aid (see judgment of 2 September 2010, *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 40 and the case-law cited; judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 21).

61 More specifically, a measure by which the public authorities grant certain undertakings advantageous tax treatment which, although not involving a transfer of State resources, places the beneficiaries in a more favourable financial situation than that of other taxpayers constitutes State aid within the meaning of Article 107(1) TFEU (judgment of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 14; see, also, judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 46 and the case-law cited). Furthermore, in the case of tax measures, the very existence of an advantage can only be established either by reference to so-called ‘normal’ taxation (judgment of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 56) or by reference to the tax rules laid down by the Member State by virtue of its fiscal autonomy.

62 Consequently, the fiscal autonomy of Member States does not mean that all tax measures, which affect in particular the tax base taken into account by the tax authorities, escape the application of Article 107 TFEU. If a tax measure in fact discriminates between companies which are in a comparable situation with regard to the objective pursued by the normal tax regime, which is the reference framework to be taken into account, and thus confers on the beneficiaries of the measure selective advantages which favour ‘certain’ undertakings or ‘certain’ types of production,

it may be regarded as State aid within the meaning of Article 107(1) TFEU (see, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 104).

63 It follows from the foregoing that, since the Commission is competent to ensure compliance with Article 107 TFEU, it did not exceed its powers when it examined the non-taxation of royalty income in order to verify whether that measure constituted an aid scheme and, if so, whether it was compatible with the internal market within the meaning of Article 107(1) TFEU.

64 None of the applicants' arguments is such as to call that finding into question.

65 First, it follows from the case-law set out in paragraph 57 above that the Commission does not, at this stage in the development of EU law, have the power to define autonomously the so-called 'normal' taxation of an undertaking by disregarding national tax rules. However, it should be noted that, in analysing the criteria of advantage and selectivity, the Commission referred to the provisions of the tax law applicable to Gibraltar, namely, the provisions of the ITA 2010 and, in particular, Articles 11, 16 and 74 and Schedule 1 of that act, as well as to the observations of the United Kingdom and the Gibraltar authorities seeking to clarify the content and guiding principles of the tax regime introduced by the ITA 2010. Therefore, contrary to the applicants' contention, the Commission did not autonomously define 'normal' taxation and cannot have infringed the principle of conferral of powers in the present case.

66 Secondly, the Commission cannot disregard the competence reserved to the Member States in matters of direct taxation when interpreting the tax provisions applicable to Gibraltar. The Commission is able, in the context of the control of tax measures in the field of State aid, to assess the national tax provisions itself, an assessment which may, if necessary, be challenged by the Member State concerned or by any interested parties in the context of an action for annulment before the Court.

67 It should be noted in that respect that the Commission based its assessment of the tax provisions applicable to Gibraltar on the information provided by the United Kingdom and Gibraltar authorities. In particular, as can be seen from recital 93 of the contested decision and footnote 46 of the contested decision, the Commission defined the reference framework, including the guiding principles of normal taxation, and the objective of that framework on the basis of the information provided to it by the United Kingdom authorities in the course of the administrative procedure.

68 Thirdly, as the Commission points out in paragraph 75 of the defence, its power to review the existence of State aid in tax matters is not limited to cases where there is a formal derogation from the national tax rule. The regulatory technique is irrelevant for the purposes of assessing the effects of a national measure under Article 107(1) TFEU (see, to that effect, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 79). Thus, contrary to the applicants' contention, the Commission did not exceed its powers in examining the non-taxation of a category of income, or its non-inclusion in the categories of taxable income, in the light of the guiding principles of the tax regime introduced by the ITA 2010.

69 Fourthly, the errors of assessment and breaches alleged by the applicants, in particular as regards the identification of the objective and guiding principles of the ITA 2010, the failure to demonstrate any discrimination and the application, to the present case, of the judgments of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*

(C-106/09 P and C-107/09 P, EU:C:2011:732), and of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981), are inoperative for the purposes of establishing the Commission's possible lack of competence. On the contrary, such arguments seek to establish either manifest errors of assessment and a breach by the Commission of Article 107 TFEU or errors and a breach committed in the exercise of its competence.

70 In the light of all the foregoing considerations, it must be held that the Commission did not infringe Article 5 TEU by adopting the contested decision.

71 In the second place, with regard to the allegation of misuse of powers, it is important to recall that, according to settled case-law, an act is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence to have been taken exclusively, or at least decisively, for purposes other than those for which it is intended or with a view to evading a procedure specifically provided for by the Treaty (see, to that effect, judgments of 16 April 2013, *Spain and Italy* v *Council*, C-274/11 and C-295/11, EU:C:2013:240, paragraph 33, and of 12 July 2018, *PA* v *Parliament*, T-608/16, not published, EU:T:2018:440, paragraph 42).

72 In the present case, the Commission cannot be accused of having misused its powers by adopting the contested decision, which, at the end of a formal investigation, seeks to find that the non-taxation of royalty income constitutes State aid incompatible with the internal market.

73 In addition, the mere assertion that the Commission used its powers in relation to State aid to combat an apparent double exemption does not constitute a body of objective, relevant and consistent evidence from which it can be inferred that it sought to circumvent the procedure laid down in Article 116 TFEU. Apart from the fact that the contested decision does not seek to call into question the application of the principle of territoriality, it should be noted, first, that the analysis according to which the non-taxation of royalty income constitutes an aid measure does not take account of the question whether or not that income is taxed in other tax jurisdictions and is based solely on the tax rules applicable to Gibraltar. Secondly, it does not appear from the contested decision that the Commission sought to align the tax law applicable in Gibraltar with the laws applicable in the various Member States.

74 In those circumstances, it must be concluded that the Commission has not misused its powers.

75 In the light of the foregoing considerations, the first plea in law, seeking annulment of Article 1(2) of the contested decision, must be rejected.

2. The pleas in law alleging manifest errors of assessment and infringement of Article 107(1) TFEU (second, third and fourth pleas in law, seeking annulment of Article 1(2) of the contested decision)

76 In essence, the second, third and fourth pleas in law, seeking the annulment of Article 1(2) of the contested decision, allege manifest errors of assessment and infringement of Article 107(1) TFEU, in that the Commission considered that the non-taxation of royalty income conferred a selective advantage on its beneficiaries. The applicants challenge, first, the assessment of advantage (second plea in law, seeking annulment of Article 1(2) of the contested decision), secondly, the findings of selectivity (third plea, seeking annulment of Article 1(2) of the contested decision) and, thirdly, the extent of the selective advantage found by the Commission (third plea in law, seeking annulment

of Article 1(2) of the contested decision). The various pleas in law raised by the applicants refer to the manifest errors of assessment relating to the content and scope of Gibraltar's tax law identified in section (a) of the first part of the application.

(a) Preliminary considerations

(1) The aid measure referred to in Article 1(2) of the contested decision

77 First of all, it should be noted that, as is apparent from recitals 28, 33 and 82 of the contested decision, the measure which is the subject of Article 1(2) of that decision is the non-taxation of royalty income, described by the Commission as 'tax exemption of royalties'. As the Commission noted in recitals 28, 33 and 93 of the contested decision, that non-taxation results from the non-inclusion of royalty income in the categories of income taxable in Gibraltar listed in Schedule 1 of the ITA 2010, which exhaustively sets out the categories of income taxable in Gibraltar.

78 In that regard, it should be noted, first, that it is apparent from the opening decision (see, in particular, recital 34 of that decision), in the light of which the contested decision must be read, that the measure which is the subject of Article 1(2) of the contested decision is, more specifically, the non-taxation of royalty income as passive income. Such a reading is also apparent from recital 76 of the contested decision, read in conjunction with footnote 25 to that decision, in which the Commission explained that the assessment contained in the contested decision related only to passive interest and royalty income and that it did not cover other categories of passive income. Secondly, as stated in recital 76 of the contested decision, the examination of the non-taxation of royalty income was limited to the period between 1 January 2011 and 31 December 2013.

79 First, in so far as the applicants claim that the Commission erroneously characterised the non-taxation of royalty income as an 'implicit exemption' and disregarded the fact that, under Section 11 of the ITA 2010, only income falling within one of the categories listed in Schedule 1 was subject to tax in Gibraltar, it should be noted that, in recital 93 of the contested decision, the Commission did take into account the fact that, under Section 11 of the ITA 2010, only income falling within one of the categories listed in Schedule 1 of the ITA 2010 was subject to tax in Gibraltar. It pointed out, in the contested decision, that the non-taxation of royalty income constituted an 'implicit exemption', since royalty income was not included in the categories of income taxable in Gibraltar listed in Schedule 1 and falling within the scope of the ITA 2010 tax regime. It is also clear from recitals 28, 32 and 33 of, and footnote 17 to, the contested decision that the Commission took into account the fact that, between 1 January 2011 and 31 December 2013, royalty income was not included in the categories of income taxable in Gibraltar listed in Schedule 1 of the ITA 2010 and was not subject to tax.

80 Moreover, it is appropriate to recall in that regard the settled case-law according to which Article 107(1) TFEU does not distinguish according to the causes or objectives of State interventions, but defines them according to their effects and, therefore, independently of the techniques used (see, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 87 and the case-law cited).

81 Therefore, the fact that royalty income is not subject to income tax in Gibraltar, by reason of its non-inclusion in the categories of income listed in Schedule 1 of the ITA 2010, has the same effect as if that category of income had been listed in that schedule, but formally benefited from an exemption from tax. As Advocate General Campos Sánchez-Bordona pointed out in his Opinion in *Wereldhave Belgium and Others* (C-448/15, EU:C:2016:808, points 40 and 42), in cases where a company is not subject to a tax, the chargeable event does not occur, whereas in cases of exemption it does. In cases of exemption, the principal tax liability has, in theory, arisen, but the taxable person is, by law, partially or completely excused from payment and, ultimately, cannot be required to pay. Therefore, 'non-taxability' and 'exemption' have the same effect, namely non-taxation. It follows that the Commission did not err in qualifying the non-taxation of royalty income as an 'implicit exemption'.

82 Secondly, in so far as the applicants contest the assertion in recital 33 of the contested decision that royalty income was never taxable under the ITA 2010 and argue that such income fell, even before the 2013 amendment to the ITA 2010, under category A of income listed in Schedule 1 of the ITA 2010, namely profits of a 'trade, business or professional', the following must be noted.

83 As can be seen from paragraphs 77 and 78 above, the measure which is the subject of Article 1(2) of that decision is the non-taxation of royalty income, described by the Commission as the 'royalty income tax exemption', as it results from the non-inclusion of royalty income in the categories of income taxable in Gibraltar listed in Schedule 1 of the ITA 2010. That measure specifically concerns royalty income, in so far as it constitutes passive income. The applicants themselves admit that 'purely passive' royalty income, not derived from a business activity, did not fall within any of the categories of income listed in Schedule 1 of the ITA 2010 until the entry into force on 1 January 2014 of the 2013 amendments to the ITA 2010 and was therefore not taxable in Gibraltar.

84 It follows that the errors alleged by the applicants are not such as to call into question the finding that royalty income, which constitutes passive income, was not in principle included in the categories of income listed in Schedule 1 of the ITA 2010, in its version prior to 1 January 2014, and therefore not taxable in Gibraltar. Consequently, those arguments are not such as to call into question the lawfulness of Article 1(2) of the contested decision and must be rejected as being inoperative.

85 In any event, the Commission did not err in holding that royalty income was not taxable in Gibraltar, without examining whether that income could be taxed under category A of income listed in Schedule 1 of the ITA 2010.

86 The United Kingdom and Gibraltar authorities have consistently confirmed, in their various submissions in the administrative procedure, that royalty income is not taxable in Gibraltar under the ITA 2010, as in force between 1 January 2011 and 31 December 2013. Furthermore, the United Kingdom made it clear, in the presentation of the ITA 2010 annexed to its observations of 14 September 2012, that such royalty income was not included in the categories of income chargeable to tax in Gibraltar listed in Schedule 1 of the ITA 2010 and, in particular, that it could not be regarded as profits of a trade or business falling within category A of income listed in that schedule.

87 Furthermore, it should be noted that the interpretation of the ITA 2010 according to which royalty income was never taxable in Gibraltar is consistent with the contents of the application for an advance tax ruling, dated 11 September 2012, on the basis of which the 2012 MJN GibCo

ATR was granted. In that document, the applicants had themselves indicated that, in their view, any royalty income received by MJN GibCo did not fall within any of the categories of income chargeable to tax in Gibraltar listed in Schedule 1 of the ITA 2010.

88 It follows that the Commission did not err in considering that the royalty income was not taxable in Gibraltar between 1 January 2011 and 31 December 2013, nor in examining whether such a non-taxation measure was likely to confer a selective advantage on its beneficiaries and thus to constitute State aid within the meaning of Article 107(1) TFEU.

(2) The examination of the criteria of advantage and selectivity

89 According to the case-law, the classification as State aid requires that all the conditions referred to in Article 107 TFEU be fulfilled. It is thus established that, in order for a measure to be classified as State aid within the meaning of that provision, first, it must be an intervention by the State or through State resources, secondly, that intervention must be liable to affect trade between Member States, thirdly, it must grant a selective advantage to its recipient and, fourthly, it must distort or threaten to distort competition (see judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 40 and the case-law cited).

90 It should be noted in that regard that, in the context of the analysis of tax measures under Article 107(1) TFEU, both the examination of the advantage criterion and the examination of the selectivity criterion imply, in advance, determining the normal rules of taxation which form the relevant reference framework for that examination.

91 First, in the case of tax measures, the very existence of an advantage can be established only in relation to so-called ‘normal’ taxation (judgment of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 56). Such a measure confers an economic advantage on its recipient where it relieves an undertaking of burdens which are normally borne by its budget and which, therefore, without being a subsidy in the strict sense of the word, is of the same nature and has identical effects (judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 22). Thus, it is precisely the so-called ‘normal’ taxation that is established by the reference framework.

92 Secondly, the classification of a national tax measure as selective presupposes, as a first step, prior identification and examination of the common or normal tax regime applicable in the Member State concerned (judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 49).

93 Furthermore, the Commission clarified its interpretation of the concept of a reference framework in its notice on the notion of State aid referred to in Article 107(1) TFEU (OJ 2016 C 262, p. 1). That notice, while not binding on the Court, may nevertheless serve as a useful source of inspiration (see, to that effect and by analogy, judgment of 26 July 2017, *Czech Republic* v *Commission*, C-696/15 P, EU:C:2017:595, paragraph 53).

94 In particular, point 133 of the notice on the notion of State aid states that the reference system is composed of a coherent set of rules which apply in a general way – on the basis of objective criteria – to all undertakings falling within its scope as defined by its objective. It is stated in that point of the notice on the notion of State aid that those rules usually define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of the undertakings subject to it and the technical aspects of the functioning of the system.

95 In the present case, while the applicants do not dispute that the Commission correctly considered that the ITA 2010 constituted the normal rules of taxation forming the relevant reference framework for examining the non-taxation of royalty income, they challenge, in support of the second to fourth pleas in law seeking annulment of Article 1(2) of the contested decision, the Commission's interpretation of the content and objective of the ITA 2010.

