STATE AID — UNITED KINGDOM

Aid C 53/2001 (ex NN 52/2000) — Gibraltar exempt companies

Invitation to submit comments pursuant to Article 88(2) of the EC Treaty

(2002/C 26/05)

(Text with EEA relevance)

By means of the letter dated 11 July 2001, reproduced in the authentic language on the pages following this summary, the Commission notified the United Kingdom of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty concerning the abovementioned measure.

Interested parties may submit their comments on the measure in respect of which the Commission is initiating the procedure within one month of the date of publication of this summary and the following letter, to:

European Commission
Directorate-General for Competition
State Aid Registry
B-1049 Brussels
Fax (32-2) 296 12 42.

These comments will be communicated to the United Kingdom. Confidential treatment of the identity of the interested party submitting the comments may be requested in writing, stating the reasons for the request.

SUMMARY

Procedure

The measure has not been notified to the Commission.

The State aid measure, which is the object of the initiation of procedure, is a measure in force in Gibraltar (United Kingdom). The measure has been established by the Companies (Taxation and Concessions) Ordinance in 1967. These rules have undergone several modifications and amendments in 1969, 1970, 1974, 1977, 1978, 1983, 1984, 1985, 1987, 1988, 1990 and 1993. On the basis of the information provided, the measure has known at least two substantial modifications since the accession of the United Kingdom to the European Union and should therefore be considered as an non-notified aid.

Description

According to the regime, a company satisfying certain conditions (amongst which, no Gibraltarian or Gibraltar resident may have a beneficial interest in the shares of the company) can obtain an exempt company certificate. Possession of this certificate will allow the exempt company to pay a lump sum ranging from GBP 200 to GBP 300 instead of being subject to the normal corporate tax.

The purpose of this regime is to attract non-Gibraltarian companies to Gibraltar through considerable tax advantage.

Assessment

The measure appears to constitute aid as it fulfils the four relevant criteria.

Firstly, the measure affords the beneficiaries an advantage that reduces the costs they normally bear in the course of their business. According to point 9 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (1), the tax advantage may be granted through different types of reduction in the company’s burden and, in particular, through a reduction in the amount of tax. The relief from the obligation to pay the full amount of corporation tax appears to fulfil this criterion.

Secondly, the advantage must be granted by the State or through State resources. The grant of a tax reduction involves a loss of tax revenue which, according to point 10 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation, is equivalent to the use of State resources in the form of fiscal expenditure.

Thirdly, the measure must affect competition and trade between Member States. This criterion is fulfilled by the measure to the extent that these companies are able, actually or potentially, to trade with companies located in other Member States. This is all the more so that, on the basis of the information provided, the exempt company may not, in normal circumstances, trade or carry on business in Gibraltar, with Gibraltarians or residents of Gibraltar.

Lastly, the measure must be specific or selective in that it favours certain undertakings or the production of certain goods. The beneficiaries of the measure are companies in which no Gibraltarian or Gibraltar resident may have a beneficial interest in their shares. In addition, the exempt company may not in normal circumstances trade or carry on business in Gibraltar with Gibraltarians or residents of Gibraltar. On the basis of these elements it can be presumed that the measure is selective, in so far as it favours foreign resident companies over others.

As stated in point 26 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation, ‘if non-resident companies are treated more favourably than resident ones’ it is difficult to justify such an exception by the logic of the tax system. Despite the fact that exempt companies are resident companies, the exempt status is granted to them only on the basis that they are foreign-owned. Exempt companies are treated more favourably than other resident companies. Therefore, the application of a lower corporate tax rate cannot be justified by the logic of the tax system.

For these reasons, the measure seems to constitute an operating State aid. Furthermore, the State aid in question does not appear to fall within any of the exceptions laid down in Article 87(2) and (3) of the EC Treaty. Therefore, in the context of its preliminary assessment under Article 6 of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, the Commission has doubts as regards the compatibility of the tax measure.

In accordance with Article 14 of Regulation (EC) No 659/1999, all unlawful aid can be subject to recovery from the recipient.

TEXT OF THE LETTER

The Commission wishes to inform the United Kingdom that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 88(2) of the EC Treaty.

