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**Subject: State aid SA.34914 (C/2013) - (ex 2013/NN) – United Kingdom
Gibraltar corporate tax regime**

Sir,

The Commission wishes to inform the United Kingdom that, having examined the information supplied by your authorities on the aid scheme referred to above, it has decided to extend the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ("TFEU"), which it initiated on 16 October 2013.

1. PROCEDURE

- (1) On 16 October 2013 the Commission initiated a formal investigation procedure in case SA.34914 to verify whether the passive income tax exemption in the Income Tax Act 2010 ("ITA 2010") selectively favours certain categories of companies, in breach of EU State aid rules (hereinafter the "first opening decision").¹

¹ Published in *OJ 2013 C 348*, p. 184.

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- (2) In parallel with the preliminary investigation preceding the formal investigation procedure, by letter of 25 October 2012, the Commission had asked the United Kingdom for information about Gibraltar's tax rulings procedure. The Commission also had asked the United Kingdom to provide it with three or four tax rulings adopted by the Gibraltar Commissioner under the ITA 2010.
- (3) On 3 December 2012, based on the request of the Commission, the Gibraltar tax authorities had provided general information regarding the tax ruling procedure (procedure for clearance in advance pursuant to section 42 of the ITA 2010) applicable in Gibraltar. The United Kingdom also provided the Commission with four anonymized examples of tax rulings adopted by the Gibraltar Commissioner under the ITA 2010.
- (4) On 29 July 2013 the Commission had asked the United Kingdom to provide more detailed information concerning the four anonymized tax rulings granted by the Gibraltar tax authorities.
- (5) On 13 September 2013 the United Kingdom had responded to the questions of the Commission on the four anonymized tax rulings. The United Kingdom also provided a comprehensive list (Excel format) of the tax rulings granted by the Gibraltar tax authorities in 2011, 2012 and 2013, according to which:
 - In 2011 the Gibraltar tax authorities issued 207 tax rulings;
 - In 2012 the Gibraltar tax authorities issued 81 tax rulings;
 - In 2013 (up to 31 August) the Gibraltar tax authorities issued 47 tax rulings.
- (6) On 3 October 2013, the Commission had requested copies of documents related to a number of tax rulings (160 tax rulings) selected by the Commission.
- (7) On 16 October 2013, the Commission sent the United Kingdom another request for information asking the United Kingdom to provide additional information with regard to the four anonymised tax rulings.
- (8) On 14 November 2013, the United Kingdom provided the Commission with the available copies of documents related to the 160 tax rulings selected by the Commission. The United Kingdom in this context insisted that there is no indication of any kind of selectivity, including de facto selectivity, and therefore they consider there is no element of State aid resulting from the tax ruling practice.
- (9) On 20 December 2013, the Commission sent the United Kingdom a request for information in which it asked the United Kingdom to provide more detailed information on a number of tax rulings issued by the Gibraltar tax authorities in 2011.
- (10) On 31 January 2014, the United Kingdom provided further clarifications on a number of remaining issues on tax rulings.
- (11) On 15 May 2014, the Commission asked the United Kingdom to provide it with additional information including the last 5 tax rulings issued in 2013.
- (12) On 20 June 2014 the United Kingdom provided information to the Commission in response to its request of information of 15 May 2014.
- (13) Several meetings were held during 2012 and 2013 with the United Kingdom (including representatives of the Gibraltar authorities).

2. DESCRIPTION

2.1. The ITA 2010

- (14) The ITA 2010 entered into force on January 2011 and replaces the former ITA 1952. The ITA 2010 introduces a corporate tax rate of 10%. Corporation tax is imposed on a company's profits, which consist of business/trading income "accruing in or derived from" Gibraltar. Investment income from listed securities is not subject to taxation (except for banks). Expenses incurred wholly and exclusively in the context of taxable income may be deducted when computing taxable income.
- (15) The ITA 2010 is based on the territoriality principle.² According to section 74(a) of ITA 2010, income "accrued in or derived from" is defined by reference to the location or the preponderance of the activities which give rise to the profits. In general, the location or the preponderance of the profit raising activities is determined on a case by case basis, depending on the specific facts and circumstances of the case.
- (16) In the ITA 2010 dividends and capital gains are exempted from taxation. In addition, interest and royalty income was not subject to taxation under the ITA 2010. After the Commission initiated its preliminary examination which eventually led to the opening of the formal investigation procedure on 16 October 2013, ITA 2010 was amended with effect as of 1 July 2013. Following the amendment, interest received or receivable from inter-company loans "accrued in or derived from" Gibraltar is now subject to taxation in Gibraltar at 10%.³
- (17) ITA 2010 was amended with effect as of 1 January 2014 in so far that also royalty income "accrued in or derived from" Gibraltar is subject to taxation in Gibraltar at 10%.⁴

2.2. Description of the ITA 2010 with respect to tax ruling practice

- (18) Section 42 of the ITA 2010 introduces a tax ruling practice. That procedure allows companies to ask in advance for clearance if companies that are incorporated in Gibraltar are liable to pay taxes in Gibraltar. It provides that companies requesting a tax ruling should provide the Gibraltar tax authorities with sufficient documentation to take a decision. In the event that the Commissioner needs more information for that purpose section 42 of the ITA 2010 also establishes a procedure for requesting additional information.

2.3. The tax ruling practice

- (19) The Commission has assessed 165 tax rulings⁵⁶ (out of a total of 340 rulings) granted to different companies in 2011, 2012 and up to 31 August 2013⁷. The outcome of the preliminary analysis of the Commission is the following:

² *Vid.* the first opening decision of 16 October 2013, *OJ 2013 C 348*, p. 184.

³ Where the interest received or receivable is less than GBP 100,000 per annum, the interest will not be subject to taxation in Gibraltar unless the income falls within the scope of trading income, as would be the case for banks, building societies, etc.

(1) There does not seem to be any designated procedure for the request of information by the Gibraltar tax authorities

- (20) The analysis of the tax rulings indicates that Gibraltar does not conduct any designated procedure to request information before deciding to issue a tax ruling.
- (21) In a meeting with the Member State authorities, the United Kingdom merely indicated that requests for tax rulings can involve preliminary meetings or telephone conversations with companies in order to obtain more detailed information on the activities performed or to be performed by those companies. It was also explained that the records of such preliminary contacts are kept on file and that it would be possible to retrieve them. However despite the Commission's repeated requests for information on that process the United Kingdom failed to provide the relevant information. Finally, the United Kingdom informed the Commission that it is not able to provide the Commission with any other records or documents related to preliminary meetings or discussions between Gibraltar tax authorities and the companies which request the tax rulings.⁸
- (22) In some tax rulings, the companies request a tax ruling by electronic mail addressed to the Gibraltar tax authorities and they obtain a tax ruling even though they do not follow the procedure established in section 42 of the ITA 2010⁹.

⁴ Royalties are deemed to “*accrue and derive*” from Gibraltar where the company receiving the royalties is registered in Gibraltar.

⁵ *Vid.* Annex 1 for the full list of tax rulings analysed.

⁶ In this decision the tax rulings are referred by name and pages as provided by the United Kingdom in its submission of information [of 14 November 2013] to the Commission. Hereinafter, this submission is referred to as “the Document”.

⁷ As it has been mentioned in the procedure, the Commission received 5 additional tax rulings between 23 of November 2013 and 23 of December 2013.

⁸ *Vid.* the United Kingdom's submission of information of 20 June 2014.

⁹ *Vid.* Partner Invest Limited (p.503) of the Document.

