ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
19 December 2001 *

In Joined Cases T-195/01 R and T-207/01 R,

Government of Gibraltar, represented by A. Sutton, M. Llamas, Barristers, and W. Schuster, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by V. Di Bucci and R. Lyal, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for interim measures in respect of the decisions of the Commission of 11 July 2001, notified to the Government of the United Kingdom by letters SG(2001) D/289755 and SG(2001) D/289757, to initiate the procedure

* Language of the case: English.

provided for by Article 88(2) EC in respect of alleged State aid granted under Gibraltarian legislation to exempt and qualifying companies respectively,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Legal framework

Community legislation

1 Article 87(1) EC provides that, save as otherwise provided, State aid is prohibited. In order to ensure the effectiveness of that prohibition, Article 88 EC places on the Commission a specific duty of monitoring aid and, on the Member States, precise obligations intended to facilitate the Commission's task and to prevent the Commission being presented with a *fait accompli*.

2 Thus, pursuant to Article 88(1) EC, the Commission, in cooperation with Member States, keeps under constant review all systems of aid existing in those States and may propose, where necessary, to the latter 'any appropriate measures

required by the progressive development or by the functioning of the common market'. So far as concerns any plans to grant or alter aid, Article 88(3) EC requires that the Commission should be informed in sufficient time to enable it to submit its comments. According to the second sentence of that provision, if it considers that a notified plan is not compatible with the common market, the Commission is to initiate the procedure provided for in Article 88(2) EC. Finally, the Member States are required not to put their proposed measures into effect until the Commission has adopted a final decision on whether those measures constitute aid and whether or not they are compatible with the common market.

3 Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1), which entered into force on 16 April 1999, contains the following definitions which are relevant to the present proceedings:

'(a) "aid" shall mean any measure fulfilling all the criteria laid down in Article [87](1) of the Treaty;

(b) "existing aid" shall mean:

(i) ... all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;

...

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

...

(f) "unlawful aid" shall mean new aid put into effect in contravention of Article [88](3) of the Treaty;

...'

4 According to Articles 2(1) and 3 of Regulation No 659/1999, 'any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned' and it must not be 'put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid'. Article 4(4)

provides that the Commission is to initiate proceedings pursuant to Article 88(2) EC (hereinafter referred to as a 'decision to initiate the formal investigation procedure') if 'doubts are raised as to the compatibility with the common market' of a notified measure.

5 According to the first sentence of Article 6(1) of Regulation No 659/1999, a 'decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market'.

6 As regards non-notified measures, Article 10(1) of Regulation No 659/1999 provides, that '[w]here the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay'. Article 13(1) provides that such examination is to result in a decision, where appropriate, to initiate the formal investigation procedure. According to Article 11(1), '[t]he Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision requiring the Member State to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market'.

7 So far as concerns recovery of aid, Article 14(1) of Regulation No 659/1999 provides that, '[w]here negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary...', unless requiring such recovery were to 'be contrary to a general principle of Community law'. According to Article 15(1), 'the powers of the Commission to recover aid shall be subject to a limitation period of 10 years'.

8 The procedure regarding existing aid schemes is laid down in Articles 17 to 19 of Regulation No 659/1999. According to Article 18, where 'the Commission... concludes that the existing aid scheme is not, or is no longer, compatible with the common market, it shall issue a recommendation proposing appropriate measures to the Member State concerned'. Where the Member State concerned does not accept the measures proposed and the Commission, despite the observations submitted by that Member State, still considers that those measures are necessary, Article 19(2) requires the Commission to initiate a formal investigation procedure.

Status of Gibraltar and the legislation at issue

9 Since Gibraltar is a European territory, within the meaning of Article 299(4) EC, for whose external relations the United Kingdom of Great Britain and Northern Ireland is responsible, the provisions of the Treaty apply there. However, by virtue of Article 28 of the Act concerning the conditions of accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, annexed to the Treaty relating to their accession (OJ 1972 L 73, p. 5), acts of the institutions of the Community relating, in particular, to the 'harmonisation of legislation of Member States concerning turnover taxes, shall not apply to Gibraltar', unless the Council decides otherwise. However, it is not disputed that the rules of Community law on competition, including those relating to State aid granted by the Member States, do apply.

10 The present cases concern two pieces of company law legislation concerning exempt and qualifying companies respectively. The former are not actually present in Gibraltar while the latter have a 'bricks and mortar' presence there and are active in various sectors.

11 On 9 March 1967, the House of Assembly (hereinafter 'the Legislature') of Gibraltar enacted Ordinance No 2 of 1967, known by its short title, the Companies (Taxation and Concessions) Ordinance. That Ordinance was amended in 1969 and 1970, and was amended on 10 further occasions following the accession of the United Kingdom, namely in 1974, 1977, 1978, 1983, 1984, 1985, 1987, 1988, 1990 and 1993. In the present proceedings, it is the version of that Ordinance, as amended in 1978 and 1983 (hereinafter referred to as 'the exempt companies legislation'), which is relevant.

12 In order to qualify for exempt company status, a company must meet the conditions set out in Section 3 of the exempt companies legislation. Those conditions include the prohibition of carrying on or transacting any trade or business in Gibraltar, other than with other exempt companies, and, according to the information provided at the hearing, with qualifying companies. No Gibraltarian or resident of Gibraltar may hold or be interested in holding any of the shares in an exempt company other than as a shareholder in a public company.

13 According to Section 8 of the exempt companies legislation, subject to some limited exceptions, an exempt company is exempted from the payment of income tax in Gibraltar and is liable only to taxation at a fixed sum of GBP 225. In addition, by virtue of Section 9 of the exempt companies legislation, any shares in, loans made to, or debentures held in, an exempt company are exempt from estate duty.

14 On 14 July 1983, the Legislature of Gibraltar enacted Ordinance No 24 of 1983, known by its short title of Income Tax (Amendment) Ordinance 1983. That Ordinance introduced the definition of a type of company known as a 'qualifying company' into the text of Ordinance No 11 of 1952, known by its short title, Income Tax Ordinance, and certain provisions relating to that type of company. The detailed rules for the implementation of those new provisions were adopted

by way of the Income Tax (Qualifying Companies) Rules of 22 September 1983. Ordinance No 24, cited above, and the 1983 Rules (hereinafter referred to as 'the qualifying companies legislation') constitute the legislation applicable to qualifying companies at issue in the present proceedings.

15 The conditions for the grant of qualifying company status are, essentially, identical to those set out above for exempt company status.

16 Under Section 41(4) of the Income Tax Ordinance, qualifying companies are liable to tax charged on profits, but the rate must not exceed the rate of corporation tax charged in Gibraltar (currently fixed at 35% of profits). There is no legislative provision laying down precisely the actual rate of tax which a qualified company must pay. However, all those companies pay, according to the information in the case-file and provided at the hearing, tax at a rate which is negotiated with the Gibraltar tax authorities and which ranges between 2% and 10% of profits. Section 41(4)(b)(c) of the Income Tax Ordinance also provides that fees payable by a qualifying company to a non-resident person (including directors' fees), and dividends paid to shareholders, are taxed at the same rate as that applicable to that company's profits. Finally, the Stamp Duty Ordinance provides that there is no need to pay stamp duty on the transfer of shares in a qualifying company, on the issue of life assurance policies or on annuities payable by such companies, or on any sale, mortgage or other dealings relating to such policies or annuities.

Background to the dispute

17 By letter of 12 February 1999, the Commission requested the Permanent Representative of the United Kingdom to the European Union to provide general

information on, *inter alia*, five tax schemes in operation in Gibraltar which were already being examined by the Council under the Code of Conduct for Business Taxation (annexed to the Conclusions of the ECOFIN Council meeting of 1 December 1997 on fiscal policy, OJ 1997 C 2, p. 1, hereinafter 'the code of conduct'), and in a group, currently chaired by Ms Primarolo (hereinafter 'the Primarolo Group'), established in 1997 by the Council, comprising national high-level tax experts and a Commission representative.

