Amtsblatt der Europäischen Union

C 52

Ausgabe in deutscher Sprache

Mitteilungen und Bekanntmachungen

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[1] Text von Bedeutung für den EWR.

II

(Mitteilungen)

MITTEILUNGEN DER ORGANE, EINRICHTUNGEN UND SONSTIGEN STELLEN DER EUROPÄISCHEN UNION

EUROPÄISCHE KOMMISSION

Genehmigung staatlicher Beihilfen nach den Artikeln 107 und 108 des Vertrags über die Arbeitsweise der Europäischen Union

Vorhaben, gegen die von der Kommission keine Einwände erhoben werden

(Text von Bedeutung für den EWR)

(2023/C 52/01)

Datum der Annahme der Entscheidung	13.12.2021
Nummer der Beihilfe	SA.100855
Mitgliedstaat	Slowenien
Region	
Titel (und/oder Name des Begünstigten)	COVID-19 — Support for self-employed, managers and farmers in form of a partial compensation for the lost income due to the quarantine
Rechtsgrundlage	Act amending the Healthcare Intervention Measures Act/Zakon o dopolnitvah Zakona o nujnih ukrepih na področju zdravstva (ZNUPZ)
Art der Beihilfe	Regelung
Ziel	Behebung einer beträchtlichen Störung im Wirtschaftsleben eines Mitgliedstaats
Form der Beihilfe	Zuschuss
Haushaltsmittel	Haushaltsmittel insgesamt: 4 000 000 EUR Jährliche Mittel: 4 000 000 EUR
Beihilfehöchstintensität	
Laufzeit	bis zum 30.6.2022
Wirtschaftssektoren	Alle für Beihilfen in Frage kommende Wirtschaftszweige
Name und Anschrift der Bewilligungsbehörde	Ministry of Economic Development and Technology Kotnikov 5, 1000 Ljubljana, SI — Slovenia

Sonstige Angaben	

Die rechtsverbindliche(n) Sprachfassung(en) der Entscheidung, aus der/denen alle vertraulichen Angaben gestrichen sind, finden Sie unter:

https://ec.europa.eu/competition/elojade/isef/index.cfm

Datum der Annahme der Entscheidung	13.12.2022
Nummer der Beihilfe	SA.102197
Mitgliedstaat	Kroatien
Region	Kontinentalna Hrvatska
Titel (und/oder Name des Begünstigten)	State Aid SA.102197 (2022/N) — Croatia COVID-19: Zagreb International Airport
Rechtsgrundlage	Act on the Government of the Republic of Croatia (Official Gazette, issue no. 150/11, 119/14, 93/16, 116/18), Act on State Aid (Official Gazette, issue no. 47/14, 69/17)
Art der Beihilfe	Ad-hoc-Beihilfe International Zagreb Airport Jsc („MZLZ“)
Ziel	Ausgleich für Schäden aufgrund von Naturkatastrophen oder sonstigen außergewöhnlichen Ereignissen
Form der Beihilfe	Schuldentilgung
Haushaltsmittel	Haushaltsmittel insgesamt: 107 900 000 HRK Jährliche Mittel: 107 900 000 HRK
Beihilfehöchstintensität	
Laufzeit	ab 1.10.2022
Wirtschaftssektoren	Personenbeförderung in der Luftfahrt, Güterbeförderung in der Luftfahrt, Erbringung von sonstigen Dienstleistungen für den Verkehr
Name und Anschrift der Bewilligungsbehörde	Ministry of the Sea, Transport and Infrastructure Prisavlje 14, 10000 Zagreb, CROATIA
Sonstige Angaben	

Die rechtsverbindliche(n) Sprachfassung(en) der Entscheidung, aus der/denen alle vertraulichen Angaben gestrichen sind, finden Sie unter:

https://ec.europa.eu/competition/elojade/isef/index.cfm

Datum der Annahme der Entscheidung	12.1.2023
Nummer der Beihilfe	SA.103141

Mitgliedstaat	Dänemark
Region	
Titel (und/oder Name des Begünstigten)	State guarantee for travel operators of the Travel Guarantee Fund
Rechtsgrundlage	Bekendtgørelse om kompensation for faktiske omkostninger til rejseudbydere og formidlere for udenlandske rejsearrangører som følge af COVID-19, tilskud til fondskassen for pakkerejser og sammensatte rejsearrangementer samt afsætning af tabsramme i 2020 til dækning af tab på statsgarantierne på op til 300 mio. kr. (Executive Order no 1137 of 6 July 2020 as amended)
Art der Beihilfe	Regelung
Ziel	Behebung einer beträchtlichen Störung im Wirtschaftsleben eines Mitgliedstaats
Form der Beihilfe	Zuschuss
Haushaltsmittel	Haushaltsmittel insgesamt: 300 000 000 DKK Jährliche Mittel: 300 000 000 DKK
Beihilfehöchstintensität	
Laufzeit	bis zum 31.12.2020
Wirtschaftssektoren	Reisebüros und Reiseveranstalter
Name und Anschrift der Bewilligungsbehörde	Rejsegarantifonden (Travel Guarantee Fund) Haldor Topsøes Allé 1, 2800 Kongens Lyngby
Sonstige Angaben	

Die rechtsverbindliche(n) Sprachfassung(en) der Entscheidung, aus der/denen alle vertraulichen Angaben gestrichen sind, finden Sie unter:

https://ec.europa.eu/competition/elojade/isef/index.cfm

Datum der Annahme der Entscheidung	9.12.2022
Nummer der Beihilfe	SA.103238
Mitgliedstaat	Belgien
Region	
Titel (und/oder Name des Begünstigten)	Belgian Travel Insolvency Fund for package travel, linked travel arrangements and travel services
Rechtsgrundlage	Draft Law amending the Law of 21 November 2017 on the sale of package travel, linked travel arrangements and travel services („Avant-projet de loi modifiant la loi du 21 novembre 2017 relative à la vente de voyages à forfait, de prestations de voyages liées et de services de voyage“).

Art der Beihilfe	Regelung
Ziel	Sektorale Entwicklung
Form der Beihilfe	Sonstiges (bitte angeben)
Haushaltsmittel	Haushaltsmittel insgesamt: 420 000 000 EUR Jährliche Mittel: 70 000 000 EUR
Beihilfehöchstintensität	
Laufzeit	1.1.2023 — 31.12.2028
Wirtschaftssektoren	ERBRINGUNG VON FINANZ- UND VERSICHERUNGSDIENSTLEISTUNGEN
Name und Anschrift der Bewilligungsbehörde	The Federal Public Service (FPS) Economy City Atrium C Rue du Progrès, 50 1210 Bruxelles
Sonstige Angaben	

Die rechtsverbindliche(n) Sprachfassung(en) der Entscheidung, aus der/denen alle vertraulichen Angaben gestrichen sind, finden Sie unter:

https://ec.europa.eu/competition/elojade/isef/index.cfm

Datum der Annahme der Entscheidung	19.12.2022
Nummer der Beihilfe	SA.103490
Mitgliedstaat	Belgien
Region	REGION WALLONNE
Titel (und/oder Name des Begünstigten)	Compensation des coûts des émissions indirectes en Wallonie pour la période 2021-2030
Rechtsgrundlage	Articles 9 et 10 du décret du 9 décembre 1993 relatif à la promotion de l'utilisation rationnelle de l'énergie, des économies d'énergie et des énergies renouvelables; Projet d'arrêté du Gouvernement wallon organisant l'octroi d'une aide aux entreprises en compensation des coûts des émissions indirectes entre 2021 et 2030
Art der Beihilfe	Regelung
Ziel	Umweltschutz
Form der Beihilfe	Zuschuss
Haushaltsmittel	Haushaltsmittel insgesamt: 200 000 000 EUR Jährliche Mittel: 20 000 000 EUR

Beihilfehöchstintensität	75,0 %
Laufzeit	1.1.2021 — 31.12.2030
Wirtschaftssektoren	Herstellung von Lederbekleidung, Erzeugung und erste Bearbeitung von Aluminium, Herstellung von sonstigen anorganischen Grundstoffen und Chemikalien, Erzeugung und erste Bearbeitung von Blei, Zink und Zinn, Herstellung von Holz- und Zellstoff, Herstellung von Papier, Karton und Pappe, Erzeugung von Roheisen, Stahl und Ferrolegierungen, Mineralölverarbeitung, Erzeugung und erste Bearbeitung von Kupfer, Erzeugung und erste Bearbeitung von sonstigen NE-Metallen, Herstellung von Kunststoffen in Primärformen, Eisengießereien, Herstellung von Glasfasern und Waren daraus, Herstellung von Industriegasen
Name und Anschrift der Bewilligungsbehörde	Ministère wallon de l'économie Place de la Wallonie, 1, 5100 JAMBES
Sonstige Angaben	

Die rechtsverbindliche(n) Sprachfassung(en) der Entscheidung, aus der/denen alle vertraulichen Angaben gestrichen sind, finden Sie unter:

https://ec.europa.eu/competition/elojade/isef/index.cfm

Datum der Annahme der Entscheidung	19.12.2022
Nummer der Beihilfe	SA.103704
Mitgliedstaat	Belgien
Region	VLAAMS GEWEST
Titel (und/oder Name des Begünstigten)	Compensation for indirect ETS costs in Flanders for 2021-2030
Rechtsgrundlage	Draft decision of the Flemish Government granting aid to undertakings for the compensation of indirect emission costs
Art der Beihilfe	Regelung
Ziel	Umweltschutz
Form der Beihilfe	Zuschuss
Haushaltsmittel	Haushaltsmittel insgesamt: 2 109 900 000 EUR Jährliche Mittel: 210 990 000 EUR
Beihilfehöchstintensität	75,0 %
Laufzeit	1.1.2021 — 31.12.2030

Wirtschaftssektoren	Herstellung von Lederbekleidung, Erzeugung und erste Bearbeitung von Aluminium, Herstellung von sonstigen anorganischen Grundstoffen und Chemikalien, Erzeugung und erste Bearbeitung von Blei, Zink und Zinn, Herstellung von Holz- und Zellstoff, Herstellung von Papier, Karton und Pappe, Erzeugung von Roheisen, Stahl und Ferrolegierungen, Mineralölverarbeitung, Erzeugung und erste Bearbeitung von Kupfer, Erzeugung und erste Bearbeitung von sonstigen NE-Metallen, Herstellung von Kunststoffen in Primärformen, Eisengießereien, Herstellung von Glasfasern und Waren daraus, Herstellung von Industriegasen
Name und Anschrift der Bewilligungsbehörde	Flanders Innovation & Entrepreneurship Agency (VLAIO) Koning Albert II Laan 35, 1030 Brussel
Sonstige Angaben	

Die rechtsverbindliche(n) Sprachfassung(en) der Entscheidung, aus der/denen alle vertraulichen Angaben gestrichen sind, finden Sie unter:

https://ec.europa.eu/competition/elojade/isef/index.cfm

Datum der Annahme der Entscheidung	16.12.2022
Nummer der Beihilfe	SA.103805
Mitgliedstaat	Rumänien
Region	Rumänien
Titel (und/oder Name des Begünstigten)	Sprijin pentru investiții în pepiniere și tehnologii moderne de producere a puieților forestieri, în capacități de condiționare a semințelor forestiere și în realizarea de plantaje forestiere
Rechtsgrundlage	Proiect de Ordin pentru aprobarea schemei de ajutor de stat „Sprijin pentru investiții în pepiniere și tehnologii moderne de producere a puieților forestieri, în capacități de condiționare a semințelor forestiere și în realizarea de plantaje forestiere“
Art der Beihilfe	Regelung
Ziel	Landwirtschaft, Forstwirtschaft, ländliche Gebiete, Beihilfen für Investitionen in Techniken der Forstwirtschaft sowie in die Verarbeitung, Mobilisierung und Vermarktung forstwirtschaftlicher Erzeugnisse
Form der Beihilfe	Zuschuss
Haushaltsmittel	Haushaltsmittel insgesamt: 158 211 200 RON Jährliche Mittel: 158 211 200 RON
Beihilfehöchstintensität	90,0 %
Laufzeit	bis zum 30.9.2024
Wirtschaftssektoren	Forstwirtschaft und Holzeinschlag

Name und Anschrift der Bewilligungsbehörde	Ministerul Mediului, Apelor și Pădurilor Blvd. Libertății nr. 12; Sector 5; București
Sonstige Angaben	

Die rechtsverbindliche(n) Sprachfassung(en) der Entscheidung, aus der/denen alle vertraulichen Angaben gestrichen sind, finden Sie unter:

https://ec.europa.eu/competition/elojade/isef/index.cfm

Datum der Annahme der Entscheidung	21.12.2022
Nummer der Beihilfe	SA.104264
Mitgliedstaat	Österreich
Region	Österreich
Titel (und/oder Name des Begünstigten)	Beihilfeprogramm für die Erbringung von Schienengüterverkehrsleistungen in bestimmten Produktionsformen 2023 — 2027
Rechtsgrundlage	Förderungsprogramm für die Erbringung von Schienengüterverkehrsleistungen in bestimmten Produktionsformen in Österreich 2023 bis 2027 sowie zur Gewährung von Förderungen für Schienenverkehrsleistungen im Marktsegment „Güterverkehr manipuliert“, für die in Österreich Wegeentgelt an die ÖBB-Infrastruktur AG entrichtet wird (Sonderrichtlinien) Allgemeine Richtlinien für die Gewährung von Förderungen aus Bundesmitteln (ARR 2014), BGBl. II 208/2014
Art der Beihilfe	Regelung
Ziel	Verkehrskoordinierung, Sektorale Entwicklung
Form der Beihilfe	Zuschuss
Haushaltsmittel	Haushaltsmittel insgesamt: 1 443 500 000 EUR Jährliche Mittel: 288 700 000 EUR
Beihilfehöchstintensität	
Laufzeit	1.1.2023 — 31.12.2027
Wirtschaftssektoren	Güterbeförderung im Eisenbahnverkehr
Name und Anschrift der Bewilligungsbehörde	Mag. Roland SCHUSTER Bundesministerium für Klimaschutz, Umwelt, Energie, Mobilität, Innovation und Technologie

Sonstige Angaben	

Die rechtsverbindliche(n) Sprachfassung(en) der Entscheidung, aus der/denen alle vertraulichen Angaben gestrichen sind, finden Sie unter:

https://ec.europa.eu/competition/elojade/isef/index.cfm

Datum der Annahme der Entscheidung	19.12.2022
Nummer der Beihilfe	SA.104831
Mitgliedstaat	Finnland
Region	
Titel (und/oder Name des Begünstigten)	Solvency support in favour of Meyer Turku Oy
Rechtsgrundlage	Act on a State Wholly Owned Company Business Finland Venture Capital Oy (967/2013)
Art der Beihilfe	Ad-hoc-Beihilfe Meyer Turku Oy
Ziel	Behebung einer beträchtlichen Störung im Wirtschaftsleben eines Mitgliedstaats, Sektorale Entwicklung
Form der Beihilfe	Andere Formen der Kapitalintervention
Haushaltsmittel	Haushaltsmittel insgesamt: 80 000 000 EUR Jährliche Mittel: 80 000 000 EUR
Beihilfehöchstintensität	
Laufzeit	ab 22.12.2022
Wirtschaftssektoren	Schiff- und Bootsbau
Name und Anschrift der Bewilligungsbehörde	Ministry of Economic Affairs and Employment P.O.box 32, 00023 Government
Sonstige Angaben	