(2) The Gibraltar tax authorities do not conduct any substantive analysis or provide reasoning in the tax rulings

- (23) In general, a typical tax ruling provided by the Gibraltar tax authorities includes two or three very brief paragraphs usually half a page long. The tax ruling states that based on the facts and circumstances outlined in the request for a tax ruling, the Commissioner confirms that no corporate tax would be chargeable in Gibraltar.
- (24) In the 165 tax rulings analysed¹⁰ the Gibraltar tax authorities state in one paragraph that the activity of the company is performed wholly outside Gibraltar without making reference to any information that has been analysed in order to conclude that there is effectively no activity developed in Gibraltar. All the 165 tax rulings contain the following automatic clause: "*On the facts and in the circumstances set out in your letter, I confirm on behalf of the Commissioner that no corporation tax would be chargeable in Gibraltar under the Act in respect of the described activity (subject to the criteria for determining "accrued in and derived from" contained in section 74 of the Act) on the basis and provided that the profits or gains of the Company arise from income generating activities and functions wholly carried on or exercised outside Gibraltar*".
- (25) The tax rulings provide no further explanations or guidance to the companies which could indicate that the Gibraltar tax authorities performed any kind of assessment based on which they provide such tax rulings. They simply repeat the statements of the requesting companies that certain (undefined) activities are not subject to Gibraltar corporate tax.
- (26) With respect to the information contained in the requests for a tax ruling, it appears from the tax rulings that have been analysed by the Commission that the only information that is provided by the company is a short letter of a law firm (incidentally always the same law firms in all the tax rulings) containing the following phrases: "*we are instructed that the activity of the company is...*", "*we have been advised that its place of business for trading purpose shall not be in Gibraltar*".

¹⁰ *Vid.* among other tax rulings the following pages of the Document: Thurlestone Shipping Limited (p.4), Link Holdings (Gibraltar) Limited (p.29), European Mail Union Limited (p.33), Anselia Aviation Limited (p.46), Gol International Limited (p.61), Graf Von Bismark and Associated Limited (p.64), Medifour Limited (p. 68), Corporate Consultants Limited (p.72), Alphasol Limited (p.75), Akasha Charters Limited (p.77), Greatheart Underwriting Limited (p. 87), UNILOG, United Logistics & Shipping Operators Limited (p.90), Baby Basics Limited (p.97), Family Roots Limited (p.107), Prime Ideas Limited (p.115), Hatrick Limited (p.117), Crane Trading Corporation (p.134), IMAAG Limited (p.142), Prospective Company (Reference No of the requestor SM.JT 10-8947, requestor Triay & Triay Lawyers) (p.162); Keystone Shipping Limited (p.197).

- (27) In five cases of tax rulings a fiduciary (acting on behalf of their client) or trust administrator (acting on behalf of the trust and on behalf of the beneficiary) request for a tax ruling in a very short letter stating that the company which they represent should not be taxed in Gibraltar without providing any further explanations and only stating that the income of a company is not derived in or accrued from Gibraltar¹¹.
- (28) Furthermore, in other cases the Gibraltar tax authorities grant tax rulings when the company does not provide its name or does not provide a description of its activity. In such cases the letter requesting for a tax ruling includes a paragraph which states: "*Can you please confirm or notify otherwise whether the following scenario, although connected with Gibraltar, would fall outside the scope of Gibraltar taxation on the basis that the income of the company is earned outside Gibraltar? (...), Company "A" is incorporated in Gibraltar and has no staff or office premises in Gibraltar (...)*". In those cases the tax rulings state: "*on the facts and in the circumstances set out in your letter, I confirm on behalf of the Commissioner that no corporate tax would be chargeable in Gibraltar under the Act on Company "A"*"¹². In certain tax rulings the companies are also named as "Newco" or "Gibraltar company" and their real name is not disclosed to the Gibraltar tax authorities.
- (29) In those cases it is even very difficult if not impossible to examine whether the company carries out any economic activity in Gibraltar or to examine the substance of the company (number of employees, location of the management and control of the company, etc.).
- (30) Additionally, it can be seen from the tax rulings that it usually takes just a few days (the average is three days¹³) for the Commissioner of Gibraltar to provide a tax ruling to the requesting company. The Commission does at this stage not understand how the Commissioner is able to consider in sufficient detail the activities and functions of the respective company and the location from where it performs those activities and functions in such a short period of time.

(3) Misapplication of the provisions of the ITA 2010 in the tax ruling practice

- (31) The analysis of the tax rulings indicates that many requests for tax rulings not only provide too little information but that the little information provided should raise doubts with the Gibraltar tax authorities whether the activities are really tax exempt because they are not derived in or accrued from Gibraltar.

¹¹ *Vid.* as an example among other tax rulings the following pages: Prospective Company (Reference No of the requestor: #VPW:LTR213690#, requestor Fiduciary) (p.28); Prospective Company (Requestor Mr. Tucker, Trust administrator) (p.56), Partner Invest Limited (p.503).

¹² *Vid.* among other tax rulings the following pages: Prospective Company (Reference No of the requestor: #VPW:LTR213690#, requestor Fiduciary) (p.27), Prospective Company (Requestor Mr. Tucker, Trust administrator) (p.54), The Consultants Limited (p. 233). As it has been mentioned the company sometimes is named as "Newco" Prospective Company (Reference No of the requestor: LC/JJ/201323, requestor STM Fiscalis Limited) (p. 321) or "Gibraltar company" Prospective Company (Requestor Grant Thornton (Gibraltar) Limited) (p.339).

¹³ In most of the cases the Gibraltar tax authorities take between one and five days from the date of reception of the letter of request for a tax ruling.

(32) The following broad categories of tax rulings illustrate that phenomenon¹⁴:

a. *Intermediaries activities are systematically exempted from taxation in Gibraltar*¹⁵ .

Most of the tax rulings granted by the Gibraltar tax authorities (40 out of 165 tax rulings) are related to companies acting as the intermediary of a business carried out outside Gibraltar. In such cases the companies ask for the income generating trade activity to be considered as exempted from taxation in Gibraltar based on the fact that the trade activities occur outside Gibraltar and that the amount of profits received in Gibraltar for the intermediary activity is "minimal". The Gibraltar tax authorities do not request any additional document to prove that the business activities of the companies are carried out outside Gibraltar or to prove the amount of income that those companies received from the intermediary activity.

It must be noted that (1) there is no definition of what is considered minimal in section 74 of ITA 2010 that contains the interpretations of the tax notions, (2) section 11 of ITA 2010 considers any income received in Gibraltar, be it minimal or not, to be subject to taxation (at 10%).

When the Commission asked the United Kingdom about the description of the intermediary trade activities, the United Kingdom answered that if a company declares to act as an intermediary and that the business for trading purpose is outside Gibraltar, there is no reason to seek further information.

¹⁴ The 165 tax rulings are referred to by the page number as they were numbered by the United Kingdom in the Document (from 1 to 589).

¹⁵ Some examples of tax rulings on companies acting as trade-intermediaries can be found in the following tax rulings (referred by name and pages as provided by the United Kingdom in its submission of information to the Commission): Thurlestone Shipping (p.4), Gol International limited (p.61), Medifour Limited (p.68), Current Technology Europe Limited (p.70), UNILOG, United Logistic & Shipping operators (p. 90), Baby Basics Limited (p.97), Baby Basics (Iberia) Limited (p.99); Baby Basics (International) Limited (p.102), Baby Basics (Asia) Limited (p.104). Some of the companies which they provided the services to are located in tax havens or countries that also apply the territoriality principle such Hong-Kong, therefore it is not possible to interchange tax information with these: Tubingen Limited (p.130), Crane Trading Corporation Limited (p.134), IMAAG Limited (p.142). Other examples of trade-intermediaries can be found in the following tax rulings: AMD Limited (p. 175), Keystone Shipping Limited (p. 197), World Rugby League (Europe) Limited (p. 200), Nightingale Investments Limited (p. 227), Orios Limited (p.253), Infor (Gibraltar) Limited (p. 397), Miller International Limited (p. 405), Prospective Company (Reference No of the requestor: MN/13638, requestor Hassans International Law Firm) (p. 431), Delphi Automotive Services (Gibraltar) Limited (p. 435), Scan Truck & Trailer Rental Limited (p. 446), Matterhorn Holdings Limited dated 16 January 2012 (p.451), Matterhorn Holdings Limited, dated 1 December 2011 (p.456), Zaida Company Limited, dated 2 March 2012 (p.470), Zaida Company Limited, dated 27 February 2012 (p.473), OED Limited (p.514), Scanlan Worldwide Limited (p.536), IAPA (Global) Limited (p. 542), Prospective Company (Reference No of the requestor.: KF/1943, requestor Budhrani & Co. Barristers-at-law) (p.581).

b. Consultancy fees are systematically exempt from taxation in Gibraltar¹⁶.