18 The legislation under examination included the exempt companies legislation and the qualifying companies legislation. The Government of the United Kingdom provided the requested information by letter of 22 July 1999 and requested a meeting with the relevant Commission services to discuss that legislation.

19 On 23 May and on 28 June 2000, the Commission sent a letter and a reminder, respectively, to the United Kingdom Permanent Representative requesting further information concerning the abovementioned legislation.

20 The Permanent Representative of the United Kingdom replied by letter dated 3 July 2000, in which it enclosed a copy of both the 1967 exempt companies Ordinance, as amended in 1983, and the version of 1983 Ordinance on qualifying companies as in force in 1984.

21 By letter of 14 July 2000 to the Permanent Representative of the United Kingdom, the Commission stated, on the basis of information which it had in its possession, that the exempt companies legislation appeared to constitute an operating aid incompatible with the common market. In order to determine

whether it constituted existing aid, it also requested a copy of the Ordinance in its original 1967 version and invited the United Kingdom, pursuant to Article 17(2) of Regulation No 659/1999, to submit its comments.

22 The Permanent Representative of the United Kingdom replied to the Commission by letters of 3 August and 12 September 2000 by providing, in the former, a copy of the original version of the legislation together with the amendments made in 1969, 1970, 1977 and 1978 and by reiterating its request for a meeting with the Commission. In the latter, it repeated that request and passed on to the Commission a document drawn up by the Government of Gibraltar setting out the reasons why it considered that the exempt companies legislation does not constitute State aid.

23 A meeting took place in Brussels on 19 October 2000 between the representatives of the United Kingdom Government and the Commission. The United Kingdom also invited representatives of the Government of Gibraltar to attend that meeting. A number of replies to questions raised by the Commission during the meeting were formulated by the Government of Gibraltar and submitted to the Commission on 28 November 2000, before they were formally transmitted to it on 8 January 2001 by the United Kingdom.

The contested decisions

24 By decisions SG(2001) D/289755 and SG(2001) D/289757 of 11 July 2001, notified to the United Kingdom by letters of that same date, the Commission decided to initiate a formal investigation procedure in respect of the exempt companies and the qualifying companies legislation.

25 In the second part of the account of the facts in decision SG(2001) D/289755, after summarising the main conditions which must be met in order to achieve the exempt companies status (point 8), the Commission states (point 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 notifiable events under State aid rules...'.

26 The amendments mentioned are described at points 12 to 14. First, the Commission takes the view that the 1978 amendment freed exempt companies from their liability to tax by introducing an exemption from stamp duty on the issue of life assurance policies, on annuities payable by them and on any dealings relating to such policies or annuities. Secondly, the Commission considers that the 1983 amendment extended the tax scheme in issue to a new category of undertakings which did not meet the requisite conditions to be eligible to become exempt companies according to the original 1967 version of the exempt companies Ordinance (namely, branches of overseas companies registered under Part IX of the Gibraltar Companies Ordinance). Those undertakings, where they do become exempt companies, only pay tax at a flat rate of GBP 300 *per annum*. The Commission concludes (point 16) that, in view of the 'substant[ive] modifications', relating both to the amount of the advantage granted and to the number of potential beneficiaries, 'the exempt companies regime cannot be regarded as an existing but [as] an illegal aid'.

27 After summarising in the third part of the account of the facts (points 19 to 23) the comments submitted by the United Kingdom authorities and the Government of Gibraltar during its preliminary examination, the Commission states, in the fourth part (points 24 to 39) that none of those comments dispels its doubts

regarding the nature of existing aid of the legislation in issue (in particular at points 34 and 35). Next, it analyses the compatibility of the aid in the fifth part (points 40 to 53) and concludes (point 48) that it does not appear to fall within the scope of the exceptions laid down in Article 87(3) EC. 'In the light of the foregoing considerations' (point 49), the Commission expresses a desire to gather the observations of the interested parties on the existence of possible obstacles to the recovery of the aid, 'in the event that [it] should be qualified as being illegal and incompatible with the common market'. The Commission reminds the United Kingdom (point 51) that the procedure provided for in Article 88(3) EC has suspensory effect and draws its attention to the fact that Article 14 of Regulation No 659/1999 provides that unlawful aid may be recovered from the recipient.

28 In the first part (points 1 and 2) of the account of the facts of the other decision, SG(2001) D/289757, the Commission states (at point 1) that the qualifying companies legislation 'does not seem to fall within' the definition of existing aid set out in Article 1 of Regulation No 659/1999, and that 'it has to be considered at this stage as non-notified aid'. The second part (points 3 to 9) and the third part (points 10 to 17) contain a description and an assessment of the legislation.

29 Compatibility of the legislation is examined in the fourth part (points 17 to 31). After finding that it appears to constitute aid within the meaning of Article 87(1) EC (point 17), the Commission concludes (points 24 and 25) that it could, 'at this stage', be considered as an operating aid, which does not appear to qualify for any of the exceptions provided for in Article 87(3) EC. It then requests, as in the first decision, the comments of the interested parties on the existence of possible obstacles to the recovery of the aid, 'in the event that [it] should be qualified as being illegal and incompatible with the common market'. The United Kingdom is warned (point 29) of the suspensory effect of the procedure provided for in Article 88(3) EC and its attention is drawn to the fact that Article 14 of Regulation No 659/1999 provides that illegal aid may be recovered from the recipient.

Procedure

30 By application lodged at the Court Registry on 20 August 2001, registered as number T-195/01, the Government of Gibraltar ('the applicant') brought an action under the fourth paragraph of Article 230 EC for the annulment of decision SG(2001) D/289755 (hereinafter 'contested decision I') initiating a formal investigation procedure in respect of the exempt companies legislation.

31 By separate document lodged at the Court Registry on the same date, the applicant brought an application under Articles 242 EC and 243 EC, registered under number T-195/01 R, for the suspension of operation of contested decision I and for the adoption of interim measures ordering the Commission to refrain from making public the initiation of the abovementioned procedure.

32 In view of the voluminous nature of the arguments set out in the application and the need to give a decision rapidly in a procedure for interim measures, the applicant was asked to submit a new version of that application which should not exceed 30 pages. The abridged version was lodged at the Registry of the Court of First Instance on 24 August 2001.

33 That abridged version of the application for interim measures was served on the Commission on 27 August 2001.

34 By application lodged at the Court's Registry on 7 September 2001, registered as number T-207/01, the applicant brought an action under the fourth paragraph of Article 230 EC for the annulment of decision SG(2001) D/289757 (hereinafter 'contested decision II') initiating a formal investigation procedure in respect of the qualifying companies legislation.

35 By separate document lodged at the Court's Registry on the same date, the applicant brought an application under Articles 242 EC and 243 EC, registered under number T-207/01 R, for the suspension of operation of contested decision II and for the adoption of interim measures ordering the Commission to refrain from making public the initiation of the abovementioned procedure.

36 By letter of 7 September 2001, the applicant requested that the cases be joined both as to the main proceedings and for the purposes of the applications for interim measures. It also sought permission for an oral hearing before the President of the Court of First Instance and sought permission that an expert witness, Professor Fletcher, whose written statement had been included with the application for interim measures in Case T-207/01 R, be allowed to testify at the hearing.

37 The Commission submitted its written observations on the two applications for interim measures on 10 and 27 September 2001 respectively.

38 By letter of 27 September 2001, the Commission informed the Court that it had no objection to the joinder of the two cases for the purposes of the main and of the interim measures procedures, but objected, as a matter of principle, to Professor Fletcher testifying in Case T-195/01 R.