In 1997, the Ecofin Council adopted a code of conduct for direct business taxation with the objective of tackling harmful tax competition (OJ C 2, 6.1.1998). Following to the commitment taken by way of this code, the Commission published in 1998 a notice on the application of State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998) stressing its determination to apply them rigorously and to respect the principle of equality of treatment. The current procedure is carried out within this framework.

I. PROCEDURE

1. Aid NN 52/2000 — ‘Gibraltar exempt companies’ has not been notified to the Commission.

2. On 12.2.1999 the Commission has sent a first formal request for information (D/50716) in respect of a number of tax schemes applicable in Gibraltar. The Permanent Representation of the United Kingdom to the European Union provided an answer dated 27.7.1999 (registered under No A35879). A second request for information was sent on 23.5.2000 (D/53070), followed by a reminder on 28.6.2000 (D/53572). The answer was provided by letter dated 3.7.2000 (A/35549).

3. On 14.7.2000 the Commission addressed to the United Kingdom Authorities a further letter (D/53831), indicating that the relevant measure appeared to be not in conformity with Community law and asking for further information, with a view to determine the status (existing or unlawful) of the aid. In particular, all the relevant legislation on exempt companies rules was required. The United Kingdom authorities were also given the opportunity to submit comments in case the aid could be qualified as an existing aid.


5. On 12.9.2000, the United Kingdom authorities submitted their comments to the Commission (A/37430). These comments are outlined in section III below.

6. On 19.10.2000 a meeting was held with British authorities and following that meeting, further information from the Gibraltar Government was transmitted to the Commission by letter from the British Permanent Representation dated 8.1.2001 (A/30254). This information is also outlined in section III below.

II. DETAILED DESCRIPTION OF THE MEASURE

Relevant legislation and substantial modifications occurred

8. According to the exempt company rules, subject to certain conditions, a company may apply for a Tax exemption certificate ('exemption certificate'). Possession of such exemption certificate will, in return for the payment of a fixed annual tax, exempt the company or branch from further taxation in Gibraltar. Possession of the exemption certificate will give the company the exempt company status (the company holding such status being referred hereinafter as ‘exempt company’). Among the conditions to be fulfilled in order to obtain the exemption certificate, no Gibraltarian or Gibraltar resident may have a beneficial interest in the shares of the company.

9. On the basis of the information transmitted by the United Kingdom authorities, it results that the legislation on exempt companies which was introduced after the accession of the United Kingdom to the European Union appears to contain at least two changes which can be considered as a notifiable events under State aid rules. This preliminary conclusion is drawn essentially for the reasons explained here below.

10. According to the 1967 exempt company rules, a company is eligible to be an exempt company if at least the following requirements are fulfilled, in particular:

   (a) it is registered in Gibraltar other than under Part IX of the companies ordinance);

   (b) the paid-up share capital of the company is not less than GBP 100;

   (c) the company does not carry on or transact any trade or business in Gibraltar (unless the income of that business arises either outside Gibraltar or from dealings with other exempt companies and originate from persons other than Gibraltarians or residents of Gibraltar);

   (d) the company does not keep any register of shares outside Gibraltar;

   (e) no Gibraltarian or resident of Gibraltar is interested in any of its shares (other than a shareholder in a public company).

11. According to the 1967 exempt company rules, exempt companies are liable to taxation only at a fixed sum, which is:

   — GBP 200 per annum in the case of an exempt company which is not ordinarily resident in Gibraltar,

   — GBP 225 per annum in the case of an exempt company which is ordinarily resident in Gibraltar.

12. The 1978 companies ordinance contains a substantial modification to the previous exempt companies rules (as amended by subsequent legislation) by introducing an exemption of stamp duty on the issue of life insurance policies by exempt companies, on annuities payable by exempt companies and on any dealings by way of mortgage, sale, etc. relating to such policies or annuities. This advantage granted to exempt companies was not available in the 1967 exempt companies rules.

13. The 1983 exempt company rules (as amended by subsequent legislation) contain another substantial modification to the previous exempt company rules (and in particular the 1967 text) as concerns one of the conditions to be fulfilled in order for eligibility as exempt company, and the consequent amount of tax to be paid. In particular, as it is shown here below, the 1983 exempt company rules contain an extension of the system on exempt companies to companies which were not, according to the previous legislation, eligible for becoming exempt companies.