A number of tax rulings (32 out of 165 tax rulings) exempt the income from consultancy fees from taxation in Gibraltar.

In all cases, the provider of the service is a company that is resident in Gibraltar. In some tax rulings, it is indicated that the consultancy services are provided to various companies (some of which are Gibraltar based companies and some of which are based in other countries). In other cases, it is indicated that the company that receives the service is located in a specific country.

In all cases, without providing any evidence or further explanation, the consultancy services are declared to be rendered wholly outside of Gibraltar and therefore in all the tax rulings the income is considered exempt from taxation in Gibraltar.

It must be noted that section 11 of ITA 2010 subjects to a 10% tax any profit derived from services rendered in Gibraltar. There is no reference to the fact that if the client that received the services is not located in Gibraltar the profits should be considered accrued in or derived from outside Gibraltar and therefore tax exempt in Gibraltar. Therefore the relevant issue is *where* the services are provided in order to decide whether the income received is subject to taxation or not.

In none of the tax rulings examined the tax authorities asked for any kind of evidence in order to prove that the consultancy services are effectively provided outside Gibraltar and without conducting any further assessment, the tax authorities used in all the tax rulings granted the following automatic clause: "*on the facts and in the circumstances set out in your letter, I confirm that no corporation tax would be chargeable in Gibraltar in respect of its income arising from the described consultancy and advisory services*".

c. The following category of rulings (passive income: interests and royalties) have been adopted on the bases of the ITA 2010 which exempts from taxation dividends, royalties and passive interest:

As preliminary remark, it should be emphasised that the focus of the present state aid assessment is not the passive income exemption laid down in Article 11(1) in conjunction with Article 15 of Schedule 3 and Schedule 1, Table C, of the ITA 2010 (amended in 2013). This is the subject of the formal investigation procedure initiated by the first opening decision. In this case the assessment is related to the tax rulings concerning passive income.

¹⁶ Some examples of tax rulings on consultancy activity can be found in the following tax rulings: KaiRo Management Limited (p.1), Corporate Consultants Limited (p.72), Osato Industries Limited (p.79), Gambit Management Services Limited (p. 83), Greatheart Underwriting Limited (p.87), Hatrick Limited (p.117), Kamakura Investment Limited (p. 160), Horizon Ventures Limited (p.167). Other examples of tax rulings are the following: Cookstown Properties Limited (p. 179), Horizon Ventures Limited (p. 195), Bushman Limited (p. 212), JST (International) Company Limited (p. 230), The Consultants Limited (p. 233), Paramount Healthcare Consulting Limited (p. 246), Bushman Limited (p. 256), CT Marketing Limited (p. 304), Ocean Pride Shipping Co. Limited (p. 311), Prospective company (Requestor Grant Thornton (Gibraltar) Limited, dated 5 August 2011)) (p. 337), Prospective company (Requestor Grant Thornton (Gibraltar) Limited, dated 22 July 2011)) (p. 341), Select Sports Management Limited (p. 417), Stabalis Limited, dated 22 November 2013 (p. 559), Stabalis Limited, dated 13 November 2013 (p. 562).

- *Interest received in Gibraltar* : There are a number of tax rulings (23 out of 165 tax rulings)¹⁷ that state that all income earned by Gibraltar companies which provide loans to associated companies located outside Gibraltar is exempt from taxation in Gibraltar. Despite the fact that the ITA 2010 after 1 July 2013 subjects to taxation interest (by means of section 4 of Schedule 5 of the ITA 2010) received by a Gibraltar company and despite the fact that the ITA 2010 also considers that a Gibraltar registered company is automatically deemed to have intercompany interest income “*accruing in or derived from*” Gibraltar, all the tax rulings analysed by the Commission automatically state that: “*on the facts and in the circumstances set out in your letter, the profits or gains arising from the described activities would not be liable to taxation*”.¹⁸

Regarding debt structures received carried out before the amendment of the law having effect as of 1 July 2013, there are several cases where a tax ruling is granted to a conglomerate of several companies (usually between seven and nine) composed by tax resident companies in Gibraltar and offshore companies. In those cases, the Gibraltar companies merely serve as debt conduit companies between the offshore companies that generate the funds and the offshore borrower companies. Such “artificial structures” (as regulated in section 40 of the ITA 2010) are in general used for avoiding the payment of taxes related to loan activities on the basis of the following reasoning: i) the tax authorities in the jurisdiction of the lender company would consider that the loan is provided in Gibraltar and that the interests are already being subject to taxation in Gibraltar, as the company located in Gibraltar is the one that directly received the payments of the interests, ii) due to the exemption applied in

¹⁷ *Vid.* As an example the following tax rulings (referred to by the page number indicated in the United Kingdom's submission of information to the Commission): Eastcheap Trading Corporation Limited (p. 191), Key Retail Technologies Limited (p. 218), Birchall Properties Limited (p. 236), Cookstown Properties Limited (p. 242), McWane (Gibraltar) Holdings Limited, McWane (Gibraltar) Limited (p. 271), Equilibrium Management Limited (p. 315), Prospective Company (Reference No of the requestor: ub, requestor Mr. Umesh Bhambhwani, Senior Manager, KPMG Advisory Limited) (p. 332), Patron Capital G.P. III Limited, dated 17 August 2011 (p. 350), Patron Capital G.P. III Limited, dated 12 July 2007 (p. 353), Patron Capital G.P. III Limited, dated 12 July 2007 (p. 357), Tubman (International) Limited (p. 362), Tubman (Holdings) Limited (p. 366), Broadstreet (Gibraltar) Limited (p. 370), Biomet (International) Limited, Biomet (Gibraltar) Holdings Limited (p. 380), Prospective Company (Reference No of the requestor: PCM/NBL/JSJ/16967-1-1, requestor Hassans International Law Firm) (p. 389), 8F Leasing (Gibraltar) Limited (Reference No of the requestor VN/JPF/11227-0012-3), 8F Leasing S.A. (Reference No of the requestor VN/JPF/11227-0012-3), 8F leasing (Bermuda) Limited (Reference No of the requestor VN/JPF/11227-0012-3) (p. 441), Rebecca (Holdings) Limited (p. 554).