Die rechtsverbindliche(n) Sprachfassung(en) der Entscheidung, aus der/denen alle vertraulichen Angaben gestrichen sind, finden Sie unter:

https://ec.europa.eu/competition/elojade/isef/index.cfm

Datum der Annahme der Entscheidung	26.1.2023
Nummer der Beihilfe	SA.105503
Mitgliedstaat	Rumänien

Region	Rumänien
Titel (und/oder Name des Begünstigten)	The IMM Invest Plus State Aid Scheme
Rechtsgrundlage	Government Emergency Ordinance No 180/2022 for the amendment and completion of Government Emergency Ordinance No 99/2022 regarding the approval of the IMM Invest Plus state aid scheme and its components
Art der Beihilfe	Regelung
Ziel	Behebung einer beträchtlichen Störung im Wirtschaftsleben eines Mitgliedstaats
Form der Beihilfe	Zuschuss, Bürgschaft
Haushaltsmittel	Haushaltsmittel insgesamt: 23 131 679 000 RON Jährliche Mittel: 157 985 906 923 RON
Beihilfehöchstintensität	
Laufzeit	bis zum 31.12.2023
Wirtschaftssektoren	Alle für Beihilfen in Frage kommende Wirtschaftszweige
Name und Anschrift der Bewilligungsbehörde	Ministry of Finance B-dul Libertății, nr. 16, sector 5, București
Sonstige Angaben	

Die rechtsverbindliche(n) Sprachfassung(en) der Entscheidung, aus der/denen alle vertraulichen Angaben gestrichen sind, finden Sie unter:

https://ec.europa.eu/competition/elojade/isef/index.cfm

V

(Bekanntmachungen)

VERFAHREN BEZÜGLICH DER DURCHFÜHRUNG DER WETTBEWERBSPOLITIK

EUROPÄISCHE KOMMISSION

STAATLICHE BEIHILFEN — VEREINIGTES KÖNIGREICH

Staatliche Beihilfe SA.34914 (2013/C) — Vereinigtes Königreich — Körperschaftsteuersystem in Gibraltar

Aufforderung zur Stellungnahme nach Artikel 108 Absatz 2 des Vertrags über die Arbeitsweise der Europäischen Union

(Text von Bedeutung für den EWR)

(2023/C 52/02)

Mit Schreiben vom 31. Oktober 2022, das nachstehend in der verbindlichen Sprachfassung abgedruckt ist, hat die Kommission das Vereinigte Königreich von ihrem Beschluss in Kenntnis gesetzt, das am 16. Oktober 2013 eingeleitete förmliche Prüfverfahren nach Artikel 108 Absatz 2 des Vertrags über die Arbeitsweise der Europäischen Union in Bezug auf die Körperschaftsteuerbefreiung, die MJN Holdings (Gibraltar) Limited (im Folgenden „MJN GibCo") für Nutzungsentgelte gewährt wurde, welche eine Kommanditgesellschaft nach niederländischem Recht, deren Hauptanteilseigner MJN GibCo war, erhalten hat, auszuweiten. Diese Körperschaftsteuerbefreiung ergab sich daraus, dass ein Steuervorbescheid, der gegenüber MJN GibCo (im Jahr 2012) erlassen worden war, nach — und trotz — einer 2013 erlassenen Gesetzesänderung, mit der Nutzungsentgelte (ab dem 1. Januar 2014) steuerpflichtig gemacht wurden, weiter angewendet wurde.

Alle Beteiligten können innerhalb eines Monats nach Veröffentlichung dieser Zusammenfassung und des Schreibens zu der Maßnahme, die Gegenstand des von der Kommission eingeleiteten Verfahrens ist, Stellung nehmen. Die Stellungnahmen sind an folgende Anschrift zu richten:

Europäische Kommission
Generaldirektion Wettbewerb
Registratur Staatliche Beihilfen
1049 Bruxelles/Brussel
BELGIQUE/BELGIË
Fax + 32 22961242
Stateaidgreffe@ec.europa.eu

Alle Stellungnahmen werden dem Vereinigten Königreich übermittelt. Beteiligte, die eine Stellungnahme abgeben, können unter Angabe von Gründen schriftlich beantragen, dass ihre Identität nicht bekannt gegeben wird und/oder dass Teile ihrer Stellungnahme vertraulich behandelt werden.

Am 16. Oktober 2013 leitete die Kommission ein förmliches Prüfverfahren ein, um zu untersuchen, ob die im gibraltarischen Income Tax Act 2010 (Gesetz von 2010 über die Körperschaftsteuer in Gibraltar, im Folgenden „ITA 2010") vorgesehene Steuerbefreiung für Einkünfte aus passiven Zinserträgen und Nutzungsentgelten bestimmte Kategorien von Unternehmen selektiv begünstigte und damit gegen das Beihilferecht der Union verstieß. Am 1. Oktober 2014 beschloss die Kommission, das förmliche Prüfverfahren auf 165 Steuervorbescheide auszuweiten, die gegenüber mehreren Unternehmen in Gibraltar im Zeitraum Januar 2011 bis August 2013 erlassen worden waren. In ihrem abschließenden Beschluss vom 19. Dezember 2018 (mit dem das förmliche Prüfverfahren abgeschlossen wurde) stellte die Kommission eine rechtswidrige und mit dem Binnenmarkt unvereinbare Beihilfe fest, und zwar in Bezug auf 1) die Steuerbefreiung für Einkünfte aus passiven Zinserträgen und Nutzungsentgelten und 2) die von der Regierung von Gibraltar genehmigte steuerliche Behandlung auf der Grundlage von Steuervorbescheiden, die gegenüber fünf in Gibraltar ansässigen Unternehmen (darunter MJN GibCo), welche Anteile an Kommanditgesellschaften niederländischen Rechts hielten und Einkünfte aus passiven Zinserträgen und Nutzungsentgelten erzielten, erlassen worden waren. Gegen diesen Beschluss legten mehrere Unternehmen der Mead Johnson Nutrition Group Rechtsmittel ein. Mit seinem Urteil vom 6. April 2022 (T-508/19 — Mead Johnson Nutrition (Asia Pacific) u. a./Kommission) erklärte das Gericht der Europäischen Union den Teil des abschließenden Beschlusses der Kommission über den Erlass von Steuervorbescheiden für nichtig, soweit er die Einzelbeihilfe betraf, die MJN GibCo auf der Grundlage des Steuervorbescheids von 2012 gewährt wurde.

Im Anschluss an die teilweise Nichtigerklärung des abschließenden Beschlusses durch das Gericht hat die Kommission die Informationen, die das Vereinigte Königreich bzw. die Behörden Gibraltars zu dem 2012 gegenüber MJN GibCo erlassenen Steuervorbescheid (und dessen weiterer Anwendung ab dem 1. Januar 2014) übermittelt haben, erneut geprüft.

Bis zu seiner Auflösung am 16. Oktober 2018 war MJN GibCo ein Unternehmen mit Sitz in Gibraltar, das zur internationalen Gruppe Mead Johnson Nutrition gehörte. Die Tätigkeit von MJN GibCo bestand darin, als Kommanditist eine Beteiligung am Kapital von Mead Johnson Three CV (im Folgenden „MJT CV“), einer Kommanditgesellschaft nach niederländischem Recht (commanditaire vennootschap, im Folgenden: niederländische CV), die bis zu ihrer Auflösung am 15. Dezember 2017 ihren Sitz in den Niederlanden hatte, zu halten.

Der betreffende Steuervorbescheid bezieht sich auf die steuerliche Behandlung von Nutzungsentgelten, die MJN GibCo über MJT CV erhalten hat, in Gibraltar. Nach dem gibraltarischen Körperschaftsteuerrecht gilt eine niederländische CV als „steuerlich transparent“, d. h., die von einer niederländischen CV in den Niederlanden erzielten Gewinne werden als von dem/den gibraltarischen Partner(n), d. h. im vorliegenden Fall MJN GibCo, erwirtschaftet betrachtet. Im Rahmen des betreffenden Steuervorbescheids bestätigten die Steuerbehörden Gibraltars, dass MJN GibCo von der Einkommensteuer auf die auf Ebene der niederländischen CV erzielten Nutzungsentgelte befreit war. Der Steuervorbescheid, der zum Zeitpunkt seines Erlasses (2012) mit den gibraltarischen Rechtsvorschriften zwar im Einklang stand, da Nutzungsentgelte damals in Gibraltar nicht steuerpflichtig waren, galt jedoch — nach und trotz der Annahme einer Gesetzesänderung im Jahr 2013, mit der derartige Einkünfte ab dem 1. Januar 2014 der Steuerpflicht unterworfen wurden — weiter und stellte Nutzungsentgelte weiterhin von der Steuerpflicht frei.

Dementsprechend hat die Kommission Zweifel daran, dass MJN GibCo den in Gibraltar effektiv zu entrichtenden Körperschaftsteuerbetrag für die vom 1. Januar 2014 bis zu seiner Auflösung erzielten Einkünfte entrichtet hat.

Zum gegenwärtigen Zeitpunkt hat die Kommission Grund zu der Annahme, dass die weitere Anwendung des gegenüber MJN GibCo erlassenen Steuervorbescheids ab dem 1. Januar 2014 (dem Inkrafttreten der Gesetzesänderung) eine staatliche Beihilfe im Sinne des Artikels 107 Absatz 1 AEUV darstellt.

Die Kommission ist der Auffassung, dass die oben dargelegte fehlerhafte Anwendung der Körperschaftsteuervorschriften Gibraltar zuzurechnen ist und eine Verwendung staatlicher Mittel in Form entgangener Steuereinnahmen darstellen würde. Darüber hinaus würde die MJN GibCo gewährte steuerliche Behandlung (ab dem 1. Januar 2014) das Vorliegen eines selektiven Vorteils beinhalten. Schließlich stellt die Kommission fest, dass eine Verfälschung des Wettbewerbs und Auswirkungen auf den Handel zwischen Mitgliedstaaten gegeben sind, da MJN GibCo einer multinationalen Gruppe angehört, die in mehreren Mitgliedstaaten und auf mehreren Märkten mit intensivem Handel im Binnenmarkt tätig ist.

Da es sich bei einer derartigen Beihilfe um eine neue Beihilfe handeln würde und die Kommission zum jetzigen Zeitpunkt der Auffassung ist, dass keine der in Artikel 107 Absätze 2 und 3 vorgesehenen Ausnahmen anwendbar ist, hat die Kommission beschlossen, das förmliche Prüfverfahren auszuweiten.

Nach Artikel 16 der Verordnung (EU) 2015/1589 des Rates [1] können alle rechtswidrigen Beihilfen vom begünstigten Unternehmen zurückgefordert werden.

Nach Artikel 92 des Abkommens über den Austritt des Vereinigten Königreichs aus der EU (im Folgenden „Austrittsabkommen“) ist die Kommission für Verwaltungsverfahren zuständig, die vor Ende des Übergangszeitraums am 31. Dezember 2020 eingeleitet wurden. Darüber hinaus sind gemäß demselben Artikel des Austrittsabkommens die im vorliegenden Fall geltenden Verfahrensvorschriften die Bestimmungen des Unionsrechts für Verwaltungsverfahren über staatliche Beihilfen.

[1] Verordnung (EU) 2015/1589 des Rates vom 13. Juli 2015 über besondere Vorschriften für die Anwendung von Artikel 108 des Vertrags über die Arbeitsweise der Europäischen Union (ABl. L 248 vom 24.9.2015, S. 9).

WORTLAUT DES SCHREIBENS

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

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

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

1. **PROCEDURE**

(1) On 16 October 2013, the Commission initiated a formal investigation procedure to verify whether the passive interest and royalty income tax exemption [2] in Gibraltar's Income Tax Act 2010 ('ITA 2010') selectively favours certain companies, in breach of Union State aid rules (the decision taken to initiate that procedure is referred to in this Decision as 'the First Opening Decision').

(2) In parallel with the preliminary investigation preceding the formal investigation procedure, following requests made by the Commission, the Gibraltar tax authorities had provided information about Gibraltar's tax rulings procedure, by letters dated 3 December 2012, 13 September 2013, 14 November 2013, 31 January 2014 and 20 June 2014. Such information included general information regarding the tax ruling procedure and a list of advanced tax rulings ('ATR') granted in 2011, 2012 and 2013 (up to 31 August 2013) as well as explanations in relation to a selection of 165 rulings.

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

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

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

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

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

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

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

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

(9) On 29 November 2017, the United Kingdom submitted a copy of all reports drawn up by the Gibraltar tax authorities as a result of the tax audits performed in relation to the 165 ATR listed in the First Decision to Extend Proceedings.

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

(11) Meetings were held on 5 December 2013, 12 March 2015, 28 May 2015 and 29 November 2017 and 5 October 2018 with the United Kingdom, together with representatives of the Gibraltar authorities.

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

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

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

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

2. DESCRIPTION OF THE MEASURE

(16) Gibraltar is a British Overseas Territory. It has full internal self-government with respect to tax matters, while the United Kingdom government is responsible for its international relations, for example for the negotiation of tax treaties.

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

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

(17) ITA 2010 ([4]) entered into force on 1 January 2011 and replaced the former Income Tax Act 1952 ('ITA 1952'). It introduced a general income tax rate of 10 % applying to companies across the whole Gibraltar economy, except for utility companies, telecommunication services and companies enjoying and abusing a dominant market position, which are subject to a rate of 20 %.

(a) *Corporate taxpayers*

(18) Both a company ([5]) ordinarily resident ([6]) in Gibraltar and a company not ordinarily resident in Gibraltar may be a Gibraltar taxpayer but, in the latter case, only if the company carries on a trade in Gibraltar through a branch or agency ([7]).

(b) *Tax base*

(19) For the purposes of computing the tax base (or 'basis of assessment') for companies, section 16 of ITA 2010 provides that, subject to certain exceptions, the assessable profits or gains of a company for an accounting period are to be the full amount of the profits or gains of the company for that accounting period, applying the territorial basis of taxation outlined in Recitals (21) to (23).

(20) However, only the income, which is specified exhaustively in Tables A, B and C of Schedule 1 to ITA 2010, is chargeable to tax. This applies to both legal and natural persons. When ITA 2010 was enacted, Tables A, B and C specified the following categories of income:

— Table A: trade, business, profession, vocation and real property;

— Table B: employment and self-employment;

— Table C: other income (dividends ([8]), fund income, income from rights, pensions and a general 'Sweeping Up Class' in relation to items of income caught under the anti-avoidance provisions in section 40 of and Schedule 4 to ITA 2010).

(c) *Territorial basis*

(21) ITA 2010 is based on a territorial system of taxation, meaning that profits or gains are taxed only if the income 'accrues in or is derived from' Gibraltar. According to section 74 of ITA 2010, 'accrued in and derived from' is to be defined by reference to the location of the activities ([9]) which give rise to the profits, normally determined on a case by case basis. That provision also deems activities requiring a licence and regulation under any law of Gibraltar to take place in Gibraltar.

(22) The application by the Gibraltar tax authorities of the concepts of accrual and derivation also finds its source in principles established by the jurisprudence of the Judicial Committee of the Privy Council ([10]) in several landmark cases, such as *Hang Seng* ([11]) and *HK-TVB* ([12]), which both relate to the application of the principle of territoriality in Hong Kong. While the judgments of the Judicial Committee of the Privy Council concerning jurisdictions other than Gibraltar are not binding on Gibraltar, they may be relied upon by the Gibraltar courts if they are considered relevant. In the view of the United Kingdom, that would clearly be the case for the judgments referred to in this recital because of the similarity of the legislation in the two jurisdictions ([13]).