96 Accordingly, it is necessary to examine, as a first step, the applicants' arguments challenging the Commission's interpretation of the content and objective of the normal rules for the taxation of corporate income in Gibraltar constituting the reference framework before examining successively, as a second step, the various pleas in law challenging the Commission's assessment of the selective advantage.

(b) The Commission's assessments of the reference framework and the normal rules for taxation in Gibraltar

97 As can be seen from recitals 28 to 30 of the contested decision, the relevant provisions of the ITA 2010 concerning the corporate income tax regime in Gibraltar were, primarily, sections 11, 16 and 74.

98 Part II of the ITA 2010, entitled 'Charge to Tax', included, inter alia, Section 11 of the ITA 2010, entitled 'The Charge to Taxation', which provided that:

'(1) Tax shall, subject to the provisions of [the ITA 2010] and of the Rules, be payable at the rate or rates specified from time to time for each year of assessment or accounting period upon the income specified in tables A to C … of Schedule 1 accruing in or derived from Gibraltar of any person.

…'

99 In the version applicable between 1 January 2011 and 31 December 2013, Schedule 1, entitled 'Heads of Charge', to which Section 11(1) of the ITA 2010 directly refers, identified three categories of income taxable in Gibraltar, namely:

– category A, which included, first, the profits or gains of a company, a foundation or a trust from any trade, business, profession or vocation and, secondly, income from property;

– category B, which referred to income from employment and self-employment;

– category C, which referred to 'other income', including, in particular, dividends and income from pension funds.

100 In addition, Section 74 of the ITA 2010 defined the concept of 'accruing in or derived from Gibraltar', used in Section 11 of the ITA 2010, as follows:

'(a) subject to (b) be defined by reference to the location of the activities or the preponderance of activities which give rise to the profits;

(b) for the purpose of (a), the preponderance of activities which give rise to the profits of the business shall be deemed to take place in Gibraltar in the case of-

(i) a business whose underlying activity that results in the income requires a licence and regulation under any law of Gibraltar; or

(ii) a business which can lawfully be transacted in Gibraltar, through a branch or any form of permanent establishment, by virtue of the fact that it is licensed in another jurisdiction which enjoys passporting rights into Gibraltar and which would otherwise require such licence and regulation in Gibraltar;

(c) subsection (b) shall not apply to any branch or permanent establishment of a Gibraltar company undertaking activities outside Gibraltar to the extent of the activities so conducted outside Gibraltar.'

101 Part III of the ITA 2010, entitled 'Computation of assessments', included Section 16(1), entitled 'Basis of assessment', which provided that:

'(1) 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 company.'

102 First, the applicants claim that the Commission erroneously considered, in disregard of the 'schedular' nature of the corporate income tax regime in Gibraltar, that the objective of the ITA 2010 was to tax the accounting profit and thus all the income of the taxpaying companies. Secondly, they argue that the Commission erroneously concluded that, by virtue of the principle of territoriality, royalty income received by Gibraltar companies was considered to be accrued in or derived from Gibraltar.

103 In so far as the parties dispute the burden of proof and the extent of the review to be carried out by the Court of the Commission's assessments of the content and scope of Gibraltar's tax law, it is important to note that, in the context of the adoption of a decision on State aid, the determination of national law is a question of fact (see, to that effect, judgment of 21 December 2011, *A2A* v *Commission*, C-318/09 P, not published, EU:C:2011:856, paragraph 125 and the case-law cited). Therefore, the question whether and to what extent the Commission has correctly interpreted the content and scope of a national rule is a matter for factual assessment by the EU judicature and is subject to the rules on the taking of evidence and on the apportionment of the burden of proof (see, to that effect, judgment of 26 November 2015, *Comunidad Autónoma del País Vasco and Itelazpi* v *Commission*, T-462/13, EU:T:2015:902, paragraph 71 and the case-law cited).

104 It should be noted, in that regard, that, in the context of State aid control, it is, in principle, for the Commission to prove, in the contested decision, the existence of such aid (see, to that effect, judgment of 12 September 2007, *Olympiaki Aeroporia Ypiresies* v *Commission*, T-68/03, EU:T:2007:253, paragraph 34, and of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 95). In that context, the Commission is required to conduct the procedure for examining the measures in question diligently and impartially, so that when it adopts a final decision establishing the existence and, where appropriate, the incompatibility or unlawfulness of the aid, it has at its disposal the most complete and reliable information possible (see, to that effect, judgments of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 90, and of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 63).

105 Furthermore, in State aid matters, the allocation of the burden of proof is subject to compliance with the respective procedural obligations on the Commission and the Member State concerned, in the context of the exercise by that institution of its power to require the Member State to provide it with all the necessary information (see judgment of 28 November 2008, *Hotel Cipriani and Others* v *Commission*, T-254/00, T-270/00 and T-277/00, EU:T:2008:537, paragraph 232 and the case-law cited). In particular, it is for the Member State concerned, by virtue of its duty to cooperate with the Commission, and for the interested parties duly invited to submit their observations in accordance with Article 108(2) TFEU, to put forward their arguments and to provide the Commission with all the information likely to enlighten it on all the facts of the case (see, to that effect, judgment of 28 November 2008, *Hotel Cipriani and Others* v *Commission*, T-254/00, T-270/00 and T-277/00, EU:T:2008:537, paragraph 233).

106 There is no obligation on the Commission to examine of its own motion and on the basis of prediction what matters of fact or law might have been submitted to it during the administrative procedure (see, to that effect, judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 60, and of 14 January 2004, *Fleuren Compost* v *Commission*, T-109/01, EU:T:2004:4, paragraph 49).

107 Finally, it should be noted that, in the context of an action for annulment based on Article 263 TFEU, the lawfulness of a State aid decision must be assessed in the light of the information, in particular as regards the national legal framework, which was available to the Commission at the time when it adopted the decision (see, to that effect, judgment of 16 July 2014, *Zweckverband Tierkörperbeseitigung* v *Commission*, T-309/12, not published, EU:T:2014:676, paragraph 97 and the case-law cited).

108 It is in the light of those principles that the various errors invoked by the applicants as to the Commission's assessment of the content and scope of the ITA 2010 must be examined.

(1) The objective of the ITA 2010 and the identification of income taxable under that law

109 By a first set of arguments, the applicants seek, in essence, to challenge the Commission's assessment that the ITA 2010 was intended to tax all accounting profits and thus all income accruing in or derived from Gibraltar. In particular, they criticise the Commission for failing to take account of the fact that only certain categories of income, listed in Schedule 1 of the ITA 2010, were taxable in Gibraltar.

110 The applicants submit that the Commission erroneously considered, in particular in recital 90 of the contested decision, that the accounting profit constituted the taxable base of companies established in Gibraltar and that the objective of the ITA 2010 was to tax the entirety of the 'accounting profit' of those companies, so that all their income would have fallen within the scope of the ITA 2010. The companies' income would have been taxable in Gibraltar only if it fell within the 'heads of charge' listed in Schedule 1 of the ITA 2010 (Section 11 of the ITA 2010) and if it accrued in or derived from Gibraltar (Sections 11 and 74 of the ITA 2010). In that respect, the applicants submit that the Gibraltar tax regime was a 'schedular' regime, in that it consisted in taxing only certain categories of income precisely defined by law. There is no general rule under which the income of a company established in Gibraltar would generally have been taxed there. Furthermore, the Commission did not take sufficient account of Section 11 of the ITA 2010, which was the fundamental provision for determining the income which would have been taxable in Gibraltar, and against which the other provisions of the ITA 2010, including Section 16, should have been read.

111 In particular, the applicants insist that passive royalty income was not included in the tax base and therefore fell outside the scope of the ITA 2010. The objective of the ITA 2010 was not to tax companies on their entire accounting profit, but only on the categories of income listed in Schedule 1 of the ITA 2010.

112 In addition, the applicants submit that the Commission erroneously asserted, in particular in recital 28 of the contested decision, that companies which were ordinarily resident in Gibraltar were, in principle, taxable in Gibraltar. The Gibraltar tax regime was 'source-based' of the income received and not 'residence-based' of the company which received it and tax would have been due in Gibraltar only in respect of income which 'accrued in or derived from Gibraltar'.

113 The Commission contests those arguments.

114 First of all, it should be noted that, contrary to what the applicants maintain, the Commission did not state, in recital 28 of the contested decision, that companies ordinarily resident in Gibraltar were, in principle, taxable there, or that the Gibraltar tax regime was based on the origin of the taxpayer. It merely stated that companies ordinarily resident in Gibraltar 'may' be taxable in Gibraltar. The Commission explained in recitals 28 and 30 of the contested decision that the categories of income taxable in Gibraltar were listed in Schedule 1 of the ITA 2010 and that such income could only be taxed in Gibraltar if it accrued in or derived from there.

115 Moreover, contrary to what the applicants maintain, the Commission did take account of the fact that Section 11 of the ITA 2010 provided that only income included in the categories of income listed in Schedule 1 of that law was taxable. That is apparent, in particular, from recital 28 of the contested decision, in which the Commission reproduced the three categories of income listed in Tables A, B and C of Schedule 1 of the ITA 2010, and from recital 93 of that decision, in which the Commission concluded, on the basis of the finding that royalty income was not included in the categories of income subject to tax in Gibraltar listed in Schedule 1 of the ITA 2010, that it was implicitly exempt from tax.

116 Similarly, contrary to what the applicants maintain, the Commission did not consider, in the contested decision, that the objective of the ITA 2010 was to tax taxpayers on their entire accounting profit. In recital 93 of the contested decision, the Commission stated that the objective of the ITA 2010 was 'to collect revenue from taxpayers taxable in Gibraltar (i.e. taxpayers receiving income derived from or accruing in Gibraltar)'. Moreover, it is apparent from recital 82 of the contested decision that the Commission based its analysis of the non-taxation of royalty income on the finding that the ITA 2010 was based on the 'general principle that corporate income tax [was] collected from all taxable persons that receive[d] income derived from or accrued in Gibraltar'.

117 In the light of those factors, and in so far as the applicants criticise the Commission for failing to take account of the fact that the Gibraltar tax regime was a schedular system whose objective was to tax companies only on the categories of income listed in Schedule 1 of the ITA 2010, it is necessary to analyse whether the Commission was justified in considering that the objective of the ITA 2010 was to tax income accruing in or derived from Gibraltar.

118 In that regard, it should be noted that the concept of the objective or nature of the normal tax regime forming the reference framework refers to the basic or guiding principles of that regime and does not refer either to the policies which may, where appropriate, be financed by means of

the resources which it provides or to the aims which might be pursued by introducing derogations from that regime (judgment of 16 May 2019, *Poland* v *Commission*, T-836/16 and T-624/17, EU:T:2019:338, paragraph 62).

119 First, it is not disputed that it follows from Section 11 of the ITA 2010, entitled 'The Charge to taxation', as reproduced in paragraph 98 above, that the Gibraltar tax regime is based on the principle of territoriality, according to which income accruing in or derived from Gibraltar is taxable. Furthermore, the United Kingdom authorities have repeatedly stated, including in their comments of 14 September 2012, that the territorial basis of taxation is the central feature or 'general norm' of the Gibraltar tax regime.

120 Secondly, it is important to point out that Section 16 of the ITA 2010, entitled 'Basis of assessment', provides that the taxable income of a company is the total amount of accounting profits over an accounting period. Contrary to what the applicants maintain, and as the Commission rightly points out, it is clear from the title and wording of Section 16 of the ITA 2010 (see paragraph 101 above) that it concerns the identification, as such, of the tax base and not only the reference period to be taken into account in determining that base.

121 It follows from that provision that all accounting income received by the taxpayer is taken into account for the purposes of taxation in Gibraltar. However, it should be noted, as is apparent from recitals 30, 90 and 91 of the contested decision, that the calculation of the tax base of companies is carried out on a territorial basis, as set out in Section 11 of the ITA 2010, so that accounting income can only be taxed if it is 'accruing in or derived from Gibraltar'.

122 In that context, it should be noted that, in their comments of 3 December 2012, the United Kingdom authorities clarified that all companies which received income that was accrued in or derived from Gibraltar were subject to tax under the ITA 2010. They added that the principle of territoriality generally applied to all companies and all types of company income. Similarly, in their comments of 18 April 2013, the United Kingdom authorities again stated that the territorial tax regime under the ITA 2010 applied to all companies in all sectors of industry, finance and commerce and that such a principle was universal in its application.

123 It therefore follows from a reading of Sections 11 and 16 of the ITA 2010, as cited in paragraphs 98 to 101 above, and from the comments submitted by the United Kingdom authorities in the course of the administrative procedure, that those provisions were to be interpreted as meaning that the tax regime introduced by the ITA 2010 was based on two guiding principles, namely the principle of territoriality, according to which income accrued in or derived from Gibraltar was subject to tax, and the principle according to which all the taxpayers' accounting income was taxable. It follows that the Commission correctly held that the Gibraltar tax regime, as introduced by the ITA 2010, was based on the objective of taxing all taxable persons on their income accrued in or derived from Gibraltar.

124 Furthermore, it should be noted that neither the United Kingdom nor the Gibraltar authorities, in their respective observations on the opening decision, challenged the Commission's reading of the objective of the ITA 2010 as being to tax all taxable persons on their income accrued in or derived from Gibraltar. The United Kingdom and Gibraltar authorities merely argued that the non-taxation of royalty income was not a selective measure, since it was a general measure, applying to all sectors of industry, commerce and finance, and available to all companies. They did not comment on recital 32 of the opening decision, in which the Commission expressly stated that the guiding principle of the Gibraltar tax regime was the taxation of all companies

receiving income accrued in or derived from Gibraltar, thereby avoiding double taxation and allowing for simplification. Similarly, the United Kingdom and Gibraltar authorities have not contested the content of recital 35 of the opening decision, in which the Commission made it clear that the objective of the Gibraltar tax regime was to tax all companies with income accrued in or derived from Gibraltar.

125 In that regard, in so far as the applicants question the relevance of the United Kingdom's observations and argue that the fact that neither the United Kingdom nor the Gibraltar authorities challenged the Commission's interpretation of the provisions of the ITA 2010, during the formal investigation procedure, does not prevent them from challenging that interpretation, it should be noted that, as is clear from paragraphs 103 to 107 above, in the context of the examination of a tax measure under Article 107 TFEU, the review of the interpretation of national law adopted by the Commission, which constitutes a question of fact, must be carried out in the light of the information available on the day on which the contested decision was adopted, and taking into account the information communicated by the Member State concerned and the interested parties. In that context, it should be noted in particular that, in the context of the formal investigation procedure, it is for the Member State and the potential beneficiary of the measure which is the subject of that procedure to inform the Commission of all the facts of the case (see, to that effect, judgment of 18 November 2004, *Ferriere Nord* v *Commission*, T-176/01, EU:T:2004:336, paragraph 93).