39 In view of that objection, a separate hearing before the President of the Court of First Instance was set for 12 October 2001 in respect of the two applications for interim measures. The parties were requested by letter of 1 October 2001 to submit their comments, at the hearing, in particular on the possible significance of the judgment which was to be given by the Court of Justice on 9 October 2001 in Case C-400/99 *Italy* v *Commission*, a copy of which would be served on them immediately after its delivery.

40 By letter of 28 September 2001 to the Permanent Representative of the United Kingdom, the Registrar of the Court requested, pursuant to the second

subparagraph of Article 21 of the EC Statute of the Court of Justice, applicable to proceedings before the Court of First Instance by virtue of the first subparagraph of Article 46 of the same Statute, to provide further information by way of answering three questions.

41 The United Kingdom Government replied to those questions by letter of 11 October 2001 (hereinafter 'the response of the United Kingdom'). According to that response, the applicant and the Legislature of Gibraltar have jurisdiction to propose and enact, respectively, legislation in respect of company taxation matters, which are matters falling within 'defined domestic matters' within the meaning of Section 55 of the Gibraltar Constitution Order 1969. Only those matters not falling within that category remain the exclusive responsibility of the Governor of Gibraltar. The ministerial Despatch of 23 May 1969 provides that the Governor may intervene, on behalf of the Government of the United Kingdom, if such intervention proves necessary to secure compliance, in particular with international obligations, including those arising from Community law, by the United Kingdom. As regards the capacity to bring proceedings in respect of company taxation, legal proceedings in the name of the applicant may be initiated on the instructions of the Chief Minister, the applicant having the power to bring such actions notwithstanding the division of internal competence in that field between it and the Legislature of Gibraltar.

42 At the hearing, the Commission having withdrawn its objection to using Professor Fletcher's evidence in Case T-195/01 R, the President of the Court of First Instance made an order for joinder of the two applications for interim measures and the parties presented oral argument and gave their replies to the questions put by the Court.

43 The Finance Centre Director of the Department of Trade, Industry and Telecommunications of the Government of Gibraltar and the Chief Secretary of that Government were heard, at the applicant's request, by the President of the Court of First Instance. Professor Fletcher was not able to attend the hearing for personal reasons.

44 In its deliberations of 12 November 2001, the Second Chamber of the Court of First Instance, to which the case in the main proceedings had been assigned, decided, on the basis of Article 76a of the Rules of Procedure of the Court of First Instance (hereinafter 'the Rules of Procedure'), as amended on 6 December 2000 (OJ 2000 L 322, p. 4), to grant the application, lodged on 18 October 2001 by the Commission, for the procedure to be expedited.

45 By order of the President of the Second Chamber of the Court of First Instance of 14 November 2001, the two actions in the main proceedings were joined for the purposes of the remainder of the written procedure, the oral procedure and the judgment, pursuant to Article 50 of the Rules of Procedure.

Law

46 Under Articles 242 EC and 243 EC, read together with Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that the circumstances so require, order suspension of operation of the contested measure or prescribe the necessary interim measures.

47 Under the first subparagraph of Article 104(1) of the Rules of Procedure, an application to suspend the operation of any measure is admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance. That rule is no mere formality; rather, it means that the main action, on which the application for interim relief depends, must be admissible. To rule, at the stage of the proceedings for interim relief, on the admissibility of the main action, when its admissibility is not, prima facie, wholly excluded, would be tantamount to prejudging the Court of First Instance's decision in respect of that action (order of the President of the Court of First Instance of 17 January 2001 in Case T-342/00 R *Petrolessence and SG2R* v *Commission* [2001] ECR II-67, paragraph 17).

48 Article 104(2) of the Rules of Procedure provides that applications for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case (*fumus boni juris*) for the interim measures applied for. These conditions are cumulative, so that an application to suspend the operation of any measure must be dismissed if one of them is lacking (orders of the President of the Court of Justice in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30, and of the President of the Court of First Instance in Case T-73/98 R *Prayon-Rupel* v *Commission* [1998] ECR II-2769, paragraph 25, and Case T-237/99 R *BP Nederland and Others* v *Commission* [2000] ECR II-3849, paragraph 34). Where appropriate, the judge hearing the application must also balance the interests involved (order of the President of the Court of Justice of 23 February 2001 in Case C-445/00 R *Austria* v *Commission* [2001] ECR I-1461, paragraph 73).

Admissibility

Arguments of the parties

49 The applicant claims that, according to the Gibraltar Constitution, it has responsibility for all 'defined domestic matters', including, in particular, company taxation. So far as concerns whether the Chief Minister may give instructions for the initiation of legal proceedings in the name of the applicant, it stated at the hearing that the response of the United Kingdom in that regard removed, in the context of the present proceedings, any doubts that might remain.

50 Next, according to the applicant, it is clear from the grounds of the contested decisions that they have legal effects. In contested decision I, the Commission finds that the exempt companies legislation constitutes new, non-notified aid and that it is therefore unlawful. Accordingly, the obligation to suspend the operation of the measure concerned, provided for in Article 88(3) EC, applies and enables the Commission to demand the recovery of the aid. Similarly, contested decision

II, despite the 'hesitant language' used by the Commission when characterising the qualifying companies legislation as non-notified aid, is not provisional in nature but rather produces legal effects similar to those resulting from contested decision I.

51 The Commission, in its written observations, expressed doubts as to whether the applicant had *locus standi* and whether the Chief Minister could bring the proceedings in the main actions. However, at the hearing and in view of the response of the United Kingdom, it accepted, at least for the purposes of the present application for interim measures, that such doubts did not suffice to declare the main actions manifestly inadmissible.

52 The Commission disputes the applicant's assertion in its applications for interim measures that contested decisions I and II have immediate legal effects. Unlike the decisions in issue in Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117 (hereinafter '*Cenemesa*') and Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, (hereinafter '*Italgrani*'), the contested decisions do not draw a final conclusion as to whether the alleged aid is new or existing aid and whether it is compatible with the common market. It follows, according to the Commission, that those decisions do not automatically entail that the obligation to suspend laid down in Article 88(3) EC must be implemented. In points 51 and 29 of contested decisions I and II respectively, the Commission merely reminds the United Kingdom of the effect of that provision in the event that it should be applicable. According to the Commission, the question as to whether the legislation at issue, should it constitute aid, must be characterised as new or existing aid therefore remains open. Moreover, no decision pursuant to Article 11 of Regulation No 659/1999 ordering the United Kingdom to suspend the legislation in issue has been taken.

53 At the hearing, the Commission, placing reliance on Case C-400/99 *Italy* v *Commission* [2001] ECR I-7303, argued that the contested decision in that case (Decision SG(99) D/6463 of 6 August 1999 (OJ 1999 C 306, p. 2) may be distinguished from the contested decisions in that, in that decision, it had invited

Italy to suspend the alleged aid. In determining the matter of admissibility, it is the effects entailed by a decision to initiate the formal investigation procedure, rather than the 'label' temporarily attached to the measure concerned, which are important. Such a decision does not systematically produce legal effects. None the less, in the light of the judgment in Case C-400/99, cited above, the Commission, without formally waiving its plea of inadmissibility, accepted that it would not be 'realistic', in the present proceedings, to argue that the main actions are manifestly inadmissible.

54 Moreover, the Commission, in its written observations on urgency, doubts whether a sub-national entity such as the applicant is entitled to defend before the Community judicature general interests of an economic and social nature, such as those invoked in the present case (Case T-238/97 *Comunidad Autónoma de Cantabria* v *Council* [1998] ECR II-2271, paragraph 50).

Findings of the President

55 So far as concerns the *locus standi* of the applicant, in light of the response of the United Kingdom and of the position taken at the hearing by the Commission, the main actions cannot be declared manifestly inadmissible. Moreover, the interest of the applicant to invoke the argument that the general interests of the Gibraltarian economy could be presumed to be adversely affected does not appear, in the light of the broad extent of its internal powers, to be wholly unfounded in law.