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

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

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

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

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

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

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

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

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

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

(23) According to the case law mentioned in Recital (22), in deciding whether the profits of any person accrue in and are derived from Gibraltar, the Gibraltar tax authorities should review what the person has done, or proposes to do, to earn the profits in question, and where that person has done it, or intends to do it. The focus is therefore on establishing the geographical location where the activity and the relevant transactions that produced the profits took place. With regard to the provision of services by a company, the Gibraltar authorities have indicated that they would rely in particular on the geographical location where all the income-generating activities (and not simply the back-office or administrative support functions) take place in order to determine the place where the services giving rise to fees are performed.

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

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

(25) ITA 2010 was amended in June 2013, with effect from 1 July 2013, to make all inter-company loan interest (both domestic and foreign sourced) liable to tax at the general rate of 10 % insofar as the interest received or receivable per source company exceeded GBP 100,000 per annum ([16]). With regard to royalty income, further legislation was enacted on 24 December 2013 subjecting royalties (received or receivable by a company registered in Gibraltar) to tax at the general rate of 10 % as from 1 January 2014 ([17]).

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

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

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

(27) Pursuant to Table C of Schedule 1 to ITA 2010, dividends paid or payable by a company to another company are not subject to tax. That is the general rule irrespective of the location of the company and regardless of the activity of the companies involved (holding companies or active trading companies). The same applies to dividends received by a permanent establishment (situated in Gibraltar) of a non-resident company.

(e) *Tax ruling practice*

(28) The Gibraltar Commissioner of Income Tax is entitled to grant advance tax rulings (rulings or ATRs) under his general duty to ensure the due administration of the Income Tax Act and his responsibility for the assessment and collection of income tax in Gibraltar. Such general powers follow from section 2(1) and 2(2) of ITA 2010.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

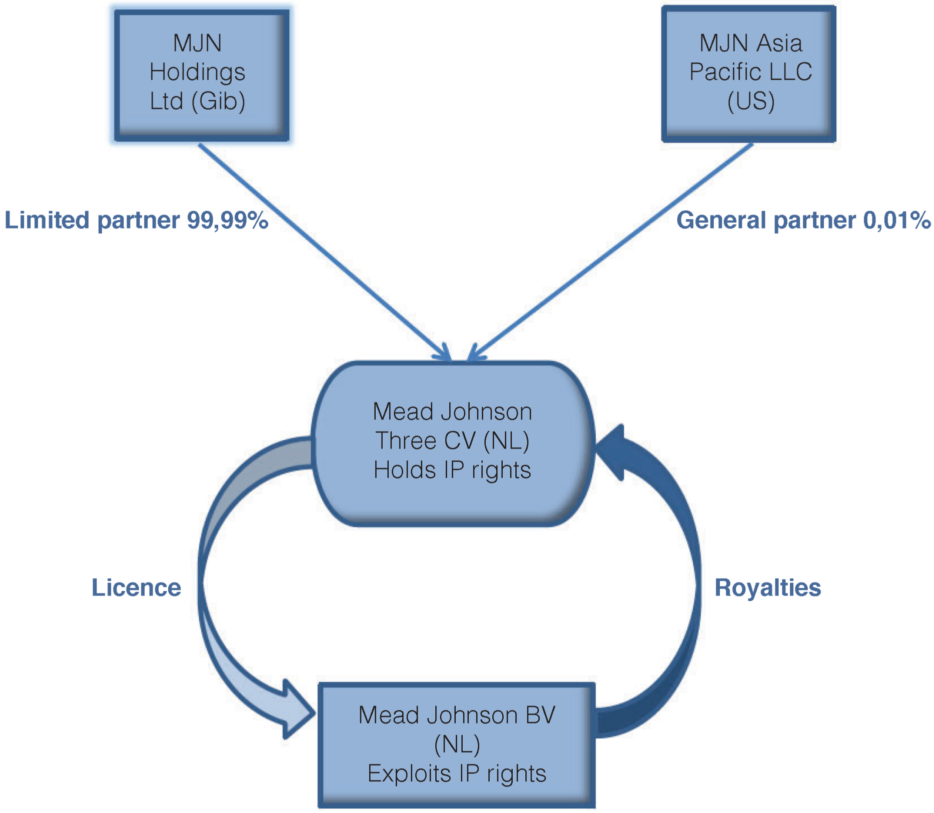
([20]) MJN GibCo's shareholding in MJT CV entitled it to 99,99 % of MJT CV's profits.

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

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

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

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



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

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

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

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

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

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

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

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

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

— USD 397,692,000 for 2014,

— USD 323,286,000 for 2015 and

— USD 325,905,955 for 2016 [28].

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

3. POSITION OF THE UNITED KINGDOM

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

4. ASSESSMENT OF THE MEASURE

4.1. Existence of aid

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

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

4.1.1. *Imputability and State resources*

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

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

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

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

4.1.2. *Effect on trade between Member States*

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

4.1.3. *Distortion of competition*

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

4.1.4. *Selective advantage*

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

4.1.4.1. Advantage

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

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

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

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

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

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

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

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

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

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

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

— MJN GibCo is a resident company registered in Gibraltar;

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

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

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

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

4.1.4.2. Selectivity

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

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

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

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

([42]) *Ibid.*

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

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

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

Reference system

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

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

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

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

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

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

([43]) Case T-314/15 *Greece v. Commission* ECLI:EU:T:2017:903, paragraph 79.
([44]) In which case, the measure could either be part of a State aid scheme or it is a general (non-selective) measure.
([45]) Case C-374/17 *A Brauerei* ECLI:EU:C:2018:1024, paragraph 36 and the case-law cited.
([46]) See Case C-203/16 P Dirk Andres v Commission ('Sanierungsklausel') ECLI:EU: C:2018:505, paragraph 88: 'The examination of the selectivity condition therefore implies, in principle, the determination, first, of the reference framework within which the measure concerned falls, that determination being of greater importance in the case of tax measures, since the very existence of an advantage may be established only when compared with "normal" taxation.' See also Case C-88/03 Portugal v Commission, ECLI:EU:C:2006:511, paragraph 56 and Case C-524/14 P Commission v Hansestadt Lübeck, EU:C:2016:971, paragraph 55.
([47]) See Case C-374/17 *A Brauerei* ECLI:EU:C:2018:1024, paragraph 37, and Joined Cases C-51/19 P and C-64/19 P, World Duty Free, paragraph 62-65. See also, Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1), paragraph 134.

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

Derogation

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

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

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

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

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

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

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

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

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

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

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

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

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

Justification

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

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

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

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

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

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

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

4.1.4.3. Provisional conclusion on the existence of a selective advantage

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

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

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

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

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

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

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

4.2. **Unlawfulness of the aid**

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

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

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

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

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

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

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

4.3. **Compatibility with the internal market**

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

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

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

5. **CONCLUSION**

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

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

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

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

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

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

(58) Regulation No 2015/1589, Article 2.

(59) Article 108(3) TFEU; Regulation No 2015/1589, Article 3.

(60) The exceptions provided for in Article 107(2) TFEU concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.

(61) The exceptions provided for in Article 107(3) TFEU concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.

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

(63) Case T-308/11 *Eurallumina* v *Commission*, ECLI:EU:T:2014:894, paragraphs 85 and 86.

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

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

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

STAATLICHE BEIHILFE — LITAUEN

Staatliche Beihilfe SA.44678 (2022/C) (ex 2018/N) — Änderung einer Beihilfe für ein LNG-Terminal in Litauen

Aufforderung zur Stellungnahme nach Artikel 108 Absatz 2 des Vertrags über die Arbeitsweise der Europäischen Union

(Text von Bedeutung für den EWR)

(2023/C 52/03)

Mit Schreiben vom 1. Dezember 2022, das nachstehend in der verbindlichen Sprachfassung abgedruckt ist, hat die Kommission Litauen von ihrem Beschluss in Kenntnis gesetzt, wegen eines Teils der genannten Beihilfe/Maßnahme das Verfahren nach Artikel 108 Absatz 2 des Vertrags über die Arbeitsweise der Europäischen Union (AEUV) einzuleiten.

Wie in dem auf die Zusammenfassung folgenden Schreiben dargelegt, hat die Kommission beschlossen, gegen bestimmte andere Teile der Maßnahme keine Einwände zu erheben.

Alle Beteiligten können innerhalb eines Monats nach Veröffentlichung dieser Zusammenfassung und des Schreibens zu der Beihilfe/Maßnahme, die Gegenstand des von der Kommission eingeleiteten Verfahrens ist, Stellung nehmen. Die Stellungnahmen sind an folgende Anschrift zu richten:

Europäische Kommission
Generaldirektion Wettbewerb
Registratur Staatliche Beihilfen
1049 Bruxelles/Brussel
BELGIQUE/BELGIË
Fax + 32 22961242
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Alle Stellungnahmen werden Litauen übermittelt. Beteiligte, die eine Stellungnahme abgeben, können unter Angabe von Gründen schriftlich beantragen, dass ihre Identität nicht bekannt gegeben wird und/oder dass Teile ihrer Stellungnahme vertraulich behandelt werden.

VERFAHREN

Am 20. November 2013 genehmigte die Kommission eine Beihilferegelung zur Förderung des Baus und des Betriebs eines Flüssiggasterminals (LNG-Terminal) in Klaipėda (im Folgenden „Beschluss von 2013“).

Am 31. Oktober 2018 genehmigte sie zwei Änderungen der mit dem Beschluss von 2013 genehmigten Beihilferegelung: die Änderungen von 2016 für den Zeitraum 2016–2018 und die Änderungen von 2019 für den Zeitraum 2019–2024 (im Folgenden „Beschluss von 2018“).

Am 8. September 2021 erklärte das Gericht in der Rechtssache T-193/19 — Achema AB und Achema Gas Trade UAB/Kommission (ECLI:EU:T:2021:558) den Beschluss von 2018 teilweise für nichtig. Das Gericht war der Auffassung, dass die Kommission hinsichtlich der Änderungen von 2016 Zweifel an der Vereinbarkeit der Maßnahme mit dem Binnenmarkt hätte haben müssen und das förmliche Prüfverfahren nach Artikel 108 Absatz 2 AEUV hätte einleiten müssen. Im Übrigen wies das Gericht die Klage gegen den Beschluss von 2018 ab, insbesondere in Bezug auf den Beschluss der Kommission, keine Einwände gegen die sich aus den Änderungen von 2019 ergebende staatliche Beihilfe zu erheben.

Um dem Urteil des Gerichts nachzukommen, überprüfte die Kommission die Änderungen von 2016 und beschloss, das förmliche Prüfverfahren nach Artikel 108 Absatz 2 AEUV einzuleiten.

Infolge der teilweisen Nichtigerklärung des Beschlusses von 2018 ist die Umsetzung der Änderungen von 2016 als rechtswidrig anzusehen.

BESCHREIBUNG DER MAßNAHME, DIE GEGENSTAND DES VON DER KOMMISSION EINGELEITETEN VERFAHRENS IST

Die mit dem Beschluss von 2013 genehmigten Maßnahmen zielten darauf ab, den Bau und den Betrieb des LNG-Terminals im Seehafen Klaipėda in Litauen zu unterstützen. Mit dem Beschluss von 2013 wurde insbesondere eine Abnahmeverpflichtung genehmigt, mit der die technische Mindestmenge an LNG sichergestellt werden sollte, die erforderlich ist, damit das LNG-Terminal jederzeit betriebsbereit bleibt (im Folgenden „vorgegebene LNG-Menge“). Bestimmte Abnehmer wurden dazu verpflichtet, von einem designierten Lieferanten die gesamte vorgegebene LNG-Menge abzunehmen, um die technische Betriebsbereitschaft des LNG-Terminals jederzeit zu gewährleisten.

Am 10. Februar 2014 ernannte das litauische Energieministerium im Anschluss an eine Ausschreibung das öffentliche Unternehmen Litgas UAB (im Folgenden „Litgas") zum designierten Lieferanten.

2016 beschlossen die litauischen Behörden, die mit dem Beschluss von 2013 genehmigte Regelung zu ändern und Litgas mit einer Dienstleistung von allgemeinem wirtschaftlichem Interesse (DAWI) für die Bereitstellung der vorgegebenen LNG-Menge zu betrauen und einen von allen Gaskunden zu finanzierenden LNG-Aufschlag zugunsten von Litgas einzuführen.

Die neuen Maßnahmen zugunsten von Litgas wurden in zwei Schritten eingeführt.

Mit den Änderungen von 2016 für den Zeitraum 2016–2018 wurde eine DAWI eingeführt, die über den LNG-Aufschlag vergütet wurde. Der Aufschlag wurde an den designierten Lieferanten für die Lieferung der vorgegebenen LNG-Menge gezahlt.

Mit den Änderungen von 2019 für den Zeitraum 2019–2024 wurde die Abnahmeverpflichtung abgeschafft und eine neue Methode für die Berechnung des Ausgleichs für die dem designierten Lieferanten übertragene DAWI eingeführt. In Bezug auf diese neue Berechnungsmethode ist insbesondere festzustellen, dass die Kosten im Zusammenhang mit dem Verdampfen und die Ausgleichskosten nach den Änderungen von 2016 vollständig ausgeglichen wurden, während nach den Änderungen von 2019 die Kosten im Zusammenhang mit dem Verdampfen nur noch teilweise und die Ausgleichkosten überhaupt nicht mehr ausgeglichen wurden.

Litauen gab als nationale Rechtsgrundlage für die Änderungen von 2016 das Energiegesetz und das Gesetz über Flüssiggasterminals („LNG-Terminalgesetz") in der jeweils geänderten Fassung an. Die Gesamtmittelausstattung der Maßnahme im Zeitraum 2016-2018 belief sich auf 78 631 120 EUR.

BEIHILFERECHTLICHE WÜRDIGUNG DER MAßNAHME

Die Kommission hat die Vereinbarkeit der Änderungen von 2016 mit dem Binnenmarkt auf der Grundlage der Anforderungen des DAWI-Rahmens von 2012 (ABl. C 8 vom 11.1.2012, S. 15) erneut geprüft. Dabei kam sie insbesondere zu dem vorläufigen Schluss, dass Litgas mit einer echten DAWI betraut wurde und die meisten Anforderungen des DAWI-Rahmens von 2012 anscheinend erfüllt wurden.

Dennoch bittet die Kommission um Klarstellungen und um Stellungnahmen zur Höhe des Ausgleichs nach den Änderungen von 2016 und insbesondere zum Ausgleich für die Gesamtheit der folgenden Kosten:

a) Kosten im Zusammenhang mit dem Verdampfen: Können sämtliche Kosten im Zusammenhang mit dem Verdampfen als „wirtschaftlich gerechtfertigte" Kosten angesehen werden, die mit der DAWI im Zusammenhang stehen und im Zeitraum 2016-2018 tatsächlich angefallen sind? War der Ausgleich für sämtliche Kosten im Zusammenhang mit dem Verdampfen nach den Änderungen von 2016 für die Erbringung der DAWI „erforderlich"? Wirkt sich die Abnahmeverpflichtung in irgendeiner Weise auf den Umfang der für Litgas im Rahmen der DAWI angefallenen Kosten im Zusammenhang mit dem Verdampfen aus?

b) Ausgleichskosten: Können sämtliche Ausgleichskosten als „wirtschaftlich gerechtfertigte" Kosten angesehen werden, die mit der DAWI im Zusammenhang stehen und im Zeitraum 2016-2018 tatsächlich angefallen sind? War der Ausgleich für sämtliche Ausgleichskosten nach den Änderungen von 2016 für die Erbringung der DAWI „erforderlich"? Wirkt sich die Abnahmeverpflichtung in irgendeiner Weise auf den Umfang der für Litgas im Rahmen der DAWI angefallenen Ausgleichskosten aus?

