



Reports of Cases

Case T-508/19

Mead Johnson Nutrition (Asia Pacific) Pte Ltd and Others
v
European Commission

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)

1. *Action for annulment – Subject matter – Partial annulment – Condition – Severability of the contested provisions – Commission decision declaring incompatible with the internal market two separate and independent aid measures – Application for annulment consisting of separate parts, each concerning a different aid measure*
(Art. 263 TFEU)

(see paragraphs 43-45)

2. *State aid – Concept – State intervention in areas not harmonised in the European Union – Direct taxation – Inclusion – Designation of the tax base and distribution of the tax burden – Competences of the Member States – Limits – Commission powers*
(Arts 4 and 5 TEU; Art. 107(1) TFEU)

(see paragraphs 56-70)

3. *Action for annulment – Pleas in law – Misuse of power – Concept*
(Art. 263 TFEU)

(see paragraphs 72, 73)

4. *State aid – Concept – Selectivity of the measure – Assessment based on taking account of the legislative technique used – Exclusion*
(Art. 107(1) TFEU)

(see paragraphs 80, 81, 134, 185)

5. *State aid – Concept – Grant of an advantage to the beneficiaries – Measure conferring a tax advantage – Reference framework for determining the existence of an advantage – Material scope – Criteria – Identification of the common or normal tax regime – General system of corporation tax aimed at taxing all income accruing in or derived from the territory of a Member State – Taking into account information from the Member State concerned – Admissibility*
(Art. 107(1) TFEU)

(see paragraphs 89-94, 118-123, 128, 135-137, 143-147, 156, 161, 162)

6. *State aid – Commission decision – Judicial review – Free assessment of the facts and evidence – Finding of national law made by the Commission – Question of fact*
(Art. 107 TFEU)

(see paragraph 103)

7. *State aid – Administrative procedure – Obligations of the Commission – Diligent and impartial examination – Account taken of the most complete and reliable information possible – Scope of the obligation*
(Art. 108(2) TFEU)

(see paragraphs 104-106, 127)

8. *State aid – Commission decision – Assessment of the legality by reference to the information available at the time of adoption of the decision*
(Art. 108 TFEU)

(see paragraphs 107, 125, 141)

9. *State aid – Concept – Tax measures – Joint examination of the conditions of selectivity and economic advantage – Admissibility*
(Art. 107(1) TFEU)

(see paragraph 169)

10. *State aid – Concept – Grant of an advantage to the beneficiaries – Measure conferring a tax advantage – System for taxing the income of undertakings – General system of corporation tax aimed at taxing all income accruing in or derived from the territory of a Member State – Tax measure derogating from that regime and providing for a tax exemption of income generated by interest or royalties – Inclusion – No explicit rule providing for the taxation of those payments – No impact*
(Art. 107 TFEU)

(see paragraphs 178-182, 206)

11. *State aid – Concept – Selectivity of the measure – Measure conferring a tax advantage – Criteria for establishing the selectivity of the measure – Introduction between operators that are in a comparable factual and legal situation of a distinction that is not justified by the nature and general structure of a general tax system – Need to identify certain common characteristics of the recipients of the tax benefit – Absence*
(Art. 107(1) TFEU)

(see paragraphs 198-201, 209-213)

12. *State aid – Concept – Selectivity of the measure – Measure conferring a tax advantage – Measure of a general nature applicable without discrimination to all economic operators – Measure not applicable to transactions comparable to those which govern whether it is granted – Measure that can be qualified as selective*
(Art. 107 TFEU)

(see paragraphs 202, 203, 207)

13. *Acts of the institutions – Reasoning – Obligation – Scope – Commission decision on State aid – Account taken of the context and all the legal rules*
(Arts 108(1) and (3) and 296 TFEU)

(see paragraphs 229-236)

14. *State aid – Examination by the Commission – Examination of an aid scheme as a whole – Admissibility – Obligation on the Commission to assess individually the situation of certain beneficiaries – Absence*
(Arts 107 and 108 TFEU; Council Regulation No 659/1999, Art. 1(d))