126 Since the information on which the Commission based its interpretation of national law came directly from the authorities of the Member State and territory concerned by the procedure and had been reiterated in several exchanges, and since the Commission's understanding of the information communicated by those authorities had been implicitly confirmed at the end of the opening decision, the Commission cannot be criticised for considering that that information was sufficiently reliable and credible. Moreover, in so far as the observations made by the United Kingdom and Gibraltar authorities did not contradict the content of the relevant provisions of the ITA 2010 and the Commission did not have any information available to it which might call those observations into question, it could, at the time of the adoption of the contested decision, rely on them in order to interpret Gibraltar tax law.

127 Moreover, it should be noted that the applicants, although they were given the opportunity to comment on the opening decision and it was clear from that decision that the subject matter of the procedure was the royalty income received by Gibraltar companies between 1 January 2011 and 31 December 2013, did not consider it necessary to do so. Neither the expert report produced by the applicants as an annex to the reply ('the expert report'), nor the information contained therein concerning the allegedly schedular nature of the Gibraltar tax regime, had been communicated to the Commission by the parties before the adoption of the contested decision. As can be seen from paragraph 106 above, in the absence of information which could call into question the interpretation of national tax law adopted in the opening decision, the Commission could not examine by guesswork all the arguments which could potentially have called into question its interpretation of national law, which, moreover, had been confirmed by the authorities of the Member State and the territory concerned. In addition, as is clear from all the foregoing considerations, the applicants have failed to establish that the information on which the Commission relied was erroneous or lacked reliability and credibility.

128 It follows from the above that the Commission was right to consider that the Gibraltar tax regime was a territorial tax regime, according to which all income accrued in or derived from Gibraltar should be taxed there.

129 That finding is not called into question by the applicants' other arguments.

130 In particular, to the extent that the applicants argue that the Gibraltar tax regime was a schedular regime whose purpose was to tax the categories of income listed in Schedule 1 of the ITA 2010, it is, admittedly, relevant to note that, as the applicants contend, Section 11 of the ITA 2010 implies that, in order to be taxable, companies' income must fall within one of the categories of income listed in Schedule 1 of the ITA 2010. Therefore, in the absence of such an inclusion, as in the case of royalty income, certain types of income could technically escape taxation under the ITA 2010.

131 However, it is important, first of all, to emphasise that neither the Gibraltar nor the United Kingdom authorities have ever asserted that the Gibraltar tax regime is a schedular regime. On the contrary, in their submissions of 14 November 2013, they stated that the ITA 2010 provided for a single tax regime, irrespective of the categories of taxable income set out in Tables A to C of Schedule 1 of the ITA 2010. Furthermore, in the various submissions made during the administrative procedure, the United Kingdom authorities solely defined the Gibraltar tax regime as a territorial tax regime.

132 Next, it should be noted that the normal rules of taxation or, in other words, the rules constituting the reference framework, must be examined as a whole and in the light of the guiding principles of the national tax regime. A tax measure cannot be assessed precisely in accordance with a few provisions which have been artificially removed from a broader legislative framework (see, to that effect, judgment of 28 June 2018, *Andres (Bankruptcy Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 103).

133 To consider, as the applicants argue, that the Gibraltar tax regime established by the ITA 2010 is a schedular regime whose objective is to tax the categories of income listed in Schedule 1 of the ITA 2010 would be to disregard the other provisions of the ITA 2010 and thus the logic of the guiding principles of that tax regime. As observed in paragraph 121 above, the ITA 2010 is based not only on the principle of territoriality, as enshrined in Section 11 thereof, but also on the principle that all accounting income of taxpayers is subject to tax, as enshrined in Section 16 thereof. It is those two principles that must be taken into account when examining the objective pursued by the ITA 2010.

134 Finally, in accordance with the case-law, the use of a particular regulatory technique cannot allow national tax rules to escape from the outset the control provided for by the TFEU in the field of State aid. Similarly, unless the form of State interventions is to prevail decisively over their effects, the regulatory technique used cannot be a decisive factor for the purposes of examining the content and scope of the rules constituting the reference framework (see, by analogy, judgment of 28 June 2018, *Andres (Bankruptcy Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 92).

135 In the present case, the fact that Section 11 of the ITA 2010, read in conjunction with Schedule 1 of the ITA 2010, provides for tax liability to be defined positively, so that only the categories of income expressly listed in Schedule 1 are subject to tax, has the same effects as an express exemption from taxation or a situation in which non-taxability is defined negatively, so that all income is subject to tax and only certain categories of income are excluded from the scope of the ITA 2010. As explained in paragraph 81 above, 'non-taxability' and 'exemption' produce the same effects, namely non-taxation. Therefore, what the applicants describe as a 'schedular system' was, in reality, only the choice of a regulatory technique and not a decisive tax rule for the purposes of analysing the Gibraltar tax regime.

136 It should be noted, in that regard that, as the Commission pointed out in recital 27 of the contested decision, the ITA 2010 introduced a general corporate tax rate of 10%, applicable to companies throughout the Gibraltar economy, with the exception of certain service providers. That meant that different categories of taxable income were subject to a single rate of 10% and were not subject to a separate tax regime. That analysis is also reflected in the comments of 14 November 2013, in which the United Kingdom authorities explained that Gibraltar's legislation did not impose a charge by reference to a category of income. They stated that the Gibraltar tax regime did not require prior determination of the category of income received in order to apply taxation specific to a particular category of income, but that the tax regime only provided for a general tax regime for income accrued in or derived from Gibraltar.

137 It thus follows from the foregoing that Section 11 and Schedule 1 of the ITA 2010, in so far as they provide for categories of taxable income, constitute mere taxation arrangements, and that those provisions cannot be artificially taken out of their context for the purpose of defining the objective of the ITA 2010. Therefore, contrary to the applicants' contention, it cannot be inferred from Section 11 of the ITA 2010 that the objective of the Gibraltar tax regime was to tax the categories of income listed in Schedule 1 of the ITA 2010.

138 In the light of the foregoing considerations, the applicants' complaints that the Commission erred in identifying the objective of the ITA 2010 must be rejected.

(2) The application of the territoriality principle to royalties

139 The applicants claim that the Commission committed a manifest error of assessment by stating, in recitals 42, 82, 94 and 106 of the contested decision, that the application of the territoriality principle meant that the royalty income was accrued in or derived from Gibraltar merely because it was received by a Gibraltar company. The applicants submit that the statement in the United Kingdom's communication of 14 September 2012, on which the Commission relied in making those assessments, is inconsistent and erroneous. According to the applicants, income derived by a Gibraltar company from activities carried on outside Gibraltar, including royalty income, was not taxable in Gibraltar. In the situation where none of the intellectual property rights are managed in Gibraltar, neither the rights nor the licensee are located in Gibraltar and the royalties are not paid in Gibraltar, the royalty income could not be regarded as having accrued in or derived from Gibraltar.

140 The Commission contests those arguments.

141 As noted in paragraph 125 above, in the context of the examination of a tax measure under Article 107 TFEU, the review of the Commission's interpretation of national law, which constitutes a question of fact, must be carried out in the light of the information available on the day on which the decision in question was adopted, and taking into account the information communicated by the Member State concerned and the interested parties.

142 In the present case, it is true that the ITA 2010, in the version applicable between 1 January 2010 and 31 December 2013, did not contain a provision expressly providing that royalty income received by Gibraltar companies was considered to be accrued in or derived from Gibraltar. Such a rule was only expressly incorporated into the ITA 2010 following the 2013 amendment to the ITA 2010, which came into force on 1 January 2014.

143 However, as stated in footnote 49 to the contested decision, the assertion that royalty income received by Gibraltar companies was necessarily considered to be accrued in or derived from that territory is based on information directly from the Member State concerned. In their comments of 14 September 2012, the United Kingdom authorities expressly stated that the principle of territoriality implied that 'all royalty income received by a Gibraltar company accrue[d] and derive[d] in Gibraltar'.

144 In that regard, it should be noted, first, that the assertion that the royalty income received by Gibraltar companies was accrued in or derived from Gibraltar was compatible with the content of Section 74 of the ITA 2010 and could thus result from a simple application of the principle of territoriality and the rule that it was necessary to take account of the place of the activity from which the income derived.

145 Section 74 of the ITA 2010 defined the notion of 'accrued in or derived from Gibraltar' in terms of 'the location of the activities … which [gave] rise to the profits'.

146 In so far as the non-taxation of royalty income concerned passive income, that is to say, income which was received by entities which merely held the intellectual property rights, it was consistent to consider that the 'activity which gave rise to the profits', within the meaning of Section 74 of the ITA 2010, was located in the place of residence of the companies which held the intellectual property rights giving rise to those royalties. Therefore, contrary to the applicants' contention, the assertion that the royalty income received by a Gibraltar company was considered to be accrued in or derived from Gibraltar indeed implied the existence of an element enabling that income to be linked to the territory of Gibraltar.

147 In addition, the assertion of the United Kingdom authorities is also not inconsistent with the case-law of the Judicial Committee of the Privy Council (United Kingdom) ('the JCPC') relied on in the administrative procedure, which, although not binding, was relevant to the interpretation of Section 74 of the ITA 2010. In the decision adopted by the JCPC, in relation to Hong Kong, in the case, *Commissioner of Inland Revenue v HK-TVB International Ltd* [1992] 2 AC 397, the JCPC stated that income received by a Hong Kong company which sub-licensed films to overseas companies and exploited them overseas was accrued in and derived from Hong Kong. Admittedly, like the applicants, the JCPC in that case took into account a number of factors specific to the case, including the fact that the sub-licensing agreements were prepared in Hong Kong and that certain additional services were sometimes provided from Hong Kong. However, it should be noted that the JCPC also took into account the fact that a fixed fee was paid to the taxpayer located in Hong Kong. Furthermore, as the United Kingdom authorities pointed out in their comments of 14 November 2013, that decision adopted by the JCPC clearly confirmed that royalty income received by a Gibraltar company could be accrued in or derived from Gibraltar, even if the intellectual property rights were exploited only outside Gibraltar.

148 Secondly, contrary to the applicants' claim, the statement contained in the observations of 14 September 2012 was neither isolated nor inconsistent with the other information contained in that document.

149 That claim was supported by a graph at page 22 of the comments of 14 September 2012, which aimed to illustrate the impact of the non-taxation of passive interest and royalty income under the ITA 2010. That graph highlighted the amounts of passive interest and royalty income received by taxpayers for the period after 1 January 2010, distinguishing between income accrued

in or derived from Gibraltar and income accrued or derived from outside Gibraltar. The fact that all of the royalty income was shown as accrued in Gibraltar confirmed that it was normally considered to be income accrued in Gibraltar.

150 Furthermore, in so far as the applicants claim that the assertion of the United Kingdom authorities, referred to in paragraph 143 above, was inconsistent with the statement, at page 10 of the observations of 14 September 2012, that ‘the 785 former exempt companies that ha[d] assessable income not accruing in or deriving from Gibraltar [were] principally engaged in either the ownership of commercial real estate outside Gibraltar (and therefore subject to taxation on their rental income in the country where the property is situate) or in receipt of dividends, interest or royalties’, it should be noted, admittedly, that that extract could give the impression that, in the view of the United Kingdom authorities, the royalty income constituted taxable income not accrued in Gibraltar.

151 However, it must be noted that that extract contains a clerical error. As the applicants point out, that sentence concerned the situation under the ITA 2010, as in force until 31 December 2013. The United Kingdom authorities explained on numerous occasions in the document in question that royalty income did not constitute taxable income at that time. In particular, it appears from page 10 of the comments of 14 September 2012 that the United Kingdom authorities did distinguish, among the undertakings which were not subject to tax in Gibraltar, between undertakings which did not have taxable income (namely, those which received passive income) and those whose income was not accrued in or derived from Gibraltar.

152 Therefore, the contradiction identified by the applicants is not such as to call into question the credibility of the United Kingdom authorities’ assertion that the royalty income is considered to be accrued in or derived from Gibraltar.

153 Thirdly, in recital 45 of the opening decision, the Commission expressly stated that the United Kingdom authorities had informed it that the principle of territoriality implied that any royalty income received by a Gibraltar company was accrued in or derived from Gibraltar. The fact that the United Kingdom and Gibraltar authorities did not dispute that statement in their comments on the opening decision confirms the Commission’s correct understanding of the information provided to it during the administrative procedure and of the application of the territoriality principle in relation to royalty income.

154 Furthermore, it should be noted that, in their comments on the opening decision, the United Kingdom and Gibraltar authorities distinguished between, on the one hand, foreign-source interest and, on the other hand, passive interest derived from Gibraltar and royalty income. The fact that the United Kingdom and Gibraltar authorities had not distinguished, with respect to royalty income, between that accrued in Gibraltar and that from a foreign source supported the contention that such income was considered to be accrued in or derived from Gibraltar.

155 Fourthly, it should be pointed out that neither the expert report nor any information tending to call into question the United Kingdom’s assertion as to the application of the principle of territoriality to royalties was communicated to the Commission during the administrative procedure. Moreover, it should be noted that the applicants did not consider it appropriate to comment on the opening decision, even though they had been invited to do so and were in a position to understand from the content of the opening decision that MJN GibCo was a potential recipient of the aid scheme as identified by the Commission in that decision. As can be seen from paragraph 106 above, the Commission could not examine, on the basis of speculation, all the

arguments that could potentially have called into question the interpretation of national tax law set out in the opening decision, which had, furthermore, been confirmed by the Member State concerned.

156 It follows from the considerations set out in paragraphs 141 to 155 above that the United Kingdom's assertion concerning the application of the territoriality principle to royalty income, which derives directly from the Member State concerned, could be considered by the Commission to be sufficiently reliable and credible information. Therefore, in accepting the interpretation of Gibraltar tax law provided by the United Kingdom authorities, the Commission did not commit any error of assessment.

157 Moreover, none of the other arguments raised by the applicants is such as to establish that the United Kingdom authorities' assertion concerning the application of the territoriality principle to royalties was wrong.

158 First of all, the mere fact that the expert report argues that the assertion of the United Kingdom authorities is very strange and that the author of that report explains, as an experienced practitioner of Gibraltar tax law, that he was never aware of the existence, before the entry into force of the 2013 amendment, of a presumption concerning the application of the territoriality principle to royalties, is not sufficient to establish that the statement to that effect emanating directly from the Member State concerned and relating to the application of its own law was inaccurate.

159 Next, in so far as the applicants point out that it was not logical for there to have existed, between 1 January 2011 and 31 December 2013, a presumption that royalty income received by Gibraltar companies accrued there, although that category of income was not taxable in Gibraltar, it is sufficient to note that it is not apparent from the United Kingdom authorities' claim that they maintained that there was a written rule providing for a specific regime for the application of the principle of territoriality to royalty income. As can be seen from paragraphs 144 to 146 above, the United Kingdom authorities' claim reflected a simple application of the territoriality principle, as derived from Sections 11 and 74 of the ITA 2010.

160 Furthermore, in so far as the applicants refer, in their pleadings, to the Gibraltar Income Tax Commissioner's 'Guidance on Accrued and Derived 2018' note, published on 25 October 2018, it should be noted that that note, which post-dated the 2013 amendment to the ITA 2010, was not relevant for the purposes of interpreting the ITA 2010, as it applied between 1 January 2011 and 31 December 2013.