Nach Artikel 16 der Verordnung (EU) 2015/1589 des Rates [1] können alle rechtswidrigen Beihilfen vom Empfänger zurückgefordert werden.

(1) Verordnung (EU) 2015/1589 des Rates vom 13. Juli 2015 über besondere Vorschriften für die Anwendung von Artikel 108 des Vertrags über die Arbeitsweise der Europäischen Union (ABl. L 248 vom 24.9.2015, S. 9).

WORTLAUT DES SCHREIBENS

The Commission wishes to inform Lithuania that, following the judgment of the General Court of 8 September 2021 in case T-193/19 — *Achema AB and Achema Gas Trade UAB v Commission* [1] ('the GC judgment'), it has re-examined the information supplied by your authorities on the measure referred to above.

After re-examination of the notification, the Commission has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU).

1. **PROCEDURE**

(1) On 20 November 2013, the Commission adopted Decision C(2013) 7884 final in which aid measures for the construction and operation of a liquefied natural gas terminal ('the LNG Terminal') in the Klaipėda Seaport were declared compatible with the internal market ('the 2013 Decision') [2].

(2) On 26 February 2016, the Lithuanian authorities pre-notified amendments to the aid measures approved in the 2013 Decision ('the 2016 Amendments'). Those amendments entered into force on 1 January 2016.

(3) On 7 July 2016, Achema and Achemos Grupė ('the complainants') lodged a complaint with the Commission against the Republic of Lithuania, alleging that the 2016 Amendments amounted to unlawful State aid incompatible with the internal market ('the complaint').

(4) In January 2018, the Lithuanian authorities informed the Commission of their intention to modify the 2016 Amendments as of 1 January 2019 ('the 2019 Amendments').

(5) On 9 July 2018, the Lithuanian authorities notified to the Commission, in accordance with Article 108(3) TFEU, the 2016 Amendments and the 2019 Amendments.

(6) On 31 October 2018, the Commission adopted Decision C(2018) 7141 final in which State aid SA.44678 (2018/N) relating to modification of the aid for the LNG terminal in Lithuania was declared compatible with the internal market ('the 2018 Decision') [3].

(7) On 8 September 2021, following Achema AB's and Achema Gas Trade UAB's ('the applicants') action for annulment, the General Court partially annulled the 2018 Decision, in so far as the Commission decided not to raise objections to the State aid resulting from the 2016 Amendments.

(8) In summary, the General Court considered that, as regards the 2016 Amendments, based on the particularly long duration of the administrative procedure, the circumstances surrounding the adoption of the 2018 Decision and the incomplete, insufficient and inconsistent examination as regards the compensation for the entirety of boil-off costs and balancing costs of Litgas, the Commission should have had doubts as to the compatibility of the measure with the internal market, which should have led it to initiate the procedure referred to in Article 108(2) TFEU. That latter factor carried significant weight in the overall assessment, in so far as those costs represent a significant part of Litgas's total costs and, therefore, significantly affect the amount of compensation during the period from 2016 to 2018.

(9) The General Court dismissed the action as to the remainder and rejected, in particular, the action against the 2018 Decision insofar as the Commission decided not to raise objections to the State aid resulting from the 2019 Amendments.

(10) In order to comply with the GC judgment, the Commission re-examined the 2016 Amendments, and decided to initiate the formal investigation proceedings under Article 108(2) TFEU.

(11) By letter dated 3 October 2022, Lithuania agreed to waive its rights deriving from Article 342 TFEU in conjunction with Article 3 of Regulation 1/1958 [4] and to have the present decision adopted and notified in English.

(1) ECLI:EU:T:2021:558

(2) Commission Decision C(2013) 7884 final of 20 November 2013 on case SA.36740 (2013/NN) Aid to Klaipėdos Nafta — LNG Terminal, Lithuania, JOCE C/161/2016.

(3) Commission Decision C(2018) 7141 final on case SA.44678 (2018/N) Modification of aid for LNG Terminal in Lithuania (OJ 2019 C 14, p. 1).

(4) Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385).

2. DESCRIPTION OF THE MEASURE

2.1. The 2013 Decision

(12) The measures approved by the 2013 Decision aimed to support the construction and operation of the LNG Terminal in the Klaipėda Seaport in Lithuania.

(13) The LNG Terminal project was developed by Lithuania with the objective to diversify gas sources, increase security of supply and introduce more competition in the Lithuanian gas market.

(14) Before the LNG Terminal, Lithuania was fully dependent on Russian gas. Russian natural gas undertaking OAO Gazprom ('Gazprom') was the only gas supplier.

(15) The complete dependence of Lithuania on Russian gas resulted from the isolated nature of the Lithuanian gas market in view of the limited options for cross-border natural gas flows to Lithuania. The natural gas system of Lithuania was connected only to the natural gas systems of the Republic of Belarus ('Belarus'), the Republic of Latvia ('Latvia') and the Kaliningrad region of the Russian Federation ('Kaliningrad'). Before the LNG Terminal was built, Lithuania was supplied gas only from Russia — for internal consumption and as a transit from Belarus to Kaliningrad. In some cases, Lithuania received Russian gas from Latvia.

(16) Under the 2013 Decision, the approved State aid measures consisted of the following:

(a) First, the 2013 Decision approved investment and operating aid to the owner and operator of the LNG Terminal — AB Klaipėdos Nafta ('KN'). The investment aid covered the part of KN's installation costs that could not be financed through other means whereas the operating aid covered the fixed operating costs of the LNG Terminal. Both aids were financed through the so-called LNG Supplement — a levy imposed as a supplement to the natural gas transmission price and collected by the Lithuanian transmission system operator for natural gas [5] ('the TSO') from gas users on the basis of their actual gas consumption, for a duration of 55 years.

(b) Second, it approved State guarantees to KN, covering 100 % of the value of the loans the terminal operator needed for the construction of the LNG Terminal.

(c) Third, the 2013 Decision also approved a purchase obligation, which had the purpose of ensuring the technical minimum LNG volume [6] necessary for the LNG Terminal to remain operational at all times ('the LNG Mandatory Quantity') and was approved for a period of 10 years subject to periodical reviews ('the Purchase Obligation').

(17) The Purchase Obligation was imposed on private and public undertakings operating in the regulated segment of electricity and heat generation ('the Obligated Purchasers' [7]). Together the Obligated Purchasers bought the minimum volume of LNG from a selected supplier ('the Designated Supplier'). Each Obligated Purchaser had an off-take quota established as a percentage of the LNG Mandatory Quantity. At the moment of the 2013 Decision, the overall quantity to be purchased by Obligated Purchasers amounted to 0,54 bcm of LNG per year, which was considered the technically minimum quantity necessary to keep the LNG terminal operational. The share of the LNG Mandatory Quantity each Obligated Purchaser had to buy was proportionate to its supply needs.

(18) Based on the 2013 Decision the beneficiary of aid under the approved measures was the LNG terminal operator — KN.

2.2. Facts subsequent to the 2013 Decision

(19) On 10 February 2014, following a call for tenders, the Lithuanian Ministry of Energy appointed the public company Litgas UAB ('Litgas') as the Designated Supplier.

(20) On 21 August 2014, following a call for tenders, Litgas signed a 5-year contract for the supply of the minimal quantity of LNG (0,54 bcm/year) with Statoil.

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(5) AB Amber Grid.

(6) The Lithuanian Government set the quantity upon declaration of KN of the LNG volume necessary to ensure stable operation of the LNG Terminal.

(7) Those are electricity or heat producers assigned whose price of produced energy is regulated. This encompasses central heating and electricity (co-generation) plants.

(21) To ensure the constant regasification at the LNG Terminal the contract provided for a fixed delivery schedule, whereby four LNG cargoes per year, once per quarter, were delivered on an even basis to the LNG Terminal.

(22) The contract was concluded at the time when the Asian LNG markets were characterised by high prices which exerted upwards pressure on European LNG prices. Nonetheless, the Lithuanian authorities demonstrated that the contract concluded with Statoil was cheaper than other options received in the course of the tender procedure (see Figure 1 below). Even though the alternative bidders offered lower prices for the years 2017-2019, Statoil offered significantly lower prices for the first two years of the contract, so that in aggregate over the 5-year delivery period the selected bid was the most attractive.

Figure 1

Comparison of bid offers (EUR/MWh)

[…]*

Source: Lithuanian authorities

(23) On 1 January 2015, the LNG terminal entered into commercial operation and Litgas began to supply LNG to the LNG terminal upstream and, downstream, gas to the Obligated Purchasers.

2.3. **Notified modifications**

2.3.1. *Context of the modifications*

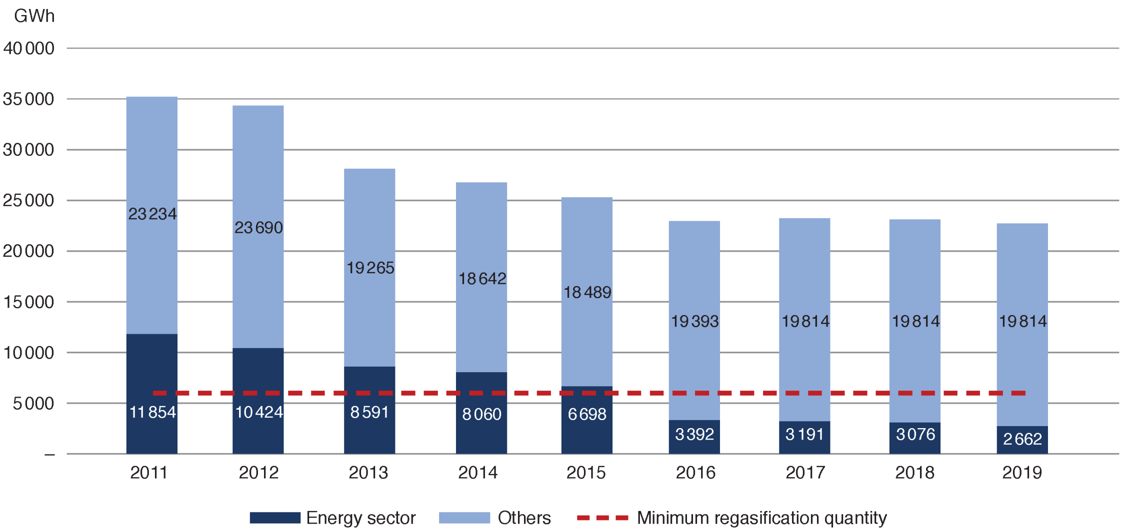
(24) Pursuant to the 2013 Decision, the Obligated Purchasers had to purchase from Litgas all the LNG Mandatory Quantity, which would ensure technical ability to maintain the LNG Terminal operational at all times. The price paid by the Obligated Purchasers for the LNG was regulated by the national regulatory authority ('the NRA') and included all costs incurred by Litgas in the delivery of the LNG Mandatory Quantity. This model intended to place all the additional costs of supplying the LNG Mandatory Quantity on the Obligated Purchasers, which subsequently would be able to pass-on such burden to the ultimate consumers of their products.

(25) However, this model appeared to be inefficient, when demand for natural gas decreased dramatically and the costs of supplying the LNG Mandatory Quantity were distributed among the Obligated Purchasers in proportion to their declining demand for natural gas.

(26) As shown in Figure 2, from 2011 to 2014, annual natural gas consumption in Lithuania dropped by 24 % (from 3,4 bcm in 2011 to 2,6 bcm in 2014) and a further reduction of demand was expected in the following years (*). The energy sector reflects the demand by the Obligated Purchasers and the red dotted line corresponds to the LNG Mandatory Quantity of 0,54 bcm of gas, as approved by the 2013 Decision.

Figure 2

Annual natural gas consumption in Lithuania



Source: Lithuanian authorities

(*) Confidential information
Data is based on NRA information and internal calculation of Litgas.

(27) Demand for natural gas decreased dramatically and the costs to maintain the LNG Terminal operational had to be distributed among the Obligated Purchasers over a smaller quantity of gas purchased. In effect, due to the reduced demand for natural gas, the unit price for the Obligated Purchasers, covering the costs to maintain the LNG Terminal operational increased significantly. In this context, Lithuania realised that the burden of maintaining the LNG Terminal operational should be distributed on all consumers of the natural gas system which were benefiting from the security of supply guaranteed by the LNG Terminal.

(28) In parallel, the Lithuanian authorities realised that the LNG terminal could be run not only on a steady regime but also on standby regime. The difference between these two regimes lies merely with the different technical means used to achieve the same purpose (i.e. to keep the LNG Terminal cooled down), which requires different minimum quantities of gas to ensure regasification. Following the regime change into a standby regime, the Lithuanian authorities could reduce to 0,37 bcm/year the LNG Mandatory Quantity that was needed to ensure the operation of the LNG Terminal.

(29) In view of the above considerations, in particular since the cost for the Obligated Purchasers turned out to be unsustainable, the Lithuanian authorities decided to amend the scheme approved by the 2013 Decision by entrusting Litgas with a service of general economic interest ('SGEI') for the provision of the LNG Mandatory Quantity and by introducing a new LNG Supplement to the benefit of Litgas to be financed by all gas customers ([8]).

(30) The new measures in favour of Litgas were introduced in two steps:

(a) covering the period from 2016-2018 ([9]) ('the 2016 Amendments'):

— Changes to the set-up of the Purchase Obligation involving a new pricing mechanism for the LNG Mandatory Quantity that the Obligated Purchasers had to buy;

— Introduction of a SGEI compensated via a LNG Supplement payable to the Designated Supplier for the supply of the LNG Mandatory Quantity.

(b) covering the period from 2019-2024 ([10]) ('the 2019 Amendments'):

— Abolition of the Purchase Obligation;

— New methodology for calculating the compensation for the SGEI entrusted to the Designated Supplier.

(31) A detailed description of the modifications is provided below in sections 2.3.6 and 2.3.7.

2.3.2. *National legal basis*

(32) Lithuania indicated as national legal basis for the 2016 Amendments the Law on Energy ([11]) and the Law on Liquefied Natural Gas Terminal ([12]) ('LNG Terminal Law'), as amended. In particular, Article 11 of the LNG Terminal Law provides that the Designated Supplier is entrusted with the obligation to deliver the LNG Mandatory Quantity to the LNG Terminal.

(33) Furthermore, Lithuania indicated a list of implementing provisions:

(a) Government Resolution of 7 November 2012 No 1354 'On the Order of Natural Gas supply diversification approval', amendment adopted on 2 December 2015 ('DivReg').

(b) NRA Resolution No O3-650 approved on 15-12-2015 'Regarding approval of the Methodology for Setting Forecasted Natural Gas Reference Price' ('Methodology for setting gas reference price No O3-650').