14. According to the 1983 exempt company rules (as modified by subsequent legislation), a further category of companies is eligible to become exempt companies, that is also registered branches of overseas companies. This type of companies were explicitly excluded by the scope of application of the 1967 exempt company rules, which, as indicated above in point 8(a) above, did not allow companies registered under part IX of the companies ordinance (which are registered branches of overseas companies) to benefit from the system on exempt companies. For this type of companies, the 1983 exempt companies rules fix the rate of taxation applicable at GBP 300 per annum.

15. As to the other conditions to be fulfilled for eligibility as an exempt company no substantial change appears to have occurred in the 1983 exempt company rules in relation to previous legislation, in particular those indicated in point 10 above.

16. Taking account of these two substantial modifications, relating both to the amount of the advantage granted and to the number of potential beneficiaries it can be said that the exempt companies regime can not be regarded as an existing but an illegal aid.

Other characteristics

17. An exemption certificate remains in force for a period of 25 years after the date stated in it.

18. The main tax benefits for an exempt company are the following:

   (a) no tax shall be charged on or payable on the profits of the company or upon any dividend or interest or director’s fee or annual payment;

   (b) subject to certain exceptions, no stamp duty shall be payable by an exempt company;

   (c) on the basis of the above, exempt company are liable to an amount of annual tax included between GBP 200 and GBP 300 per annum (see above).
III. COMMENTS SUBMITTED BY THE UNITED KINGDOM AUTHORITIES

19. In their letter of 12.9.2000, the United Kingdom authorities have submitted their observations on the preliminary position of the services of the Commission, as expressed in the letter of 14.7.2000. These observations take the form of a letter, dated 5 September, from the Government of Gibraltar.

20. In the first place it is argued that Article 87(1) would not be applicable to tax schemes, such as the exempt company rules, which are designed to operate in an international context. In particular, given that exempt companies status is granted to the extent that such companies do not undertake business with Gibraltar, there would be no advantage, consisting of an exemption from the normally applicable tax rates, as Gibraltar would not be competent to grant an advantage relating to another jurisdiction.

21. It is further claimed that a tax advantage cannot constitute an aid and that the exempt companies rules is not selective in nature.

22. In addition, it is argued that, in assessing the exempt company rules, the Commission should take into account Gibraltar's precise status within the Community, in particular the fact that Gibraltar does not form part of the Community's common customs territory.

23. As a last point, the letter indicates that a large number of companies holding the exempt status would benefit of the currently applicable de-minimis rules.

24. In the letter dated 8 January 2001 referred above, the British authorities transmitted to the Commission answers provided by the Government of Gibraltar on several questions raised by the Commission during the meeting held on 19 October 2000. In their letter, the British authorities informed the Commission that they had no comments to make at this stage. The information contained in the forwarded document, can be summarised as follows:

(a) the modification to the exempt companies status in 1983 should not be regarded as a notifiable event because it amounted to an administrative improvement. Therefore, the regime should be considered as an existing aid regime and not an illegal aid. It is added that the case Namur-les Assurances du Crédit v OND, where the ECJ examined an analogous situation proves that the amendment of 1983 should not be regarded as a substantive change to the regime;

(b) the payment of a flat rate of tax is commensurate and proportional to the extremely negligible economic activity which exempt companies are allowed to conduct within Gibraltar. The activities carried out by exempt companies outside Gibraltar cannot be taxed in Gibraltar;

(c) as result of its status, Gibraltar is precluded from concluding double taxation treaties. No treaty concluded by the United Kingdom Government has been extended to apply to Gibraltar;

(d) the vast majority of the 8 000 exempt companies have been set up by and for individuals and do not carry any economic activity within Gibraltar. The other exempt companies set up by undertakings only carry from their office in Gibraltar an economic activity ancillary to the principal trade which never amounts to substantial activities. Exempt companies can subject to normal regulatory requirement, do the activity of banking only with non-residents.

(e) a few management services providers to exempt companies have set up themselves as exempt companies which allows them to undertake an economic activity in Gibraltar and to enjoy a flat rate of taxation. However, it is stated that the Government of Gibraltar is seeking to repeal this possibility.