¹⁸ *Vid.* Prospective Company (Requestor Mr. Tucker, Trust administrator) (p.54), Continental Maritime Limited (p. 93), Europe Income Real Estate Limited (p. 137), Eastcheap Trading Corporation Limited (p. 191), Key Retail Technologies Limited (p. 218), Birchall Properties Limited (p. 236), Cookstown Properties Limited (p. 242), Equilibrium Management Limited (p. 315), Prospective Company (Reference No of the requestor: ub, requestor Mr. Umesh Bhambhwani, Senior Manager, KPMG Advisory Limited) (p. 332), Patron Capital G.P. III Limited, dated 17 August 2011(p. 350), Patron Capital G.P. III Limited, dated 12 July 2007 (p. 353), Patron Capital G.P. III Limited, dated 12 July 2007 (p. 357), Tubman (International) Limited (p. 362), Tubman (Holdings) Limited (p. 366), Broadstreet (Gibraltar) Limited (p. 370), Biomet (International) Limited, Biomet (Gibraltar) Holdings Limited (p. 380), Prospective Company (Reference No of the requestor: PCM/NBL/JSJ/16967-1-1, requestor Hassans International Law Firm) (p. 389), 8F Leasing (Gibraltar) Limited(Reference No of the requestor VN/JPF/11227-0012-3), 8F Leasing S.A. (Reference No of the requestor VN/JPF/11227-0012-3), 8F leasing (Bermuda) Limited (Reference No of the requestor VN/JPF/11227-0012-3) (p. 441), Rebecca (Holdings) Limited (p. 554).

Gibraltar on the basis of the tax ruling the interests can be distributed to the real lender company without being subject to taxation.

Another important fact to consider is that neither the tax ruling nor the company requesting for a tax ruling mention the remuneration that is charged for intercompany loans. Thus, there is no reference to transfer pricing, despite schedule 4 and section 40 of the ITA 2010 which refer clearly to transfer pricing principles and state that intercompany loans should be based on the arm's length principle. Accordingly, the remuneration for intercompany loans should have been fixed in the loan agreements in advance.

- *Royalties received in Gibraltar*: There are several tax rulings (22 out of 165 tax rulings) granted to Gibraltar companies which receive royalty payments from companies which use intellectual property rights ("IP") and which are located outside Gibraltar¹⁹.

It must be noted that under the version of the ITA 2010 in force at the time when the tax rulings were issued, royalty income was tax exempt. However, the Gibraltar tax authorities grant tax rulings to companies exempting from taxation such royalty income without verifying where the user of the IP is located. By *exempting* from tax the royalty income without verifying where the user of the IP is located, such royalty income is not subject to taxation anywhere else (in contrast to the situation where the income *is not subject to taxation* in Gibraltar. In that case, the income could be subject to taxation elsewhere).

d. Profits derived from marketing activities are exempted from paying taxes in Gibraltar.

In a number of tax rulings (20 out of 165 tax rulings), the Gibraltar tax authorities recognize that profits, capital gains and inbound/outbound dividends are exempt from taxation based on the companies' statements that the activities carried out in Gibraltar are minimal²⁰. Similarly as in case of the trade intermediaries' tax ruling, the Gibraltar

¹⁹ *Vid.* the following tax rulings (referred to by the page number indicated in the United Kingdom's submission of information to the Commission): Prime Ideas Limited (p.115), Prospective Company (Reference No of the requestor: #VPW:LTR213690#, requestor Fiduciary) (p.27), Prospective Company (Reference No of the requestor: ub, requestor Mr. Umesh Bhambhwani, Senior Manager, KPMG Advisory Limited) (p.233), Prospective Company (Requestor Mr. Tucker, Trust administrator) (p.54), Prospective Company (Reference No of the requestor: LC/JJ/201323, requestor STM Fiscalis Limited) (p.321), Prospective company (Requestor Grant Thornton (Gibraltar) Limited) (p.339), Burlington English Limited, Burlington English Marketing Limited (p. 187), Key Retail Technologies Limited (p. 216), Prospective Company (Reference No of the requestor: da/ap/5344, requestor PricewaterhouseCoopers Limited, GibCo1 and GibCo2) (p. 275), Vantini Spur Limited (p. 360), Ash (Gibraltar) One Limited (p. 490), Prospective Company (Reference No of the requestor: TAX/gacj/da, requestor KPMG Advisory Limited) (p. 495), Prospective Company (Reference No of the requestor: FJT/cj, requestor Triay & Triay Lawyers) (p. 520), Prospective Company (Reference No of the requestor: CBB/1212-01-1, requestor Benzaquen & Associates) (p. 529), Collinson Group (Trademarks) Limited, IAPA (Global) Limited (p. 550), J Domains Limited (p. 568), Famous Four Media Limited (p. 575).

²⁰ For instance in the following requests for a tax ruling: BO (Middle East) Limited (p.11), THE One (Middle East) Limited (p.17), THE One Music Limited (p.25), THE One Retail Network (International) Limited (p.21), European Mail Union Limited (p.33), Zartello (p.57), Jonsden Properties Limited (p.146), Ellise Group Limited (p.150), Prospective Company (Reference No of the requestor SM.JT 10-8947, requestor Triay & Triay Lawyers) (p.162), Burlington English Limited (reference No of the requestor: GRJ/14118-1-1) , Burlington Marketing Limited (reference No of the requestor: GRJ/14118-1-1) (p. 183), World Rugby League (Europe) Limited (p.

tax authorities do not request any documentation on the amount of income that those companies received from the marketing activity. It is important to note that section 11 of ITA 2010 subjects profits of companies that are resident in Gibraltar to a 10% taxation without making any distinction whether such profits or business activities are "minimal".

When the Commission asked the United Kingdom²¹ about a short description of the marketing activities, the United Kingdom answered that the facts need to be looked at on a case-by-case basis. However, if meetings between the clients and the provider of service take place in Gibraltar the profits or business activities should be subject to taxes in that territory and if the meetings are held outside Gibraltar the activity is considered performed outside Gibraltar. In contrast, the Commission could not find any evidence in the tax rulings analysed in respect to where the clients are located or where the meetings are held. Notwithstanding that lack of evidence, in all cases it is stated that the marketing activity in Gibraltar is minimal.

In addition, the territoriality principle does not rely solely on the fact that meetings with clients would take place in Gibraltar or not. The application of this principle requires a more detailed assessment of the particular situation of the requesting company based on a comprehensive description of its activities.

e. Procurement of petroleum products and logistic organization are exempted from taxation in Gibraltar without further assessment of the Gibraltar tax authorities.

In cases where the company exercises the activity of procuring petroleum products and organising logistics or delivering jet fuel under various contracts²² (seven out of 165 tax rulings), a law firm sent a one page letter describing those activity as being carried out by its clients. The Gibraltar tax authorities granted tax rulings which consisted of only one paragraph in which it recognized the exemption from taxation without asking for further clarifications.

However, given the sparse information provided by the law firm, the Commission has doubts whether the Gibraltar tax authorities are in a position to consider if the activity of the companies in question is subject to taxation in Gibraltar or not (i.e. from whom the products are acquired, to whom such companies deliver the products, the relevant

202), McWane (Gibraltar) Holdings Limited, McWane (Gibraltar) Limited (p. 274), CT Marketing Limited (p. 304), Prospective Company (Reference No of the requestor: LC/JJ/201323, requestor STM Fiscalis Limited) (p. 321), Promo 6000 International Limited, Visavi 5x5 Limited, Visavi Activities Limited, Visavi Spins Limited, Visavi Portals Limited (p. 523), the company requesting for a tax ruling stated the following: "*the activities carried out in Gibraltar are minimal and none of profit making activities are currently or will in the future take place in Gibraltar*" and several days after that the Gibraltar tax authorities granted a tax ruling stating the following: "*on the facts and in the circumstances set out in your letter I confirm on behalf of the Commissioner that the profits or gains arising from the described activities would not be subject to corporate tax in Gibraltar*".

²¹ The Commission's request for information sent to the United Kingdom on 15 May 2014.

