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Press and Information

Advocate General's Opinion in Joined Cases C-106/09 P and C-107/09 P European Commission and Spain v Government of Gibraltar and United Kingdom

According to Advocate General Niilo Jääskinen, harmful tax measures cannot be classified automatically as unlawful State aid

The Advocate General proposes that the Court should uphold the annulment of the Commission decision which found that the reform of Gibraltar corporate tax proposed in 2002 constituted unlawful State aid

In August 2002, the United Kingdom notified the European Commission of Gibraltar's proposed reform of corporate tax[1], That reform included in particular the repeal of the former tax system and the imposition of three taxes applicable to all Gibraltar companies, namely a registration fee, a payroll tax and a business property occupation tax, with a cap on liability to payroll tax and business property occupation tax of 15% of profits.

In 2004, the Commission decided[2] that the proposals notified for the reform of the system of corporate taxation in Gibraltar constituted a scheme of State aid that was incompatible with the internal market and accordingly could not be implemented. In its decision, the Commission found that the proposed reform was regionally selective since it provided for a system under which companies in Gibraltar would be taxed, in general, at a lower rate than United Kingdom companies. It concluded, furthermore, that the reform was materially selective, taking the view that the proposed tax system was 'inherently discriminatory' since its structure would result in offshore companies not being taxed in Gibraltar.

Ruling upon the actions brought by the Government of Gibraltar and the United Kingdom, the Court of First Instance (now 'the General Court') annulled the Commission decision on 18 December 2008[3]. In its judgment, the General Court held that the reference framework for assessing the reform's regional selectivity had to correspond exclusively to Gibraltar's, and not the United Kingdom's, territorial limits. As regards the measure's material selectivity, it held that the Commission had not followed a correct method of analysis. The Commission and Spain accordingly brought the present appeals before the Court of Justice in order to have the General Court's judgment set aside.

In his Opinion delivered today, Advocate General Niilo Jääskinen, proposes that the Court of Justice should dismiss both appeals.

So far as concerns territorial selectivity of the tax reform proposed by the Government of Gibraltar, the Advocate General upholds the General Court's conclusion that the territory of Gibraltar constitutes the territorial reference framework to be used for assessing the selectivity of the intended reform.

With regard to material selectivity of the Government of Gibraltar's intended measure, **Mr Jääskinen considers that the State aid rules cannot be diverted from their objective so**

[1] However, the reform at issue in the present cases did not enter into force. Indeed, a new system of corporate tax has been adopted.

[2] Commission Decision 2005/261/EC of 30 March 2004 on the aid scheme which the United Kingdom is planning to implement as regards the Government of Gibraltar Corporation Tax Reform (OJ 2005 L 85, p. 1).

[3] Judgment in Joined Cases T-211/04 and T-215/04 *Government of Gibraltar and United Kingdom* v *Commission* (see also press release 99/08).

as to be used to combat the phenomenon of harmful tax competition between Member States. In the European Union, the measures to combat that phenomenon fall within the field of direct tax policy.

In this connection, the Advocate General notes that the provisions of EU law that relate to State aid seek only to remedy distortions of competition deriving from the desire of a Member State to grant, in derogation from its general policy guidelines, a particular advantage to certain undertakings or goods. **On the other hand, where a tax measure is of a general character, it constitutes an adjustment to general fiscal policy and not State aid. The same principle is applicable to the phenomenon of harmful tax competition between Member States of the European Union, which therefore does not automatically fall within the mechanism for controlling State aid.** A substantial proportion of harmful tax measures comprise general measures to which the provisions of EU law concerning State aid cannot therefore be applied.

In addition, **Mr Jääskinen considers that the General Court was right in rejecting the Commission's novel approach under which any 'inherently discriminatory' tax system must be classified as State aid.**

So far as concerns this question, the Advocate General notes that, in order to determine whether a national tax measure does constitute State aid, it is necessary to examine whether the measure results in a selective advantage for the beneficiaries. He thus observes that, in its decision on the Gibraltar tax reform, the Commission failed to identify a common or 'normal' tax regime in relation to which certain of the elements of Gibraltar's tax system constituted derogations, and were therefore prima facie selective. By contrast, following a new approach[4], the Commission found in its decision that Gibraltar's tax system, by its structure, conferred an advantage on a category of undertakings through selection of the criteria to be applied in the allegedly 'normal' taxation system. It accordingly concluded that Gibraltar's tax system as a whole was 'inherently discriminatory', which was equivalent, in its view, to the existence of a selective advantage and, therefore, to the existence of State aid.

The Advocate General **considers that this novel approach adopted by the Commission means that existence of a selective advantage would be assessed no longer on the basis of a comparison between the national tax measure under specific examination and the normally applicable national tax regime, but by virtue of a comparison between the national tax regime as it stands in its entirety and another – hypothetical and non-existent – tax system.** Such an approach would require the construction of a 'reference tax system' for the European Union in order to be able to assess the allegedly discriminatory effect of the choices made by the Member States regarding the tax base (or tax rates) in the field of corporate taxation. However, Mr Jääskinen states, no such common reference system exists and the application of the European Union State aid rules cannot lead de facto to the adoption of a tax harmonisation measure of that kind.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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[4] The Commission did not follow the derogation-based approach advocated in its Notice on the application of the State aid rules to measures relating to direct business taxation (OJ 1998 C 384, p. 3).