(see paragraphs 259-268)

15. *State aid – Examination by the Commission – Administrative procedure – Decision to initiate the formal investigation procedure provided for in Article 108(2) TFEU – Analysis of the existence of a selective advantage – Change to the Commission’s position at the end of the procedure – Final decision based on a different basis than that identified in the decision to extend the procedure – Decision to extend the procedure does not contain the decisive elements on which the Commission’s assessment is based – Violation of the procedural rights of the undertaking concerned*
(Art. 108(2) TFEU; Council Regulation No 659/1999, Art. 6(1))

(see paragraphs 283-316)

Résumé

Between 1 January 2011 and 31 December 2013, under the Income Tax Act 2010 ('ITA 2010'),¹ royalty income was not included in the categories of income taxable in Gibraltar.

¹ Gibraltar Income Tax Act 2010.

MJN Holdings (Gibraltar) Ltd ('MJN GibCo') was a company of the group MeadJohnson established in Gibraltar holding a 99.99% interest in the capital of the limited partnership under Dutch law Mead Johnson Three CV ('MJT CV'), which granted sub-licenses to another company in the group in return for royalties.² In 2012, the Gibraltar tax authorities granted MJN GibCo an advance tax ruling confirming, under the Gibraltar corporate tax regime resulting from the ITA 2010, the non-taxation in respect of MJN GibCo of MJT CV's income generated by the royalties.

In October 2013, the European Commission initiated formal investigation proceedings, in order, in particular, to verify the compatibility of the regime for the taxation of royalty income, provided for by the ITA 2010, with the European Union's State aid rules. In October 2014, it decided to extend those proceedings to include the practice of advance tax rulings in Gibraltar ('the decision to extend proceedings').

By its decision of 19 December 2018 ('the contested decision'),³ the Commission, first, classified the non-inclusion of royalty income in the tax base between 1 January 2011 and 31 December 2013 as an 'implicit exemption' and considered that that measure constituted an unlawful aid scheme that was incompatible with the internal market. In the Commission's view, the exemptions introduced a reduction in the tax that the companies concerned would otherwise have had to pay, given the objective of the ITA 2010 to tax income accruing in or derived from Gibraltar.

Secondly, the Commission considered that the tax treatment granted by the Gibraltar Government in advance tax rulings to five Gibraltar-based companies holding shares in limited partnerships incorporated under Dutch law, some of which received royalty income, constituted unlawful individual State aid incompatible with the internal market. Those decisions, which confirmed the non-taxation of the royalty income of those companies, continued to apply after the 2013 amendment of the ITA 2010, under which royalties were included among the categories of taxable income. MJN GibCo was one of the five companies concerned.

The General Court, hearing an action brought by various companies in the MJN group, upheld the action in part. It dismissed the action in so far as it sought to challenge the part of the contested decision relating to the aid scheme. In that context, the Court endorses the Commission's approach according to which the 'non-taxation' and 'exemption' have the same effect and the absence of an explicit rule providing for the taxation of royalty income does not prevent a measure from conferring an advantage. The Court annuls the contested decision in so far as it relates to the individual aid granted to MJN GibCo. In that context, it clarifies the scope of the right of interested parties to be involved in the formal State aid investigation procedure and the impact of a breach of that right on the legality of the final decision adopted at the end of such a procedure.

² MJT CV held licenses to intellectual property rights, which it sub-licensed to Mead Johnson BV, another company incorporated under Dutch law within the MJN group, in return for royalties. Prior to its dissolution in 2018, MJN GibCo was part of the international Mead Johnson Nutrition group ('the MJN group'). Mead Johnson Nutrition (Asia Pacific) Pte Ltd, based in Singapore, was the wholly owned parent company of MJN GibCo.