56 With regard to the question as to whether or not the contested decisions constitute actionable measures, given that it concerns an absolute bar to proceedings and in view of the uncertainty of the Commission as to the proper interpretation of the judgment in *Italy* v *Commission*, cited above, it is appropriate to establish whether there exist certain factors which would justify the prima facie conclusion that the main actions may be admissible.

57 In *Cenemesa*, the Court, after observing that the Commission had 'decided to treat aid as new aid which the Spanish Government regarded as existing aid' (paragraph 19), held that the contested decision in that case, 'clearly involv[ing] a choice of the relevant category of aid and the rules of procedure relating to it', produced 'legal effects' (paragraph 20). In the same way, in *Italgrani* the Court pointed out that the decision to initiate the formal investigation procedure in issue 'prohibited the Government from paying the proposed aid', and that such prohibition was 'the result of a deliberate decision' by the Commission (paragraphs 20 and 21). In light of the 'choice [made] by the Commission', it concluded that the contested decision 'ha[d] legal effects'.

58 It is true that, in *Italy* v *Commission*, cited above, the pleas in law put forward by Italy in support of the admissibility of its action relied on the premiss that the contested decision involved suspension of the financial support in issue. However, the Court of Justice there considers the question whether, despite the absence of any such injunction, 'the contested decision does not imply that the Italian authorities must suspend the implementation of the measures referred to' (paragraph 55). It states quite clearly that, '[r]egarding aid in the course of implementation the payment of which is continuing and which the Member State regards as existing aid, the contrary classification as new aid, even if provisional, adopted by the Commission in its decision to initiate the procedure under Article 88(2) EC in relation to that aid, has independent legal effects' (paragraph 57). According to the Court of Justice, such a decision 'implies that the Commission does not intend to examine the aid in the context of the permanent examination of existing aid schemes provided for by Article 88(1) EC and Articles 17 to 19 of [Regulation No 659/1999]' (paragraph 58), and 'necessarily alters the legal position of the measure under consideration and that of the undertakings which are its beneficiaries, particularly as regards the pursuit of its implementation' (paragraph 59). In a manner very pertinent to the assessment of the present applications for interim measures, the Court of Justice goes on to state:

'Whereas, until the adoption of such a decision, the Member State, the beneficiary undertakings and other economic operators may think that the measure is being lawfully carried out as an existing aid, after its adoption there is at the very least a significant element of doubt as to the legality of that measure

which, without prejudice to the possibility of seeking interim relief from the court with the power to grant it, must lead the Member State to suspend payment, since the initiation of the procedure under Article 88(2) EC excludes the possibility of an immediate decision holding the measure compatible with the common market which would enable it to be lawfully pursued.'

59 It appears, at least at first sight, from that judgment that a decision adopted by the Commission to initiate a formal investigation procedure in respect of a measure in the course of implementation produces specific legal effects and may, therefore, be challenged immediately before the Community judicature, without having to await the adoption of the final decision concluding that procedure. Moreover, the possibility for any interested party, who initiates such an action, to apply for interim relief is expressly contemplated by the Court of Justice. It follows that such a decision may, in principle, be the subject of interim measures.

60 Accordingly, there exist certain factors which justify the prima facie conclusion that the main actions may be admissible.

Prima facie case

61 In order to demonstrate that there is a prima facie case in the present proceedings, the applicant relies essentially on the same pleas in law as those put forward in the main proceedings. Those pleas in law allege, first, that the contested decisions are incompatible with Article 88 EC and Article 1(b) of Regulation No 659/1999 and, secondly, breach of the rights of defence of the applicant and of the United Kingdom, breach of the principles of proportionality, legal certainty and legitimate expectations and breach of the obligation to state reasons.

62 The Commission, while firmly disputing that the pleas in law advanced are well founded, does not formally deny that they have, at least for the purpose of assessing the present applications for interim relief, some foundation. In observing that the arguments put forward by the applicant in support of those pleas in law are virtually all predicated on the assumption that the contested decisions make a final determination of the issue whether the alleged aid in issue is new or existing aid, the Commission states, nevertheless, that it has not taken any definitive position as to the classification of the legislation at issue. The arguments put forward by the applicant do no more, according to the Commission, than demonstrate that the main action is premature.

63 It is appropriate to examine the core plea alleging infringement by the Commission, in the contested decisions, of Article 88 EC and Article 1(b) of Regulation No 659/1999.

Arguments of the parties

64 In support of its arguments, the applicant claims, with regard to the exempt companies legislation, that the Commission has committed a manifest error of assessment in finding that the 1978 and the 1983 amendments constituted 'substant[ive] modifications' to a non-notified aid scheme. In thus classifying them and, as a consequence, the entire exempt companies legislation, as a 'new aid scheme', ignoring the Community law context in which those measures were adopted at the time and without taking into account their economic substance, the Commission has given a strained and artificial meaning to the concept of 'new aid'. Since the legislation in issue was introduced in 1967, it clearly constituted, at the time of the accession of the United Kingdom in 1973, existing aid and only a 'substant[ive] modification' could have changed the status of the aid to a 'new' aid scheme (judgment in Case C-44/93 *Namur-les Assurances du Crédit* [1994] ECR I-3829 and the Opinion of Advocate General Lenz in that case, p. I-3831, as well as that of Advocate General Fennelly in Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, I-8859). The mere

fact of an existing aid scheme having been the subject of legislative amendment should not automatically lead to a finding, such as that made by the Commission in the present case, that a substantive modification has occurred (Opinion of Advocate General Fennelly, cited above, point 62). The 1978 amendment merely gave legislative recognition to what was an existing common practice and did not, therefore, have any specific impact. The 1983 amendment, although it included those companies referred to in Part IX of the Companies Ordinance among those eligible, in principle, for exempt company status, amounted to no more than an administrative improvement, since those companies must none the less meet the same conditions in order actually to be granted the aforementioned status. The applicant points out that, on 31 July 2001, only 24 of the 260 companies covered by Part IX of that Ordinance enjoyed that status.

65 As regards the qualifying companies legislation, the applicant takes the view that the Commission erred in law in not classifying it as an existing aid scheme. According to the applicant, it dates from 1983 and notably from a period when it was far from clear either to the Commission, the Member States or, above all, to the economic operators whether, and to what extent, State aid rules were to be systematically applied to national legislation on company taxation. The legislation in issue thus predates by 10 years the liberalisation of capital movements and by 15 years the clarification of the concept of State aid made by the Commission in its notice, published on 10 December 1998, on the application of State aid rules to measures relating to business taxation (OJ 1998 C 384, p. 3, hereinafter 'the 1998 notice').

66 The qualifying companies legislation was notified to the Primarolo Group by the United Kingdom even before the publication of the 1998 notice. It constituted the Commission's response to the ECOFIN Council's call in paragraph J of the Code of Conduct, inviting the Commission to 'undertake to publish guidelines on the application of the State aid rules to measures relating to direct business taxation'. According to the applicant, the 1998 notice contained the first comprehensive, albeit not exhaustive, definition of 'fiscal State aid' and can be regarded as more a

policy statement as to future Commission action in this area than a 'clarification' of the applicable legislation. Essentially, it constitutes a development of the provisions in force rather than a reflection of existing law. The dearth of precedents, in the form of Commission or Community judicature decisions, cited in the 1998 notice, confirms that view.

67 Furthermore, the fact that Community State aid legislation can evolve through such decisions is recognised in Article 1(b)(v) of Regulation No 659/1999. The qualifying companies legislation constitutes a measure, as provided for by that provision, which became aid only subsequently. The Commission itself actually acknowledged that fact when it declared, in the third recital of the preamble to the 1998 notice that, '[f]ollowing the completion of the single market and the liberalisation of capital movements, it has also become clear that there is a need to examine the particular effects of aid granted in the form of tax measures...'. By failing to regard the qualifying companies legislation as existing aid, the Commission is applying, with hindsight, the relatively refined State aids criteria of 2001 to the legal and economic situation prevailing in 1983. The applicant makes reference, in that regard, to the Irish company tax scheme which, according to it, was initially not classified as aid, although the Commission subsequently changed its view to reflect the gradual tightening of Community disciplines regarding such tax incentive schemes (the Commission's decisions regarding the international financial services centre and the Shannon customs-free airport zone (OJ 1998 C 395, pp. 14 and 19)).