(c) The order of the Minister of Energy of 10 February 2014 No 1-20 'On UAB Litgas awarding as the Designated Supplier' ('Order awarding Litgas as the Designated Supplier').

([8]) Lithuania initially also notified some technical changes related to the operation of the LNG Terminal by KN. The amendments concerned in particular changing the technological regime of the LNG Terminal from steady to stand-by regime. Following several information exchanges with the Lithuanian authorities, it became apparent that the modifications related to KN did not substantially amend the initial scheme approved by the 2013 Decision and therefore no notification in this respect was needed.

([9]) From 1 January 2016 to 31 December 2018.

([10]) From 1 January 2019 to 31 December 2024.

([11]) Law on Energy of the Republic of Lithuania No. IX-884 adopted on 16-05-2002; Official Gazette Valstybės žinios, 2002, 56-2224.

([12]) Law on Liquefied Natural Gas Terminal No. XI-2053 adopted on 12-06-2012. Publication: Official Gazette Valstybės žinios, 2012, 68-3466.

(d) The National Control Commission for Prices and Energy Resolution No O3-367 of 13 September 2013 'On the approval of methodology of fixing State-regulated prices in the natural gas sector' amendments adopted on 18 December 2015 ('NRA Methodology No O3-367'). The NRA Methodology No O3-367 details the parameters for calculating the compensation to the Designated Supplier.

(34) Lithuania indicated, as national legal basis for the 2019 Amendments, the LNG Terminal Law, which was amended accordingly, and the NRA Methodology No O3-367, which was amended after the adoption of the 2019 Amendments so as to reflect the same principles.

2.3.3. *Objective*

(35) The objective of the modifications was to maintain the LNG Terminal operational in order to achieve diversification of gas supply. Supply diversification in itself would contribute to increased security of supply levels and greater energy independence of Lithuania.

2.3.4. *Budget*

(36) The total budget for the scheme is EUR 276 703 731 covering the period 2016 to 2024.

(37) The total budget for the measure during the period 2016-2018 scheme was EUR 78 631 120, allocated as shown in Table 1 below.

Table 1

Budget for the measure during the period 2016-2018

	2016	2017	2018	Total
Aid in EUR	23 562 675	30 968 445	24 100 000	78 631 120

Source: Lithuanian authorities

(38) The total budget for the measure during the period 2019-2024 is EUR 198 072 611, allocated as shown in Table 2 below.

Table 2

Budget for the measure during the period 2019-2024

	2019	2020	2021	2022	2023	2024	Total
Aid in EUR	34 551 588	34 520 933	33 856 268	31 714 607	31 714 607	31 714 607	198 072 611

Source: Lithuanian authorities

2.3.5. *Beneficiary*

(39) The beneficiary under the notified modifications is the Designated Supplier –Litgas, the recipient of the new LNG Supplement ([13]).

(40) Litgas was founded in December 2012 by KN. In October 2016 the State-owned energy company Lietuvos Energija became the sole shareholder of Litgas with a share ownership of 100 %.

(41) The Lithuanian authorities informed the Commission about the planned structural reorganisation of Litgas by way of merging Litgas into UAB Lietuvos duju tiekimas ('LDT'), which is also controlled by Lietuvos Energija. That means that as of 1 January 2019 Litgas ceased to exist and its functions of the Designated Supplier and its status of beneficiary were taken over by LDT.

([13]) Based on Article 11(2) of the LNG Terminal Law, the Designated Supplier is recognized as an entity of strategic importance for national security.

2.3.6. *The 2016 amendments*

(42) Pursuant to the 2016 Amendments ([14]), the Purchase Obligation was amended as follows:

a) Litgas, as the Designated Supplier, was entrusted with an SGEI, consisting of an obligation to provide the LNG Mandatory Quantity to the LNG terminal; the SGEI would be financed by a new component of the LNG supplement in favour of Litgas, the purpose of which was to compensate Litgas for the costs it incurred in connection with the SGEI which were not entirely covered by the revenue generated by the resale downstream of gas at a regulated price; that new component of the LNG supplement in favour of Litgas would be added to the LNG supplement in favour of KN referred to in recital (16)(a);

b) the methodology for calculating the regulated price paid by the Obligated Purchasers to Litgas for the purchase of the LNG Mandatory Quantity was changed; that price was now calculated by the NRA by reference to the market price, on the basis of the average gas market prices, taking into account data relating to contracts for the supply of gas traded on the Lithuanian gas exchange and on a bilateral basis;

c) the LNG Mandatory Quantity was reduced from 0,54 bcm per year to 0,37 bcm per year;

d) the quantity of gas that each Obligated Purchaser had to purchase from Litgas was now determined only on the basis of its individual demand for gas; if the gas demand from all the Obligated Purchasers taken together was less than the LNG Mandatory Quantity, Litgas was to sell the quantities not resold to Obligated Purchasers on the national or international market.

(43) On 18 February 2016, following renegotiation of the LNG supply contract, Litgas and Statoil signed an amended contract, according to which, first, the annual quantity of LNG supplied by Statoil to Litgas was reduced to 0,37 bcm per year, second, the duration of the contract was extended until 2024 and, third, the LNG price was reduced.

2.3.6.1. Determination of the regulated price by the NRA

(44) Based on the pricing mechanism introduced by the 2016 Amendments the LNG purchased by the Obligated Purchasers from Litgas was sold at a new regulated price, calculated on the basis of the projected natural gas market prices for the Lithuanian market.

(45) The NRA set the regulated natural gas price using an approved 'Methodology for Setting Forecasted Natural Gas Reference Price' ('the Methodology').

(46) The Methodology was based on several principles. According to the Methodology, the price projections on which the regulated natural gas price was based were calculated by taking into account the prices and the volumes of natural gas quantities imported to Lithuania in the course of the last 12 months. For that purpose, data from gas supply contracts traded on the Lithuanian gas exchange and on a bilateral basis (both on wholesale and retail markets) as well as projected prices of each company importing natural gas on the basis of their contractual conditions were taken into account. Furthermore, the respective weighted average prices were calculated taking into account any correlation effects as well as any additional gas suppliers' expenses and profits.

(47) The regulated natural gas price was updated once a year. In case of a major change in any of the main input parameters for the calculation of the natural gas price the latter could be updated on a more frequent basis — once every three or six months. A major change was defined as a sudden increase or decrease in the market price of natural gas of more than 10 %. In that case, the new regulated natural gas price would have been revised up or down by a maximum of 10 %. Since the middle of 2017 the regulated natural gas price was updated once per quarter.

(48) According to the Lithuanian authorities, the new price setting mechanism did not pose any serious risks of distorting downstream markets. That is due to the fact that the Obligated Purchasers ([15]), who bought natural gas at the new regulated price operated on regulated markets and sold electricity and gas at regulated prices. Lithuania confirmed that under the amended set-up of the Purchase Obligation the Obligated Purchasers continued to be subject to the requirements of separation of accounts if they engaged in any non-regulated activities.

(49) The provisions of the LNG Terminal Law foresaw that quantities of natural gas not sold to the Obligated Purchasers would be auctioned on the market. The auctions were organised by the market operator (GET Baltic), as defined in the Law of the Republic of Lithuania on Natural Gas. In case the surplus natural gas quantities were not fully realised through the auctions, the remaining quantities had to be realised by the Designated Supplier through the gas exchange or by concluding bilateral trade agreements.

([14]) The above mentioned principles are established in Articles 11(1), 11(5), 11(6), 11(7) and 11(9) of LNG Terminal Law.

([15]) Price of natural gas distributed by the Designated Supplier subject to Purchase Obligation is regulated by the State (Art. 24 of the DivReg). Costs incurred by the Obligated Purchasers in purchasing such obligatory volumes of natural gas from the Designated Supplier are included into their regulated energy prices (Art. 20 of DivReg).

(50) The Lithuanian authorities explained that the amended pricing mechanism did not entail any extra profit for the Obligated Purchasers. Any positive financial effects of the changes described above were fully passed on to final consumers in the form of lower regulated prices of heat and electricity.

2.3.6.2. SGEI Compensation to Litgas

(51) Article 5(2) of the LNG Terminal Law dealt with cost compensation via the LNG Supplement.

(52) The compensation to Litgas took into account Litgas's revenues resulting from the LNG sold at regulated prices to the Obligated Purchasers and on the market, all Litgas's costs stemming from its activities as the Designated Supplier and a regulated profit margin. The compensation notably covered the difference between the LNG price paid, upstream, by Litgas to Statoil and the price at which Litgas sold, downstream, to the obligated purchasers and to the free market. The introduction of the LNG Supplement for Litgas was a direct consequence of the new pricing mechanism for calculating the price of the LNG Mandatory Quantity purchased by the Obligated Purchasers.

(53) Based on the 2016 Amendments, Litgas received a fixed profit margin approved by the NRA of 0,24 EUR/MWh on the sale of the LNG Mandatory Quantity to the Obligated Purchasers.

(54) A different mechanism was applicable for sales of the LNG Mandatory Quantity on the market. Litgas was entitled to keep half the profit from such sales, yet such profit in all cases could not exceed the average profit margin earned by natural gas companies in Lithuania. In the years 2016-2018, the profit margin earned by Litgas was in the range of [0-5 %].

(55) Pursuant to the requirements of the Law on Natural Gas applicable to the Lithuanian gas sector, all undertakings, including Litgas, were obliged to submit to the NRA annual reports on costs as well as the annual audited reports. The mentioned provision also imposed the requirement of separation of accounts. In line with these requirements Litgas was obliged to maintain separate accounts for its regulated activities as a Designated Supplier and for its non-regulated activities.

(56) The new LNG Supplement paid to Litgas was designed to compensate Litgas for the costs associated with the activities of the Designated Supplier. Under the LNG Terminal Law the costs associated with the activities of the Designated Supplier providing the SGEI and covered by the new component of the LNG Supplement had to be 'justified costs' — i.e. the costs associated with the SGEI of the Designated Supplier had to be incurred in an 'efficient manner'.

(57) The NRA Methodology No O3-367 contained a mechanism for the SGEI provider to perform assigned obligations efficiently. For a certain number of operating expenses (repairs, maintenance, personnel, insurances, marketing and administrative costs, etc.), the NRA established a ceiling for the price of the regulated service. Costs going beyond that limit were not compensated. In addition, since 2017 the regulated companies had an additional incentive to further reduce OPEX. A company, which reduced its costs more than required by the NRA in a given period of time, could keep part of such savings. Moreover, the costs that were taken into account for setting the LNG Supplement and the compensation were increased only by half of the inflation coefficient and not more than 3 %.

(58) The LNG Supplement covered costs such as gas acquisition costs, labour costs, administration costs, amortization costs, costs for repairs, marketing and sales costs as well as financial costs. Furthermore, as explained in recital (21), under the LNG supply contract with Statoil the delivery schedule was fixed and four LNG cargoes per year were delivered once per quarter on an even basis to the LNG Terminal. This type of long-term contract with a fixed delivery schedule gives rise to some costs, namely boil-off costs, balancing costs and long-term guarantee costs. In 2017 these specific costs constituted more than two thirds of the total Designated Supplier's costs ([16]).

(59) For the purposes of determining the justified costs, Litgas submitted to the NRA monthly reports with data on the quantities of LNG bought and sold as well as on all expenses and revenues resulting from buying and selling LNG. The NRA evaluated the actual and the forecasted costs of Litgas's activities as Designated Supplier as well as the way in which they were incurred and established the eligible costs which could be covered by the LNG Supplement.

([16]) The total Designated Supplier's costs included boil-off costs, balancing costs, bank guarantee costs, financing costs, OPEX and costs of regasification and capacity booking.

Boil-off costs

(60) The Designated Supplier must keep its LNG in tanks at the LNG Terminal and regasify LNG at the minimum output rate to keep the LNG Terminal operational (rather than releasing LNG to the natural gas system immediately) even though such slow regasification causes high natural losses of LNG due to evaporation (boil-off gas). Boil-off gas is a natural loss of LNG, which occurs in the period from injection of LNG into tanks until its release to the natural gas system. As a general rule, the less time LNG is kept in a tank, the less natural loss of LNG is incurred by the specific user of the LNG Terminal.

(61) Lithuania indicated that boil-off gas costs accounted for a significant proportion of the Designated Supplier's costs incurred in connection with the supply of the LNG Mandatory Quantity (in 2017 boil-off gas costs amounted to ca. 55 % of the total costs incurred by the Designated Supplier) and were incurred mainly during the winter period (December to March). As shown in Figure 3 below, this can be explained by the fact that the volume of boil-off gas is higher in winter ([17]) and that during this period, Litgas is generally the only user at the LNG Terminal ([18]). During the summer period, the volume of boil-off gas is lower and part of the boil-off costs are allocated to other users of the LNG Terminal ([19]). The graph below illustrates fluctuations of the boil-off gas costs at the LNG Terminal throughout the year.

Figure 3

Monthly fluctuation of boil-off gas in 2017 at the LNG Terminal.

[…]

Source: Lithuanian authorities

(62) The Lithuanian authorities provided evidence that for the entire year 2017 the Designated Supplier lost [5-15 %] of its LNG due to boil-off, while other suppliers lost only 1.23 % of their LNG. According to the Lithuanian authorities, such differences are explained by the fact that unlike the Designated Supplier other suppliers generally do not use the LNG Terminal in the winter period and that other suppliers can regasify LNG at a much faster pace than the Designated Supplier. Lithuania underlined that only actual boil-off gas costs which were attributable to the Designated Supplier were included in the calculation of Litgas's compensation.

Balancing costs

(63) Lithuania explained that the Designated Supplier incurred significant balancing costs. In 2017 these costs were EUR 900 000 which represented approximately [5-15 %] of the total Designated Supplier's costs.

(64) To ensure stable operation of the LNG Terminal, the Designated Supplier must release its LNG into the natural gas system at a stable output rate throughout the year. Therefore, the Designated Supplier's delivery schedule does not correspond to projected demand of natural gas from its consumers. For example, in the winter period when the demand is higher the Designated Supplier cannot release immediately natural gas from tanks as this would leave the LNG Terminal empty until the next delivery of LNG, whereas requesting to deliver a LNG cargo earlier (if agreed by Statoil) would impair the delivery schedule for the entire year.

(65) Lithuania noted that in view of these considerations the Designated Supplier is in a different situation from other market participants. In particular, the import profile of pipeline gas suppliers mirrors the demand for natural gas throughout the year. Thanks to flexible gas contracts other suppliers of natural gas incurred minimal balancing costs.

(66) Nonetheless, whilst keeping its obligations towards the LNG Terminal, the Designated Supplier must also meet the demand of its customers. To meet the demand of its customers and to ensure the steady operation of the LNG Terminal the Designated Supplier can have recourse to two instruments:

a) Swap contracts — including agreement on lending (in the summer period) or borrowing (in the winter period, when the Designated Supplier is short of gas or when the use of the LNG terminal is impossible, e.g. due to maintenance) of natural gas.

([17]) Lithuania explained that this is due to the way the LNG Terminal performs regasification. The closed loop system — the mode of operation during cold season, causes several times higher boil-off volumes than the open loop system — the mode of operation during warm season.

([18]) Due to increased demand (ex. increased energy consumption such as heat and electricity), LNG is more expensive in winter. As a result all the users of the LNG terminal buy LNG in the summer period when it is cheaper. Litgas is the only user in winter of the LNG terminal as it is bound by its SGEI obligation to regasify constantly and receive cargoes of LNG based on fixed schedule.