IV. ASSESSMENT OF THE MEASURE

25. To be considered an aid under Article 87(1) of the EC Treaty, a measure must fulfil the four following criteria.

26. Firstly, the measure must afford the beneficiaries an advantage that reduces the costs they normally bear in the course of their business. According to point 9 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (2), the tax advantage may be granted through different types of reduction in the company's burden and, in particular, through a reduction in the amount of tax.

27. The relief from the obligation to pay the full amount of corporation tax seems to fulfil this criterion. As regards the exemption of stamp duties on life insurance policies, annuities and any dealings related to such policies or annuities, seems to constitutes an indirect advantage to the exempt companies because this exemption is not available to other companies and therefore individuals are encouraged to subscribe policies written by, or receive annuities from exempt companies.

28. Secondly, the advantage must be granted by the State or through State resources. The grant of a tax reduction involves a loss of tax revenue which, according to point 10 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation, is equivalent to the use of State resources in the form of fiscal expenditure. As regards stamp duty, and as confirmed by the case law of the European Court of Justice (3) in an analogous case, the origin of the advantage indirectly conferred on exempt companies is the renunciation by the Member State of tax revenue which it would normally have received, inasmuch as it is this renunciation which has enabled individuals to subscribe policies issued by or to receive annuities from exempt companies on conditions which are in tax terms more advantageous.

29. Thirdly, the measure must affect competition and trade between Member States. This criterion seems to be fulfilled by the measure to the extent that these companies are able, actually or potentially, to trade with companies located in other Member States. This is all the more so that, on the basis of the information provided, the exempt company may not, in normal circumstances, trade or carry on business in Gibraltar, with Gibraltarians or residents of Gibraltar. Moreover, as undertakings registered as exempt companies can, under certain conditions, issue insurance policies or be active in the field of banking, it cannot be excluded that Community trade might be affected in these domains.

30. Lastly, the measure must be specific or selective in that it favours ‘certain undertakings or the production of certain goods’. The beneficiaries of the measure are companies in which no Gibraltarian or Gibraltar resident may have a beneficial interest in their shares. In addition, the exempt company may not in normal circumstances trade or carry on business in Gibraltar with Gibraltarians or residents of Gibraltar. On the basis of these elements it can be presumed that the measure is selective, in so far as it accords privileged tax treatment to those non-Gibraltarian-owned companies. It should be borne in mind that the identification of the abovementioned features regarding material specificity do not exclude the existence of other features that would confer specificity to the envisaged tax regime, like for example regional specificity.

31. As stated in point 26 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation, ‘if non-resident companies are treated more favourably than resident ones’ it is difficult to justify such an exception by the logic of the tax system. Despite the fact that exempt companies can be resident companies, it cannot be challenged that the exempt status is granted to them only on the basis that they are foreign-owned. Qualifying companies are treated more favourably than other resident companies. Therefore, the application of a lower corporate tax rate does not seem at this stage to be justified by the logic of the tax system.

32. As to first argument put forward by the United Kingdom authorities (which is indicated in point 20 above) in their comments of 12.9.2000, it is noted that, irrespective of the type of activities in which exempt companies may be active in, their exempt status is granted to the extent that these companies are registered in Gibraltar or are registered branches of an overseas companies. Consequently, these companies benefit of a special and more beneficial tax treatment in Gibraltar, when their position is compared to that of other companies registered in Gibraltar.

33. As to the argument relating to the special status of Gibraltar, it is however recalled in the first place that the Act of Accession to the European Communities of, inter alia, the United Kingdom does not provide any exclusion as to the applicability of the relevant provisions on State aid (e.g. Articles 92 (now 87) and 93 (now 88) of the Treaty to Gibraltar. Second, it is recalled that current Articles 28 to 30 of the EC Treaty only refer to goods, while exempt companies may be active in financial activities for example. Third, it is noted that, to the extent that there is a possibility of diversion of trade within the EU because of the existence of exempt companies in Gibraltar, there is an effect on intra-Community trade which is created by this Gibraltarian system, which is under consideration.

34. As a last point, it is noted that the argument relating to the de-minimis rule cannot be accepted, given that there is no guarantee that aid in excess of that allowed under the de-minimis rule will not have been granted in certain cases, nor that aid may have been granted in sectors where the de-minimis rule does not apply.