³ 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 Court's assessment

In the first place, as regards the aid scheme, the Court notes, first of all, that interventions by Member States in areas which have not been harmonised within the European Union, such as direct taxation, are not excluded from the scope of the rules on the control of State aid. Consequently, 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. In the present case, the Court notes that, by referring to the provisions of tax law applicable to Gibraltar and by basing its assessment of those provisions on the information communicated by the United Kingdom and Gibraltar authorities, the Commission did not define autonomously the so-called normal taxation of the tax provisions applicable to Gibraltar in the context of its examination of the non-taxation of royalty income. Furthermore, 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.

The Court next rejects the pleas alleging, in essence, errors of assessment and of law in identifying the normal rules of taxation in Gibraltar and in identifying a selective advantage.

As a preliminary point, the Court observes that, in the context of the analysis of tax measures from the point of view of EU State aid law, the examination of both the criterion of advantage and selectivity implies, in the first place, determining the normal rules of taxation which form the relevant frame of reference for that examination.

As regards the normal rules for taxation in Gibraltar, the Court recognises that the Commission was right to consider that the Gibraltar tax system was a territorial tax regime, according to which all income accrued in or derived from Gibraltar should be taxed there, and that, under that system, royalty income received by a Gibraltar company was necessarily regarded as accrued in or derived from that territory. Those conclusions were based on information directly from the Member State concerned and were consistent with the content of the relevant provisions of the ITA 2010.

As regards the existence of an economic advantage, the Court considers that the Commission has shown that the system of non-taxation of royalty income led to a reduction in the amount of tax which would normally have been payable by undertakings established in Gibraltar receiving royalties and that that was in accordance with the guiding principles of the ITA 2010, namely the principle of territoriality and the principle that all of the taxpayers' accounting income was taxable.

In that context, the Court rejects the applicants' argument that, in the absence of an explicit rule in the ITA 2010 providing for the taxation of royalty income, the tax authorities could not have waived the taxation of that income and had therefore not conferred any advantage on the applicants. The Court notes, in that regard, that the fact that a tax measure is designed according to a certain regulatory technique is irrelevant for the purposes of its analysis under Article 107 TFEU and that the fact that, in the present case, royalty income was not subject to income tax, because it was not included in the categories of income subject to tax in Gibraltar, had the same effect as if that category of income formally benefited from a tax exemption.

As regards the selective nature of the non-taxation of royalty income, the Court considers that the Commission was entitled to consider that it constituted a derogation from the general principle of territoriality, 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 that territory, even though those two categories of undertakings were in comparable situations in the light of the objective pursued by the ITA 2010.

In the second place, as regards the individual aid measure granted on the basis of the advance tax ruling granted to MJN GibCo, the Court considers that the discrepancies between the analysis contained in the decision to extend the procedure and the contested decision, in so far as they related to decisive elements of assessment for the purposes of classifying the advance tax ruling adopted in favour of MJN GibCo as individual State aid, were such that the Commission should have adopted an amending decision or a second decision to extend the procedure in order to enable the applicants to participate effectively in the procedure.

The reasoning on the basis of which the Commission considered, in the contested decision, that the continuity of that advance tax ruling, subsequent to the 2013 amendment of the ITA 2010, constituted individual State aid incompatible with the internal market, was based on decisive factors which were not present in the decision to extend the procedure, namely the transparent nature of the limited partnerships under Dutch law for the purposes of the application of Gibraltar tax law and the finding that the partner companies would normally have been subject to income tax in Gibraltar to the extent of their share in the profits of their limited partnerships under Dutch law.

Therefore, the Court notes that, where the Commission changes its reasoning, between the decision to initiate the procedure and the final decision, on matters which are decisive in its assessment of the existence of aid, the obligation on the Commission to extend the formal investigation procedure, in order to give the persons concerned the opportunity to submit their comments, is an essential procedural requirement, the breach of which entails the annulment of the defective act, irrespective of whether that breach has caused damage to the person invoking it or whether the procedure could have led to a different result. On the basis of those findings, the Court annuls the contested decision in so far as it relates to the individual State aid granted on the basis of the advance tax ruling granted to MJN GibCo.