([19]) The actual LNG Terminal's boil-off costs are allocated to the terminal users in proportion to the amount of gas virtually stored in the terminal in line with the LNG terminal rules approved by the NRA.

b) Inčukalns storage site in Latvia — provides a physical underground storage solution when the Designated Supplier has surplus of natural gas (mostly in summer period) and can be retrieved when Designated Supplier has a shortage of natural gas. During the period 2016-2018, the storage was used by the Designated Supplier for balancing purposes in 2018 only.

(67) The cost of such swap and storage contracts was also compensated as part of the balancing costs.

Long-term guarantee

(68) Lastly, Lithuania also considered that the Designated Supplier should be compensated for costs of the long-term guarantee. To secure the long-term contract with Statoil, the Designated Supplier had to issue a performance guarantee for Statoil to cover a commitment until 2024. The cost related to the guarantee is EUR 300 000 per year. Lithuania explained that the cost is specific to the long-term nature of the contract with Statoil and that other market participants do not bear such a cost.

2.3.7. *The 2019 Amendments*

(69) Lithuania closely monitored the LNG Terminal's operation and development of the natural gas market in the country. Due to positive changes in 2018 the Lithuanian authorities decided to introduce as of 1 January 2019 a number of changes to the scheme under the 2016 Amendments.

(70) As a result Lithuania changed the model for the calculation of the SGEI compensation paid to Litgas and introduced more competition in the natural gas market from 1 January 2019. The Purchase Obligation was abolished and Litgas can sell the LNG Mandatory Quantity freely on the market.

2.3.7.1. Abolition of the Purchase Obligation

(71) The Lithuanian authorities continued to regard it as necessary to secure regular supplies of LNG to the LNG Terminal via the long-term supply contract with Statoil. Lithuania explained that plausibly cheaper gas purchasing options as annual or spot capacity bookings could not guarantee achieving this objective. First, annual capacity bookings allow for redirecting cargoes to another destination (subject to penalties). Second, spot bookings are not sufficiently reliable since the LNG Terminal's operations must be planned in advance.

(72) Therefore, as of 1 January 2019, the Purchase Obligation was transformed into a delivery obligation placed on Litgas. Litgas remains bound to deliver the LNG Mandatory Quantity, which is needed to keep the LNG Terminal operational irrespective of market conditions ('the Delivery Obligation'). The Delivery Obligation applies for the same period and on the same conditions, which applied to the Purchase Obligation, namely until 2024 and for an LNG Mandatory Quantity of 0,37 bcm/year.

(73) Simultaneously, as of 1 January 2019 the obligation to purchase such quantities of natural gas from Litgas originally placed on the Obligated Purchasers was abolished.

(74) As a result, Litgas is exposed to full market risks in selling the LNG Mandatory Quantity in the market. The Obligated Purchasers buy gas on the market at a market price determined by market conditions without any intervention of the NRA and based entirely on their needs.

2.3.7.2. SGEI Compensation to Litgas

(75) Pursuant to the 2019 Amendments, Litgas continues to receive compensation from the LNG Supplement.

(76) According to the Article 11 of the LNG Terminal Law the following costs are compensated to Litgas:

a) Difference between the import price of the LNG Mandatory Quantity supplied by the Designated Supplier under the contract with Statoil and a monthly factual average weighted import price of natural gas imported into Lithuania calculated by the NRA;

b) Boil-off gas costs: (a) all factual boil-off costs experienced by the Designated Supplier during the periods when Litgas is the only user of the LNG terminal; and (b) difference between the actual boil-off costs experienced by Litgas and average of boil-off costs experienced by other LNG Terminal users during the periods when Litgas is not the only user of the LNG terminal;

c) Long-term guarantee financing costs.

(77) Under the new compensation methodology, Litgas is no longer compensated for balancing costs.

(78) Furthermore, Litgas sells LNG directly on the market and its marginal profit is no longer regulated by the NRA. Therefore, the Designated Supplier's profit margin earned by selling the LNG Mandatory Quantity on the market solely depends on its efficiency and market conditions.

2.3.8. *Transparency*

(79) The Lithuanian authorities informed the Commission that the outcome of public discussions on the necessity of the Designated Supplier, scope and duration of the SGEI entrusted to the Designated Supplier are available in various legislative acts and documents of parliamentary discussions, which are published in the central register of laws available at https://www.e-tar.lt/.

(80) Furthermore, the information regarding the amounts of compensation granted to Litgas each year is available on the website of the NRA: www.regula.lt.

(81) Finally, the Lithuanian competition authority is responsible for publishing such information on the state aid transparency portal: https://webgate.ec.europa.eu/competition/transparency/public/.

2.4. **The complaint and comments from the Lithuanian authorities**

2.4.1. *The complaint*

(82) In the complaint, the complainants put forward several allegations regarding the 2016 Amendments.

(83) The complainants alleged in particular that the LNG Supplement paid to Litgas since 1 January 2016 constituted a direct grant, suggesting the presence of State aid as it provided an economic advantage to Litgas.

(84) Furthermore, the complainants stated that the parameters of the compensation to Litgas were not objectively set and led to overcompensation of Litgas. The overcompensation resulted from the fact that the compensation of Litgas covered the difference between the price at which the Designated Supplier bought LNG and the price at which it sold LNG. The complainants also claimed that Litgas was guaranteed to be compensated even beyond the quota relating to the Purchase Obligation, since the compensation included additional cost elements.

(85) The complainants also considered that the gas supply contract Litgas concluded with Statoil was based on a very high gas price and that the volume to be purchased by Litgas was excessive. In this context Litgas's costs were not comparable with those of a typical well-run undertaking.

(86) Finally, the complainants alleged that Litgas had not been appointed the Designated Supplier in conformity with public procurement rules.

2.4.2. *Comments from the Lithuanian authorities*

(87) On 7 September 2016 the Commission forwarded the complaint to the Lithuanian authorities requesting their comments on the issues raised. The Lithuanian authorities replied on 5 October 2016, 11 November 2016 and 27 January 2017.

Allegation on the presence of economic advantage

(88) To the allegation regarding the existence of economic advantage bestowed by the LNG Supplement onto Litgas, the Lithuanian authorities responded that under the measure approved by the 2013 Decision, Litgas could not sell the LNG Mandatory Quantity on a commercial basis in retail markets. Initially, Litgas, as the Designated Supplier, operated only in the regulated market, i.e. Litgas had an obligation to sell LNG only to certain electricity and heat producers, which all operate on regulated markets of heat and electricity.

(89) Furthermore, the Lithuanian authorities argued that the new set-up of the Purchase Obligation under the 2016 Amendments did not provide an economic advantage to Litgas as any sales which the Designated Supplier performed on the open gas market were monitored and regulated by the NRA, which prevented Litgas from retaining any profit which would make it better remunerated than the average gas supplier on the market.

Allegation on overcompensation

(90) The Lithuanian authorities rebutted the allegations of the complainants related to overcompensation on the basis of the fact that the LNG sale price of the Designated Supplier was regulated by the NRA. Established rules took into account the actual costs of the Designated Supplier, which it had incurred by implementing the entrusted SGEI mission. These calculations were performed by the NRA. The NRA's assessment procedure was performed taking into account the return from the resale activity of the part of LNG Mandatory Quantity, which exceeded the volume purchased by the Obligated Purchasers. Such return was limited by law to the average return of gas suppliers operating on the Lithuanian gas market.

Allegations on Statoil contract

(91) The Lithuanian authorities stressed that the contract concluded with Statoil was best priced compared to other options received in the course of tender procedure.

Allegations on appointment of Litgas

(92) According to the Lithuanian authorities the selection of Litgas did not violate public procurement rules. The tender conditions were clearly laid out in the LNG Terminal Law.

3. ASSESSMENT OF THE MEASURE

(93) As mentioned in recital (10), in order to comply with the GC judgment, the Commission re-examined the 2016 Amendments. The scope of this decision is therefore limited to the re-assessment of the 2016 Amendments and does not include a re-assessment of the 2019 Amendments. The Commission found in the 2018 Decision that the 2019 Amendments are compatible with the internal market and the General Court rejected the action for annulment as regards those amendments, thereby confirming the Commission's assessment in this respect.

3.1. Existence of aid

(94) Article 107(1) of the Treaty on the Functioning of the European Union ('TFEU') provides 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, in so far as it affects trade between Member States, be incompatible with the internal market.

(95) In order to conclude whether State aid is present, the Commission must assess whether the cumulative criteria of Article 107(1) TFEU (i.e. transfer of State resources and imputability to the State, selective advantage, potential distortion of competition and affectation of intra-EU trade) are met for the measure under assessment.

(96) In the 2013 Decision the Commission concluded that the LNG Supplement constituted State aid to KN.

(97) Since by the 2016 Amendments Lithuania introduced the LNG Supplement to Litgas, the Commission has to assess whether the cumulative criteria of Article 107(1) TFEU are met for the LNG Supplement to Litgas to constitute State aid.

3.1.1. *Transfer of State resources and imputability*

(98) As held by the Court [20], State resources encompass both advantages which are granted directly by the State and those granted by a public or private body designed or established by the State. The Commission considers that the LNG Supplement constitute State resources imputable to the State for the following reasons.

(99) First, the system for attribution and collection of the LNG Supplement was established by Lithuania. Based on the 2016 Amendments introduced to the LNG Terminal Law, Article 5(2) stipulated that the LNG Supplement would be collected, administered and paid out to Litgas by the TSO in accordance with procedures established by and under supervision of the NRA. The LNG Supplement is not a component of the transmission fee and does not finance the transmission services but it constitutes a separate surcharge.

(100) Second, the State appointed the TSO as administrator of the LNG Supplement. The TSO is instructed by the State by means of legal acts and the supervision of the NRA. The NRA controls the entire process with regard to the administration and transfer to Litgas of the funds collected.

(101) The Commission also notes that the TSO — AB 'Amber Grid' — is controlled by UAB 'EPSO-G', which is 100 %-owned by the Lithuanian Ministry of Energy.

(102) On the basis of those elements, the Commission concludes that the LNG Supplement has been provided to Litgas by the State through State resources and is imputable to the State.

([20]) Judgment of 22 March 1977, Steinike & Weinling, 76/78, EU:C:1977:52, paragraph 21; Judgment of 13 March 2001, Preussen Elektra, C-379/98, EU:C:2001:160, paragraph 58.

3.1.2. *Economic advantage*

(103) The LNG Supplement provides an economic advantage to Litgas as it ensures certain cost coverage and positive net revenues which would not be achieved under the normal competitive conditions on the market.

3.1.3. *Selectivity*

(104) The LNG Supplement is a selective advantage as it was granted solely to Litgas pursuant to a specific legal act — the LNG Terminal Law. Pursuant to the law other gas suppliers were not eligible to perform this function (See section 3.3.6).

3.1.4. *Effect on trade and distortion of competition*

(105) The objective of the LNG Supplement as amended in 2016 was to ensure the continuous operation of the LNG Terminal. Gas is a product traded between Member States. Favouring a particular LNG supplier — Litgas through the LNG Supplement — is liable to affect the patterns of trade between Member States. In addition gas is used for electricity production. Electricity is another product traded across Member States. Therefore, the LNG Supplement distorts or threatens to distort competition and is likely to affect trade between Member States.

3.1.5. *Conclusion on the existence of State aid*

(106) On the basis of the above-mentioned elements, the Commission concludes that the LNG Supplement as amended in 2016 involves State aid within the meaning of Article 107(1) TFEU.

3.2. **Lawfulness of aid**

(107) Lithuania granted the LNG Supplement under the 2016 Amendments to Litgas before the adoption of the 2018 Decision authorising the scheme. Moreover, the latter decision was annulled by the General Court, in so far as it concerned these amendments. It must thus be regarded as unlawful ([21]).

3.3. **Compatibility with the internal market**

3.3.1. *Legal basis for assessment*

(108) In accordance with the Commission notice on determination of the applicable rules for the assessment of unlawful State aid ([22]), the Commission has assessed the compatibility of the measure with the internal market, in accordance with the rule applicable at the time when the aid was granted.

(109) The procedure for adopting a new decision may be resumed at the very point at which the illegality occurred ([23]).

(110) On the basis of point 11 of the 2012 SGEI Framework ([24]), the Commission considers that, '*At the current stage of development of the internal market, State aid falling outside the scope of Decision 2012/21/EU may be declared compatible with Article 106(2) TFEU if it is necessary for the operation of the SGEI concerned and does not affect the development of trade to such an extent as to be contrary to the interests of the Union*' ([25]).

(111) The 2012 SGEI Framework describes the conditions to be met to achieve such balance.

(112) In the light of the General Court's conclusions (see recital (8)) that the Commission should have had doubts as to the compatibility with the internal market of certain aspects of the 2016 Amendments, the Commission revised its assessment and decided to initiate the formal investigation procedure. The Commission sets out hereafter its preliminary assessment of the compatibility of the 2016 Amendments with the internal market on the basis of the conditions established in the 2012 SGEI Framework.

([21]) See Article 108(3) TFEU and Judgment of 12 February 2008, *CELF*, C-199/06, EU:C:2008:79, paragraphs 61 and 64.
([22]) Commission notice on determination of the applicable rules for the assessment of unlawful State aid (OJ C 119, 22.5.2002, p. 22).
([23]) Judgment of 3 July 1986, Council v Parliament, 34/86, EU:C:1986:291, paragraph 47; Judgment of 12 November 1998. Spain v Commission, C-415/96, EU:C:1998:533, paragraph 31; and Judgment of 3 October 2000, Industrie des poudres sphériques v Council, C-458/98 P, EU:C:2000:531, paragraph 82.
([24]) Communication from the Commission — European Union framework for State aid in the form of public service compensation (2011) 2012/C 8/03 (OJ C 8, 11.1.2012, p. 15), referred to herein as the '2012 SGEI Framework'.
([25]) The present aid measure does not fall under the scope of Decision 2012/21/EU since the foreseen public service compensation does not fall within the categories of its Article 2(1).

3.3.2. *Genuine service of general economic interest as referred to in Article 106 TFEU*

(113) As indicated in point 13 of the 2012 SGEI Framework, Member States have a wide margin of discretion regarding the nature of services that could be classified as being SGEI. The Commission's task is to ensure that the margin of discretion is applied without manifest error as regards the definition of SGEI. The Commission's competence in this respect is limited to checking whether the Member State has made a manifest error when defining the service as an SGEI and to assessing any State aid involved in the compensation.

(114) However, as foreseen in point 46 of the 2012 SGEI Communication ([26]), where specific Union rules exist, the Member States' discretion is bound by those rules, without prejudice to the Commission's duty to carry out an assessment of whether the SGEI has been correctly defined for the purpose of State aid control. Therefore, the measure would be incompatible with Article 106(2) TFEU if it infringes specific EU law provisions. In the case at hand, the relevant provisions are laid down in the Gas Directive ([27]).

(115) The entrustment of a particular public service task implies the supply of services which, if it were to consider its own commercial interest, an undertaking would not assume or would not assume to the same extent or under the same conditions. Applying a general interest criterion, Member States or the Union may attach specific obligations to such services.

(116) The Commission notes that according to the Article 3(2) of the Gas Directive security of supply is an objective that might justify public service obligation.

(117) As explained in recital 208 of the 2013 Decision, the mere construction of the LNG Terminal would not ensure security of supply in Lithuania. In order to meet this objective it would require maintaining the LNG Terminal operational.