²² *Vid.* the following tax rulings (referred to by the page number indicated in the United Kingdom's submission of information to the Commission): Mina Corp Limited, Red Star Enterprises Limited (p. 7), Nidham Holding Limited (p.171), Oilcom Agency Limited (p.301), Rowan Gorilla V (p.477), Rowan Gorilla VII (p.479), Rowan Drilling (Gibraltar) Limited (p.483)

prices and in general how the company's business is organized)²³. The Gibraltar tax authorities essentially only make reference to the nature of the activity (procurement of petroleum products), and that therefore the activity cannot be performed on Gibraltar territory: *"the activities will predominantly take place outside of Gibraltar waters and under section 74 ITA it is the location of these profit making activities which determines where the profits accrued in or derive from and hence their liability to tax"*. That reasoning, however, is oversimplified and does not consider the fact that the activity includes more than just the procurement of petroleum.

f. Tax rulings serve as a means to prolong the existing benefits under the tax exemption regime without any scrutiny.

Some tax rulings follow a request by a law firm (acting in the name of the client) for a confirmation that *"given the cessation of tax exempt status on 31 December 2010, the activities of the company will not give rise to a tax liability in Gibraltar"*; or *"the above company was previously registered as an exempt company, and we are now requested to seek a ruling that as from 1st January 2011 the company will not be liable to Gibraltar Corporation tax"*; or *"we should also be grateful for your confirmation of the tax position under both ITA and the Income Tax 1952"*²⁴. In all those cases the companies do not explain or provide any documentation for supporting their statements regarding their business activities.

g. Other tax rulings cases (21 out of 165 tax rulings) are related to the following activities:

- Holding companies which hold as a sole asset a yacht²⁵. From the tax rulings, it is not obvious that the Gibraltar tax authorities have sufficient information to analyse whether the holding company carries out any activity (such as renting the yacht in Gibraltar) from which it could generate taxable income in Gibraltar pursuant to sections 11 and 74 of the ITA 2010. Nevertheless, in all the tax rulings analysed, the expenses for maintaining the yacht are recognized as deductible but the possible income obtained by the yacht is considered as exempted as it is accrued in or derived from outside Gibraltar without any further assessment or request for additional information carried out by the Gibraltar tax authorities.²⁶ In principle, the Gibraltar tax

²³ The OECD defines exemption as: Tax law exercises its tax sovereignty but provides specific exemptions for persons, items or transactions, etc. which would otherwise be taxed. Non subject to taxation means that the tax law will not exercise its sovereignty over this person, item or transaction, therefore another country can claim for this sovereignty.

²⁴ Among other cases see tax rulings on the following pages: THE One Retail Network (International) Limited (p. 17), Western Mediterranean Holding Limited (p.111), M. Benady & Company, dated 16 March 2011 (p.112), M. Benady & Company, dated 18 March 2011 (p.114), Horizon Ventures Limited (p.196), Bushman Limited (p.214), Key Retail Technologies Limited (p.218), Orios Limited (p.253), Bushman Limited (p.258), Patron Capital G.P. III Limited (p.352).

²⁵ *Vid.* among other tax rulings on the following pages: Nautilus Limited (p.259), Salamba Shipping Limited (p.262), Ocean Pride Shipping Limited (p.313), Rebecca (Holdings) Limited (p.540).

²⁶ A holding company with a yacht as the sole asset can deduct maintenance expenses from the corporate income tax and case of any activity performed by the yacht (such as renting or chartering), the income received can be

authorities should require more information such as the certificate of registration of the yacht to verify if an activity is performed with the yacht that could be considered taxable.²⁷ Following a question to that effect, the United Kingdom answered that the Gibraltar tax authorities do not have any information on the companies registered in Gibraltar which own a yacht or ship as the sole assets.

- Trusts incorporated in Gibraltar that are tax exempt without further analysis by the Gibraltar tax authorities as to whether the trust received any income that could be considered as taxable income in Gibraltar²⁸. Pursuant to section 13 of the ITA 2010 any income received by a trust resident in Gibraltar is considered as chargeable to taxation.

3. POSITION OF THE UNITED KINGDOM

- (33) According to the United Kingdom in order to carry out an assessment and to apply the territoriality principle, it is not always necessary to have a full description of the activity in question. The party requesting the ruling may, of course, choose to provide details, if it is thought useful to do so²⁹. However, if no such trading is carried out or exercised in Gibraltar it is of no relevance to seek further factual detail on evidences proving such companies' business activities³⁰.
- (34) In addition, the United Kingdom submitted that the Commissioner's office can be reasonably sure that the activity described is not carried out in Gibraltar, on the basis of local knowledge and that nothing further is required to determine whether the activity is taxable³¹. It is not a question of providing supporting evidence but rather an understanding of the transaction/event which needs to be sufficiently complete³². The fact that income does not accrue in or derive from Gibraltar is sufficient to make an assessment in the particular case and further information would not provide additional clarity³³.

offset with the expenses. However, if the yacht is owned by a natural person, this person has to be paid a fee for the maintenance of the yacht in the harbour that cannot be deducted from the personal income tax.

²⁷ Yacht registration is mandatory in Gibraltar as a way to control the number of yachts registered in its territory and to control if there is any activity performed with the yacht that could be considered taxable.

²⁸ *Vid.* Kinsman Trustees Limited, Amicus Trustees Limited, Benamara Limited, Halstead Investments Limited (p. 223), Cookstown Properties Limited (p. 245), Galva Investments Limited (p. 325).

²⁹ *Vid.* the United Kingdom's submission of information of 20 June 2014.

³⁰ *Ibid.*

³¹ The United Kingdom's submission of information of 31 January 2013 stated the following: "(...) *if the activity is carried out in Gibraltar there is tax in Gibraltar. If this is not done in Gibraltar, then there is no tax in Gibraltar. In this latter case there is likely to be an exposure to tax elsewhere, in the place where the activity is carried on. In the absence of a tax treaty there is no mechanism to determine or allocate the respective taxing rights*"

³² *Ibid.*

³³ *Vid.* the United Kingdom's submission of information of 20 June 2014.

- (35) Furthermore, the tax rulings are issued on the basis of the facts and circumstances provided in the requests themselves and the tax rulings are always conditional, i.e. any material change and/or misinterpretation of any fact or change of law may result in the revocation of a tax ruling. Moreover, the United Kingdom notes that the information, declarations and statements made in requests for tax rulings are almost in all cases made by Gibraltar law firms or Gibraltar accountancy firms which are bound by codes of professional ethics and standards or by company managers all of which are licenced by the Financial Services Commission in Gibraltar. Therefore, disclosure of false or misleading information could expose the requesting party to sanctions from either their professional body or the Financial Services Commission³⁴.
- (36) With respect to the review of structures involving interest and royalties, the United Kingdom submitted that the Gibraltar tax authorities had neither enough expertise nor material resources to conduct a sophisticated review³⁵.
- (37) All relevant information that the Commissioner needs in order to make his determination as to the tax treatment should be contained in the initial request. If such information is not provided the Commissioner requests whatever additional information he considers pertinent to make his determination. Those requests for additional information depend on the complexity of the ruling request in the context of the information provided.
- (38) The United Kingdom states that it would be difficult for a company to conduct any activity within Gibraltar without that fact coming to the attention of the Gibraltar tax authorities. Moreover, systematic background checks are carried out on the status of any company in the Income Tax Office computer database and with other sections such as the Corporate and Investigations sections. Additional background checks are also made where appropriate in any case of doubt about the application of section 74 of the ITA 2010. According to the United Kingdom, the combination of all those procedures would make it very difficult for a company to commence activity in Gibraltar without it being noted through those checks.
- (39) The United Kingdom claims that the tax ruling practice of the Income Tax Office seems to be similar to the practice of other tax authorities in Europe that routinely give advance tax rulings, namely, that they rely on what is submitted by the taxpayer company, and carry out background checks later if necessary or appropriate to confirm that the company has operated substantially as described³⁶.
- (40) The United Kingdom also argues that Gibraltar's tax rulings apply in a wide variety of situations and a wide range of activities and that they do not apply primarily or exclusively to any identifiable category or group of companies or industries. According to the United Kingdom there is no indication of any kind of selectivity, including *de facto*, and therefore, the United Kingdom considers that there is no element of State aid resulting from the tax rulings.