68 The Commission argues, with regard to the exempt companies legislation, that, despite the ambiguous language used in points 12 and 13 of contested decision I, what must be ascertained is whether the 1978 and the 1983 amendments are substantive, inasmuch as they concern the substance of the aid, rather than merely considerable (Opinion of Advocate General Fennelly in *Italy and Sardegna Lines* v *Commission*, cited above, points 62 and 63). The Commission is thus required not to carry out an economic analysis of the effect but to examine

the legislative provisions in question. An examination must be carried out as part of a formal investigation procedure where, as contested decision I shows, there are prima facie grounds for the conclusion that the amendments referred to made substantive amendments to the scheme in issue.

69 So far as concerns the qualifying companies legislation, the mere fact that it has been in force for many years is not, in the Commission's submission, relevant. A measure which was new aid when it was introduced does not lose that character simply by passage of time (Case C-295/97 *Piaggio* [1999] ECR I-3735). The applicant's argument that the extension to company taxation of Community State aid rules is something of a novelty is untenable. According to the Commission, it has been clear, since 1974, that the concept of State aid applies to advantages granted in the field of taxation (Case 173/73 *Italy* v *Commission* [1974] ECR 709). Furthermore, the Commission points out that the legislation in issue was enacted in 1983, the same year in which it brought the first infringement proceedings against a Member State concerning company taxation, namely in Case 270/83 *Commission* v *France* [1986] ECR 273. The question as to whether those undertakings which benefited from the scheme in issue were open to cross-border competition cannot be confined to the issue of the liberalisation of capital movements. The applicant's argument would be of some weight only in assessing possible legitimate expectations that there might be no recovery of the aid, assuming that it were eventually found to be new and incompatible aid. Finally, the mere fact that the qualifying companies must essentially do business outwith Gibraltar demonstrates the cross-border nature of such business.

Findings of the President

70 It should be noted at the outset that it is settled case-law that, under Article 88(3) EC, the Commission is under an obligation to initiate a formal investigation procedure where, after the preliminary examination, it encounters

serious difficulties in determining the compatibility with the common market of measures which have been notified, or which have not been notified but of which it has become aware (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 29, and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 39; Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501, paragraph 58, and Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 42). That rule, laid down by the case-law, is reproduced in Article 4(4) of Regulation No 659/1999, according to which, where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it is to initiate the formal investigation procedure.

71 It is for the Commission to determine, on the basis of the factual and legal circumstances of each case, whether the difficulties involved in assessing the compatibility of the aid warrant the initiation of that procedure (*Cook* v *Commission*, paragraph 30, and Case T-73/98 *Prayon-Rupel* v *Commission*, paragraph 43, both cited above).

72 Next, the answer to the question whether alleged aid is new and its introduction therefore requires the preliminary examination procedure under Article 88(3) EC to be put in motion cannot depend on a subjective assessment by the Commission (*Piaggio*, cited above, paragraph 47).

73 It is not disputed in the present cases that, so far as concerns the exempt companies legislation, the 1978 and the 1983 amendments, to which the Commission refers in contested decision I, were not notified to the Commission in compliance with Article 88(3) EC. As regards the qualifying companies legislation, it is clear, despite the 'notification' of the measures in issue to the Primarolo Group, that that legislation was not notified, within the meaning of the Community State aid rules, to the Commission either.

74 It follows that the exempt companies legislation can be regarded as constituting an existing aid scheme only if the 1978 and the 1983 amendments, whose significance is disputed, do not constitute 'alterations' within the meaning of Article 88(3) EC and of Article 1(c) of Regulation No 659/1999. The qualifying companies legislation, which dates from 1983, cannot constitute an existing aid unless, pursuant to Article 1(b)(v) of Regulation 659/1999, it did not constitute aid at that time but it became aid subsequently as a result of the development of the common market. However, it is precisely the legality of the Commission's refusal, as expressed in the contested decisions, to rule out, at least the possibility, that that legislation might constitute new aid which is challenged in the main actions by the applicant.

75 State aid is a legal concept which must be interpreted on the basis of objective factors. Accordingly, the classification of State measures by the Commission as new or existing aid must, in principle, having regard both to the specific features of the case and to the technical or complex nature of its assessments, be subject to a comprehensive review by the Community judicature (Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 52, confirmed upon appeal by Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25). However, since, at the end of its preliminary examination, the Commission is under an obligation to initiate a formal investigation procedure where it cannot rule out that the State measures in issue might constitute aid incompatible with the common market, its power to find aid to be compatible with the common market upon the conclusion of the preliminary procedure is restricted to aid measures that raise no serious difficulties (T-73/98 *Prayon-Rupel*, cited above, paragraph 44).

76 Although it appears appropriate to interpret the judgment of 9 October 2001 in *Italy* v *Commission*, cited above, as confirming, at least in principle, that a decision to initiate a formal investigation procedure in respect of a State measure which has already been implemented, where a Member State wishes to continue to apply it pending a definitive decision by the Commission, may always be simultaneously challenged before the Community judicature and be the subject of an application for interim relief, despite the absence of any injunction to suspend

the measure at issue in the contested decision, it is nevertheless true that the question of the nature of the review which the Community judicature must undertake in the context of such an application has not yet been decided in the case-law.

77 It must be stated, at first appearance, that such judicial review must be precisely circumscribed in order to ensure that the Commission is not prevented from carrying out the 'preventive control' provided for in the Treaty (see, to that effect, *Cenemesa*, paragraph 16, and *Italgrani*, paragraph 24). Such circumscription would seem even more appropriate since the Commission has no discretion as regards whether to initiate a formal investigation procedure when it encounters serious difficulties in classifying a State measure and determining its compatibility with the common market (see the case-law cited in paragraph 70 above).

78 Accordingly, the case-law acknowledges that, although the Commission's powers are circumscribed as far as initiating the formal procedure is concerned, it nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious difficulties (T-73/98 *Prayon-Rupel* v *Commission*, cited above, paragraph 45). Even though the notion of serious difficulties is an objective one, whether or not such difficulties exist requires investigation of both the circumstances under which the contested measure was adopted and its content (T-73/98 *Prayon-Rupel* v *Commission*, cited above, paragraph 47). Thus, where the Commission confirms that there are difficulties, it cannot refuse to initiate a formal investigation procedure by concluding that such difficulties are not serious (*Prayon-Rupel* v *Commission*, cited above, paragraph 48). In the contested decisions, the Commission concluded that, notwithstanding the comments submitted by the United Kingdom and the applicant during the preliminary examination, it still encountered serious difficulties regarding, in particular, the classification of the legislation in issue. Those conclusions are based both on an assessment of the objective principles governing the concepts of Community law on new aid and existing aid and on the information available to the Commission when the contested decisions were adopted concerning the facts and the relevant provisions of national law, namely those in force when the State measure at issue

and, where appropriate, the relevant alterations, were adopted. It follows that a party who contests, as the applicant does here, a decision by the Commission to initiate a formal investigation procedure in respect of alleged new aid, instead of treating the measure under investigation as existing aid, must be able to prove that the institution could not arrive, after such a preliminary assessment, at the conclusion that there were serious difficulties and that it was therefore under an obligation to initiate such a procedure.

79 In view of the broad discretion which the Commission must enjoy in so far as concerns the provisional assessment of the facts and elements of relevant national law, it appears, prima facie, that the applicant must prove that a manifest error of assessment has occurred in order ultimately to obtain the annulment of a decision finding the existence of serious doubts as to whether a State measure constitutes new, rather than existing, aid.