161 Finally, contrary to what the applicants maintain, the fact that the passive income was considered to be accrued in the place where the company receiving it was located, although it implied taking into account the place where that company was established or registered, was no less an application of the principle of territoriality and could not be equated with taxation based on the criterion of residence. As explained in paragraph 146 above, in the case of royalties, which constitute passive income, namely, income received by entities that merely held the intellectual property rights, it was consistent to consider that the 'activity that results in the income', within the meaning of Article 74 of the ITA 2010, was located at the place of residence of the companies that held the intellectual property rights giving rise to those royalties.

162 It follows, therefore, from all the foregoing that the Commission was right to find that the royalty income received by Gibraltar companies was considered to be accrued in or derived from Gibraltar.

(c) Examination of the criterion of advantage (second plea in law, seeking annulment of Article 1(2) of the contested decision)

163 By their second plea in law, seeking annulment of Article 1(2) of the contested decision, the applicants submit that the Commission committed manifest errors of assessment and infringed Article 107(1) TFEU in so far as it failed to establish the existence of an economic advantage.

164 In the first place, the applicants submit that the Commission confused, in recital 82 of the contested decision, the concept of economic advantage and that of selectivity. First, it did not explain how the non-taxation of royalty income conferred an economic advantage, whereas, according to the case-law of the Court of Justice, it was required to identify, initially, the existence of an economic advantage, then to carry out an analysis of selectivity. Secondly, the analysis carried out by the Commission was part of the assessment of selectivity and not that of economic advantage.

165 In the second place, the applicants claim that the Commission erred in law in holding, in recital 83 of the contested decision, that the ‘exemption’ from tax of royalty income introduced a mitigation of a charge and thus conferred an advantage on its beneficiaries. Since royalty income did not fall within the scope of the ITA 2010, its non-taxation could not constitute an exemption, or a renunciation by the Gibraltar tax authorities of revenue which they could have collected. In that context, they argue that the Commission committed several manifest errors of assessment with regard to the content and objective of the ITA 2010 and, in particular, the assessment that royalty income received by Gibraltar companies was considered to be accrued in or derived from Gibraltar.

166 In addition, the applicants argue that the transparent tax treatment of the profits of a CV was provided for only by Section 18 of the ITA 2010 and on condition that a trade, business or professional activity was carried out through that CV. They added that, in the present case, if the income of MJT CV could fall within the category of business profits and be attributed to MJN GibCo, pursuant to Section 18 of the ITA 2010, it would not have been taxable in Gibraltar, since it was not accrued in or derived from that territory.

167 The Commission contests those arguments.

(1) The first complaint in the second plea in law, alleging confusion between the criteria of advantage and selectivity

168 By their first complaint, the applicants criticise the Commission for confusing the criterion of advantage with that of selectivity. It should be recalled in that regard that, in principle, selectivity and advantage are two separate criteria. So far as advantage is concerned, the Commission must show that the measure improves the financial position of the recipient (see, to that effect, judgment of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 33). By contrast, as regards selectivity, the Commission must show that the advantage is not enjoyed by other

undertakings in a legal and factual situation comparable to that of the recipient in the light of the objective of the reference framework (see, to that effect, judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 49).

169 However, it should be pointed out that, in tax matters, the examination of advantage overlaps with the examination of selectivity in so far as, in order for those two conditions to be satisfied, it must be shown that the contested tax measure leads to a reduction in the amount of tax which would normally have been payable by the beneficiary of the measure under the ordinary tax regime which would, therefore, have been applicable to other taxpayers in the same situation. Moreover, it follows from the case-law of the Court of Justice that those two criteria may be examined together, as the 'third condition' laid down by Article 107(1) TFEU, relating to the existence of a 'selective advantage' (see, to that effect, judgment of 30 June 2016, *Belgium* v *Commission*, C-270/15 P, EU:C:2016:489, paragraph 32).

170 In the present case, it should be noted, with regard to the non-taxation of royalty income, that the Commission examined the criterion of advantage and the criterion of selectivity separately in two separate sections of the contested decision, namely section 7.1.2, entitled 'Advantage', and section 7.1.3, entitled 'Selectivity'.

171 As regards the examination of the criterion of advantage, it is clear from recital 83 of the contested decision, which forms part of section 7.1.2 of that decision, that the Commission did examine the effect of the measure in question on the situation of the beneficiaries. In that recital, the Commission stated that the exemption introduced a reduction in the tax which the undertakings benefiting from the non-taxation of royalty income would otherwise have had to pay. It follows that the Commission did not, in any event, confuse the criterion of advantage with that of selectivity, but sought to establish that the non-taxation of royalty income improved the financial situation of the beneficiaries of that measure within the meaning of the case-law cited in paragraph 168 above.

172 The fact that the Commission stated, in recital 83 of the contested decision, that the beneficiaries of the non-taxation thus enjoyed a more favourable financial position than other taxpayers is not such as to call that finding into question. The fact that the Commission also referred to assessments that were more relevant to the examination of the selectivity criterion than to that of the advantage criterion has no bearing on the circumstance that it did examine whether the measure in question conferred an advantage on its beneficiaries.

173 Consequently, the first complaint in the second plea in law, seeking annulment of Article 1(2) of the contested decision, must be rejected.

(2) The second complaint in the second plea in law, which contests the existence of tax mitigation

174 By their second complaint, the applicants contest that the non-taxation of royalty income constituted an economic advantage within the meaning of Article 107(1) TFEU.

175 According to settled case-law, measures which, whatever their form, are likely directly or indirectly to benefit undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (see judgment of 2 September 2010, *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 40 and case-law cited; judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 21).

176 As explained in paragraph 91 above, the very existence of an advantage can be established only in relation to so-called ‘normal’ taxation (judgment of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 56). Consequently, such a measure confers an economic advantage on its recipient where it relieves the charges which normally burden the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the term, are of the same nature and have identical effects (judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 22). Therefore, a measure by which the public authorities grant certain undertakings advantageous tax treatment which, although not involving a transfer of State resources, places the beneficiaries in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 107(1) TFEU (see, to that effect, judgments of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 14, and of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 46 and the case-law cited).

177 Consequently, in order to determine whether there is a tax advantage, it is necessary to compare the situation of the recipient resulting from the application of the measure in question with the situation of that recipient in the absence of that measure and in application of the normal rules of taxation (see judgment of 24 September 2019, *Netherlands and Others* v *Commission*, T-760/15 and T-636/16, EU:T:2019:669, paragraph 147 and the case-law cited).

178 In the present case, the Commission considered, in recital 82 of the contested decision, that the non-taxation of royalty income constituted an advantage, on the grounds that that measure was in contradiction with the principle that income tax should be collected from all taxable persons who received income accrued in or derived from Gibraltar. It added that royalty income received by a company in Gibraltar should normally have been subject to tax, in accordance with the principle of territoriality, as it was considered to have been accrued in or derived from that territory. In recital 83 of the contested decision, the Commission concluded that the ‘exemption’ of royalty income introduced a mitigation of a charge which the companies would otherwise have had to pay. In that respect, it should be noted that the Commission’s reasoning in recitals 81 to 83 of the contested decision must be read in the light of that decision as a whole and, in particular, of the finding, referred to in recital 93 of that decision, that the non-taxation of royalty income was the result of the non-inclusion of those categories of income in Schedule 1 of the ITA 2010.

179 First, as can be seen from paragraphs 116 to 128 above, the Commission correctly concluded, in recital 82 of the contested decision, that there existed a principle that income tax should be collected from all taxable persons receiving income accrued in or derived from Gibraltar and that such a principle formed part of the normal rules of taxation against which it had to examine the non-taxation of royalty income. As noted in paragraph 123 above, the tax regime introduced by the ITA 2010 was based on two guiding principles, namely, the principle of territoriality, according to which income accrued in or derived from Gibraltar was subject to tax, and the principle that all of the taxpayers’ accounting income should be subject to tax.

180 Similarly, as set out in paragraphs 141 to 156 above, under the principle of territoriality, royalty income received by a company in Gibraltar was considered to be accrued in or derived from Gibraltar.

181 It follows from those findings that the non-inclusion of royalty income among the categories of income listed in Schedule 1 of the ITA 2010 allowed that income to escape income tax in Gibraltar, whereas, in accordance with the principles identified by the Commission in recital 82 of the contested decision, such income, which was accrued in or derived from Gibraltar, should normally have been subject to it.

182 Therefore, the Commission was right to find that the non-taxation of royalty income introduced a reduction in the tax which the undertakings receiving such income would otherwise have had to pay under the normal taxation rules and concluded that there was an economic advantage for those undertakings.

183 None of the applicants' other arguments is such as to call that finding into question.

184 First, in so far as the applicants argue that the measure could not constitute an advantage, on the ground that the tax authorities, not having a basis for taxing that income, could not have waived the taxation of royalty income, it is sufficient to note that the non-inclusion of that category of income in Schedule 1 of the ITA 2010 constitutes a waiver by the Gibraltar legislature and, therefore, by the competent authorities of the territory concerned. Furthermore, the Commission cannot be criticised for having disregarded the fiscal sovereignty of the Member States in determining the tax base for the purposes of income taxation, since, as is apparent from paragraphs 178 and 181 above, it did examine that measure in the light of the content and objective of the ITA 2010 and, thus, of the normal rules on taxation.

185 Secondly, in so far as the applicants argue that there was no explicit rule providing for the taxation of royalties, so that that category of income did not fall within the scope of the ITA 2010, it should be noted that the fact that a tax measure is designed according to a certain regulatory technique has no bearing for the purposes of analysing that measure under Article 107 TFEU, there is a risk that national tax rules may escape State aid control from the outset simply because they are based on a different regulatory technique, even though they have the same *de jure* or de facto effects, by the adjustment and combination of different tax rules. Any other interpretation would run counter to the settled case-law, according to which Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects, and thus independently of the techniques used (see, to that effect, judgment of 28 June 2018, *Andres (Bankruptcy Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 91 and the case-law cited).

186 As explained in paragraph 81 above, the non-inclusion of a category of income in the tax base and the formal derogation from tax of a category of income normally included in the tax base produce the same effects. Therefore, the fact that there was no explicit rule in the ITA 2010 providing for the taxation of royalty income did not prevent such a measure from conferring an advantage within the meaning of Article 107 TFEU.

187 Thirdly, in so far as the applicants claim that the Commission has not demonstrated that the potential beneficiaries of the aid, namely the 10 undertakings referred to in recital 98 of the contested decision, actually benefited from the non-taxation of royalty income, it is sufficient to recall that, according to settled case-law in the context of a decision on an aid scheme, the Commission may confine itself to examining the characteristics of the scheme in question in order to assess, in the grounds of its decision, whether, by reason of the arrangements for which the scheme provides, it gives an appreciable advantage to the beneficiaries over their competitors and is likely to benefit essentially undertakings engaged in trade between Member States.

Therefore, the Commission is not required to carry out an analysis of the aid granted in each individual case on the basis of such a scheme. It is only at the stage of recovery of the aid that it will be necessary to verify the individual situation of each undertaking concerned (see, to that effect, judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 63 and the case-law cited).

188 It follows that the Commission was not required to show that the 10 potential beneficiaries had actually benefited from the tax measure. Such arguments are not capable of bringing about the annulment of Article 1(2) of the contested decision and must be rejected as being inoperative.

189 For the same reasons, the arguments relating to the specific situation of MJN GibCo must be rejected as ineffective for the purposes of analysing the legality of Article 1(2) of the contested decision. In particular, as regards the arguments relating to the tax transparency of the CVs, it should be noted that, since the Commission did not base its assessment of the aid scheme arising from the non-taxation of royalty income on the question of tax transparency, they are irrelevant for the purposes of examining whether the Commission correctly considered that that measure conferred a tax advantage on its beneficiaries.

190 In the light of the foregoing, it is necessary to reject the second complaint in the second plea in law seeking annulment of Article 1(2) of the contested decision and, consequently, that plea in law must be rejected in its entirety.

(d) The selectivity test (third plea in law, seeking annulment of Article 1(2) of the contested decision)

191 By their third plea in law, seeking annulment of Article 1(2) of the contested decision, the applicants claim, in essence, that the Commission committed manifest errors of assessment and infringed Article 107(1) TFEU by considering that the non-taxation of royalty income was a selective measure.

192 In the first place, the applicants claim that the Commission erred in determining the reference framework. They state that, in tax matters, the selectivity criterion can only be assessed in the light of so-called 'normal' taxation, the definition of which, like the choice of the tax base, falls within the sovereignty of the Member States. While the applicants confirm that the ITA 2010 is the appropriate reference framework, they claim that the Commission has committed several errors as to the content and objective of that law.

193 In the second place, the applicants claim that the Commission erroneously identified a derogation from the framework.

194 First of all, the non-taxation of royalty income does not constitute an exemption, a derogation or an 'implicit exemption', but results solely from the fact that such income falls outside the scope of the ITA 2010.

195 Next, the Commission misunderstood the scope of the principle that a measure constituting State aid should be defined by its effects. Admittedly, in the judgments of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732), and of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981), the Court of Justice held that a measure could be selective where it has the effect of excluding certain undertakings from the tax

base. However, those cases concerned exceptional circumstances and did not justify that the concept of State aid defined by its effects was stretched too far. Moreover, the Court clarified in the judgment of 16 May 2019, *Poland* v *Commission* (T-836/16 and T-624/17, EU:T:2019:338), that a tax measure may provide for differences in treatment without being classified as selective, provided that those differences are not arbitrary, are applied in a non-discriminatory manner and remain in accordance with the objective of the tax concerned.

196 Finally, the applicants argue that the non-taxation of royalty income did not introduce any differentiation between economic operators in the same legal and factual situation. In that respect, they argue that none of the conditions for non-taxation were applicable only to multinational undertakings and that the fact that the measure mainly benefited multinational groups was merely a random circumstance and not an 'effect of the measure'.

197 The Commission contests those arguments.

198 It follows from the case-law of the Court of Justice that the assessment of selectivity requires a determination as to whether, in the context of a given legal regime, the national measure at issue is such as to favour 'certain undertakings or the production of certain goods' over others which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation and which are thus subject to differential treatment which may, in substance, be classified as discriminatory (see judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54 and the case-law cited).

199 Where the measure at issue is envisaged as an aid scheme and not as individual aid, it is for the Commission to establish that that measure, although it provides for a general advantage, confers the benefit thereof exclusively on certain undertakings or certain sectors of activity (see judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 55 and the case-law cited). A general measure applicable without distinction to all economic operators does not constitute an aid measure within the meaning of Article 107(1) TFEU (see, to that effect, judgment of 19 September 2000, *Germany* v *Commission*, C-156/98, EU:C:2000:467, paragraph 22).

200 In tax matters, the case-law traditionally requires a three-step selectivity analysis. That analysis involves, as a first step, identifying the common or 'normal' tax regime applicable in the Member State concerned, which constitutes the reference framework, and, as a second step, showing that the tax measure at issue derogates from that reference framework, in so far as it introduces differentiation between operators who are, in the light of the objective pursued by that reference framework, in a comparable legal and factual situation (judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 57). As a third step, it is for the Member State to show that the differentiation introduced by the measure at issue, which is 'prima facie selective', is justified, since it results from the nature or general scheme of the framework of which that measure forms part (see, to that effect, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 58).