³⁴ *Vid.* the United Kingdom's submission of information of 20 December 2013.

³⁵ *Vid.* the United Kingdom's submission of information of 3 December 2012 (pp. 3- 4)

³⁶ *Vid.* the United Kingdom's submission of information of 20 December 2013.

- (41) Last but not least, the United Kingdom stated³⁷ that due to the existence of concerns related to the meaning of the term "*accrued in or derived from*" in section 74 of the ITA 2010, it is proposed to issue a Guidance Note by the Commissioner explaining how the concept should be interpreted, including explanations of how the Gibraltar tax authorities make the assessment of whether an undertaking carries out activities both within and outside Gibraltar. However, up to the date of this decision, the Guidance Note has not been published.

4. ASSESSMENT

4.1. Existence of aid

- (42) Article 107(1) TFEU states that "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market*".
- (43) It follows that in order to be qualified as State aid, the following cumulative conditions have to be met: 1) the measure has to be granted out of State resources, 2) it has to confer an economic advantage to undertakings, 3) the advantage has to be selective and distort or threaten to distort competition, 4) the measure has to affect intra-Union trade.
- (44) In this case, it seems appropriate to examine firstly the selectivity of the measure. The selectivity criterion can be assessed at either material or geographical (or regional) levels or both. In the present case, it is sufficient to examine whether the tax ruling practice under the ITA 2010 is materially selective.

4.1.1. Material selectivity

Scope of assessment

- (45) According to settled case-law, the material selectivity of tax measures should normally be assessed by following a three-step analysis³⁸. Firstly, the system of reference has to be identified. Secondly, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objective intrinsic to that system, are in a comparable factual and legal situation. If the measure in question does derogate in such a fashion (and therefore is *prima facie* selective), it still needs to be verified in the last step of the test whether the derogating measure is justified by the nature or the general scheme of the (reference) system³⁹. If a

³⁷ *Vid.* the United Kingdom's submission of information of 3 December 2012.

³⁸ *Vid.* Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* [2011], paragraph 49 et seq.

³⁹ *Vid.* Case C-279/08 P, *Commission v Netherlands (NOx)* [2011], paragraph 62, Case T-210/02 RENV, *British Aggregates Association v Commission* [2012], paragraph 83, Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* [2011], paragraph 69 et seq. Sometimes the Court refers also to justification by "the logic of the system", *vid.* Case C-53/00, *Ferring*, [2001] ECR I-9067, paragraph 17.

prima facie selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and thus falls outside the scope of Article 107(1) TFEU.

Identification of the system of reference

- (46) The system of reference normally constitutes the framework against which the selectivity of a measure is assessed. It is composed of a consistent set of rules generally applicable – on the basis of objective criteria - to all undertakings falling within its scope as defined by its guiding principle.
- (47) In the case at hand, the reference tax system must be defined as the Gibraltar corporate income tax as introduced by the ITA 2010 in the version in force at the time of the issuance of the tax rulings, which applies to all resident companies in Gibraltar (as well as to non-resident companies carrying on a trade in Gibraltar through a branch or agency). The guiding principle of that system consists in levying taxes on all those undertakings generating income accruing in or derived from Gibraltar, avoiding double taxation and leading to simplification.

Existence of a derogation from the system of reference

- (48) The next question is then whether the Gibraltar tax system provides any derogation leading to a different treatment for companies in a comparable legal and factual situation.
- (49) Such a derogation could exist if, when granting a tax ruling, tax authorities enjoy discretion when applying the respective legal provisions, or treat undertakings that are in a similar legal and factual situation differently by, for instance, granting rulings only to certain companies or applying a more "favourable" tax treatment to some companies.⁴⁰ In addition, a selective tax treatment could result from the fact that the tax authorities deviate in their rulings from the applicable national provisions which results in a lower amount of tax to be paid by the company.
- (50) According to the Court of Justice of the European Union, treating economic agents on a discretionary basis may mean that the individual application of a general measure takes on the features of a selective measure, in particular where exercise of the discretionary power goes beyond the simple management of tax revenue by reference to objective criteria⁴¹. Moreover, if in daily practice tax rules need to be interpreted, they cannot leave room for a discretionary treatment of undertakings. Every decision of the administration that departs from the general tax rules to the benefit of individual undertakings in principle leads to a presumption of State aid and must be analysed in detail.
- (51) As far as administrative rulings merely contain an interpretation of general rules, they do not give rise to a presumption of aid. However, the opacity of the decisions taken by the authorities and the room for manoeuvre which they sometimes enjoy support the presumption that such is at any rate their effect in some instances.

⁴⁰ *Vid.* Commission Notice on direct business taxation, *OJ C384*, 10.12.1998, p.3.

⁴¹ Case C-241/94 *France v. Commission* (Kimberly Clark Sopalin) [1996] ECR I-4551.

- (52) After the review of 165 tax rulings, the Commission considers that the Gibraltar tax authorities generally refrain from a proper assessment of the companies' tax obligations by exercising their discretionary powers. Such a course of conduct is possible because the legal provisions are formulated in a sufficiently vague manner to allow the Gibraltar tax authorities room of manoeuvre. In addition, in some case, the Gibraltar tax authorities issue rulings that are in contradiction to the applicable tax provisions. Such is the case, for instance, when the tax authorities introduce the concept of "minimal income" which is not mentioned anywhere in the legal rules.
- (53) The selective treatment through the tax ruling practice will be explained in more detail with the help of the following examples:
1. *Intermediary activities*: The Commission considers that, when the Gibraltar tax authorities grant a tax ruling confirming the tax exemption of income derived from intermediary trade activities on the sole basis that the requesting party has declared that such activities would occur outside Gibraltar (without further information being requested or verification being done), such a ruling practice is the result of discretionary practices. A tax ruling that recognizes the tax exemption of income derived from intermediary activity can be granted by the Gibraltar tax authorities without requesting further explanations, as they consider that in any event the income generated in Gibraltar for that activity is minimal. However, the concept of "minimal activity" does not exist in the applicable tax provisions and granting a ruling exempting from tax such activities constitutes a deviation from the legal rules and therefore a selective treatment.
 2. *Consultancy fee*: The Commission considers that in none of the tax rulings that it examined the tax authorities asked for any kind of evidence in order to prove that the consultancy services are effectively provided outside Gibraltar. However, section 11 of ITA 2010 subjects to taxation any profit derived from services rendered in Gibraltar. By exempting such income from tax without requiring further prove as to where the activities are effectively carried out, the tax authorities deviate from the applicable tax provisions and grant a selective tax treatment to the companies requesting a tax ruling.
 3. *Passive income*: Based on its analysis of the tax rulings, the Commission concludes on a preliminary basis that the Gibraltar tax authorities do not possess enough information to evaluate the possible taxation of income derived from interest or royalties. As mentioned above in the factual description, most of the tax rulings have been issued in the period when ITA 2010 included a passive income exemption. However, the tax rulings do not only confirm the tax exemption but go beyond that. For instance, there are a number of tax rulings that state that all income earned by Gibraltar companies which provide loans to associated companies located outside Gibraltar are exempted from taxation in Gibraltar. For instance, in some cases a tax ruling is granted to a conglomerate of several companies (usually between seven and nine) composed by tax resident companies in Gibraltar and offshore companies. In those cases, the Gibraltar companies seem to merely serve as debt conduit companies between the offshore companies that generate the funds and the offshore borrower companies. The Commission considers that without a proper explanation of the whole framework it is impossible to understand the clear structure of the loan mechanism. Moreover, section 40 of ITA 2010 expressly refers

to such "artificial structures" and stipulates that the Commissioner "may disregard the arrangement" and assess the amount of taxation "in the absence of the arrangement". By issuing a tax ruling that accepts such structures without any further explanations and exempting them from taxation, the tax authorities deviate from the applicable national tax provisions and in particular section 40 of ITA 2010.