(118) The LNG Terminal Law obliged Litgas to provide the LNG Mandatory Quantity that would ensure the stable operation of the LNG Terminal. In order to keep the LNG Terminal operational (keep terminal 'cool'), certain quantities of LNG must be kept in tanks of the LNG Terminal and constantly released to the natural gas system operating.

(119) Furthermore, the Commission notes that annual capacity bookings or spot bookings are not sufficient to ensure stable operation of the LNG Terminal. This is because first, deliveries under annual bookings can always be redirected to another delivery point if LNG prices justify it and second, LNG operations must be planned two weeks in advance so the terminal cannot reply on spot deliveries. Therefore, the Commission asserts that some LNG quantities must be delivered on an even basis throughout the year in accordance with a fixed schedule, including the periods when the demand for natural gas is low.

(120) Therefore, the LNG Terminal Law imposes an obligation on Litgas to deliver the LNG Mandatory Quantity which is needed to maintain the LNG Terminal operational.

(121) Pursuant to the 2016 Amendments such LNG Mandatory Quantity was reduced by 1/3 due to the change of the operating regime into the standby regime (see recital (28)). In order to implement such legislative changes Litgas renegotiated its contract with Statoil in 2016 ([28]). Therefore, Litgas's SGEI obligation is directly linked to this Statoil agreement as it ensures fulfilment of its SGEI obligation.

(122) In the light of the assessment above, the Commission reaches the preliminary conclusion that Litgas's obligation to keep the LNG Terminal operational by delivering the LNG Mandatory Quantity to the LNG Terminal constitutes a genuine SGEI as referred to in Article 106 TFEU. This conclusion was confirmed by the General Court in its judgment ([29]).

([26]) Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4).

([27]) Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94).

([28]) http://www.Litgas.lt/en/Litgas-and-statoil-have-signed-the-amended-baseload-supply-agreement

([29]) Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraphs 97-124.

3.3.3. *Need for an entrustment act specifying the SGEI and the methods of calculating compensation*

(123) As indicated in section 2.3 of the 2012 SGEI Framework, the concept of SGEI within the meaning of Article 106 TFEU means that the undertaking or undertakings in question have been entrusted with the operation of the service of general economic interest by way of one or more official acts.

(124) These acts must specify, in particular i) the precise content of the SGEI and its duration; ii) the undertakings concerned and territory concerned; (iii) the nature of any exclusive rights assigned to the undertakings concerned; (iv) the parameters for calculating, controlling and reviewing the compensation; and (v) the arrangements for avoiding and recovering any overcompensation.

(125) The Commission notes that the precise nature of the SGEI is determined in Article 11 of the LNG Terminal Law. Namely, the provision states that the Designated Supplier is entrusted with the obligation to deliver the LNG Mandatory Quantity to the LNG Terminal (see recital (32)).

(126) Furthermore, the Commission takes note that by Order of the Minister of Energy No 1-20 of 10 February 2014, Litgas was appointed as Designated Supplier on the Lithuanian territory (see recital (33)(c)).

(127) As regards the parameters for calculating the compensation, the Commission notes that Article 11 of the LNG Terminal Law established the principles for calculating the compensation to the Designated Supplier. The detailed parameters were clearly defined in the relevant implementing regulation — NRA Methodology No O3-367 complementing the LNG Terminal Law (see recital (33)(d)).

(128) Therefore, it can be concluded that the entrustment act contained the parameters for calculating the compensation.

(129) The Commission considers on a preliminary basis that the allegations of the complainants that the parameters of the compensation to Litgas for the period from 1 January 2016 until 31 December 2018 were not objectively set and that Litgas was guaranteed to be compensated even beyond the quota relating to the Purchase Obligation (see recital (84)) seem to be unfounded.

(130) As it is already stated above, the Commission takes note of the fact that the legal acts such as the LNG Terminal Law and the NRA methodology No O3-367 established a clear model for calculating the compensation. The parameters of this compensation paid to Litgas were set by the NRA.

(131) The NRA Methodology No O3-367 provides the formula by which the NRA calculated the compensation to be paid to Litgas. The Commission notes that the formula includes all the costs for which Litgas was compensated. The list of costs seems to be clearly defined and no other costs are included into the compensation model.

(132) Moreover, the Commission notes that Litgas's profit was strictly limited to a fixed profit margin approved by the NRA of 0,24 Eur/MWh and that its profit from sales in all cases could not exceed the average profit margin earned by natural gas companies in Lithuania.

(133) Based on the LNG Terminal Law the compensation was limited only to the LNG Mandatory Quantity.

(134) Finally, Litgas had to submit to the NRA regular reports on costs and revenues in order to ensure that any overcompensation was detected in a timely manner and was subsequently eliminated.

(135) By clearly defining the eligible costs, subjecting the Designated Supplier to regular reporting requirements and limiting its profits to the average profit observed on the market (see recitals (53) and (54)) the entrustment act and its implementing regulations seem to provide the necessary arrangements to calculate, control, review and avoid overcompensation.

(136) In light of the above, the Commission reaches the preliminary conclusion that the entrustment act complies with the requirements of section 2.3 of the 2012 SGEI Framework.

3.3.4. *Duration of the period of entrustment*

(137) As indicated in section 2.4 of the 2012 SGEI Framework, "the duration of the period of entrustment should be justified by reference to objective criteria such as the need to amortise non-transferable fixed assets. In principle, the duration of the period of entrustment should not exceed the period required for the depreciation of the most significant assets required to provide the SGEI."

(138) Article 11 of the LNG Terminal Law stipulates that the duration of the SGEI is limited to 10 years and is revised yearly by the NRA. The Commission notes that the duration of the entrustment seems to be justified as it is linked to the duration of the contract with Statoil for the supply of the LNG Mandatory Quantity, which will expire in 2024.

3.3.5. *Compliance with Directive 2006/111/EC* [30]

(139) According to point 18 of the 2012 SGEI Framework: "Aid will be considered compatible with the Internal Market on the basis of Article 106(2) TFEU only where the undertaking complies, where applicable, with Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings".

(140) Under Article 2(d) of Directive 2006/111/EC, any undertaking that is entrusted with the operation of an SGEI pursuant to Article 106(2) TFEU, that receives public service compensation in any form whatsoever in relation to such service and that carries out other activities, is an undertaking required to maintain separate accounts.

(141) The account separation and transparency requirements for public undertakings established in the Directive 2006/111/EC are fulfilled by implementing acts — Resolution of the Government of the Republic of Lithuania No 768 dated 14 July 2005 and Amending Resolution No 1333 dated 12 December 2007.

(142) As detailed in recital (55), Litgas is obliged to maintain separate accounts for its regulated activities as a Designated Supplier and for its non-regulated activities.

(143) Based on the above, the Commission considers that the requirements of Directive 2006/111/EC are complied with.

3.3.6. *Public procurement requirements*

(144) Point 19 of the 2012 SGEI Framework requires that the responsible authority entrusts the provision of the service in question in compliance with the applicable Union rules in the area of public procurement.

(145) The entrustment of Litgas with the SGEI as the Designated Supplier took place in 2014 before the adoption of the 2016 Amendments constituting the State aid under the Commission's assessment. Nevertheless, the Commission will assess below the claims made by the complainants with regard to the alleged non-compliance of the aid with point 19 of the 2012 SGEI Framework.

(146) The complainants claim that Litgas's appointment process violated public procurement requirements (see recital (86)).

(147) The Commission considers that the contract would in principle fall within the material scope of Directive 2004/18/EC [31].

(148) However, as was stated in the 2013 Decision (recitals (229)-(236)), the LNG Terminal project is a project of major importance for Lithuania and the appointment of AB Klaipėdos Nafta as the operator of the LNG Terminal by the Lithuanian government is exempted from the public procurement rules on grounds of protection of the essential interests of a Member State as provided by Article 14 of the Directive 2004/18/EC.

(149) The Commission considers that the appointment of Litgas as the Designated Supplier is subject to the same principles as the appointment of AB Klaipėdos Nafta in this respect. As in the case of AB Klaipėdos Nafta, the contract by which Litgas was appointed as the Designated Supplier is therefore also covered by the exemption provided in Article 14 of the Directive 2004/18/EC.

(150) This is due to the fact that the task of keeping the LNG Terminal operational through deliveries of the LNG Mandatory Quantity must be also considered as essential for Lithuania's security of gas supply. Any disruption in the delivery of the LNG Mandatory Quantity would jeopardise the operation of the LNG Terminal and thus the supply of LNG into the Lithuanian gas market and thus ultimately Lithuania's security of supply. In particular, given the structure of the Lithuanian gas supply market an entrustment of the Designated Supplier's tasks via a public procurement procedure pursuant to Directive 2004/18/EC would risk to confer the genuine SGEI to an undertaking linked to the former single gas supplier. In addition, an undertaking selected through the procedure under Directive 2004/18/EC without being controlled by the State could have (at the time of the tender or later) developed ties with the former single supplier that would allow the latter to influence its market behaviour in a way that could negatively affect the fulfilment of its SGEI mission.

[30] Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.

[31] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

(151) In the Commission's view thus adopting a different approach towards the Designated Supplier than the operator of the LNG Terminal (AB Klaipeda Nafta) would jeopardise the essential interests invoked in the 2013 Decision. Therefore, the appointment of Litgas as the Designated Supplier by the Ministry of Energy should be exempted from the public procurement rules on grounds of protection of the essential interests of a Member State as provided by Article 14 of the Directive 2004/18/EC.

(152) In this context the Commission also notes that, irrespective of the applicability of the Article 14 exemption, in 2014 Lithuania conducted a selection process for the appointment of the Designated Supplier. The selection criteria were approved by the Ministry of Energy on 3 January 2014 and made public ([32]). The tender evaluation criteria were established in the secondary legislation, i.e. Section 49 DivReg. In line with the above security concerns, participation in this tendering procedure was only open to undertakings meeting the following selection criteria:

a) 2/3 votes of the shareholders general meeting should be held directly or indirectly by the State; and

b) the Designated Supplier should not be involved in activities related to the transmission and (or) distribution of gas.

(153) Litgas took part in the call for tender and was selected the winner. Consequently, by the order of the Minister of Energy of 10 February 2014 No 1-20 "On UAB LITGAS awarding as the Designated Supplier", Litgas was appointed as the Designated Supplier.

(154) Based on the above and as confirmed by the General Court in its judgment ([33]), the Commission considers that point 19 of 2012 SGEI was complied with.

3.3.7. *Amount of compensation*

(155) Point 21 of the 2012 SGEI Framework states that "(…) *the amount of the compensation must not exceed what is necessary to cover the cost of discharging the PSOs, including a reasonable profit*". The amount of compensation can be established on the basis of either the expected costs and revenues or the costs and revenues actually incurred or a combination of the two (point 22 of the 2012 SGEI Framework). Where the compensation is based, in whole or in part, on expected costs and revenues, they must be specified in the entrustment act. They must be based on plausible and observable parameters concerning the economic environment in which the SGEI is being provided and rely, where appropriate, on the expertise of sector regulators or of other entities independent from the undertaking. Member States must indicate the sources on which these expectations are based (point 23 of the 2012 SGEI Framework).

(156) The net costs necessary, or expected to be necessary, should be calculated using the net avoided cost methodology where required or possible, or use alternative methods such as the cost allocation methodology (points 24 and 27 of the 2012 SGEI Framework).

(157) Considering the fact that the LNG Terminal was the first LNG terminal in Lithuania and that there was no developed market expertise in LNG procurement and trading, the Commission considers, on a preliminary basis, that the application of the net avoided cost methodology does not seem appropriate for the assessment of the 2016 Amendments. Where duly justified, the Commission can accept alternative methods for calculating the net cost necessary to discharge the SGEI, such as the methodology based on cost allocation (point 27 of the 2012 SGEI Framework).

(158) Under the cost allocation methodology, the maximum amount of compensation should be calculated as the difference between revenues and costs from fulfilling the SGEI obligation, including a reasonable profit.

(159) Under the 2016 Amendments, the compensation granted to Litgas for the SGEI, financed by the new component of the LNG supplement, was calculated, in essence, on the basis of the following three factors: (i) the difference between the LNG price paid, upstream, by Litgas to Statoil and the price at which Litgas sold, downstream, to the obligated purchasers and to the free market; plus (ii) compensation for the "justified" costs incurred in connection with the SGEI, namely the operating costs, boil-off costs, balancing costs and the costs of financing a long-term State guarantee; plus (iii) a regulated profit margin, determined by the NRA (see section 2.3.7.2).

(160) Therefore, the Commission will assess whether all the requirements concerning the amount of compensation prescribed in 2012 SGEI Framework have been complied with.

([32]) https://enmin.lrv.lt/uploads/enmin/documents/files/Konkursai/Kiti_konkursai/Archyvas/Konkursosalygos.pdf
([33]) Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraphs 130-149.

(161) The Commission also notes that the methodology was amended in 2019. According to the new methodology resulting from the 2019 amendments, the compensation granted to Litgas for the SGEI, which continued to be financed by the new component of the LNG supplement introduced in 2016, was calculated, in essence, on the basis of the following two factors: (i) the difference between the LNG price paid, upstream, by Litgas to Statoil, and the actual average price of gas imported into Lithuania, calculated by the NRA; to which was added, (ii) compensation for part of the boil-off costs and the costs of financing a long-term State guarantee.

(162) It follows, in particular, that, while all the boil-off costs and balancing costs incurred by Litgas were included in the compensation for the SGEI during the period from 2016 to 2018, Litgas was compensated, under the 2019 amendments, for only part of the boil-off costs and not at all for the balancing costs that it incurred.

(163) In view of this difference and in light of the GC judgment ([34]), the Commission will also assess the compliance of the amount of compensation for boil-off costs and for balancing costs during the period from 2016 to 2018 with the requirements of the 2012 SGEI Framework taking into account the changes in the amount of compensation of these two elements following the 2019 amendments.

3.3.7.1. Costs

(164) As described in recital (58), in addition to operating costs, Litgas incurred the following specific costs 1) boil-off gas costs; 2) balancing costs; 3) long-term guarantee costs.

Boil-off costs

(165) As explained in recitals (60)-(62), boil-off costs are costs caused by the evaporation of LNG which occurs when LNG is stored in the LNG terminal tanks before being released into the natural gas system. They are therefore essentially quantities of LNG lost as a result of evaporation. Those costs represented ca. 55 % of the total costs incurred by Litgas in connection with the SGEI in 2017.

(166) The Commission notes that, according to the Lithuanian authorities, Litgas incurred higher boil-off costs than other users of the LNG Terminal because, due to the fixed delivery schedule, it had to keep LNG in the tanks of the terminal and regasify LNG at the minimum output rate to keep the LNG terminal operational. The Lithuanian authorities therefore conclude that, while other users could minimise their boil-off gas costs by releasing LNG to the natural gas system immediately Litgas had to continue slow regasification which causes high natural losses of LNG due to evaporation.

(167) Furthermore, the Commission takes note that, following information provided by the Lithuanian authorities, boil-off gas costs were higher during the winter period when Litgas was the only user at the LNG Terminal and that they were lower in the summer period when several other users used the LNG Terminal. The Commission considers, on a preliminary basis, that because of its SGEI obligation, the Designated Supplier’s boil-off gas costs were higher than the costs incurred by other users.