201 The condition of selectivity is therefore satisfied where the Commission succeeds in demonstrating that the measure derogates from the common or 'normal' tax regime applicable in the Member State concerned, thereby introducing, by its practical effects, differential treatment between operators, even though the operators who benefit from the tax advantage and those who

are excluded from it are, in the light of the objective pursued by that Member State's tax regime, in a comparable legal and factual situation (judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 67).

202 In the judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016: 981, paragraph 74), the Court of Justice essentially drew a distinction between, on the one hand, the case where the measure took the form of a tax advantage derogating from a common tax regime and, on the other hand, the case where the measure took the form of the application of a 'general' tax regime based on criteria which are themselves also general in nature, but which in fact discriminate between certain undertakings, thus implying 'de facto selectivity'. Such a distinction is based directly on the judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732), in which the measures subject to review under Article 107(1) TFEU were the rules on the determination of the tax base for corporation tax purposes. In that case, the Court of Justice held that the tax regime consisting of a tax on the number of employees and a tax on the size of the premises had the effect, as designed, of excluding from the outset any taxation of offshore companies, since they had no employees and no business premises.

203 In such a case, the measure may be selective, although it is general in nature and does not constitute a derogation from the common tax regime, but forms an integral part of it (see, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 91 and 92). It is then for the Commission to show that the tax regime is, in itself, manifestly discriminatory in relation to the objective which it is designed to pursue and, thus, that the measures at issue, being an integral part of the tax regime are contrary to the objective pursued by the latter, in that they empty the objective of the tax of its substance (see, to that effect, judgment of 16 March 2021, *Commission* v *Poland*, C-562/19 P, paragraphs 42 and 43, and of 16 May 2019, *Poland* v *Commission*, T-836/16 and T-624/17, EU:T:2019:338, paragraphs 70, 79 and 94). That is the case where the Commission demonstrates that the scheme, through its effects, favours certain undertakings by virtue of their own specific characteristics (see, to that effect, judgments of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 87 and 88, and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 74 to 76).

204 In the present case, it must be noted that, in the contested decision, the Commission examined the non-taxation of royalty income not only in the light of the three-step analysis of the selectivity of tax measures constituting a derogation, but also by applying the analysis adopted by the Court of Justice in the judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732).

205 First, it is clear from recitals 87, 90 to 94, 100, 103 and 105 to 110 of the contested decision and from the heading of sections 7.1.3.1, 7.1.3.2 and 7.1.3.3 of that decision that the Commission considered that the non-taxation of royalty income constituted a derogation and applied the three-step analysis of selectivity.

206 More specifically, the Commission held, first, that the reference framework was the ITA 2010, the objective of which was to collect income tax from taxpayers receiving income accrued in or derived from Gibraltar (see recitals 90 to 93 and 100 of the contested decision) and considered that the non-taxation of royalty income constituted an 'implicit exemption' from income tax.

Next, the Commission considered, in the light of the objective of the ITA 2010, that the undertakings benefiting from the non-taxation of royalty income, namely companies belonging to multinational groups which licensed intellectual property rights, were in a similar legal and factual situation to all other undertakings established in Gibraltar receiving income accrued in or derived from Gibraltar (recitals 100 and 103 of the contested decision). In order to establish that the non-taxation of royalty income led to a different tax treatment of those undertakings, even though they were in a comparable situation, the Commission noted that, in the absence of the 'exemption' for royalty income, the territorial tax regime would consider that royalty income received by an undertaking established in Gibraltar derived from Gibraltar (recital 94 of the contested decision). Finally, the Commission rejected the justifications put forward by the United Kingdom authorities (recitals 105 to 108 of the contested decision).

207 Secondly, the Commission also stated that 'where the measure does not arise from a formal derogation from the tax [regime], it [was] particularly relevant to consider the effects of the measure in order to assess whether the measure significantly favour[ed] a particular group of undertakings' (recital 97 of the contested decision). It then explained that the non-taxation of royalty income had benefited only 10 undertakings, all of which were part of multinational groups of undertakings, and that no independent undertaking had received royalty income in Gibraltar (recital 98 of the contested decision). Furthermore, the Commission stated in recital 104 of the contested decision that the fact that the 'exemption' for royalty income mainly benefited multinational groups was not a random consequence of the scheme and that the rule was designed to attract or favour group companies and, in particular, multinational groups, more particularly, multinational groups carrying out certain activities (licensing of intellectual property rights), thus using the terminology used in the judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732).

208 It follows from recitals 90 to 104 of the contested decision that the Commission, as it confirmed in response to a question from the Court at the oral hearing, considered, primarily, that the non-taxation of royalty income constituted a derogating measure which was selective, in that it favoured companies with royalty income over all other companies with income accrued in or derived from Gibraltar and, in the alternative, also examined the 'de facto' selectivity of the non-taxation of royalty income.

209 It is therefore necessary, as a first step, to examine whether the Commission was justified, for the purposes of establishing the selective nature of the non-taxation of royalty income, in considering, primarily, that it constituted a derogation from the ITA 2010, in that it had the effect of applying to Gibraltar undertakings receiving royalty income a tax treatment distinct from that applied to undertakings taxable in Gibraltar receiving income accrued in or derived from Gibraltar, although those two categories of undertakings were in comparable situations in the light of the objective pursued by the ITA 2010.

210 In that regard, it should be noted that, as set out in paragraphs 118 to 128 above, the Commission correctly found that the objective of the ITA 2010 was to collect tax on the income of taxpayers receiving income accrued in or derived from Gibraltar. Similarly, as set out in paragraphs 141 to 156 above, the Commission correctly held that royalty income received by undertakings in Gibraltar was considered to be accrued in or derived from Gibraltar. In that context, the Commission correctly considered that Gibraltar undertakings receiving royalty income should normally have been subject to tax in Gibraltar and that they were in a similar legal and factual situation to other undertakings receiving income accrued in or derived from Gibraltar.

211 Therefore, the Commission did not err in finding that the non-taxation of royalty income favoured undertakings receiving royalty income over other undertakings receiving income accrued in or derived from Gibraltar. It follows that it was right to consider that the non-taxation of royalty income derogated from the ITA 2010 and its objective.

212 Those considerations alone are sufficient to establish the a priori selective nature of the non-taxation of royalty income, without it being necessary to verify whether the Commission correctly considered that the measure specifically benefited multinational companies carrying out certain activities, such as the licensing of intellectual property rights. The Commission is not required, in order to establish the selectivity of a measure, to identify certain specific features that are characteristic of and common to the undertakings that could be the recipients of the tax advantage, by which they can be distinguished from those undertakings that are excluded from the advantage (see, to that effect, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 71, 76 and 78). Although, for the purposes of establishing the selectivity of a tax measure, it is not always necessary for that technique to derogate from a common tax regime, the fact that it is a derogation is relevant for those purposes where the effect of that technique is that two categories of operators – those who fall within the scope of the derogating measure and those who continue to fall within the scope of the ordinary tax regime – are distinguished and are subject, a priori, to different treatment, even though those two categories are in a comparable situation in the light of the objective pursued by that regime (see, to that effect, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 77 and 78).

213 Furthermore, it is important to note that the applicants do not contest the Commission's conclusions that the non-taxation of royalty income was not justified by the nature or general scheme of the Gibraltar tax regime. Therefore, the Commission was right to conclude that the non-taxation of royalty income was selective and to consider that such non-taxation, by reason of the non-inclusion, between 1 January 2011 and 31 December 2013, of royalty income in the categories of income chargeable to tax in Gibraltar listed in Schedule 1 of the ITA 2010, constituted an aid scheme. To the extent that the three-step selectivity analysis is sufficient to support that conclusion, it is not necessary to address the applicants' arguments challenging the Commission's alternative reasoning that the non-taxation of royalty income was de facto selective. In so far as certain grounds for a decision are, on their own, capable of justifying it to the requisite legal standard, any defects in other grounds of the decision do not, in any event, affect its operative part. Moreover, where the operative part of a Commission decision is based on several pillars of reasoning, each of which is sufficient in itself to justify that operative part, the act should in principle be annulled only if each of those pillars is vitiated by illegality. In that case, an error or other illegality affecting only one of the pillars of reasoning cannot suffice to justify annulment of the contested decision, since that error could not have had a decisive influence on the operative part adopted by the institution which took that decision (see judgment of 1 March 2018, *Poland* v *Commission*, T-316/15, not published, EU:T:2018:106, paragraph 91 and the case-law cited).

214 In particular, it should be noted that the applicants' arguments concerning the consequences to be drawn, in the present case, from the judgments of 16 March 2021, *Commission* v *Poland* (C-562/19 P, EU:C:2021:201), and of 16 March 2021, *Commission* v *Hungary* (C-596/19 P, EU:C:2021:202), as well as the judgments of 16 May 2019, *Poland* v *Commission* (T-836/16 and

T-624/17, EU:T:2019:338), and of 27 June 2019, *Hungary* v *Commission* (T-20/17, EU:T:2019:448), are inoperative, in so far as they relate to the analysis of de facto selectivity and not to the three-stage analysis of selectivity.

215 Furthermore, in so far as the applicants contest, in the context of their arguments relating to the selectivity analysis, the Commission's assertion, in paragraph 95 of the defence, that it was not required to explain in detail the reasons which led it, in the contested decision, to conclude that the non-taxation of royalty income constituted an aid scheme merely because it had already examined those elements, in detail, in the opening decision, it should be noted, first, that the Court has already held that the decision to initiate the formal procedure was part of the context of the decision to terminate that procedure and that the former could be taken into account when examining the grounds for the latter (see, to that effect, judgment of 12 July 2018, *Austria* v *Commission*, T-356/15, EU:T:2018:439, paragraph 535). Secondly, and in any event, as is apparent from paragraphs 204 to 208 above, the contested decision set out in detail the factors which led the Commission to consider that the non-taxation of royalty income constituted a selective measure.

216 In view of the foregoing, the third plea in law seeking annulment of Article 1(2) of the contested decision must be rejected.

(e) The scope of the selective advantage (fourth plea in law, seeking annulment of Article 1(2) of the contested decision)

217 By their fourth plea in law, the applicants claim that, in any event and even assuming that the non-taxation of royalty income did confer a selective advantage, the Commission committed a manifest error of assessment and an error of law in considering that that selective advantage extended to royalties generated by activities and intellectual property rights not located in Gibraltar, as that income did not fall within the territorial scope of the ITA 2010.

218 According to the applicants, income derived by a Gibraltar company from activities outside Gibraltar, including royalty income, was not taxable in Gibraltar. They argue that, in their situation in which none of the intellectual property rights arose in Gibraltar, those rights are not located in Gibraltar, the licensees are not located in Gibraltar and the royalty income is not paid in Gibraltar, the royalty income is not accrued in or derived from Gibraltar. Therefore, the applicants argue that, in this case, despite tax transparency, MJN GibCo's share of MJT CV's income was not taxable because that income was not accrued in or derived from Gibraltar.

219 The Commission contests those arguments.

220 In so far as, as found in paragraphs 141 to 162 above, the Commission did not err in finding that the royalty income received by Gibraltar companies was considered to be accrued in or derived from Gibraltar, it is necessary to reject the applicants' arguments that royalty income relating to activities and intellectual property rights not located in Gibraltar did not fall within the territorial scope of the ITA 2010, and that the Commission therefore erred in considering that the selective advantage conferred by the non-taxation of royalty income extended to those royalties.

221 Furthermore, in so far as the applicants claim that, in the case of MJN GibCo, the royalty income was not accrued in or derived from Gibraltar, such an argument is not such as to call into question the Commission's analysis that the non-taxation of royalty income constituted an aid scheme, nor the legality of Article 1(2) of the contested decision, and must be rejected as inoperative.

Assuming that it is well founded, that argument would at most call into question the status of MJN GibCo as a recipient of the aid. Article 1(2) of the contested decision merely states that the non-taxation of royalty income constitutes an aid scheme, without identifying the potential beneficiaries of that scheme. Moreover, as is clear from the case-law set out in paragraph 187 above, in a decision concerning an aid scheme, the Commission is not required to carry out an analysis of the aid granted, in each individual case, on the basis of such a scheme.

222 In the light of the foregoing, the fourth plea in law seeking annulment of Article 1(2) of the contested decision must be rejected.

3. The plea in law alleging manifest errors of assessment and infringement of Article 1(c) of Regulation No 659/1999 (fifth plea in law, seeking annulment of Article 1(2) of the contested decision)

223 By their fifth plea in law, seeking annulment of Article 1(2) of the contested decision, the applicants challenge the finding in section 7.2 of the contested decision that the non-taxation of royalty income constituted new aid within the meaning of Article 1(c) of Regulation No 659/1999.

224 First, the applicants allege that the contested decision does not contain an assessment of the classification as new aid of the measure consisting in the non-taxation of royalty income. They argue that, while the Commission had indeed stated, in the opening decision, that royalty income had been excluded from the scope of income taxation for the first time in the ITA 2010, the contested decision did not contain such a finding.

225 Secondly, they claim that, even if the non-taxation of royalty income constituted State aid within the meaning of Article 107(1) TFEU, it should be regarded as existing aid, since passive royalty income was not taxed in Gibraltar under the ITA 1952, which was in force before the adoption of the ITA 2010, so that that rule was already applicable on 1 January 1973, the date on which the United Kingdom became a Member State. In particular, the applicants submit that, although Section 6(1) of the ITA 1952 listed, among the six categories of taxable income, the category ‘rents, royalties, premiums and other profits arising from property’, such a category in fact referred only to immovable property rights. The term ‘royalties’ referred only to royalties from mining.

226 The Commission contests those arguments.

227 In essence, the applicants raise two complaints, alleging, first, a failure to state reasons, in breach of Article 296 TFEU, in that the Commission did not explain, in the contested decision, in what way the non-taxation of royalty income constituted new aid, and, secondly, an infringement of Article 1(c) of Regulation No 659/1999, in that the Commission erroneously took the view that that measure constituted an existing aid measure.

228 According to settled case-law, the obligation to state reasons laid down in Article 296 TFEU constitutes an essential procedural requirement which must be distinguished from the question of the merits of the reasons, which is a matter of the substantive legality of the contested measure (see judgments of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 146 and the case-law cited, and of 14 May 2014, *Donau Chemie* v *Commission*, T-406/09, EU:T:2014:254, paragraph 28 and the case-law cited). It is therefore necessary to deal,

in the first place, with the complaint alleging, in essence, breach of the obligation to state reasons, laid down in Article 296 TFEU, and then, in the second place, with the complaint alleging breach of Article 1(c) of Regulation No 659/1999.

