

Form of order sought

The appellant claims that the Court should:

- set aside the judgment of the Court of First Instance (Third Chamber, Extended Composition) of 18 December 2008, notified to the Commission on 5 January 2009, in Joined Cases T-211/04 and T-215/04 *Government of Gibraltar and United Kingdom v Commission*;
 - reject the applications for annulment lodged by the Government of Gibraltar and by the United Kingdom; and
 - order the Government of Gibraltar and the United Kingdom to pay the costs;
- alternatively,
- refer the cases back to the Court of First Instance for reconsideration; and
 - reserve the costs of the proceedings at first instance and on appeal.

Pleas in law and main arguments

The Commission maintains that the contested judgment should be set aside on the following grounds:

The Court of First Instance erred in assessing the relationship between Article 87(1) EC and the competence of the Member States in tax matters;

The Court of First Instance erred in interpreting and applying Article 87(1) EC by imposing an unjustified constraint on the assessment of suspected State aid measures;

The Court of First Instance erred in interpreting and applying Article 87(1) EC by imposing an unjustified constraint on the exercise of review powers in respect of the identification of a common or 'normal' tax system;

The Court of First Instance erred in interpreting and applying Article 87(1) EC by considering that the common or 'normal' tax system may result from the application of different techniques to different taxpayers;

The Court of First Instance erred in interpreting and applying Article 87(1) EC by considering that the Commission had failed to identify the common or 'normal' tax regime and to perform the required assessment to show the selective character of the measures at stake;

The Court of First Instance erred in interpreting and applying Article 87(1) EC by failing to examine the three elements of selectivity identified in the contested decision.

Appeal brought on 20 March 2009 by the Kingdom of Spain against the judgment delivered by the Court of First Instance (Third Chamber, extended composition) on 18 December 2008 in Joined Cases T-211/04 and T-215/04 *Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities*

(Case C-107/09 P)

(2009/C 141/42)

Language of the case: English

Parties

Appellant: the Kingdom of Spain (represented by: N. Díaz Abad and J.M. Rodríguez Cárcamo, Agents)

Other parties to the proceedings: Government of Gibraltar, United Kingdom of Great Britain and Northern Ireland and Commission of the European Communities

Form of order sought

- set aside in full the judgment of the Court of First Instance under appeal and give a new judgment, declaring 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 ⁽¹⁾ to be lawful;
- order the respondents to pay the costs.

Pleas in law and main arguments

1. Infringement of Article 299(4) EC, as it has been interpreted in the case-law of the Court of Justice. First, the judgment under appeal disregards the legal status of Gibraltar according to the case-law of the Court of Justice of the European Communities (judgments of 23 September 2003 and 12 September 2006), since it fails to state that Gibraltar was ceded by the King of Spain to the British Crown under the Treaty of Utrecht 1713 and since it makes a number of errors in describing the status of Gibraltar. Second, the judgment under appeal also infringes Article 299(4) EC in that it affords Gibraltar the possibility, in the field of taxation, to separate itself from the United Kingdom, which means that, in that field, the United Kingdom ceases to be responsible for the external relations of Gibraltar and that the latter is converted de facto into a new Member State for the purposes of taxation.
2. Infringement of Article 87(1) EC by interpreting it in a manner which precludes its application by the Community when tackling tax havens identified by the OECD. Gibraltar is considered a tax haven by the OECD. The judgment under appeal, in holding that no comparison can be made between business activity in Gibraltar and that in the United Kingdom, is in breach of the principles of

the OECD, according to which measures which may be general in Gibraltar may be harmful to OECD member countries, which include the United Kingdom. Article 87(1) EC must be interpreted in accordance with OECD principles, so that that comparison is not only possible but necessary.

3. Infringement of the ECB Guideline of 16 July 2004 when applying Article 87(1) EC. The European System of Central Banks regards Gibraltar, together with 37 other territories, as an offshore financial centre distinct from the United Kingdom with regard to balance of payments, international investment position and international reserves. The analysis in the judgment under appeal, which precludes a comparison between business activity in Gibraltar and the United Kingdom, is at odds with that definition, which does consider such a comparison to be possible, and entails a breach of a binding rule of Community law, namely the ECB Guideline of 16 July 2004, in the application of Article 87(1) EC.
4. Infringement of Article 87(1) EC by failing to observe the requirement that aid must be granted 'by a Member State or through State resources'. Given that Gibraltar is a territory which is not part of a Member State, pursuant to Article 299(4) EC, the finding in the judgment that the reference framework for the application of Article 87(1) EC corresponds exclusively to the geographical limits of the territory of Gibraltar is tantamount to treating Gibraltar as a Member State, since otherwise it would never be possible to fulfil the requirement that the aid be granted 'by a Member State or through State resources'.
5. Infringement of the principle of non-discrimination, by applying without good cause the rules in the *Azores* judgment (Case C-88/03) to a situation other than the one envisaged therein. There are two differences between the *Azores* case and the case considered in the judgment under appeal. First, the *Azores* is a territory of a Member State, which is not the case of Gibraltar, and, second, in the *Azores* case the Court of Justice examined a reduction of the corporate tax rate, whilst in the case of Gibraltar what is at issue is a new general corporate tax system.
6. Infringement of Article 87(1) EC, by holding that, from the point of view of regional selectivity, the conditions for State aid have not been satisfied. Specifically, the Kingdom of Spain argues that the judgment erred in law in finding that the three requirements of political autonomy, procedural autonomy and economic autonomy established by the *Azores* judgment were met.
7. Error in law by failing to assess and apply the fourth condition put forward by the Kingdom of Spain in the proceedings at first instance. Even if the three conditions of the *Azores* judgment were held to be satisfied, the Court of First Instance should have set a fourth harmonisation condition in relation to the domestic tax system of the Member State which introduced the measure.

8. Infringement of Article 87(1) EC by holding that, from the point of view of material selectivity, the conditions for State aid have not been satisfied. Even on the assumption that Gibraltar is an autonomous reference framework in which the conditions of the judgment in *Azores* are met, the judgment under appeal infringed Article 87(1) EC in its consideration of material selectivity, given that the Court of First Instance in its analysis did not take into account that the corporation tax reform which Gibraltar is seeking to implement creates a system in which, of the 29 000 companies in existence in Gibraltar, 28 798 undertakings may be subject to a zero rate of taxation. The measure particularly favours those companies and the judgment under appeal, in failing to recognise that, infringed Article 87(1) EC. Furthermore, contrary to what is maintained in the judgment, the Commission did indeed identify the common tax regime.
9. Failure to state reasons in the judgment with regard to the assessment of the 'fourth condition' put forward by the Kingdom of Spain.
10. Infringement of the fundamental right to have the proceedings disposed of within a reasonable period, since the proceedings before the Court of First Instance lasted virtually twice as long as a normal case without any justification being given for that, whilst that situation had a significant impact on the proceedings.
11. Infringement of Article 77(a) and (b) of the Rules of Procedure of the Court of First Instance in that the Court failed to stay the proceedings after hearing the parties.

(¹) OJ 2004 L 85, p. 1.

Reference for a preliminary ruling from the Baranya Megyei Bíróság (Hungary) lodged on 23 March 2009 — Ker-Optika Bt. v ÁNTSZ Dél-dunántúli Regionális Intézete

(Case C-108/09)

(2009/C 141/43)

Language of the case: Hungarian

Referring court

Baranya Megyei Bíróság

Parties to the main proceedings

Applicant: Ker-Optika Bt.

Defendant: ÁNTSZ Dél-dunántúli Regionális Intézete