(168) However, in light of the GC Judgment ([35]), the Commission has doubts on whether all the boil-off costs can be considered “economically justified” costs linked to the SGEI and incurred efficiently for the period from 2016 to 2018 and whether the compensation for the entirety of the boil-off costs under the 2016 amendments was “necessary” for the operation of the SGEI. Moreover, in light of the methodology for the calculation of the boil-off costs compensation in the 2019 Amendments described in recital (76) of this Decision, it is unclear whether the boil-off costs incurred during the periods when Litgas was not the sole user of the Terminal, should be compensated in full, as it has been, or whether, on the contrary, it was only necessary to compensate the costs incurred by Litgas which Litgas would not have incurred in the absence of the SGEI.

(169) As detailed in recitals (71)-(74), the Commission notes that under the 2019 Amendments, the Purchase Obligation was abolished and replaced by a Delivery Obligation. In light of the GC judgment ([36]), the Commission considers it appropriate to seek clarification whether the difference in the compensation of the boil-off costs pre- and post-2019 may have been due to the existence of the Purchase Obligation during the period from 2016 to 2018 and to the abolition of that obligation in 2019; in other words, whether the Purchase Obligation determined, in any way whatsoever, the extent of the boil-off costs incurred by Litgas in the context of the SGEI.

(170) The Commission invites views from the Lithuanian authorities and interested parties on all issues described in recitals (165) to (169) above.

([34]) Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraphs 164-170.
([35]) Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraphs 175-179.
([36]) Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraphs 180-183.

Balancing costs

(171) As detailed in recitals (63)-(67), balancing costs are those incurred, in particular, under swap contracts concluded by Litgas with other gas suppliers, in order to respond, on a specific basis, to fluctuations in demand. The Lithuanian authorities explain that the conclusion of such swap contracts is necessary because of the inflexibility of the schedule for the supply of gas upstream, as agreed in the contract between Litgas and Statoil, which does not correspond to downstream demand, which shows significant seasonal fluctuations. Thus, under those swap contracts, Litgas could either supply gas to other suppliers, when it had excess quantities of gas, or borrow gas, when it had insufficient quantities of gas. Those costs represented approximately 12 % of the total costs incurred by Litgas in connection with the SGEI in 2017. The balancing costs could also include costs incurred by Litgas to store LNG temporarily in a storage facility in Inčukalns (Latvia).

(172) As explained in recital (65), the Commission notes that, according to the Lithuanian authorities, other suppliers of natural gas also incurred some balancing costs, but in a smaller proportion.

(173) The Commission also notes that following the 2019 amendments, under a new compensation model, Litgas was no more compensated for balancing costs.

(174) In light of these considerations and of the GC judgment ([37]), the Commission has doubts on whether all the balancing costs can be considered “economically justified” costs linked to the SGEI and incurred efficiently for the period from 2016 to 2018 and whether the compensation for the entirety of the balancing costs under the 2016 Amendments was “necessary” for the operation of the SGEI. In particular, it is unclear whether the balancing costs should be compensated in full, as it has been, or whether, on the contrary, it would have only been necessary to compensate for the costs incurred by Litgas which it would not have incurred in the absence of the SGEI.

(175) The Commission notes that under the 2019 Amendments the Purchase Obligation was abolished and Litgas sold the LNG Mandatory Quantity freely on the market. The Commission therefore considers that, in order to determine whether Litgas should have been compensated for all, for part or for none of the balancing costs during the 2016 to 2018 period, the impact of Purchase Obligation on the amount of balancing costs incurred needs to be further investigated. In light of the GC judgment ([38]), the Commission considers it appropriate to seek clarification whether the Purchase Obligation determined, in any way whatsoever, the extent of the balancing costs incurred by Litgas in the context of the SGEI.

(176) The Commission invites views from the Lithuanian authorities and interested parties on all issues described in recitals (171) to (175) above.

Long-term guarantee costs

(177) As regards costs related to the long-term guarantee, the Commission notes that in order to secure long-term supply of LNG from Statoil, Litgas had to issue long-term contract performance guarantees for Statoil and incurred additional costs, which are not inherent in the activity of any other natural gas supplier (see recital (68)).

(178) The Commission considers at this stage that these long-term guarantee costs are “justified” costs incurred in direct connection with the SGEI, as these costs are related to the long-term nature of the contract that Litgas concluded with Statoil to fulfil its SGEI mission.

3.3.7.2. Revenue

(179) In accordance with point 32 of the 2012 SGEI Framework, the revenue to be taken into account must include at least the entire revenue earned from the SGEI.

(180) Based on the 2016 Amendments first the revenues which Litgas received as a result of selling the LNG to the Obligated Purchasers at the established regulated price were taken into account. In addition, the revenues that Litgas obtained from selling on the market the part of the LNG Mandatory Quantity not purchased by the Obligated Purchasers were also considered. Thus, the Commission concludes, on a preliminary basis, that all possible revenues that Litgas could earn under the SGEI it has been entrusted with were covered (see recital (52)).

3.3.7.3. Reasonable profit

(181) The 2012 SGEI Framework allows for the entity fulfilling the SGEI to achieve a reasonable profit. This is the rate of return on capital that would be required for a typical company considering whether or not to provide the SGEI for the whole duration of the entrustment act, taking into account the level of risk (points 33 and 35). Where duly justified, other profit level indicators can be used (point 34).

([37]) Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraphs 190-192.

([38]) Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraph 191.

(182) In relation to the profit margin, the Commission notes that already according to the 2013 Decision Litgas was entitled to a reasonable profit margin. Under the 2016 Amendments, the NRA established a fixed profit margin for Litgas taking into account natural gas market conditions in Lithuania. Based on the NRA calculations Litgas was entitled to 1) a fixed profit margin of 0,24 EUR/MWh on the sale of the LNG Mandatory Quantity to the Obligated Purchasers and 2) Half of the profit on the sales of LNG on the market provided that the profit did not exceed the profit margin of a natural gas company operating on the market.

(183) The Lithuanian authorities explained that the profit margin for sales of LNG on the market established by the 2016 Amendments was well below the average profit margin earned by suppliers active on the Lithuanian gas supply market which historically amounted to 3.2 %. For the period from 2016 to 2018, Litgas profit margin was in the range from 1.1 % to 1.5 %.

(184) In addition, based on the NRA Methodology No O3-367 any extra profit beyond the observed average market profit was recouped from the beneficiary.

(185) In view of the evidence provided that the profit margin of Litgas was market conform, the Commission considers at this stage that it corresponds to a reasonable profit as per the 2012 SGEI Framework.

3.3.7.4. Efficiency incentives

(186) As regards the efficiency incentives, point 39 of the 2012 SGEI Framework, provides that "[i]n devising the method of compensation, Member States must introduce incentives for the efficient provision of SGEI at high standard, unless they can duly justify that it is not feasible or appropriate to do so".

(187) The efficiency mechanisms applicable to Litgas were established in the NRA Methodology No O3-367.

(188) The NRA Methodology No O3-367 contained a mechanism for the SGEI provider to perform assigned obligations efficiently. For a certain number of operating expenses (repairs, maintenance, personnel, insurances, marketing and administrative costs, etc.), the NRA established a ceiling for the price of the regulated service. Costs going beyond that limit were not compensated. In addition, since 2017 the regulated companies had an additional incentive to further reduce OPEX. A company, which reduced its costs more than required by the NRA in a given period of time, could keep part of such savings (see recital (57)).

(189) Moreover, incentives for efficient operation also related to the adjustment to inflation. The costs that were taken into account for setting the LNG Supplement and the compensation were increased only by half of the inflation coefficient and not more than 3 % (see recital (57)).

(190) To conclude, the Commission considers at this stage that the 2016 Amendments introduced new mechanisms positively incentivising Litgas not only to maintain its efficiency but also to increase it. Based on the 2016 Amendments, Litgas had 1) the possibility to increase profitability by reducing OPEX exceeding the NRA established benchmark and 2) the possibility to keep part of the profit from the sale of surplus LNG Mandatory Quantity.

3.3.7.5. Control of overcompensation

(191) Point 16(e) of the 2012 SGEI Framework requires that the act of entrustment includes arrangements for avoiding and recovering overcompensation. The latter should be understood as compensation that the undertaking receives in excess of the amount of aid as defined in point 21 of the 2012 SGEI Framework for the whole duration of the contract (point 47 of the 2012 SGEI Framework).

(192) Point 49 of the 2012 SGEI Framework states that "Member States must ensure that the compensation granted for operating the SGEI meets the requirements set out in this Communication and in particular that undertakings are not receiving compensation in excess of the amount determined in accordance with the requirements set out in this section. They must provide evidence upon request from the Commission. They must carry out regular checks, or ensure that such checks are carried out, at the end of the period of entrustment and, in any event, at intervals of not more than three years. For aid granted by means other than a public procurement procedure with publication, checks should normally be made at least every two years".

(193) Litgas was obliged to submit to the NRA regular reports on costs and revenues in order to ensure that any overcompensation was detected in a timely manner and was subsequently eliminated (see recitals (55) and (59)).

(194) In light of the foregoing the Commission considers at this stage that the measure includes arrangements for avoiding and recovering overcompensation.

3.3.8. *Allegations by the complainants*

(195) The complainants put forward claims that Litgas failed to operate efficiently as a typical well-run undertaking. In particular, the complainants argued that under the contract with Statoil, Litgas had to purchase too large volumes at a very high gas price (see recitals (85)).

(196) In view of the evidence submitted by the Lithuanian authorities in terms of global LNG prices and received bids (see recital (22)), the Commission considers, on a preliminary basis, the allegations of the complainants regarding the high price of the gas supply contract concluded by Litgas as unfounded. In particular, the Commission notes that even though in the course of the tender procedure other bidders offered lower prices for the years 2017 — 2019, Statoil offered significantly lower prices for the first two years of the contract (2015 — 2016), so that in aggregate over the five year delivery period the selected bid was the most attractive. Furthermore, the Commission takes note of the fact that the gas supply contract renegotiated in 2016 provides for a lowering of the initially contracted gas acquisition price and quantities of LNG.

(197) The Commission also considers, on a preliminary basis, unfounded the allegations of the complainants regarding the too big volumes contracted under the supply agreement between Litgas and Statoil. The initially contracted volume equalled the LNG Mandatory Quantity that was necessary to keep the LNG Terminal operational in steady mode in its incipient stage when there were no other LNG Terminal's users. In view of that the Commission regards the initially contracted gas volume as necessary for Litgas to perform its obligations under the SGEI. The Commission also notes that following the renegotiation of the contract with Statoil the LNG Mandatory Quantity (see recital (43)) and the purchase price of natural gas were lowered. Therefore, the Commission notes at this stage that the difference in the LNG Mandatory Quantity seems to stem from different technological requirements for the operation of the LNG Terminal, which were based on the technical expertise provided to the Lithuanian authorities.

(198) The Commission also considers at this stage that swap contracts and gas storage options were another way of minimising costs resulting from changes in seasonal demand (see recitals (65)-(67)). The promotion of such measures was enshrined in the applicable legal framework.

(199) In view of the above the Commission considers at this stage that the complainants' allegations regarding the efficiency of Litgas are unfounded and that the requirements of the 2012 SGEI Framework regarding efficiency incentives are complied with.

(200) In this regard, the General Court concluded in its judgment that the complainants had failed to show that the Commission should have had doubts as to whether the extension of the contract between Litgas and Statoil rendered the compensation for the SGEI disproportionate [39].

3.3.9. *Provisions applicable to undertakings carrying out activities outside the scope of the SGEI*

(201) Although its activities as Designated Supplier represent the core of Litgas's business the company also performs a limited number of activities unrelated to the scope of the SGEI (see recital (55)).

(202) According to point 44 of the 2012 SGEI Framework, where an undertaking carries out activities falling both inside and outside the scope of the SGEI, the internal accounts must show separately the costs and revenues associated with the SGEI and those of the other services.

(203) The Commission notes that the Lithuanian authorities have demonstrated that Litgas is subject to full separation of accounts (see recital (55)).

(204) The legal obligation to separate accounts of SGEI and non-SGEI activities is established in Article 44 of Law on Natural Gas. The detailed methodology for the separation of accounts, allocation of costs and revenues is regulated by the NRA Decision No O3-316 'Regarding the separation of accounts, costs of the natural gas undertakings'.

(205) In this context the Commission considers at this stage that the requirements of point 44 of the 2012 SGEI Framework are satisfied.

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[39] Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraphs 196-205.

3.3.10. *Additional requirements which may be necessary to ensure that the development of trade is not affected to an extent contrary to the interests of the Union*

(206) The requirements set out in sections 2.1 to 2.8 of the SGEI Framework are usually sufficient to ensure that the aid does not distort competition in a way that is contrary to the interests of the Union. However, it is conceivable that in some exceptional circumstances serious competition distortions in the internal market could remain unaddressed and the aid could affect trade to such an extent as would be contrary to the interest of the Union (see points 51 and 52 of the 2012 SGEI Framework).

(207) In this case, the Commission considers at this stage that no serious competition distortions in the internal market have remained unaddressed and that the aid cannot affect trade to such an extent as would be contrary to the interests of the Union. This view is confirmed by the GC judgment ([40]).

(208) The Commission considers that the potential negative effects on competition and trade will be minimal. Litgas is entrusted to deliver the LNG Mandatory Quantity that amounts to 0,37 bcm. As the total capacity of the LNG Terminal is 3,75 bcm, the LNG Terminal has capacity to provide access to other potential gas suppliers. For the year 2018 there were at least two other users of the LNG Terminal.

(209) Furthermore, the notified 2016 Amendments were limited in time from 1 January 2016 until 1 January 2019 which ensures avoidance of long-term distortions of competition.

3.3.11. *Transparency*

(210) Point 60 of the 2012 SGEI Framework provides that Member States must publish, for each SGEI compensation they grant: (i) the results of the public consultation, (ii) the content and duration of the SGEI, (iii) the undertakings and the territory concerned and (iv) the amounts of aid granted to the undertakings on a yearly basis.

(211) In this case, the Lithuanian authorities published the above-mentioned information on a publicly accessible website (see recitals (79)-(81)).

4. **CONCLUSION**

(212) On the basis of the currently available information and the elements described above, the Commission seeks clarification and solicits comments concerning the amount of compensation under the 2016 Amendments and in particular the compensation for the entirety of the following costs:

(a) Boil-off costs: whether all the boil-off costs can be considered 'economically justified' costs linked to the SGEI and incurred efficiently for the period from 2016 to 2018; whether the compensation for the entirety of the boil-off costs under the 2016 Amendments was 'necessary' for the operation of the SGEI; whether the Purchase Obligation determined, in any way whatsoever, the extent of the boil-off costs incurred by Litgas in connection with the SGEI; and

(b) Balancing costs: whether all the balancing costs can be considered 'economically justified' costs linked to the SGEI and incurred efficiently for the period from 2016 to 2018; whether the compensation for the entirety of the balancing costs under the 2016 Amendments was 'necessary' for the operation of the SGEI; whether the Purchase Obligation determined, in any way whatsoever, the extent of the balancing costs incurred by Litgas in connection with the SGEI.

(213) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the TFEU, requests Lithuania to submit its comments and to provide all such information as may help to assess the aid (measure applicable from 2016 to 2018), within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

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

(215) The Commission warns Lithuania 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.

([40]) Judgment of 8 September 2021, Achema AB and Achema Gas Trade UAB v Commission, T-193/19, EU:T:2021:558, paragraphs 206-218.

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