AYUDAS ESTATALES — REINO UNIDO

Ayuda C 53/2001 (ex NN 52/2000) — Sociedades gibraltareñas exentas

Invitación a presentar observaciones, en aplicación del apartado 2 del artículo 88 del Tratado CE

(2002/C 26/05)

(Texto pertinente a efectos del EEE)

Por carta de 11 de julio de 2001, reproducida en la versión lingüística auténtica en las páginas siguientes al presente resumen, la Comisión notificó al Reino Unido su decisión de incoar el procedimiento previsto en el apartado 2 del artículo 88 del Tratado CE en relación con la medida antes citada.

Las partes interesadas podrán presentar sus observaciones sobre las medidas respecto de las cuales la Comisión ha incoado el procedimiento en un plazo de un mes a partir de la fecha de publicación del presente resumen y de la carta siguiente, enviándolas a:

Comisión Europea
Dirección General de Competencia
Registro de ayudas estatales
B-1049 Bruxelles/Brussel
Fax (32-2) 296 12 42.

Dichas observaciones serán comunicadas al Reino Unido. La parte interesada que presente observaciones podrá solicitar por escrito, exponiendo los motivos de su solicitud, que su identidad sea tratada confidencialmente.

RESUMEN

Procedimiento

La medida no ha sido notificada a la Comisión.


Descripción

En virtud de este régimen las sociedades que reúnen determinadas condiciones (entre éstas, que ningún gibraltareño ni residente en Gibraltar tenga participación en las acciones de la sociedad) pueden obtener un certificado de sociedad exenta. La posesión de ese certificado permite a la sociedad exenta pagar un tanto alzado que varía entre 200 y 300 libras esterlinas en lugar de estar sujeta al pago del impuesto de sociedades habitual.

El régimen tiene por objeto atraer a Gibraltar a sociedades no gibraltareñas, mediante la concesión de considerables ventajas fiscales.

Evaluación

La medida es constitutiva de ayuda puesto que cumple los cuatro criterios pertinentes.

En primer lugar, la medida ofrece a sus beneficiarios una ventaja que reduce los costes que, por regla general, deben soportar en el marco de sus actividades. De acuerdo con el apartado 9 de la Comunicación de la Comisión relativa a la aplicación de las normas sobre ayudas estatales a las medidas relacionadas con la fiscalidad directa de las empresas (1), la ventaja fiscal puede concederse reduciendo las cargas de la empresa de diferentes maneras y, en particular, disminuyendo la cuantía del impuesto. La exención del pago de la totalidad del impuesto de sociedades satisface este criterio.

En segundo lugar, la ventaja debe ser concedida por el Estado o mediante fondos estatales. La concesión de una reducción fiscal implica una pérdida de ingresos fiscales que, de acuerdo con el apartado 10 de la Comunicación de la Comisión relativa a la aplicación de las normas sobre ayudas estatales a las medidas relacionadas con la fiscalidad directa de las empresas, equivale al consumo de fondos estatales en forma de gastos fiscales.

En tercer lugar, la medida debe afectar a la competencia y los intercambios entre los Estados miembros. Este criterio se cumple, puesto que dichas empresas comercian, o pueden hacerlo, con empresas situadas en otros Estados miembros. A este respecto, la información facilitada pone además de manifiesto que la sociedad exenta no puede, en circunstancias normales, realizar transacciones en Gibraltar con gibraltareños ni con residentes en Gibraltar.

Por último, la medida debe ser específica o selectiva en el sentido de favorecer a «determinadas empresas o producciones». Los beneficiarios de la medida son sociedades en cuyas acciones ningún gibraltareño o residente en Gibraltar puede tener una participación. Además, la sociedad exenta no puede, en circunstancias normales, efectuar transacciones en Gibraltar con gibraltareños ni con residentes en Gibraltar. Por todo ello cabe suponer el carácter selectivo de la medida, toda vez que favorece a las empresas establecidas en el extranjero con respecto a las demás.

Tal como se afirma en el apartado 26 de la Comunicación de la Comisión relativa a la aplicación de las normas sobre ayudas estatales a las medidas relacionadas con la fiscalidad directa de las empresas, cuando «las empresas no residentes (off-shore) reciben un trato más favorable que las empresas residentes» resulta difícil justificar estas excepciones argumentando la lógica de un sistema fiscal. Aunque las sociedades exentas son empresas residentes, solamente se las considera exentas porque pertenecen a empresas extranjeras. Aparentemente las sociedades exentas reciben un trato más favorable que otras empresas residentes. Por consiguiente, la aplicación de un impuesto de sociedades reducido no puede justificarse por la lógica del sistema fiscal.

Por todo ello, la medida parece constituir una ayuda estatal de funcionamiento. Además, la ayuda estatal en cuestión no parece poder ampararse en ninguna de las excepciones contempladas en los apartados 2 y 3 del artículo 87 del Tratado CE. En consecuencia, en el marco de la evaluación preliminar realizada con arreglo al artículo 6 del Reglamento (CE) n° 659/1999 del Consejo de 22 de marzo de 1999 por el que se establecen disposiciones de aplicación del artículo 93 del Tratado CE, la Comisión tiene dudas sobre la compatibilidad de esta medida fiscal.

De conformidad con el artículo 14 del Reglamento (CE) n° 659/1999, toda ayuda concedida ilegalmente podrá ser reclamada a su beneficiario.

CARTA

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

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

I. PROCEDURE

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

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

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


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

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

II. DETAILED DESCRIPTION OF THE MEASURE

Relevant legislation and substantial modifications occurred

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Other characteristics

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) as result of its status, Gibraltar is precluded from concluding double taxation treaties. No treaty

concluded by the United Kingdom Government has been extended to apply to Gibraltar;

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

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

IV. ASSESSMENT OF THE MEASURE

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

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

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

28. Secondly, the advantage must be granted by the State or through State resources. The grant of a tax reduction involves a loss of tax revenue which, according to point 10 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation, is equivalent to the use of State resources in the form of fiscal expenditure. As regards stamp duty, and as confirmed by the case law of the European Court of Justice (1), in an analogous case, the origin of the advantage indirectly conferred on exempt companies is the renunciation by the Member State of tax revenue which it would normally have received, inasmuch as it is this renunciation which has enabled individuals to subscribe policies issued by or to receive annuities from exempt companies on conditions which are in tax terms more advantageous.

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

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

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

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

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

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

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

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

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

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

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

V. COMPATIBILITY OF THE AID

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

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

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

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

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

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

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

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

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

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

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

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