80 At the hearing, the applicant clarified that it was its contention that a manifest error of legal classification had been committed, in the present case, by the Commission. In that connection, the general nature should be noted, in the case-law as it stands, of the criteria which must serve to assess whether the 'changes' introduced into an existing aid scheme constitute 'alterations' within the meaning of Article 88(3) EC. Moreover, as Advocate General Fennelly points out in his Opinion in *Italy and Sardegna Lines* v *Commission*, what has to be considered is the substance itself of the 'changes in issue'. In those circumstances, it is possible, at least prima facie, that the Commission, by restricting itself to a rather literal examination of the scope of the 'changes' introduced in 1978 and 1983, so far as concerns the exempt companies legislation, committed a manifest error. In that regard, the Commission acknowledges that points 12 and 13 of contested decision I are ambiguously worded, and that such ambiguity does not make it easy to understand the reasoning underpinning the reference, at point 16 of that decision, to alleged 'substant[ive] modifications'. A judge hearing an application for interim measures cannot therefore rule out the possibility that the Commission, in arriving at such an assessment, only made a literal comparison of the texts which preceded and followed the amendments at issue and, thus, committed a manifest error.

81 So far as concerns the qualifying companies legislation, it is, at least prima facie, conceivable that it did not constitute aid at the time of its introduction in 1983. It is possible that the absence of a genuine liberalisation of capital movements at that time prevented that legislation from producing anything other than insignificant effects on trade or from having an unfavourable influence on cross-border competition. The applicant's argument that, first, the application of Community State aid rules to State measures on company taxation is relatively new and that, secondly, that novelty is confirmed both by the circumstances giving rise to the adoption of the Code of Conduct and by the wording of the 1988 notice, is not wholly unfounded. Furthermore, the applicant's arguments relating to the development of the Community law provisions applicable to such alleged State aid, as well as the proper construction of Article 1(b)(v) of Regulation No 659/1999, are, prima facie, serious in nature (see, to that effect, Case T-288/97 *Regione Autonoma Friuli-Venezia Giulia* v *Commission* [2001] ECR II-1169, paragraphs 89 to 90).

82 In view of the foregoing arguments, it cannot be considered that the pleas of fact and law relied upon by the applicant are, at least prima facie, wholly unjustified.

Urgency and the balancing of interests

Arguments of the parties

83 The applicant claims that, although it is for the party applying for interim measures to demonstrate that it would suffer serious and irreparable damage pending the Court's judgment in the main action if such measures were not adopted, it is not required to establish with absolute certainty that damage would

occur: it is sufficient that the damage is foreseeable with a sufficient degree of probability. In the present case, the entire viability of Gibraltar's economy would be put at risk of being seriously harmed if the interim measures applied for were not granted. The applicant refers to the order of the Court of Justice in Case C-280/93 R *Germany* v *Council* [1993] ECR I-3667, paragraph 27, and maintains that its position is analogous to that of a Member State seeking to protect its economy. In an extremely small-scale economy like Gibraltar's, the contested decisions represent an infinitely greater danger then they would if they applied to the economy of a State.

84 The source of the damage is twofold. First, the contested decisions produce immediate effects, since they render the legislation on exempt companies and on qualifying companies illegal and therefore require that the legislation be suspended; there is also the threat of recovery of the aid and of actions in the Gibraltar courts. Second, publication of the contested decisions, informing third parties that the formal investigation procedure has been initiated, would have the consequence of disrupting, if not ruining, Gibraltar's reputation as a reliable finance centre in the financial services market.

85 The applicant observes that Gibraltar, with a population of approximately 30 000 persons and an area of 5.82 square kilometres, is the smallest self-governing territory to which Community law applies. Gibraltar suffers from poor transport links and a lack of natural resources and has no possibility of developing primary or heavy industry. Its economy has traditionally been based on the British military presence, but since the early 1980s the military contribution to Gibraltar's gross domestic product has fallen from 60% to 6%. However, Gibraltar has survived that difficult transition, largely as a result of the successful development of its financial services sector. That sector, which is based on exempt companies and qualifying companies, is currently responsible for approximately 30% of Gibraltar's gross domestic product, compared with only 7% in 1988, and provides direct employment for approximately 2 000 persons and indirect employment for approximately 1 000 persons.

86 According to the study by Professor Fletcher, cited above, the particular importance of exempt companies for Gibraltar's economy lies in the services

provided to those companies, which generally do not have a physical presence on the territory, by various undertakings operating in that field. Qualifying companies are generally companies which, unlike exempt companies, have a 'bricks and mortar' presence in Gibraltar. They operate in various sectors, notably in the banking and financial sectors, ship repairs, motor vehicles, telecommunications and gaming and betting; they are highly mobile and have approximately 1 450 employees (including 1 000 in financial activities). Thus, according to Professor Fletcher, suspension of the legislation on exempt companies and on qualifying companies would have the effect of threatening approximately 4 000 persons out of a total workforce in Gibraltar of approximately 13 000 persons, or more than 30% of the total. In addition to that direct loss of jobs, suspension of the legislation would result in the destabilisation of the sectors providing services to exempt companies, such as banks, investment houses, insurance companies and the company manager sector, and also of legal firms and accountancy practices. It would also destabilise non-financial services which depend on qualifying companies, such as hotels, restaurants, retail outlets, courier services and also telecommunications companies. Both commercial and residential property prices would collapse and there would be a significant fall in the applicant's revenue, affecting its capacity to provide public services.

87 There is a real danger that the gross domestic product generated by Gibraltar's financial sector would fall to the 1988 figure. The interim measures sought are therefore clearly vital to its economic, social and political stability, while, on the other hand, their impact on competition and trade within the common market would be negligible.

88 The damage is not hypothetical. In an era of electronic commerce and 'e-money', investors can transfer their activities from one location to another in a very short time. In answer to the questions put by the President of the Court at the hearing, the applicant stated that, although financial circles in Gibraltar were almost immediately aware that the contested decisions had been adopted, the 'shock-wave' thus produced was confined, because the detailed content of the decisions had not been made public.

89 As regards the balancing of interests, the applicant claims that the judge hearing the application for interim measures must compare, on the one hand, the advantage in allowing the contested decisions to be implemented, which would lead to the immediate suspension of the exempt companies legislation, in force for between 18 and 23 years, and, in the case of the qualifying companies legislation, to the suspension of a system of taxation which has been in force for 18 years, with, on the other hand, what the applicant would gain should the decisions be suspended pending the judgment of the Court of First Instance in the main proceedings. In that regard, whereas suspension of the legislation on exempt companies and on qualifying companies would have disastrous consequences for Gibraltar's economy, it would be of no advantage to the Community. Consequently, an equitable balancing of the interests at stake requires that the Commission consider the legislation as existing aid.

90 The Commission contends that the arguments put forward by the applicant concerning the possible collapse of Gibraltar's economy following implementation of the contested decisions are largely speculative, whereas it is for the applicant to demonstrate in a satisfactory manner the reality of the alleged harm (order in *Prayon-Rupel* v *Commission*, cited above, paragraphs 22, 36 and 38). The applicant's arguments are also contradictory: if the legislation challenged in those decisions is indeed the only reason for the presence in Gibraltar of the undertakings concerned, it is hard to deny that it constitutes aid. In any event, the alleged damage would not be the consequence of the contested decisions, which do not contain a finding that the alleged aid is new aid or order its suspension. As regards the threat of recovery of the aid, the Commission claims that it took the highly unusual step of stating explicitly in both contested decisions (paragraphs 49 and 25 respectively) that, even supposing that the legislation concerned does constitute new aid and is therefore unlawful, the issue of recovery must be approached with caution, having regard to the possibility that the principle of legitimate expectations may be applicable.