(a) The first complaint, alleging a failure to state reasons within the meaning of Article 296 TFEU

229 Under the second paragraph of Article 296 TFEU, legal acts must state the reasons on which they are based. According to settled case-law, the statement of reasons required must be appropriate to the nature of the act in question and show, clearly and unequivocally, the reasoning of the institution which adopted the act, so as to enable the persons concerned to know the reasons for the measure taken and the competent court to exercise its review. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which such a decision is based is, therefore, in addition to permitting review by the Courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged (see judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraphs 146 to 148 and the case-law cited; judgments of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraphs 114 and 115, and of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 44).

230 It is not required that the statement of reasons specify all the relevant matters of fact and law, since the question whether the statement of reasons for an act satisfies the requirements of Article 296 TFEU must be assessed in the light not only of its wording, but also of its context and of all the legal rules governing the matter concerned (judgments of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 150; of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 116; and of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 45).

231 In the present case, it should be noted that, although the Commission considered that the non-taxation of royalty income constituted unlawful aid (recitals 216 and 217 of the contested decision), the contested decision contains no information, including in the section entitled ‘New aid character of the measure’ (recitals 118 to 121 of the contested decision), explaining why that measure constituted new aid. The elements contained in that section concern solely the aid scheme relating to the non-taxation of passive interest.

232 However, as stated in paragraph 230 above, compliance with the obligation to state reasons must be examined in the light of the content of the act, but also of its context and the applicable legal rules. Moreover, in the context of the State aid control procedure, the final decision, taken at the end of the formal investigation procedure, constitutes an act which is prepared in several stages. The Court has thus already held that the decision to open the formal procedure forms part of the context of the decision terminating the formal procedure and that the former may be taken into account in the context of the examination of the statement of reasons for the latter (see, to that effect, judgment of 12 July 2018, *Austria* v *Commission*, T-356/15, EU:T:2018:439, paragraph 535).

233 First, it is apparent from recitals 217 and 221 of the contested decision that the non-taxation of royalty income was an unlawful aid measure which had to be recovered, so that the Commission necessarily considered, in the contested decision, that that measure was a new aid measure. As it follows from Article 108(1) and (3) TFEU and Article 1(f) of Regulation No 659/1999, only a new aid measure which has been put into effect without the Commission’s authorisation can be

classified as an unlawful aid measure. Existing aid schemes, by contrast, are subject to ongoing review, in the context of which the Commission proposes appropriate measures required by the progressive development or functioning of the internal market.

234 Secondly, it appears from recitals 45, 66 and 67 of the opening decision that the Commission had qualified the non-taxation of royalty income as new aid on the grounds that royalty income was subject to tax in Gibraltar under the ITA 1952 until the ITA 2010 came into force.

235 Therefore, in so far as the finding, in the contested decision, that the measure at issue was an unlawful aid measure was compatible with the assessment contained in the opening decision and that decision and the contested decision did not contain any elements which might suggest that the Commission had changed its position on that particular point, it must be considered that, in the present case, the opening decision formed part of the context in which the contested decision was adopted and had to be taken into account for the purposes of assessing the reasoning of the latter, as regards the classification of the non-taxation of royalty income as a new aid measure.

236 Furthermore, it should be noted that the applicants dispute the assessment that the non-taxation of royalty income was new aid and, in particular, that such income was subject to income tax under the ITA 1952. That demonstrates that they were in a position to know the grounds on which the Commission had considered that the non-taxation of royalty income constituted an unlawful new aid measure.

237 In the light of the foregoing, the complaint alleging that the contested decision failed to state reasons must be rejected.

(b) The second complaint, alleging infringement of Article 1(c) of Regulation No 659/1999

238 According to Article 1(c) of Regulation No 659/1999 laying down detailed rules for the application of Article 108 TFEU, new aid means any aid, that is to say, any aid scheme or individual aid, which is not existing aid, including any alteration to existing aid.

239 According to Article 1(b)(i), (ii) and (v) of Regulation No 659/1999, existing aid means any authorised aid, that is to say, aid schemes and individual aid authorised by the Commission or the Council of the European Union, any aid existing before the entry into force of the Treaty in the Member State concerned, namely, aid schemes and individual aid put into effect before, and still applicable after, the entry into force of the Treaty, as well as any aid which is deemed to be existing aid because it can be established that it did not constitute aid at the time of its entry into force, but which subsequently, as a result of the evolution of the common market, became aid without having been altered by the Member State concerned.

240 Measures taken after the entry into force of the Treaty in the Member State concerned which tend to introduce or alter aid must therefore be regarded as new aid (see judgment of 20 May 2010, *Todaro Nunziatina & C.*, C-138/09, EU:C:2010:291, paragraph 46 and the case-law cited).

241 It is by reference to the provisions which provide for it, their modalities and their limits that aid may be classified as new or as a modification of the existing scheme (see judgment of 16 December 2010, *Netherlands and NOS* v *Commission*, T-231/06 and T-237/06, EU:T:2010:525, paragraph 180 and the case-law cited).

242 In the present case, the applicants merely challenge the Commission's finding that royalty income was taxed under the ITA 1952 and was excluded from the scope of income tax in Gibraltar only when the ITA 2010 was adopted.

243 In that regard, it should be noted that, as the Commission pointed out in the opening decision, Section 6(1)(e) of the ITA 1952, which was repealed by the ITA 2010, expressly listed royalty income among the categories of income taxable in Gibraltar. Such income was therefore subject to income tax in Gibraltar until the ITA 2010 came into force on 1 January 2011.

244 The applicants' arguments that the term 'royalties' in Section 6(1)(e) of the ITA 1952 covered exclusively royalty income received in connection with real estate and referred to mining royalties cannot succeed.

245 First, the applicants' analysis is at odds with the information provided by the United Kingdom authorities during the administrative procedure. Indeed, the United Kingdom authorities expressly stated, on several occasions and, in particular, in their observations of 14 September and 3 December 2012, that, 'before the [ITA 2010] was adopted, [royalty income was] taxed and … did not give rise to a significant or worthwhile tax yield', which was why it had been excluded from taxation by the 2010 Act. It is clear from the context of those comments that the United Kingdom authorities were referring to intellectual property royalties and not to mining royalties.

246 Furthermore, as the Commission maintains, the United Kingdom and Gibraltar authorities have not contested its assessment of the ITA 1952 contained in the opening decision. As can be seen from paragraph 106 above, in the absence of information which could call into question the interpretation of national tax law given in the opening decision, the Commission could not examine, by way of speculation, all the arguments which could potentially have called into question that interpretation, which, moreover, was based directly on information from the Member State concerned, which could be considered sufficiently reliable and credible.

247 Secondly, the arguments contained in the expert report, annexed to the reply, do not allow the finding that royalty income was subject to income tax under Section 6(1)(e) of the ITA 1952 to be called into question. Although the term 'royalties' was inserted in Section 6(1)(e) of the ITA 1952 between the terms 'rents', 'premiums' and 'other profits arising from property', it was not clear from the wording of that article that all of those categories of income related to real estate. The term 'property' could refer both to real estate and to any other form of property, including intellectual property.

248 Furthermore, in so far as the expert report is based on the case-law of the JCPC on the interpretation of the law applicable in former colonies characterised by their mineral wealth, it should be noted, as the Commission does, that it is inconsistent to apply such case-law, by analogy, to the situation of Gibraltar, whose territory lacks such characteristics, in order to conclude that the term 'royalty' within the meaning of Section 6(1)(e) of the ITA 1952 refers only to mining royalties.

249 It therefore follows from the above that the Commission correctly considered that the non-taxation of royalty income was introduced with the adoption of the ITA 2010. Consequently, the Commission did not err in classifying that non-taxation as a new and unlawful aid measure.

250 The second complaint and, consequently, the fifth plea in law seeking annulment of Article 1(2) of the contested decision must therefore be rejected.

251 The action must therefore be dismissed in so far as it seeks the annulment of Article 1(2) of the contested decision concerning the non-taxation of royalty income and the recovery order relating to that measure.

C. The second part of the application, seeking annulment of Article 2 of the contested decision in so far as it concerns the individual State aid granted to MJN GibCo and the order for recovery linked to that measure

252 The second part of the application seeks the annulment of Article 2 of the contested decision, under which the Commission found that individual State aid granted on the basis of five advance tax rulings, granted to five companies established in Gibraltar, holding a stake in Dutch CVs and receiving passive interest and royalty income, was unlawful and incompatible with the internal market. The 2012 MJN GibCo ATR is one of the five advance tax rulings referred to in Article 2 of the contested decision.

253 As is apparent from paragraph 40 above, the present action seeks the annulment of Articles 2 and 5 of the contested decision solely in so far as they concern the situation of MJN GibCo.

254 In support of their claims for annulment of Article 2 and Article 5(1) and (2) of the contested decision, the applicants raise four pleas in law:

– the first plea in law alleges infringement of Article 108(2) TFEU and Article 6 of Regulation No 659/1999, in that the Commission failed to provide sufficient information in the decision to extend the formal investigation procedure about the subject matter of that procedure (section (a) of the second part of the application);

– the second and third pleas in law allege infringement of Article 107(1) TFEU and manifest errors of assessment as to the meaning and effects of the 2012 MJN GibCo ATR and its classification as an individual aid measure (sections (b) and (c) of the second part of the application);

– the fourth plea in law alleges misuse of powers, in that the Commission used the State aid control procedure to challenge the use of a CV in the structures of multinational groups combined with the territorial principle of taxation (section (d) of the fourth part of the application).

1. Preliminary considerations on the scope of Article 2 of the contested decision

255 Article 2 of the contested decision provides that ‘the individual State aids granted by the Government of Gibraltar, on the basis of the [five] tax rulings … to five Gibraltar companies with interests in Dutch [CVs] 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’. In that regard, it should be recalled that the 2012 MJN GibCo ATR is one of the five advance tax rulings at issue.

256 By their application, the applicants seek the annulment of the contested decision in so far as it held that the 2012 MJN GibCo ATR constituted individual aid granted to MJN GibCo, both for the period up to 31 December 2013 and for the period after that date. In particular, it appears from the applicants' replies to the Court's written questions that they considered that Article 2 of the contested decision provided that, for the period until 31 December 2013, individual aid had been granted to them on the basis of the aid scheme identified in Article 1(2) of that decision. The Commission, for its part, clarified, in response to a question from the Court at the oral hearing, that Article 2 of the contested decision related only to the period after 31 December 2013.

257 It must therefore be examined whether Article 2 of the contested decision refers only to the ad hoc individual aid measure granted on the basis of the 2012 MJN GibCo ATR for the period after 31 December 2013 or whether that part of the operative part must be interpreted as also concluding that, for the period up to 31 December 2013, MJN GibCo benefited from an individual aid measure, pursuant to the aid scheme referred to in Article 1(2) of the contested decision.

258 First, it should be recalled that, according to Article 1(e) of Regulation No 659/1999, aid which is not granted on the basis of an aid scheme, or which is granted on the basis of an aid scheme but which must be notified, constitutes 'individual aid'.

259 Therefore, it follows from the case-law of the Court of Justice that a Commission decision finding the existence of State aid cannot be interpreted as relating both to an aid scheme and to the individual decisions implementing that scheme, even though the Commission expressed its view, in the grounds and operative part of that decision, on the aid granted individually to certain beneficiaries, identified by name, stating that that aid was to be regarded as unlawful and incompatible with the market (see, to that effect, judgment of 4 March 2021, *Commission* v *Fútbol Club Barcelona*, C-362/19 P, EU:C:2021:169, paragraphs 70 to 77).

260 In the present case, first, it is apparent from recitals 183 and 196 of the contested decision that the Commission clarified that the non-taxation of royalty income conferred on the beneficiaries of the 2012 MJN GibCo ATR constituted, for the period until 31 December 2013, State aid granted on the basis of the aid scheme which had been examined in section 7 of the contested decision. The 2012 MJN GibCo ATR concerned an 'aid scheme' within the meaning of Article 1(d) of Regulation No 659/1999, and not an individual measure, since the non-taxation of royalty income was likely to benefit, by reason only of the non-inclusion of that income among the categories of income chargeable to tax in Gibraltar listed in Schedule 1 of the ITA 2010, each of the Gibraltar companies receiving such income, defined in a general and abstract manner, for an indefinite period and amount, without the need for further implementing measures and without those provisions being linked to the carrying out of a specific project. It should, in addition, be noted that the tax provisions allowing companies receiving royalty income to benefit from the non-taxation of such income were contained in a measure of general application, namely the ITA 2010, in its version in force until 31 December 2013.

261 Secondly, in recital 183 of the contested decision, the Commission stated that, as regards the period up to 30 June 2013 and 31 December 2013 respectively, the part of the five advance tax rulings relating to the exemption of passive interest and royalty income merely confirmed the application of the tax provisions applicable at the time, namely, that such income was not taxable in Gibraltar. In that regard, it is clear from the case-law of the Court of Justice that individual measures which merely implement an aid scheme which, as such, should have been notified to the Commission by the Member State concerned constitute mere measures implementing the

general scheme, which do not, in principle, have to be notified to that institution. Such a measure does not therefore constitute 'individual aid' within the meaning of Article 1(e) of Regulation No 659/1999.

262 Secondly, it should be noted that, in the case of an aid scheme, a distinction must be drawn between the adoption of the scheme, on the one hand, and the granting of aid on the basis of that scheme, on the other (see judgment of 4 March 2021, *Commission* v *Fútbol Club Barcelona*, C-362/19 P, EU:C:2021:169, paragraph 66 and the case-law cited).

263 In the specific case of an aid scheme, the Commission may confine itself to examining the characteristics of the scheme in question in order to assess, in the grounds for the decision, whether, by virtue of the terms of the scheme, it gives an advantage to the recipients of the aid granted under it over their competitors and is likely to benefit undertakings involved in trade between Member States. Therefore, the Commission, in a decision on such a scheme, is not required to carry out an analysis of the aid granted in each individual case on the basis of such a scheme. It is only at the stage of recovery of the aid that it will be necessary to verify the individual situation of each undertaking concerned (judgments of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 63; of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 114; and of 29 July 2019, *Azienda Napoletana Mobilità*, C-659/17, EU:C:2019:633, paragraph 27).

264 It follows that, for the purposes of determining the existence of advantage, the Commission had to examine exclusively, in the contested decision, the 'aid scheme' within the meaning of Article 1(d) of Regulation No 659/1999, as identified in Article 1(2) of the contested decision, and not the aid granted on the basis of and in automatic application of that scheme. In that context, it has been held that it is irrelevant that the grounds and operative part of the contested decision directly identified potential addressees of the contested decision (see, to that effect, judgment of 4 March 2021, *Commission* v *Fútbol Club Barcelona*, C-362/19 P, EU:C:2021:169, paragraphs 70, 71, 74, 75 and 86).

265 It should also be noted that the contested decision did not contain a detailed assessment of MJN GibCo's situation in order to ascertain whether it had in fact received an advantage under the aid scheme referred to in Article 1(2) of the contested decision, but merely referred, in recitals 183 and 196, to the assessment of the aid scheme carried out in section 7 thereof.