35. As regards the information forwarded by the British authorities on 12.1.2001, none of the arguments transmitted allowed the Commission to dissipate at this stage its doubts as regards the nature of the aid.

36. As regards, the status as existing aid, it should be noted that the reference to the EC case Namur-les assurances du Crédit v OND is non relevant because it targets the scope of activities of a company enjoying State aid and not the number and the nature of beneficiaries of the aid. Moreover, even if the 1983 amendment consisted in a small administrative modification, it cannot be contested that it lead to an extension of the number of potential beneficiaries which should have been notified to the Commission pursuant Article 93(3) of the EC Treaty (now Article 88(3)).

37. As regards, the fact that activities carried out outside Gibraltar cannot be taxed in Gibraltar, it should be noted if it is true for certain kind of activities which require a physical presence outside Gibraltar and that have already been taxed outside Gibraltar, it should be noted that financial services can be provided by exempt companies from Gibraltar to non-residents, no physical presence being necessary outside Gibraltar. The revenue of these activities will probably arise directly in Gibraltar without having been taxed outside Gibraltar. Furthermore, no indication was given as regards revenue arising from economic activities outside Gibraltar of Gibraltarian undertakings not registered as exempt companies.

38. As far as the fact that Gibraltar is precluded from concluding double taxation agreements and is not covered by any double taxation agreement concluded by the United Kingdom, it should be noted that, as stated in point 26 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation: ‘the whole purpose of the tax system is to collect revenue to finance State expenditure’. The non-collection of taxes can therefore be justified in order to avoid double taxation. However, it appears from the information available at this stage that no information on whether taxation occurred abroad, or not, is required from exempt companies.

39. Regarding, the fact that most of the 8 000 exempt companies have been set up by individuals shall not exclude the possibility for these companies to carry on economic activity, an affectation of trade can therefore not be excluded.
Finally, as regards the possibility to carry on economic activity with an exempt company status within Gibraltar, it is recognised that such possibility exists for the moment, even if it is claimed to be limited.

V. COMPATIBILITY OF THE AID

41. On the basis of the information currently available, the Commission has therefore formed the view that the measure as currently applied appears to constitute an operating aid in the meaning of Article 87(1) of the EC Treaty. This measure allows a company or registered branch holding the status of exempt company to be liable to taxation at a lower level than that applied to other companies.

42. It is therefore necessary to determine if such an aid is compatible with the common market under the exceptions laid down in Article 87(2) and (3) of the EC Treaty.

43. It appears that the exceptions under Article 87(2) of the EC Treaty cannot be applied in this case, as the aid is not aimed at the objectives listed in these provisions.

44. Under Article 87(3)(a), an aid is considered compatible with the common market when it is designed to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. Since Gibraltar is not such an area, this provision does not apply.

45. As regards the exceptions laid in Article 87(3)(b) and (d), the aid in question is not intended to promote the execution of an important project of common European interest or to remedy to a serious disturbance in the economy of the United Kingdom, nor is it intended to promote culture or heritage conservation.

46. Lastly, it is necessary to examine if the aid can qualify for the exception laid down in Article 87(3)(c) which states that may be considered compatible an aid to facilitate the development of certain economic activities or of certain economic areas where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

47. The rules according an exempt company status are not related to an investment or to a job creation and constitute a permanent relief from charges that should be normally met by these companies in the course of their business.

48. The aid can, at this stage, be considered as an operating aid, the benefits of which will cease as soon as the aid is withdrawn. According to the constant practice of the Commission, such aid cannot be considered to facilitate the development of certain economic activities or of certain economic areas.

49. Since the aid does not appear to qualify for any of the exceptions provided for in the Treaty, the Commission has doubts about the compatibility of the aid with the common market.

50. In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, requests the United Kingdom to submit its comments and to provide all such information as may help to assess the aid, within one month of the date of receipt of this letter. The Commission would in particular like to gather the observations of the United Kingdom and interested parties on possible legitimate expectations of the sort that would pose an obstacle to the recovery of aid, in the event that this aid would be qualified as being illegal and incompatible.

51. The Commission requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

52. The Commission wishes to remind the United Kingdom that Article 88(3) of the EC Treaty has suspensive effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.'