91 As regards the alleged risk of actions in the Gibraltarian courts, the Commission points out that it is always open to a litigant to assert before national courts that a State measure constitutes unlawful aid, whatever the attitude of the Commission

may be. The fact that the Commission's attitude is not binding on the national court emerges plainly from the judgment in *Piaggio*, cited above. The Commission further contends that, if the continued activity of the undertakings which benefit from the legislation in question is really dependent on the maintenance in operation of that legislation, proposals for the adoption of appropriate measures, in accordance with Article 88(1) EC, and, in the event of non-compliance therewith, the adoption of an order, would lead to the same unfavourable consequences as those the applicant fears. Such consequences might also follow from any measure reforming the legislation adopted in order to comply with the commitment given by the United Kingdom Government in the context of the Primarolo group to ensure that it is rolled back by no later than the end of 2005, and from the fact that the applicant, following the commitment given by the United Kingdom, itself gave a 'commit[ment] to undertake a reform of Gibraltar's tax system' in its observations of 28 November 2000 (see paragraph 23 above).

92 As regards the harmful effects which, the applicant maintains, publication of the contested decisions would have for the reputation of Gibraltar's finance centre, the Commission claims that that assertion is inconsistent with the argument that there is no evidence that the presumed aid is new aid or existing aid. Furthermore, interested third parties, including investors, are already aware of the Commission's general direction, notably because the contested decisions formed the subject-matter of a press release on 11 July 2001.

93 As regards the balancing of interests, the Commission contends that, in the absence of a definitive classification of the aid as new aid in the contested decisions, the decisions have no actual legal effect and cannot therefore be compared with the consequences of the suspension sought by the applicant, which would prevent the Commission from investigating all the issues raised by the legislation in question. The applicant's argument means that it would have the Commission carry out that examination in secret, which would be contrary to the general principles of Community law. At the hearing, the Commission emphasised the unacceptable consequences that would follow if it were unable to carry out a full investigation into the legislation at issue and to hear all the interested parties.

Findings of the President

94 It should be observed at the outset that the mere fact that the Court of First Instance decided, on 12 November 2001, on application by the Commission, to adjudicate on the substance of the action under an expedited procedure cannot influence either the assessment of urgency or, should it prove necessary, the balancing of the interests concerned by the judge hearing the application for interim measures. The relevant criteria of the existence of a 'particular urgency', which, under Article 76a(1) of the Rules of Procedure, is to be satisfied if the Court is to adjudicate under an expedited procedure, are only partly the same as those which, according to the case-law, govern the assessment of the condition of urgency that must be satisfied before the judge hearing an application for interim measures is able to adopt such measures.

95 It is common ground that the urgency of an application for interim measures must be assessed in relation to the necessity for an order granting relief in order to prevent serious and irreparable damage to the party requesting the interim measure (order of the President of the Court of Justice in Case C-213/91 R *Abertal and Others* v *Commission* [1991] ECR I-5109, paragraph 18; order in *BP Nederland and Others* v *Commission*, cited above, paragraph 48).

96 It is for the party who pleads serious and irreparable damage to prove its existence (order of the President of the Court of Justice of 12 October 2000 in Case C-278/00 R *Greece* v *Commission* [2000] ECR I-8787, paragraph 14). It does not have to be established with absolute certainty that the harm is imminent; it is sufficient that the harm in question, particularly where it depends on the occurrence of a number of factors, should be foreseeable with a sufficient degree of probability (order of the President of the Court of Justice of 19 July 1995 in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 38; orders in *Prayon-Rupel* v *Commission*, cited above, paragraph 38, and *BP Nederland and Others*, cited above, paragraph 49).

97 In the present case, since the applicant acknowledged at the hearing that no 'measurable' damage had yet occurred in Gibraltar, the main damage relied on rests on the argument that the contested decisions find that the legislation on exempt companies and qualifying companies is illegal. The consequence of that illegality, resulting from classification of the legislation as new aid in the former case and as illegal aid in the latter case, is that the applicant is obliged to suspend the legislation immediately.

98 Without prejudice to the assessment of the Court on the substance of the action, it seems doubtful that such an interpretation can be accepted. Under Article 6(1) of Regulation No 659/1999, the Commission is to include in the decision to initiate the formal investigation procedure 'a preliminary assessment... as to the aid character' of the measure in question and to 'set out the doubts as to its compatibility with the common market'. Although it is true, in the present case, that the wording of certain points of the contested decisions is clumsy, as the Commission agrees, it is clear on the face of it that the decisions, taken as a whole, contain no definitive classification of the legislation in question. The applicant is therefore under no obligation to suspend it.

99 As regards the risk of actions in the Gibraltarian courts, it should be pointed out that, whatever the preliminary classification of the measures made by the Commission in the decision to initiate a formal investigation procedure, it is always open to an interested party to bring proceedings before the national courts for a declaration that a State measure constitutes new aid implemented without being notified, contrary to the prohibition set out in the final sentence of Article 88(3) (judgments in Case C-354/90 *FNCE* [1991] ECR I-5505, paragraphs 11 and 12; Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraphs 39 and 40, and Case C-143/99 *Adria-Wien Pipeline and Others*, ECR I-365 paragraphs 26 and 27). Since the Commission and the national courts 'fulfil complementary and separate roles' in the supervision of Member States' compliance with their obligations under, in particular, Article 88(3) EC (judgment in *SFEI and Others*, paragraph 41), a decision by the Commission finding,

after a preliminary investigation, that the measure is not aid would not prevent the national court from arriving at the opposite conclusion and from being able, or being bound, as the case may be, to refer a question to the Court of Justice on the interpretation of Article 88(3) EC and Regulation No 659/1999 (judgment in *Piaggio*, cited above).

100 As regards the threat which publication of the contested decisions would allegedly represent for Gibraltar's reputation as a finance centre with appropriate and reliable legislation, it should first of all be pointed out that, as the Commission rightly submits, the applicant's argument concerning the reality of that threat is essentially linked with its interpretation of the contested decisions. As stated above (paragraph 98), the contested decisions do not oblige the applicant immediately to suspend the legislation on exempt companies and qualifying companies. Furthermore, the fact that the applicant may be uncertain as to whether it should itself propose such a suspension cannot in itself justify suspending implementation of the decisions. That uncertainty could have been avoided if the legislation in question had been notified to the Commission.

101 In so far as the applicant bases its arguments on the anticipated reaction of the financial circles concerned, the damage invoked remains, for the time being, entirely hypothetical in so far as it is based on the occurrence of future and uncertain events. Such damage cannot justify granting the interim measures requested (orders of the President of the Court of First Instance in *Prayon-Rupel* v *Commission*, cited above, paragraphs 22, 26 and 38, and in *BP Nederland and Others* v *Commission*, cited above, paragraphs 57 and 66; and in Case T-241/00 R *Le Canne* v *Commission* [2001] ECR II-37, paragraph 37).

102 The mere fact that the contested decisions are intended to initiate a formal investigation procedure, during which there will be a thorough investigation, involving the participation of all the interested parties, of the legislation

concerned, and which may culminate in a final decision finding that the legislation is incompatible with Community law, is not necessarily of such a kind as to cause a veritable exodus of exempt companies or qualifying companies to other locations offering advantages the same as, or similar to, those of the legislation in question. It seems more probable, at least at first sight, that the directors of the companies concerned, and in particular the directors of qualified companies with a physical presence in Gibraltar, will await the adoption of the final decisions by the Commission. That seems all the more probable because, as the applicant confirmed at the hearing, neither examination of the legislation within the Primarolo group nor the determination of a deadline, namely 2005, for its repeal has led to a large-scale transfer of activities.