266 It follows from the foregoing that, since the Commission found in the contested decision that the non-taxation of royalty income constituted an incompatible and unlawful aid scheme, Article 2 of that decision cannot be interpreted as finding, for the period until 31 December 2013, that an individual aid measure had been granted to MJN GibCo under that scheme, irrespective of the fact that the grounds of the contested decision identified MJN GibCo as a potential recipient of the aid scheme in question. The question of the identification of MJN GibCo and the applicants as actual recipients of the aid scheme concerned only the stage of recovery of the aid.

267 Accordingly, Article 2 of the contested decision must be held to relate only to the aid measures granted on the basis of the five advance tax rulings, and not to the aid implemented on the basis of the aid scheme referred to in Article 1(2) of the contested decision, and thus to relate only to the period after 31 December 2013.

268 Therefore, the applicants' arguments challenging Article 2 of the contested decision in so far as it relates to individual aid measures granted on the basis of the 2012 MJN GibCo ATR for the period up to 31 December 2013 must be rejected as ineffective.

2. The plea in law alleging infringement of Article 108(2) TFEU and Article 6 of Regulation No 659/1999 (first plea in law, seeking annulment of Article 2 of the contested decision)

269 By their first plea, seeking annulment of Article 2 of the contested decision, the applicants complain that the Commission failed to satisfy, in the decision to extend proceedings, the requirement, arising from Article 108(2) TFEU and Article 6 of Regulation No 659/1999, to summarise the relevant matters of fact and law and to include a provisional assessment of whether the measure examined in that decision had the character of aid and to set out the reasons which led the Commission to doubt its compatibility with the internal market. They note that a decision to initiate, or extend, the formal investigation procedure must allow interested parties to participate meaningfully in the procedure and to respond to the Commission's preliminary findings. Consequently, the Commission is obliged to define the framework of its investigation sufficiently to ensure that the right of interested parties to submit comments is not deprived of its content and it could not adopt a final decision on issues that were not addressed in the opening decision. In the present case, the decision to extend proceedings did not contain any information enabling them to anticipate the findings, contained in the contested decision, that the 2012 MJN GibCo ATR constituted individual State aid for the period after 31 December 2013.

270 First, the applicants claim that the Commission's reasoning in the contested decision in relation to the five advance tax rulings, including the 2012 MJN GibCo ATR, rested on a completely different basis from that identified in the decision to extend proceedings. In their view, the Commission had addressed the issue of payment of royalty income through corporate group structures with CVs, as well as the structure of the MJN group, for the first time in the contested decision, and nothing allowed them to foresee, from a reading of the decision to extend proceedings, that the Commission would consider those issues. The only concern relating to the taxation of royalty income identified by the Commission in the decision to extend proceedings was that advance tax rulings had been granted to Gibraltar companies without the Gibraltar tax authorities having verified the location of the user of the intellectual property rights. Since it was clear from their application for an advance tax ruling that the user of the intellectual property rights was located outside Gibraltar, the applicants did not consider it useful to submit comments to the Commission, even though the 2012 MJN GibCo ATR was annexed to the decision to extend proceedings.

271 Secondly, according to the applicants, it was not clear from the decision to extend proceedings that the Commission's examination covered not only the practice of advance tax rulings as an aid scheme, but also individual advance tax rulings taken outside the application of that scheme. The fact that the Commission identified, in the decision to extend proceedings, certain aspects of the practice of advance tax rulings did not entitle it to examine all aspects of all 165 advance tax rulings for compliance with Gibraltar tax law. The applicants add that, from a reading of the decision to extend proceedings, the only ground on which the Commission could have examined the question of the taxation of royalty income received in the context of CV structures was the question of the place of establishment of the users of the intellectual property rights.

272 Thirdly, the applicants complain that the Commission did not indicate that it was extending its examination to individual aid that had potentially been granted after 31 December 2013. In that respect, the applicants point out that the 2012 MJN GibCo ATR had ceased to be in force after that date, in so far as it had been replaced by the advance tax ruling of 2014.

273 Fourthly, the applicants complain that the Commission changed its assessment of selectivity between the adoption of the decision to extend proceedings and that of the contested decision. In the contested decision, the Commission compared the beneficiaries of the five advance tax rulings not only with multinational companies, but also with all other corporate taxpayers in Gibraltar, including companies belonging to multinational groups, the beneficiaries of the other advance tax rulings and domestic companies.

274 According to the applicants, those shortcomings deprived them of the opportunity to make meaningful submissions during the formal investigation procedure, in particular with regard to the existence of the 2014 ATR which replaced that of 2012.

275 The Commission contests those arguments.

276 In essence, it argues that the decision to extend proceedings contained sufficient information on the purpose of the review procedure and sufficiently defined the individual aid measure resulting from the 2012 MJN GibCo ATR.

277 First, the Commission notes that the decision to extend proceedings expressly referred to the 2012 MJN GibCo ATR, which contained a description of the group structure and made specific reference to MJN US, MJ BV and Mead Johnson Nutrition (Asia Pacific). MJN GibCo and the applicants would therefore necessarily have been aware that the Commission had opened an investigation into the 2012 MJN GibCo ATR and that that investigation concerned other entities of the MJN group than MJN GibCo. Furthermore, with regard to the 2014 MJN GibCo ATR, the Commission stresses that it was not submitted to it by the United Kingdom authorities and that, in any event, that ATR did not contradict or prevail over the 2012 MJN GibCo ATR, as it dealt with the tax situation of a different entity, namely MJT CV. The Commission adds that the audit report of 16 December 2015, drawn up by the Gibraltar tax office following a comprehensive audit of the 2012 MJN GibCo ATR, confirmed that the ATR was still applicable in 2015.

278 Secondly, the Commission considers that the decision to extend proceedings was clear and precise as to the nature and source of the potential aid, namely, the wide discretion of the Gibraltar tax authorities and the possible misapplication of tax provisions by them. It points out that the extent of its doubts and the scope of the investigation procedure was clear from recital 52 of the decision to extend proceedings. The scope of the procedure was not limited to the examples identified in recitals 32 and 53 of the latter decision. The Commission explains that, given the purpose of the 2012 MJN GibCo ATR, the applicants should have had no doubt that it was concerned about the royalty income received by MJN GibCo in respect of its shareholding in MJT CV.

279 Thirdly, the Commission submits that nothing in the contested decision indicated that the scope of the formal investigation procedure was limited to the period before the entry into force of the 2013 amendments.

280 Fourthly, it considers that it was clear from recital 68 of the decision to extend proceedings that the formal investigation procedure did not relate only to the possible aid scheme arising from a recurrent practice, but also to the 165 individual cases of advance tax rulings.

281 Fifthly, in response to the arguments that it changed its assessment of selectivity between the adoption of the decision to extend proceedings and that of the contested decision, the Commission argues that it is free to change its assessment between the opening decision and the final decision.

282 In essence, by the first plea in law, seeking the annulment of Article 2 of the contested decision, the applicants claim that the Commission infringed Article 108(2) TFEU and Article 6 of Regulation No 659/1999 and their right to be involved in the formal investigation procedure by adopting, in the contested decision, an analysis of the 2012 MJN GibCo ATR which differed from that contained in the decision to extend proceedings. They were therefore not in a position to make meaningful comments during the formal investigation procedure.

283 In that respect, it should be recalled that, pursuant to the first subparagraph of Article 108(2) TFEU, where the Commission decides to initiate a formal investigation procedure, it is obliged to give interested parties notice to submit their comments.

284 As is apparent from the case-law, the purpose of the first subparagraph of Article 108(2) TFEU is, first, to oblige the Commission to ensure that all potentially interested persons are given notice and an opportunity to put forward their arguments and, secondly, to enable the Commission to be fully informed of all the facts of the case before taking its decision (judgment of 25 June 1998, *British Airways and Others* v *Commission*, T-371/94 and T-394/94, EU:T:1998:140, paragraph 58).

285 Article 6(1) of Regulation No 659/1999, entitled 'Formal investigation procedure', provides that the decision to initiate the formal investigation procedure is to summarise the relevant matters of fact and law, include a preliminary assessment by the Commission of whether the proposed measure constitutes aid, set out the grounds for doubting its compatibility with the internal market and invite the Member State concerned and other interested parties to submit their comments within a specified period.

286 In that context, it should be recalled that the case-law recognises interested parties essentially as sources of information for the Commission in the context of the administrative procedure initiated under Article 108(2) TFEU. It follows that the interested parties, far from being able to avail themselves of the rights of defence granted to persons against whom proceedings are initiated, have the sole right to be associated with the administrative procedure to an extent appropriate to the circumstances of the case (judgments of 25 June 1998, *British Airways and Others* v *Commission*, T-371/94 and T-394/94, EU:T:1998:140, paragraphs 59 and 60, and of 30 November 2009, *France and France Télécom* v *Commission*, T-427/04 and T-17/05, EU:T:2009:474, paragraph 147). In particular, the right to information of interested parties cannot extend to the general right to express their views on all the potentially crucial points raised during the formal investigation procedure (judgment of 30 November 2009, *France and France Télécom* v *Commission*, T-427/04 and T-17/05, EU:T:2009:474, paragraph 149).

287 While the Commission cannot be required to present a definitive analysis of the aid in question in its notice on the initiation of the formal investigation procedure, it is necessary for it to define the framework of its investigation sufficiently so as not to render meaningless the right of interested parties to submit their comments (see judgment of 12 July 2018, *Austria* v *Commission*, T-356/15, EU:T:2018:439, paragraph 703 and the case-law cited).

288 The decision to initiate the formal investigation procedure must therefore enable interested parties to participate effectively in that procedure, during which they will have the opportunity to put forward their arguments. To that end, it is sufficient for the interested parties to know the reasoning which led the Commission provisionally to consider that the measure at issue could constitute new aid incompatible with the internal market (see judgment of 13 December 2018, *Ryanair and Airport Marketing Services* v *Commission*, T-165/15, EU:T:2018:953, paragraph 82 and the case-law cited).

289 Furthermore, it should be recalled that any discrepancy between the decision to initiate the formal investigation procedure and the final decision cannot in itself be regarded as constituting a defect vitiating the legality of the latter. Only a change affecting the nature of the measures at issue would be capable of triggering an obligation for the Commission to inform the interested parties once again (judgment of 12 July 2018, *Austria* v *Commission*, T-356/15, EU:T:2018:439, paragraph 727). Therefore, where the Commission changes its reasoning, following the decision to initiate the formal investigation procedure, on facts or a legal characterisation of those facts which prove to be decisive in its assessment of the existence of aid or its compatibility with the internal market, it must rectify the decision to initiate that procedure or extend it, in order to allow interested parties to submit observations in a meaningful way (see, to that effect, judgment of 30 April 2019, *UPF* v *Commission*, T-747/17, EU:T:2019:271, paragraph 77).

290 In that context, it must be noted that the obligation on the Commission, at the stage of the opening decision, to give the interested parties the opportunity to submit their observations is an essential procedural requirement (see, to that effect, judgment of 11 December 2008, *Commission* v *Freistaat Sachsen*, C-334/07, EU:C:2008:709, paragraph 55). Therefore, the infringement of such a requirement entails the annulment of the vitiated act, irrespective of whether that infringement caused damage to the person invoking it or whether the administrative procedure could have led to a different result (see, to that effect, judgment of 22 February 2006, *Le Levant 001 and Others* v *Commission*, T-34/02, EU:T:2006:59, paragraphs 95 to 99).

291 Consequently, the obligation to rectify or extend the formal investigation procedure, in order to give interested parties the opportunity to submit their comments, must also have the character of an essential procedural requirement where the Commission has changed its reasoning, between the opening decision and the final decision, on the basis of facts or on the basis of a legal characterisation of the facts which prove to be decisive in its assessment of the existence of aid and which affect the very nature of the measure in question.

292 In such circumstances, the change in the Commission's position is such that it alters the object and scope of the formal investigation procedure. To allow the Commission to amend, after the decision to initiate the formal investigation procedure or, as in the present case, the decision to extend the opening decision, the subject matter of that procedure and the most substantial elements on the basis of which it considered that the measure under examination potentially constituted an aid measure, without adopting a corrective decision, would deprive interested parties of the possibility of commenting on the amended subject matter of the formal investigation procedure. That would render ineffective the Commission's obligation to define the framework of

its investigation in a sufficiently precise manner to enable interested parties to participate effectively in the investigation procedure when submitting their comments, and thus to define the framework of its investigation sufficiently. As set out in paragraph 290 above, that obligation has the character of an essential procedural requirement.

293 That assessment is not called into question by the judgment of 11 March 2020, *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo* (C-56/18 P, EU:C:2020:192, paragraphs 76 to 82), in which the Court of Justice criticised the General Court for having erred in law in finding that the right of interested parties to submit observations was an essential procedural requirement without establishing that the administrative procedure could have led to a different result. It is clear from paragraphs 78 to 82 of that judgment that the finding of such an error was justified by the specific circumstances of the case, namely, that, even if the interested parties had not been invited to submit their observations on the impact of a change in the legal regime which occurred after the opening decision was adopted, such a circumstance was not an essential procedural requirement, in so far as that change was not likely to alter the meaning of that decision.

294 Moreover, as is apparent from paragraph 85 of the judgment of 11 March 2020, *Commission* v *Gdynia Miasto and Port Lotniczy Gdynia Kosakowo* (C-56/18 P, EU:C:2020:192), while, in principle, substantial changes to a legal basis on which a Commission decision is founded are capable of affecting that decision, that was not so in that case in so far as the decision in question was founded, furthermore, on an autonomous legal basis which had not changed and which was sufficient to found that decision. It follows that the case-law cited in paragraph 290 above, according to which the Commission must give interested parties the opportunity to submit their comments when it decides to initiate the formal investigation procedure and according to which that obligation is an essential procedural requirement, is not called into question.

295 In the present case, in order to assess the existence of an infringement of Article 108(2) TFEU, Article 6 of Regulation No 659/1999 and the Commission's obligation to give interested parties the opportunity to submit their comments in a meaningful way, it is necessary to examine whether the assessment in the decision to extend proceedings contained the decisive elements on which the Commission based its assessment, in the contested decision, that the 2012 MJN GibCo ATR, after 31 December 2013, constituted an individual State aid measure granted by the Government of Gibraltar and, therefore, whether it allowed the nature of the measure subject to Article 2 of the contested decision to be identified.

296 To that end, it is necessary, first of all, to examine the decisive elements of the reasoning which led the Commission to consider, inter alia, in Article 2 of the contested decision, that, after 31 December 2013, the effects produced by the 2012 MJN GibCo ATR constituted individual State aid.

297 First, it should be noted that Article 2 of the contested decision referred to 'the individual State aids granted by the Government of Gibraltar, on the basis of the [five] tax rulings … to five Gibraltar companies with interests in Dutch [CVs] in receipt of royalty and passive interest income'. Moreover, in Section 12, entitled 'Conclusion' and, more particularly, in recital 246 of that decision, it was pointed out that it was 'the tax treatment granted by the Government of Gibraltar on the basis of the [five] tax rulings in favour of five Gibraltar companies with interests in Dutch [CVs] in receipt of royalty and passive interest' which constituted individual aid measures.