With regard to royalties, there are several tax rulings granted to Gibraltar companies which receive royalty payments from companies which use intellectual property rights. In these cases the tax rulings are granted to companies without verifying where the user of the IP is located. By *exempting* from tax the royalty income without verifying where the user of the IP is located, such royalty income is not subject to taxation anywhere else (in contrast to the situation where the income *is not subject to taxation* in Gibraltar. In that case, the income could be subject to taxation elsewhere). It therefore provides the companies requesting a tax ruling with a clear advantage based on a selective tax treatment.

4. *Marketing activities*: As regard the rulings granted for marketing activities, the Commission can conclude that there is generally no evidence of where the clients are located or where the meetings are held to consider whether the income generated from these activities should be taxed in Gibraltar or not. The Gibraltar tax authorities generally do not assess where the activity is performed as in any case the marketing activity that could be identified as performed in Gibraltar is considered to be minimal. The Commission has doubts whether that argument is sufficient to refrain from any further analysis and, in any case, constitutes a deviation from the applicable tax provisions which do not recognise the concept of "minimal activity" or "minimal income".
5. *Procurement of petroleum products and logistic organization*. The Commission considers that based on the information provided by the law firms (on behalf of their clients), the Gibraltar tax authorities do not perform any kind of assessment in order to be able to consider if the activity of the companies in question would be subject to taxation in Gibraltar in accordance with section 11 of ITA 2010. Section 11 of ITA 2010 subjects to taxation any income accrued in or derived from activity in Gibraltar. Without any information as to what the activity entails, the tax authorities cannot conclude that the income derived from this activity is not subject to taxation. The ruling is therefore issued in contravention of the applicable national tax provision and constitutes a selective treatment in favour of the companies requesting a tax ruling.

6. *Tax rulings that serve as a means to prolong the existing benefits under the tax exemption regime without any scrutiny.* Some tax rulings follow a request by a law firm (acting in the name of the client) for a confirmation that "given the cessation of tax exempt status on 31 December 2010, the activities of the company will not give rise to a tax liability in Gibraltar"; or "the above company was previously registered as an exempt company, and we are now requested to seek a ruling that as from 1st January 2011 the company will not be liable to Gibraltar Corporation tax"; or "we should also be grateful for your confirmation of the tax position under both ITA and the Income Tax 1952". In none of these cases, the companies explain or provide any documentation that supports their statements regarding their business activities. Issuing a tax ruling and confirming, without any further evidence or analysis that the activities continue to benefit from tax exemption is not in conformity with the national tax provisions.
7. *Other tax rulings cases mentioned in section 2 of this decision:* With regard to holding companies which hold as a sole asset a yacht, the Commission considers that the Gibraltar tax authorities should require more information such as the certificate of registration of the yacht to conduct an assessment pursuant to section 11 of ITA 2010 which determines the tax liability. Not doing so shows that the Gibraltar tax authorities deviate from their own applicable tax provisions when granting a tax ruling on the basis of insufficient information. There are also several cases related to trusts located in Gibraltar which are systematically exempted from taxation without any further analysis by the Gibraltar tax authorities and thus irrespective of the fact whether the trust received any income that could be considered as taxable income in Gibraltar.
- (54) In conclusion and after an analysis of a significant number of tax rulings, the Commission understands that the Gibraltar tax authorities grant formal tax rulings without performing an adequate evaluation of such companies' business in order to safeguard Gibraltar's tax base. Such practice is possible because the Gibraltar tax authorities dispose of a large room for manoeuvre under the ITA 2010 and because tax rulings are issued in contravention of the applicable tax provisions. By granting such tax rulings only to certain multinational companies as opposed to other, purely domestic companies that do not ask for a tax ruling, the tax authorities thereby treat companies that are in a similar legal and factual situation differently.

The absence of justification by the nature or the general scheme of the reference system

- (55) A measure which derogates from the system of reference (prima facie selectivity) may be still found to be non-selective if it is justified by the nature or general scheme of that system. A derogating measure is justified where that measure results directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of that system. By contrast, external policy objectives which are not inherent to the system cannot be relied upon for that purpose.
- (56) The United Kingdom has not yet provided any justification to the Commission. Even if the Commission assumed that the Gibraltar tax authorities were carrying out some scrutiny, it is submitted that the way in which the tax ruling practice is implemented is not in line with international tax standards and with the logic of the system in a fashion that could be accepted in the State aid context. It is obvious from the tax rulings practice that Gibraltar

offers rulings to the requesting companies and exempts them from any taxation even if some income is received in Gibraltar.

- (57) In addition, the tax authorities must also ensure the existence of appropriate control and monitoring procedures in order to ensure a coherent application of the tax system⁴². The Commission has doubts whether the United Kingdom provide for appropriate control procedures both as regards *ex ante* control (before granting a ruling) and *ex post*, i.e. as regards the implementation of the tax structures that are the object of the ruling. It rather appears at this stage that the tax rulings practice is accompanied by a systematic non-enforcement of key conditions that lead to the granting of an advantage to those companies that receive a tax ruling. In fact, the rulings generally provide a circular reasoning that the company is exempted from paying taxes in Gibraltar because its income is not "*accruing in or derived from*" Gibraltar "provided that the profits or gains of the company arise from income generating activities and functions carried out or exercised outside Gibraltar". By systematically adding the last disclaimer to all their rulings, the Gibraltar tax authorities in fact argue that it is for the company to inform the Gibraltar tax authorities if its income is not generated (or is not generated any longer) outside Gibraltar. However, from the above analysis it appears that the tax authorities deliberately ignore information that points to the contrary and do not perform any adequate monitoring of such companies' business in order to safeguard its national tax base.

4.1.2. State resources

- (58) The use of State resources can follow from the loss of tax revenue. Since the non-taxation of income results in a loss of tax revenue that otherwise would have been available to the Member State, it can be concluded that the scheme is financed through State resources.⁴³ It is also imputable to the State because it results from tax rulings granted by the State.

4.1.3. Advantage

- (59) According to the case-law, the concept of aid embraces not only positive benefits, but also measures which in various forms mitigate the charges which are normally included in the budget of an undertaking⁴⁴.

⁴² *Vid.* e.g. Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* [2011], paragraph 73 et seq., which ruled "Moreover, it is necessary to ensure compliance with the requirement that a benefit must be consistent not only with the inherent characteristics of the tax system in question but also as regards the manner in which that system is implemented. It is therefore for the Member State concerned to introduce and apply appropriate control and monitoring procedures in order to ensure that specific tax measures introduced for the benefit of cooperative societies are consistent with the logic and general scheme of the tax system and to prevent economic entities from choosing that particular legal form for the sole purpose of taking advantage of the tax benefits provided for that kind of undertaking".

⁴³ Joined Cases C-106/09 P and C-107/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom* [2011], paragraph 72.

⁴⁴ Case C-143/99, *Adria-Wien Pipeline*, ECR [2001], I-8365, point 38.

- (60) Since the tax rulings practice exempts from taxation certain companies that have been granted a tax ruling, it seems to provide an economic advantage to the benefitting companies in comparison to other companies which do not benefit from such tax advantages, whenever the beneficiaries would otherwise be subject to taxation in Gibraltar. Furthermore, in each case where the level of taxation of a company benefitting from a tax ruling would be inferior to the level of taxation resulting from the correct implementation of the applicable tax provisions, there would be an advantage for them.