103 As regards the standstill effect which, as the applicant stated in its oral pleadings, has already applied to new investments in Gibraltar since the adoption of the contested decisions, there is no direct link of causality between that alleged absence of new investments and the contested decisions. It is public knowledge, first, that all the legislation identified by the Primarolo group must be rolled back no later then 2005 and, second, that, as the Commission observed at the hearing, since the end of 2001 no new company has been able to take advantage of the legislation on exempt companies or qualifying companies. The combination of those two factors may also explain any slow-down in the formation of new companies in Gibraltar since the contested decisions were adopted.

104 Last, although it is possible that the official publication of the contested decision will precipitate the departure of a number of the companies concerned, it is equally possible, at least at first sight, that it will not. The fact that the Commission took the very unusual, if not unprecedented, step in the contested decisions (paragraphs 49 and 25 respectively) of inviting, *inter alia*, the applicant to submit its observations on whether, if the Commission should finally conclude that the legislation in question is illegal, it would be appropriate, in the light of the possible application of the principle of legitimate expectations, to proceed to recover the aid, might convince many companies not to leave Gibraltar.

105 It follows that any harm that might be caused by the implementation of the contested decisions is, at least at present, still hypothetical, depending as it does on the presumed reaction of certain operators to the initiation of the investigations announced in the decisions.

106 In any event, in the present case the balance of interests inclines towards allowing the Commission to initiate the formal investigation procedures envisaged.

107 It follows from the applicant's observations that it is seeking in reality to prevent the Commission from considering, in the context of such an examination, whether the legislation in question constitutes new aid. The applicant maintains that, having already studied that question in the context of a preliminary investigation lasting more than two years, the Commission must have reached the conclusion that at the very most it constitutes existing aid. The Commission's only remaining option is therefore to follow the procedure in relation to existing aid, pursuant to Article 88(1) EC and Articles 17 to 19 of Regulation No 659/1999.

108 As a matter of principle, such an obstacle to the performance by the Commission of the task entrusted to it by Article 88(3) EC and by Article 4(4) of Regulation No 659/1999, and described by the Court of Justice as 'essential for protection the proper functioning of the common market' (judgment in *Adria-Wien Pipeline and Others*, cited above, paragraph 25), cannot be accepted. It follows from Article 13(2) of Regulation No 659/1999 that where measures are not notified the Commission is not to be bound by the time-limit laid down for completion of its preliminary examination. Furthermore, under Article 88(3) EC, as interpreted by the Court of Justice, 'it cannot be accepted that the Commission's delay in completing its preliminary examination may result in the transformation of new aid granted in breach of the last sentence of Article [88(3) EC] into existing aid which can be abolished only with respect to the future' (judgment in *SFEI and Others*, cited above, paragraph 46).

109 First, Article 88(3) EC, as interpreted in the case-law (see paragraph 70 above), and Article 4(4) of Regulation No 659/1999 do not confer any discretion on the Commission as regards initiating the formal investigation procedure where, after carrying out its preliminary examination, it has serious doubts. Notwithstanding the various references which the applicant made at the hearing to the judgment of 9 October 2001 in *Italy* v *Commission*, cited above, and in particular to paragraphs 59 to 62 thereof, it cannot be considered, at least at first sight, that by classifying the decision to initiate a formal investigation procedure as an attackable measure, the Court of Justice intended to alter the scope of the Commission's obligation to adopt such a decision in the event of doubt, or that it recognised that the Commission had a wider discretion in that regard. The mere fact that such a decision may give rise to uncertainty as to the legality of proceeding to implement a non-notified State measure does not suffice to justify the balance of interests being opposed to its being maintained in force.

110 It follows, as the applicant effectively admitted at the hearing, that the Community interest on behalf of which the Commission exercises its fundamental role, under Article 88 EC, of ensuring that the common market is not distorted by aid that has not been notified and/or that is incompatible with the common market must, except in truly exceptional circumstances, prevail, at the stage of the adoption of a decision to initiate the formal investigation procedure, over the interest which a Member State may have in obtaining an interim decision of the President of the Court of First Instance preventing the Commission from examining, within the framework of Article 88(2) EC and Regulation No 659/1999, whether a specific measure constitutes new aid and, if so, whether it is incompatible with the common market.

111 Second, since in the present case the applicant is essentially afraid that information potentially very unfavourable to Gibraltar's reputation will be disclosed to the international financial markets by the publication of the contested decisions, the probable effects of such publication must be examined. In that regard, as already stated in paragraph 103 above, it is undoubtedly public knowledge, at least in the financial circles concerned, that the Primarolo group has already examined the legislation in question and that, consequently, that legislation, together with certain other measures that were examined, must be repealed no later than 2005. Nor has the applicant disputed the Commission's

assertion at the hearing that, since the end of 2001 at least, new companies have no longer been able to take advantage of the financial arrangements examined. As regards the knowledge that the contested decisions have been adopted, it is common ground that a press release announcing the initiation of the formal investigation procedures was issued by the Commission on 11 July 2001. The essential contents of the contested decision are therefore already in the public domain.

112 The applicant acknowledged at the hearing that there has not yet been any 'measurable' effect in Gibraltar. It maintained that publication of the details of the contested decisions, namely all the incorrect findings of the Commission, and also the warning about the possible recovery of the aid, would place in the public domain information susceptible of causing serious and irreparable harm to it.

113 That argument cannot prevail over the Community interest and the interest of potentially interested third parties. The Commission must be able to communicate to the latter the points on which it wishes, *inter alia*, to receive observations, not only so that the interested third parties can exercise their rights but also so that the Commission can be in a position, after receiving the comments of the Member State concerned on those observations, to adopt its final decision, on the basis of information that is as complete as possible. In that regard, it should be observed that, according to recital 8 in the preamble to Regulation No 659/1999, the purpose of initiating a formal investigation procedure is to 'enable the Commission to gather all the information it needs to assess the compatibility of the aid and to allow the interested parties to submit their comments'. That recital further states that 'the rights of the interested parties can best be safeguarded' by such a procedure. Furthermore, the second sentence of Article 14(1) of that regulation provides that 'the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'. Accordingly, the Commission's express invitation to submit comments on the possible application in the present case of the principle of legitimate expectations must, at first sight, and contrary to what the applicant claims, allay to a considerable extent any concerns which the present beneficiaries of the legislation in question may have.

114 It follows that the applicant's interest in restricting the Commission's investigation of the legislation in question to a procedure relating to existing aid cannot prevail over the Commission's interest in initiating the formal investigation procedures envisaged in the contested decisions.

115 It is, indeed, difficult to envisage the circumstances which, in the absence of a particularly serious prima facie case and manifest urgency, would justify suspension by the judge hearing an application for interim measures of a decision which, in regard to a non-notified State measure that has already been implemented, is limited to initiating a formal investigation procedure.

116 Furthermore, under Article 108 of the Rules of Procedure the judge hearing an application for interim measures may at any time vary or cancel an interim order on account of a change in circumstances (orders of the President of the Court of Justice in Case C-40/92 R *Commission* v *United Kingdom* [1992] ECR I-3389, paragraph 33, and of the President of the Court of First Instance in Joined Cases T-7/93 R and T-9/93 R *Langnese Iglo and Schöller* v *Commission* [1993] ECR II-131, paragraph 46, Joined Cases T-79/95 R and T-80/95 R *SNCF and British Railways* v *Commission* [1995] ECR II-1433, paragraph 43, and the order of 12 September 2001 in Case T-132/01 R *Euroalliages and Others* v *Commission*, not published in the ECR, paragraph 15). It follows from that case-law that, by a 'change in circumstances', what are especially envisaged are factual circumstances capable of altering the assessment made in each particular case of the criterion of urgency. It is for the applicant, if it deems it appropriate, to apply to the President of the Court of First Instance should the serious and irreparable damage which it fears materialise.

117 Since the condition relating to urgency is not satisfied and as the balance of interests inclines in favour of the Commission, the present requests for interim measures must be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The applications for interim measures are dismissed.**

2. **The costs are reserved.**

Luxembourg, 19 December 2001.

H. Jung

Registrar

B. Vesterdorf

President