298 In that context, it should be noted that the Commission states, in recital 152 of the contested decision, that the five advance tax rulings, including the 2012 MJN GibCo ATR, 'remained in effect and [had not been] revoked by the tax authorities either as a result of the amendments to ITA 2010 in 2013 that brought [passive] interest and royalties into the scope of taxation, or as a result of the audits carried out in 2015'.

299 Similarly, in recitals 180, 182 and 184 of the contested decision, the Commission explained that, while it was true that, at the time of the grant of the five advance tax rulings and, therefore, of the 2012 MJN GibCo ATR, they complied with the applicable tax provisions, since 1 July 2013 and 1 January 2014 respectively passive interest and royalty income were now included in the categories of income taxable in Gibraltar listed in Schedule 1 of the ITA 2010. Therefore, it found that the Gibraltar tax authorities had extended the existence of the non-taxation of passive interest and royalty income by allowing the beneficiaries of the five advance tax rulings, including MJN GibCo, to take advantage of those rulings after the entry into force of the 2013 amendments to the ITA 2010. It should be noted in that regard that the Commission noted in footnote 92 to, and in recital 152 of, the contested decision that the five advance tax rulings remained in force at least until 2015, when an audit was carried out by the Gibraltar tax authorities.

300 It follows from those elements that it was not the 2012 MJN GibCo ATR as such, nor its adoption, but the tax treatment granted to MJN GibCo by the Gibraltar tax authorities 'on the basis' of that advance tax ruling confirming the non-taxation of the royalty income and, in particular, the continuation of that ruling after 31 December 2013, which constituted individual State aid, as confirmed by the Commission at the oral hearing, in response to a question from the Court.

301 Secondly, it should be noted that the Commission focused its analysis of the five advance tax rulings and, thus, of the 2012 MJN GibCo ATR on the structure, reported in the applications for advance tax rulings, characterised by the presence of a Dutch CV holding the intellectual property rights and by partner companies established in Gibraltar, holding the shares in the CV, as well as on the transparent nature of the Dutch CVs for the purposes of the application of the ITA 2010 (see recitals 153 to 159 of the contested decision). In particular, the Commission noted that, according to the submissions of the United Kingdom authorities, it appeared that, in the absence of specific rules in the ITA 2010, Gibraltar applied common law principles and considered the Dutch CVs to be transparent entities, so that the corresponding share of the income received by the CVs should be considered to be received directly by the Gibraltar companies holding the shareholding in the CV (recital 155 of the contested decision). It concluded, in recitals 161 and 162 of the contested decision, that the shares of each of the five Gibraltar-based companies which were beneficiaries of the five advance tax rulings, including MJN GibCo, in the amount of profits earned at the level of the Dutch CVs should have been included in the tax base of those five companies and taxed in Gibraltar.

302 It follows from the above that the reasoning on the ground of which the Commission considered that the continued application of the 2012 MJN GibCo ATR constituted an individual aid measure was essentially based on the fact that that advance tax ruling concerned a group structure involving a Dutch CV, namely MJT CV, and a Gibraltar-based partner, MJN GibCo, as well as on the question whether MJT CV was a fiscally transparent entity, so that the royalty income received by it should be taxed directly in respect of MJN GibCo, as if that income had been received directly by the latter. The finding of a selective advantage was based on the finding that, under Gibraltar tax law as in force from 1 January 2014, the partner companies would normally have been liable to Gibraltar corporate income tax to the extent of their share in the profits of the Dutch CV.

303 Those various elements were therefore decisive in the Commission's assessment, underlying Article 2 of the contested decision, according to which, after 31 December 2013, the continuation of the 2012 MJN GibCo ATR had the character of individual State aid granted by the Government of Gibraltar.

304 In the light of the foregoing findings, it is necessary to consider whether the decision to extend proceedings contained sufficient information as to the nature of the individual State aid granted to MJN GibCo, after 31 December 2013, by the 2012 MJN GibCo ATR, as referred to in Article 2 of the contested decision, for the Commission to be able to adopt that decision without infringing the right of interested parties to submit their comments effectively, in accordance with Article 108(2) TFEU and Article 6 of Regulation No 659/1999.

305 Admittedly, as the Commission argues, in the decision to extend proceedings, it identified the 2012 MJN GibCo ATR as potentially constituting an individual aid measure. Similarly, contrary to the applicants' contention, the Commission did not confine the formal investigation procedure to an assessment of the practice of advance tax rulings as a potential aid scheme.

306 It is clear from recitals 62 and 69 of the decision to extend proceedings and from the 'Conclusion' part of that decision that the extension of the formal investigation procedure covered not only the practice of advance tax rulings, but also 165 individual advance tax rulings, each of which could potentially constitute an individual aid measure. As the 2012 MJN GibCo ATR was included in the list of 165 advance tax rulings annexed to the decision to extend proceedings, it was part of the subject matter of the formal investigation procedure as a potential individual aid measure.

307 However, it should be noted that the factors taken into account by the Commission in the contested decision for the purpose of concluding that individual aid had been granted on the basis of the 2012 MJN GibCo ATR, as identified in paragraphs 297 to 303 above, differed from the provisional assessment of the effects produced by the 2012 MJN GibCo ATR, subsequent to 31 December 2013, contained in the decision to extend proceedings.

308 First, the assessment contained in the decision to extend proceedings focused mainly on the adoption of advance tax rulings and the lack of verification that the conditions described in the applications for advance tax rulings had actually been fulfilled.

309 In recitals 31, 32 and 53 of the decision to extend proceedings, the Commission explained, in relation to the 165 advance tax rulings examined in the preliminary examination procedure, including the 2012 MJN GibCo ATR, that several applications for advance tax rulings should have raised doubts, on the part of the Gibraltar tax authorities, as to whether the activities were genuinely exempt from taxation on the grounds that they were not accrued in or derived from Gibraltar. The Commission thus based its preliminary analysis of the advance tax rulings on the fact that the Gibraltar tax authorities had, in general, failed to carry out a proper examination of the tax liabilities of companies in the exercise of its discretionary powers.

310 That finding was reiterated in recital 62 of the extension decision, where the Commission found that there was potential State aid in 'all the … 165 advance tax rulings', in so far as 'none of them [had been] based on sufficient information so as to ensure that the level of taxation of the activities concerned [was] in line with the tax paid by other companies in a similar situation and the applicable tax provisions'.

311 Secondly, while the Commission stated in the decision to extend proceedings that the advance tax rulings examined went beyond the non-taxation of passive income, as it resulted from the version of the ITA 2010 applicable at the time of their adoption, the only concerns identified by the Commission in relation to advance tax rulings on royalty income, such as the 2012 MJN GibCo ATR, concerned the fact that 22 advance tax rulings were allegedly granted to Gibraltar companies which received royalties from companies using the intellectual property rights which were located outside Gibraltar, without verifying where the user of the intellectual property was located. In the Commission's view, the 'exemption' of royalty income, without such verification, meant that the income was not subject to tax anywhere.

312 As the Commission confirmed in response to a question from the Court at the oral hearing, the decision to extend proceedings did not contain any further comments on the advance tax rulings relating to the non-taxation of royalty income.

313 Thirdly, it should be noted that, although the decision to extend proceedings was adopted on 1 October 2014, namely, after the entry into force, on 1 January of the same year, of the 2013 amendments to the 2010 ITA, and it expressly referred to those amendments (see, in particular, recital 32 of that decision), it does not appear from that decision that the Commission's analysis concerned the continued application of advance tax rulings confirming the non-taxation of royalty income after the entry into force of the 2013 amendments to the ITA 2010. Moreover, there was no evidence in the decision to extend proceedings that, in the Commission's view, the effects of the 2012 MJN GibCo ATR had been continued after 31 December 2013.

314 Fourthly, the decision to extend proceedings did not contain any elements regarding the rules on tax transparency, the factual situation of the beneficiaries of the five advance tax rulings and, more specifically, the 2012 MJN GibCo ATR or the use of group structures including Dutch CVs.

315 The preliminary analysis contained in the decision to extend proceedings thus diverged, in every respect, from the Commission's reasoning in the contested decision. First, the latter related to an erroneous application of the ITA 2010, in its version after 31 December 2013, and not to the fact that, for the period up to 31 December 2013, royalty income was not subject to tax in any tax jurisdiction. Secondly, the erroneous application of the ITA 2010 by the Gibraltar authorities, as found in the contested decision, related to the question of whether royalty income, which was now included in the categories of income taxable in Gibraltar listed in Schedule 1 of the ITA 2010, accrued in or derived from that territory, due to the tax transparency of the company that received it outside Gibraltar, and not to the determination of the location of the user of the intellectual property.

316 It follows from the above that the assessments, factual or legal, contained in the decision to extend proceedings were not sufficient to make it clear that the formal review procedure concerned not only the grant of advance tax rulings, but also the continued effect of some of those rulings, including the 2012 MJN GibCo ATR, after the 2013 amendment to the ITA 2010, despite the inclusion of royalties in the categories of income taxable in Gibraltar listed in Schedule 1 of the ITA 2010, and the compliance of those rulings with the latter law, in the version in force on 1 January 2014. Those latter elements were decisive in identifying the measure under examination by the Commission and in finding, in Article 2 of the contested decision, that individual State aid had been granted to MJN GibCo, on the basis of the 2012 MJN GibCo ATR, after 31 December 2013.

317 None of the Commission's arguments is capable of calling that finding into question.

318 First, the fact that the decision to extend proceedings identified the 2012 MJN GibCo ATR as potentially constituting an individual aid measure and the fact that it was stated in recitals 32 and 53 of that decision that the analysis of the various categories of advance tax ruling was carried out by way of illustration or as 'examples' of the conduct of which the Gibraltar tax authorities are accused was not sufficient for the Commission to consider that it had complied with its obligation, under Article 6 of Regulation No 659/1999, to give interested parties the opportunity to submit their comments effectively. As is clear from the case-law set out in paragraphs 287 to 290 above, it was for the Commission to determine with sufficient precision the scope of its examination and it was not for the applicants, as interested parties, to anticipate all the grounds on which the Commission could consider that individual State aid arose from the continued effects of the 2012 MJN GibCo ATR, after 31 December 2013.

319 Secondly, in so far as the Commission submits that it was clear from the decision to extend proceedings that the subject of its review was the wide discretion enjoyed by the Gibraltar authorities in relation to the lax and possibly erroneous application of the ITA 2010, it is sufficient to note that it was not clear from those elements that the formal review procedure concerned the continued effect of certain advance tax rulings, including the 2012 MJN GibCo ATR, after the entry into force of the 2013 amendment to ITA 2010, and the consequences to be drawn from the tax transparency of Dutch CVs, such as MJT CV.

320 Thirdly, the fact, invoked by the Commission, that MJN's application for an advance tax ruling, referred to in the annex to the decision to extend proceedings, described the structure of the MJN group and referred to MJT CV was not sufficient to consider that that issue and the consequences to be drawn from the tax transparency of the Dutch CVs were precisely the subject of the formal investigation procedure. There was no indication in the body of the decision to extend proceedings that the Commission was going to examine that issue in the context of the formal investigation procedure. As set out in paragraph 318 above, it was not for the applicants, as interested parties, to anticipate all the grounds on which the Commission was able to consider that individual State aid arose from the continued effects of the 2012 MJN GibCo ATR after 31 December 2013.

321 It follows from all the foregoing considerations that the differences between the analysis contained in the decision to extend proceedings and the contested decision, in so far as they concern decisive elements of assessment for the purposes of the classification as individual State aid of the effects produced by the 2012 MJN GibCo ATR after 31 December 2013, are such that the Commission should have adopted a corrective decision or a second decision to extend proceedings in order to enable the applicants to participate effectively in the procedure (see paragraphs 287 and 289 above).

322 Furthermore, it should be noted that the Commission acknowledged in recitals 212 to 215 of the contested decision that it was abandoning the argument as to the selectivity of the 165 advance tax rulings, which it had supported in the decision to extend proceedings. Consequently, the differences between the assessment contained in the decision to extend proceedings and the final decision constitute substantial modifications which are capable of changing the meaning of the final decision.

323 As can be seen from paragraphs 287 to 290 above, the existence of discrepancies between the decision to extend proceedings and the contested decision in relation to the decisive elements of assessment for the purposes of classifying as individual State aid the effects produced by the 2012

MJN GibCo ATR after 31 December 2013 is sufficient to lead to the annulment of Article 2 of the contested decision, in so far as it relates to the 2012 MJN GibCo ATR, as well as to the order for recovery connected with that measure.

324 Therefore, it is necessary to uphold the first plea in law, seeking annulment of Article 2 of the contested decision, in so far as it relates to the individual State aid granted to MJN GibCo and to the applicants on the basis of the 2012 MJN GibCo ATR, and to annul that article as well as Article 5(1) and (2) of that decision, to the extent that they relate to that aid, without there being any need to examine the other pleas in law raised by the applicants.

D. The third part of the application, seeking the annulment of Article 5 of the contested decision

325 In the third part of their action, the applicants claim that the Commission erred in law by finding that the Dutch CV, the partner companies and the parent company constituted one and the same economic unit and by deciding, in Article 5(2) of the contested decision, that the aid could be recovered from the entities forming that economic unit, in the event that it could not be recovered from the undertaking concerned established in Gibraltar, that is to say, in this case, from MJN GibCo.

326 They criticise the Commission for not having sought to establish the exercise of effective control by MJN US or Mead Johnson Nutrition (Asia Pacific) over MJN GibCo, as required by the case-law, or the fact that MJN Global Holdings and MJ BV benefited, directly or indirectly, from the aid allegedly granted to MJN GibCo.

327 The Commission contests those arguments.

328 In the light, first, of the dismissal of the application in so far as it seeks the annulment of Article 1(2) of the contested decision and of the order for recovery in relation to that measure, secondly, of the annulment of Article 5(1) and (2) of the contested decision in so far as it concerns the individual aid granted to MJN GibCo and the applicants and, thirdly, since Article 5(2) of the contested decision relates only to the recovery of the aid measure referred to in Article 2 of that decision, there is no longer any need to examine the present pleas in law, raised by the applicants, seeking the annulment of Article 5(2) of that decision, in so far as they concern them.

IV. Costs

329 Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads of claim, each party bears its own costs. Since the applicants and the Commission have each been partially unsuccessful, they should be ordered to bear their own costs.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. **Annuls 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 so far as it states, in Article 2, that the individual aid granted by the Government of Gibraltar on the basis of the continuation, after 31 December 2013, of the advance tax ruling granted to MJN Holdings (Gibraltar) Ltd is unlawful and incompatible with the internal market and in so far as it orders, in Article 5(1) and (2), the recovery of that aid;**

2. **Dismisses the action as to the remainder;**

3. **Orders Mead Johnson Nutrition (Asia Pacific) Pte Ltd, MJN Global Holdings BV, Mead Johnson BV, Mead Johnson Nutrition Co. and the Commission to each bear their own costs.**

Tomljenović	Schalin	Škvařilová-Pelzl
Nõmm		Steinfatt

Delivered in open court in Luxembourg on 6 April 2022.

E. Coulon Registrar	M. Papasavvas President

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