4.1.4. *Effect on trade and competition*

- (61) Many of the companies established in Gibraltar (and the groups to which they belong) are likely to be active in sectors where there is trade between Member States. The Court of Justice has repeatedly ruled that when aid granted by the Member State strengthens the position of an undertaking vis-à-vis other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid and there is a distortion of competition. For that purpose, it is not necessary for the recipient undertaking itself to export its products. Where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State. Similarly, where a Member State grants aid to undertakings operating in the service and distribution industries, it is not necessary for the recipient undertakings themselves to carry on their business outside the Member State for the aid to have an effect on intra-Union trade. The relatively small amount of aid, or the relatively small size of the undertaking which receives it, does not as such exclude the possibility that intra-Union trade might be affected⁴⁵. Therefore to the extent that Gibraltar companies, benefitting from the advantages of being exempted from taxation by virtue of a tax ruling, operate in sectors where intra-Union trade takes place, it would appear that the aid affects trade between Member States and threatens to distort competition.

4.1.5. *Conclusion on the existence of aid*

- (62) It seems at this stage that there is potentially a State aid in all the assessed 165 tax rulings (identified in annex), because none of them is based on sufficient information so as to ensure that the level of taxation of the activities concerned is in line with the tax paid by other companies in a similar situation and the applicable tax provisions.
- (63) These 165 tax rulings also point to a recurrent practice. Section 42 of ITA 2010 concerns the tax rulings procedure which allows companies to ask in advance for clearance as to whether companies that are incorporated in Gibraltar are liable to pay taxes in Gibraltar. The preceding analysis points to a recurrent practice in the provision of rulings by the Gibraltar tax authorities which at this stage seem to be a *de facto* scheme.
- (64) Pursuant to Article 1(d) of Regulation 659/1999 a scheme is to be considered as an act "*on the basis of which, without further implementing measures being required, individual aid*

⁴⁵ *Vid.* cases 730/79 *Philip Morris v Commission* [1980] ECR 2671, 142/87, *Belgium v Commission* [1990] ECR I-959, joined cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraphs 40-42 and case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraphs 84-86.

awards may be made to undertakings defined within the act in a general and abstract manner".

- (65) First, section 42 of ITA 2010 can be considered as the basis for the granting of tax rulings to companies in Gibraltar.
- (66) Second, the Commission's analysis of the tax rulings provided to it showed that the tax ruling practice consistently misapplies the provisions of the ITA 2010. Such misapplication is based on wide powers granted to the Gibraltar tax authorities when applying the provisions of ITA 2010. A legal basis with such a wide discretion is bound to lead to misapplication (for instance, by creating the tax exemption for "minimal" income which is nowhere mentioned in the ITA 2010).
- (67) Third, that consistent tax ruling practice is accompanied by a systematic non-enforcement of key conditions that lead to the granting of an advantage to those companies that receive a tax ruling. As indicated above, the rulings generally are based on the reasoning that the company is exempted from paying taxes in Gibraltar given that the company has to inform the Gibraltar tax authorities if its income is not generated outside Gibraltar. However, the Gibraltar tax authorities seem not to perform any adequate monitoring of such companies' business in order to safeguard its national tax base. It is thus the tax rulings practice that provides a very superficial assessment (if any) of the situation of the company together with the lack of enforcement from the side of the Gibraltar tax authorities that is objectionable and forms the basis for a State aid investigation.
- (68) The ITA 2010 with the tax rulings procedure as it is applied by the specialised tax authorities thus meets the criteria laid down in Article 1(d) of Regulation 659/1999. Therefore the Commission considers at this stage that it can conduct its analysis both on the 165 individual cases of rulings constituting State aid and on *the de facto* scheme resulting from the application of the tax ruling procedure.
- (69) The Commission concludes, at this stage, that the 165 individual tax rulings examined and the administrative tax rulings practice in Gibraltar constitute a new State aid⁴⁶ within the meaning of Article 107(1) TFEU. The Commission has found factual evidence that the United Kingdom grants selective advantages to companies that receive a tax ruling on the basis of a scheme by exempting them from taxation in Gibraltar by way of tax rulings.

4.1.6. *Compatibility of aid*

- (70) As the measure appears to constitute State aid, it is therefore necessary to determine if such aid is compatible with the internal market. State aid measures can be considered compatible on the basis of the exceptions laid down in paragraphs (2) and (3) of Article 107 TFEU.
- (71) At present the Commission has doubts as to whether the measure in question can be considered compatible with the internal market. The United Kingdom authorities did not present any argument to indicate that any of the exceptions provided for in paragraphs (2) or (3) of Article 107 TFEU applies in the present case.

⁴⁶ Joined Cases T-195/01 and T-207/11, *Government of Gibraltar v. Commission*, paragraph 111.

- (72) The exceptions provided for in Article 107(2) TFEU, which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not seem to apply in this case.
- (73) The exception provided for in Article 107(3)(a) TFEU also does not apply, which concerns the authorisation of aid to promote the economic development of areas where the standard of living is abnormally low or where there is a serious unemployment, and of the regions referred to in Article 349 TFEU, in view of their structural, economic and social situation. Such areas are defined by the United Kingdom's regional aid map⁴⁷. Since Gibraltar is not such an area, Article 107(3)(a) TFEU does not apply.
- (74) As regards the exceptions laid in subparagraphs (b) and (d) of Article 107(3) TFEU, the aid in question is not intended to promote the execution of an important project of common European interest nor to remedy to a serious disturbance in the economy of the United Kingdom, nor is it intended to promote culture or heritage conservation.
- (75) Aid granted in order to facilitate the development of certain economic activities or of certain economic areas could be considered compatible where it does not adversely affect trading conditions to an extent contrary to the common interest, according to Article 107(3)(c) TFEU. At this stage, however, the Commission has no elements to assess whether the tax advantages granted by the measure under examination are related to specific investments eligible to receive aid under Union rules and guidelines, to job creation or to specific projects. The Commission considers, on the contrary, that the measure in issue seems to constitute a reduction of charges that should normally be borne by the entities concerned in the course of their business, and should therefore be considered as operating aid. According to the Commission practice, such aid cannot be considered compatible with the internal market in that it does not facilitate the development of certain activities or of certain economic areas, nor are the incentives in question limited in time, digressive or proportionate to what is necessary to remedy to a specific economic handicap of the areas concerned. In addition Gibraltar is not included in the regional aid map for the United Kingdom for the period 2007 to 2013, as approved by the Commission under State aid N673/2006.

5. CONCLUSION

In the light of the foregoing considerations, the Commission's preliminary view is that the 165 tax rulings listed in annex and the tax rulings practice of Gibraltar constitute State aid measures within the meaning of Article 107(1) TFEU and has doubts about their compatibility with the internal market. The Commission has therefore decided to extend the procedure laid down in Article 108(2) TFEU with respect to the measures in question.

The Commission wishes to remind the United Kingdom that Article 108(3) TFEU has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No. 659/1999, which provides that all unlawful aid may be recovered from the recipient.

⁴⁷ *OJ C 55, 10.03.2007, p. 2.*

The Commission invites the United Kingdom authorities to transmit immediately copy of the present decision to all companies requesting a tax ruling, or at least to proceed to inform them with appropriate means.

Furthermore, as the Commission has doubts whether the United Kingdom and the Gibraltar tax authorities ensure the existence of appropriate control and monitoring procedures in order to ensure a coherent application of the tax system, the Commission invites the United Kingdom and the Gibraltar tax authorities to provide it with evidences of such *ex post* control.

In addition, the Commission requests the United Kingdom to explain whether and on what grounds the scheme and/or any of the assessed 165 tax rulings (identified in annex), which it at this stage considers as constituting State aid, can be found compatible.

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

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
B - 1049 Brussels
Belgium
Fax No: +32 2 296 12 42

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President